



Appeal number: EA/2021/0109 & QJ/2021/0011  
V<sup>1</sup>

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Information Rights**

**PAULINE STEWART**

**Applicant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Before:  
JUDGE LYNN GRIFFIN**

**Determined at a remote hearing via Cloud Video Platform  
On 9 June 2021**

**Appearances  
Mrs Stewart appeared in person**

**DECISION**

1. The application EA/2021/0109 is struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, because there is no reasonable prospect of the Applicant's case succeeding in the proceedings.
2. Application QJ/2021/0011 is struck out under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, because the Tribunal does not have jurisdiction to deal with the proceedings.

---

<sup>1</sup> V: video (all remote)

## MODE OF HEARING

3. The proceedings were held by the cloud video platform. Mrs Stewart joined remotely. The Respondent had indicated that she did not propose to attend the hearing. I was satisfied that it was fair and just to conduct the hearing in this way.

## REASONS

### *Background to the Applications*

4. These applications relate to further complaints<sup>2</sup> made to the Respondent by Mrs Stewart arising from her concerns about how various public authorities have calculated her pension entitlement and consequent enquiries in that regard about her personal data held by those public authorities. The Applicant believes that her pension has been wrongly calculated and that information held on the systems of her former employers and pension providers is inaccurate and has adversely affected the amount of her pension.

5. The public authority subject of the Applicant's complaints in these cases is the Cabinet Office in EA/2021/0109 and the Information Commissioner in QJ/2021/0011. For the sake of clarity when describing the Information Commissioner acting as the public authority I shall use "ICO" (i.e. The Information Commissioner's Office) and as regulator I shall use the Information Commissioner.

6. The cases were joined for the hearing at the request of Mrs Stewart and both stem from her underlying concerns.

7. The Applicant's ultimate aim is the rectification of that information and the re-calculation of her pensions, including payment of unpaid amounts. She also seeks a direction to the Information Commissioner to issue sanctions to the Cabinet Office for non-compliance with timescales.

8. EA/2021/0109 relates to complaint reference IC-60277-T2P0 made to the ICO; a data protection complaint made to the Information Commissioner on 9 September 2020. In case management directions made by the Registrar on 21 April 2021 a short extension of time was granted to lodge the application and it was identified as an application under s166 Data Protection Act 2018.

9. In the response to the application the Information Commissioner argues that the application in EA/2021/0109 should be struck out as the complaint

---

<sup>2</sup> See the tribunal's decision in QJ/2020/0022

investigation is ongoing. The Information Commissioner had instructed the Cabinet Office to respond to the Applicants concerns by 5 May 2021. On 4 May 2021 the Cabinet Office wrote to Mrs Stewart. She was informed in the letter of 4 May 2021 that should she not be satisfied with the response she could make a further complaint to the Cabinet Office and/or make a new complaint to the Information Commissioner.

10. QJ/2021/0011 relates to ICO reference IC-92952 – D6P5. The Applicant’s letter of 7 March 2021 was treated by the ICO as a request made under the Freedom of Information Act 2000 [FOIA]. A response was sent to Mrs Stewart on 31 March 2021 informing her that of the information requested she had some already, a part had been previously answered and providing her with 103 pages of information from the ICO system to which she had not previously had access.

11. Mrs Stewart agreed that her request of 7 March 2021 was properly treated as a request under FOIA. She explained that at the heart of her request is her belief that she has not been provided with all the information she is entitled to about how her pension was calculated and in relation to the complaints she has made.

12. I note that in her notice of application and other documents Mrs Stewart outlines the nature of her disability and the circumstances leading to her ill health. She is representing herself. As a result, and having regard to the Equal Treatment Benchbook, I asked Mrs Stewart whether there were any adjustments to the process that were needed to enable her participation; she said there were not.

*The Law- EA/2021/0109*

13. A data subject has a right to make a complaint to the Commissioner if they consider that in connection with the processing of personal data relating to them there is an infringement of the General Data Protection Regulation [GDPR], and/or Parts 3 or 4 of the Data Protection Act 2018 [DPA18]: see Article 77 GDPR, and section 165 (1) & (2) DPA18.

14. Under section 166 DPA18, a data subject has a right to make an application to the Tribunal if they consider that the Commissioner has failed to take certain procedural actions in relation to their complaint.

