



Appeal number: EA/2018/0290

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

FERIDE ANIL KOSAR

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 4 December 2018 is confirmed.

REASONS

Background to Appeal

3. The Appellant is a data controller within the meaning of the Data Protection Act 2018¹ (“DPA”). As such, she 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 28 May 2018.

5. The Respondent served a Notice of Intent on 5 October 2018 then, in the absence of any representations from the Appellant, served a Penalty Notice of £400 on 4 December 2018.

6. The Appellant has appealed to this Tribunal on the basis that her default was an innocent mistake due to having changed address and asks that the penalty be varied by the Tribunal for reasons of financial hardship.

Appeal to the Tribunal

7. The Appellant’s Notice of Appeal dated 18 December 2018 relies on grounds that she did not receive the Notice of Intent, or any of the Information Commissioner’s written reminders, because she changed address in or before October 2017 and had changed email address. The Appellant submits that she is unable to pay the penalty at that time as she is on maternity leave and without means.

8. The Respondent’s Response dated 29 January 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 was due to an oversight, but it is submitted that the imposition of a Penalty was appropriate in all the circumstances. The Respondent notes that the Appellant had been a data controller prior to the commencement of

¹ <http://www.legislation.gov.uk/ukpga/2018/12/contents>

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

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 26 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:

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) If the Tribunal considers—

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

(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 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...."

The Facts

17. There appears to be no dispute between the parties as to the facts in this case. The Appellant accepts that the relevant Notices were sent to the address held by the Information Commissioner and, by implication, that she had failed to notify her change of address.

18. The Appellant expressly accepts that she was in breach of her legal obligations under the Regulations on the relevant date. She states that she only became aware of the Penalty

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

Notice after she received ‘a pile of letters’ from her former landlord and this led to her contacting the Commissioner on 10 December 2018. However, she submits that she is unable to pay the penalty because she gave birth at the end of November 2018 and she and her family will have insufficient means until November 2019.

19. The Appellant has provided corroborating evidence of her change of address and of her son’s birth in November 2018. She has also provided bank statements for the periods 26 December 2018 to 25 January 2019 and 4 February 2019 to 11 February 2019, showing both her and her husband’s accounts as overdrawn. The Appellant submits that paying the £400 penalty would cause serious financial difficulties.

20. The Respondent has provided the Tribunal with copies of email reminders sent to the Appellant on 14 May 2018 and 3 August 2018 together with confirmation that the later of these was received. However the Commissioner does not dispute that the Appellant changed her email address and may not have received these reminders.

21. *Conclusion*

22. We have considered whether the Appellant has advanced a reasonable excuse for her failure to comply with the Regulations. We conclude that she 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 her departure from the expected standards of a reasonable data controller.

23. 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.

24. We note that the Appellant in this case has presented evidence of financial hardship which could affect her ability to pay the £400 penalty at the point the Penalty Notice was issued. However, the evidence provided relates to a short period of time. In the case of the Appellant’s husband, who is described by the Appellant as being the sole source of income for the family, a single bank statement has been provided that shows the balance of his account over the course of a week. We further note that the *obligation* to pay the fee arose several months prior to the change in the Appellant’s financial circumstances.

25. We conclude that there is no reason to depart from the Respondent’s assessment of the appropriate penalty. We accept that payment of the penalty in a single instalment might have caused some difficulty for the Appellant while on maternity leave. Had it been open to us, we would have recommended payment terms to be found to avoid undue financial hardship to the Appellant’s family

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

(Signed)

JUDGE MOIRA MACMILLAN

DATE: 30 September 2019

PROMULGATION DATE: 9 October 2019