EA/2021/0089/FP

BETWEEN:

LEADS WORK LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

DECISION OF THE FIRST-TIER TRIBUNAL

Brian Kennedy QC,

Suzanne Cosgrave,

Marion Saunders.

Hearing on the Papers on Tuesday 28 September 2021.

Decision: The Tribunal refuses the appeal.

REASONS

Introduction:

[1] This decision relates to an appeal against a Monetary Penalty Notice ("MPN") issued on 1 March 2020 by the Commissioner, in which the Commissioner imposed a penalty of £250,000 on the Appellant company for a serious contravention of regulation 22 Privacy and Electronic Communications Regulation, ("PECR") (prohibition concerning unsolicited communications by e-mail).

Legislation:

[2] 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.

[3] "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".

[4] Regulation 22 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).

[5] Regulation 23 PECR states:

A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail—

(a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or

(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.

[6] 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.

[7] 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.

(1) This subsection applies if the contravention was deliberate.

(2) 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.

[8] Section 122(5) of the DPA 2018 defines "direct marketing" as "the communication (by whatever means) of any advertising material which 719 3 is directed to particular individuals". This definition also applies for the purposes of PECR.

[9] Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

[10] The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of part 9, Schedule 20 of that Act).

Monetary Penalty Notice:

[11] The Commissioner held that the Appellant relied upon invalid consents to send direct marketing texts to individuals whose data was sourced by Latch Media, Join the Triboo, and Interrog8. The Commissioner found that the Appellant had contravened Regulation 22 of PECR. In making her decision, the Commissioner was satisfied that the consent relied on by the Appellant did not amount to valid consent for the purposes of regulation 22 PECR. As the Appellant sent 2,670,140 marketing text messages which resulted in excess of 10,000 complaints, over a period of 41 days, the Commissioner was satisfied that the contravention was both deliberate and serious.

[12] The Commissioner asserted that as the Appellant is registered with the ICO as a data controller, the Appellant should be aware of the regulations.

The Commissioner referred to the Appellant's Data Protection Impact Assessment from 20 October 2019, which states as follows:

"LW have considered the fact that there is a degree of public concern over the sales of personal data. The legislation is clear on the point of consent and the subsequent enforcement action brought by the Regulator (ICO) has reinforced the legislation and demonstrated a clear pathway to take for businesses engaged in the sale of personal data This unambiguously references public concern regarding data sales, and an awareness of enforcement action taken by the ICO."

[13] The Commissioner found that the Appellant failed to conduct sufficient due diligence to prevent the contraventions despite by placing great reliance upon the due diligence conducted by third parties. Notwithstanding the Commissioner's investigation the Appellant continued to send significant numbers of marketing text messages throughout. The Appellant stated that at no time was it made aware that its practices were non-compliant despite the ongoing investigation. The Commissioner was therefore satisfied that condition (b) from section 55A (1) DPA was met. The conduct of the Appellant both during the pandemic and whilst under investigation by the Commissioner were aggravating features in this case. The Commissioner decided that it was appropriate and proportionate to impose a penalty of £250,000.

The Appeal:

[14] The Appellant asked the Tribunal to review both the reasoning and decision of the Commissioner to impose the MPN. The Appellant refuted the Commissioner's assertion that the company exploited the pandemic stating that the business never deviated from its approach. Further, the Appellant stated that the Commissioner, despite numerous requests, failed to provide the evidence, which formed the basis of her decision. The Appellant disputed the Commissioner's argument of invalid consent and challenges the claim that his company took advantage of the pandemic.

Commissioner's Response:

[15] The Commissioner maintained that the penalty is justified by the seriousness and deliberate nature of the breach. Further the Commissioner took account of the existence of aggravating factors. The Commissioner reiterated to the concern raised in that a significant portion of the messages referred to the *"lockdown"* when the population was vulnerable as recorded in the MPN (#44): *"the ratio of complaints to the volume of data subjects in receipt of unlawful texts far exceeds any contravention she has witnessed to date".* Furthermore, the Commissioner considered that the Appellant deliberately proceeded to send large volumes of messages upon receipt of the Commissioner's formal notification of investigation.

[16] The Commissioner re-ordered the "specific points" which form the basis of the appeal in order to mirror the legislative and regulatory scheme:

1) Ground 1. The Commissioner was wrong to conclude that the Appellant had not obtained valid consent from individuals whose personal data it used to send direct marketing messages.

2) Ground 2. The Commissioner was wrong to take into account that the Appellant continued to send unsolicited direct marketing messages both during and after the Commissioner's investigation. The Commissioner did not indicate during her investigation that the Appellant may have been in breach of PECR, and the NoI of 23 November 2020 came "out of the blue".

3) Ground 3. The Commissioner was wrong to conclude that a relevant aggravating feature was that the Appellant sought to capitalise on the pandemic.

4) Ground 4. The Commissioner published the MPN and PEN, as well as an accompanying press release, before giving the Appellant the opportunity to bring a successful appeal to the FTT.

