



Case Reference: EA-2021-0266/FP

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing
Heard on: 25 May 2022
Decision given on: 27 May 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER EMMA YATES

Between

HAMILTON BOYD LTD

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decision: The appeal is dismissed. The penalty notice is confirmed.

REASONS

REASONS

Mode of hearing

1. The parties have agreed to the Reference being determined on the papers under rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and we are satisfied that we can properly determine the issues without a hearing. We have considered the Notice of Appeal, the Commissioner's response and a bundle of supporting documents.

Background

2. The Appellant challenges a penalty notice ("the Penalty Notice") issued by the Commissioner on 25 August 2021.
3. The Appellant is a data controller under the Data Protection Act 2018 (DPA). The Appellant failed to pay to the Commissioner the Data Protection Fee required by the Data Protection (Charges and Information) Regulations 2018 ('the Regulations') by the compliance date of 27 January 2021. As a tier 2 organisation it was required to pay a fee of £60.
4. The Commissioner sent a Notice of Intent to the registered office of the Appellant with a covering letter dated 12 July 2021.
5. The Appellant replied stating that it had not received any previous reminders. The Appellant confirmed by email dated 12 August 2021 that it would pay the fee. The Commissioner sent a chasing email on 19 August 2021 asking the Appellant to confirm if payment had been made because the Commissioner was due to issue a penalty notice for non-payment of the fee. The Commissioner received a read receipt but no substantive response.
6. In the absence of any representations from the Appellant the Penalty Notice was issued under s 155(1)(a) of the DPA. It required the Appellant to pay a penalty of £600 for failing to comply with the Regulations prescribing the payment of a charge to the Commissioner.

The Law

7. Regulation 2 of the Regulations requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt).
8. A breach of the Regulations is a matter falling under s 149 (5) of the DPA. S 155 (1) of the DPA provides that Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S 158 of the DPA requires the Commissioner to set a fixed penalty for such a breach, which she has done in her published **Regulatory Action Policy**. The specified penalty for a tier 2 organisation which breached regulation 2(2) is £600.

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

(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.

10. Paragraph 3 of Schedule 16 sets out what a Notice of Intent must include. It must give the person to whom it is sent an opportunity to make written or oral representations about the intended Penalty Notice and must allow at least 21 days for these to be made. If representations are made within the specified time, the Commissioner must consider them before deciding whether to issue a Penalty Notice.

11. Section 141 of the DPA sets out various options by which the Commissioner may serve a notice required under the DPA:-

(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) ...

(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.

12. For the Notice under appeal to have been brought 'in accordance with the law', the Commissioner must have complied with the requirements of Schedule 16 of the DPA, including the requirements relating to the timing of the Notice of Intent.
13. In relation to a Penalty Notice issued for failure to comply with the Regulations, no other statutory pre-conditions are set. It is sufficient simply to establish that there was a failure to comply with the Regulations. There is no separate and additional requirement to establish, for example, that the contravention was serious or that there was a likelihood of damage or distress to data subjects.
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.
15. The role of the Tribunal is to make its own decision on the appropriate action for the Commissioner to take, considering the evidence before it:
16. The Regulations are permissive. The Commissioner may issue a Penalty Notice. Although the legislation says nothing about reasonable excuse, the Tribunal may have regard to whether or not there is a reasonable excuse for the failure to comply and to do so is entirely consistent with fairness and justice (see, in a comparable regulatory regime, the Upper Tribunal decision in **The Pensions Regulator v Strathmore Medical Practice** [2018] UKUT 104 (AAC)).

The facts

17. It is not disputed that the Appellant is a data controller and was liable to pay and did not pay the £60 charge owed by a tier 2 controller by 27 January 2021.
18. The Appellant's registered address is 6th Floor, 2 London Wall Place, Barbican, London, United Kingdom, EC2Y 5AU. That is its principal office for the purposes of the Regulations.
19. The Commissioner and the Appellant sent the following relevant correspondence:

16 December 2020 - 1st renewal reminder - by email from ICO to chloe@8northumberland.co.uk

6 January 2021 - renewal reminder - by post from ICO to the Appellant's registered office addressed to Chloe Brack

13 May 2021 - reminder after registration expired - by email from ICO to chloe@8northumberland.co.uk

12 July 2021 - Notice of intention to issue penalty notice - by post from ICO to the Appellant's registered office addressed to Chloe Brack

12 August 2021 - informing that have sent Notice of Intent asking for reply - by email from ICO to chloe@8northumberland.co.uk

12 August 2021 - querying what the registration is - by email from Chloe Benest (chloe@8northumberland.co.uk) to ICO

12 August 2021 - Information about registration and details of outstanding fee - by email from ICO to chloe@8northumberland.co.uk

12 August 2021 - States did not receive any previous reminders and will pay the fee for Hamilton Boyd - by email from Chloe Benest (chloe@8northumberland.co.uk) to ICO

12 August 2021 - looking forward to payment - by email from ICO to chloe@8northumberland.co.uk

19 August 2021 - asking for confirmation that fee has been paid - by email from ICO to chloe@8northumberland.co.uk

25 August 2021 - Penalty Notice - by post to the Appellant's registered office addressed to 'The Director'

31 August 2021 - copy of Penalty Notice by email from ICO to chloe@8northumberland.co.uk

1 September 2021 - direct debit altering tier from 2 to 1 -from Appellant to ICO

8 September 2021 - up to date contact details provided for Appellant - from Appellant to ICO

Submissions

Notice of Appeal

20. The Notice of Appeal relies, in summary, on the following grounds:
- (i) The primary contact left in October 2020. The email address was made inactive, but emails were not stopped from being received.
 - (ii) The only communication attempted by the Commissioner was by email to the inactive email address.

