



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

Appeal Reference:EA/2019/0071

**Heard at Wigan & Leigh Court
On 29 July 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ANNE CHAFER & JEAN NELSON

Between

ALISTAR GREEN LEGAL SERVICES LIMITED

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:-

Appellant: Javid Musa (Intelligent Compliance Service Limited)/ Kabir Abbas Sharif (Director of the Appellant)

Respondent: Mr Peter Lockley (instructed by Ms Sara Jones, IC legal department)

DECISION

1. The appeal against the Enforcement Notice is dismissed.
2. The appeal against the Monetary Penalty Notice is dismissed. In the light of the evidence before the tribunal the amount of the Monetary Penalty is increased to £90,000.

REASONS

3. The making of telephone calls for direct marketing purposes to a telephone number whose subscriber has registered with the Telephone Preference Service (TPS) operated on behalf of the industry by the Direct Marketing Association not to receive such calls is prohibited under Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI2003/2426) ("PECR") unless the subscriber has indicated that he does not object to such calls being made.
4. On 30 January 2019 the Respondent in these proceedings, the Information Commissioner ("IC") (the regulator responsible for the enforcement of PECR) served a monetary penalty notice on the Appellant ("AGLS") under these regulations for breaching these regulations. The notice set out the legal background and the history of complaints which had led to the issuing of the notice. Between 13 March 2017 and 18 July 2017 the Telephone Preference Service ("TPS" - which manages the list of the numbers of telephone subscribers who do not wish to receive marketing calls) received 127 complaints and the IC received 86 complaints from subscribers registered with the TPS who had received direct marketing calls from AGLS. The notice gave examples of the persistence and rudeness of those making the unsolicited calls including repeated calls despite having told by the subscriber that they did not wish to receive calls from AGLS and complaints that the caller would not disclose the company name when asked to do so.
5. The IC had given details of the complaints and her powers to AGLS which had provided some responses. During the course of her investigation she noted (bundle page 235) that data was obtained from a company not registered with the IC, the data did not show valid consent which would over-ride TPS registration, AGLS had acknowledged that its live TPS screening was not active for at least two months.
6. Having considered the responses the IC on 26 November 2018 served a notice of intent to issue a Monetary Penalty Notice under s55A Data Protection Act:- on the basis that:_

"Power of the Commissioner to impose monetary penalty notice

55A(1) *The Commissioner may serve an data controller with a monetary penalty notice if the Commissioner is satisfied that-*

(a) *There has been a serious contravention of the requirements of [PECR} by the person, and*

(b) *Subsection (2) or (3) applies*

...

(3) *this subsection applies if the person –*

(a) *knew or ought to have known that there was a risk that the contravention would occur, and*

(b) *failed to take reasonable steps to prevent the contravention."*

7. With respect to seriousness she had concluded that there had been multiple breaches over 4 months leading to a significant number of complaints and *"it is reasonable to suppose that the contravention could have been far higher because those who went to the trouble to complain represent only a proportion of those who actually receive the call."*
8. In concluding that AGLS met the requirement of subsection (3) *"knew or ought to have known..."* she noted that TPS inform the company each time a complaint is made by a TPS subscriber which would enable the company to investigate and resolve the issue. While AGLS blamed a manager who had been sacked the company had continued to receive complaints and *"in any event it is the company's responsibility to ensure that it is compliant with legislation."* In seeking to support companies to achieve compliance she had published extensive guidance, *"specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls, or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls."*
9. With respect to *"failed to take reasonable steps"* she noted AGLS was unable to show it had consents to receive marketing calls, and despite assurances from AGLS that it had a TPS licence to screen data the TPS had confirmed that no such licence existed and the licence AGLS had provided belonged to another company which had not been downloading data regularly.
10. The IC was satisfied that condition (b) was satisfied.
11. In considering the amount of penalty the IC had noted that the director of AGLS was also director of an associated company that had also contravened PECR prior to its dissolution. She notified her intention to impose a penalty which should act *"as a deterrent against non-compliance, on the part of all persons running businesses currently engaged in these practices"* and she concluded that a penalty of £80,000 was reasonable and proportionate.
12. She also served a preliminary enforcement notice on the Appellant giving 35 days' notice to cease making telephone calls in breach of PECR:-

“Except in the circumstances referred to in paragraphs (3) and (4) of regulation 21 of PECR, neither make, nor instigate unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.”

