Appeal number: EA/2018/0278

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

HARRY BURROWS FABRICATIONS LIMITED **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: **JUDGE ALISON MCKENNA**
Mr DAVE SIVERS
Ms JEAN NELSON

Determined on the papers, the Tribunal sitting in Chambers on 27 June 2019

DECISION

1. The appeal is dismissed.

2. The Penalty Notice dated 28 November 2018 is confirmed.

REASONS

Background to Appeal

3. The Appellant is a data controller within the meaning of the Data Protection Act 2018[1] ("DPA"). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 ("the Regulations")[2]. As a "tier 1" organisation, the Appellant's fee was £40 (although it is now assessed as a "tier 2" organisation).

4. The Appellant failed to provide the Respondent with the information required by regulation 2 (3) of the Regulations or to pay to the Respondent the Data Protection Fee required by regulation 2 (2) of the Regulations by the compliance date of 31 May 2018.

5. The Respondent served a Notice of Intent on the Appellant on 25 October 2018 and, in the absence of any representations from the Appellant, served a Penalty Notice of **£400** on 28 November 2018.

6. The Appellant has appealed to this Tribunal on the basis that it did not receive reminders from the Respondent, that it is fact a tier 2 not a tier 1 organisation, and that it tried but failed to pay on-line. The Appellant asks that the penalty be revoked by the Tribunal.

Appeal to the Tribunal

7. The Appellant's Notice of Appeal dated 5 December 2018 implicitly accepts that it is a data controller and that it failed to pay the fee by the due date. It asks the Tribunal to revoke the penalty as it did not receive the reminders sent.

8. The Respondent's Response dated 24 January 2019 resists the appeal. She submits that the Penalty regime has been established by Parliament. It is submitted that reminders were sent (copies are enclosed) but that the Appellant has not explained why it failed to make the payment.

9. The Respondent notes that the Appellant had been a data controller prior to the commencement of the Regulations and had paid the relevant fees under the earlier legislation,

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[1] http://www.legislation.gov.uk/ukpga/2018/12/contents

[2]The Regulations were made under s. 137 DPA. See http://www.legislation.gov.uk/uksi/2018/480/contents/made

so should have had relevant administrative systems in place. It is submitted that the level of penalty is appropriate and in keeping with the Commissioner's published policy. Whilst it is noted that it would be open to the Tribunal to increase the penalty in view of the Appellant's status as a tier 2 organisation, the Respondent does not ask us to do so in this case.

10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 40 pages.

The Law

11. The Regulations came into force on 25 May 2018. They replace the previously applicable regulations, made in 2000. Regulation 2 requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt). It also requires the data controller to supply the Information Commissioner with specified information so that she can determine the relevant charge, based on turnover and staff numbers.

12. A breach of the Regulations is a matter falling under s. 149 (5) of the DPA. Section 155 (1) of the DPA provides that the Information Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S. 158 of the 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*[3]. The specified penalty for a tier 3 organisation which breached regulation 2(2) is **£400**. The statutory maximum penalty is £4,350, which will be appropriate where there are aggravating factors.

13. Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, which includes the service of a Notice of Intent written inviting representations.

14. 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."*

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

> *163 Determination of appeals*
>
> *(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] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

(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.

…

16. We note that section 7 of the Interpretation Act 1978[4] provides a presumption that a Notice is received when it is sent to the intended recipient's usual address by post.

17. 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.

18. 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).[5] There is much case law concerning what is and is not a "reasonable excuse" and it is inevitably fact specific. An oft-cited definition is the one used by the VAT Tribunal (as it then was) in *The Clean Car Company v HMRC* (LON/90/1381X) as follows:

> *"…the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse…."*

[4] http://www.legislation.gov.uk/ukpga/1978/30/section/7

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

Evidence and Submissions

19. The Appellant accepts in its Notice of Appeal that it was in breach of its legal obligations under the Regulations on the relevant date.

20. The Appellant has not provided any evidence of problems with receiving its post. The address and post code used by the Respondent is the same as that provided in the Notice of Appeal. The Respondent has provided the Tribunal with copies of the correspondence and Notices it sent to the Appellant by post.

21. The Respondent used a slightly different e mail address to the one we have on the Notice of Appeal, (*marc@* instead of *accounts@*) but the Respondent has also provided us with confirmation of receipt of the emails it sent to the email address it had for the Appellant (Marc Burrows' email).

Conclusion

22. We have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Regulations. In so doing, we have considered whether the Appellant has pointed to any particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller. We note that this was not the first time that a data controller's fee had been due and consider that a reasonable data controller would have had systems in place to pay it. We note that the Appellant was sent information about how to set up a direct debit.

23. We are satisfied by the evidence that reminders were sent to the Appellant and there is no evidence to suggest they were not received by post in the usual way so we must presume they were delivered. There is evidence that they were received when sent by e mail.

24. We conclude that the Appellant has not established a reasonable excuse for its failure to pay the fee in this case.

25. We have gone on to consider whether there is any basis for departing from the Respondent's policy as to the imposition of a **£400** fixed penalty in the circumstances of this case. We conclude that there is not.

26. 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 level of penalty. We therefore conclude that there is no reason to depart from the Respondent's assessment of the appropriate penalty in this case.

27. For all these reasons, the appeal is now dismissed, and the Penalty Notice is confirmed.

(Signed)

JUDGE ALISON MCKENNA
CHAMBER PRESIDENT **DATE: 17 July 2019**

Re-issued on 2 August 2019, amended under rule 40