**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2014/0213**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Monetary Penalty Notice dated 24 July 2014.**

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| **Appellant:** | **Reactiv Media Limited** |
| **Respondent:** | **The Information Commissioner** |
| **Heard at:** | **York House, Leeds** |
| **Date of Hearing:** | **28 January 2015** |

**Before**

**Chris Hughes**

**Judge**

and

**Anne Chafer and Gareth Jones**

**Tribunal Members**

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| **Date of Decision:** | **13 April 2015** |
| **Date of Promulgation:** | **14 April 2015** |

**Representatives:**

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| **The Appellant:** | **Mr Swann** |
| **The Respondent:** | **Mr Knight** |

**Subject matter:**
Privacy and Electronic Communications Regulations 2003 –unsolicited calls for direct marketing

**Cases:-**
Niebel v IC [2014] UKUT 0255 (AAC)
Amber UPVC Fabrications Limited v IC EA/2014/0112

## REASONS FOR DECISION

Introduction

1. The making of telephone calls for direct marketing purposes to a telephone number whose subscriber has registered with the Telephone Preference Service (TPS) operated on behalf of the industry by the Direct Marketing Association not to receive such calls is prohibited under Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI2003/2426) ("PECR") unless the subscriber has indicated that he does not object to such calls being made.

2. The appellant in these proceedings operates a business making direct marketing live telephone calls using the name Discover Finance. On 24 July 2014 the Commissioner issued a Monetary Penalty Notice (MPN) under s55A of the Data Protection Act 1998 (as amended) finding the Appellant in serious breach of Regulation 21 PECR by reason of unsolicited direct marketing live telephone calls made by the Appellant and imposed a penalty of £50,000.

3. The recitals to the Directive 2002/58/EC "concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)" set out the considerations leading to the adoption of the directive. These include (recital 40):- "Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes". Directive 2009/136/EC amended the directive with a view to make it more effective. Recital 69 to the latter directive provides:- "The need to ensure an adequate level of protection of privacy and personal data transmitted and processed in connection with the use of electronic communications networks in the Community calls for effective implementation and enforcement powers in order to provide adequate incentives for compliance. Competent national authorities and, where appropriate, other relevant national bodies should have sufficient powers and resources to investigate cases of non-compliance effectively, including powers to

obtain any relevant information they might need, to decide on complaints and to impose sanctions in cases of non-compliance."

4. This underlying policy was given effect through inserting a new article in the 2002 directive:-

*'Article 15a*

***Implementation and enforcement***

*1. Member States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified."*

5. PECR Regulation 21 provides:-

***Unsolicited calls for direct marketing purposes***

*21.—(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where—*

*(a)the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or*

*(b)the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.*

*(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).*

*(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.*

*(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.*

*(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—*

*(a)the subscriber shall be free to withdraw that notification at any time, and*

*(b)where such notification is withdrawn, the caller shall not make such calls on that line.*

6. The power to impose a sanction for breach of this is provided by S55A DPA:-

***55APower of Commissioner to impose monetary penalty***

*(1)The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—*

*(a) there has been a serious contravention of the requirements of the privacy and electronic communications (EC Directive) Regulations 2003,*

*(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and*

*(c) subsection (2) or (3) applies.*

*(2) This subsection applies if the contravention was deliberate.*

*(3)This subsection applies if the data controller—*

*(a) knew or ought to have known —*

*(i) that there was a risk that the contravention would occur, and*

*(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but*

*(b) failed to take reasonable steps to prevent the contravention.*

*…..*

*(4)A monetary penalty notice is a notice requiring the data controller to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.*

*(5)The amount determined by the Commissioner must not exceed the prescribed amount.*

*…..…*

*"prescribed" means prescribed by regulations made by the Secretary of State.]*

7. In his MPN the Commissioner reviewed the history of the complaint and the response of Reactiv to the issues put to it. Between 13 November 2012 and 31 December 2013 TPS received 481 complaints from persons registered with them who had received direct marketing calls from Reactiv – each call was a breach of the regulations. Reactiv responded with respect to 55 of these by providing "opt-in" dates (dates on which it claimed the telephone subscriber had indicated a preparedness to receive

calls) on or subsequent to the date of the call. The Commissioner noted (DN paragraph 29 bundle page 223) Reactiv "have responded to 167 out of the 481 TPS complaints on the basis that they rely on prior consent which has not been evidenced".

8. The Commissioner found that Reactiv had been in breach of Regulation 21 by making 601 direct marketing unsolicited calls to subscribers who had been registered for more than 28 days and who had not given consent to receive the calls (DN paragraphs 34-36 bundle page 225).

