



NCN: [2023] UKFTT 00204 (GRC)

Case Reference: EA/2022/0081 GDPR

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

Heard: by determination on the papers
Heard on: 22 February 2023
Decision given on: 24th February 2023
Before: Judge Alison McKenna

Between:

GLEN MARLOW

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

**DECISION on rule 4 (3) application:
The appeal is struck out.**

REASONS

1. On 16 December 2022, the Registrar struck out the Applicant's appeal as having no prospects of success. On 28 January 2023, the Applicant asked for the matter to be considered afresh by a Judge, pursuant to rule 4 (3) of the Tribunal's Rules¹. This I now do.
2. The Applicant by Notice of Appeal dated 27 March 2022 applied for an order under s. 166 of the Data Protection Act 2018. In his grounds of appeal, he sought an acknowledgement from the ICO that it had not dealt judiciously with his complaint against the PHSO. By way of remedy, he asked for the Tribunal to reach a conclusion on the facts and issue a Decision Notice.
3. On 14 September 2022, the Information Commissioner responded to the Notice of Appeal and proposed a strike out under rule 8 (3)(c) of the Tribunal's Rules, for no prospects of success. The Information Commissioner stated that it issued an outcome letter to the Applicant on 11 March 2022 and a case review letter on 25 August 2022. It submitted that there was no order that the Tribunal could make under s. 166 DPA 2018 because, as a matter of law, this remedy is procedural and cannot be used to change the substantive outcome of a complaint. It offered the Applicant apologies for the delays in dealing with his complaint.

¹ [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/111111/2009-01-26-FTT-Rules-2009.pdf)

4. Under rule 8 (4), the Applicant was given an opportunity to make representations in respect of the proposed strike out. The Applicant submitted on 18 September 2022 that he thought his case should go ahead because the ICO has not made a sound case why it should not.
5. The Registrar made a strike out decision on 16 December 2022. The Applicant asked for a Judge to consider the matter afresh, and so I have reviewed all the papers. I am sorry to hear of the Applicant's health problems and I am willing to conduct a fresh consideration notwithstanding that the application was made late. I note that the Applicant has asked for an explanation of the Registrar's reference to not transferring his case to another Court. He will see that this is the language used in rule 8 (2) (b) of the Tribunal's Rules. It actually refers to a strike out under rule 8 (2) (a), rather than the present situation of a strike out under rule 8 (3) (c). I therefore do not consider it relevant to my fresh consideration of the facts and law.
6. I note that the powers of this 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 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)² 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."
7. In this case, it is clear that the ICO progressed the complaint (albeit belatedly) and informed the Applicant of its outcome decision. In the light of Mostyn J.'s judgment, it seems to me that the March outcome letter served 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 appropriate.
8. Nevertheless, I have considered whether a strike out under rule 8 (3)(c) for no prospects of success should be directed. I note that an outcome letter has been provided and this means that there is no longer any remedy which this Tribunal can provide under s. 166 DPA 2018. The Applicant should consider whether the order he seeks is obtainable through the courts, as I'm afraid it is not obtainable in this Tribunal.
9. I conclude that this Notice of Appeal has no reasonable prospects of success as the ICO had responded to the complaint before the Notice of Appeal was filed and the law does not allow me to take the action which the Applicant requests. I direct that this application to the Tribunal be struck out and will accordingly proceed no further.

(Signed)
Judge Alison McKenna

Dated: 22 February 2023

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² [BEN PETER DELO, R \(on the application of\) v THE INFORMATION COMMISSIONER & Anor - Find case law \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