- (iii) The email address was assigned to a new employee later in 2021. The first communication received was on 12 September 2021.
- (iv) There is no record of any alternative communication attempts despite the Commissioner having other company details.
- (v) The first receipt of a renewal request was on 12 August 2021.
- (vi) There have been highly unusual business requirements advised by the UK Government over the last 18 months (covering furlough).

The Commissioner's response

21. The Commissioner's response dated 22 October 2021 submits that the denial of receipt of correspondence is no answer as to why the fee was not paid before 27 January 2021. The statutory scheme does not require the Commissioner to issue reminders. In any event email and written correspondence was sent to the Appellant.
22. The Commissioner is under no obligation to remind a data controller of their legal liabilities to pay a charge. As a matter of practice the Commissioner does issue reminders to assist data controllers.
23. An email reminder dated 16 December 2020 was sent to the email address listed on the Commissioner's register. A subsequent reminder letter on 6 January 2021 was sent to the address listed on the Commissioner's register. A further reminder email was sent on 13 May 2021 to the email address on the Commissioner's register making clear that the charge was overdue. The Notice of Intent dated 12 July 2021 was sent by post to the registered office address.
24. A further reminder email was sent to the address listed on the Commissioner's register on 12 August 2021, confirming that the Commissioner had recently served a Notice of Intent to serve a fixed monetary penalty, and reminding the Appellant that payment was urgently required to avoid the penalty fee.
25. On 12 August 2021 the Appellant's named contact responded to the Commissioner's reminder email and queried what the registration fee was, as it was not something she had previously been aware of. On the same date, the ICO fees officer responded to the Appellant's contact to advise of the legal requirements to pay the data protection fee. The Appellant's contact confirmed receipt of the fees officer's email and confirmed that it would pay the data protection fee owed.
26. The Commissioner sent a further email chaser to the named contact on 19 August 2021. The Commissioner received a read receipt which confirmed that the email was read by the Appellant's named contact on 19 August 2021.
27. No further response was received by the Commissioner and under cover of a letter dated 25 August 2021, the Commissioner issued the Penalty Notice to the

Appellant, sending it by post to the company's registered office address. The Commissioner sent a copy of the Penalty Notice by email to the Appellant at the address listed on the Commissioner's register on 31 August 2021.

28. On 1 September 2021 the Appellant wrote to the Commissioner and attached a direct debit form for the Appellant company. The company had amended its tier from a tier 2 controller to a tier 1 controller. The change in tier was updated on the Commissioner's register and the data protection fee was subsequently paid via direct debit.
29. On 8 September 2021 the Applicant provided up-to-date contact details for the Appellant company. The contact details were updated on the Commissioner's register.
30. The Appellant states that its named contact left the organisation in October 2020 and that the email address was assigned to a new employee in late 2021. The Commissioner refers to correspondence with the named contact in August 2021.
31. The Commissioner had written to the Appellant by email and post on 6 occasions between December 2020 and August 2021. The Appellant should have systems in place to ensure it complies with its legal obligations.

Conclusions

32. We find that issuing the Penalty Notice was appropriate unless there was a reasonable excuse for the Appellant's failure to comply with the requirements of the Regulations.
33. The Appellant asserts that the named contact left in October 2020. This seems unlikely as there was correspondence with the named contact in August 2021. Even if the named contact left in October 2020, we do not accept that it is reasonable to have no system for monitoring emails sent to a former employee responsible for paying the data protection fee, particularly when that email address has been provided to the Commissioner as the contact details of the organisation. A change of personnel does not prevent the Appellant from complying with its legal obligations.
34. The renewal reminder dated 6 January 2021 was sent by post to the registered office, and therefore should have been received even if the named contact had left by that date and the email account was no longer being monitored.
35. The Commissioner took adequate measures to inform the Appellant of the forthcoming Notice of Intent. A number of reminders were received and read by the Appellant in August 2021. In any event, there is no obligation on the

Commissioner to send reminders and the fact that a reminder might not have been received is not a reasonable excuse for failing to pay.

36. We accept that the coronavirus pandemic led to unusual business requirements advised by the UK government, but steps should have been taken to ensure post and emails were monitored and legal requirements were complied with.
37. Taking all the above into account we are not persuaded that there is a reasonable excuse for failing to comply with the Regulations.
38. We have considered whether there is any basis for departing from the Commissioner's policy as to the imposition of a £600 fixed fee 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 bear in mind that the fixed penalty regime encourages compliance with the law. We see no reason to depart from the Commissioner's assessment of the appropriate penalty.
39. For the above reasons the appeal is dismissed and the Penalty Notice in the sum of £600 stands.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 27 May 2022

Promulgated: 30 May 2022