Case Reference: FT/EA/2024/0224/GDPR
Neutral citation number: [2024] UKFTT 00939 (GRC)
Decision issued on: 22 October 2024

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Before

JUDGE MOAN

Between

DENNIS HOWARD

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 received on 5th June 2024. The appeal form stated that the Appellant was appealing the

decision of the Information Commissioner because the Appellant disagreed with the outcome of their investigation.

2. The application lacked clarity. It was made on a GRC 1 which is the appeal form rather than the GRC 3 application form. The application referred to the right to be forgotten and how the Appellant disagreed with the Respondent's decision dated 28th May 2024. A letter dated 28th May 2024 was exhibited albeit this was clearly in connection with a data processing request (which is an application) and not a Freedom of Information request (which is an appeal). Whilst an incorrect form can be overlooked, the form and exhibited outcome letter clearly highlighted that the issue complained about was data.

3. The Appellant was unhappy with the results of google searches that included his name and location and had made a complaint to the Respondent on 10th May 2024. The Information Commissioner determined that the search results did not interfere the right to be forgotten on 28th May 2024.

4. The Respondent made their strike out application on 18th July 2024 as part of their submissions on the basis that the Tribunal had no jurisdiction to deal with an appeal following the outcome from a data processing breach investigation and that the application could not succeed as the Tribunal did not have power to direct the Information Commissioner to conclude their investigation in an alternative way.

5. The Appellant responded to the strike out application and submitted that:
   (i) The Tribunal had jurisdiction under section 166 if the Respondent had not adequately dealt with the complaint;
   (ii) The Tribunal can determine if the Respondent has failed to investigate and address the complaint;

(iii) The Tribunal has the power to consider judicial review;

(iv) The Tribunal has jurisdiction to ensure data protection rights under GDPR are secured;

(v) He had rights under Article 8 for his complaint to be dealt with; and

(vi) Case law precedent – although no case-law was cited.

6. The submissions were statements of assumed fact not supported by any reference to primary legislation or case law.

7. 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, if indeed it can be categorised as an investigation as per the Respondent's submissions.

8. 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. However, as the Tribunal does not have any jurisdiction to otherwise supervise compliance with GDPR, the only basis for an application to the Tribunal would be under section 166.

9. 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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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).

18. 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.

Analysis and conclusions

19. The Appellant is not satisfied with the decision of the information Commissioner as regards his data on google. That is not a decision that this Tribunal can review. The Tribunal cannot look into a concluded complaint and revisit it. There is no inherent powers gifted to the First Tier Tribunal; the powers of this Tribunal are the gift of statute alone.

20. Judicial reviews can only be heard by the High Court and Upper Tribunal. The Tribunal has no power to do what the Applicant is asking for in his applications. Submitting that a cause of action engages a person's human rights does not give power to a body that it does not have. The engagement of human rights affects interpretation of existing

rights and powers; it does not create a freestanding right of appeal that cannot otherwise be made.

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

22. There is no realistic prospect of the application succeeded in the circumstances and it would be a misuse of the limited resources of the Tribunal and the Respondent to allow the application to continue further. Time spent on this application reduces those resources available to consider other applications.

District Judge Moan sitting as a First Tier Tribunal Judge
23rd September 2024
Promulgated on: 22 October 2024