IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2018/0235

ON APPEAL FROM:

The Information Commissioner's
Monetary Penalty Notice
Dated: 12 November 2018

Appellant:	**Boost Finance Limited**
Respondent:	**The Information Commissioner**
Date and venue of hearing:	**23 and 24 July 2019, Field House**
Date of decision:	**15 October 2019**

Before

Anisa Dhanji

Judge

and

Michael Jones
Andrew Whetnall

Panel Members

Representation:

For the Appellant: Paul Motion, Solicitor Advocate
For the Respondent: Peter Lockley, Counsel

DECISION

For the reasons given in the Decision below, this appeal is allowed in part.

The Tribunal substitutes the Monetary Penalty Notice in the same terms as that issued by the Information Commissioner but with the amount of the penalty being reduced to £60,000 (sixty thousand pounds).

The Tribunal has no jurisdiction over whether payments can be made by instalment. That is a matter for the Commissioner.

Signed

Anisa Dhanji

Judge

REASONS FOR DECISION

Introduction

1. This is an appeal against a Monetary Penalty Notice ("MPN"), dated 3 October 2018, served on the Appellant by the Information Commissioner (the "Commissioner"), pursuant to section 55A of the Data Protection Act 1998 (the "DPA").

2. The MPN was issued following the Commissioner's finding that between 1 January 2017 and 20 September 2017, the Appellant had committed a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended) ("PECR"), in relation to the sending of approximately 4,396,870 e-mails for direct marketing purposes, without the appropriate consent of the recipients.

3. The MPN required the Appellant to pay to the Commissioner, the sum of £90,000.

The Legislative Framework

4. The PECR was made pursuant to section 2(2) of the European Communities Act 1972 to give effect, among other things, to Directive 2002/58/EC (the "Directive").

5. The fundamental purpose of the Directive is to protect the privacy of electronic communications users.

6. PECR has been amended to give effect to amendments to the Directive, made by Directive 2009/136/EC, which refers to the need for effective implementation and enforcement powers to provide adequate incentives for compliance.

7. Regulation 31 provides that the enforcement provisions of the DPA are extended for the purposes of PECR, subject to modifications set out in Schedule 1.

8. Regulation 22 of the PECR headed *Use of electronic mail for direct marketing purposes,* provides as follows:

   (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."

9. "*Direct marketing*" is defined in section 11(3) of the DPA as "*the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals*".

10. As regards enforcement powers, Section 55A of the DPA (as modified by Schedule 1), provides, in so far as is relevant, that:

(1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that—

(a) there has been a serious contravention of the requirements of The Privacy and Electronic Communications (EC Directive) Regulations 2003, and
(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person—

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.

(4) A monetary penalty notice is a notice requiring the data controller to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(5) The amount determined by the Commissioner must not exceed the prescribed amount."

11. Under Regulation 1 of the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010, the prescribed amount which must not be exceeded is £500,000.

Appeal to the Tribunal

11. Section 55B of the DPA provides that a person on whom an MPN is served may appeal to the Tribunal against the issue of an MPN and/or the amount of the penalty specified. This is a full merits review and the Tribunal may consider all the evidence before it, even if the evidence was not before the Commissioner.

12. The nature of the FTT's jurisdiction on such an appeal is akin to the nature of its jurisdiction in an appeal against a decision notice of the Commissioner under section 58 Freedom of Information Act 2000 ("FOIA"). In other words, the FTT's function is to decide whether the Commissioner's decision to issue an MPN and the amount of the penalty was right: *Central London Community Healthcare NHS Trust v Information Commissioner [2013] UKUT 0551.*

13. If the Tribunal considers that the MPN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised her discretion differently, the Tribunal must allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner.

14. The Appellant appealed against both the issue of the MPN, and the amount of the penalty.

15. The parties had indicated that this appeal could be dealt with on the papers without the need for an oral hearing. When the panel convened to consider the appeal without an oral hearing, we considered that to do justice to the issues raised, an oral hearing would be needed, with witness evidence that could be tested in cross-examination. Directions were made accordingly for evidence to be lodged by both the Appellant and the Commissioner. The oral hearing greatly assisted our understanding of the factual matrix of this case, in particular, and we are grateful to the parties for their assistance.

16. The Tribunal heard evidence from Jaffer Abbas, a shareholder and employee of the Appellant. We also heard evidence from two staff members from the Commissioner's office, namely Michelle Crowshaw, Lead Recovery Officer in the Financial Recovery Unit, whose evidence was concerned with the financial impact on the Appellant of the MPN; and from Wendy Broadhurst, Team Manager in the Cyber Incident Response and Investigation Team, whose evidence was concerned with the contravention of PECR and the process for determining the amount of the MPN.

