



Case Reference: EA/ 2022/0439 GDPR

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

Heard: by determination on the papers

Heard on: 13 February 2023

Decision given on:

Before: Judge Alison McKenna

ED RYLAND

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

RULING

on Rule 4 (3) Application

I refuse to extend time to admit this appeal.

REASONS

1. On 27 January 2023 the Registrar refused to extend time to admit the Applicant's Notice of Appeal dated 18 January 2023. The Notice of Appeal seeks an Order under s. 166 of the Data Protection Act 2018 on the basis that the Information Commissioner did not take appropriate steps in relation to a concluded complaint. By application dated 31 January 2023, the Applicant asked for a Judge to consider the matter afresh, pursuant to rule 4 (3) of the Tribunal's Rules. This I now do.
2. The Registrar noted that the Applicant's Notice of Appeal was filed 6 months and 3 days outside the time limit. The Applicant has not disputed that calculation, but states that it was impossible for him to comply with the time limit because he did not know that the Information Commissioner's Office had not taken the steps he thought it had taken.
3. I have discretion to extend the time limit for making an appeal under rule 5 (3) (a) of the Tribunal's Rules. In deciding whether to exercise my discretion I have considered the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC). I have also considered the Upper Tribunal's decision in *BPP University*

College of Professional Studies v HMRC [2014] UKUT 496 (TCC) in which the *Data Select* principles were applied. (*BPP* was considered further in the Court of Appeal and the Supreme Court, but on a different point).

4. In *Morgan J's* decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

5. Applying the recommended approach, I find (i) that the purpose of the time limit is to ensure that proceedings are conducted in an orderly way and that the principle of finality in litigation may be observed; (ii) I find that the period of delay in this case was six months and 3 days; (iii) the explanation given for the delay is that he did not know that the Information Commissioner had not taken further steps to communicate with the Data Controller. I do not find the reason for the delay to be a good one because (as I explain below) it rests on a misunderstanding of the Appellant's remedy.
6. Finally, (iv) and (v): I consider the consequences for the parties of extending or not extending time. If I refuse, then these proceedings will be brought to an end today. If I agree, then this matter will proceed. This will involve the expenditure of both time and costs for the Information Commissioner, and indeed for the Tribunal itself.
7. I note that the powers of this Tribunal in determining an application under s. 166 of the DPA 2018 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 the ICO 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). This Tribunal has no supervisory jurisdiction in relation to the handling of a complaint to the Information Commissioner's Office and the Tribunal may not review the Information Commissioner's decision to take no further action in relation to a complaint. That view has been frequently expressed by the Upper Tribunal and was also recently taken in the High Court by Mostyn J. in *R (Delo) v ICO* [2022] EWHC 3046 (Admin)¹ at [128] as follows:

"...Sections 166(2) and (3) allow the Tribunal to order the Commissioner to take steps specified in the order to respond to the complaint. In my judgment, this would not extend to telling the Commissioner that he had to reach a conclusive determination on a complaint where the Commissioner had rendered an outcome of no further action without reaching a conclusive determination. This is because s. 166 by its terms applies only where the claim is pending and has not reached the outcome stage. It applies only to alleged deficiencies in procedural steps along the way and clearly does not apply to a merits-based outcome decision."

8. In this case, it is clear that the ICO progressed the complaint and informed the Applicant of its outcome decision. In the light of Mostyn J.'s judgment, it seems to me that this outcome letter (and case review letter) serves to deprive the Tribunal of jurisdiction under s. 166 DPA, as the complaint could no longer be said to be 'pending' when the Notice of Appeal was lodged. This would mean that a mandatory strike out under rule 8 (2) (a) of the Tribunal's rules would have been considered if the appeal had been made in time. It therefore seems unlikely that an Order would be made in this case, even if I were to extend time to admit the Notice of Appeal. Thus, I find that there is little consequence to the Appellant of refusing to extend time as it is most likely that if I did so, I would then proceed to strike out the appeal.

¹ [BEN PETER DELO, R \(on the application of\) v THE INFORMATION COMMISSIONER & Anor - Find case law \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

9. In all the circumstances, I have concluded that it would not be appropriate to exercise my discretion so as to extend time and so I now refuse to do so. It follows that these proceedings are at an end.

(signed)
Judge Alison McKenna

Dated: 13 February 2023

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