Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2016/0093**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: ENF0577795
Dated: 14 March 2016

Appellant: **FEP Heatcare Limited**

Respondent: **The Information Commissioner**

Heard at: **Edinburgh**

Date of Hearing: **7 September 2016**

Date of Promulgation: 7 December 2016

Before

Chris Hughes

Judge

and

Henry Fitzhugh and **Melanie Howard**

Tribunal Members

Date of Decision: **3 December 2016**

Attendances:

For the Appellant: David Massaro

For the Respondent: Christopher Knight

Subject matter:

Data Protection Act 1998

Privacy & Electronic Communications Regulations 2003

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the monetary penalty notice dated 14 March 2016 with the substitution of a penalty of £160,000 and dismisses the appeal.

Dated this 3rd day of December 2016

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. FEP Heatcare Limited, the Appellant in these proceedings ("FEP"), is a company that supplies and services gas boilers in domestic premises. In the last two years it has changed its mode of marketing and began to use telemarketing to gain sales. This has resulted in a large number of complaints to the Telephone Preference Service (TPS) about unsolicited phone calls. The Respondent in these proceedings, the Information Commissioner, is the Regulator responsible for enforcing the Privacy and Electronic Communications Regulations 2003/2011. On 24 March 2015 he wrote to the Company Secretary of FEP setting out his powers, (including the possibility of issuing a monetary penalty notice of up to £500,000 for breach of the Regulations) and providing a breakdown of the complaints received by between 2 February and 25 February 2015. He drew attention to the duty to ensure compliance with the regulations lay with the instigator of the calls irrespective of the assurances provided by a data supplier and he asked for evidence of consent to make the calls to certain identified numbers, an explanation for the total number of complaints, steps the company would take to reduce the number of complaints received and information about the way the company operated. The letter drew attention to guidance freely available via the ICO website.

2. Mr Craig Bonnyman (signing as a Director of FEP) replied providing the letter of assurance it had received from its data supplier DWD, explaining that the company had recently expanded in size and in its marketing efforts and asserting it had a "rigid TPS Complaints procedure, which I personally oversee".

3. The ICO responded on 9 April pointing out that TPS had received 26 valid complaints in a short period, reminding FEP of its responsibilities and seeking specific evidence concerning relevant matters. Mr Bonnyman responded by a phone call and letter of 29 April. He re-affirmed that he had assurances from the DWD that the recipients of the calls had opted in to receiving calls, but stated that he had not seen the evidence for this. He confirmed that: "In light of the situation described above, I felt it would be prudent for my company to take the preventative measure of

ceasing to make telemarketing calls as of 30.4.15 until we have sourced a data supplier who can supply all of the details".

4. On 1 May 2015 the ICO notified Mr Bonnyman that it would, for a three month period, monitor the number of complaints against FEP and the fact of the monitoring would be published on the ICO website. By an email of 28 July Mr Bonnyman complained about this and asserted that the majority of complaints did not relate to his company's activities. On 30 July the ICO responded to the email confirming that of 203 complaints to TPS relating to FEP between February and June 2015 42 related to a number not associated with FEP. The ICO relied on the other complaints as being made in response to calls from FEP. In a telephone conversation of 31 July he stated that FEP had stopped telemarketing on 7 May.

5. Solicitors acting for FEP wrote to the ICO on 31 July confirming that FEP had ceased telemarketing from 7 May and asserting that information on the ICO website was misleading and asking the ICO to acknowledge that FEP had ceased telemarketing and change its website in the light of this. On 10 August, the solicitors, in the light of adverse coverage of FEP in the Sunday Mail on the previous day, wrote again to the ICO protesting at the failure to change the ICO's webpages and expressing concern *"in relation to the potential impact that the publication of the article will have on its business activities and its commercial reputation."*

6. The ICO replied to FEP's solicitors on 10 August explaining that the outcome of the monitoring would be considered around 15 August and would draw together various sources of information, including TPS data, the ICO's own complaints information, information from telecommunications service providers:-

   "and also intelligence received which alleges that your client has taken steps to avoid detection when it makes direct marketing telephone calls or uses third parties to do so on its behalf.

