NCN: [2025] UKFTT 53 (GRC)

Case Reference: FT/EA/2024/0055

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 18 December 2024
Decision given on: 22 January 2025

Before

TRIBUNAL JUDGE HEALD
MEMBER GRIMEY-EVANS
MEMBER COOK

Between

(1) STUART PEARSON
(2) L.A.D. H LIMITED

Appellants

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant did not attend
For the Respondent: Harini Iyengar of counsel

Decision:

1. L.A.D. H Limited is hereby added as the 2nd Appellant by rule 9(1) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
2. the application to strike out the Appeal is refused
3. the application to withdraw the Appeal is refused
4. the Appeal is dismissed

REASONS

1. This Appeal was commenced on 8 February 2024 by section 162(3) Data Protection Act 2018. It is in respect of a Monetary Penalty Notice for £50,000 dated 11 January 2024 issued by the Respondent against L.A.D. H Limited.

2. What follows is a summary of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The absence of a reference by us to any specific submission or evidence does not mean it has not been considered. In this Decision page numbers indicated by their inclusion in brackets refer to pages of the Bundle and the following definition are adopted:

Data Protection Act 1998	DPA98
Data Protection Act 2018	DPA18
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009	2009 Rules
Privacy and Electronic Communications (EC Directive) Regulations 2003	PECR
L.A.D. H Limited	LADH
Stuart Pearson	Mr Pearson
the Information Commissioner	the IC
Monetary Penalty Notice dated 11 January 2024	the MPN
IC's Statutory Guidance issued pursuant to section 55C(1) DPA98	the Penalty Guidance
a bundle of 208 pages prepared by the IC for this Appeal	the Bundle

The background in summary

3. The IC in its guidance describes spam messages as:-

"...marketing text messages (also known as SMS) sent to you without your consent. Not all marketing text messages sent without consent are spam marketing texts. Marketing text messages can be sent without prior consent by organisations who obtained your email address when you bought something from them and are advertising similar products or services. However, these marketing text messages must abide by strict rules regarding their content and provide you with the opportunity to opt out."

The Privacy and Electronic Communications Regulations 2003 cover the sending of text message marketing. This legislation says that organisations must only send marketing text messages to individuals if you have agreed to receive them, except where there is a clearly defined customer relationship."

4. The IC became aware of a number of complaints to Mobile UK's spam reporting service about unsolicited SMS messages being sent from a particular UK mobile number. The content was the marketing of "free Debt Help" and "FREE Government Debt Help." On investigation the IC found 106 complaints and was able to identify LADH as the subscriber of the number (152). The IC calculated that between 14 March 2022 and 30 April 2022 LADH had sent 49,838 SMS messages of which 31,329 were delivered.

Law

5. There have been no disputes on the law raised in this Appeal and so what follows is an overview only of the relevant provisions. Regs 22 and 23 PECR provide as follows:-

"22 (1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where –

(a)that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

(b)the direct marketing is in respect of that person's similar products and services only; and

(c)the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2).

23. A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –

(a)where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;

(b)where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided;

(c)where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or

(d)where that electronic mail encourages recipients to visit websites which contravene that regulation.

6. Reg 31 PECR refers to parts of DPA98 and says:-

   (1) The provisions of Part V and sections 55A to 55E of the Data Protection Act 1998 and of Schedules 6 and 9 to that Act are extended for the purposes of these Regulations and, for those purposes, shall have effect subject to the modifications set out in Schedule 1.

   (2) In regulations 32 and 33, "enforcement functions" means the functions of the Information Commissioner under the provisions referred to in paragraph (1) as extended by that paragraph and the functions set out in regulations 31A and 31B.

   (3) The provisions of this regulation are without prejudice to those of regulation 30.

7. The IC's authority to serve an Information Notice is as set out in schedule 1 PECR which incorporates an amended version of section 43 DPA98 including as follows:-

   "*(1) If the Commissioner reasonably requires any information for the purpose of determining whether a person has complied or is complying with the relevant requirements, he may serve that person with a notice (in this Act referred to as "an information notice") requiring him, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to compliance with the relevant requirements as is so specified.*"

8. Section 55A- E DPA98 (as referred to in reg 31 PECR) provides the statutory basis for the IC's power to impose a monetary penalty notice. It includes at section 55C(1) an obligation on the IC to issue the Penalty Guidance on how he proposes to exercise these functions and

   "*(2)The guidance must, in particular, deal with –*

   (a)the circumstances in which he would consider it appropriate to issue a monetary penalty notice, and

   (b)how he will determine the amount of the penalty."

9. Reg 31 PECR incorporates some of the provisions of DPA98 by paragraph 58 to schedule 20 of DPA18 which provides:-

   (1)The repeal of a provision of the 1998 Act does not affect its operation for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("the PECR 2003") (see regulations 2, 31 and 31B of, and Schedule 1 to, those Regulations).

   (2)Where subordinate legislation made under a provision of the 1998 Act is in force immediately before the repeal of that provision, neither the revocation of the subordinate legislation nor the repeal of the provision of the 1998 Act affect the application of the subordinate legislation for the purposes of the PECR 2003 after that time.

10. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 sets the maximum penalty at £500,000.

The IC's communication with LADH

11. On 15 July 2022 (155) the IC sent an initial letter to Mr Pearson at LADH setting out their role, concerns and powers in which they said:-

"We have concerns about L, A. D. H Limited's compliance with the Privacy and Electronic Communications Regulations 2003 and have therefore commenced an investigation....

