First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0289

22 October 2019

Before

JUDGE ANTHONY SNELSON
MR PIETER DE WAAL
MR ANDREW WHETNALL

Between

DR KALEEM A SIDDIQUI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. Dr Kaleem Siddiqui, the Appellant in this case, is a medical doctor. Until June 2017, he ran a medical practice which consisted of or entailed medico-legal work. It is common ground between the parties that such work involves data handling and that practitioners who undertake it must register as data controllers and pay the annual charge which attaches to such registration.

2. By this appeal Dr Siddiqui challenges the Penalty Notice ('PN') dated 4 December 2018 issued by the Respondent ('the Commissioner') requiring him to pay a penalty of £400 for failing to pay the applicable annual data controller charge within 21 days of the beginning of the relevant charge period.

3. The following matters are common ground.

3.1 Although he has ceased to perform medico-legal reporting work, Dr Siddiqui holds personal data in digital form and responds to occasional queries about it. Accordingly, he was and remained a data controller on and after 1 June 2018 and the data controller charge regime continued (and still continues) to apply to him.
3.2 Under the relevant legislation (see below) the relevant annual 'charge period' began on 1 June 2018.
3.3 The applicable annual charge was £40 and was payable no later than 22 June 2018.
3.4 The charge was not paid when it fell due.
3.5 The Commissioner issued a 'Notice of Intent' on 29 October 2018, warning Dr Siddiqui of her intention, on or after 19 November 2018, to make a final decision whether to issue a PN for non-payment of the charge.
3.6 The charge was not paid until 5 December 2018, one day after issue of the PN.

The statutory framework

4. The Data Protection Act 2018 ('DPA') provides, by s137, that regulations may be made for the recovery by the Commissioner of charges from data controllers.

5. The Data Protection (Charges and Information) Regulations 2018 ('the Regulations'), made under the Digital Economy Act 2017 but, after 25 May 2018, treated as having been made under DPA, s137 (see DPA, sch 20, para 26), provide by reg 2(2) that a data controller must pay a charge to the Commissioner within 21 days of the beginning of the relevant charge period. The duration of any charge period is 12 months (reg 2(6)).

6. Under reg 2(3), a data controller must, within the first 21 days of each charge period, provide the Commissioner with specified information including its name and address, its headcount, its annual turnover and whether it is a public authority.

7. Reg 3 includes:

> **(1) For the purposes of regulation 2(2), the charge payable by a data controller in —**
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> **(a) tier 1 (micro organisations), is £40;**
> **(b) tier 2 (small and medium organisations), is £60;**
> **(c) tier 3 (large organisations), is £2,900.**
>
> **(2) For the purposes of this regulation, a data controller is, subject to paragraph (3) —**

(a) in tier 1 if—

(i) it has a turnover of less than or equal to £632,000 for the data controller's financial year,

(ii) the number of members of staff of the data controller is less than or equal to 10,

(iii) it is a charity, or

(iv) it is a small occupational pension scheme;

(b) in tier 2 if it is not in tier 1 and—

(i) it has a turnover of less than or equal to £36 million for the data controller's financial year, or

(ii) the number of members of staff of the data controller is less than or equal to 250;

(c) in tier 3 if it is not in tier 1 or tier 2.

(3) Paragraphs (2)(a)(i) and (2)(b)(i) are to be disregarded in relation to a public authority.

8. The DPA, s149 is concerned with enforcement notices. It empowers the Commissioner to issue such notices in the event of specified infringements of relevant obligations, one of which is a failure to comply with regulations made under s137 (s149(5)).

9. DPA, s 155 includes:

(1) If the Commissioner is satisfied that a person—

(a) has failed or is failing as described in section 149(2), (3), (4) or (5), or

(b) has failed to comply with an information notice, an assessment notice or an enforcement notice,

the Commissioner may, by written notice (a "penalty notice"), require the person to pay to the Commissioner an amount in sterling specified in the notice.

