EA/2018/0113

ALEX GOLDTHORPE

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

BEFORE

Brian Kennedy QC Paul Taylor and Steve Shaw

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 48 of the Data Protection Act 1998 ("DPA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in final Monetary Penalty Notice dated 16 April 2018 (reference ENF0688592), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 1 November 2018 and after agreed Directions and further submissions, again to deliberate on 19 December 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal and the Commissioner's decision are set out in the final Monetary Penalty Notice and in the Commissioners' further detailed submissions dated 9 November 2018, not repeated here, other than to state that, in brief, the appeal concerns whether the Commissioner was correct to issue a penalty in Mr Goldthorpe's case for breaches of the Privacy and Electronic Communications Regulations 2003/2426 (PECR).

Chronology:

1 April – 30 July 2017	107 complaints received from individuals registered with Telephone Preference Service ("TPS") that they had received unsolicited calls from the Appellant's company
30 June 2017	Commissioner writes to company detailing complaints and requesting an explanation
24 July 2017	Commissioner sends chaser letter as no response received
31 July 2017	Response from Appellant confirming telemarketing and claiming no access to or knowledge of TPS register.
12 January 2018	Commissioner's Notice of Intent to impose £150,000 penalty
10 February 2018	Appellant admits faults but requests reconsideration of amount of penalty
27 February 2018	Appellant recants admissions regarding all save for lack of training and registration as data controllers, requests reconsideration of imposition of any penalty
16 April 2018	Final Monetary Penalty Notice upholding decision and amount
28 May 2018	Notice of Appeal

Relevant Decision:

Privacy and Electronic Communications Regulations 2003 ("PECR").

Regulation 21 Unsolicited calls for direct marketing purposes

(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where—

(a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or

(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.

(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.

Data Protection Act 1998

Section 11 - Right to prevent processing for purposes of direct marketing.

(1) An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject.

(2) If the court is satisfied, on the application of any person who has given a notice under subsection (1), that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit.

...

(3) In this section “direct marketing” means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

Section 17 - Prohibition on processing without registration.

(1) Subject to the following provisions of this section, personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Commissioner under section 19 (or is treated by notification regulations made by virtue of section 19(3) as being so included).

(2) Except where the processing is assessable processing for the purposes of section 22, subsection (1) does not apply in relation to personal data consisting of information which falls neither within paragraph (a) of the definition of “data” in section 1(1) nor within paragraph (b) of that definition.

Section 48 - Rights of appeal.

(1) A person on whom an enforcement notice, an assessment notice, an information notice or a special information notice has been served may appeal to the Tribunal against the notice.

(2) A person on whom an enforcement notice has been served may appeal to the Tribunal against the refusal of an application under section 41(2) for cancellation or variation of the notice.

Section 55A - Power of Commissioner to impose monetary penalty

(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—

(a) there has been a serious contravention of section 4(4) by the data controller,

(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c) subsection (2) or (3) applies.

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

(3)This subsection applies if the data controller—

(a) knew or ought to have known —

(I) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b) failed to take reasonable steps to prevent the contravention.

(3A) The Commissioner may not be satisfied as mentioned in subsection (1) by virtue of any matter which comes to the Commissioner's attention as a result of anything done in pursuance of-

(a) an assessment notice;

(b) an assessment under section 51(7).

(4) A monetary penalty notice is a notice requiring the data controller 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.

(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.

<u>Commissioner’s Penalty notice:</u>

[4] The Commissioner explained that the Appellant is a sole trader trading as Approved Green Energy Solutions ("AGES"), and in the course of his communications with the Commissioner ; he stated that AGES buys data from a third party and did not know how to get the TPS register. In an attempt to prevent calls to those who had previously indicated that they did not consent to contact, AGES cross-referenced old data with newly purchased data sets and manually removed numbers. There was no formal training for staff, and the Appellant was unaware of a legal obligation under DPA to register with the ICO.