17. We were provided in advance with an agreed bundle, and in due course, a supplementary bundle, including Skeleton Arguments from both parties. Additionally, we were provided with a bundle of authorities at the hearing and some updated information about the Appellant's financial position.

18. We will refer to the evidence and submissions as needed. We have had regard to all of the evidence and submissions, even if not referred to specifically in this decision.

The Factual Background and Chronology

19. The Appellant's primary business concerns "biddable media". The Appellant also engages (or at the relevant time engaged), in direct marketing campaigns. One of the Appellant's marketing campaigns which ran between 1 January 2017 and 20 September 2017, was "findmeafuneralplan.com" (the "Campaign"). The Campaign forms the factual background for the MPN.

20. In the Campaign, the Appellant offered financial products in the form of pre-paid funeral plans. The Appellant used third party marketing companies (which the Appellant describes as "Affiliates"), who sent out approximately 4,396,780 direct marketing emails promoting those products.

21. The Affiliates obtained the email addresses to which it sent these direct marketing e mails, from a number of "source" websites. Those websites had compiled their email lists by offering services and opportunities, such as competitions, to people who provided their email addresses in order to avail themselves of those services and opportunities. In most or all cases, the source websites were owned by the Affiliates, or there was another close relationship between the Affiliates and the source websites.

22. The following table submitted by the Commissioner, shows the Affiliates used by the Appellant in the Campaign, and the source websites for the email lists:

Affiliate	**Source Website**	**Number of emails sent by the Affiliates**
Monetise Media Ltd	www.youroffersnow.co.uk www.sendinpromo.com	250,000
MP Innovations Inc	www.ukprize.co.uk www.myoffers.co.uk	1,710,445
DMLS Ltd	www.isalesshop.com www.blue-red-store.win-shopvouchers-uk.com www.dealbistro.co.uk	636,335
MRN Media	www.prizereactor.co.uk	1,800,000

23. On 7 and 27 November 2017, the Commissioner wrote to the Appellant explaining her enforcement powers and seeking information about the Campaign, in particular about the source of the e mail addresses used, how the Appellant had ensured it had the recipient's consent, and about the Appellant's procedures and due diligence in relation to ensuring it had the necessary consents.

24. In response, the Appellant provided, amongst other things, the names of the marketing companies of the Affiliates, the 8 source websites from which they obtained the email addresses, and some of the links to the Affiliates' fair processing and consent statements.

25. Following her investigations, on 17 July 2018, the Commissioner sent the Appellant a Notice of Intent to Issue an MPN, The Appellant made submissions to the Commissioner in response. On 3 October 2018, the Commissioner issued the MPN, setting the penalty at £90,000.

26. The Appellant then sought to negotiate with the Commissioner as to the amount of the penalty and the time for payment. The negotiations were unsuccessful, and the Appellant submitted its appeal on 2 November 2018.

The MPN

27. The MPN sets out the nature of the unsolicited direct marketing email messages sent in connection with the Campaign. It also sets out the content of some of the privacy notices upon which the Appellant relied in support of its position that sufficient consent had been obtained.

28. In addition, the MPN sets out the Commissioner's conclusion that the Appellant did not have consent for the e mail messages it had instigated, and that it was responsible for the contravention of section 22 of PECR.

29. The Commissioner also considered that while the Appellant's actions were not deliberate, it knew or ought to have known that there was a risk that the contraventions would occur. It had not taken reasonable steps to avoid the contravention and/or it had failed to undertake sufficient due diligence.

30. The Commissioner considered that the breach was serious. She considered that the penalty of £90,000 was reasonable and proportionate in the circumstance.

Issues and Findings

31. The Appellant had provided detailed Grounds of Appeal to which the Commissioner had responded. By the time of the oral hearing, the issues to be addressed, as agreed with the parties, are those set out below. We will consider each in turn.

- What is the standard of proof?
- Which party bears the burden of proof?
- Did the Appellant instigate the sending of the e mails?
- Was the consent obtained from the recipients of the e-mails freely given, specific and informed?
- If there was a contravention, was it serious?
- If there was a contravention, was it negligent?
- What was the appropriate amount of the MPN?

What is the standard of proof?

32. The Appellant asserts that the Commissioner has to show a breach of PECR beyond reasonable doubt (ie, that the criminal standard of proof applies).

33. We do not consider that this is a proper issue for the FTT. Appeals against MPNs are properly brought before the FTT. Under the relevant legislative schemes and procedural rules, the FTT does not apply procedures appropriate to a criminal standard of proof. The venue to argue that this should be different cannot be the FTT itself. As noted in *HMRC v Abdul Noor [2013] UKUT 071 (TCC)* (applied in the course of case management directions in *DM Design Bedrooms Ltd v ICO (EA 2018/0287),* where the appellant argued that MPNs are "criminal" for the purposes of Article 6 of the European Convention on Human Rights), the FTT has no supervisory jurisdiction. Its jurisdiction is derived wholly from statute.