9. He further concluded that they were serious as they were on-going, often repeated despite requests to cease and being reminded that the subscriber was TPS registered, had continued despite the intervention to the Regulator and trade standards body the Direct Marketing Commission ("DMC") (DN paragraphs 37-39 bundle page 225)

10. In considering the impact of some of these calls the Commissioner considered an online survey of the 120 complaints made to him and which by capturing more information revealed examples of the impact caused (DN paragraph 27, bundle page 222). These included two examples of repeated calls on the same day to disabled persons, a call to the work mobile telephone of a 999 centre operator and "this call was received by my mother who has dementia and it caused her distress. She is registered with the TPS".

11. This evidence contributed to the Commissioner's conclusion that not only were the calls "likely to cause substantial distress" but that they had been shown to have caused such distress (DN paragraph 44 bundle page 226).

12. Reviewing the evidence of the nature of Reactiv's business, the repeated concerns raised with Reactiv by subscribers, the Commissioner, the level of complaints received by TPS and the finding by DMC that Reactiv's marketing practices were in breach of the DMA code, the Commissioner concluded that Reactiv knew or ought to have known of the risk of breach and that it would be of a kind likely to cause substantial distress ((paragraph 46-49), that Reactiv had failed to take reasonable steps to prevent contravention. The Commissioner considered aggravating and mitigating features, the objectives furthered by serving a MPN, and the representations Reactiv had made.

13. These representations were made by a letter of 16 June (bundle pages 183-187 appendix 188-205). The appendix listed and categorised the calls in various ways

including "Appendix 7, 27 numbers where the caller hung up, .Appendix 9, 161 numbers where the caller asked for their number to be removed,… Appendix 11 51 numbers where the caller told us it was the wrong number, representing 10.6% of the complaints. My take on this on the basis that they are all land lines is that caller had recently moved and that the TPS registration hadn't moved with them or hadn't reached the register." The representations continued "whilst your letter refers to the cumulative effect of all these calls being a nuisance a large proportion approximately 60%, were either numbers we haven't called, applications, call backs, could not helps, dead numbers of wrong numbers. In the large call centre environment that Reactiv works in 40% of 481 calls approx. 200 whilst being an unacceptable number isn't a large number". The submissions cast doubt on the accuracy of the specific complaints referred to in the draft of the notice, cast doubt on the processes of TPS, drew attention to the fact that they had not featured in the top 20 since October 2013 and argued that the company had made progress without the monetary penalty being imposed and the penalty would hit the company hard.

14. The Commissioner concluded that a penalty of £50,000 should be imposed.

15. Reactiv appealed (bundle pages 253) seeking "either a reduction or overturn of the decision" and arguing that a good proportion of the calls were not theirs, that the Commissioner had noted a change in their behaviour and disputing that Reactiv had caused substantial damage or distress to individuals.

Evidence

16. Mr Clancy, a manager employed by the Commissioner gave a history of the origin and investigation of the complaint against Reactiv Media (statement, bundle pages 596-603). It was one of the 20 most complained against companies in December 2012. In January 2013 the Commissioner wrote to Reactiv indicating his power to impose sanctions, emphasising the importance of co-operation with the Commissioner's inquiry and seeking information about Reactiv's operations, procedures and processes. In a process lasting many months Reactiv failed to respond adequately. Through much of 2013 Reactiv continued to figure in the TPS top 20 list. Of 481 complaints made to the TPS Reactiv acknowledged it had made 429 and accepted it had made 120 calls the subject of complaint to the ICO. Mr Clancy presented an analysis of the TPS complaints and the Reactiv response, and concluded

that 462 calls had been made by Reactiv. Reactiv had made a number of claims with respect to these calls, such as the consent of the subscriber, but had failed to substantiate them. Of the 120 complaints to the ICO 13 had stated that the call had caused substantial distress or damage, this was 12% of the complaints made directly to the ICO. Mr Clancy had a full understanding of the evidence which had been gathered and was a credible witness who clearly established that the processes the Commissioner relied upon were robust.

17. Mr Cummings, Assistant Manager of TPS demonstrated the robustness of the procedures used by the TPS to ensure that only eligible complaints were processed. He confirmed that Reactiv had been in the top 20 most complained list for five months in 2013, most recently in October 2013 but had not figured subsequently. He gave clear and convincing evidence which the tribunal accepted.

