



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2019/0342 V

Between

COMPLETE FITNESS GYMS LIMITED

Appellant

and

INFORMATION COMMISSIONER

Respondent

Before

JUDGE HAZEL OLIVER

Appearances:

Appellant – Mr Simon Hill
Respondent – did not attend

Determined at a remote hearing via video (Cloud Video Platform) on 29 January 2021

DECISION

1. The appeal is allowed
2. The Penalty Notice dated 4 September 2019 is revoked

REASONS

1. Complete Fitness Gyms Limited (the “appellant”) has appealed against a fixed Penalty Notice issued by the Information Commissioner (the “Commissioner”) on 4 September 2019 requiring the appellant to pay a fixed penalty of £400 for non-payment of the charge due from the appellant as a data controller.

2. The proceedings were held by video (CVP). All parties joined remotely. I was satisfied that it was fair and just to conduct the hearing in this way. The appellant was represented by

Mr Simon Hill, the sole director of the respondent. The Commissioner did not attend the hearing, having informed the Tribunal in advance that she did not intend to do so.

Applicable Law

3. Data controllers have a legal obligation to pay an annual charge and provide information to the Commissioner under the Data Protection Act 1998 (“DPA”) and the Data Protection (Charges and Information) Regulations 2018 (the “Regulations”). The Regulations came into force on 25 May 2018. They replace the previously applicable regulations, made in 2000.

4. Under the Regulations:

- a. A data controller is to pay a charge to the Commissioner within 21 days of the beginning of the relevant charge period (Regulation 2(2)).
- b. For data controllers prior to 25 May 2018, the charge period is 12 months beginning on the date which is 12 months after the last fee was paid to the Commissioner, and each subsequent period of 12 months (Regulation 2(6)(a)).
- c. The amount of the charge depends on which one of three tiers the data controller is in, based on type of organisation, turnover and members of staff (Regulation 3(2)). The fee for tier 1 is £40, for tier 2 is £60, and for tier 3 is £2,900 (Regulation 3(1)).

5. The Commissioner can issue a Penalty Notice for a failure to comply with the Regulations. The Commissioner has published a Regulatory Action Policy specifying the amount of the penalty for a failure to comply with the Regulations, in accordance with section 158 DPA. For a breach of Regulation 2(2) the penalty for a tier 1 organisation is £400 / tier 2 organisation is £600 / tier 3 organisation is £6,000.

6. Schedule 16 DPA sets out the procedure for imposing a penalty. Paragraph 2 requires the Commissioner to send a Notice of Intent before issuing a penalty:

- 2 (1) *Before giving a person a penalty notice, the Commissioner must, by written notice (a “notice of intent”) inform the person that the Commissioner intends to give a penalty notice.*
- (2) *The Commissioner may not give a penalty notice to a person in reliance on a notice of intent after the end of the period of 6 months beginning when the notice of intent is given, subject to sub-paragraph (3).*
- (3) *The period for giving a penalty notice to a person may be extended by agreement between the Commissioner and the person.*

7. A Notice of Intent must specify a period for the data controller to make written representations about the Commissioner’s intention to give a penalty notice (at least 21 days), and may also specify a time for making oral representations (paragraph 3). The Commissioner may not give a Penalty Notice before the end of the time specified in the Notice of Intent for making oral or written representations. If representations are made within the specified time, the Commissioner must consider them before deciding whether to issue a Penalty Notice (paragraph 4).

8. Section 141 DPA sets out various options by which the Commissioner can serve a notice required under the DPA:

141 Notices from the Commissioner

- (1) *This section applies in relation to a notice authorised or required by this Act to be given to a person by the Commissioner.*