34. In case we are wrong, we will deal, briefly at least, with the arguments the parties have made as to the correct standard of proof.

35. The Appellant argues that the relevant legislation does not mention the word "civil" in relation to monetary penalties. Also, the legislation which introduces MPNs is the Criminal Justice and Immigration Act 2008, covering matters as diverse as nuclear terrorism, extreme pornography and criminal sentencing. Although it is recognised that the DPA amendment was introduced at a relatively late stage in the legislative proceedings, and that there was limited Parliamentary debate in relation to MPNs, the Appellant still argues that the choice of an overtly *criminal* statute as the preferred delivery mechanism for MPNs, is relevant.

36. The Appellant also says that since the penalty is imposed for alleged contraventions of the law and is intended to be both punitive and a deterrent, the appropriate standard of proof must be the criminal standard. It has referred us to case law in relation to penalties imposed for defaults in VAT compliance, including; *Georgiou v UK (40042/98) [2001] STC80 and King v Walden [2001] WL 513115.* We have also been referred to *R McCann v Manchester Crown Court (2002) UKHL 39,* and *Chief Constable*

of Lancashire v Potter (2002) EWHC 2272 (Admin), as examples of cases in which it has been held that the criminal standard of proof can apply, even to proceedings characterised as "civil".

37. The Appellant says that if MPN proceedings are criminal proceedings, then not only is the standard of proof different, but also the European Convention on Human Rights would apply.

38. The Commissioner says that the correct standard of proof is the balance of probabilities. She says that this has been applied consistently by the tribunals and courts when considering PECR. The standard is common across the civil penalties in the DPA. Although there are separate criminal penalties to which the criminal standard applies, those are the preserve of the criminal courts.

39. We have considered these decisions as well as those we have been referred to in the bundle of authorities, including *Amber UPVC Fabrications Limited v The Information Commissioner (EA/2014/0112), and Yau & Ors v Customs & Excise [2001] EWCA Civ 1048.*

40. In the context of MPNs, the issue as to which standard of proof applies, was considered in *Scottish Borders Council v Information Commissioner* (*EA/2012/0212)*. In that case it was argued that MPNs were criminal penalties. The FTT said this (at para 20):

> *In our judgement the statute itself here gives us sufficient guidance on which to conclude that parliament's intention was that the ordinary civil standard of proof applies. The offences in s55 are dealt with by proceeding in the criminal courts according to their rules, conventions and procedures. By contrast, the new s55A places the decision on whether to impose a monetary penalty on the ICO, someone who has traditionally decided issues on the balance of probabilities. Moreover, the right of appeal is to the Tribunal, not to a criminal court. We conclude that parliament intended the civil standard of proof to apply.*

41. Although the case is not binding on us, having regard to the case law, and the statutory regime, we are persuaded that the FTT's comments in *Scottish Borders* was correct for its reasons, as set out above. The Appellant has not put forward any arguments that would persuade us to reach a different finding on this issue.

Which party bears the burden of proof?

42. Regulation 22(2) prohibits the sending (or instigating the sending) of unsolicited direct marketing emails unless the sender has consent. A breach occurs where someone sends unsolicited direct marketing emails without being able to show consent.

43. The Commissioner has to show that the Appellant sent or instigated the sending of unsolicited direct marketing emails. This she has done. It now falls to the Appellant to show consent.

Did the Appellant instigate the sending of the e mails?

44. The evidence is that the Appellant did not itself obtain e-mail addresses or hold or utilise data lists for sending marketing e-mails. However, "instigating" the sending of direct marketing e-mails by another can also contravene Regulation 22 of PECR.

45. There is no statutory definition of "instigating". The ordinary meaning implies having another party do something on one's behalf.

46. Between 1 January and 20 September 2017, the Affiliates sent approximately 4,396,780 direct marketing emails as part of the Campaign.

47. The evidence is that the Appellant entered into contractual relationships with the Affiliates, pursuant to which the sending of the e mails had to comply with terms the Appellant specified and was subject to payment by the Appellant to the Affiliates. The "creative", ie, the content of the e mails promoting the Campaign was provided by the Appellant. The only decision left to the Affiliate was as to the number of the e mails to send, since this was determined by the Affiliate's database.

48. We find, in these circumstances, that the Appellant clearly instigated the sending of the e-mails for the purposes of PECR. If it were not for the Appellant's contractual relationship with the Affiliates relating to the sending of those e mails, they would not have been sent. While not conceding the point, no real argument has been made by the Appellant as to why we should find otherwise.

