



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

Appeal Reference: EA/2021/0186/FP/P

Before
Judge Stephen Cragg Q.C.
Mr Dave Sivers
Mr Stephen Shaw

**Determined, by consent, on written evidence and submissions
Considered on the papers on 13 January 2022.**

Between

Pedal Pulses Limited

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered a bundle of evidence and submissions comprising 49 pages.

BACKGROUND TO THE APPEAL

4. The Appellant is a data controller within the meaning of the Data Protection Act 2018 (DPA). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 (the Regulations)¹. The Commissioner has assessed the Appellant as a "tier 2" organisation, and the Appellant's Data Protection Fee (the Fee) was £60 which it was due to pay by 28 November 2020.
5. The Appellant failed to pay to the Commissioner the Fee required by regulation 2 (2) of the Regulations by 28 November 2020.
6. The Commissioner served a Notice of Intent by letter dated 3 June 2021 and, in the absence of any representations from the Appellant, served a Penalty Notice of £600 by post on 28 June 2021 (25 days later).
7. The Appellant has appealed to this Tribunal on the basis that it was unable to pay the fee until 2 July 2021 as it had no finance staff until that date due to Covid (no further details given), and asks that the penalty be revoked by the Tribunal.

APPEAL TO THE TRIBUNAL

8. The Appellant's Notice of Appeal is dated 15 July 2021. It explains that:-

We received a letter dated 3 June 2021 from the Information Commissioner's Office stating that there was a notice of intention to issue a penalty notice if £60 was not paid by 24 June 2021. The office did not have any finance staff in until 2 July due to

¹The Regulations were made under s. 137 DPA. See <http://www.legislation.gov.uk/uksi/2018/480/contents/made>

Covid. The £60 fee was payable and paid immediately on 2 July. We believe that it is unreasonable to issue a penalty of this size when the letter came to an unmanned office due to Covid.

9. The Commissioner's Response dated 20 August 2021 resists the appeal. She submits that the Penalty regime has been established by Parliament and that there is no requirement to issue reminders (although reminders were in fact been sent in this case). The Appellant's reasons for not making payment are not accepted, and it is submitted that the imposition of a Penalty was appropriate in all the circumstances. The Commissioner explains as follows:-

23. The Commissioner sent an emailed reminder to the Appellant at the address listed on the Commissioner's register (julia.lettner@margaretdabbs.co.uk) on 18 October 2020 [appended to this Response]. That email reminded the Appellant that the charge was due by 28 November 2020, that the Commissioner had calculated the sum as £60 and gave further information as to payment. It is not known whether the Appellant accepts that it had received the reminder email.

24. The Commissioner sent a further reminder letter to the Appellant at the address listed on the Commissioner's register and the Appellant's registered office address on 8 November 2020 [appended to this Response]. The letter reminded the Appellant that the charge was due to expire on 28 November 2020. It is not known whether the Appellant accepts that it had received the reminder letter.

25. A subsequent reminder email was sent by the Commissioner to the Appellant on 11 March 2021 to the address listed on the Commissioner's register, making clear that the charge was now overdue [appended to this Response]. It is not known whether the Appellant accepts that it had received the reminder email.

...

27. Following no payment having been received, the Commissioner sent a Notice of Intent under Schedule 16 to the DPA, along with a covering letter dated 3 June 2021, by post to the company's registered office address [appended to this Response]. That covering letter was headed, in bold type, "NOTICE OF INTENTION TO ISSUE A PENALTY NOTICE UNDER THE DATA PROTECTION (CHARGES AND INFORMATION) REGULATIONS 2018" and made clear that it emanated from the Commissioner, as well as what it concerned. The Appellant accepts that it received the Notice of Intent.

28. No representations or other response was received by the Commissioner.

29. Accordingly, under cover of a letter dated 28 June 2021, the Commissioner issued the Penalty Notice to the Appellant, sending it by post to the company's registered office address [appended to this Response]. The nature and origin of that correspondence was, again, plain to any reader. The Appellant accepts that it received the Penalty Notice.

30. On 1 July 2021 the Appellant telephoned the ICO to advise that it had received the Notice of Intent and realised that it should have responded by 24 June 2021. The Appellant advised that it would pay the £60 data protection fee on the same date [appended to this Response]. The Commissioner received payment of the £60 fee on 1 July 2021.

10. All the documents referred to by the Commissioner are included in the appeal bundle.

THE LAW

11. Regulation 2 of the Regulations requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt).

12. A breach of the Regulations is a matter falling under s. 149 (5) DPA. Section 155 (1) DPA provides that the Information Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S. 158 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*². The specified penalty for a tier 2 organisation which breached regulation 2 is £600.

13. Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, including at paragraph 2 a requirement that the Commissioner gives a Notice of Intent before a Penalty Notice is issued:-

(1) Before giving a person a penalty notice, the Commissioner must, by written notice (a "notice of intent") inform the person that the Commissioner intends to give a penalty notice.

(2) The Commissioner may not give a penalty notice to a person in reliance on a notice of intent after the end of the period of 6 months beginning when the notice of intent is given, subject to sub-paragraph (3).

(3) The period for giving a penalty notice to a person may be extended by agreement between the Commissioner and the person.

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

14. Paragraph 3 of Schedule 16 sets out what a Notice of Intent must include. It must give the person to whom it is sent an opportunity to make written or oral representations about the intended Penalty Notice, and must allow at least 21 days for these to be made. If representations are made within the specified time, the Commissioner must consider them before deciding whether to issue a Penalty Notice (paragraph 4).
15. Section 141 DPA sets out various options by which the Commissioner may serve a notice required under the DPA:-

(1) This section applies in relation to a notice authorised or required by this Act to be given to a person by the Commissioner.

(2) The notice may be given to an individual—

(a) by delivering it to the individual,

(b) by sending it to the individual by post addressed to the individual at his or her usual or last-known place of residence or business, or

(c) by leaving it for the individual at that place.

(3) The notice may be given to a body corporate or unincorporate—

(a) by sending it by post to the proper officer of the body at its principal office, or

(b) by addressing it to the proper officer of the body and leaving it at that office.

(4) ...

(5) The notice may be given to the person by other means, including by electronic means, with the person's consent.

(6) In this section—

“principal office”, in relation to a registered company, means its registered office;

“proper officer”, in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs;

“registered company” means a company registered under the enactments relating to companies for the time being in force in the United Kingdom.

(7) This section is without prejudice to any other lawful method of giving a notice.

16. 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.”

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

(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.

18. For the Notice under appeal to have been brought ‘in accordance with the law’, the Commissioner must have complied with the requirements of Schedule 16 of the DPA, including the requirements relating to the timing of the Notice of Intent. In relation to a Penalty Notice issued for failure to comply with the Regulations, no other statutory pre-conditions are set. It is sufficient simply to establish that there was a failure to comply with the Regulations. There is no separate and additional requirement to establish, for example, that the contravention was serious or that there was a likelihood of damage or distress to data subjects.

19. 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.

20. 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).³

DISCUSSION

21. There appears to be little dispute between the parties as to the facts in this case. The Appellant accepts that it received both the Notice of Intent and the Penalty Notice.
22. The Appellant's case is that, because of Covid, it did not have any finance staff to deal with the payment required by 24 June 2021, even though the Notice was sent on 3 June 2021. The Commissioner argues that the Appellant is 'a well-established beauty retailer that continued to trade throughout the pandemic, it should have systems in place to ensure that it complies with its legal obligations', and we note that it has not been explained why there was no financial oversight at all during this period, or why no contact at all was made with the Commissioner once the Notice of Intent had been received and before the issue of the Penalty Notice. No specific details have been provided to explain why Covid prevented the Appellant taking these steps.
23. Furthermore, the Appellant does not explain why it did not respond to the reminders sent by the Commissioner about the payment which was, in fact, due on 28 November 2020. We can see for example that the reminder sent on 8 November 2020 was sent to the address now included in the Notice of Appeal. The Appellant does not say that this reminder was not received, nor that the email reminders referred to by the Commissioner were not received.
24. We note that it is the Appellant's responsibility to ensure that the relevant fee is paid to the Commissioner. In this case the Commissioner served a Notice of Intent in accordance with section 141(3)(c) DPA, by sending it by post to the Appellant company at its registered address.

³ https://assets.publishing.service.gov.uk/media/5acf131ee5274a76be66c11a/MISC_3112_2017-00.pdf

25. We note that the Appellant has dealt quickly to remedy the situation once it telephoned the Commissioner on 1 July 2021.

26. In our view this is not an appropriate case to revoke the Penalty Notice where the Appellant has not explained, adequately or at all, why it did not act on email and postal reminders sent by the Commissioner. There is no 'reasonable excuse' for failing to pay the fee.

27. We do have the power to vary the amount of the penalty. However, the Appellant has not made any representations on reduction, other than to say that it is for an 'unreasonable' amount. Bearing in mind the factors set out in the previous paragraphs, this does not seem to us to be an appropriate case to reduce the fixed penalty amount of £600. In reaching this conclusion we bear in mind that the fixed penalty regime encourages compliance with the law, aims to ensure the Commissioner's work is properly funded, and reflects a well-established historical system of registration and payment.

28. On that basis this appeal is dismissed and the Penalty Notice in the sum of £600 stands.

JUDGE STEPHEN CRAGG QC

DATE: 14 January 2022

Promulgated: 17 January 2022