



Case Reference: EA-2023-0188-GDPR
Neutral Citation Number: [2023] UKFTT 844 (GRC)

First-tier Tribunal
General Regulatory Chamber
Section 166 DPA 1998

Before

TRIBUNAL JUDGE BUCKLEY

Between

ROBERT BARTOSIK

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

JUDGE BUCKLEY

Sitting in Chambers
on 11 October 2023

DECISION

1. The application under section 166 of the Data Protection Act 1998 is struck out.

REASONS

2. In this decision, 'the Application' is a reference to the application made to the tribunal by Mr Bartosik under section 166 of the Data Protection Act 1998 (DPA) and 'the Applicant' is a reference to Mr Bartosik.

Application and response

3. The Commissioner applies for the Application to be struck out under rule 8(3)(c) (no reasonable prospects of success) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
4. The Commissioner submits that the Applicant simply disagrees with the conclusions reached by the Commissioner on his complaint. An application under section 166 DPA permits a Tribunal to make an order against the Commissioner only if he has failed in some procedural respect. The Commissioner has taken steps to respond to this complaint and provided an outcome to the Applicant's complaint on 6 April 2023. The outcome was that the Commissioner had concluded that it was not appropriate or necessary for the Commissioner to take any further regulatory action.
5. The Applicant was given the opportunity to make representations in response to the strike out application but did not provide any representations.

Discussion and conclusions

6. On an application to the tribunal under section 166, the tribunal has no power to deal with the merits of the complaint to the Commissioner or its outcome (**Killock & Veale & ors v Information Commissioner** [2021] UKUT 299 (AAC) and **R (on the application of Delo) v Information Commissioner and Wise Payments Ltd** [2023] EWCA (Civ) 1141).
7. I have considered whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of the Application succeeding at a full hearing.
8. In EA/2022/0065/GDPR in a decision dated 16 January 2023 the First-tier Tribunal found that the Commissioner had failed to consider a complaint made by the Applicant at all and therefore concluded that the Commissioner had 'failed to take appropriate steps to respond to the complaint'. The First-tier Tribunal ordered:
 - “(i) The Commissioner takes appropriate steps to respond to the Applicant's complaint, by registering and considering the complaint, in line with the Commissioner's functions.
 - (ii) The Commissioner informs the Applicant within 28 days of the date of this decision of the progress of the complaint, and of the date an outcome will be provided (if not already done).”

9. The Commissioner’s response sets out the steps taken following that decision, which, in essence, included investigating the complaint and then providing an outcome by letter dated 6 April 2023, which included the following:

“Within the documents provided to us by Police Scotland we note that you submitted a petition to the court seeking orders under sections 167 and 169 of the DPA 18 for the erasure of the “challenged information”. The petition was considered by Lord Clark with the conclusion on 16 August 2022 that your claim for “erasure and compensation” [had] not succeeded, and the petition was refused.

As party litigant in this case you would have been furnished with the reasoning on which Lord Clark based his conclusions.

The Outcome of your Complaint

In light of the court’s decision the ICO therefore does not consider it appropriate or necessary to take any further regulatory action in this case.”

10. A decision not to take any further regulatory action is an ‘outcome’ (see para 64 of **R (Delo) v The Information Commissioner**).
11. It is apparent from the grounds that the Applicant is of the view that the data controller should have provided a substantive determination of the complaint rather than deciding that it was not appropriate to pursue further regulatory action. This is an impermissible challenge to the outcome of the complaint. It cannot be brought by way of an application under section 166.
12. However, the Applicant also asserts that the Commissioner has failed to take appropriate steps to investigate his complaint because the Commissioner ‘didn’t investigate the reason why the court refused my petition’. He states that the court decision has been appealed and ‘is under the review’.
13. The extent to which the tribunal can consider the appropriateness of the steps taken by the Commissioner to investigate the complaint is set out in paragraphs 83-88 and 116 of the Upper Tribunal’s decision in **Killock & Veale & ors v Information Commissioner** [2021]UKUT 299 (AAC):

“83. We agree however with Ms Lester’s submission that a s.166 order should not be reduced to a formalistic remedy and that the various elements of s.166(2) have real content in the sense of ensuring the progress of complaints. Parliament has empowered the Tribunal to make an order requiring the Commissioner to take appropriate steps to respond to a complaint (s.166(2)(a)). Any such steps will be specified in the order (s.166(3)(a)). Appropriate steps

include “investigating the subject matter of the complaint, to the extent appropriate” (s.165(5)(a)).