Was the necessary consent obtained from the recipients of the e-mails?

49. The core of the Commissioner's claim is that the Appellant instigated the sending of unsolicited direct marketing emails without having the required consent.

50. Instigating the sending of direct marketing e-mails is only lawful if:

    (i) the cumulative conditions in Regulation 22(3) of PECR are met; or

    (ii) the recipient of the e mail has previously notified the sender that he consents to such communications being sent by, or at the instigation of, the sender.

51. It is not disputed that the Appellant did not have any pre-existing relationship with the recipients of the e-mails. The Appellant had not made sales to the recipients or engaged with them in any negotiation for sales. It cannot, therefore, fulfil the first of the Regulation 22(3) conditions.

52. Accordingly, it can only have been lawful for the Appellant to instigate the sending of the e-mails if the recipients had given their consent.

53. We have been referred to *Optical Express v Information Commissioner* (EA/2015/0114). It is a decision of the FTT, so it is not binding on us. Also, it was an appeal against an enforcement notice not an MPN. However, it

is still helpful to note that when considering the meaning of "consent", the FTT said that:

> *When a data subject gives consent they must be informed about the processing to take place, including who by and what for. In no other way can consent be said to be 'informed'. […] If the data subject doesn't know what products might be marketed then how can he exercise his right to object to some whilst being happy to receive others?*

54. The Commissioner has published guidance (the "Guidance"), on Direct Marketing. Again it is not binding on us, but we note that the Guidance states that to give informed consent:

> *The person must understand what they are consenting to. Organisations must make sure they clearly and prominently explain exactly what the person is agreeing to, if this is not obvious. Including information in a dense privacy policy or hidden in 'small print' which is hard to find, difficult to understand, or rarely read will not be enough to establish informed consent.*

55. The Guidance highlights that the consent must be given to the sender of the marketing messages. While this does not rule out sending marketing messages through third parties, there is a greater need for the person to whom consent is given to be specific about the ways in which the data will be used.

56. The Guidance also states that individuals can only give informed and specific consent to receive third-party marketing in very tightly-defined circumstances:

> *However indirect consent could also be valid if the consent very clearly described precise and defined categories of organisations and the organisation wanting to use the consent clearly falls within that description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list, of general categories of organisations. The names of the categories used must be tightly defined and understandable to individuals. In practice, this means that the categories of companies need to be sufficiently specific that individuals could reasonably foresee the types of companies that they would receive marketing from, how they would receive that marketing and what the marketing would be.*

57. Returning to the present case, the Commissioner examined the fair processing and consent statements for the source websites that the Affiliates had used to obtain the email addresses, to see if they provided valid consent for the Appellant's direct marketing emails. We have also considered such statements to the extent they have been put before us. For the most part, the privacy notices only go so far as to inform individuals that their details will be shared with unspecified third parties.

58. The Commissioner says that one of the websites (www.blue-red-store.win-shopvouchers-uk.com), was no longer active by the time of her investigation. She was unable, therefore, to examine its fair processing and consent statements, and was unable to identify any other potential evidence of consent in relation to the emails obtained through this website.

59. At the hearing, during cross examination of Mr Abbas, we were taken, in some detail, through the evidence which the Commissioner relies upon to submit that:

- Only one of the websites (www.dealbistro.co.uk), mentioned that individuals entering their email address could receive marketing emails from a trading name of the Appellant. However, this was embedded in a lengthy list of organisations, and individuals would likely not have been able to understand the nature of the direct marketing which they were agreeing to receive.

- None of the other websites mentioned the Appellant directly, nor by any of its trading names. They only contained generic statements about direct marketing, eg that “sponsors", " related partners" or "selected marketing partners" could contact them, or that the contact details could be used for marketing by a variety of sectors.

- All except one of the source websites simply described the sectors from which those entering their addresses would receive e-mails. Even then, in about half the cases, funeral plans were not mentioned to as one of the sectors.

60. We agree with the Commissioner that on the civil standard of proof, the evidence does not support a finding that recipients of the e mails had provided the Appellant with valid and informed consent.

61. We also agree with the Commissioner that from the list of sectors, it would likely not have been understood by the public that they would be sent e mails about financing funerals, let alone e-mails from the Appellant. As already noted, in many cases, funeral plans were not even mentioned as one of the sectors which would generate marketing e mails. Where funeral plans were mentioned, it was one amongst a long and varied list of sectors. In these circumstances, we consider that the individuals cannot be said to have given specific consent to receive e mails about funeral financing plans.