15. Section 166 DPA18 as relevant states:

*(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the 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.*

*(3) An order under subsection (2)(a) may require the Commissioner –*

*(a) to take steps specified in the order;*

*(b) to conclude an investigation, or take a specified step, within a period specified in the order.*

16. The reference to taking “appropriate steps” in section 166(1)(a) and (2)(a), includes “investigating the subject matter of the complaint to the extent appropriate” and “informing the complainant about progress on the complaints”, as set out in sections 166(4) and 165(5) DPA18 which read

*(4) If the Commissioner receives a complaint under subsection (2), the Commissioner must –*

*(a) take appropriate steps to respond to the complaint,*

*(b) inform the complainant of the outcome of the complaint,*

*(c) inform the complainant of the rights under section 166, and*

*(d) if asked to do so by the complainant, provide the complainant with further information about how to pursue the complaint.*

*(5) The reference in subsection (4)(a) to taking appropriate steps in response to a complaint includes –*

*(a) investigating the subject matter of the complaint, to the extent appropriate, and*

*(b)informing the complainant about progress on the complaint, including about whether further investigation or co-ordination with another supervisory authority or foreign designated authority is necessary.*

17. The reference to “provide the complainant with.... the outcome of the complaint” in s. 166(1)(b) and 2(b) is not qualified with the word appropriate.

18. The Tribunal can only exercise powers given to it by Parliament as set out in legislation. When considering an application under s. 166 the Tribunal is not concerned with the merits or strength of the underlying complaint. Section 166 DPA18 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s. 165 DPA18. Neither does it allow the Tribunal to direct to what extent it is appropriate to investigate any complaint; that is a matter for the Information Commissioner.

19. On an application under s. 166 DPA18 the Tribunal is limited to considering whether to make an order of the kinds set out in s. 166(2) requiring the Commissioner to

- a. Take appropriate steps to respond to the complaint or
- b. Inform the complainant of progress on the complaint or
- c. Inform the complainant of the outcome of the complaint.

20. The powers of the Tribunal in determining such an appeal have been considered by the Upper Tribunal in *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) in which Upper Tribunal Judge Wikeley said at paragraph 31

*“Appropriate steps” mean just that, and not an “appropriate outcome”. Likewise, the FTT’s powers include making an order that the Commissioner “take appropriate steps to respond to the complaint”, and not to “take appropriate steps to resolve the complaint”, least of all to resolve the matter to the satisfaction of the complainant.*

21. In the case of *Scranage v Information Commissioner* [2020] UKUT 196 (AAC) the Upper Tribunal went further in saying:

*“... there is a widespread misunderstanding about the reach of section 166. Contrary to many data subjects’ expectations, it does not provide a right of appeal against the substantive outcome of the Information Commissioner’s investigation on its merits. Thus, section 166(1), which sets out the circumstances in which an application can be made to the Tribunal, is procedural rather than substantive in its focus. This is consistent with the terms of Article 78(2) of the GDPR (see above). The prescribed circumstances are where the Commissioner fails to take appropriate steps to respond to a complaint, or fails to update the data subject on progress with the complaint or the outcome of the complaint within three months*

*after the submission of the complaint, or any subsequent three month period in which the Commissioner is still considering the complaint.”.*

22. These decisions of the Upper Tribunal are binding on the First Tier Tribunal as to the approach that must be taken to applications such as this.

23. As I explained to Mrs Stewart, a person who wants a data controller (or processor) to rectify personal data or otherwise properly comply with the Data Protection Act 2018 or General Data Protection Regulations in relation to holding personal data must go to the High Court or a County Court pursuant to section 180 of the Data Protection Act 2018; that is not an application for judicial review. I express no opinion one way or another about whether Mrs Stewart can do so or whether she should do so; that is a matter for her about which this Tribunal cannot advise her.

24. Mrs Stewart is not satisfied with the actions of the Information Commissioner. This Tribunal does not have an oversight function in relation to the Information Commissioner’s Office and does not hold them to account for their internal processes. The Parliamentary and Health Service Ombudsman is the body which has that function. I express no opinion one way or another about whether Mrs Stewart can or whether she should raise the issue with the Ombudsman; again, that is a matter for her about which this Tribunal cannot advise her.

*The legislative framework - QJ/2021/0011*

25. The Tribunal’s jurisdiction to deal with appeals under FOIA is set out in section 57 which requires, in subsection 1, that a decision notice has been served by the Information Commissioner before a complainant may bring an appeal to the Tribunal.