13. The effect of which would be that were the Respondent to make telephone calls after the expiry of the 35 day period the making of such calls would be a criminal offence.
14. These were sent by special delivery to the company's address on 26 November 2018 and were returned. The information was re-sent on 8 January 2019. On 30 January 2019 they were again sent and the notices were published on the IC website.
15. On 25 February the representative of AGLS notified the tribunal of AGLS's intention to appeal.
16. The case advanced by AGLS in its grounds of appeal was that it was unfair to impose a penalty and they did not believe that they had broken PECR:-
 - The data they received was TPS cleaned by the data suppliers and the dialling system used had a TPS cleaning facility built in which would have taken any TPS numbers out, however this was automatically switched off without AGLS knowing, therefore there was a process in place which did not work due to a technical issue therefore there was no breach of PECR.
 - AGLS had stopped dialling in July and therefore no complaints from July 2017 could have occurred.
 - AGLS had all but closed down in July 2017 and the firm and director “are not in a position to pay”.
17. In responding to this the IC emphasised that AGLS had no proper system of controls to ensure compliance with PECR. There were no proper contracts in place with the suppliers of data so it had been unable to validate its claims as to consent. AGLS was responsible to ensure its compliance with PECR. AGLS had produced to the IC a TPS licence, on investigation this had been found to belong to another company, a company which did not download TPS data regularly. The claim that the dialler “automatically switched off” was inconsistent with the previous explanation provided by AGLS.
18. With respect to the amount of the penalty the IC had provided AGLS with the opportunity to make representations as to the amount of the penalty, one letter was returned but the next was not. Nonetheless, no representations were received. The IC had exercised her discretion in the light of the information available and the gravity of the breaches and comparable cases. The IC noted

that the Notice of Appeal claimed that the company was currently in liquidation but that Companies House had suspended a proposal to strike the company off the register following an objection. As the company was still in existence AGLS was responsible for contraventions occurring while the business was trading.

19. In its response to the IC AGLS argued:-

- AGLS had evidence to show that it used consented, TPS cleansed data (four invoices from Legend Alliance to AGLS February – April 2017 each for “10k fresh opt in records “opt in for telemarketing” and an undated “Due Diligence Review on Third Party Data Suppliers” carried out by Lumen Corporation Limited)
- other firms had been not been so severely sanctioned and the sanction was disproportionate given there were only 230 complaints
- the company had ceased trading and had no resources to pay
- AGLS accepted complaints in May and early June were possible, however it had ceased operations from the middle of June 2017 and by that stage AGLS was no longer in operation and it had disposed of its computers so no records were available

20. In evidence the Director of AGLS (Mr K A Sharif) explained that he had employed about 30 people at the registered office of the company. A number of organisations were in the building. The postman placed mail for each tenant in separate stacks and if uncollected, removed it the following day. He explained that “we rarely checked for post as there was no need for us to check.”

21. Mr Sharif agreed that a letter of 15 May 2017 from the IC to him as director of another company registered at the same address, Lumen Corporation, warning of the investigation of breaches of PECR by Lumen Corporation, “must have been picked up”. The letter included a substantial list of complaints made to the IC and to TPS, dating from April 2015 but mainly between February – April 2017 from telephone numbers associated with Lumen and relating to accident claims. He agreed that he had not responded to it or subsequent communications, stating that was seeking help from his representative Mr Musa. He stated that “I continued to make calls because I believed everything was in order”.

22. Mr Sharif confirmed that in the list complaints against RK Legal were complaints against a business name used by AGLS. He agreed that telephone numbers supplied to the IC as a result of a third-party information notice (bundle page 70) had been supplied by Connex Solutions to Lumen Corporation on payment by BACS for use in telemarketing on various dates including and January and February 2015, July and November 2016, January and March 2017. He claimed that AGLS had taken over the business from Lumen Corporation at the end of December 2016 and Lumen had stopped

making phone calls in November 2016. The reason for this was that the marketing was “doing a different type of industry”. Lumen Corporation had been involved in health marketing (using names such as the Hearing Centre and the Hearing Clinic) while AGLS used names such as RK Legal and KS Legal and was seeking accident claims. He stated that his actions were taken on the advice of his accountant.

23. AGLS was registered in October 2016 and Mr Sharif became a director on 12 October 2016.

24. Lumen Corporation filed dormant accounts for the period 1 April 2015 to 31 March 2016. The conditions upon which a company can file such accounts are laid down in s480 Companies Act 2006:-

“480Dormant companies: conditions for exemption from audit

(1)A company is exempt from the requirements of this Act relating to the audit of accounts in respect of a financial year if–

(a)it has been dormant since its formation, or

(b)it has been dormant since the end of the previous financial year and the following conditions are met.

...”

25. It is clear that Lumen Corporation was not entitled to rely on s460 since it was trading during that period.

26. Mr Sharif applied to Companies House on 13 April 2017 under s1003 Companies Act 2006 to strike the company of the register. In so doing he declared that none of the conditions in s1004 applied:-

“1004 Circumstances in which application not to be made: activities of company

(1)An application under section 1003 (application for voluntary striking off) on behalf of a company must not be made if, at any time in the previous three months, the company has –

(a)changed its name,

(b)traded or otherwise carried on business,

(c)made a disposal for value of property or rights that, immediately before ceasing to trade or otherwise carry on business, it held for the purpose of disposal for gain in the normal course of trading or otherwise carrying on business, or

(d)engaged in any other activity, except one which is –

(i)necessary or expedient for the purpose of making an application under that section, or deciding whether to do so,

(ii)necessary or expedient for the purpose of concluding the affairs of the company,

(iii)necessary or expedient for the purpose of complying with any statutory requirement,

....”