62. The Appellant has suggested that since the Commissioner only accessed the source websites some four months after the end of the Campaign, its name may by then have been removed from these websites. The Commissioner says, and we agree, that this is implausible, because most of the websites do not list any companies by name – they list sectors, and it is unlikely that they would have departed from this practice specifically to list the Appellant by name. There is no evidence to suggest that this was the case.

63. The Appellant has also raised a more general concern about delay. As already noted, the Campaign ran from 1 January 2017 and 20 September

2017. The MPN was issued on 3 October 2018. The Commissioner has been upfront in saying that the delay arose because for a time, her resources were diverted elsewhere (on the Cambridge Analytica matter, in particular, which has, of course, been extensively reported in the press). It has been suggested by the Appellant that had the Commissioner undertaken her investigations more promptly, she would have obtained a more accurate picture as regards consents which would have been more favourable to the Appellant. We accept that websites, by their nature, are updated frequently. However, there is no evidence before us, by way of screenshots or otherwise as to what the position was at the time of the Campaign. The burden of proof is of course on the Appellant. Given the evidence from Mr Abbas, and the Appellant's reliance on third parties without much (if any) due diligence on the Appellant's part, we do not find that the position as regards the consents in issue was ever different, or materially dufferent.

64. The Commissioner has pointed out that several of the source websites listed data brokers as third party recipients of e-mail addresses, meaning that the e-mail addresses would be passed on to further, unidentified companies. This adds a further level of difficulty, and further undermines the Appellant's claims as to consent.

65. The Appellant also says that recipients could have opted out or unsubscribed. However, that is not relevant to whether the initial consent was valid. In any event, since consent to receive marketing e-mails was, for the most part, a condition of entering the competition or accessing the service in question, the user was not offered the opportunity to opt out at the point in time when their e mail addresses were harvested. In addition, those websites that offered a "soft opt-in" did not always do so in clear terms.

66. We agree with the Commissioner that for all these reasons, consent, if it was given at all, cannot be described as being freely given, specific, and informed. It follows that we find that the e-mails were sent in contravention of PECR.

If there was a contravention, was it serious?

67. The Commissioner can only issue an MPN if the contravention is serious. There is no statutory definition of that term in the context of PECR.

68. The Commissioner's says that there are a number of factors relevant to seriousness, including in particular, the nature and number of the communications concerned.

69. There were over 4 million direct marketing e mails sent. On any measure, that is a very considerable number.

70. The subject matter of the e mails, namely funeral plans, is also relevant. While benign for many, the Commissioner says and we accept that it is likely to have been upsetting for some to receive an unsolicited e-mail

urging them to take out a funeral plan, if for instance, they or someone close to them, was seriously ill, or recently bereaved.

71. The evidence indicates that some of the recipients were contacted about loan services after their details had been obtained through what appears to be a gambling website. There is no evidence before of us of any direct harm, but the Commissioner argues, and again we agree, that there must be a likelihood of harm arising from offering loan services to those who may already have financial difficulties or addictions. That is also a relevant factor when assessing the seriousness of the contravention.

72. The Appellant says that the contravention was not serious. Amongst other things, the Appellant says that there is "general industry guidance" that 15-20% of sent messages in these types of campaigns do not reach a recipient. It submits, therefore, that the number of recipients in this case is less than the headline figure suggests. We have seen no evidence to support this. In any event, even with a reduction in the range the Appellant suggests, there would still have been well over 3.5 million marketing e mails sent out where the required consent was not provided.

73. The Appellant says that the extremely low number of complaints supports a finding that the contravention was not serious. There is no comparable evidence before us to assess whether the number of complaints is low or not, but we query how useful an indicator the number of complaints is, when assessing seriousness. There is, of course, no longer a requirement that the contravention must be of a kind likely to cause substantial damage or substantial distress. It may also be that other recipients took other action. As the FTT stated in *Xerpla Ltd v Information Commissioner* (EA/2017/0262), at paragraph 37:

> *The Tribunal appreciates that rates of complaint have to be treated with caution because the majority, perhaps the vast majority, of people who receive unsolicited electronic direct marketing simply delete the messages or at most unsubscribe. Complaining to the Commissioner, even if that is known to be an option, is time-consuming, disproportionately so in most cases.*

74. For all these reasons, we agree with the Commissioner that the contravention was serious.

If there was a contravention, was it negligent?

75. Under Section 55A of the DPA, the Commissioner can issue an MPN if the contravention is either deliberate or negligent. The Commissioner has accepted that the contravention was not deliberate.

76. The issue, therefore, is whether the Appellant was negligent in failing to ensure that the recipients of the e mails had given the requisite consent.

77. The Appellant would have been negligent if he knew or ought to have known that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent it.

