NCN **[2024] UKFTT 00713 (GRC)**. Case Reference: FT-EA-2024-0199-GDPR

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Before

JUDGE MOAN

Between

KEITH VERNON GELL

Applicant

And

THE INFORMATION COMMISSIONER

Respondent

Decision made on the papers.

Decision: The Applicant's application received on 1st July 2024 to strike out the application of the Applicant is granted. The appeal is struck out under Rule 8(2)(a) as an application that cannot be made to this Tribunal and under Rule 8(3)(c) on the basis that there is jo prospect of the application in being successful.

REASONS

1. The Appellant lodged a notice of appeal to the Tribunal dated 21st May 2024. The appeal form stated that the Appellant was appealing the decision of the Information Commissioner because they refused to investigate alleged breaches of data protection.

2. It appears that the Appellant had made a complaint to the Respondent that Eastbourne Borough Council had not retained information. The Respondent concluded that the Council hand processed the data correctly.

3. The Appellant included a letter from the Information Commissioner confirming that the Respondent had investigated the Appelant's complaining and then reviewed the handling of that complaint being satisfied that the complaint was dealt with correctly. That letter went onto state –
"…if you believe that the ICO has provided you with a poor service, or if you believe we have not treated you properly or fairly then you may be able to complain to: The Parliamentary and Health Service Ombudsman (PHSO), Millbank Tower, Millbank, London, SW1P 4QP."

4. The Appellant responded to the strike out application stating that to strike out his appeal would be breach of his human rights.

5. The Appellant does have a right to make an application under s166 of the Data Protection Act 2028 as regards a complaint to the Information Commissioner. However, the scope of an application under section 166 of the Data Protection Act 2018 is to achieve some progress in a complaint that has not been progressed. Once an outcome is received, there is nothing left to progress. The Tribunal has no powers to investigate the investigation of the Respondent or supervise their investigation as is suggested in the notice of appeal. The investigation has been competed and reviewed.

6. As highlighted by the notice of appeal and the subsequent response from the Appellant, he seeks to for the tribunal to review the complaint outcome which is not an outcome that can be achieved under a section 166 application, albeit the appeal has not in any way referred to the application being a section 166 application.

7. I considered it appropriate to conduct the review on the papers and without a hearing noting the nature of the application made and that both parties have fully responded to the issues.

The legal framework and powers of the Tribunal

8. The Data Protection Act 2018 confirms the jurisdiction of the information Commissioner for upholding information rights and data privacy. The Act provides limited scope for appeals to the Tribunal, proceedings in the County and the prosecution of offences before the criminal courts. The courts and tribunals can only deal with those issues that Parliament has intended it to do so as set out by the legislation.

9. As stated on the Information Commissioner's website – complaints about data protection outcomes can be reported for review to the ICO's office or referred to the Parliamentary and Health Service Ombudsman. There is no right of appeal to the First Tier Tribunal from a data protection decision save in the very limited circumstances permitted by the Act for example under s162 as regards penalty notices etc This is distinct from Freedom of Information requests where decisions of the ICO can be appealed to the First Tier Tribunal. There also exists the right to apply for judicial review albeit that would relate to the reasonableness of decision-making discretion of the ICO rather than a disagreement with the decision itself, and noting the judicial review is costly and time-consuming.

10. Since the DPA 18 came into force a person can apply to this Tribunal for an "order to progress complaints" under section 166. That section provides –

166 (1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—
(a) fails to take appropriate steps to respond to the complaint,
(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or

(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.

(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—
(a) to take appropriate steps to respond to the complaint, or
(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.

(3) An order under subsection (2)(a) may require the Commissioner—
(a) to take steps specified in the order;
(b) to conclude an investigation, or take a specified step, within a period specified in the order.

11. Under section 166 DPA18, a data subject has a right to make an application to the Tribunal if they consider that the Commissioner has failed to take action in relation to their complaint.

12. The scope of s166 has already been considered by more senior Judges on a number of occasions and as such their views on the ambit of s166 are binding on this Tribunal.

