Appeal Number: EA/2020/0351

BETWEEN:

STUDIOS MG LIMITED

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

DECISION

Tribunal: Brian Kennedy QC

Date of Hearing: 21 September & 13 October 2021.

Appearances:

For the Appellant: Malcolm Graham, Director of the Appellant Company as a Litigant in person.

For the Respondent: Khatioja Hafesji of Counsel.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal.

REASONS

Introduction:

[1] This decision relates to an appeal against a Monetary Penalty Notice ("**MPN**") issued on 6 October 2020 by the Information Commissioner ("the Commissioner"), in which the Commissioner imposed a penalty of £40,000 on the Appellant company for a breach of regulation 22 Privacy and Electronic Communications Regulation ("**PECR**") - (prohibition concerning unsolicited communications by e-mail).

Legislation:

1. Regulation 22 of PECR states:

(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

a. that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

b. the direct marketing is in respect of that person's similar products and services only; and

c. the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did

not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2).

2. Regulation 22(3) of PECR states:

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

(a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

(b) the direct marketing is in respect of that person's similar products and services only; and

(c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

3. Section 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (regulation 2(2)).

4. Consent is defined in the European Directive 95/46/EC as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."

5. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".

6. A “subscriber” is defined in regulation 2(1) of PECR as “a person who is a party to a contract with a provider of public electronic communications services for the supply of such services”.

7. “Electronic mail” is defined in regulation 2(1) of PECR as “any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient and includes messages sent using a short message service”.

8. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual’s fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

9. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) states:

> (1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –
>
> (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,
>
> (b) subsection (2) or (3) applies.
>
> (2) This subsection applies if the contravention was deliberate.
>
> (3) This subsection applies if the person –
>
> (a) knew or ought to have known that there was a risk that the contravention would occur, but
>
> (b) failed to take reasonable steps to prevent the contravention.

10. Section 55B of the DPA provides for the following procedural rights conferred on those to whom MPNs may be served:
    a. A MPN must be preceded by a notice of intent ("**NOI**');
    b. A NOI must inform the person that he may make written representations in relation to the Commissioner's proposal within a specified period (section 55B(3));
    c. The Commissioner may only serve a MPN after the expiry of the period in which representations may be made (section 55B(4));
    d. A person upon whom a MPN has been served may appeal to the Tribunal against the issue of the MPN and/or the amount of the penalty specified in the notice (section 55B(5)).

11. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

Monetary Penalty Notice:

[2] In the present case the MPN issued on 6 October 2020 for £40,000, addressed to Studies MG Limited, stated that the reduction in the penalty notice is explained by the fact that the Commissioner considered the following factors:

a. The lack of evidence as to how many individuals had actually received the unsolicited e-mail made it difficult to ascertain the gravity of the breach;
b. The Commissioner did not maintain that all of the individuals who received the unsolicited email were vulnerable by reason of the Covid-19 pandemic. This has previously been regarded as an aggravating factor;
c. The Commissioner did not accept that the Appellant would suffer financial hardship as the Appellant failed to provide the evidence, which the Commissioner had requested to demonstrate such harm.

Grounds of Appeal:

[3] The Appellant argued that the MPN of £40,000 is both disproportionate and punitive. The Appellant sought an alternative enforcement action. The Appellant challenged the finding of "serious" on the basis that the Commissioner failed to consider the impact of the pandemic and the urgency of the Appellant's situation. The Appellant contends that the Commissioner's finding was flawed, for the following reasons:

d. The denomination of the severity of the breach is a context sensitive exercise.
e. The severity of Studios MG's breach (that there was a breach is accepted, it should be noted) should be balanced against the prevailing context of the coronavirus pandemic.
f. Weight should be attached to the Appellant's admission of liability.
g. Further, that the Commissioner acted less than totally impartially in the making of her decision.
h. The Appellant further challenges the finding that breach was "deliberate". He avers that the breach should rather be characterised as a "negligent" breach.

