Neutral citation number: [2024] UKFTT 961 (GRC)
Case Reference: FT-EA-2024-0123-GDPR
Decision given on: 30 October 2024

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Before

JUDGE MOAN

Between

DR MICHAEL GUY SMITH

Applicant

And

THE INFORMATION COMMISSIONER

Respondent

Decision made on the papers.

Decision: The Respondent's application 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 no prospect of the application being successful.

REASONS

1. The Applicant lodged a notice of appeal to the Tribunal dated 2nd April 2024. The appeal form stated that the Applicant was appealing the decision of the Information Commissioner dated 7th December 2023.

He said that the application was not appeal but an application under section 166 of the Data Protection Act 2018.

2. He said that that –
I am making an application under section 166 of the Data Protection Act 2018 ("section 166") and in particular applying for an order to progress under section 166(2).

He received an outcome decision on 7th December 2024 in response to his complaint and he was dissatisfied with that outcome. He considered that the Commissioner had failed to handle his complaint in a *procedurally proper fashion.* He had raised with the Commissioner whether he had included all of the information requested, whether he had assessed that information and contended that the Commissioner did not supply all of the information in the requested format.
He described the response as summarily dismissing his complaints.

The grounds of appeal were summarised as *"The Commissioner has failed to take appropriate steps to respond to my complaint including by failing to investigate the subject matter of my complaint, to the extent appropriate."*

In particular, the Commissioner had not addressed his initial complaint about the complexity of his subject access request and that he did not investigate at all the subject matter of his complaint.

He was seeking a remedy that *"an order under section 166(2) which requires the Commissioner to take appropriate steps to respond to my complaint by investigating the subject matter of my complaint, to the extent appropriate. This should include appropriate timescales for concluding such an investigation and informing me of the outcome."*

3. The Applicant had made an extensive subject access requests to the Commissioner on 2nd July 2023. The Commissioner sought an extension to comply with the request on the basis of complexity. The Applicant disagreed that the request was complex and there ensued a dialogue by email about whether his requests were or were not complex. I regarded the request as more extensive in nature than complex but understood why the Commissioner needed extra time to comply.

4. A response to his subject-access request was provided on 2nd October 2023. That response detailed each piece of information requested and a response to that individual request. Some information was stated to not held, other information was provided. A full detailed response was provided. There was extensive and comprehensive correspondence exchanged between the parties thereafter.

5. Dissatisfied about the response, he complained on 3rd September 2023. The Commissioner provided an outcome letter to that complaint dated 7th December 2023.

6. The Respondent responded to the application on 14th August 2024. In that response the Commissioner confirmed that he provided the outcome to the complaint; that was not disputed by the Applicant. The Commissioner considered that the application made by the Applicant was not a permissible use of the section 166 procedure. The Tribunal was not in a position to make an order on the basis of a purported suggestion that the Commissioner had failed to investigate at all or to the extent appropriate. The Respondent made an application to strike out the appeal on the basis that the Tribunal lacked jurisdiction to deal with the appeal and/or there was no realistic prospect of the appeal succeeding.

7. The Applicant is aware of the strike out application and no response has been received. He acknowledged the same in his correspondence with the respondent dated 21st August 2024.

8. The Applicant 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.

9. As highlighted by the notice of appeal and the subsequent response from the Applicant, he seeks to for the Tribunal to review the complaint outcome and process, which is not an outcome that can be achieved under a section 166 application.

10. I considered it appropriate to conduct the review on the papers and without a hearing noting the nature of the strike out application made and having regard that both parties have fully responded to the issues. The Tribunal must strike out an application where it does not have jurisdiction. There is no room for discretion on that ground.

The legal framework and powers of the Tribunal

11. 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 Court 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.

12. 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. There is also a remedy available in the County Court.

13. 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.

14. 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.

15. The scope of section 166 has already been considered by more senior Judges on a number of occasions and as such their views on the ambit of section 166 are binding on this Tribunal.

16. 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.

17. 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**, section 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 no powers to alter the outcome or any enforcement steps thereafter.

18. 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...*".