   At that point we will determine whether it is appropriate to cease monitoring, to extend monitoring for a further period of time or to prepare a report in contemplation of recommending that regulatory action should be taken. At that point your client will obviously be entitled to make representations."

7. Using his statutory powers the ICO obtained information about FEP's operations from its service provider and on 25 August notified the solicitor and Mr Bonnyman of

issues with respect to compliance with Regulations 19 and 24; requiring the company to provide information, providing details of complaints the ICO had received.

8. FEP changed its solicitor and on 10 September 2015 its new representative provided significant explanations and admissions to the ICO. These included that Mr Craig Bonnyman had set up a new company on 7 May *"in an effort to deal with marketing as a distinct and separate activity. Marketing staff who worked for FEP were transferred via TUPE to Centura [the new company]"*. Subsequently calls were made intermittently, including automated calls. Centura had no evidence that the recipients of calls listed on 25 August had consented to the calls. *"Regrettably Centura cannot guarantee that some data from … DWD was not also used to make calls."* The letter acknowledged that during February FEP had contacted individuals on the TPS register blaming deficiencies in the data supplied by DWD. The letter went on to explain steps which FEP and Centura intended to take in the future to ensure compliance with PECR. In a further letter of 8 October the solicitors detailed certain of the difficulties which the company faced and stated that:- *"In a desperate effort to secure some form of cash flow, Mr Bonnyman looked to telemarketing, but admittedly naively stumbled into the telemarketing arena with a poor knowledge of the rules."* The letter asserted that FEP had obtained no commercial advantage from telemarketing.

9. On 27 October an officer of the ICO prepared a detailed Regulatory Action Recommendation Report detailing the history, and finding that between 6 April and 15 July FEP instigated 2,692,217 automated calls of which 934,176 connected and 1,758,041 failed to connect. During this period there had been 25 complaints of Regulation 21 contraventions to TPS and 94 complaints of Regulation 19 contraventions to ICO. In considering whether breaches of regulations were serious it noted the large number of calls, that 94 complaints had been received *"although as FEP did not identify themselves in the messages it is unsurprising that not many people complained … their actions resulted in a serious contravention affecting many people… the fact that the calls also breach Regulation 24 appears to be indicative of FEP acting in such a way as to generate leads but deliberately frustrate any attempt to identify the maker of the automated calls"* . In considering whether the contraventions were deliberate the report concluded that they were; noting the conduct of telemarketing after an assurance to the ICO that the company would no

longer conduct telemarketing and the failure to provide an identifier of the messages and using another company to mask the instigator of the marketing. It noted that FEP knew there was a risk of contravention as it had been notified that monitoring was in place following concerns about breaches of PECR, reasonable steps had not been taken to avoid contravention. The report noted that FEP had not lived up to its previous statements. The report noted the financial position of FEP from Companies House information. Following consideration of the report a decision was made to issue a monetary penalty at level D – £100,001-£250,000. A notice of intent to issue a monetary penalty notice on £180,000 was served on FEP.

10. FEP's solicitors responded on 18 January stressing the financial hardship which would be caused. FEP had made a loss of £260,000 for the six months April-October 2015. They claimed that there had been embezzlement by an employee causing a loss calculated at £300,000 and the jobs of 13 employees were at risk if the penalty were imposed. FEP had made a considerable loss during the period of non-compliance with the regulations and accordingly had made no benefit from the non-compliance. There was no chance of further non-compliance from FEP. They argued that it had been a steep learning curve for FEP, its reputation had been adversely affected which would affect future business simply due to the ICO's actions and accordingly no monetary penalty should be imposed. Details of the FEP's position were disclosed through the provision of accounts and a balance sheet showing an excess of liabilities over assets. FEP had negotiated time to pay its liabilities to HMRC

11. Having considered these representations the ICO decided not to change the draft notice and on 14 March 2016 the ICO issued a monetary penalty notice against FEP in the sum of £180,000 (with the offer of a discount for early payment) in respect of breach of Regulation 19 of PECR which regulates the use of automated calling systems:-

"19.—(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system except in the circumstances referred to in paragraph (2).