78. The Appellant says that it carried out "stringent checks" on the Affiliates. It also says that it took action if it discovered (for example through a complaint), that an Affiliate had failed to comply with PECR. It also invested in platforms to ensure its Affiliates had up-to-date lists.

79. Before commencing the Campaign, the Appellant should, of course, have ensured it had the necessary consents. We consider that a proper due diligence exercise would have immediately revealed the weaknesses.

80. We are satisfied from the answers given by Mr Abbas in cross examination, that the Appellant relied largely on its contracts with the Affiliates, and on the completion of due diligence questionnaires by them, as more or less a box ticking exercise. We find that the Appellant did not in fact carry out meaningful checks, let alone stringent checks.

81. Although Mr Abbas said, in reply to a number of questions at the hearing, that the Appellant would have checked the actual terms of the privacy policies, as well as what a consumer would have seen on the sign-up page. He says that the Appellant would have raised any issues with the Affiliates by e mail. However, no such e mails have been produced. Since any such e mails would have been sent by the Appellant, it is reasonable to expect that e mails dating from 2017, could have been produced. We are not satisfied on the evidence, that the Appellant did in fact take such steps as has been claimed.

82. For all these reasons, we find that the contravention was negligent.

What was the appropriate amount of the penalty?

83. The legislation sets the maximum amount of the penalty, but gives no guidance about how the proper amount should be arrived at, what factors are relevant, nor what weight should be given to any such factors.

84. There is also no binding case law to assist with the amount of the monetary penalty, or how to approach the assessment, nor what factors are relevant in that assessment.

85. In *LAD Media v Information Commissioner (EA/2017/0022)*, the FTT considered that depending on the particular facts, the following factors are relevant:

- The circumstances of the contravention;
- The seriousness of that contravention, as assessed by the harm, either caused or likely to be caused, as a result;
- Whether the contravention was deliberate or negligent;
- The culpability of the person or organisation concerned, including an assessment of any steps taken to avoid the contravention;
- Whether the recipient of the MPN is an individual or an organisation, including its size and sector;

- The financial circumstances of the recipient of the MPN, including the impact of any monetary penalty;

- Any steps taken to avoid further contravention(s); and

- Any redress offered to those affected.

86. Further factors for consideration in regard to the size of the penalty were identified in *Holmes Financial Solutions v ICO [2018] UKFTT 2018*. They include:

- the duration of the unlawful conduct;

- the number of contraventions; and

- the culpability of individual directors.

87. In addition, under section 55C(1) of the Data Protection Act 1998, the Commissioner has published guidance about the issue of monetary penalties ('MPN Guidance"). The MPN Guidance sets out the general types of issues that are relevant to deciding the appropriate level of an MPN. These include:

- The seriousness of the contravention;

- Whether the contravention was deliberate;

- Whether the data controller knew or ought to have known about the risk of contravention; and

- Whether there was a failure to take reasonable steps to prevent the contravention.

88. The MPN Guidance states that the Commissioner may also take into account:

- The need to maximise the deterrent effect of the monetary penalty by setting an example to others; and

- Whether a person had expressly, and without reasonable cause, refused to submit to a voluntary assessment or audit.

89. The MPN Guidance sets out additional factors that the Commissioner will take into account in determining the amount of the monetary penalty, including:

- The type of individuals affected (for example, children or vulnerable adults);

- Whether the contravention was a "one-off" or part of a series of similar contraventions;

- Whether the contravention was caused or exacerbated by activities or circumstances outside the direct control of the person concerned, for example, a data processor or an errant employee;

- What steps, if any, the person had taken once they became aware of the contravention (for example, concealing it, voluntarily reporting it to the Commissioner, or not taking action once the Commissioner or another body had identified the contravention);

- The role of senior managers who would be expected to demonstrate higher standards of behaviour;

- Whether the data controller or person has been willing to offer compensation to those affected; and

- Whether there has been any lack of co-operation or deliberate frustration, for example, failure to respond to the Commissioner's reasonable requests for information during the course of the investigation.

90. The MPN Guidance further sets out considerations relating to the impact of the penalty. Amongst other things, it states that the Commissioner will consider the likely impact of the penalty on the person on whom it is imposed, in particular financial and reputational impact, and will take into account evidence of genuine financial hardship.

91. It also says that:

> *If the Commissioner considers there are other factors, not referred to above, that are relevant in a particular case to his determination of the amount of the monetary penalty the Commissioner will explain what these are. Although there may not always be any other factors this provision allows the Commissioner to take into account circumstances that are not generally applicable but which are still relevant to the Commissioner's determination of the amount of a monetary penalty in the case in question.*

92. We turn now to the factors the Commissioner considered in this case, and to what (if anything) she has said about the weight she has attached to any factor in particular.