18. Mr Jewitt, the finance director of Reactiv gave evidence in support of the appeal. Mr Jewitt has been the data controller for the company since May 2012 when he had the title of "group development director" (bundle page 3). The company had been established 7 years, He had been employed by the company for three years. The company was a call centre operation handling ppi, selling insurance and conducting surveys. It employed 210 people and planned to increase that by 90. The turnover in the previous year was £5.8 million and it was anticipated to increase this year to £7.75 million. He confirmed that they now screened daily against TPS. The call centre manager had been made compliance director. He denied that they had changed their systems since the MPN. The company now had a bigger team in IT and considered their processes fool-proof. He accepted that the company had not provided the information requested by the Commissioner. The individual responsible to whom the Commissioner's first letter (which asked for detailed information) was addressed no longer worked for the company. He acknowledged that he had signed the reply (bundle page 19) and accepted that it did not provide the information requested. He denied that the unhelpful reply was a manifestation of the culture of the company and blamed the individual who had left the company stating that "I suspect [name redacted] got the letter, wrote a reply and asked me to reply". He confirmed that everyone who enters the business is trained, "taught TPS" and that there were "written policies in the manual" and that there had been "policies and procedures since I joined". They had updated all the policies and procedures as well as updating all the

websites. He confirmed that he was not a statutory director of Reactiv Media. The company had four "directors in title" and one "Companies House" the latter owned the business. Mr Jewitt was a "Companies House" director of a company in the group. The four directors in name meet weekly and discuss every aspect of the business, bringing any issues to the meeting, there is no audit committee.

Submissions

19. It was common ground between the parties that the analysis carried out in *Amber UPVC Fabrications Limited v IC EA/2014/0112* was an accurate exposition of the law as it applied to cases of unsolicited live marketing calls.

20. It was submitted on behalf of the appellant that the grounds for issuing a MPN had not existed. The evidence upon which the Commissioner relied was not verified, there was no evidence who the complainants were, whether they had a grievance and the material the Commissioner had relied upon had been contaminated. The issue could not be seen as serious.

21. The bulk of the case related to the TPS complaints. These complainants had not been asked about any impact upon them, so there was no evidence of substantial distress or damage. Of the complaints to the Commissioner only 13 had indicated that it had caused substantial distress or damage; that was only 10% of complaints. The Commissioner had to be satisfied that there was a likelihood of causing substantial distress, on these figures it was not likely as only slightly more than 10% had indicated this – the vast majority were saying otherwise.

22. It was not accepted that the company had acted deliberately; the evidence that Reactiv were aware of any breach was unsubstantiated raw data.

23. While acknowledging the public should be protected from nuisance calls the grounds for issuing a MPN were not made out. The company offered a service to the public, it had a right to trade, it was trading well in an area of high unemployment. A thorough investigation should have been carried out before harsh penalties were imposed. The penalty had been reduced by the Commissioner from £60,000 to £50,000 to reflect the company's position, and even £50,000 would have a big impact. The function of the notice was primarily deterrent and now, the complaints against the company were virtually nil. If any penalty were imposed it should be significantly smaller.

24. On behalf of the Commissioner it was submitted that there was no dispute as to the law. Unsolicited marketing calls were an intrusion into the privacy of individuals and, if the individual had registered with TPS, unlawful. The legal regime, derived from the directives was intended to protect privacy and provide an effective remedy for breach.

25. While all three limbs of s55A were contested; in substance the factual situation was the same as in *Amber*.

26. It was unclear whether Reactiv accepted that there had been multiple breaches of regulation 21. The attack on the sufficiency of evidence was also unsatisfactory – the Commissioner could not be required to contact each of the individuals who had complained to TPS or the Commissioner. There was no evidence submitted supporting the allegations of action by competitors or any other bad faith in the complaints. The vast majority of individuals would not complain, the Tribunal was entitled to accept the good faith of the individuals who did. There had been no detailed engagement with the individual complaints so therefore, subject to a slight reduction in the numbers now established not to be against Reactiv, there were established 462 complaints via TPS and 120 directly to the ICO. The record showed that, contrary to the claims of Reactiv, there were repeated calls to the same number on one day (bundle page 349) and Mr Clancy's evidence. The claim that some had not been registered for 28 days was demonstrated to be unsustainable by Mr Cummings evidence. Reactiv's compliance was so poor that they had been forced to admit the number of calls which it should not have made.

27. The unsolicited calls required an interaction with the subscriber, it was accepted that they were an invasion of privacy of those who had sought to protect their privacy. It was accepted that irritation was not sufficient, however the four examples set out in the MPN had not been serious challenged, there was supporting evidence of multiple calls to one number, the examples themselves of the distress caused to disabled people, including one with dementia were substantial, and the distress and the risk around the inappropriate call to phone for use in emergency and the content of the call were clear evidence of substantial distress or substantial damage. Companies had a responsibility to be very careful not to call registered numbers.

28. The Commissioner relied on the matter set out at paragraphs 46-49 of the MPN to establish the reckless conduct of the company. In addition (bundle pages 364a-c) the DMC had made findings against the company of breaches of its Code of Conduct in April 2012, in October 2013 in respect of conduct from April-September 2013 and in April 2014 the DMA had expelled the company from membership.