26. The regime set under FOIA applies as regards the ICO just as it does to any public authority, once a response has been received to the request for information the requestor has the option of making a request to the ICO for an internal review and thereafter if still not satisfied with the response a complaint can be made to the Information Commissioner as regulator under s50 FOIA. The complaint is considered, a decision notice issued and that if the complainant wishes to challenge the decision notice this forms the basis of the tribunal’s power to hear an appeal and decide if the decision notice was in accordance with law, see s58 FOIA.

27. The Tribunal rules<sup>3</sup> require that the tribunal strike out any proceedings where there is no jurisdiction to hear the case; rule 8(2).

*Submissions from Mrs Stewart*

28. Re EA/2021/0109 , Mrs Stewart said she had made a request for an internal review to the Cabinet Office on 7 May 2021. She had also written to the ICO on 1 June 2021, there is no conclusion as yet. At the hearing Mrs Stewart understood the explanation I gave her about the tribunal’s jurisdiction in FOIA cases. She apologised for bringing the application but I reassured her that no apology was needed.

29. More generally Mrs Stewart explained she is seeking the information to support and to prove that her pension has been wrongly calculated and she wants her information “rectified”. She wants the Information Commissioner to use her powers to force the Cabinet Office to rectify the data it holds. She would like her pension recalculated.

30. Mrs Stewart has not made any application to the civil courts; she explained her concerns about costs and her current family circumstances preclude this. Her previous experience of obtaining legal advice has led to a loss of confidence in the legal professions. However, as explained at the hearing the Tribunal cannot advise Mrs Stewart and cannot provide her with a remedy that it has no power to order.

31. The Commissioner submits that the applications to the Tribunal should be struck out as having no reasonable prospects of success.

*Conclusion EA/2021/0109*

32. Turning to s166 DPA18, and EA/2021/0109 as set out above the Cabinet Office has written to Mrs Stewart on 4 May 2021, she has responded to them and to the Information Commissioner. The next step is for the Respondent to consider the Applicant’s complaints, take steps and inform her of the outcome her complaint and the steps she needs to take in order for further progress to be made if appropriate.

33. The complaint is recently made and ongoing, the Tribunal does not have any power to supervise the performance of the Commissioner’s functions, or mandate the imposition of any sanction. It is for the Information Commissioner to comply with her duties under s165, in particular subsection 4 which requires her to

---

<sup>3</sup> The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

- a. take appropriate steps to respond to the complaint,
- b. inform the complainant of the outcome of the complaint,
- c. inform the complainant of the rights under section 166, and
- d. if asked to do so by the complainant, provide the complainant with further information about how to pursue the complaint.

34. These actions should be taken within 3 months of the complaint, see s166 DPA18. This application is made too soon. There is nothing to suggest that the Information Commissioner has or will fail to abide by her statutory duty. I note that Mrs Stewart remains sceptical about what will happen in response to her complaint but it would not be fair or just to assume that a direction was required before giving the Information Commissioner the opportunity to follow her processes.

35. The tribunal does not have power to order the rectification of data whether held by the Information Commissioner's office or any other public authority.

36. There is subsequently no basis, at this stage, for the Tribunal to make an order under section 166(2) DPA18.

37. In order for this application to go forward there must be a realistic, as opposed to a fanciful or unrealistic, prospect of its success as explained by Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

38. For the reasons set out above, I have concluded that this Tribunal would not be able to provide the Applicant with the orders she seeks in EA/2021/0109 and that therefore the application has no reasonable prospect of success.

39. Having taken account of all relevant considerations, I strike out application EA/2021/0109 pursuant to 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 because there is no reasonable prospect of the application succeeding.

#### *Conclusion QJ/2021/0011*

40. Turning to QJ/2021/0011, in the absence of a decision notice the tribunal has no power to consider the appeal under FOIA. Given the stage of the complaint and the nature of the request for information there is no other more appropriate forum. I must therefore strike it out under rule 8(2). This will not affect any later right of appeal accruing once the process has taken its course.

41. Having taken account of all relevant considerations, I strike out application QJ/2021/0011 pursuant to 8(2) of the Tribunal Procedure (First-tier



Tribunal) (General Regulatory Chamber) Rules 2009 because the tribunal has no jurisdiction to deal with the proceedings.

**Date of Decision: 28 June 2021**

**Date Promulgated: 30 June 2021**

**Lynn Griffin**  
**First Tier Tribunal Judge**