



Appeal number: EA/2019/0069/GDPR

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

RICHARD SMITH

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE MOIRA MACMILLAN
SUZANNE COSGRAVE
Dr HENRY FITZHUGH**

Determined on the papers, the Tribunal sitting in Chambers on 25 July 2019

DECISION

1. The application is refused.

REASONS

2. The Applicant applied to the Tribunal for an Order to Progress his Complaint under s. 166 of the Data Protection Act 2018 (“DPA 2018”).
3. In his Notice of Appeal form dated 6 March 2019, the Applicant relies on grounds that the Commissioner had not replied to or progressed a complaint he made on 2 December 2018.
4. The Information Commissioner’s Response dated 8 April 2019 accepts that she failed to provide the Applicant with information about the progress of his complaint within 3 months of having received it and apologises for this oversight. She relies on grounds of opposition that the Commissioner has since responded appropriately to the Applicant’s complaint so there no basis for making the Order sought.
5. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 134 pages, including submissions made by both parties.

The Law

6. Section 166 of the DPA 2018 creates a new right of application to the Tribunal as follows:

Orders to progress complaints

(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.

(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a).

7. The “*appropriate steps*” which must be taken by the Information Commissioner is further defined by s. 165 (5) DPA 2018 as investigating the subject matter of the complaint “*to the extent appropriate*” and keeping the complainant updated as to the progress of inquiries.

8. The powers of the Tribunal in determining a s. 166 application are limited to those set out in s. 166 (2). In Order to exercise them, the Tribunal must be satisfied that the Commissioner has failed to progress a complaint made to her under s. 165 DPA 2018. The jurisdiction to make an Order is limited to circumstances in which there has been a failure of the type set out in s. 166 (1) (a), (b) and (c).

The Evidence

9. We have considered carefully the agreed bundle of evidence. This shows that the Applicant made a complaint to the Information Commissioner on 2 December 2018 about Scottish Power plc. Thereafter the Applicant sent the Commissioner a number of additional emails containing further information. The Commissioner wrote to the Applicant on 12 March 2019, acknowledging his complaint and apologising for the delay in her response. On 18 April 2019 the Commissioner wrote to the Applicant to inform him of her conclusions.

Submissions

10. The Applicant submits that the Information Commissioner’s response to his complaint has been poor. At the time he made this application the Commissioner had failed to provide him with information about the progress of his complaint or to provide an explanation for the delay.

11. The Commissioner submits that, although she failed to provide the Applicant with information about the progress of his complaint within 3 months of receiving it, she has now taken appropriate steps to respond to his complaint and there is no longer a proper basis for the Tribunal to make an Order under s. 166 DPA 2018 because the Tribunal’s jurisdiction is limited to procedural failings.

Conclusion

12. We conclude that the Information Commissioner has taken appropriate steps to respond to the Applicant’s complaint. We are not persuaded that there has been a failure on the

Commissioner's part to address the matters in s. 166 (1) (a) and (c) and any failure under s. 166 (1) (b) has been remedied.

13. We conclude that there is no basis for making an Order under s. 166 (2) DPA 2018 on the facts of this case.

14. For these reasons, the application is refused.

(Signed)

MOIRA MACMILLAN

DATE: 21 August 2019
PROMULGATED: 3 September 2019