- (2) *The notice may be given to an individual—*
 - (a) *by delivering it to the individual,*
 - (b) *by sending it to the individual by post addressed to the individual at his or her usual or last-known place of residence or business, or*
 - (c) *by leaving it for the individual at that place.*
- (3) *The notice may be given to a body corporate or unincorporate—*
 - (a) *by sending it by post to the proper officer of the body at its principal office, or*
 - (b) *by addressing it to the proper officer of the body and leaving it at that office.*
- (4) *The notice may be given to a partnership in Scotland—*
 - (a) *by sending it by post to the principal office of the partnership, or*
 - (b) *by addressing it to that partnership and leaving it at that office.*
- (5) *The notice may be given to the person by other means, including by electronic means, with the person’s consent.*
- (6) *In this section—*
 - “principal office”, in relation to a registered company, means its registered office;*
 - “proper officer”, in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs;*
 - “registered company” means a company registered under the enactments relating to companies for the time being in force in the United Kingdom.*
- (7) *This section is without prejudice to any other lawful method of giving a notice.*

9. The language of section 141 engages section 7 of the Interpretation Act 1978 which is of general application, subject to any contrary statutory provision:

7 References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

10. In cases where the timing or fact of delivery or receipt of a notice is a relevant issue, the presumption of effective service may be rebutted where a party proves, on the balance of probabilities, that the notice was either not received on time or at all.

11. A person who receives a Penalty Notice may appeal it to the Tribunal in accordance with section 162(1)(d) DPA. The appeal may be against the issue of the Notice, and/or the amount of the penalty (section 162(3)).

12. The jurisdiction of the Tribunal is set out in section 163 DPA:

- (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.*

13. For the Penalty Notice under appeal to have been brought 'in accordance with the law', the Commissioner must have complied with the requirements of Schedule 16 DPA, including the requirements relating to the Notice of Intent.

14. 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. This approach was approved by the Upper Tribunal in ***The Pensions Regulator v Strathmore Medical Practice*** [2018] UKUT 104 (AAC).

Facts

16. I have considered the appellant's notice of appeal document and the Commissioner's response document, the agreed bundle of documents provided by the Commissioner, and final written submissions from the appellant. I have also considered the oral submissions from Mr Hill on behalf of the appellant at the hearing. I find the following material facts.

17. The appellant is Complete Fitness Gyms Limited and is the data controller. It is not in dispute that the appellant was a data controller who was required to pay a charge to the Commissioner. The appellant had paid a fee prior to 25 May 2018 under the previous rules. It is also not in dispute that the appellant is a tier 1 organisation, meaning the applicable charge is £40 and the fixed penalty for failure to comply is £400.

18. The Commissioner sent Mr Hill of the appellant company a reminder of the need to pay the charge by email and letter. The email was sent on 10 June 2018 and the letter is dated 20 August 2018, and both contain the same information. They explain that the appellant's registration as a data controller expires on 1 July 2018 and the appellant is required to renew the registration, or cancel it if circumstances have changed. They say the appellant is now required to pay £40.

19. The email was sent to Mr Hill. He accepts that he received this email. He says he sent it on to his then accountants to deal with. They had dealt with the previous data protection fee. His usual practice is to send official letters of this nature to his accountants, so that they can verify what is required and pay any fees on his behalf. He did not hear anything back from his accountants about this. At around the same time he was becoming unhappy with the service they had provided to him, and he changed to new accountants in September 2018.

20. The letter containing this information was addressed to Mr Hill at De Vere House, 90 St Faith's Lane, Norwich, NR1 1NE. This was an old registered address. Companies House records show that this had changed in November 2017. Mr Hill did not receive this letter.

21. The Commissioner sent a Notice of Intent to the appellant on 28 March 2019. This gave the appellant the options to pay the charge or make written representations by 18 April 2019. The Notice of Intent was sent to 10a Castle Meadow, Norwich, NR1 3DE. This was the registered office address of the appellant from 13 November 2018. It is actually the address of the appellant's new accountants, Norwich Accountancy Services Limited.

22. The appellant did not pay the charge or make written representations by 18 April 2019. The Commissioner issued a fixed Penalty Notice to the appellant on 2 September 2019 for the sum of £400. This was sent to the same address as the Notice of Intent and was received by the appellant's new accountants.

23. Mr Hill explained that his accountants deal with post sent to the appellant's registered office address, and will contact him about anything that needs to be dealt with. Stefan Markovic from Norwich Accountancy Services Limited also provided a letter for the purposes of this hearing. The letter confirms that they act as agents and accountants for the appellant, and since September 2018 have dealt with all the accounting and tax affairs. The letter states that they always forward any relevant documentation to their client, and it is their professional standard and duty to ensure this happens. The letter goes on to say, "*We can honestly say that the original letter was never received by our firm. If we had, like many other letters issued by the ICO, we forward them straight to our clients and they pay the small fee associated*".