Subsections (2) and (3) set out the matters to which the Commissioner is to have regard in determining the appropriate penalty. These list a series of aggravating and mitigating factors which should inform the assessment of the penalty in any given case. Importantly, however, the next subsection reads:

(4) Subsections (2) and (3) do not apply in the case of a decision or determination relating to a failure described in section 149(5).

10. Schedule 16 sets out supplementary procedural measures to do with penalty notices, including the requirement for the Commissioner to give a notice of intent to impose a penalty and provision about payment, variation, cancellation and enforcement.

11. The significance of s155(4) becomes clear when one turns to s158, entitled "Fixed penalties for non-compliance with charges regulations", which states:

(1) The Commissioner must produce and publish a document specifying the amount of the penalty for a failure to comply with regulations made under section 137.

(2) The Commissioner may specify different amounts for different types of failure.

(3) The maximum amount that may be specified is 150% of the highest charge payable by a controller in respect of a financial year in accordance with the regulations, disregarding any discount available under the regulations.

(4) The Commissioner—

(a) may alter or replace the document, and
(b) must publish any altered or replacement document.

(5) Before publishing a document under this section (including any altered or replacement document), the Commissioner must consult—

(a) the Secretary of State, and
(b) such other persons as the Commissioner considers appropriate.

(6) The Commissioner must arrange for a document published under this section (including any altered or replacement document) to be laid before Parliament.

12. In the 'Regulatory Action Policy' ('RAP') produced in purported compliance with DPA, s158(1), the Commissioner states (p28):

> **Certain legislation provides for set penalties to be applied for failing to meet specific obligations (for example, a failure to pay the relevant fee to the ICO). Where those provisions apply, we will levy those penalties in accordance with the law. For the purposes of section 155 of the DPA, the fixed penalty payable by a controller for any type of failure to pay a data protection fee in accordance with the Data Protection (Charges and Information) Regulations 2018, are [sic]:**
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> **(a) tier 1 (micro organisations), is £400;**
> **(b) tier 2 (small and medium organisations), is £600;**
> **(c) tier 3 (large organisations), is £4,000.**
>
> **We reserve the right to increase this amount up to a statutory maximum of £4,350 for data controllers in respect of a failure to provide the ICO with sufficient information to determine the appropriate fee/exemption, depending on aggravating factors (for example, a failure to engage or co-operate with the ICO).**

A footnote presumably intended to explain the figure of £4,350 appears to have been accidentally omitted. We note that that sum is 150% of the tier 3 annual data handling charge of £2,900.

13. Mr Knight explained that the RAP was the subject of consultation with the appropriate minister and the public at large and was duly laid before Parliament in accordance with s158(6) (see also the consultation provisions in ss 160(9) and 161). He told us, and of course we accept, that there is no evidence of any issue having been raised concerning levels of penalties specified under s158.

14. Mr Knight stressed the modest scale of the Commissioner's fixed penalty powers when contrasted with those governing penalties for breaches of GDPR or infringements of DPA other than those within s149(5). These may be visited with

penalties of up to the "standard maximum amount" (10 million Euros or 2% of annual worldwide turnover, whichever is the greater) or, as applicable, the "higher maximum amount" (20 million Euros or 4% of annual worldwide turnover, whichever is the greater).[1]

15. By DPA, s162(1)(d) a data controller may appeal against the issue of the PN to the First-tier Tribunal. Its jurisdiction is governed by s163. It may review any determination of fact by the Respondent (s163(2)). If it considers that the PN was not in accordance with law or involved an exercise of discretion which ought to have been exercised differently, it must allow the appeal or substitute another notice or decision which the Respondent could have given or made (s163(3)). Otherwise, it must dismiss the appeal (s163(4)).

The appeal

16. Dr Siddiqui has acted in person throughout. His notice of appeal is confined to challenging the Commissioner's refusal of his request for the PN to be 'waived', largely on the basis that the infringement was minor and the penalty disproportionate. He did not question her legal right to issue the PN. In her response the Commissioner replied that no good ground was shown for waiving the PN and that the appeal should be dismissed.