You should be aware that at the end of our investigation we may decide to take formal enforcement action against L. A, D. H Limited, if we believe the law has been broken"

12. LADH was asked to provide information to the IC in response. (158) However when replying on 15 July 2022 Mr Pearson just said "*Hi This company is no longer trading since 2021. Thank you Stuart*" That information did not accord with what the IC already knew and they replied on the 15 July 2022 as follows:-

"Please be advised, however, that the communications service provider, 767 Media, has confirmed that between 13 March 2022 and 28 April 2022 nearly 50,000 text messages were sent from a mobile number allocated to LAD H Limited. In view of this and the fact that the LAD H Limited remains active on Companies House we still require a response to our earlier sent enquiries.

If the above mentioned text messages were not sent by LAD H Limited, please confirm the identity of the sender where these messages were sent from a number registered to LAD H Limited and payment for their sending was made by you."

13. On 9 August 2022 the IC chased LADH for a response to their detailed letter of 15 July 2022 (165). Mr Pearson replied that day and said "*My apologies I don't use this email address very often*" and asked to speak to the ICO "*on Friday*" (166). The ICO agreed (167/168). On trying to call on 12 August 2022 the ICO discovered the call could not connect. A meeting was arranged for the following week (169). The ICO and Mr Pearson had a call on 15 August 2022 at 3pm. We were provided with a note of that conversation. While there is no witness statement on the point in the absence of any challenge or reply from Mr Pearson we have no reason to doubt that it is an accurate note of that call. It records as follows (104):-

"Mr Pearson said he wanted the opportunity to explain what had happened. He noted that he had never done this before and wished to be as helpful as possible. He said he was aware, having seen it online, of the fines issued by the ICO and wished to be as helpful as possible.

PG [a representative of the IC] *stated that she was happy to engage over the telephone and assist with any questions but written responses would still be required and necessary. Mr Pearson said he understood.*

He said he has not used LAD H in a couple of years and wanted to liquidate it but did not have the funds to do so.

Mr Pearson said he had 'never done this before' but was offered this opportunity in respect of a text campaign. He thought he would give it 'one last shot' and was reassured verbally that he was receiving 'opt-in data' and went ahead to send the messages. He said he had received nothing in writing to confirm this – "call it stupidity" he repeated a number of times. It appears he took the verbal confirmation at face value and did not take any steps to ensure that individuals had opted in. He expressed shocked at receiving the ICO's letter.

He said he now works in admin at an office for a different company he did not name. He said he finished at 9pm but would work to provide a quick response to the ICO.

PG providing the password by email whilst still on the phone and ensure Mr Pearson was able to access the complaints spreadsheet and she also directed him to the questions. PG requested that Mr Pearson email tomorrow to check in to advise of his progress and identify how long he would need to provide a response."

14. The password was sent on the same day (172) and on 16 August 2022 Mr Pearson emailed and said (173):-

"*Hope you are well? Thank you for the extra time I started last night but I don't finish until 9pm so I struggled to get everything I needed. I will have all the answers for you and any evidence.*"

15. A chasing email was sent to Mr Pearson on 31 August 2022 (174) and he was asked to respond (to the 15 July 2022 letter) by 2 September 2022. The letter warned:-

"*Please note that failure to respond may result in an information notice being served on L.A.D. H Limited under section 43 of the Data Protection Act 1998. Failure to comply with an information notice is a criminal offence.*"

16. We accept on the evidence that in fact Mr Pearson did not reply again until he received a Notice of Intent from the IC in October 2023.

17. The absence of a reply to the request for information led to an Information Notice being served on LADH dated 15 September 2022 (176) requiring information to be provided to the IC within 35 days. There was no appeal and no reply from LADH (or Mr Pearson) and no information was provided. LADH was sent an Information Notice again dated 19 October 2022. There was no reply or appeal and no information was forthcoming.

18. On 14 September 2023 (202) the IC served a Notice of Intent (30) on LADH. The covering letter said

"*You are invited to make representations in respect of the Notice of Intent. The procedure for doing so is set out in Annex 1 of the Notice. You must make any representations by 12 October 2023.* "

It notified LADH that the IC had found that LADH had contravened regs 22 and 23 PECR and after explaining its reasoning at para 63 (47) said that a penalty of £50,000 was appropriate. The Notice of Intent had with it an annex which amongst other

things invited LADH to make representations as regards the level of penalty and financial hardship. The annex said "*All representations will be carefully considered by the Commissioner before a final decision is made.*"

19. Although it was not in evidence it appears from an email from the IC dated 10 October 2023 (204) that in response to the Notice of Intent Mr Pearson emailed the IC on 9 October 2023. What this shows is that Mr Pearson said:-

    "After out last conversation I thought this matter had been delt with and I am sorry for not replying sooner."

    "The LADH emails were cut off due to non payment so I wasn't aware you were trying to contact me, I remember receiving an email saying the matter had been concluded? I had left the debt industry behind as well, I work full time in a factory, I tried to come back but it didn't work."

    "The data I received and texedt were from Hudson and Clarke, they told me all data was opt in and I could run text campaigns. At no point did they tell me the data wasn't meant to be used for this. I am sorry if I was wrong but I was mislead as they wanted me to buy data and their greed has now put me in the spot light."