13. The Tribunal is limited in its powers to those given by Parliament as interpreted by the Upper Tribunal. As stated in **Killock & others v Information Commissioner [2022] 1 WLR 2241** by Mrs Justice Farbey-

74. The remedy in s.166 is limited to the mischiefs identified in s.166(1). We agree with Judge Wikeley's conclusion in Leighton (No 2) that those are all procedural failings. They are (in broad summary) the failure to respond appropriately to a complaint, the failure to provide timely information in relation to a complaint and the failure to provide a timely complaint outcome. We do not need to go further by characterising s.166 as a "remedy for inaction" which we regard as an unnecessary gloss on the statutory provision. It is plain from the statutory words that, on an application under

s.166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome. We reach this conclusion on the plain and ordinary meaning of the statutory language but it is supported by the Explanatory Notes to the Act which regard the section 166 remedy as reflecting the provisions of article 78(2) which are procedural. Any attempt by a party to divert a tribunal from the procedural failings listed in section 166 towards a decision on the merits of the complaint must be firmly resisted by tribunals.

14. The legislation refers to "appropriate steps". It is not the Tribunals' function to supervise the Information Commissioner who is an expert and in the best position to assess what steps are required. This Tribunal will not interfere with an exercise of regulatory judgement without good reason. See Killock paras 84 to 86.

15. The appropriateness of any investigative steps taken is an objective matter which is within the jurisdiction of this Tribunal. However, as stated in paragraph 87 of Killock, s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. This Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given. It will do so in the context of securing the progress of the complaint in question. The Tribunal has not powers to alter the outcome or any enforcement steps thereafter.

16. Moreover, the Upper Tribunal said in Killock that if the Commissioner goes outside her statutory powers or makes any other error of law, it is for the High Court to correct her on ordinary public law principles in judicial review proceedings. The assessment of the appropriateness of a response already given is for the High Court and not this Tribunal. The combination of a statutory remedy in the Tribunal in relation to procedures and to the supervision of the High Court in relation to substance provides appropriate and effective protection to individuals.

17. This approach has been confirmed by the High Court and the Court of Appeal. Mostyn J in the High Court in **R (Delo) v Information Commissioner [2023] 1 WLR 1327**, paragraph 57 –

"*The treatment of such complaints by the commissioner, as before, remains within his exclusive discretion. He decides the scale of an investigation of a complaint to the extent that he thinks appropriate. He decides therefore whether an investigation is to be short, narrow and light or whether it is to be long, wide and heavy. He decides what weight, if any, to give to the ability of a data subject to apply to a court against a data controller or processor under article 79. And then he decides whether he shall, or shall not, reach a conclusive determination...".*

18. Mostyn J's decision in Delo was upheld by the Court of Appeal, see **[2023] EWCA Civ 1141**.

19. More recently in the Upper Tribunal in **Cortes v Information Commissioner (UA-2023-001298-GDPA)** which applied both Killock and Delo in confirming that the nature of section 166 is that of a limited procedural provision only.

"The Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court)….As such, the fallacy in the Applicant's central argument is laid bare. If Professor Engelman is correct, then any data subject who is dissatisfied with the outcome of their complaint to the Commissioner could simply allege that it was reached after an inadequate investigation, and thereby launch a collateral attack on the outcome itself with the aim of the complaint decision being re-made with a different outcome. Such a scenario would be inconsistent with the purport of Article 78.2, the heading and text of section 166 and the thrust of the decisions and reasoning in both Killock and Veale and R (on the application of Delo). It would also make a nonsense of the jurisdictional demarcation line between

the FTT under section 166 and the High Court on an application for judicial review." (paragraph 33)

20. As initially indicated, this Tribunal does not have an oversight function in relation to the Information Commissioner's Office and does not hold them to account for their internal processes. The Parliamentary and Health Service Ombudsman is the body which has that function as do the High Court.

Analysis and conclusions

21. The Appellant has not indicated which article of the European Convention of Human Rights he considers to be engaged. That Convention does not give freestanding rights to override the will of domestic Parliament. The ECHR does not provide power to the Court and tribunal that they do have, it requires legislation to be read as far as possible to be compatible with the ECHR provisions. The Appellant complains about a lack of remedy but there is a remedy available to the Appellant as indicated in the letter.

22. The Applicant has an outcome from the Information Commissioner. The Tribunal has no power to consider an appeal against the Information Commissioner's substantive findings or steps to be taken.

23. The Tribunal has no power to do what the Applicant is asking for in his applications.

24. Section 166 Data Protection Act 2018 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s.165 Data Protection Act 2018.

25. Furthermore, the Tribunal does not have any power to supervise or mandate the performance of the Commissioner's functions.

26. There is no realistic prospect of the application succeeded in the circumstances and it would be a gross misuse of the resources of the Tribunal and the parties to allow that application to continue further. Time spent on a hopeless application reduces those resources available to consider other applications.

District Judge Moan sitting as a First Tier Tribunal Judge

2nd August 2024