17. The parties having agreed that we should decide the appeal on paper, we met in private on 9 May this year to do so. At that stage, we took the view that an arguable point of some importance arose, namely whether the penalty of £400 was lawful. It seemed to us that there was room for the view that the limit imposed by DPA, s158(3) was intended to be set at 150% of the applicable annual data handling charge, rather than, as the Commissioner appeared to assume, the tier 3 charge. If that were right, the maximum penalty which could have been specified in Dr Siddiqui's case would have been £60. Accordingly, we invited the representations of the parties. On 1 July Mr Christopher Knight, counsel, delivered submissions on behalf of the Commissioner contending that the statutory limit was fixed at 150% of the tier 3 charge.[2] Dr Siddiqui, not surprisingly, argued to the contrary and added that he was entirely willing to pay a penalty of £60. Having conferred, we decided that it was appropriate to convene a face-to-face hearing and a date was set for 22 October. Pursuant to a further direction, Mr Knight delivered a full skeleton argument dated 4 October and a short addendum document dated 11 October.

18. The hearing proceeded on 22 October. Dr Siddiqui was not present, preferring to rely on his prior written representations. Mr Knight attended on behalf of the Commissioner. We are most grateful to him for his careful and comprehensive submissions.

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[1] See DPA, s157.

[2] It was not disputed (see Mr Knight's submissions of 1 July, para 27) that, if s 158(3), properly interpreted, set three maxima by reference to the three tiers, the penalty of £400 was unlawful and the Tribunal must allow the appeal and quash the penalty. Moreover, it could not substitute another penalty of or up to £60 (£40 x 150%) because no such penalty had been specified under s158 and there was no other provision empowering the Commissioner to impose such a fixed penalty.

Principles of statutory interpretation

19. The central aim of any court faced with an issue of statutory interpretation is to "give effect to the true meaning of what Parliament has said" (see *R (Quinatavalle) v Secretary of State for Health* [2003] 2 AC 687, per Lord Bingham (para 8)). The primary focus must be on the statutory language (*Quintavalle*, per Lord Millett, para 38). Context is often a critical consideration. Modern authorities stress the importance of interpreting legislation 'purposively', with a view to achieving the (presumed) intention of Parliament. In particular, this may involve rejection of a literal interpretation if it is inconsistent with the statutory purpose or is illogical or anomalous (see *eg. R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2016] PTSR 112 CA, per Lord Dyson MR (para 38).

20. There are many canons of statutory construction. One is the principle against doubtful penalisation, which states that a person should not be subjected to a detriment unless it is imposed by clear words (see *Bennion on Statutory Interpretation*, 7th ed. 2017, section 27.1). The principle is not absolute and may be outweighed by other factors (*Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872, per Sales J (para 48).

Submissions for the Commissioner

21. Mr Knight focussed first and foremost on the language of s158(3). He laid particular emphasis on the use of the indefinite article ("a controller"). He submitted that if Parliament had intended to set three separate maxima depending upon the tier of charge applicable in any particular case, it would have been natural to use the definite article ("the controller").

22. Staying with the statutory language, Mr Knight further submitted that the reference to the "highest charge" supported the Commissioner's interpretation, for two reasons. First, it was consistent with his point on the use of the indefinite article. Second, contrary to the Tribunal's suggestion, the wording should not be read as seeking to cater for a case in which there was doubt as to which tier of charge was applicable (owing, for example, to the controller's failure to comply with the duty under the Regulations, reg 2(3) to supply specified information). In any case there was only one correct charge. The "highest" charge was, necessarily, the tier 3 charge. And the likely explanation for the draftsman or draftswoman not referring in terms to the tier 3 charge lay, it was submitted, in the legislative chronology, and in particular the fact that the Regulations were not made until 11 April 2018, by which stage the Data Protection Bill had only the Report and Third Reading stages in the House of Commons and the 'ping pong' procedure between the Houses to complete. [3]

23. Next, we were addressed on the subject of proportionality. Setting s158(3) alongside the Regulations, we pointed out to Mr Knight that, by our arithmetic, the

[3] The Act came into force on 25 May 2018.