20. What he did not do was make any representations as regards any financial hardship or the level of penalty. The IC responded to each of these points and provided information (again) and ended by saying:-

    "*As stated in the Notice of Intent and Preliminary Enforcement Notice, which were hand delivered to you on 14 September 2023 (attached here for ease of reference), at this stage of the proceedings, you may make representations within the deadline of 12 October 2023. Please send any such documentary evidence (for example copies of correspondence or invoices between Hudson and Clarke and yourself) to this email address.*"

21. This was not forthcoming and on 11 January 2024 the IC issued and delivered the MPN for £50,000 by hand to LADH (208 and 73). This Appeal results from the MPN.

The Appeal

22. Mr Pearson said in the Appeal (4-16):-

    "*I would like to appeal against the decision of fining me £50,000 for SMS message I sent in the past when I had a previous company. The reason I am appealing are:-*

    I was told by Hudson and Clarke that all data provided me was Opt in and I could send messages

    Louise Hudson also asked me not to mention them as they have been investigated in the past which leads me there is record of them doing this before with the ICO

    I am not a business or in the industry anymore and have no reason/want to return

I cannot afford £50,000, I live in a small 2 bed house with my wife and son and I earn minimum wage. I would have no choice but to go bankrupt which would ruin future prospects for me

I am sorry I sent messages but I wouldn't have done if I knew the data provided by Hudson and Clarke wast Opt in"

23. The outcome sought (12) is:-

"*A massive reduce in fine or cancellation of it. If I go bankrupt because of this decision I cannot complete my studies and it will destroy my future ambitions as I am studying for my JIEB's and I cannot do this if bankrupt*"

24. The IC responded to the Appeal (17- 29) and in summary resisted it on the basis that it considered the level of penalty to be "*appropriate and not excessive.*"

25. There was no appeal from the Enforcement Notice dated 11 January 2024. The Appeal did not seek to challenge the legal or background factual basis for the MPN. The scope of the Appeal relates only to the level of the monetary penalty.

Role of the Tribunal

26. By section 162(3) DPA18:-

"*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.*"

27. Section 163 DPA18 provides:-

(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.

(5)On an appeal under section 162(2), if the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal must cancel or vary the notice.

(6)On an appeal under section 162(4), the Tribunal may cancel the Commissioner's determination.

28. In *Doorstep Dispensaree Limited v The Information Commissioner [2024] EWCA Civ 1515* the Court of Appeal (in a case involving a penalty issued pursuant to section 155 DPA18 for breaches of GDPR not PECR) held that:-

"21...- an appeal under s. 163 gives rise to a full merits review of the decision under appeal" (to quote from paragraph 35 of the Decision). As Judge Macmillan observed in paragraph 36: "when taking a fresh decision, the Tribunal is not required to undertake a reasonableness review of the [Commissioner's] decision, but instead must decide whether it would itself reach the same decision based on the evidence now before it"

"39. In my view, however, the burden of proof lies on the appellant in an appeal against the imposition of a penalty under section 155 of the DPA. The Commissioner must before raising a penalty notice be satisfied that one of the conditions specified in section 155(1)(a) and (b) is met and that it is appropriate to require the person to pay the penalty. Where, however, the recipient of a penalty notice appeals under section 163, it seems to me to be incumbent on him to persuade the FTT that the penalty should not stand

"57. Depending on the particular facts, however, the position may be different at the stage when the FTT is deciding whether to impose a penalty and, if so, in what sum. In that context, it seems to me that it can sometimes be proper for the FTT to attach weight to the fact that something said in a penalty notice was informed by the knowledge and expertise of an individual to whom Parliament has given functions and responsibilities as regards data protection. While the FTT must beware of attaching too much importance to the contents of a penalty notice, I do not think that it must necessarily treat the fact that a view expressed in a penalty notice emanated from the Commissioner as without significance. To the contrary, it can, I think, be open to the FTT to see things said in a penalty notice as relevant to the exercise of its discretion. "

Evidence and matters considered

29. Counsel for the IC attended the Appeal and she is thanked for her skeleton, attendance and assistance to the Tribunal. There were no witnesses or witness statements. The Tribunal was provided with the Bundle which contained for example:-

(a) the Appeal and the IC's response

(b) previous case management directions

(c) correspondence between the parties

(d) the relevant documents

(e) other documentary evidence

30. We also had a copy of the relevant Penalty Guidance provided by counsel.

Procedural Chronology

31. The progress of the Appeal is an important issue in this case as regards in particular the absence of the Appellant at the hearing, the application to strike out made by the IC and its application for costs.

32. The Appeal was issued on 8 February 2024 (4) and in the form GRC1 Mr Pearson said (12) that he wished the Appeal to be decided with a hearing. The IC responded on 3 June 2024 and the Appeal was listed for 2pm on 19 July 2024.

33. On 16 July 2024 the Registrar gave Directions to adjourn that hearing and "*4. The Appellant and Respondent must each provide the Tribunal with a completed Case Management Questionnaire by no later than 24 July 2024.*" The IC complied with this but Mr Pearson did not.

34. On 6 November 2024 (99) Case Management Directions were given. They included the following:-

"1. There has been a failure to comply with the previous case management directions issued by the Tribunal. Directions were issued on 16 July 2024 vacating a hearing on 19 July 2024 and directing both parties to file completed case management questionnaires by no later than 24 July 2024. The Respondent filed a case management questionnaire on 24 July 2024 as directed but the Appellant has yet to comply with this direction.

