



Appeal number: EA/2021/0233 FP

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

**ABC HILLINGDON Ltd
T/A ABC HOUSING**

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALISON MCKENNA
SUZANNE COSGRAVE
MARION SAUNDERS**

Determined on the papers, the Tribunal sitting in Chambers on 11 January 2022

DECISION

1. The appeal is dismissed. The Penalty Notice is confirmed.

REASONS

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 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence.

Background to Appeal

3. The Appellant was registered as a data controller within the meaning of the Data Protection Act 2018¹ (“DPA”) prior to August 2020. As such, it was required to comply, and did comply, with the Data Protection (Charges and Information) Regulations 2018 (“the Regulations”)². As a “tier 2” organisation, the Appellant’s annual fee was £60.

4. The Appellant failed to renew its registration in October 2020 did not pay to the Respondent the Data Protection Fee required by regulation 2 (2) of the Regulations by the compliance date of 29 October 2020.

5. The Respondent served a Notice of Intent on 24 June 2021 and, in the absence of any representations from the Appellant, served a Penalty Notice of £600 on 1 August 2021. The Appellant has appealed to this Tribunal, asking for the penalty to be revoked.

Appeal to the Tribunal

6. The Appellant’s Notice of Appeal dated 27 August 2021 relies on grounds that it had moved premises in August 2020 and that, as the new premises did not have CCTV installed, the renewal was unnecessary. Accordingly, its position is that the penalty was unwarranted.

7. The Respondent’s Response dated 1 October 2021 resists the appeal. It submits that, having reviewed the Appellant’s website, it appears to be a data controller quite

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>

independently of the operation of CCTV, because it clearly controls and processes data (including sensitive data) relating to its vulnerable housing clients and the staff who support them. It notes that, despite the Appellant moving premises, it has not suggested that it did not receive the several letters of reminder sent to it. In any event, they were also sent by email to the email address given on the Notice of Appeal.

8. The Appellant has not filed a Reply explaining its position further and has not disputed the Respondent's finding of fact that it remained a data controller despite moving to premises without CCTV.

The Law

9. 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.

10. 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 2 organisation which breached regulation 2(2) is £600.

11. 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.

12. Section 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.*"

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

163 Determination of appeals

(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

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

(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.

...

14. 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.

15. 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, 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

16. The Respondent has made a finding of fact, having reviewed the Appellant's website, that it is a Data Controller. This was apparently not disputed by the Appellant prior to 2020, but the Appellant then formed the view that it was no longer

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

required to be registered and pay the fee after it ceased to operate CCTV. It is unclear why the Appellant reached this view.

17. We have looked at the extracts from the Appellant's website provided by the Respondent. These refer to the Appellant as having staff who support vulnerable young people, e.g., those leaving care, and to the Appellant's role in securing bespoke housing solutions for these clients, working with other key stakeholders such as the police and social services. It seems inconceivable that the Appellant would not be handling personal data (including special category or 'sensitive' personal data) given its field of operation.

18. The only evidence provided by the Appellant relates to its moving date. We accept it as accurate but do not consider that it is relevant to the key issue in this appeal. As noted above, the Appellant has not disputed the Respondent's finding of fact.

19. The Tribunal agrees with the Respondent's finding of fact that, as a result of its core activities, the Appellant was, and remained, a data controller. We find that the operation of the CCTV was a factor in its requirement to register in the past but was not the only reason. Its core activities in our view required it to comply with Regulation 2 (2) in renewing its registration in October 2020, by paying the fee and supplying the relevant information, notwithstanding the absence of CCTV. It failed to do so.

Conclusion

20. 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 taken professional advice about its obligation to comply with the Regulations and/or asked the Information Commissioner's Office for assistance. We note that despite communications from the ICO in September and October 2020 and in March, May and June 2021, the Appellant did not engage with the process which ultimately led to a penalty being issued. The Appellant has pointed to no particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller.

21. We have considered whether there is any basis for departing from the Respondent's policy as to the imposition of a £600 fixed penalty in the circumstances of this case. Having regard to the relevant principles, we note that the Appellant in this case has not presented any evidence of financial hardship which could affect the penalty. We see no reason to depart from the Respondent's assessment of the appropriate penalty.

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

(Signed)

JUDGE ALISON MCKENNA

DATE: 11 January 2022