NCN **[2025] UKFTT 00628 (GRC)**

Case Reference: FT/EA/2025/0101

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 4 June 2025

Before

JUDGE HARRIS

Between

ENZO SEAMAN

Applicant

and

INFORMATION COMMISSIONER

Respondent

Decision: The proceedings are struck out under Rule 8(3)(c) because there is no reasonable prospect of the Applicant's case, or any part of it, succeeding.

REASONS

Background

1. These proceedings appear to be an application under Section 166(2) of the Data Protection Act 2018 ("DPA 2018") for an order to progress the Applicant's complaint against the Mortgage Advice Bureau ("MAB") to the Respondent dated 24 September 2024 (Reference IC-335213-L5Q7).

2. On 27 January 2025, the Respondent wrote to the Applicant and advised that his view was that MAB had complied with its data protection obligations because data protection legislation did not state when personal data should be deleted, only that it should not be kept for longer than necessary. In this letter the Respondent stated that it appeared that MAB had a viable data retention policy in place and had every intention of acting upon it, in which case there would be no infringement of the

Applicant's rights as a data subject. The Respondent advised the Applicant that he would not be taking further regulatory action, but assured the Applicant that a record of their complaint would be kept on file in order to help build up a picture of MAB's information rights practices.

3. The Applicant appealed to the Tribunal by way of form GRC1 dated 23 February 2025. He stated that *"My complaint is about my previous Mortgage network using my e mail address which includes my full name after i have left the company. The ICO has just accepted the mortgage advice bureau that they have followed its own policy and that's accepted. I do not find this acceptable... I consider this a breach of privacy and the ICO has just accepted the policy of MAB"*. He further stated as his desired outcome that *"I believe the outcome is wrong as the retention time of my email address which identifies me is unreasonable. In my opinion a period of 2 weeks is reasonable"*

4. On 27 April 2025, the Applicant emailed the Respondent's case officer and reiterated his concerns regarding MAB's handling of his erasure request and their continued use of his data. The Respondent's case officer responded on 13 May 2025 that MAB had identified an appropriate basis to process the Applicant's data until 12 March 2025 and that he had given consent to such processing.

5. In his Response to the grounds of appeal dated 21 May 2025, the Respondent noted that Section 166 DPA 2018 does not provide a mechanism by which an applicant can challenge the substantive outcome of a complaint. He went on to state that the relief available from the Tribunal on an application under section 166 only applies where it is satisfied that the Information Commissioner has failed in some procedural respect to comply with the requirements of section 166(1) DPA 2018. He argued that that he has taken steps to investigate, provided the Applicant with an outcome on 27 January 2025 and further explained it in correspondence on 13 May 2025. Accordingly, the outcomes sought by the Applicant are not outcomes which the Tribunal has power to grant because an order can only be made in relation to procedural failings.

6. In his Response, the Respondent therefore submits that the Tribunal has no jurisdiction to consider the Applicant's application and/or that it has no prospect of success. It invites the Tribunal to strike the application out under either Rule 8(2)(a) and/or 8(3)(c) of the Tribunal Rules.

The legal framework

7. Section 165 DPA 2018 sets out the right of data subjects to complain to the Commissioner about infringement of their rights under the data protection legislation. Under section 166 DPA 2018 a data subject can make an application to this Tribunal for an order 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 UK 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."

8. In his Response, the Respondent therefore submits that the Tribunal has no jurisdiction to consider the Applicant's application and/or that it has no prospect of success. It invites the Tribunal to strike the application out under either Rule 8(2)(a) and/or 8(3)(c) of the Tribunal Rules. The Tribunal can only make an order under section 166(2) if one of the conditions at section 166(1)(a), (b) or (c) is met. There have been a number of appeal decisions which have considered the scope of section 166. It is clearly established that the Tribunal's powers are limited to procedural issues, rather than the merits or substantive outcome of a complaint.

9. The case of Killock v Information Commissioner [2022] 1 WLR 2241, Upper Tribunal at paragraph 74 stated - "*…It is plain from the statutory words that, on an application under section 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.*"

10. 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...".*

11. Mostyn J's decision in Delo was upheld by the Court of Appeal ([2023] EWCA Civ 1141) – *"For the reasons I have given I would uphold the conclusion of the judge at [85] that the legislative scheme requires the Commissioner to receive and consider a complaint and then provides the Commissioner with a broad discretion as to whether to conduct a further investigation and, if so, to what extent. I would further hold, in agreement with the judge, that having done that much the Commissioner is entitled to conclude that it is unnecessary to determine whether there has been an infringement but sufficient to reach and express a view about the likelihood that this is so and to take no further action. By doing so the Commissioner discharges his duty to inform the complainant of the outcome of their complaint."* (paragraph 80, Warby LJ).

12. The decision of 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).

13. The case of Dr Michael Guy Smith v Information Commissioner [2025] UKUT 74 (AAC), noted at paragraph 60 that "it is for the Tribunal to decide, applying an objective test, if an "appropriate step" has been omitted, but observe that, in practice, that is unlikely to be the case where an 'outcome' has been produced. That is for two main reasons: first, because section 166 is a procedural provision and, as the principal mechanisms for enforcing rights or challenging the Commissioner are either claims against the data controller or judicial review of the Commissioner, section 166 should not be used to obtain 'by the back door' a remedy normally only available in those proceedings; secondly, because, if the Commissioner has already produced an outcome then, given the very wide discretion that the Commissioner has, both as to what and how to investigate and as to outcome, the scope for the Tribunal to say that an appropriate step has been omitted is limited." In considering this the Tribunal must, as set out in paragraph 85 of Killick "when deciding objectively whether any (further) appropriate step needs to be taken by the Commissioner, take into account and give weight to the views of the Commissioner as an expert regulator."

Discussion and conclusions

14. The Respondent provided the Applicant with a response to his complaint dated 27 January 2025. I am satisfied that this response, particularly when further explained by the Respondent on 13 May 2025, both provided an outcome to the complaint and

demonstrated that the Respondent had given consideration to whether there were other appropriate steps which could be taken to progress the Applicant's complaint.

15. It appears to me that there were no further appropriate steps which the Respondent ought reasonably to have taken to progress the complaint. The Applicant's other points are challenging the substantive outcome of the complaint to the Commissioner. The Tribunal does not have power under section 166 to consider the merits or substantive outcome of a complaint. Section 166 is limited to procedural issues and there is no further procedural failing in respect of which the Tribunal can make a decision.

16. I therefore find that there is no reasonable prospect of the case, or any part of it, succeeding. The proceedings are therefore struck out.

Signed Judge Harris Date 3 June 2025