Appeal number: EA/2019/0134

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

AKRISE ACCOUNTANCY LTD **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: Judge Moira Macmillan
Mr Nigel Watson
Mr John Randall

Determined on the papers, the Tribunal sitting in Chambers on 5 August 2019

DECISION

1. The appeal is dismissed.

2. The Penalty Notice dated 1 April 2019 is confirmed.

REASONS

Background to Appeal

3. The Appellant is a data controller within the meaning of the Data Protection Act 2018[1] ("DPA"). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 ("the Regulations")[2]. As a "tier 1" organisation, the Appellant's fee was £40 .

4. The Appellant failed to provide the Respondent with the information required by regulation 2 (3) of the Regulations or to pay to the Respondent the Data Protection Fee required by regulation 2 (2) of the Regulations by the compliance date of #27 June 2018.

5. The Respondent served a Notice of Intent on 26 November 2018 and, in the absence of any representations from the Appellant, served a Penalty Notice of £400 on 1 April 2019.

6. The Appellant has appealed to this Tribunal on the basis that its default was an innocent mistake and asks that the penalty be revoked by the Tribunal.

Appeal to the Tribunal

7. The Appellant's Notice of Appeal dated 4 April 2019 relies on grounds that the failure to pay the fee was an oversight, the Appellant having forgotten that the fee was due. The Appellant has provided evidence that the person who operates the Appellant company underwent surgery in July 2018 that necessitated a period of recovery.

8. The Respondent's Response dated 1 May 2019 resists the appeal. She submits that the Penalty regime has been established by Parliament and that there is no requirement to issue reminders (although a reminder was fact been sent in this case). It is accepted that the Appellant's failure to comply with the Regulations was due to an oversight, but it is submitted that the imposition of a Penalty was appropriate in all

[1] http://www.legislation.gov.uk/ukpga/2018/12/contents

[2]The Regulations were made under s. 137 DPA. See http://www.legislation.gov.uk/uksi/2018/480/contents/made

the circumstances. The Respondent notes that the Appellant had been a data controller prior to the commencement of the Regulations and had paid the relevant fees under the earlier legislation so should have had relevant administrative systems in place. It is submitted that the level of penalty is appropriate.

9. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 41 pages.

The Law

10. The Regulations came into force on 25 May 2018. They replace the previously applicable regulations, made in 2000. Regulation 2 requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt). It also requires the data controller to supply the Information Commissioner with specified information so that she can determine the relevant charge, based on turnover and staff numbers.

11. A breach of the Regulations is a matter falling under s. 149 (5) of the DPA. Section 155 (1) of the DPA provides that the Information Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S. 158 of the 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*[3]. The specified penalty for a tier 1 organisation which breached regulation 2(2) is £400. The statutory maximum penalty is £4,350, which will be appropriate where there are aggravating factors.

12. Schedule 16 to the DPA makes provision as to the procedure for serving Penalty Notices, which includes the service of a Notice of Intent written inviting representations.

13. 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."*

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

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[3] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

(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.

…

15. 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.

16. 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).[4] There is much case law concerning what is and is not a "reasonable excuse" and it is inevitably fact-specific. An oft-cited definition is the one used by the VAT Tribunal (as it then was) in *The Clean Car Company v HMRC* (LON/90/1381X) as follows:

"…the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and,

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

doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse…."

The Facts

17. There appears to be no dispute between the parties as to the facts in this case. The Appellant implicitly accepts that it received the relevant Notices.

18. The Appellant expressly accepts that it was in breach of its legal obligations under the Regulations on the relevant date. It said that it did so because the obligation was remembered and then forgotten.

19. The Appellant has provided any corroborating evidence of medical appointments and treatment relating to the person it describes as its sole operator. There were 6 such appointments between December 2017 and October 2018.

20. The Respondent has provided the Tribunal with copies of the correspondence and Notices that were sent.

21. *Conclusion*

22. We have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Regulations. We conclude that it has not. We conclude that a reasonable data controller would have systems in place to comply with the Regulations and that the Appellant has pointed to no particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller.

23. In reaching this conclusion we note the medical treatment that the Appellant's sole operator underwent during July 2018, but also that a period of 9 months passed between the Appellant being first reminded of its obligation in June 2018 and the Penalty Notice being issued.

24. We have considered whether there is any basis for departing from the Respondent's policy as to the imposition of a tier 1 £40 fee in the circumstances of this case. Having noted that the Appellant does not challenge whether the fee was due, we have concluded that there is no such basis.

25. Having regard to the relevant principles, we note that the Appellant in this case has not presented any evidence of financial hardship and we therefore see no reason to depart from the Respondent's assessment of the appropriate penalty.

26. For all these reasons, the appeal is now dismissed and the Penalty Notice is confirmed.

Tribunal Judge Moira Macmillan **DATE: 8 October 2019**
DATE PROMULGATED: 9 October 2019