93. The Commissioner's rationale as to the amount of the penalty in this case has been explained by Ms Broadhurst. She says, in her witness statement, at paras 16-20, that:

> *The panel agreed this was a serious contravention due to the volume and extent of the unlawful email marketing and that the organisation had demonstrated disregard of due diligence. In view of this, we agreed that the starting figure fell within the Level C band of £40,001 to £100,000.*
>
> *Next, the panel considered any aggravating and mitigating factors that had so far not been covered within the Investigator's report.*

Although Boost Finance Ltd had ceased the funeral plan marketing campaign, the panel was of the opinion that any penalty had to reflect the sensitive nature of the emails and potential high detriment to individuals. The panel was also of the opinion that Boost Finance Limited had shown a lack of due diligence in failing to scrutinise third parties. A further aggravating factor noted was that the company had no apparent control over the high volume of emails involved.

The panel then considered the financial impact on Boost Finance Limited. [name deleted] of The Financial Recovery Unit was asked to provide input with regard to any potential financial impact on the organisation. From the company accounts at the time, as submitted to the Registrar of Companies, FRU did not foresee any penalty causing difficulties for the organisation.

The panel then looked at comparative cases. Where comparative cases are available we will look at previous penalties issued to guide our decision of what penalty to recommend. In this particular case we considered previous penalties issued to BT and Everything DM Limited. BT had sent 4,930,141 unlawful emails which resulted in a penalty of £77,000 and Everything DM Limited had sent 1,502,364 unlawful emails (spanning 12 months) which resulted in a penalty of £60,000.

Considering again the sensitive nature of the emails, the panel therefore decided to recommend a fine at the higher end of the Level C band; of £90,000. This decision was recorded.

94. Based on the evidence given in cross examination of Ms Broadhurst, the position as to how the Commissioner arrives at a monetary penalty amount, and how she did so in this case, is not as clear or transparent as we might have expected. No criticism attaches to the Commissioner's witnesses. They did their best to assist, and we are grateful to them.

95. The evidence before us is that the first step the Commissioner takes is to decide which band the case comes within. There are 5 bands A – E. The Commissioner considered that the current contravention came within Band C (ie the middle band), the penalty for which is within the range of £40,000 to £100,000.

96. It is not clear, however, what brings a contravention within a particular band. In her witness statement, Ms Broadhurst indicated that the Appellant's case came within Band C because of the number of e mails involved, and because of the lack of due diligence. However, the lack of due diligence is, of course, also what makes the contravention negligent, so it is not clear how it then becomes a factor again, in deciding the level of penalty.

97. In her oral evidence, Ms Broadhurst emphasised the number of e mails. However, if the category is determined by the number of contraventions then it might be reasonable to expect that there would be a range as to the number of contraventions corresponding with the different bands. However, it seems from the evidence we heard, that there is not.

98. We were told, in evidence, that once the band has been identified, individual aggravating and mitigating factors can move the amount up or down within the range, or can even take the figure into another band. The logic of that is sound, but it pre-supposes a starting point within a band, and it was not clear that there is, or was one, in this case.

99. As regards the aggravating and mitigating features in this case, the MPN addresses these at paras 44 and 45. Aggravating features are listed as lack of due diligence, loss of control of personal data by the Appellant leaving individuals to become exposed to high volumes of unsolicited e mails without control over the volume of e mails sent, the sensitive nature of the e mails, and that the Appellant continues to operate under other live trading names conducting marketing campaigns for other sectors.

100. The evidence from Ms Broadhurst was that amongst the aggravating factors, those that pushed the penalty in this case to the top end of Band C were the large number of emails sent, the fact that the Appellant had no apparent control over the number of emails and had put everything in the hands of a third party, and the potential sensitivity of the subject matter of the campaign to some. It was accepted that this sensitivity was a matter for personal judgement. She said the lack of due diligence, was considered as significant a factor as sensitivity.

101. We note that while the considerations about the aggravating features have been identified, it is not clear what weight is given to each. Also, the factors identified by Ms Broadhurst at the hearing are not exactly the same as those in the MPN. We would have expected them to be entirely consistent. Some of the aggravating factors are already ones that have been taken into account in determining that the contravention is negligent and/or serious. It is unclear why they are then regarded as aggravating features. It gives risks double counting.

102. As regards mitigating factors, in the MPN, the Commissioner noted only that the Appellant had discontinued the Campaign. The panel asked Ms Broadhurst whether the fact that the activity appeared to be a first offence was a factor in deciding the amount of penalty, but we were told it was not. This is notwithstanding that the MPN Guidance (see para 89 above) indicates that it should be a relevant consideration.