(2) Those circumstances are where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line.

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

(4) For the purposes of this regulation, an automated calling system is a system which is capable of—

(a)automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and

(b)transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called."

12. The notice set out the background, the previous advice given to FEP and monitoring of its performance, the subsequent identification of complaints about automated direct marketing calls from FEP which during the period 6 April 2015 to 15 July 2015 was responsible for 2,692,217 automated calls and had no evidence of the subscribers' consent to receive those calls. The ICO found a breach of Regulation 19(1), that this was a serious breach, that these were deliberate actions. S55A (1) of the DPA which provides:-

"(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 section 4(4) by the data controller,

(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."

13. In fixing the amount of the penalty the ICO took account the mitigating effect of the potential for damage to FEP's reputation, and the aggravating feature that the ICO had previously given FEP guidance on compliance, that FEP might gain an unfair advantage over its competitors through unlawful marketing activity and that there was also a breach of regulation 24 of PECR in that the it had not identified the person instigating the calls and provide a free address of telephone number for that person.

14. In its appeal FEP disputed the notice and penalty:-

    - The number of calls made in breach of Regulation 19 and, having discounted "failed calls" asserted that its records showed 561,951 calls were made. It further claimed that there was no breach of Regulation 21 – relying on the indemnity provided to FEP by its data provider DWD.
    - The level of fine, arguing the starting point should have been Band C - £40,001 to £100,000 which would then be reduced on account of undue hardship.
    - The ICO had failed to take into account the financial hardship, the short period of breach, the breach had been by one employee not sanctioned by the board, FEP was a family company of modest means and had co-operated with the ICO since the end of automated calling, FEP had not made gains through its actions.
    - The ICO had taken into account irrelevant considerations, breach of Regulations 19 and 24, both of which were disputed.
    - The ICO had committed an error of law by finding deliberate wrongdoing
    - The penalty was out of line with penalties for similar breaches.

15. The ICO maintained his position in resisting the appeal. In the light of a reconsideration of the category of failed calls the ICO considered that a sanction of £160,000 was the correct level.

16. The written evidence of a partner in the firm of accountants instructed by FEP to prepare its annual accounts was that the company was cash insolvent and could not absorb any monetary penalty. An exceptional item in the accounts of £467,515 for

the alleged stolen boilers reflected a figure given to the accountants by FEP and no specific work had been done to check its accuracy, however he viewed it as consistent with his understanding of the business. It would take the company almost two years to pay of the debts arising as a result of the theft.

17. Mr Alan Bonnyman and his wife own the majority of the shares in the company, the others are owned by their children. He told the tribunal that a major fraud had occurred in the company with a manager over-ordering boilers and then diverting them to his own benefit. This had been for a period of about nine months. There was no indication that the police were not proceeding with a case, however he had not been notified of any arrest. This had left the company with a debt to its main supplier of over £300,000. The commercial relationship between FEP the company and its supplier was continuing and they had agreed to repay at £18,000 a month over two years. This amount had recently been reduced to £10,000 a month. They had been given time to pay corporation tax and VAT; the total current liabilities were £402,331. In 2015 the company had acquired new premises and its old premises could be disposed of. He accepted that his son signed himself as a director and that he had been easing out of day to day control of the company for two years. He was not aware if his son had shown him correspondence from the ICO, his son had a high level of autonomy on decision- making with respect to sales and technology. He accepted that the company may have made a gain from telemarketing since the turnover had increased by £400,000 in that period, however they had made heavy losses. He hoped the sale of the surplus premises would be enough to wipe out losses.

18. He considered that the press release put out by the Respondent had harmed the reputation of the company causing a higher than usual proportion of cancellations. The company had in his view been trading honestly for 50 years and had not realised it was doing anything wrong.