2. Whilst I do not consider it necessary to take any action in relation to this, the Appellant's non-compliance may be taken into consideration when dealing with any future non-compliance or in the determination of future applications in this appeal"

35. The 6 November 2024 Directions went on to say:-

5. The parties must comply with the following directions. The parties may agree to vary these dates by up to 14 days, without needing to seek the permission of the Tribunal.

a. Parties must send to each other copies of any additional evidence on which they intend to rely by 11 November 2024. This must include a witness statement for any witness whose evidence is to be relied upon, including witnesses to be called to give evidence at the hearing. The parties must follow the Tribunal's Bundles Guide...

b. The Information Commissioner will be taken as having complied with the above direction if, by the same date, he provides the other parties with:

i. Confirmation that he will only rely upon documents that have already been provided to the other parties,

ii. Copies of any other documents upon which he intends to rely.

c. By 15 November 2024 the party producing the bundle must send a draft index to the other parties for agreement.

6. The finalised bundle, complying with the Tribunal's Bundle Guide, must be sent to all parties and to the Tribunal by 22 November 2024

7. Should a closed bundle be considered necessary....

8. Any party wishing to provide a skeleton argument must do so no later than 3 working days before the hearing. This date cannot be varied by agreement.

The Tribunal's permission is required to vary any of the dates below.

9. A Case Management Hearing will take place by video on 28 November 2024 at 11am

a. By 22 November 2024 all parties must complete the attached Certificate of Compliance and send it to the Tribunal. This should include their availability for a hearing between 06 December 2024 and 31 January 2025

The following will then happen:

b. If all parties confirm that the case is ready for hearing, then the Case Management Hearing will be automatically cancelled.

c. If the case is not yet ready for hearing, but the parties notify the Tribunal that they agree that all directions will be complied with by no later than 14 days from the date directed for the filing of the Certificate of Compliance, a Legal Officer or Registrar will review the case and decide whether to cancel the Case Management Hearing.

d. If the case will not be ready in time for the final hearing, or if any party fails to return the completed Certificate of Compliance, then the Case Management Hearing will proceed.

10. All parties are required to attend or be represented at the Case Management Hearing unless and until they are notified that it has been cancelled. If a party fails to attend or be represented at the Case Management Hearing then the Tribunal may decide under rule 8(3)(a) to strike out the proceedings (or, in the case of a respondent, bar it from further participation in the proceedings and summarily determine all issues against it).

11. Because Case Management Hearings are usually only necessary when a party has failed to comply with the Tribunal's directions, they should be exceptional. It is open to a party to make an application for an order that its costs of attendance, as well as any other costs that arise, be paid by the party who has not complied.

36. On 7 November 2024 the Tribunal sent out a copy of the 6 November directions. On 11 November 2024 Mr Pearson emailed the Tribunal to say that:-

"... they had been using an email address of an ex-partner and may have missed any emails sent to that address and requested they be provided with any previous emails sent by the Tribunal"

37. On 15 November 2024 Mr Pearson was sent the draft bundle. On 22 November 2024 the IC filed its certificate of compliance in which it said:-

"The Appellant has not complied with any of the Directions to date and has not served any evidence in support of his appeal. In those circumstances the Respondent contents that this appeal should be struck out."

38. On 25 November 2024 the Tribunal sent out the Notice for the hearing on 28 November. On the 28th:-

(a) at 9.31am Mr Pearson was sent the Directions of the 6 November 2024 and other material.

(b) at 10.57 Mr Pearson emailed the Tribunal and said:-

"I am confused your email says the hearing is today but I have another email saying it's the 18th December. Since I have received the email I have cancelled my day off work and I am not available today. Please advise?"

(c) in reply the Tribunal said:-

"Right now is the Case Management Hearing which the Registrar is waiting for you to join. The full hearing is listed for 18 November as per the Case Management Directions. The Registrar is allowing you till 11:15 to join. Please follow the joining instructions to join the hearing today. I have tried contacting you by the phone number on the appeal form but no contact was possible."

*(*d*)* the Registrar delayed its start until 11.15 but there was no attendance by the Appellant.

39. The Registrar was asked to strike out the Appeal but decided as follows:-

7. The Information Commissioner's Certificate of Compliance (CoC) dated 22November 2024 states the Appellant has not complied with any Directions to date and contends the appeal should be struck out. The application is not contained in a GRC 5 application form, but nonetheless I consider myself duty bound to consider it. It is important to state that the Information Commissioner's CoC was sent to the Appellant's previous email correspondence address (through no fault of the Information Commissioner) so it is very likely that the Appellant is unaware of the application.

8. The Appellant has not attended, and as a result I have not been able to invite them to make representations as to the strike out application for non-compliance with Directions of the Tribunal pursuant to rule 8(4).

9. In the circumstances, I do not consider I can properly deal with the strike out application. The appeal will be determined in due course. The Information Commissioner is at liberty to make any subsequent applications at the hearing.

40. The Registrar went on to direct that the Appeal would be heard on 18 December 2024 at 10am and to remind the parties of their duty to cooperate.

41. On 29 November 2024 the Bundle was emailed to the Tribunal and Mr Pearson. On 13 December 2024 Counsel's skeleton was sent to the Tribunal and Mr Pearson and later on the same day the IC's costs schedule was sent in the same way.