27. The evidence supplied to the IC with respect to the supply of telephone numbers indicates the conditions for s1004 may not have been complied with.
28. Mr Sharif confirmed that he had no records of the calls made by AGLS and that it had not recorded any calls due to the cost.
29. In submissions on behalf of AGLS Mr Musa submitted that his client had wished to co-operate with the IC and had started to co-operate on 28 July 2017. AGLS had provided all the information that it could. The level of complaints had reduced month by month and after July 2017 Mr Sharif had closed the company down because of the situation.
30. In responding counsel for the IC noted that the level of complaints had escalated over time and that after the receipt of the letter sent to him as director of Lumen Corporation in May 2017 the rate of complaints had increased, with 58 in June and 59 in July. He noted that on the evidence of Mr Sharif, many of the calls which had been identified in the first investigation relating to Lumen Corporation had been RK Legal and KS Legal and should have been considered as complaints against AGLS. The total number of complaints was considerably more than the number ascribed to AGLS at the time the monetary penalty was fixed. The monetary penalty was in line with other penalties imposed bearing in mind the number of complaints received and the number of calls connected (349207 – bundle page 214).

Consideration

31. This was an appeal against two notices served by the IC on AGLS. One, an Enforcement Notice required the company not to make unsolicited calls (bundle page 297-301). The tribunal is satisfied that, given the history of unsolicited calls AGLS has been unable to establish any grounds to justify its appeal and this appeal is dismissed.
32. The second appeal is against a monetary penalty notice in the sum of £80,000. The facts are very clear and many of them were confirmed by the director of AGLS in his evidence.
33. Mr Sharif had run another telemarketing company Lumen Corporation from the same premises, with the same staff who subsequently worked for AGLS and using many of the telephone numbers leased by Lumen Corporation. That company attracted a significant number of complaints due to its failure to comply with PECR. It is clear that as a director of Lumen Corporation Mr Sharif made inaccurate returns and declarations to Companies House; while he claimed to the tribunal that he acted on professional advice there is no evidence of this and in any event it is a director's duty to act with reasonable care skill and diligence and he clearly failed to do so.

34. It is clear that there was an almost total absence of the systems and controls necessary to ensure that AGLS was properly run and compliant with PECR. During the period when AGLS was active in the telemarketing business it did not have a TPS licence, on Mr Sharif's account its equipment which should have prevented it from call TPS registered numbers was not functioning correctly, a key employee responsible for operations/dealing with complaints did not know what he was doing and, it is claimed, suppressed all information about complaints, post to the company at its registered office was not collected despite the fact that it was its place of business where thirty staff worked. Despite the protestations and assertions of Mr Musa that the numbers which AGLS called had been properly screened the evidence for this claim was absent, numbers were purchased from unregistered organisations and AGLS were unable to produce evidence that individuals had consented to receive calls. On the contrary the complaints logged by TPC and the IC showed repeated calls to the same numbers despite the repeated protests of subscribers which should have prevented a further call, but which did not, and also discourtesy and bullying by AGLS staff. There was no system in place to ensure that the thirty staff recognised the rights under PECR of people whom they called.
35. While Mr Sharif complained about the lack of support from the IC and claimed that he acted on advice, it was entirely clear to the tribunal that he had no understanding of his duties as a director of any company and he did not show the knowledge, skills, application and experience needed to manage a telemarketing company.
36. On the basis of the information before the IC the tribunal is satisfied that the decision of the IC to impose a monetary penalty of £80,000 was a proportionate response, consistent with other financial penalties imposed in the light of the numbers of calls made and complaints received. It is now clear that the total number of complaints relating to AGLS was higher than the IC took into account when determining the amount of the monetary penalty. The company did not respond to the opportunity it had of making representations with respect to the amount of the penalty. In its appeal it has submitted no financial information about the company so the tribunal has not been in a position to determine anything about the income generated by the company or its financial affairs generally, the only indication of its size being the number of staff it employed. An application has been made to liquidate the company, but no financial information has been provided to the tribunal.
37. However it is now apparent that the director responsible for AGLS had also previously controlled Lumen Corporation which had a similar history of breach of PECR but which had been liquidated before the IC had taken action. There is a clear pattern of wholesale disregard for the law. The tribunal is charged with reviewing all the evidence and may make a different determination with respect to the monetary penalty. In the circumstances the

tribunal is satisfied that a penalty of £90,000 should be substituted and paid to the IC within 35 days of the date of promulgation of this decision.

Signed Hughes

Judge of the First-tier Tribunal

Date: 15 August 2019