single maximum penalty (according to the Commissioner's case) of 150% of the tier 3 charge represented 10,875% of the tier 1 charge. Could it be right that Parliament had intended to bring in a scheme[4] which set tier 1, 2 and 3 charges at £40, £60 and £2,900 respectively, plainly in order to minimise the burden on all but 'large' organisations, but then permitted a minor default by a tier 1 organisation (say, late payment of the annual charge) to be met with a penalty of over 100 times the annual charge and as great as the maximum that could be applied to a household name with a worldwide turnover measured in billions?[5]

24. Mr Knight did not quibble with our arithmetic. He did contrast the single maximum contended for (£4,350) with the massive penalties which may be levied for breaches not covered by the fixed penalty regime.

25. Turning to our concern about internal proportionality Mr Knight first made the point (very politely) that the Tribunal was not considering a challenge by way of judicial review and had no power to do so.

26. On the substance of the internal proportionality aspect, Mr Knight's initial stance was forceful and robust. He submitted that the purpose of the fixed penalty regime was clear: to enforce the charging arrangements under the Regulations. Those arrangements were of critical importance to ensuring that the income generated was sufficient to cover the Commissioner's expenses in performing her data protection functions (see the Digital Economy Act 2017, s109(2)). This is not only for the purposes of ensuring the economic maintenance of a public resource; it also seeks to guarantee compliance with Community legislation requiring the independence of the data protection supervisory authorities of member states: see Regulation 2016/679/EU, Art 52. In context, said Mr Knight, there is nothing surprising about a power to visit *any* breach by *any* controller with a penalty of £4,350. Moreover, had the Commissioner specified a single penalty at that level, she would have been unassailable. Having started there, in the course of argument Mr Knight shifted his ground quite significantly (that is an observation, not a criticism). Ultimately, his position was that any perception of a proportionality problem undermining the Commissioner's interpretation of s158(3) was mistaken because any RAP that failed to take into account the need for a reasonable correspondence between the charging and penalty regimes would be exceedingly vulnerable to a powerful challenge through judicial review.

27. Mr Knight next confronted the central logic of the case against him, submitting that it was inherently improbable that Parliament intended to fix a maximum in tier 1 cases of £60. Set at that level, a penalty would lack any deterrent effect and the aim of enforcing the charges regime would be severely undermined.

[4] The 2018 scheme of charges and civil penalties (contained in DPA and the Regulations) replaced arrangements backed by criminal sanctions. Comparison of the new scheme with those arrangements is not enlightening.

[5] The tier 3 defaulter having a headcount at least 25 times greater than the tier 1 defaulter and a turnover more than 56 times greater.

28. Finally, Mr Knight very properly drew attention to the principle against doubtful penalisation, to which we have already referred, but submitted that there was limited room for its application here having regard to the statutory language, the context and the evident purpose of the legislation.

Conclusions on the legal issue

29. We start with the language of s158(3). In our judgment, Mr Knight's submissions are correct. We accept that the better interpretation of the words "150% of the highest charge payable by a controller" is that it sets a single limit. The use of the indefinite article and the reference to the "highest" charge both favour that view. As to the latter point, it seems to us that if the formulation had been designed to cover a case of doubt as to the applicable charge, that would have been explained in the statutory language. We are also persuaded that the legislative history (specifically the late enactment of the Regulations) offers a plausible explanation for the relatively loose language adopted in s158(3).

30. On the subject of apparent disproportion between the tiers of charges and the single maximum penalty for which the Commissioner contended, we sought to reassure Mr Knight, and now repeat, that we are not confused about the limits of our inquiry. We are not concerned at all with whether the penalties specified in the RAP were irrational or unreasonable. Our focus is not on the RAP at all, but on the meaning of s158(3). We are interested in proportionality only in so far as it may bear on our task of interpreting the Parliamentary intention behind the subsection. We do regard the logic of the Commissioner's case (reduced above to numerical terms) as striking. But in the end, we are persuaded by Mr Knight's submissions on this aspect, at least in their modified form. Our concern, we think, stems from an error in regarding the enactment of a single limit as if it created an unrestricted legal power to set penalties up to that limit. To put the point another way, DPA sets a limit but does not prescribe or authorise particular penalties. The setting of penalties is a matter for the Commissioner's careful assessment following consultation, based on all relevant factors. We are in no doubt that, had she produced a RAP setting penalties at levels out of all proportion to the charges tiers, it would have been a very strong candidate for being struck down by the High Court as an irrational and unreasonable exercise of her s158 powers. The appearance of a power to set a single, across-the-board penalty without limitation save for the cap at 150% of the tier 3 charge is belied by the formidable constraints of consultation and judicial review.