84. There is nothing in the statutory language to suggest that the question of what amounts to an appropriate step is determined by the opinion of Commissioner. As Mr Black submitted, the language of s.165 and s.166 is objective in that it does not suggest that an investigative step in response to a complaint is appropriate because the Commissioner thinks that it is appropriate: her view will not be decisive. Nor has Parliament stated that the Tribunal should apply the principles of judicial review which would have limited the Tribunal to considering whether the Commissioner’s approach to appropriateness was reasonable and correct in law. In determining whether a step is appropriate, the Tribunal will decide the question of appropriateness for itself.

85. However, in considering appropriateness, the Tribunal will be bound to take into consideration and give weight to the views of the Commissioner as an expert regulator. The GRC is a specialist tribunal and may deploy (as in *Platts*) its non-legal members appointed to the Tribunal for their expertise. It is nevertheless our view that, in the sphere of complaints, the Commissioner has the institutional competence and is in the best position to decide what investigations she should undertake into any particular issue, and how she should conduct those investigations. As Mr Milford emphasised, her decisions about these matters will be informed not only by the nature of the complaint itself but also by a range of other factors such as her own regulatory priorities, other investigations in the same subject area and her judgment on how to deploy her limited resources most effectively. Any decision of a Tribunal which fails to recognise the wider regulatory context of a complaint and to demonstrate respect for the special position of the Commissioner may be susceptible to appeal in this Chamber.

86. We do not mean to suggest that the Tribunal must regard all matters before it as matters of regulatory judgment: the Tribunal may be in as good a position as the Commissioner to decide (to take Mr Milford’s example) whether a complainant should receive a response to a complaint in Braille. Nor need the Tribunal in all cases tamely accept the Commissioner’s judgment which would derogate from the judicial duty to scrutinise a party’s case. However, where it is established that the Commissioner has exercised a regulatory judgment, the Tribunal will need good reason to interfere (which may in turn depend on the degree of regulatory judgment involved) and cannot simply substitute its own view.

87. 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.

88. The same reasoning applies to orders under s.166(2)(b) requiring the Commissioner to inform the complainant of progress on the complaint or of the outcome of the complaint within a specified period. These are procedural matters (giving information) and should not be used to achieve a substantive regulatory outcome.

...

116. As we have explained above, s.166 is a procedural, not a substantive, remedy which provides for a right of appeal to the Tribunal on process, where the Commissioner fails to address a complaint under s.165 DPA 2018 in a procedurally proper fashion. However, as we have concluded above, the appropriateness of the investigative steps taken by the Commissioner is an objective matter which is within the jurisdiction of the Tribunal and is not something solely within the remit of the Commissioner to determine for herself...

14. Thus it is within the tribunal's jurisdiction to consider the appropriateness of the investigative steps taken by the Commissioner and, although section 166 is a forward looking provision the Upper Tribunal did 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).
15. Having considered the grounds of Application and the response, it is evident to me that the Commissioner complied with his statutory duties in relation to this complaint in that he:
 - 15.1. handled the Appellant's complaint promptly,
 - 15.2. took appropriate steps to investigate the complaint to the extent appropriate in the circumstances, and
 - 15.3. informed the Appellant of the outcome of the complaint.
16. Having looked at the steps taken by the Commissioner as set out in the documents before me, I have considered whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of the Application succeeding at a full hearing. Taking into account the Commissioner's role as expert regulator in this field, I find that there are no reasonable prospects of the tribunal

concluding that the Commissioner had not taken appropriate steps to investigate the complaint.

17. Further, in my view this is clearly an application in which the complainant is using the section 166 process to achieve a different substantive outcome, although it is clothed as a procedural challenge. I find that it is in essence a challenge to the Commissioner's decision not to take further regulatory action.
18. The essence of the 'failure to investigate' complaint is that the Appellant asserts that the Commissioner was wrong to decide not to take regulatory based purely on the refusal of the petition seeking orders under sections 167 and 169 of the DPA 18 for the erasure of the "challenged information". It is difficult to see how the tribunal could determine this appeal without enabling a collateral challenge to the outcome of the complaint.
19. I have considered whether I should exercise my discretion to strike the Application out. Taking into account the overriding objective, it is a waste of the time and resources of the Applicant, the tribunal and the Commissioner for this Application to be considered at a final hearing. In my view it is appropriate to strike the Application out.
20. For the above reasons the Application is struck out under rule 8(3)(c).

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 11 October 2023

Promulgation Date: 13 October 2023