[5] Enquiries revealed that between 1 April and 24 July 2017, AGES made 414,482 connected unsolicited direct marketing calls. Of this, 334,879 (80.9%) were to subscribers to TPS. This resulted in 107 complaints to TPS and the Commissioner, and a finding that the Appellant had breached Regulation 21 PECR. The high volume of calls, the percentage of calls to TPS subscribers, and the lack of any proper contractual safeguards to ensure the veracity of data purchased led the Commissioner to conclude that the contravention was serious.

[6] It was accepted that the Appellant did not deliberately contravene the regulations, but because his company relied so heavily on direct marketing he should have known that that such actions would risk contravention of the law. The Commissioner published detailed guidance for companies operating under PECR, and TPS contacted the Appellant on each occasion that a complaint was made to it. There were insufficient safeguards in the Appellant's business, and he had failed to take reasonable steps to prevent the contravention. A penalty of £150,000 was deemed to be reasonable.

<u>Grounds of Appeal:</u>

[7] The Appellant stated that "much of the information" regarding the arrangements for data purchase, training and the amount of connected unsolicited calls was "untrue and were provided by a member of the administrative team and not by myself". He also denied that as a "sole trader" he ought to have known "the inner workings of the ICO". The Appellant also claimed that the level of the fine would result in him having to cease trading.

<u>Commissioner's Response:</u>

[8] The Commissioner noted; that the facts on which she relied in making her decision were supplied by a Barrie Goldthorpe on behalf of AGES. At no stage prior to the Notice of Appeal did Alex Goldthorpe attempt personally to engage with the Commissioner. Barrie Goldthorpe held himself out in correspondence as the only person in the business other than Alex Goldthorpe that could deal with company accounts, and therefore the Commissioner was satisfied that the representations of Barrie Goldthorpe can be relied

upon as to the practices of the Appellant. Numerous contradictory statements appear between documents sent by AGES prior to the Final Notice and after the Notice of Appeal.

[9] The Appellant, as a businessman in the field of direct marketing, had every reason to know the legal obligations imposed on him by virtue of his business. This was compounded and exacerbated by the fact that TPS actually contacted him on each occasion that a complaint was received about his conduct.

[10] The Commissioner also asserted that the level of the fine was reasonable, citing the potential maximum fine of £500,000 and casting doubt on some of the expenditure claimed in the Appellant's purported company accounts.

Tribunal Oral Hearing of the Appeal on 01 November 2018.

[10] The Commissioner was represented by Mr Leo Davidson of Counsel. The Appellant was called within the precinct of the Court Building several times but there was no appearance on behalf of the Appellant, nor any explanation given to the Tribunal administration as to the failure of the Appellant to attend the hearing of the Appeal. Submissions were made on behalf of the Commissioner and in light of queries raised by the Tribunal and in the absence of the Appellant at the hearing the Tribunal issued Directions for the service of more detailed submissions by the Commissioner to be served on the Appellant and an opportunity for the Appellant to respond.

Tribunal Deliberations on 19 December 2018.

[11] The Tribunal now has the advantage of comprehensive and detailed evidence through a witness statement with exhibits, including a sample letter notifying AGES of a complaint. This statement, dated 9 November 2018, from Arthur Cummings who has been employed by Direct Marketing Association (UK) Limited ("DMA") since May 20005. The Telephone Preference Service Limited ("TPA") was a subsidiary company of the DMA and Mr Cummings had carried out a comprehensive investigation into complaints from subscribers who had registered their telephone numbers with TPS but who subsequently received unsolicited direct marketing calls from AGES and complaints on behalf of subscribers who had complained about their receipt of unsolicited direct marketing calls after their registration on their telephone numbers on the TPS file.