31. We also accept Mr Knight's argument that it is unlikely that Parliament intended to limit penalties for tier 1 and tier 2 cases at or around the level of fines imposed for parking or minor traffic offences. That would not have been consistent with its evident intention of making provision for an effective regime to enforce the entire data controller charges system.

32. Lastly, we agree that the principle against doubtful penalisation does not win the day for Dr Siddiqui. We approach our task on the footing that s158 is penal

legislation and must be interpreted strictly. Nonetheless, that constraint does not dictate the outcome. It is simply one of the considerations to be weighed in the balance when determining the intention behind the relevant subsection. We agree with Mr Knight that the principle is outweighed by the countervailing factors already discussed.

33. For all of these reasons, having stepped back and reviewed the arguments as a whole, we are clear that, although the legislation could have been more clearly formulated, the Commissioner's case on the meaning of s158(3) is correct and that, accordingly, the imposition of the £400 penalty on Dr Siddiqui entailed no contravention of that subsection.

Conclusions on the substance of the appeal

34. We must now address Dr Siddiqui's appeal on its merits. In correspondence with Ms Bamford, solicitor for the Commissioner, he pointed out that he has been honest and transparent. We have no doubt that he has, but that by itself does not justify revocation of the PN. The power to impose a PN is a necessary element in the machinery of enforcement of the charges regime. The correct starting-point, we think, is to establish whether Dr Siddiqui demonstrates a reasonable excuse for his default (see *eg. Farrow & Ball v Information Commissioner* (EA/2018/0269). The question must be answered in the negative. No excuse, let alone a reasonable excuse, is offered for the failure to comply with the duty to pay the charge, despite the reminder in the 'Letter of Intent'. No doubt, the level of the penalty was uncomfortable for Dr Siddiqui but he is a professional person and he does not assert that it is liable to expose him to any real hardship. And in any event, there was and is no power for the Commissioner to impose a lesser penalty or for the Tribunal to reduce the penalty she imposed. In the circumstances, given that it was lawful to set the penalty for tier 1 cases at £400, we are quite unable to say that, in imposing it, the Commissioner was wrong in law or ought to have exercised her discretion differently in this particular case.

Outcome and postscript

35. For the reasons stated, the appeal fails and is dismissed.

36. Before leaving this case, we think it right to mention an incidental matter which arose in argument. We asked Mr Knight to comment on the passage in the RAP (reproduced above) commencing "We reserve the right". We told him that we were quite unable to identify any source for the claimed power to increase "this" amount (which, Mr Knight thought, may be £400, £600 or £4,000 depending on the applicable tier) to £4,350 on account of a failure to provide relevant information. Mr Knight pointed out that the question was not strictly germane to the issues arising in the appeal and he had had little opportunity to reflect on it. Doing the best he could, he stated that the Commissioner stood by the RAP. He also helpfully assured us that if the relevant power existed, as he maintained it did, it was to be found in s155 read

with s158: we were not overlooking another source located elsewhere. He added that the alleged power has never been invoked. Our difficulty was that the power under consideration is to levy fixed penalties in sums specified in a RAP. There appears to be no power to 'specify' an unspecific, discretionary penalty, let alone one which, in a tier 1 case at least, could theoretically fall anywhere in a range of almost £4,000. We respectfully suggest that the Commissioner review this part of the RAP as a matter of priority and, if so advised, amend or clarify it.

Anthony Snelson
Judge of the First-tier Tribunal

Date: 4 November 2019
Date Promulgated: 6 November 2019