42. On 18 December 2024 (the day of the Appeal) at 07.38 Mr Pearson sent to the Tribunal and the solicitors for the IC an email in which he said:-

"*Good morning, After much thought and deliberation I have decided not to continue with the appeal. I have a lot of personal issues at the moment I need to attend to,* [details provided but redacted here]. *I am sorry to have wasted every ones time. Thank you Stuart.*"

Litigant in Person("LiP")

43. In considering this Appeal we kept in mind that Mr Pearson is a LiP and had regard to the guidance from the Equal Treatment Bench Book concerning the courts duty to a LiP and the difficulties and challenges they may face. As part of this assessment we also kept in mind:-

(a) he said that he is taking the JIEB exams (which may be a reference to the Joint Insolvency Examination Board) and understands that a bankruptcy order will impact him.

(b) that in an email he sent to the IC of 9 October 2023 (204) he appears to understand the importance of ensuring that the material he received from "Hudson and Clarke" was all "*opt in and I could run text campaigns. At no point did they tell me the data wasn't meant to be used for this. I am sorry if I was wrong...*".

(c) that in the Appeal he appears to have understood the issues when he said (11):-

"*Louise Hudson also told me not to mention them as they have been investigated in the past which leads me there is record of them doing this before with the ICO*"

(d) that while he engaged with the procedure only to a minimal extent he did complete and submit the GRC1.

(e) that in the IC's Investigation Report (117) they say

"*Given that the company was also notified with the ICO, its director would have been aware of the available resources on the ICO's website including guidance on PECR and direct marketing.*

Mr Pearson did also exhibit an awareness for the need to use 'consented' data during a telephone call with the investigating officer and acknowledged it as 'stupidity' that he did not acquire written confirmation that this was the case."

44. Counsel in the skeleton (para 4) said:-

"Mr Pearson is a literate and numerate person. He is the sole Director of LADH and on 11 January 2024 he was still listed a person with significant control of LADH at Companies House [78; 140-143]. He has in the past been the Director of three other companies, all of which were dissolved via compulsory strike off. He described himself to the Commissioner as an independent financial advisor when registering LADH with the Information Commissioner's Office in 2020 [137], although the Commissioner believes that the Appellant has never been authorised by the Financial Conduct Authority as such."

Non attendance of the Appellant

45. We considered Mr Pearson's email of 18 December 2024 in light of his status as a LiP. In our view the options open to the Tribunal were (a) to treat it as a request to adjourn and find a time for him when his issues (the detail of which are redacted as they contain personal data) improved (b) treat his email as an application to withdraw his Appeal by rule 17 (1) 2009 Rules and consider whether to consent by rule 17(2) or (c) proceed on the basis that he was in effect saying he was not going to attend.

46. Having heard from counsel for the IC (and considered the overriding objective) we concluded that:-

(a) it was not an application to adjourn but even if it was we would not have agreed bearing in mind the procedural history referred to in this Decision and the absence of any independent evidence of the issues he described

(b) it could be better interpreted as a notice to withdraw but bearing in mind the strike out and costs applications the IC intended to make and because counsel and the Tribunal were present and ready for the Appeal we would not consent to the withdrawal

(c) we would continue to deal with the matter in the absence of the Appellant.

Preliminary issue – parties

47. In form GRC 1 the Appellant is named (5) by Mr Pearson as "Mr Pearson" who is also named as the person to contact. He also signed the form as Appellant and not Appellant's Representative (14).

48. The IC's initial letter of 15 July 2022 said(156):-

"We have concerns about L, A. D. H Limited's compliance with the Privacy and Electronic Communications Regulations 2003 and have therefore commenced an investigation."

49. The IC's Information Notice of 19 October 2022 (194) Notice of Intent (30) and MPN (73) were addressed to LADH. LADH is a company limited by shares. It was incorporated on 24 June 2019 with company number 12065159. We were told that it is subject to an active proposal to strike it off the Register of Companies that had been put on hold at the request of the IC.

50. In his Appeal Mr Pearson referred to LADH as a "*previous company*" and that "*I am not a business or in the industry any more and have no reason/want to return*". However since 25 June 2019 Mr Pearson has been (and remains) a director of LADH and the sole director since August 2021. He is also listed as the person with significant control. In its Response the IC said (17):-

    "*The Appellant has chosen to file a Notice of Appeal in his own name, rather than in the name of LADH against whom the MPN was issued. As a director of LADH, it appears that the Appellant considers he has appropriate authority to conduct litigation in his own name, on behalf of LADH. The Commissioner is unclear whether this is in fact the case and will invite the Tribunal to review the Articles of Association of LADH to determine the Appellant's legal standing.*"

51. As Mr Pearson did not reply to this point nor attend the Appeal we do not know his position. We considered a number of possibilities including (a) that he meant to be the Appellant in his own name or (b) as the IC says, that he in some way considered he had appropriate authority to conduct litigation in his own name, on behalf of LADH or (c) as a LiP that he read annex 1 to the MPN (94) which says

    "*Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the Tribunal') against the notice.*"

    to mean a human person but intended to be appealing as director on behalf of the company.

52. The Grounds of Appeal are personal to him. For example (11) he says (emphasis added)

    "*I would like to appeal against the decision of fining **me** £50,000 for SMS messages **I** sent in the past when I had a previsions company*"

    and they refer to the risk of his personal bankruptcy (not liquidation of LADH) and the impact that would have on his studies.