[17] In response to Ground 1 of the appeal, the Commissioner determined that the alleged consent obtained was invalid. The Commissioner asserted that consent was not freely given or informed. The Commissioner contends, in response to the Appellant's second ground, that the breach was deliberate and refers to #50 of the MPN:

"The Commissioner considers that in this case that LWL's actions were deliberate, as despite having been notified that it was under investigation by the Commissioner, and given her concerns about LWL's compliance with PECR, LWL has continued its marketing campaign without making any adjustments to its business model. LWL continues to send unlawful text messages even after the investigation was completed, and a Notice of Intent served upon LWL in which it's practices were deemed non-compliant."

[18] In response to Ground 3, the Commissioner stated that it is impossible to avoid the conclusion that the Appellant modified the wording of its messages in light of the effects of the pandemic to maximise the leads it has generated. In relation to Ground 4, the Commissioner reminded the Tribunal that it does not have the jurisdiction to consider whether the Commissioner was entitled to publish the MPN, PEN and accompanying press release.

The Appellant's Reply

[19] In acknowledgement of the Commissioner's response dated 25 May 2021, the Appellant put forward 5 grounds for the Tribunal to consider:

1) The MPN was unlawfully issued.
2) The ICO unlawfully published the MPN prior to the appeal.
3) The case has been mishandled.
4) There is a lack of proportionality.
5) There are significant consequential damages as a direct result of the ICO's actions.

[20] The Appellant denied that a contravention under section 55A of the DPA occurred and raised concern over the categorisation of the contravention resulting in the Commissioner determining it to be serious. The Appellant contended that the MPN should not have been issued as 'reasonable steps' were taken. The Appellant repeated the claim that the Commissioner's investigation was abnormal and maintained that his requests for guidance were ignored. The Appellant asked the Tribunal to ensure, going forward, that the Commissioner applies a balanced approach and does not mishandle future investigations.

Witness Statement: of Christopher Gibson – PECR Investigator :

[21] Mr Gibson provided a statement in response to the Appellant's assertion at pages 5-6 of his reply dated 7 June 2021 that the increased level of complaints were not due or related to the pandemic.

[22] Mr Gibson explained that a Privacy and Digital Marketing Investigation Team ("PDMIT") was set up in response to the pandemic, in line with the ICO's updated regulatory approach and the initiatives the ICO took included implementing an operation named "7726" (a spam reporting tool) aimed at tackling those who were seeking to use direct marketing to exploit the pandemic. Mr Gibson stated that the modus operandi of this operation was daily monitoring of complaints across several channels looking for keywords such a "covid", "coronavirus", "lockdown" and others.

[23] The complaints monitoring began in March 2020 and continued until the end of July 2021. Mr Gibson exhibited a breakdown of the Covid-related complaints from March 2020 until July 2020, which covered the period of investigation of the activities of Leads Works Limited. The total amount logged came to 6197, of which a number identified would have been related to the Appellant's messages, which included the word "lockdown". Looking at data having excluded the complaints made against the Appellant Mr Gibson concluded from the data analysed *"Thus this trend continued irrespective of Leads Works"*. We do not accept the Appellant's argument there were

reasons unrelated to the pandemic and referencing of “lockdown” which gave rise to the sharp rise in complaints made by those in receipt of communication from his company.

Appellant’s Final Submission:

[24] The Appellant provided a chronology in relation to the letter of intent to highlight the representations lodged to the Commissioner. The Appellant maintained that the Commissioner failed to advise of non-compliance. The Appellant invited the Tribunal to dismiss the MPN. The Appellant claimed that the Commissioner pre-determined the Appellant’s case and unlawfully published the MPN and PEN, and accompanying press release. The Appellant did not accept that a breach of regulation 22 PECR occurred.

Conclusion:

[25] We have considered the Commissioner’s decision to impose a MPN of £250,000 on the Appellant and the arguments put forward on behalf of both parties.

[26] On review of the comprehensive and thorough MPN provided, we commend the Commissioner for the transparency therein. It speaks for itself in its thoroughness and detail. We refute the suggestion that it is in any way unlawful. On the evidence before us we are satisfied that condition (b) from Section 55A (1) DPA is met. As each case turns on its merits, the aggravating factors have been the focus of our deliberations.

[27] Turning to the issue of consent, we find that the Appellant has not satisfied the test in that the consent, as interpreted by the Appellant was neither specific nor informed. The Commissioner provided the Appellant ample opportunity to evidence the consent relied upon, but the Appellant did not avail of these opportunities. Further, it is our considered and unanimous view (on our reading of the papers before us) that the Appellant lacked the requisite clarity for specific intent from the confusion created in the readers’

minds with the marketing messages. We do not accept that consent at any material time can be said to be substantially fair or transparent and unanimously accept entirely the submissions of the Respondent in paragraphs 82 – 103 of the Response of 25 May 2021 (pages 831 to 835 of the Open Bundle "OBN").

[28] We further find that the Appellant's conduct was deliberate and again accept, endorse and adopt the careful reasoning set out in the Respondents Response to the Grounds of Appeal as set out in Paragraphs 104 to 110 (Pages 835 to 837 of the OB) before us.

