



Appeal number: EA/2019/0188/P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

TIGER MOBILES LIMITED

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE MOIRA MACMILLAN

Determined on the papers, the Tribunal sitting in Chambers on 17 April 2020

DECISION

1. The appeal is dismissed.
2. The Penalty Notice dated 14 May 2019 is confirmed.

REASONS

Background to Appeal

3. The Appellant is registered as a data controller within the meaning of the Data Protection Act 2018¹ (“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 29 May 2018.

5. The Respondent served a Notice of Intent on 7 January 2019 and, in the absence of any representations from the Appellant, served a Penalty Notice of £400 on 14 May 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 relies on grounds that it is not a data controller, notwithstanding that its website explains to subscribers that their data may be passed to 3rd parties for analytical purposes, informs them that they may be contacted by mobile phone or network subscribers and links to the Appellant’s data protection registration certificate. The Appellant submits that it only uses personal data for its own marketing, advertising, and public relations. It acknowledges that it registered as a data controller between 2014 and 2017, but stated it decided in 2018 that it was exempt from this requirement.

¹ <http://www.legislation.gov.uk/ukpga/2018/12/contents>

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

8. The Appellant states that it believed it could allow its registration to lapse, rather than having to inform the Respondent of its changed status. Further, the Appellant submits that it did not receive the Notice of Intent.

9. The Respondent's Response dated 1 July 2019 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 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.

10. 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 55 pages.

The Law

11. 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.

12. 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 3 organisation which breached regulation 2(2) is £4,000. The statutory maximum penalty is £4,350, which will be appropriate where there are aggravating factors.

13. 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.

14. 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."

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

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

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(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.

...

16. I 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.

17. 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 an 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

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

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, 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

18. There is some dispute between the parties as to the facts of this case. The Appellant does not accept that it is a data controller, although it accepts that it failed to inform the Respondent that it no longer considered itself such.

19. The Appellant therefore implicitly accepts that it was in breach of its legal obligations under the Regulations on the relevant date, as it neither paid the fee nor provided the required information.

20. The Appellant has not provided any corroborating evidence to support its contention that it was not a data controller at the relevant date, notwithstanding the information on its website. It submits that the website’s privacy policy was incorrect.

21. The Respondent has provided the Tribunal with copies of an email reminder sent to the Appellant on 14 May 2018; a reminder letter sent to the Appellant’s registered address on 3 August 2018; the Notice of Intent sent on 7 January 2019 and the Penalty Notice. All correspondence sent by post was sent to the same address.

22. The Respondent has also provided the Tribunal with copies of the privacy policy section of the Appellant’s website.

Conclusion

23. I have considered whether the Appellant is a data controller as defined in s. 6 DPA and article 4(7) GDPR. I conclude on the balance of probabilities that the Appellant held itself out as a data controller at the relevant time, because its website alerted customers to activity which, ‘[either] *alone or jointly with others, determines the purposes and means of the processing of personal data.*’

24. I have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Regulations. I conclude that it has not. I conclude that a reasonable data controller would have systems in place to comply with the Regulations and, in the circumstances put forward by the Appellant, to inform the Respondent that it no longer considered itself to be a data controller. I find that a reasonable data controller would expect such a change of status to be properly notified and considered. I note that the Appellant has pointed to no particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller in this regard.

25. I have considered whether there is any basis for departing from the Respondent's policy as to the imposition of a £400 fixed fee in the circumstances of this case. I have concluded that there is not.

26. Having regard to the relevant principles, I note that the Appellant in this case has not presented any evidence of financial hardship which could affect the penalty.

27. I see no reason to depart from the Respondent's assessment of the appropriate penalty.

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

JUDGE MOIRA MACMILLAN

DATE: 29 APRIL 2020