



**First-tier Tribunal  
(General Regulatory Chamber)  
Pensions Regulation**

**Appeal Reference: EA/2021/0181/FP**

**Decided without a hearing  
On 6 December 2021**

**Before**

**JUDGE SOPHIE BUCKLEY  
MARION SAUNDERS  
EMMA YATES**

**Between**

**PRICE FORBES & PARTNERS LIMITED**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

**DECISION**

1. The appeal is dismissed. The penalty notice is confirmed.

**REASONS**

*Mode of hearing*

1. The parties have agreed to the Reference being determined on the papers under rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and we are satisfied that we can properly determine the issues without a hearing. We have therefore considered the Notice of Appeal, the Commissioner's response and a bundle of supporting documents

### *Background*

2. The Appellant challenges a penalty notice ("the Penalty Notice") issued by the Commissioner on 25 June 2021.
3. The Appellant is a data controller under the Data Protection Act 2018 (DPA). The Appellant failed to pay to the Commissioner the Data Protection Fee required by the Data Protection (Charges and Information) Regulations 2018 ('the Regulations') by the compliance date of 18 October 2020. As a tier 3 organisation it is required to pay a fee of £2900.
4. The Commissioner sent a Notice of Intent to the registered office of the Appellant with a covering letter dated 17 May 2021.
5. In the absence of any representations from the Appellant the Penalty Notice was issued under s 155(1)(a) of the DPA. It required the Appellant to pay a penalty of £4000 for failing to comply with the Regulations prescribing the payment of a charge to the Commissioner.

### *The Law*

6. Regulation 2 of the Regulations requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt).
7. A breach of the Regulations is a matter falling under s 149 (5) of the DPA. S 155 (1) of the DPA provides that Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S 158 of the DPA requires the Commissioner to set a fixed penalty for such a breach, which she has done in her published **Regulatory Action Policy**. The specified penalty for a tier 3 organisation which breached regulation 2(2) is £4,000.
8. Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, which includes the service of a Notice of Intent inviting written representations:

(1) Before giving a person a penalty notice, the Commissioner must, by written notice (a "notice of intent") inform the person that the Commissioner intends to give a penalty notice.

(2) The Commissioner may not give a penalty notice to a person in reliance on a notice of intent after the end of the period of 6 months beginning when the notice of intent is given, subject to sub-paragraph (3).

(3) The period for giving a penalty notice to a person may be extended by agreement between the Commissioner and the person.

9. Paragraph 3 of Schedule 16 sets out what a Notice of Intent must include. It must give the person to whom it is sent an opportunity to make written or oral representations about the intended Penalty Notice, and must allow at least 21 days for these to be made. If representations are made within the specified time, the Commissioner must consider them before deciding whether to issue a Penalty Notice.

10. Section 141 of the DPA sets out various options by which the Commissioner may serve a notice required under the DPA:-

(1) This section applies in relation to a notice authorised or required by this Act to be given to a person by the Commissioner.

(2) The notice may be given to an individual –

(a) by delivering it to the individual,

(b) by sending it to the individual by post addressed to the individual at his or her usual or last-known place of residence or business, or

(c) by leaving it for the individual at that place.

(3) The notice may be given to a body corporate or unincorporate –

(a) by sending it by post to the proper officer of the body at its principal office, or

(b) by addressing it to the proper officer of the body and leaving it at that office.

(4) ...

(5) The notice may be given to the person by other means, including by electronic means, with the person's consent.

(6) In this section –

“principal office”, in relation to a registered company, means its registered office;

“proper officer”, in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs;

“registered company” means a company registered under the enactments relating to companies for the time being in force in the United Kingdom.

(7) This section is without prejudice to any other lawful method of giving a notice.

11. For the Notice under appeal to have been brought ‘in accordance with the law’, the Commissioner must have complied with the requirements of Schedule 16 of the DPA, including the requirements relating to the timing of the Notice of Intent.

12. In relation to a Penalty Notice issued for failure to comply with the Regulations, no other statutory pre-conditions are set. It is sufficient simply to establish that

there was a failure to comply with the Regulations. There is no separate and additional requirement to establish, for example, that the contravention was serious or that there was a likelihood of damage or distress to data subjects.

13. An appeal against a Penalty Notice is brought under s. 162(1)(d) DPA. S.162(3) DPA provides that:

A person who is given a penalty notice or a penalty variation notice may appeal to the Tribunal against the amount of the penalty specified in the notice, whether or not the person appeals against the notice.

14. The role of the Tribunal is to make its own decision on the appropriate action for the Commissioner to take, considering the evidence before it:
15. The Regulations are permissive. The Commissioner may issue a Penalty Notice. Although the legislation says nothing about reasonable excuse, the Tribunal may have regard to whether or not there is a reasonable excuse for the failure to comply and to do so is entirely consistent with fairness and justice (see, in a comparable regulatory regime, the Upper Tribunal decision in **The Pensions Regulator v Strathmore Medical Practice** [2018] UKUT 104 (AAC)).