[29] In relation to the extent of how serious the breach was, we again refer to and accept the careful analysis of the evidence as provided in the Respondents Response of 25 May 2021 (Pages 837 – 838 OB). The Appellant continued to send significant numbers of marketing texts to individuals throughout, and since the Respondents investigation commenced, incurring a substantial amount of complaints.

[30] The Appellant was registered with the ICO as a Data controller and would, or should, have been aware of the Regulations and as sender of the impugned Texts was responsible to ensure valid consent had been obtained prior to transmission. The Appellant contended that he conducted his own privacy policy, however, has relied upon the due diligence of third parties for the purposes of marketing messages. We also find the Appellant clearly had not read, or had misread, reports upon which he claims to have relied.

[31] We accept, endorse and adopt the Commissioner's conclusion at MPN 45 that, *"it is reasonable to suppose that the volume of contraventions is actually significantly higher, and spanned a broader period of time".*

[32] We refer to the Appellant's argument detailed below to highlight the Appellant's fundamental misunderstanding of the Commissioner's role. The Commissioner informed the Appellant that they were under investigation for

non-compliance. As a result, the Appellant requested evidence of non-compliance. It is a fundamental understanding, that in any such investigation the onus is not on the Commissioner to disclose details of an investigation before a conclusion has been reached.
“The ICO stated that they told us during the investigation phase that we were not compliant and that we carried on regardless. I have repeatedly asked for the evidence of where they told us this but it has never been provided to me, and in checking through every bit of communication that I have received there is nothing that even suggests that, let alone states that”. The Tribunal reminds the Appellant that it is trite Law to say that compliance is the Responsibility of the Appellant at all times.

[33] The Appellant acknowledged he was operating his business in breach of PECR regulation 23, yet he continued to conduct his business while under investigation without any attempt to remedy that breach: therefore we endorse the Commissioner's decision to determine the Appellant's breach deliberate."

[34] We refer the Appellant to the Commissioner's letter of 15 May 2020, which formally opened the investigation, and to the Commissioner's letter dated 24 July 2020 which stated; *"...we will now consider whether formal enforcement action is appropriate in this case. I refer you to my introductory letter of 15 May 2020, which explains the Commissioner's powers. I will take this opportunity to remind you that all options are under consideration."* The Tribunal completely rejects the Appellant's argument that the NoI came "out of the blue".

[35] The Tribunal would expect the Appellant to be properly satisfied of his own compliance with due diligence in advance of his endeavours resulting in infringement at the outset, or to seek advice if necessary, to be satisfied that due diligence had been effective, when challenged by the Commissioner. If not so satisfied, he should immediately have ceased his impugned conduct. However, there is no evidence before us of meaningful consultation or legal advice with those he had engaged in relation to due diligence checks. He did continue with non-compliance while under investigation. We do not accept

that the contracts he entered into in this regard did, or could, amount to a defence for his failure in compliance. The onus is on the Appellant, at all material times to ensure compliance. The Commissioner is under no duty to provide advice to the Appellant.

[36] The Appellant makes the assertion that his business "NEVER deviated from what it was doing before the pandemic". The Tribunal remind the Appellant that his marketing message read as follows, *"In lockdown and want to earn extra cash?".* We find that this is a direct contradiction of the previous assertion by the Appellant.

[37] The Tribunal takes no issue with the £250,000 MPN. We accept, adopt and endorse the Commissioner's calculations and in particular her comprehensive assessment of the aggravating factors in this case. It is clear to the Tribunal that the value of the MPN is balanced upon the number of complaints recorded by PDMIT's operation. The Respondent, familiar with many breaches commented on the significantly high numbers involved in this investigation. We find the fine to be proportionate on all the facts before us in this instance.

[38] In our deliberations we adopt the careful reasoning of the Upper Tribunal in Leave.EU and Eldon v Information Commissioner: [2021] UKUT 26 (AAC) at paragraph [109]:

"In an attempt to buttress his submissions on proportionality, Mr Facenna also took us to the Table of other MPNs which he had handed up before the FTT. This listed all other MPNs issued by the Commissioner between 2017 and 2019 and purported to set out the key features of each case. We agree with Mr Knight that an exercise by reference to other financial penalties is not particularly helpful. Each MPN has no precedent value in its own right and the cases inevitably turn on their own facts. Further, all of the previous MPNs related to more conventional forms of spamming"

[39] Having considered all of these factors we do not accept the Appellant's 5 submissions at Paragraph **[19]** above, and for the reasons given above we find;

1) The MPN of 1 March 2020 is lawful and is upheld.
2) The MPN was published in the usual manner by the ICO.
3) We see no relevant or significant evidence to support the submission that the Commissioner has mishandled the investigation of this case.
4) Given the serious nature and extent of the breach, the deliberate nature and extent of the continuing breach and the volume of complaints, together with the other aggravating factors taken into account by the Commissioner in her Decision-making, we find the Decision and MPN proportionate in all the circumstances.
5) The consequences of the Lawful Decision made by the Commissioner are not a matter for, or within the jurisdiction of, this Tribunal.

[40] For the above reasons we dismiss this appeal.

Brian Kennedy QC 11 October 2021.

Promulgated: 13 October 2021