53. This suggests he meant to appeal in his personal name. If this is the case then it is probable that his appeal would be struck out (having given notice) by rule 8(3)(c) 2009 Rules on the basis that the Tribunal considered he had no standing to bring the Appeal personally and so there was no reasonable prospect of the case succeeding.

54. The IC 's position was that the Appellant was in effect LADH and their issue was whether Mr Pearson had the right to bring proceeding in his own name for LADH. This suggests that he thought he was acting for LADH in some sort of capacity akin to that of a litigation friend or where a minority shareholder is permitted to bring proceedings in the name of a company in a derivative action. In our view this proposition would require there to have been far more thought than we suspect took place.

55. The analysis we prefer is that Mr Pearson (as a LiP) did not give this question as much thought as the IC or the Tribunal has done but if he had done so his position would be that he was seeking to appeal for the "person" who had been served with the MPN which was in legal terms LADH even if in fact he personally received it. This makes LADH the Appellant which is consistent with the identity of the party which was served with the MPN and the approach taken by the IC including as regards its application for costs.

56. Accordingly having considered rule 2 2009 Rules LADH is added as an Appellant by rule 9(1) 2009 Rules.

Strike out rule 8(2) 2009 Rules.

57. The IC did not make an application to strike out the Appeal as part of its response but has applied to strike out the Appeal by rules 8(3)(a) and/or (b) and/or (c) 2009 Rules. Rules 8(3) and (4) 2009 Rules provide that:-

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out

58. In *HMRC -v- Fairford Group (in liquidation) and Fairford Partnership Group (in liquidation) [2014] UKUT 0329* the Upper Tribunal ("UT") summarised the task to be carried out by a Tribunal in these terms at (41):

"41. In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see Swain v Hillman [2001] 2 All ER 91 and Three Rivers (see above) Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see ED & F Man Liquid Products v Patel [2003] EWCA Civ 472. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in Three Rivers, the strike out procedure is to deal with cases that are not fit for a full hearing at all"

59. In *AW-v-Information Commissioner and Blackpool CC [2013] 30 ACC* the UT set out the principles governing the application of rule 8(3)(c) 2009 Rules. These included: -

"*8. More recent rulings from the superior courts point to the need to look at the interests of justice as a whole ….It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules*"

Rule 8(3)(a) 2009 Rules

60. In the Directions of 6 November 2024 the Registrar said:-

"*10 If a party fails to attend or be represented at the Case Management Hearing then the Tribunal may decide under rule 8(3)(a) to strike out the proceedings (or, in the case of a respondent, bar it from further participation in the proceedings and summarily determine all issues against it)*"

61. In fact as set out above Mr Pearson did not attend the Case Management Hearing but for the reasons explained the Appeal was not struck out at that point.

62. The Registrar also said on 6 November 2024:-

"2. *Whilst I do not consider it necessary to take any action in relation to this, the Appellant's non-compliance may be taken into consideration when dealing with any future non-compliance or in the determination of future applications in this appeal*"

63. It is not clear to us what it could be said the Appellant failed to do thereafter which he had been warned, in clear enough terms, could lead to a strike out.

Rule 8(3)(b) 2009 Rules

64. In its certificate of compliance of 22 November 2024 the IC said:-

"*The Appellant has not complied with any of the Directions to date and has not served any evidence in support of his appeal. In those circumstances the Respondent contents that this appeal should be struck out.*"

65. This must have been a reference to rule 8(3)(b) because the Registrar when dealing with it on 28 November 2024 referred specifically to rule 8(4) and it does not refer to a reasonable prospects test that we would expect for 8(3)(c).

66. First as regards the requirement of rule 8(4) 2009 rules we are satisfied that while it was not the most clear indication that an application to strike was to be made (for example there is no GRC5 form) it would have been clear from the Directions of 28 November 2024 and from the skeleton (see para 56 and following) sent to Mr Pearson on 13 December 2024 that an application was to be made. However rule 8(4) refers to the need to provide an appellant with "*an opportunity to make representation*". This might be satisfied for example by the appellant being sent the application and being

told of their right to do so and for time to be given for this to occur. This might have been gleaned from para 8 of the 28 November Directions where the Registrar says:-

"8. The Appellant has not attended, and as a result I have not been able to invite them to make representations as to the strike out application for non-compliance with Directions of the Tribunal pursuant to rule 8(4)."

but even though the IC in this case might reasonably assume that no reply would have been forthcoming in our view this was not a clear enough indication of the position to enable us to strike out the Appeal by rule 8(3)(b). However in any event we would not have concluded that the Appellant's failures to cooperate were to such an extent that the Appeal could not proceed fairly and justly.

Rule 8(3)(c) 2009 Rules

67. In the skeleton Counsel says:-

"57.. For the avoidance of doubt, the Commissioner's position is that the Tribunal should also strike out the appeal under Rule 8(3)(c) because there is no reasonable prospect of the appeal, or part of it, succeeding. "

68. While the IC' had strong grounds for an application for a strike out under rule 8(3)(c) in our view again while the Appellant knew of this application from the skeleton we are not convinced (however unlikely it is that he would have replied) that he had the adequate opportunity required in rule 8(4).