#### *The facts*

16. It is not disputed that the Appellant is a data controller and was liable to pay and did not pay the £2900 charge owed by a tier 3 controller by 18 October 2020.
17. The Appellant's registered address is 2 Minster Court, Mincing Lane, London, EC3R 7PD. That is its principal office for the purposes of the Regulations.
18. Until September 2020 the Appellant's Data Protection Officer was Ian Whitt. The Appellant emailed the Commissioner on 11 November 2020 to ask the Commissioner to change the Data Protection Officer (DPO) to Neil Isherwood.
19. The parties exchanged the following relevant correspondence:

**6 September 2020** – 1<sup>st</sup> renewal reminder – by email from ICO to Ian Whitt

**27 September 2020** – renewal reminder – by post from ICO to the Appellant's registered office addressed to Ian Whitt

**11 November 2020** - request to change details of DPO – by email from Neil Isherwood to ICO

**4 March 2021** – further reminder after expiry of registration – by email to Ian Whitt

**13 May 2021** – request to confirm receipt of email of 11 November – by email from Neil Isherwood to ICO

**17 May 2021** – Notice of Intent – by post to the Appellant’s registered office addressed to ‘The Director’.

**24 May 2021** – confirmation that change of details actioned on 14 December 2020 – by email to Neil Isherwood

**15 June 2021** – query why Appellant no longer on the ICO register – by email from Neil Isherwood to ICO

**22 June 2021** – request to call ICO to discuss email of 15 June – by email from ICO to Neil Isherwood

**25 June 2021** – Penalty Notice – by post to the Appellant’s registered office addressed to ‘The Director’

### *Submissions*

#### Notice of Appeal

20. The Notice of Appeal relies, in summary, on the following grounds:

- (i) The Commissioner failed to make adequate measures to inform the Appellant of the forthcoming Notice of Intent.
- (ii) The Commissioner sent email correspondence to the former DPO, which would have received a bounce back. No emails were sent to email address provided to the Commissioner in November 2020.
- (iii) The Commissioner did not mention the notice of intent in the emails of 24 May 2021 or 22 June 2021.
- (iv) No postal correspondence could be located as having been received.
- (v) There has been a series of errors by the Commissioner.
- (vi) The amount of the fine is grossly excessive.

#### The Commissioner’s response

21. The Commissioner’s response dated 17 August 2021 submits that no reason, still less convincing reason, to overturn the Penalty Notice or vary the amount to a sum other than that fixed under section 158, has been identified. The Appellant has not advanced a reasonable excuse for failing to pay the charge by the stated deadline.

22. The Commissioner is under no obligation to remind a data controller of their legal liabilities to pay a charge. As a matter of practice the Commissioner does issue reminders to assist data controllers. An email reminder dated 6 September 2020 was sent to the contact details listed on the Commissioner’s register. The

commissioner has no way of monitoring undelivered emails due to the volume of emails sent daily. A subsequent reminder letter on 27 September was sent to the address and contact listed on the Commissioner's register. This was the accurate registered office address. A further reminder email was sent on expiry of the registration to the email address on the Commissioner's register on 4 March 2021. The Notice of Intent dated 17 May 2021 was sent by post to the registered office address.

23. The email dated 11th November 2020 advised the Commissioner of a change of data protection officer. There was no request to change the contact details for the organisation.
24. It is unclear how the Appellant received the penalty notice posted to the Appellant's office address but failed to receive any prior communication from the Commissioner. The Appellant should have ensured that it had appropriate systems in place to comply with its legal obligations. It should have ensured that the appropriate contact details were updated on the data protection register. The change of data protection officer does not prevent the Appellant from complying with its legal requirements.

### *Conclusions*

25. We find that issuing the Penalty Notice was appropriate, unless there was a reasonable excuse for the Appellant's failure to comply with the requirements of the Regulations.
26. The Appellant has not provided the exact date in September that Ian Whitt left the company. Even if he left before the reminder was received from the Commissioner on 6 September 2020, we do not accept that it is reasonable to have no system for monitoring emails sent to a former DPO, particularly when that email address has been provided to the Commissioner as the contact details or the organisation.
27. The renewal reminder dated 27 September 2020 was sent by post to the registered office, and therefore should have been received even if Ian Whitt had left by that date.
28. We accept that it is possible that the reminder sent after expiry of registration might not have been read by the Appellant, however:
  - a. This was the third reminder;
  - b. There is no obligation on the Commissioner to send reminders; and
  - c. It was sent after the deadline for payment had expired.
29. The Notice of Intent was sent to the registered office address. The reminder dated 27 September 2020 was sent to the registered office address. In the light of

s.144 of the DPA and the lack of any explanation as to why post might not have been received or read, we find, on the balance of probabilities, that the Appellant received the Notice of Intent and the reminder dated 27 September 2020.

30. We do not accept that the Commissioner failed to take adequate measures to inform the Appellant of the forthcoming Notice of Intent, and in any event the Commissioner is under no obligation to do so. It is not reasonable to expect the Commissioner to monitor 'bounce back' emails. We do not accept that it was an error or unreasonable for the Commissioner not to mention the Notice of Intent in the emails of 24 May 2021 or 22 June 2021. We do not accept that there has been 'a series of errors' by the Commissioner.
31. It is unclear whether the change of DPO is in itself put forward as a reasonable excuse, but we do not accept that it is one. A change of personnel does not prevent the Appellant from complying with its legal obligations.
32. Taking all the above into account we are not persuaded that there is a reasonable excuse for failing to comply with the Regulations.
33. We have considered whether there is any basis for departing from the Appellant's policy as to the imposition of a £4,000 fixed fee in the circumstances of this case. Having regard to the relevant principles, we note that the Appellant in this case has not presented any evidence of financial hardship which could affect the penalty. We bear in mind that the fixed penalty regime encourages compliance with the law. We see no reason to depart from the Commissioner's assessment of the appropriate penalty.
34. For the above reasons the appeal is dismissed and the Penalty Notice in the sum of £4000 stands.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 9 December 2021

**Promulgated : 14 December 2021**