Appeal number: EA/2019/0065

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

YATTA MEDIC SERVICES LIMITED **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: **JUDGE ALISON MCKENNA**
Mr DAVE SIVERS
Ms JEAN NELSON

Determined on the papers, the Tribunal sitting in Chambers on 27 June 2019

DECISION

1. The appeal is dismissed.

2. The Penalty Notice dated 18 February 2019 is confirmed.

REASONS

Background to Appeal

3. The Appellant is a data controller within the meaning of the Data Protection Act 2018[1] ("DPA"). As such, it is required to comply with the Data Protection (Charges and Information) Regulations 2018 ("the Regulations")[2]. As a "tier 1" organisation, the Appellant's fee was £40.

4. The Appellant failed to provide the Respondent with the information required by regulation 2 (3) of the Regulations or to pay to the Respondent the Data Protection Fee required by regulation 2 (2) of the Regulations by the compliance date of 22 June 2018.

5. The Respondent served a Notice of Intent on the Appellant on 28 November 2018 and, in the absence of any representations from the Appellant, served a Penalty Notice of £400 on 18 February 2019.

6. The Appellant has appealed to this Tribunal on the basis that its default was an innocent mistake, due to IT problems, due to the ill-health of its director and on humanitarian grounds. The Appellant asks that the penalty be revoked by the Tribunal.

Appeal to the Tribunal

7. The Appellant's Notice of Appeal dated 3 March 2019 implicitly accepts the failure to pay the fee in apologising for the omission. It relies on grounds that there were difficulties making payments in January, February and March 2019, that the director had health problems, that the business is small and will find it difficult to pay the penalty and that the Tribunal ought to waive the penalty on medical and humanitarian grounds.

8. The Respondent's Response dated 3 April 2019 resists the appeal. She submits that the Penalty regime has been established by Parliament. It is accepted that the Appellant's failure to comply with the Regulations was due to an oversight, but several reminders were sent (she has provided copies of the e mail dated 6 June 2018, the letter dated 15 August 2018 and the Notice of Intent dated 28 November 2018). In the absence of any reply from the Appellant it is submitted that the imposition of a Penalty was appropriate. The Respondent notes that the Appellant had been a data controller prior to the commencement of the Regulations and had

[1] http://www.legislation.gov.uk/ukpga/2018/12/contents

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

paid the relevant fees under the earlier legislation so should have had relevant administrative systems in place. It is submitted that the level of penalty is appropriate and in keeping with the Commissioner's published policy.

9. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 57 pages.

The Law

10. The Regulations came into force on 25 May 2018. They replace the previously applicable regulations, made in 2000. Regulation 2 requires a data controller to pay an annual charge to the Information Commissioner (unless their data processing is exempt). It also requires the data controller to supply the Information Commissioner with specified information so that she can determine the relevant charge, based on turnover and staff numbers.

11. A breach of the Regulations is a matter falling under s. 149 (5) of the DPA. Section 155 (1) of the DPA provides that the Information Commissioner may serve a Penalty Notice on a person who breaches their duties under the Regulations. S. 158 of the DPA requires the Information Commissioner to set a fixed penalty for such a breach, which she has done in her publicly available *Regulatory Action Policy*[3]. The specified penalty for a tier 3 organisation which breached regulation 2(2) is £4,000. The statutory maximum penalty is £4,350, which will be appropriate where there are aggravating factors.

12. 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.

13. 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."*

14. 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—*

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

(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.

…

15. 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.

16. 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…."*

Evidence and Submissions

17. The Appellant implicitly accepts that it received the relevant correspondence and Notices. The Appellant expressly accepts that it was in breach of its legal obligations under the Regulations on the relevant date and offers an apology for this omission.

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

18. The Appellant has provided some evidence of his ill-health.

19. The Appellant has provided some evidence of experiencing computer problems (a screen shot and an error e mail). These are either un-dated or relate to dates after the obligation to pay the fee arose.

20. The Respondent has provided the Tribunal with copies of the correspondence and Notices it sent to the Appellant. The Respondent has commented that the reference number on the screen shot relied on by the Appellant actually relates to a different legal entity.

Conclusion

21. We have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Regulations.

22. We accept that this is a small business but conclude that a reasonable data controller would have systems in place to comply with the Regulations. This is particularly to be expected where there is a predictable annual payment to be made. We would also expect a reasonable data controller to respond to repeated reminders from the ICO.

23. We have considered whether the Appellant has pointed to any particular difficulty or misfortune which explains its departure from the expected standards of a reasonable data controller. As the evidence of computer problems relates to the wrong time period, it is difficult to accord any weight to that evidence. We note that the Appellant's director has not anywhere suggested that he had computer problems which prevented him paying the fee *before* 22 June 2018.

24. We accept that the Appellant's director has had some health problems but there is no evidence to suggest that there was a sudden and catastrophic health-related event which prevented him from attending to his legal duties at the relevant time.

25. We conclude that the Appellant has not established a reasonable excuse for its failure to pay the fee in this case.

26. We have gone on to consider whether there is any basis for departing from the Respondent's policy as to the imposition of a £400 fixed penalty in the circumstances of this case. We conclude that there is not.

27. 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 level of penalty. We therefore conclude that there is no reason to depart from the Respondent's assessment of the appropriate penalty in this case.

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

(Signed)

CHAMBER PRESIDENT **DATE: 17 July 2019**
PROMULGATION DATE: 18 July 2019