19. Mr Craig Bonnyman agreed that he acted as a director of the company although he was not registered as such. In written evidence he stated that the company had a typical turnover of £1 to £1.5 million however in the last year turnover was £3.2 million with a loss of £100,000.

20. He accepted that the company had breached Regulation 21; the Regulations required a telephone caller to confirm who was calling and the company's staff had not but had

used a generic name, however this was not, he claimed, to conceal the company's identity and the phone line was registered to the company. He denied that the company had done this to disadvantage consumers "we didn't purposely intend to remove a right from consumers, it was not our intention". He acknowledged that at the time he replied to the ICO's letter of 25 February 2015 he had not read the guidance provided. He explained that "I was listening to what I was told by the data supplier, I didn't think he was lying". He acknowledged that a practical way to give effect to the assurance to the ICO he gave at the start of the ICO's investigation that "I plan on continuing to improve our standards to the satisfaction of regulators such as yourselves" would have been to read the guidance from the ICO. He did not recall the contents of the telephone conversation with the ICO's office of 29 April (the ICO's note of which stated that FEP *"were no longer conducting Direct Marketing from Friday onwards as it hadn't worked out for them due to the likes of us (the ICO) giving them hassle"*). He did not recall any complaints before the ICO drew them to his attention. He accepted that he had not looked at the PECR before embarking on a programme of automated marketing. He had monthly reports from the manager of the team so information was not available to him that people were not happy with the phone calls. He claimed there was no benefit to the company from telemarketing. He accepted that the failure to train staff was an error of judgement. He knew that automated calling was a different kind of marketing, he did not know it was against the Regulations. He had relied on DWD for the data and another company to provide the operating software.

21. Mr Clancy, the enforcement manager for the ICO gave evidence with respect to the investigation. FEP had been placed on monitoring due concern about regulation 19, the subsequent investigation demonstrated breaches of regulations 19, 21 and 24. The creation of a separate company Centura was clearly for avoidance purposes however the issue of that avoidance had not been addressed in the monetary penalty notice. The level of penalty had been calculated on the basis of the information available. The conclusion that the appropriate level of sanction was level D was based on all the factors including the volume of calls and that such calls can only be made to consenting subscribers.

22. In his submissions for FEP Mr Massaro accepted that there had been a serious breach of the Regulations however he argued that it had been a negligent and not a deliberate

breach. A sanction of £160,000 was very large for a company with a turnover of £3.5 million. He repeated the arguments underlying the grounds of appeal.

Consideration

23. The tribunal reminded itself that it conducted a full merits review of the case in the light of all the information available to it; not simply the available relied upon by the ICO.

24. There was a factual dispute between FEP and the ICO as to the number of calls relevant to the sanction. The ICO had agreed that the making of a failed call did not amount to the transmission of communication within the Regulation. However the function of the PECR was to protect personal privacy and they were engaged when a phone was connected. The service provider had confirmed that 934,176 calls were connected, at that stage the user's phone had responded. FEP claimed that the correct figure was 561,951. Even on FEP's own figure the number called was exceptionally large, a very large proportion of the phones in Scotland were illegitimately called, within a very short period. That was a very serious breach of PECR. Despite the non-identification of the source there were 94 recorded complaints to the ICO and some calls occasioned real distress. It was therefore proper to consider this as a case falling within Band D.

25. Contrary to the submission that Regulation 19 and 24 were irrelevant and not accepted by FEP it is clear that they form a significant background to the need for regulatory action and are relevant to the issue of the level of sanction furthermore the breaches have been accepted by FEP. The failure to have an identified originator of the call was a clear breach of Regulation 24(2). While Mr Craig Bonnyman considered this insignificant his attitude showed a clear failure to understand what the Regulations required. Since the calls were only permitted if there was consent, how could an individual called know whether the call was permitted if he did not know who was making the call? This was a separate and significant illegality and an aggravating factor in considering the Regulation 21 breach. The indemnity, such as it is, from the supplier of data does not prevent liability from attaching to FEP for its breach of Regulation 19, the more so since it is clear that even after the breach was identified FEP did not take effective steps to prevent the re-use of the data which it then knew to contained individuals who had not consented.