[12] The evidence before us effectively demonstrates how TPS offers a complaint handling service to subscribers and organisations who continue to receive unsolicited direct marketing calls to the TPS registered telephone numbers after such numbers have been registered for 28 days or more. We can also see from a sample letter of the type used to notify AGES about each complaint, that this contains details of the requirements of PECR and the DPA 1998, together with the risk of monetary penalties for non-compliance. We have a detailed explanation of the time taken to process complaints and precisely how the complaints are recorded and compiled. We have the detailed evidence of the Complaints received specific to AGES, the Appellant Company between 1 April 2017 and 31 July 2017 provided by Mr Cummings, for the Commissioner in an excel sheet (Exhibit1).

[13] The Tribunal were presented with evidence which demonstrates AGES were provided with comprehensive details of 88 complaints within the relevant timescale and given the opportunity to respond electronically via their correct company response portal or by completing and returning in the post a hard copy response (Exhibit 2). AGES did respond electronically via the company response portal to the complaints issues. The Tribunal are satisfied that someone at AGES accessed the Company Response portal using their unique login credential supplied by TPS and submitted their response to the complaint. On the evidence before us, the Tribunal further accept that the earliest complaints go back to April 2017; a response to one of these was made by AGES on 4 April 2017 meaning that by then they were aware, in view of the letter sent to them by TPS, that they were engaged in a compliance breach. On 89 occasions AGES were reminded of their obligation to comply with PECR. Further investigations revealed another 146 complaints covering the period 1 August 2017 – 09 November 2018 (Exhibit 3) The Tribunal notes that this includes contraventions of compliance obligations on the day of the first hearing of the Appellant's appeal to this Tribunal on 1 November 2018 (See Exhibit 3 at internal Page 1 16 lines from bottom).

[14] On considering the evidence of Mr Cummings, this Tribunal accepts the submission that the Appellant continued to make unsolicited marketing calls in breach of reg 21 PECR beyond July 2017 and after the Commissioner had contacted the Appellant with details of her investigation. We accept that this continued disregard for the privacy rights of individuals in light of the Commissioners investigation demonstrates egregious failure on the part of the Appellant to amend his practices to comply with the law. We also accept on the Commissioners evidence that this was in direct contradiction to an explicit assurance

that those practices would cease, which the Commissioner had taken into account as a mitigating factor when setting the amount of the monetary penalty.

[15] We accept and adopt the Commissioner’s reasoning and justification in the calculation of the penalty fine imposed as set out at pages 13 – 16 (of 18) of the Commissioners’ Enforcement Report and at page 6 the further submissions (and witness statement of Mr Cummings with exhibits) dated 9 November 2018 of Mr Davidson of counsel on 9 November 2018 before this Tribunal, which were served on the Appellant.

[16] In the course of our deliberations on 19 December 2018, this Tribunal checked to find if the Appellant had responded to the Commissioners submissions of 9 November 2018 or supplied any reason for failing to attend the Appeal at any stage. There have been no representations made by or no behalf of the Appellant to the Tribunal administration.

[17] This Tribunal finds that the Appellant has, from the outset, demonstrated a conscious disregard for the rights of the public, and his own legal obligations. This, on the Commissioners clear evidence and submissions, we accept is partly attributable to a wilful ignorance, and partly a cynical prioritisation of his own business interests over those at the receiving end of his “business model”. The inconvenience and distress caused to his victims, in their hundreds of thousands, was a price he was willing to pay to generate clients. It is a serious breach reflected in the monetary fine imposed. Further, we note his blatant disregard and abuse of this appeal process, with evidence of on-going breaches on the 01 (the date of his Appeal hearing) & again on 06 November 2018, which we find, demonstrates flagrant disregard for the use of public funds.

[18] In all the circumstances and in light of the fact that the Commissioner had taken into account as mitigating factor the appellant’s assurance to the Commissioner that his practices would cease lead us to the conclusion that we are justified in increasing the fine to £200,000.00 and accordingly hereby do so.

Brian Kennedy QC 24 December 2018.

Promulgated 27 December 2018.