



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2021/0307/FP

Before

Judge Stephen Cragg Q.C.
Ms Anne Chafer
Ms Marion Saunders

**Determined, by consent, on written evidence and submissions
Considered on the papers on 29 March 2022.**

Between

Jamie Peters

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered a bundle of evidence and submissions comprising 71 pages, and some additional papers.

BACKGROUND TO THE APPEAL

4. The Appellant is a data controller within the meaning of the Data Protection Act 2018 (DPA). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 (the Regulations)¹. The Commissioner has assessed the Appellant as a "tier 2" organisation, and the Appellant's Data Protection Fee (the Fee) was £60 which it was due to pay by 30 March 2021.
5. The Appellant failed to pay to the Commissioner the Fee required by regulation 2 (2) of the Regulations by 30 March 2021.
6. The Commissioner served a Notice of Intent by letter dated 26 July 2021 and, in the absence of any representations from the Appellant, served a Penalty Notice of £600 by post on 21 September 2021 (57 days later).

APPEAL TO THE TRIBUNAL

7. The Appellant's Notice of Appeal is dated 21 October 2021. It explains that:-

Unfortunately, we did not receive the normal fee reminder or a notice of intent from the ICO as stated in their letter dated 21 September 2021. We were first made aware of our non-payment of the data protection fee on 28 September 2021 when a letter was forwarded on from our accountants (MHA MacIntyre Hudson) on 28 September 2021. Upon receiving the final monetary penalty notice from the ICO the outstanding £60 fee was paid

¹The Regulations were made under s. 137 DPA. See <http://www.legislation.gov.uk/uksi/2018/480/contents/made>

immediately. We contacted the ICO to find out why we have not received the normal fee reminder or any correspondence relating to the payment of the data protection fee. It was then discovered by an ICO representative, that correspondence information the ICO held on file for Westbourne Partners was out of date, although we believed this had been updated. We immediately requested that our information was updated and the ICO has now confirmed that our current information is on file. We were then advised by the ICO representative that due to the fact that we have always paid our data protection fee on time, without exception, that we can appeal the monetary penalty notice through the General Regulatory Chamber. It was not our intention to avoid payment of the data protection fee and had we received the normal fee reminder would have made payment promptly.

8. The Commissioner's Response dated 25 November 2021 resists the appeal. She submits that the penalty regime has been established by Parliament and that there is no requirement to issue reminders (although reminders were in fact been sent in this case). The Appellant's reasons for not making payment are not accepted, and it is submitted that the imposition of a penalty was appropriate in all the circumstances. The Commissioner explains as follows:-

24. The Commissioner sent an emailed reminder to the Appellant at the address listed on the Commissioner's register (e.smyth@westbourne-partners.com) on 16 February 2021... That email reminded the Appellant that the charge was due by 30 March 2021, that the Commissioner had calculated the sum as £60 and gave further information as to payment. The Appellant denies receipt of this email.

25. The Commissioner sent a further reminder letter to the Appellant at the address listed on the Commissioner's register on 9 March 2021... The letter reminded the Appellant that the charge was due to expire on 30 March 2021. The Appellant denies receipt of this letter.

26. A subsequent reminder email was sent by the Commissioner to the Appellant on 8 June 2021 to the address listed on the Commissioner's register, making clear that the charge was now overdue... The Appellant denies receipt of this email.

27. As the above demonstrates, whilst there is no obligation on her to do so, the Commissioner has taken discretionary steps to remind the Appellant of its legal duties both before and after the expiration of its registration. It is the responsibility of the controller to ensure that correspondence is properly read, that the regulator has appropriate contact information and that legal obligations are complied with.

28. Following no payment having been received, the Commissioner sent a Notice of Intent under Schedule 16 to the DPA, along with a covering letter dated 26 July 2021, by post to the company's registered office address... That

covering letter was headed, in bold type, “NOTICE OF INTENTION TO ISSUE A PENALTY NOTICE UNDER THE DATA PROTECTION (CHARGES AND INFORMATION) REGULATIONS 2018” and made clear that it emanated from the Commissioner, as well as what it concerned. The Appellant denies that it had received the Notice of Intent.

29. No representations or other response was received by the Commissioner.

30. Accordingly, under cover of a letter dated 21 September 2021, the Commissioner issued the Penalty Notice to the Appellant, sending it by post to the company’s registered office address ...The nature and origin of that correspondence was, again, plain to any reader. The Appellant accepts that it received the Penalty Notice.

9. All the documents referred to by the Commissioner are included in the appeal bundle.

10. In a response dated 10 December 2021, the Appellant say:-

...the ICO advises that we should not rely on their reminders to pay the data protection fee which I feel is unreasonable. This is not practical in the working world and many small businesses like ourselves rely upon such reminders to make payment and to ensure the amount to pay is correct. Considering previously we have always received reminders from the ICO to notify us of what and when to pay I do not think that it is unreasonable for us to rely upon these reminders in order to make payment. Had the ICO had the correct information on file for us we would have made payment on time as we have always done.