Appeal grounds

24. The appellant says that he sent the original reminder email for his then accountants to deal with. The reminder letter was sent to the wrong address and he never received it. Neither he nor his accountants received the Notice of Intent. Had he been aware of the need to pay the £40 charge, he would have done so. He says that the method of sending letters by second class post is unreliable. The Commissioner should email to notify data controllers about a Notice of Intent, rather than simply sending an email about the Penalty Notice itself.

25. The Commissioner resists the appeal. The Commissioner's response says that there was no requirement to send reminders, but she does so as a matter of practice. The appellant was reminded of its legal duties both before and after the date by which the charge was due to be paid. The appellant accepts that the email reminder was received and sent on to its accountant. The appellant has not provided any good reason for failing to comply with its legal obligations. The Notice of Intent was sent to the appellant's correct address.

Conclusions

26. I have considered whether the appellant has a reasonable excuse for failing to comply with its legal duty to pay the annual charge as a data controller. I find that the appellant does not have a reasonable excuse.

27. There is no legal requirement on the Commissioner to issue reminders before and after the charge is due to be paid. Nevertheless, the Commissioner sent the appellant an email and a letter. I accept that the letter sent in August 2018 was not received by the appellant, as it was sent to the wrong address. However, the email sent in June 2018 was received by the appellant. This contained the same information as the letter.

28. Mr Hill's explanation is that he sent this email on to his then accountants to deal with. I appreciate that it can be difficult for small businesses to deal with lots of regulatory correspondence, and it is common to engage professional advisers to act on their behalf. However, the legal duties remain with the business. The appellant must ensure that it has competent professional advice, and that those advisers are complying with all relevant legal duties on its behalf. Mr Hill said that he had not received a good service from those accountants, which is why he changed accountants in September 2018. However, the appellant has not explained why its then accountants failed to deal with the matter in June/July 2018. A basic failure by a professional adviser to deal with the charge does not provide a reasonable excuse in this case.

29. I therefore find that the charge was due, and the appellant did not have a reasonable excuse for failing to pay the charge. This means that it was appropriate for the Commissioner to exercise her discretion to issue a Penalty Notice.

30. However, before issuing a Penalty Notice, the Commissioner is required by Schedule 16 DPA to inform the appellant that it intends to do so by sending a written Notice of Intent. The Commissioner sent a Notice of Intent to the correct registered office address for the appellant – the address of its new accountants. The appellant and its accountants both say that this Notice was not received by them.

31. As the Notice of Intent was correctly addressed and posted, it is deemed to have been delivered to that address in the normal course of post under section 7 of the Interpretation Act 1978 – unless the contrary is proved. This means that the appellant must prove it was not delivered. I have considered the letter provided by the appellant's accountants, which maintains that the Notice of Intent was never received by them. It also explains that they would forward all documentation to their clients, including letters from the ICO. I note that they received the Penalty Notice and contacted the appellant immediately about this. These accountants are professional advisers who acted correctly as soon as they received the Penalty Notice. Having considered this evidence, I find on the balance of probabilities that the Notice of Intent was not delivered to the appellant's registered office address.

32. The Notice of Intent is required to be served on a data controller before the Commissioner can issue a Penalty Notice. The Notice of Intent is important as it gives a data controller the opportunity to make representations before the Commissioner makes a final decision to impose a penalty. The Notice of Intent in this case also gave the appellant the opportunity to pay the charge by 18 April 2019 and avoid any penalty. The Notice of Intent was correctly addressed, but I have found on the facts that it was not delivered to the appellant. This means that it was not correct for the Commissioner to issue the Penalty Notice.

33. For the above reasons, I determine that the Penalty Notice was not in accordance with the law. The appeal succeeds and the Penalty Notice is revoked. The appellant confirmed at the hearing that he has now paid the £40 charge.

Hazel Oliver

Judge of the First-tier Tribunal

Dated 29 January 2021

Date Promulgated: 01 February 2021