

THE HIGH COURT
CIRCUIT APPEAL
DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

Record Number: 2011 No. 85 CA

BETWEEN:

DAVID FOX

APPLICANT/APELLANT

AND

THE OFFICE OF THE DATA PROTECTION COMMISSIONER

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 5th DAY OF FEBRUARY 2013:

1. A net issue of statutory interpretation arises in this case where the applicant's two complaints made to the Data Protection Commissioner by letters dated respectively 10th December 2010 and 19th January 2011 were considered by the Commissioner to come within the provisions of Section 10(1)(b)(i) of the Data Protection Act 1998 as amended ("the Act") i.e. that they are considered to be "*frivolous or vexatious*", and accordingly a letter was written to the applicant by the Commissioner's office to inform him of this opinion on the part of the Commissioner to inform the applicant that they would not enter into any further correspondence on the issues raised.

2. Section 10 (1) of the Act, as amended provides:

"(1) (a) -- The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.

(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall –

(i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and

(ii) if he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the decision, appeal against it to the Court under Section 26 of this Act within 21 days from the receipt by him or her of the notification."

3. "The Court" referred to in Section 10 in the context of an appeal is by interpretation contained in section 1 "The Circuit Court".

4. Section 26 of the Act makes provision for an appeal against, inter alia, (d) a decision of the Commissioner in relation to a complaint under section 10(1)(a) of the Act. Under that section, the decision of the Circuit Court is final, except that a disappointed appellant may appeal to the High Court on a point of law only.

5. In the present case, following the receipt of the letter from the Commissioner's office that his complaints were not being investigated as they are considered to be "*frivolous or vexatious*", the applicant appealed to the Circuit Court what he considers to be a decision on his complaints, namely that they are frivolous or vexatious, and therefore a decision in respect of which in his submission he has a right to appeal under Section 26 of the Act.

6. The applicant's appeal was dismissed by Her Honour Judge Linnane by order dated 4th May 2011 following a preliminary issue on the question of jurisdiction to hear an appeal at all in relation to the opinion that the complaints are frivolous or vexatious. The learned judge concluded that such a decision by the Commissioner was not one in respect of which an appeal lay, given the wording of the section.

7. The section provides in subsection (1) that the Commissioner may investigate a complaint. Subsection (2) goes on to require the Commissioner to investigate a complaint but only if he does not consider the complaint to be frivolous or vexatious. In the latter case he is not required to investigate the complaint at all. Where he does investigate the complaint (i.e. where it is not deemed to be frivolous or vexatious) he must first try and have the matter resolved amicably, and if unsuccessful in that regard, notify the complainant of his decision and inform the person that he/she may, if aggrieved by the decision appeal the decision under section 26 of the Act.

8. There is a clear sequencing evident in this section. The complaint does not get even to an attempt to resolve it amicably or a decision upon it until the Commissioner is satisfied that it is not a frivolous or vexatious complaint. The reference in Section 10 (1)(b) (ii) to "the decision" (as distinct from "a decision"), must in my view relate to the decision made following the investigation. It speaks of only one decision, and that in my view cannot include the opinion formed for the purpose of subsection (1)(b)(i) that the complaint is frivolous or vexatious. It follows in my view that the reference to "a decision" in section 26 of the Act must in turn be read as meaning a decision reached in relation to the complaint after it has been investigated.

9. This very issue has been the subject already of a judgment given by Mr Justice Birmingham in *Nowak v. Data Protection Commissioner* [2012] IEHC 449, where the learned judge reached the same conclusion. I respectfully adopt his reasoning, and have no reason whatsoever not to follow his decision in all respects. Even without that judgment which is worthy of respect as a judgment of a judge of equal jurisdiction, and save in exceptional circumstances to be followed in the interests of consistency, I would reach the same conclusions.

10. For these reasons I am satisfied that the learned Circuit Judge was correct and I dismiss this appeal and affirm her order made on the 4th May 2011.