Commissioner's Response:

[4] The Commissioner noted that the Appellant's objections lacked the conciseness, which would have been provided had the Appellant been represented. The Commissioner provided five grounds in which the Commissioner believed that Appellant sought to appeal the MPN on. The Commissioner held the view that the "pressure" in which the Appellant experienced did not justify the lack of co-operation including, deleting information so as to comply with the PECR but failing to pay the requisite data protection fee.

[5] The Commissioner, however, on consideration of the Appellant's representations reduced the penalty sum to £30,000. The Commissioner did not believe that the Appellant provided sufficient evidence of financial hardship to justify a further reduction. The Commissioner therefore invites the Tribunal to maintain the imposition of the MPN at the revised sum of £30,000.

Commissioner's Skeleton Argument:

[6] The Commissioner having provided a chronology of events and schedule of disputed issues adopted the arguments detailed in her Response of the 29th of January 2021 in relation to the Appellant's five grounds of appeal. Notably, the Commissioner highlighted the significance of the Appellant's failure to comply with the Tribunal's directions of 10 March 2021.

Financial Recovery Unit Report:

[7] It was noted that the recent incorporation of Releyn Limited raised concern and that its trading activity may involve the manufacture of PPE and subsequent digital marketing as seen through the Appellant.

[8] In relation to the financial status, the company accounts submitted are limited in their value when attempting to assess the impact that any penalty may have, however, the Appellant argues he is unlikely to be able to withstand a penalty.

[9] The Appellant provided representations on the turnover of Studio MG Limited and asked the Tribunal for leniency given that he was experiencing hardship.

[10] In summary the Tribunal noted that there is no financial information available nor has any been provided to assist in determining whether the Representations of the Appellant can be properly or adequately considered; however, the Appellants apparent lack of transparency is a cause for concern and there is in fact no evidence of undue financial hardship.

Supplementary Submissions of the Commissioner:

[11] The Commissioner noted the "undue hardship" the Appellant claimed he would suffer from if a fine over "*a few £1000*" were imposed. The Commissioner highlighted that the Appellant was asked to provide information to support his claim and specifically:

"*Bank statements for the last 6 months of trade;*
Full accounts dated 28 February 2020;
Evidence of any financial support sought as a result of the Covid-19 outbreak, e.g. government backed loans, payment holidays etc; o *Profit and Loss statements for the last year;*
o *Balance Sheet statements for the last year."*

[12] The Commissioner stated that Appellant failed to correspond with the Commissioner's request of 14 August 2020. Further, no additional financial information/evidence was provided.

[13] On 4 October 2021 the Appellant provided bank statements spanning February 2020 – August 2020. On consideration of the additional financial evidence and the report of the Financial Recovery Unit, the Commissioner held, it is clear that in 2020 there was a significant increase in payments into the Appellant's bank. Additionally, the Commissioner argued that the overall profit appeared to be healthy. Therefore, the Commissioner did not reconsider the imposition of the monetary penalty.

[14] Whilst the Commissioner remained sympathetic to the medical history of the Appellant's director, she refuted the assertion that she ought to have exercised her discretion differently. The Commissioner confirmed that had she been provided with copies of these medical records, she still would have proceeded with her enforcement action.

Tribunal Hearing:

[15] The Tribunal wises to acknowledge the considerable assistance of Counsel for the Commissioner throughout the course of this appeal. The Tribunal was taken to further correspondence between the Commissioner and the Appellant, wherein the Commissioner requested the following information in support of a financial hardship claim:

- Bank statements for the last 6 months of trade;
- Full accounts dated 28 February 2020;
- Evidence of any financial support sought as a result of the Covid-19 outbreak; e.g., government backed loans, payments holidays etc;
- Profit and Loss statements for the last year;
- Balance Sheet statements for the last year.

[16] The Appellant stated that he didn't apply for any financial support and was in a position to pay a fine in the sum of £5,000. In relation to co-operation, the Appellant was referred to E305 – E309 of the Open Bundle. In a letter dated 04 May 2020, the Commissioner informed the Appellant of her concern with the Appellants PECR compliance and that an investigation had commenced as a result. The Commissioner identified the regulations and powers available to her in respect of breaches of PECR.