The Appeal

69. Counsel referred us to the evidence from the inception of the IC's investigation to why and how the IC decided to issue the MPN and how it reached its conclusions on the level of the penalty. In our view the grounds of Appeal contained no relevant information being based entirely on Mr Pearson's circumstances as opposed to that of LADH. In so far as his concern was one of affordability and the impact of the penalty we were directed to the times the IC had invited him to make representations to enable the IC to consider the matter and noted that he had not responded. We also noted that the IC had considered the impact of the penalty by reference to section 108(2)(b) The Deregulation Act 2015.

70. We were taken to the Investigation Outcome Report (107-131). The evidence included detailed information about the background and initial investigation. It reported how matters had progressed from correspondence to the Letter of Intent. It provided information about LADH and Mr Pearson. Of particular note was that it recorded that (116)

"*Another overarching reason for concern in respect of these contraventions is that the marketing targeted people in financial difficulty and so represent a vulnerable set of individuals. Such financial vulnerability may be accompanied by stress and psychological vulnerability. "*

and

"This contravention of PECR is 'serious' due to the significant volume of unsolicited messages received, numbering 31,329 over the time period between 14 March 2022 and 30 April 2022 – that is over one and a half months. It is also noteworthy that more – 49,938 – messages were actually sent."

71. The matter proceeded to a "Decision to Impose Panel" (121) held on 3 February 2023. Again in our view this evidenced a detailed and thorough review and decision making process. We noted for example:-

***"Seriousness of contravention**:*

The Panel noted that whilst the contravention involves a relatively low volume of text messages (31,329) over a short period of time (14-3-22 to 30-4-22), the weekly volumes are high. The Panel further noted a significant 106 complaints. The case of L.A.D. H formed part of the ICO's Operation Spodden which focussed on organisations preying on people and offering individuals, who may be subject to financial constraints during times of recession, inappropriate advice on debt management solutions."

72. On 9 March 2023 the IC held a Penalty Setting Meeting (124). We noted for example that they referred to the Penalty Guidance which was provided to us by counsel and which we reviewed. We also saw that the meeting had regard to the Deregulation Act 2015 (125):-

" including: the nature and level of risks associated with non compliance, including the risks to economic growth; the steps taken by the business to achieve compliance and reasons for its failure; the willingness and ability of the business to address non-compliance; the likely impact of the proposed intervention on the business, and the likely impact of the proposed intervention on the wider business community, both in terms of deterring non-compliance and economic benefits to legitimate businesses. "

73. The meeting also noted that in their view *"...the evidence in this case indicated that the contravention was due to negligence rather than deliberate in nature."* and that there was no "...evidence of financial gain directly resulting from the contravention. Although it had been redacted we saw that meeting considered comparator cases.

74. The starting point for the penalty was £40,000 but as the IC found no mitigating circumstances this was increased by £10,000 as a result of aggravating factors stated as (126):-

"The Director of L.A.D H Ltd, failed to engage satisfactorily with the investigation despite the opportunities given to him by the investigating officer. This resulted the service of an Information Notice which was not complied with (this is a criminal offence contrary to s47 DPA 1998).

Although the contravention period was relatively short the weekly volumes were relatively high and resulted in a significant number of complaints"

75. The meeting considered the best evidence it could obtain as to LADH's financial, position. They concluded:-

"According to the information available to the FRU at this stage, the financial situation of the company indicated that it is highly unlikely that L. A. D. H Limited will be able to discharge any penalty as and when it falls due and so formal recovery action may be necessary...

As with all cases, if the case progresses and an NOI is issued, L. A. D. H Limited will have the opportunity, via Representations, to provide the latest information on the Company's finances, which can then be taken into consideration accordingly."

76. The IC issued an authority to proceed dated 26 July 2023. From the decision maker's notes we saw it said (129):-

"I have taken into consideration that 'predatory marketing' or unlawful electronic communications is an enduring strategic objective for the ICO as set out in ICO25. I have applied the regulatory approach principles to the current case.

Nuisance calls and messages remain a cause of significant public concern, and are one of the most-complained about issues reported to the ICO. In some cases, that unlawful activity can cause harm or distress, or enable harm or distress, for example in facilitating fraud or scams. This particular case is not one where we have uncovered evidence of poor behaviour in the sense of deliberately targeting members of the public, it is one of negligence by the company in failing to conduct reasonable due diligence. However, the scale of the contravention is serious and meets the threshold for a monetary penalty.

I believe there is evidence the company has instigated substantial numbers of unlawful marketing communications. The scale of that activity is serious and meets the threshold for regulatory action.

In general, UK businesses would expect the regulator to take active steps to enforce the law and maintain a level playing field for all businesses undertaking electronic direct marketing. It is reasonable to argue that companies using direct marketing channels, such as this, and evading the rules – either deliberately or negligently – act to undercut companies who do comply with the Regulations.

I have considered the proposed monetary penalty of £50,000 and believe it is reasonable and proportionate in the circumstances of this case..."

Decision

77. On the basis of the evidence and having considered the decision in *Doorstep i*n particular as regards the burden of proof and the notice that can be taken of the IC's position we are satisfied that the MPN was set at an appropriate level and the Appeal should be dismissed.

Costs

78. The IC has applied for costs and provided a schedule of those costs. Paragraph 60 of the skeleton says:-

"*The Commissioner further submits that the Tribunal should order Mr Pearson to pay the Commissioner his costs incurred in attending the hearing under Rule 10(b) because Mr Pearson has acted unreasonably in bringing this appeal and in his conduct of this appeal*"

79. At the Appeal counsel for the IC confirmed that the IC sought a costs order against LADH and not Mr Pearson personally. There was no response from Mr Pearson on this question.