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

20. 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)

21. 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

22. The Applicant seeks to persuade that the cases of **Killock** and **Delo** come to different conclusions about whether the Tribunal can wind back the clock. I noted para 87 of **Killock** –

Moreover, 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. 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). It will do so in the context of securing the progress of the complaint in question. We do not rule out circumstances in which a complainant, having received an outcome to his or her complaint under s.165(b), may ask the Tribunal to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint under s.166(2)(a). However, should that happen, the Tribunal will cast a critical eye to assure itself that the complainant is not using the s.166 process to achieve a different complaint outcome.

And para 131 of **Delo –**

For my part, if an outcome has been pronounced, I would rule out any attempt by the data subject to wind back the clock and to try by sleight of hand to achieve a different outcome by asking for an order specifying an appropriate responsive step which in fact has that effect. The Upper Tribunal rightly identified in [77] that if an outcome was pronounced which the complainant considered was unlawful or irrational then they can seek judicial review in the High Court.

23. A single paragraph of **Killock** cannot be read in isolation. A full reading of the judgment is important, for example, para 74 of the case of **Killock** - *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 s.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 s.166 towards a decision on the merits of the complaint must be firmly resisted by Tribunals.*

24. And at para 76 of **Killock** - *The Tribunal does not have the same expertise in determining the appropriate outcome of complaints. The Commissioner is the expert regulator. She is in the best position to consider the merits of a complaint and to reach a conclusion as to its outcome. In so far as the Commissioner's*

regulatory judgments would not and cannot be matched by expertise in the Tribunal, it is readily comprehensible that Parliament has not provided a remedy in the Tribunal in relation to the merits of complaints.

25. At para 77 - *This does not leave data subjects unprotected. If the Commissioner goes outside her statutory powers or makes any other error of law, the High Court will correct her on ordinary public law principles in judicial review proceedings. 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.*

26. The High Court in **Delo** conclusively dismissed any argument that the Tribunal could look at the failure to take procedural steps to adequately determine a complaint. He referred to the argument as one *seeking to clothe a merits-based outcome decision with garments of procedural failings.*

27. Both cases were discussed by UT Judge Wikely in **Lawton v ICO**. Whilst there may be perceived differences, where an applicant is seeking a different outcome, the cases are clear that this is not a permissible outcome in a section 166 application which is precisely what the Applicant seeks to achieve. Judge Wikely did not need to determine the limited disagreement between the cases as the appeal in his case was seeking to challenge the substantive outcome. The Applicant in this application described the investigation as summary and disagrees with the outcome. On that issue all the authorities are very clear, section 166 cannot be used as a mask to reconsider the outcome.

28. Both **Delo** and **Killock** have since been approved by the Court of Appeal. The Upper Tribunal have consistently confirmed that the ambit of section 166 application is not to review the outcome. The order to progress in EW was on the exceptional facts of that appeal in that no investigation had de facto taken place. That is not the case in this

application. There had been extensive enquiries made, and significant clarification in correspondence.

29. The Tribunal has no power to order further steps to have been taken when an outcome has been provided and in circumstances when there has clearly been an investigation, nor does the Tribunal have power to demand that the Commissioner produce an outcome that is consistent with another decision relating to another party. The level of correspondence between the parties indicates that there had been some investigation. This was not the rare case of no investigation taking place at all.

30. This Tribunal does not need to grapple with the perceived differences in **Killock** and **Delo**, those differences have no bearing on this application. Whilst the outcome was not available at the time of this application, it is available now and so there is no investigation to progress.

31. 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. This is the very consistent conclusions o the High Court, Upper Tribunal and the Court of Appeal. There is no inherent or overarching jurisdiction of the Tribunal to monitor or scrutinise; these powers lie elsewhere but not with this Tribunal. This application is precisely a case of disguising an appeal within the garments of an order to progress as described by Mostyn J.

32. There is no realistic prospect of the application succeeding in the circumstances and it would be a misuse of the resources of the Tribunal and the parties to allow that application to continue any further. Time spent on a meritless application reduces those resources available to

consider other applications. As has been advised on numerous occasions, there are remedies available to the Applicant, just not before this Tribunal.

District Judge Moan sitting as a First Tier Tribunal Judge
18th October 2024