[17] Counsel then referred the Appellant to communications at E312 of the Open Bundle between himself and Malcolm Graham. The communications relate to the Appellant asking for guidance when the Commissioner submitted that he was informed of what to do and what information to disclose. The Appellant argued that there was no opportunity of him breaching the PECR regulations as he had decided not to do any more direct marketing. In an email dated 04 May 2020, and where the Appellant stated, "*we have now removed the data related to the email address"*. The Appellant claimed that when he sent the email, he knew it was wrong and as a result deleted the £200 per month subscription he had with constant contact.

[18] Counsel for the Commissioner drew the Tribunal's attention to Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC) at paragraph [31] which states as follows:

"The material parts of regulation 22 of PECR, which implements Article 13, provide as follows: Use of electronic mail for direct marketing purposes 22.— (1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

> *(a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
>
> *(b) the direct marketing is in respect of that person's similar products and services only; and*
>
> *(c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication."*

[19] Counsel submitted that paragraph [31] of Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC) sets out the requirements of regulation 22 PECR.

[20] Counsel further relied upon paragraph [71] of Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC) to illustrate the criteria for the issuing of an MPN:

"The criteria for issuing an MPN are found in section 55A of the DPA 1998, which was inserted by section 144(1) of the Criminal Justice and Immigration Act 2008. Regulation 31 of PECR applies section 55A and associated provisions as modified for the purposes of enforcing PECR. In particular, for the purposes of regulations 19-24 of PECR, the material provisions of section 55A of the DPA 1998 are modified by paragraph 8AA of Schedule 1 to PECR (as amended) to provide as follows:

> ***Power of Commissioner to impose monetary penalty***
> *55A.—*
> *(1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that—*
> > *(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003, and*
> > *(b) subsection (2) or (3) applies.*
> *(2) This subsection applies if the contravention was deliberate.*
> *(3) This subsection applies if the person—*
> > *(a) knew or ought to have known that there was a risk that the contravention would occur, but*
> > *(b) failed to take reasonable steps to prevent the contravention.*
> *(3A), (3B), (3C) […]*
> *(4) A monetary penalty notice is a notice requiring the person on whom it is served to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.*
> *(5) The amount determined by the Commissioner must not exceed the prescribed amount.*
> *(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice.*
> *(7) The notice must contain such information as may be prescribed."*

[21] Counsel for the Commissioner further argued the significance of the 9,000 emails sent and echoed the Commissioner's view that this amounted to a serious PECR breach. Further, Counsel for the Commissioner asserted that the 1,000,000 emails sent in Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC) was not a target and each case must be judged on its own merits.

[22] Counsel again referred to the Financial Recovery Unit Report and stated that it demonstrates that the Appellant knew or ought to have known that he was in breach of the PECR regulations. The Commissioner takes a strict approach in cases where the conduct is solicited and deliberate. The Commissioner holds the view that the Appellant operated without consent.

[23] In relation to the value of the MPN, the Commissioner initially issued a £130,000 penalty before reducing the MPN to £40,000. Subsequently, on consideration of the Appellant's representations the Commissioner allowed a further reduction to £30,000. The Commissioner maintains that £30,000 is just and proportionate given the aggravating factor of the deliberateness of the breach. Further, the Commissioner noted that the Appellant failed to cooperate with the investigation.

[24] The deliberateness of the Appellant's breach can be found at E313 of the Open Bundle whereby it states, "*we have now removed the data related to the email address mentioned in the letter and several others".* The Commissioner raised her concern that the Appellant's response was to delete the data in this instance. Counsel for the Commissioner referred to correspondence at E315 to E326 of the Open Bundle to focus the Tribunal's attention on the deliberateness of the breach. The use of "*now"* is clear evidence of the Appellant's aggravated conduct, exacerbated by the lodgement of £200 the following day.

