



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

Appeal Reference: EA/2021/0178/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

SPS Technologies Limited

Appellant

and

The Information Commissioner

Respondents

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 3" organisation, and the Appellant's fee was £2900 which it was due to pay by 16 August 2020.
5. The Appellant failed to pay to the Commissioner the Data Protection Fee required by regulation 2 (2) of the Regulations by 16 August 2020.
6. The Commissioner served a Notice of Intent by letter dated 17 May 2021 and, in the absence of any representations from the Appellant, served a Penalty Notice of £4000 by post on 23 June 2021 (37 days later).
7. The Appellant has appealed to this Tribunal on the basis that it did not receive any of the correspondence sent by the Commissioner before the Penalty Notice was received.

APPEAL TO THE TRIBUNAL

8. The Appellant's Notice of Appeal dated 16 July 2021. It explains that:-

We received a penalty notice, dated 23 June 2021 (attached), with regards to an unpaid Data Protection Fee of £2900.

This was the first letter received in relation to the fee for SPS Technologies. Prior to this, we only received one other letter from ICO which was for Chevron Aerostructures Limited (Chevron letter attached).

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

We contacted ICO on 28 June 2021 and spoke to Jane. We explained the situation to Jane who confirmed the Notice of Intent was sent to the correct address. We asked for a copy of this notice and as advised sent an email to paymentsandpenalties@ico.org.uk requesting this (email attached).

The email reply stated that copy of the notice was sent to the named contact by email. We are unable to identify the named contact and have contacted ICO regarding this, but they are unable to help us any further.

As per the ICO website, the following notices are sent:

- When the data protection fee is due, an email would be sent as a reminder. We have not received this and are unable to identify who's details ICO hold.

- If the fee is not paid, a reminder letter is sent. Once again we have not received this and are unable to obtain a copy.

- 14 days after the expiry, a Notice of Intent is issued. We've not received this either and a copy cannot be obtained.

We are disagree with the additional penalty charge of £4000 that has been added on as we did not receive the initial notices and suspect they may be incorrectly addressed.

We are unable to obtain a copy of the correspondences sent to verify any this.

We are more than happy to pay the normal Data Protection Fee of £2900 asap.

9. The Commissioner's Response dated 12 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 (pateli@spstech.com) on 5 July 2020 [appended to this Response]. That email reminded the Appellant that the charge was due by 16 August 2020, that the Commissioner had calculated the sum as £2,900 and gave further information as to payment. The Appellant denies that it 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 26 July 2020 [appended to this Response]. The letter reminded the Appellant that the charge was due to expire on 16 August 2020. The Appellant denies that it received the reminder letter.

25. A subsequent reminder email was sent by the Commissioner to the Appellant on 20 February 2021 to the address listed on the Commissioner's register, making clear that the charge was now overdue [appended to this Response]. The Appellant denies that the email was received.

...

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 17 May

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.

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

29. The Appellant denies receiving the Notice of Intent and suggests that the letter may have been incorrectly addressed. The Notice of Intent was sent to the Appellant's registered office address, which remains current at the date of this Response. The company address is also the same address used by the Appellant within the Notice of Appeal. In any event, the Commissioner sent a reminder by email and post prior to 16 August 2020 to the address which had been provided by the Appellant at the time of its registration. No explanation is provided by the Appellant as to why payment was not made by the relevant time.

30. Accordingly, under cover of a letter dated 23 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.

31. To date, the Commissioner has not received payment of the applicable charge of £2,900 from the Appellant.

32. The Appellant states in its Notice of Appeal that it 'is unable to identify the named contact'. The named contact was provided by the company when it registered its details on the data protection register. It is the responsibility of the data controller to ensure that contact details remain up-to-date on the register to ensure that correspondence is received by the appropriate individual.

10. All the documents referred to 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 3 organisation which breached regulation 2 is £4000.

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.

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—

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

(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. In this case the Appellant accepts that it received the Penalty Notice, but not the Notice of Intent or previous correspondence.
22. However, the Appellant has not explained how it failed to receive the Notice of Intent, or the posted reminder letters, but did receive the Penalty Notice. Although the Appellant says that it suspects that the correspondence was sent to the wrong address,

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

we can see from the documents provided that all the correspondence was sent to the same address as the Penalty Notice, which is the address provided to the Commissioner by the Appellant.

23. The Appellant has also made reference to the email reminders sent by the Commissioner and says that 'We are unable to identify the named contact and have contacted ICO regarding this', The email address is pateli@spstech.com. Some of the Commissioner's posted correspondence is addressed to Ilesh Patel at the Appellant's address, as the person notified by the Appellant to the Commissioner. Other correspondence was sent to the Appellant's company name at the same address (including the Notice of Intent and the Penalty Notice). The Appellant has not stated, for example, that Mr Patel was not an employee, or that unauthorised contact has been made by this person with the Commissioner. All the Commissioner can do is correspond via the postal and email addresses provided by a body that needs to register, and the evidence shows that this is what the Commissioner did in this case.
24. We note that it is the Appellant's responsibility to ensure both that the relevant fee is paid to the Commissioner, and that the contact details held by the Commissioner are up to date. This would include notifying the Commissioner when the Appellant's contact name and email address changes.
25. In this case the Commissioner served a Notice of Intent in accordance with section 141 (3) (c) of the DPA, by sending it by post to the Appellant company at its registered address. The Appellant is unable to produce positive evidence that the Notice of Intent was not received and has not explained why it took no notice of previous reminders.
26. We note that as of 12 August 2021, the Commissioner states that the £2900 fee has not been received (it was due almost a year before). That may have changed by now (January 2022), but indicates that the Appellant did not deal quickly to remedy the situation once in receipt of the Penalty Notice.
27. 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.

28. We do have the power to vary the amount of the penalty. However, the Appellant has not made any representations on reduction. 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 £4000. 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.

29. On that basis this appeal is dismissed and the Penalty Notice in the sum of £4000 stands.

JUDGE STEPHEN CRAGG QC

DATE: 14 January 2022
Promulgated: 17 January 2022