26. It was clear to the Tribunal that FEP was for several years a poorly controlled and badly managed company. It had embarked on a substantial growth programme expanding from a turnover of about £1 million to a turnover in excess of £3 million in a very short period. It had moved premises and had a substantial capital asset which was unused. During that period the managing director, Mr Alan Bonnyman had (in the rather apposite phrase of Counsel for the ICO) "been asleep at the wheel". Control of some of the operations of the company had been effectively in the hands of a manager who over a period of nine months apparently made off with goods worth several hundreds of thousands of pounds.

27. In the meantime Mr Craig Bonnyman a shareholder in the family firm and the son of the director and acting as a de facto director, had unfettered control of marketing and sales activity. With a reckless abandon and frequently acting hastily and without thought he embarked on telemarketing with no knowledge of the legal framework. When the inevitable complaints reached the ICO he dissembled. He misled the ICO about ceasing telemarketing and on his instructions FEP's solicitors wrote to the ICO a letter which was significantly misleading with respect to the recent actions and future intentions of FEP. The letter of 31 July 2015 states:-

   "(1) Cessation of telemarketing activity

   FEP has confirmed to us that it ceased from engaging in telemarketing activity from 7 May 2015"

28. While FEP in the hearing suggested that this was due to a misunderstanding and the solicitors had made an error; the Tribunal is satisfied that a reputable firm of solicitors such as Harper MacLeod could not have made such a fundamental error on a crucial issue in dealings with a Regulator on behalf of a client. It wrote the letter on the instructions of FEP, the letter was false, and in now claiming the solicitors were in error FEP confirmed its own shortcomings in the hearing in the starkest possible way.

29. Mr Craig Bonnyman set up Centura Direct Marketing partly (he claimed) to secure a larger income for himself however its foundation and operations were clearly part of the strategy of concealing FEP's continued use of telemarketing. The tribunal found Mr Craig Bonnyman an unsatisfactory witness. In the light of these matters it is clear that the actions of the company were deliberate calculated risks – there was deliberate

wrongdoing by the company organised by the family member in day to day control of most of its operations.

30. While FEP made much play of the issue of financial hardship and the risks of the company becoming insolvent if the penalty were imposed the Tribunal was unconvinced by the evidence. It accepted the evidence of Mr McKelvie that FEP had significant difficulties with cashflow. The company has entered into arrangements with HMRC and a trade supplier to phase payment of its liabilities over time. However the company has grown substantially over the last years and there is little to indicate (from the inconsistent and unreliable financial and operational information put forward), that apart from the exceptional item of the alleged dishonesty by a staff member, the company is not able to continue to trade profitably going forward. FEP's witnesses were inconsistent in whether or not the company had profited by its breach of PECR and the information is simply unreliable on the point. It is clear however that the company intended to, and deliberately breached the rights of hundreds of thousands of people in order to make a profit; given the scale of this clandestine operation it is clear that some additional business must have come to FEP due to this marketing activity. Although it is submitted that FEP has co-operated with the ICO since the end of automated calling, the deception prior to that, the minimisation of the wrong done and attempt to blame the previous solicitors are not consistent with a true acceptance of the misconduct.

31. The Tribunal is satisfied that the level of sanction originally imposed by the ICO was proportionate in all the circumstances and does not accept the submission that it was out of line with those imposed in cases which were properly comparable. The Tribunal noted the concession made by the ICO in the light of the changed position with respect to unsuccessful calls. The facts as established by the Tribunal would have justified a higher penalty, however in the light of the concession the Tribunal substitutes a penalty of £160,000. The original penalty notice offered a discount for prompt payment, this is no longer relevant. While the ICO may choose to come to some arrangement for the payment of the penalty by monthly payments over a 1-2 year period as HMRC and the trade creditor have done the Tribunal is satisfied that such a matter should not, in this case, be a matter for decision by the Tribunal.

32. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 3 December 2016