[25] In terms of mitigation, the Commissioner recognised that the Appellant stopped sending marketing emails and deleted the database. The Commissioner noted the £80,000 upturn in earnings since 2019 and what appeared to be a healthy balance sheet across the Appellant's accounts. The Commissioner emphasised the Appellant's lack of compliance with the Commissioner's investigation. The Appellant argued on the contrary, however, Counsel for the Commissioner stated that despite the Appellant's submissions the MPN was proportionate in the circumstances. The Commissioner held that, in applying Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC), it is clear that the Appellant profited from and exploited the pandemic.

The Commissioner's Supplemental Submissions:

[26] The Appellant averred, at the hearing, that the Commissioner's decision to impose a penalty was procedurally unfair. Further, and for the first time, the Appellant asserted that his legal advice suggested that the Commissioner should allow the complainant to liaise with the person said to be in breach of PECR. As a result, the Tribunal therefore invited the Commissioner to provide further supplemental submissions on this point.

[27] The Commissioner drew the Tribunal's attention to the procedural rights provided under 55B PECR:

"55B Monetary penalty notices: procedural rights
(1) Before serving a monetary penalty notice, the Commissioner must serve the person with a notice of intent.
(2) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice.
(3) A notice of intent must—[
(a) inform the person that he may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and

(b) contain such other information as may be prescribed.
(4) The Commissioner may not serve a monetary penalty notice until the time within which the person may make representations has expired.
(5) A person on whom a monetary penalty notice is served may appeal to the Tribunal against—
(a) the issue of the monetary penalty notice;
(b) the amount of the penalty specified in the notice.
(6) In this section, "prescribed" means prescribed by regulations made by the Secretary of State."

[28] The Commissioner refuted the assertion that she breached her own policies and procedures. The Commissioner noted, with reference to the form used by members of the public, that complainants are not directed to liaise with the organisation responsible for the PECR breach.

[29] Further, the Commissioner provided her policies and procedures and highlighted, at page 3 of the Regulatory Action Policy, that "*we will continue to take a strong regulatory approach against any organisation breaching data protection laws aimed at taking advantage of current circumstances"*.

[30] The Commissioner clarified that the webpage referred to the Appellant concerns an entirely separate issue of how the individual data subject may go about raising the objection to the use of their individual personal data.

[31] The Commissioner detailed the reasons why she should not adopt such as a policy, practice, or procedure. They are:

i. A pre-condition to purse a complaint themselves would act as a deterrent
j. The correct approach was made clear in Leave.EU Group Ltd and Eldon Insurance Services Ltd -v- Information Commissioner [2021] UKUT 26 (AAC) at paragraph 80: "*the criteria for the issue of an MPN do not require a serious intrusion of individuals' privacy rights – rather, they require a serious contravention of PECR. Indeed, the original*

condition in section 55A (as modified for PECR) that the contravention must have been "of a kind likely to cause substantial damage or substantial distress" was repealed by the [PECR]..."

The Commissioner invited the Tribunal to dismiss this ground of appeal.

[32] There was no evidence of consent and the Appellant admits the breach. The appellant argues that it was a negligent breach rather than deliberate.
The Tribunal find that negligent or deliberate, the breach was serious for the reasons provided and decided upon by the Commissioner. Further the Tribunal accepts the Commissioners' assessment that the breach was deliberate and the Appellant has failed to persuade this Tribunal to the contrary. Having heard the Appellant, at length, the Tribunal accepts also that the Appellant has deliberately failed to co-operate with the Commissioners' investigation and in deed frustrated the investigation throughout, including by deliberately deleting his records at the outset. The Tribunal find that the Appellant has also failed to co-operate with the Tribunals directions and has failed to make a full and frank admission of all material facts throughout his attempt to justify the appeal. This Tribunal find the Appellant has in fact been evasive and unhelpful. The appellants' last minute suggestion about his legal advice is suspect as the Commissioner has clearly illustrated. The Tribunal is in agreement with the Commissioners assessment of this breach and finds the ultimate penalty imposed to be reasonable in all the circumstances pertaining. On the facts as presented throughout this appeal and for the reasons set out in the Commissioners arguments above, the Appeal is dismissed.

Brian Kennedy QC

(First Tier Tribunal Judge)

Date of Decision: 29 October 2021.

Date Promulgated: 02 November 2021.