80. Section 29 Tribunal, Courts and Enforcement Act 2007 provides as follows:-

(1) The costs of and incidental to –
(a) all proceedings in the First-tier Tribunal, and
(b) all proceedings in the Upper Tribunal,
shall be in the discretion of the Tribunal in which the proceedings take place.

81. The relevant part of rule 10(1)(b) 2009 Rules provides that:-

(1)...the Tribunal may make an order in respect of costs.. only – (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; …

82. The question of costs in Tribunal proceedings has been considered in a number of authorities including:-

(a) in *Kirkham v Information Commissioner (Recusal and Costs): [2018] UKUT 65 (AAC)* the UT held:-

"*Decisions on the award of costs are always discretionary. The starting point is that the information rights jurisdiction in tribunals is a costs-free zone. The onus is on the person making the costs application. Costs...are very much the exception rather than the rule, and should be reserved for the clearest of cases..*"

(b) in *MG v Cambridgeshire County Council (SEN) [2017] UKUT 172 (AAC)* the UT held (para 26):-

"*The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.*

Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule..."

(c) in *Cancino v Secretary of State for the Home Department [2015] UKFTT 59 IAC* it was held that the onus is on the person making the application and that orders for costs would be "*… reserved to the clearest cases.*"

(d) in *Ridehalgh -v- Horsefield & Isherwood [1994] 3 WLR 462* in the Court of Appeal, (and followed for example by the Tribunal in *Cowley v Secretary of State for Environment, Food and Rural Affairs [2023] UKFTT 438 para 14)* "unreasonable" was said to be:-

"conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently."

"The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable"

(e) the Court of Appeal in *McPherson v BNP Paribas (London Branch) [2004] ICR 1398* considered the question of costs where the Applicant had brought but then withdrawn Employment Tribunal proceedings. It held at 28:-

"...it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. ….."

"On the other side, I agree...that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction."

*(*f) in *Scnee -v- IC Mark Snee v IC (Freedom of Information Act 2000) [2014] UKFTT 2013-0005 (GRC) (09 May 2014)* general considerations to take into account included were*:-*

"5. First, although in the courts costs follow the event, tribunals have a different tradition, which is reflected in the present Rule 10." "…...In general, both the public authority and the citizen gain from a cost free environment….."

83. The UT in *MG (*para 28) indicated that the test was as follows:-

(a) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings? This is not a matter of the use of a discretion. Appropriate findings must be made on an objective basis.

(b) if it did, should the Tribunal as a matter of discretion make an order for costs, having considered all the circumstances for example, the nature of the unreasonable conduct, how serious it was, and the effect of it.

(c) if so, what is the quantum of those costs?

84. If this was a jurisdiction to which, for example, CPR Part 44 applied it is reasonable to assume that the IC would be able to persuade a Judge that it should be awarded its costs because for example:-

    (a) it had been successful in its defence of the Appeal

    (b) Mr Pearson opted for an Appeal by CVP but then did not attend

    (c) of the issues recorded on 28 November 2024

    (d) of the absence of almost any involvement by the Appellant in the process

    however as decided in *McPherson* such an analogy is erroneous.

85. We do not consider it appropriate in considering this question to take into account conduct prior to the issue of the Appeal because to a certain degree the Appellant's failure to respond to the IC was dealt with by the IC in adding £10,000 to the MPN for aggravating factors. The IC suggested that it was unreasonable for the Appeal to have been commenced but in our view and based on *MG* it would be wrong for us to make a costs order against this Appellant for having commenced an appeal on receipt of the MPN.

86. While the Appellant did fail to take a proactive part in the proceedings or follow Directions given and while that may have been frustrating and will have added costs it did not seem to us that these issues amounted to the "clearest of cases" (*Kirkham).*

87. At the very last moment the Appellant sought to withdraw or at least not proceed with the CVP hearing. Following *McPherson* our view is that it would also not be appropriate to order costs simply because of the withdrawal (if that was intended) of the Appeal.

88. The Court of Appeal in *McPherson* also said:-

    "... tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction."

89. It was a feature of this Appeal that whether intentionally or otherwise the Appellant had managed to delay matters from 15 July 2022 when the first letter was sent to the date of the promulgation of this Decision. Issuing the Appeal itself will have caused over a further 11 months to go by. There was a suggestion from the chronology with its missed hearings and changing email addresses that the issuing of the Appeal may have been tactical to cause that delay. Had we been satisfied that this was the case then we would have considered that to be have been a clear case for the award of costs as suggested in *Ridehalgh* and *McPherson.* We concluded on the information available that we could not find as a fact that the issuing of the Appeal by the Appellant was only done as a tactic to cause delay.

90. We considered the very late decision by the Appellant not to attend the Appeal for which he apologised for having "*wasted every ones time*". Had we concluded that his reasons were disingenuous or misleading then we would have awarded costs of the hearing itself to the IC. However while the non attendance and late notification might be seen as part of a pattern of behaviour by the Appellant we were in no position to challenge the reasons he gave.

91. For these reasons we concluded that the first hurdle in the test from *MG* had not been passed and so we do not award costs to the IC. For completeness had we done so we would have concluded that the rates claimed and other items of the schedule were reasonable.

Signed: Tribunal Judge Heald **Date: 15 January 2025**