103. When asked about parity between different cases, Ms Broadhurst said that the Commissioner does have regard to penalties levied in other cases. In response to questions from the panel, she arranged to provide us with a schedule setting out some key matrix in relation to other cases where MPNs had been issued. However, in our view, the parity between the present case and the others (and indeed as between the others), is far from apparent. We accept, of course, that there are limits to the conclusions that can be drawn from the schedule without a more detailed study of the circumstances and factors, including the precise mitigating or aggravating factors taken into account in each particular case. Nevertheless, it does seem to us that there is inconsistency, or inadequately explained variations in the amount of penalties levied.

104. The schedule offers a mapping of MPNs in other cases by reference to the

section breached, company, nature, scale and duration of contravention and showing in some cases (but not all) the number of complaints. Amongst other things we note that:

- The number of emails in the present case was comparable to those sent by BT (4.9m, MPN £77k), albeit that those were about charity rather than marketing.

- Morrison's supermarket, another large concern, had a penalty levied of £10.5k in relation to 236k sent messages of which 130k were opened.

- Avalon plc were fined £80k for 52k calls. Two of the Directors had previously been associated with concerns incurring MPNs.

- Costello Kennedy had been fined £30k for sending 283k text messages about funeral plans.

- the period of contravention of the Campaign was 8 months. Others have been fined less for longer periods of contravention.

105. When deciding the amount of the penalty, it is not clear to what extent the Commissioner takes into account the means of the data controller or distinguishes between a public authority and a private sector business. It is also unclear whether, and to what extent, adjustments are made for the relative impact of a penalty on the person or entity on whom a penalty is levied.

106. We queried, without a satisfactory reply, how the interests of parity are met when the Appellant's case is compared, for example, with BT, on the basis of the number of e mails sent, without also reflecting the relative size and financial status of those companies. Clearly the impact of penalties of that scale on a company the size of BT is much less material to its ability to trade and remain solvent than for a smaller company like the Appellant.

107. The Commissioner's position is simply that in this case, a penalty at this level would not have the drastic effect claimed by the Appellant, and even if it did, this was not a barrier to setting the penalty at the level the Commissioner has set. She points out that the statutory scheme makes no reference to ability to pay. That may be true, it also does not address the various factors that the Commissioner clearly does take into consideration.

108. In our view, the effect on the Appellant is a relevant consideration. See also para 85 above. The Appellant submits that £90,000 is excessive. The company is small. There are only 3 shareholders. and it makes no profit other than to provide a modest income for the sole Director, Mr Beresford. It may have to be wound up if the penalty has to be paid.

109. The Commissioner refers to para 18 of Ms Crowshaw's witness statement and says that the Commissioner had requested up to date financial information on the Appellant, that this had been provided, and that the Commissioner took it into account.

110. The Commissioner also refers to the Appellant's Profit & Loss Report for the period 1 Dec 2017 to 31 July 2018 (page 33 of the bundle). It says that the Appellant's accounts for the year ending 30 November 2016 showed net assets of just over £68,000. The Director was paid a dividend of £40,000 in that year. The bank statement provided by the Appellant shows an available balance of just over £95,000.

111. At the hearing it was pointed out that Mr Beresford's salary was a healthy £80,000 and that there was a payment to Mr Abbas of over £15,000 in August 2018. Mr Abbas explained that in fact, Mr Beresford had taken a reduction in salary from £100,000, and that he, Mr Abbas, was being reimbursed for use of his personal credit card for business expenses because the company had no credit cards. These are not matters which the Commissioner appears to have reflected in its decision.

112. We do not consider that we need to make any finding as to whether the penalty would result in the Appellant being wound up. There may be a restructuring options available to it to continue trading. We are satisfied, however, that the penalty would have a considerable impact.

113. Given that one of the purposes of an MPN is deterrence, we consider it relevant that the Appellant has discontinued the type of business activity that led to this contravention. The evidence is that the Appellant has decided to focus on other business activities that do not carry legal requirements that it considers are too complex for its modest level of staffing and resources.

114. We return now to the amount of the penalty in this case. The figure of £90,000 is clearly at the higher end of the band that the Commissioner has applied. Although we consider that by itself, the high number of contraventions justifies an MPN in the amount specified by the Commissioner, we also consider that to reflect the factors which we have referred to above, in particular as regards parity, that the Appellant has discontinued the offending business activity, and that the amount of the penalty would have an unduly harsh impact on its financial status, the penalty should properly be reduced by a third to £60,000.

Decision

115. For all these reasons, we allow this appeal in part by substituting a MPN in the same terms as that issued by the Information Commissioner with the amount of the penalty amended to £60,000 (sixty thousand pounds).

116. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 15 October 2019
Promulgation date: 17 October 2019