In section 24 of the Information Commissioner’s Office response letter dated 25th November 2021, the ICO imply that we did receive a reminder via e-mail and referenced E Smyth as the contact. I can confirm that this not the case and the e-mail sent to e.smyth@westbourne-partners.com on 16 February 2021 was not received by Westbourne Partners Limited as E Smyth has not worked for Westbourne Partners Limited since 2017 and her e-mail address was no longer in existence on 16 February 2021 (please note, four years after E Smyth had left Westbourne Partners Limited). The contact information the ICO had on file for us was unfortunately completely incorrect as stated in our original appeal letter dated 12TH October 2021. We believe that our information had previously been updated and therefore the fault lies with the ICO.

THE LAW

11.Regulation 2 of the Regulations requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt).

12.A breach of the Regulations is a matter falling under s. 149 (5) DPA. Section 155 (1) DPA provides that the Information Commissioner may serve a Penalty Notice on a

person who breaches their duties under the Regulations. S. 158 DPA requires the Information Commissioner to set a fixed penalty for such a breach, which she has done in her publicly available *Regulatory Action Policy*². The specified penalty for a tier 2 organisation which breached regulation 2 is £600.

13. Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, including at paragraph 2 a requirement that the Commissioner gives a Notice of Intent before a Penalty Notice is issued:-

- (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.

14. 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 (paragraph 4).

15. Section 141 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.

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

- (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.

16. 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.”

17. The jurisdiction of the Tribunal is established by s. 163 DPA, as follows:-

- (1) Subsections (2) to (4) apply where a person appeals to the Tribunal under section 162(1) or (3).
- (2) The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.
- (3) If the Tribunal considers—
 - (a) that the notice or decision against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice or decision involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently,

the Tribunal must allow the appeal or substitute another notice or decision which the Commissioner could have given or made.

(4) Otherwise, the Tribunal must dismiss the appeal.

18. 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. 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.

19. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

20. It is increasingly common for the General Regulatory Chamber to determine appeals against financial penalties imposed by civil regulators. In appeals against Fixed Penalty Notices issued by the Pensions Regulator, tribunal judges have frequently adopted the approach of asking whether a defaulting Appellant has a “reasonable excuse” for their default, notwithstanding the fact that this concept is not expressly referred to in the legislation. This approach was approved by the Upper Tribunal in *The Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 104 (AAC).³

DISCUSSION

21. The main point raised by the Appellant in this case is that emails and letters were sent to out of date addresses by the Commissioner, and the Appellant believed that contact details had been updated.

³ https://assets.publishing.service.gov.uk/media/5acf131ee5274a76be66c11a/MISC_3112_2017-00.pdf

22. However, the Appellant does not say how or by whom the contact details would have been updated, and we note that the Appellant has not provided any evidence (in the form of letters or emails to the Commissioner) to show that this was done. It may have been that the Appellant was expecting an agent or representative to do this on its behalf, but that is not explained in the appeal documents.
23. The Appellant states that the penalty notice was forwarded by its accountants and received on 28 September 2021. The penalty notice letter was sent to an address which the Commissioner says is the Appellant's registered company address. This is an address in London EC2. The penalty notice letter (dated 21 September 2021) bears a stamp to say that it was scanned on 27 September 2021 (the day before the Appellant received it), and so we presume that it was opened by someone at the EC2 address authorised by the Appellant to do so, before being forwarded.
24. What has not been explained, though, is why the Notice of Intent, which was sent to the same address in London EC2 on 26 July 2021 was not opened, scanned and passed on in the same way.
25. We note that it is the Appellant's responsibility to ensure that the relevant fee is paid to the Commissioner. In this case the Commissioner served a Notice of Intent in accordance with section 141(3)(c) DPA, by sending it by post to the Appellant company at its registered address, as held by the Commissioner at that time. In the absence of any evidence that the Appellant had updated its details with the Commissioner, we accept the Commissioner's submission that this was not done.
26. In our view this is not an appropriate case to revoke the Penalty Notice where the Appellant has failed to pay the relevant fee, and has failed to update its details with the Commissioner. There is no 'reasonable excuse' for failing to pay the fee.
27. We do have the power to vary the amount of the penalty. We accept that the Appellant has now paid the fee, and has paid the fee in previous years. However, bearing in mind the factors set out in the previous paragraphs, this does not seem to us to be an appropriate case to reduce the fixed penalty amount of £600. In reaching this conclusion we bear in mind, and give importance to, the fact that the fixed penalty regime at the published levels encourages compliance with the law, aims to ensure the

Commissioner's work is properly funded, and reflects a well-established historical system of registration and payment.

28. On that basis this appeal is dismissed and the Penalty Notice in the sum of £600 stands.

JUDGE STEPHEN CRAGG QC

DATE: 15 April 2022