29. The Commissioner drew attention to the aggravating factors that the relevant period November 2012 to December 2013 came after the findings of the DMC in April 2012, Reactiv had never provided evidence of steps taken to remedy the position, it had stonewalled the investigation and failed to engage with the Commissioner and had come to the Tribunal asserting that it had resolved the issues but not provided evidence. The company even now showed no sense of taking responsibility for its actions. Furthermore the deterrent effect on other companies was a relevant factor to take into account.

30. A monetary penalty of £50,000 was entirely appropriate, indeed lenient for a company with a turnover of £5,800,000. There was no evidence that any difficulty would be caused to the company by the sanction and it lay at the bottom of the scale; since this was a full merits hearing it was open to the Tribunal to consider a larger penalty.

31. In response to this submission Counsel for Reactiv reiterated the points previously made.

Consideration

32. In considering this appeal the Tribunal was greatly assisted by the reasoning in *Amber* and adopts it generally. The identification of breach of the Regulation requires individuals to complain. They may complain to the TPS or the Commissioner and the complaints are captured in different ways with varying amounts of information gathered from the complainant. The fact that a complaint is made is an indication of a level of upset caused to the individual concerned, the number of complaints received will, given the very human response of not wishing to be further bothered by raising a complaint, be only a small percentage of the wrongful calls made. The evidence was clear and unshaken; a large number of complaints were made over a sustained period of time, during that period of a year for many months Reactiv was one of the most complained against companies. The arguments advanced in correspondence by Reactiv were unsupported by evidence and showed a poor understanding of the

issues. The Commissioner was amply justified in finding that the large number of breaches amounted to serious contravention.

33. People who register with TPS are by their nature likely to be more affected by intrusive calls than others. Where there are a large number of unlawful calls to potentially vulnerable people the likelihood is that some will be at the more extreme end of vulnerability – perhaps recently bereaved or seriously ill. That is foreseeable, given a large sample, such as the approximately 600 calls in this case, it is inevitable that some will be at that end of the distribution and will experience substantial distress, as was illustrated by the examples used in the MPN. The Tribunal finds as a matter of fact that substantial distress was caused in these examples and will have been caused in others where the details have not been collected, and also where no complaint was made.

34. The evidence is overwhelming that the company carried on its business in conscious disregard of its obligations. The finding against it by its trade body in April 2012 was made before the period of the investigation. The initial letter from the Commissioner in January 2013 was at the start of the period in question and gave a clear guidance and warning, yet nine months later the company was still recording sufficiently large numbers of complaints to figure in the TPS top 20.

35. The Tribunal is therefore satisfied, for the reasons advanced by the Commissioner, that the MPN was fully justified.

36. In deciding what level of penalty to impose the Commissioner had due regard to the guidance approved by the Minister and laid before Parliament and, having categorised the breach as lying in the least severe category considered a sanction of £60,000. It was hampered in its consideration by the lack of co-operation from the company. In the light of that it took a cautious view as to the financial resources of the company and discerning some mitigating factors imposed a lower sanction of £50,000. In the circumstances as he knew them the Commissioner was justified in coming to that conclusion.

37. The Tribunal; however has two advantages over the Commissioner in that it has a better knowledge of the financial robustness of the company and clearer sight of the mitigating and aggravating factors in the case derived from oral and written evidence not before him.

38. The financial affairs of the company at the time the sanction was determined were more robust than the Commissioner knew. At that time its turnover of £5,800,000 was more robust than was known at the time (the Commissioner's estimate of turnover was £3,500,000 – bundle page 67). The company is growing rapidly and this year will be twice the size estimated a year ago.

39. Furthermore the evidence before the Tribunal shows a culture of denial and minimisation of the breach, weak governance of the company and a tendency to blame others rather than accept responsibility. There is little evidence of robust policies and procedures coupled with a culture which properly respects telephone subscribers and their right to privacy. There continues to be no effective engagement with the regulatory process, either with the Commissioner or indeed with the MPA which has expelled it. In its handling of the public announcement of the MPN it clearly sought to mislead the press and minimise the issues raised (bundle page 252) blaming a technical error and falsely stating "it relates almost entirely to event that happened in October and November 2012". The Tribunal can have little confidence that appropriate lessons have been learned.

40. In the circumstances therefore of a larger, more prosperous company and clearer evidence of aggravating factors the Tribunal is satisfied that the penalty of £50,000 is too low and a sum of £75,000 more appropriately meets the objectives of the notice.

41. Our decision is unanimous.

Judge Hughes
[Signed on original]

Date: 13 April 2015