Appeal number: EA/2018/0112

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ORIEL CARE HOME LIMITED **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: **JUDGE MOIRA MACMILLAN**
Mr DAVE SIVERS
Mr HENRY FITZHUGH

Determined on the papers, the Tribunal sitting in Chambers on 21 August 2019

DECISION

1. The appeal is dismissed.

2. The Penalty Notice dated 1 April 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.

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 5 October 2018.

5. The Respondent served a Notice of Intent on 4 January 2019 and, in the absence of any representations from the Appellant, served a Penalty Notice of £400 on 1 April 2018.

6. The Appellant has appealed to this Tribunal on the basis that the company changed ownership on 8 January 2018, not correspondence was received before 1 April 2019. It asks that the penalty be revoked by the Tribunal.

Appeal to the Tribunal

7. The Appellant's Notice of Appeal dated 3 April 2019 relies on grounds that Oriel Care Home was sold on 8 January 2018 and no 'mail' correspondence was received before 1 April 2019.

8. The Respondent's Response dated 30 April 2019 resists the appeal. She submits that the Penalty regime has been established by Parliament and that there is no requirement to issue reminders (although a reminder was in fact sent in this case). It is accepted that the Appellant's failure to comply with the Regulations may have been due to an oversight, but it is submitted that the imposition of a Penalty was

[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

appropriate in all the circumstances. 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 so should have had relevant administrative systems in place. It is submitted that the level of penalty is appropriate.

9. 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 46 pages.

The Law

10. 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.

11. 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 1 organisation which breached regulation 2(2) is £400. The statutory maximum penalty is £4,350, which will be appropriate where there are aggravating factors.

12. 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.

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

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[3] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

(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.

…

15. 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.

16. 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).[4] There is much case law concerning what is an 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,

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

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…."

The Facts

17. There appears to be no dispute between the parties as to the fact that the Appellant is a data controller and therefore subject to the Regulations.

18. The Appellant implicitly accepts that it received the Penalty Notice, which was addressed to the Company Secretary and sent to the Appellant's business address. The Notice of Intent was addressed in the same way when sent.

19. The Appellant also implicitly accepts that it was in breach of its legal obligations under the Regulations on the relevant date of 5 October 2018, but asserts ownership of the Appellant company had changed on 8 January 2018.

20. The Appellant has provided no corroborating evidence.

21. The Respondent has provided the Tribunal with copies of email correspondence and Notices sent to the Appellant. In addition to the Notices, the Respondent sent reminders by email on 24 August and by post on 14 September 2019, both addressed to Jane Linford.

22. *Conclusion*

23. We have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Regulations. We conclude that it has not. We conclude that a reasonable data controller would have systems in place to comply with the Regulations and that the Appellant has pointed to no particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller.

24. We conclude that, irrespective of a change of ownership, the Appellant has continued to operate as a business and is therefore subject to the obligations and liabilities of a data controller.

25. We note that a reminder was sent by the Respondent to the Appellant's business premises, in addition to the Notices which were sent there addressed to the Company Secretary. We are satisfied on the balance of probabilities that these were received by post in the normal way and that that all three were received.

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

27. We have considered whether there is any basis for departing from the Respondent's policy as to the imposition of a £40 fixed fee in the circumstances of this case. We conclude that there is not.

28. 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.

29. We have therefore gone on to consider whether there is any other 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.

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

JUDGE MOIRA MACMILLAN **DATE: 30 September 2019**
DATE PROMULGATED: 03 October 2019