



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

**Appeal Reference: EA/2021/0151/FP**

**Decided without a hearing  
On 10 December 2021**

**Before**

**JUDGE HAZEL OLIVER  
PAUL TAYLOR  
ROGER CREEDON**

**Between**

**COS SYSTEMS LIMITED**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**DECISION**

The appeal is dismissed.

**REASONS**

**Background to Appeal**

1. This appeal is against a fixed penalty notice (“Penalty Notice”) issued by the Information Commissioner (the “Commissioner”) dated 9 June 2021.
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. The appellant is a data controller under the Data Protection Act 2018 (“DPA”). The appellant appeals a Penalty Notice of £600 for failure to pay a £60 charge to the Commissioner.

### **The Appeal**

4. The appellant appealed on 14 June 2021. The grounds of appeal are that the Penalty Notice was the first communication the appellant had received about the matter. The appellant supports the events and exhibitions industry. The appellant says that the majority of staff have been furloughed since March 2020, and their building has not been staffed as all un-furloughed staff were working from home. The £60 fee was paid on the date of the appeal.

5. The Commissioner’s response maintains that the Penalty Notice was correctly issued and defends the appeal. The Commissioner says that the fixed penalty regime has been determined by Parliament, and the statutory scheme does not require the Commissioner to issue any reminders in respect of the charges due. The appellant’s apparent denial of receipt of written correspondence is no answer as to why the annual charge was not paid before 25 May 2021, and in any event an email reminder was sent to the appellant as well as correspondence.

### **Applicable law**

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

7. Under the Regulations:

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

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

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

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

- (3) *The period for giving a penalty notice to a person may be extended by agreement between the Commissioner and the person.*

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

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

#### **141 Notices from the Commissioner**

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

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

#### **7 References to service by post.**

*Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and,*

*unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

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

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

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

- (1) *Subsections (2) to (4) apply where a person appeals to the Tribunal under section 162(1) or (3).*
- (2) *The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.*
- (3) *If the Tribunal considers-*
  - (a) *that the notice or decision against which the appeal is brought is not in accordance with the law, or*
  - (b) *to the extent that the notice or decision involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently,**the Tribunal must allow the appeal or substitute another notice or decision which the Commissioner could have given or made.*
- (4) *Otherwise, the Tribunal must dismiss the appeal.*

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

17. It is increasingly common for the General Regulatory Chamber to determine appeals against financial penalties imposed by civil regulators. In appeals against Fixed Penalty Notices issued by the Pensions Regulator, Tribunal judges have frequently adopted the approach of asking whether a defaulting Appellant has a “reasonable excuse” for their default. This approach was approved by the Upper Tribunal in ***The Pensions Regulator v Strathmore Medical Practice*** [2018] UKUT 104 (AAC). 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....”*

## **Facts**

18. The Commissioner calculated that the date of the charge period was 8 September 2020, but she allowed until 25 May 2021 for the payment to be made. There is no dispute that this was the relevant date, and no dispute that the applicable charge was £60 for a tier 2 controller.

19. We have seen copies of various reminders sent to the appellant by the Commissioner. The Commissioner sent an email reminder to the appellant to the address listed on the Commissioner's register on 28 July 2020. A reminder letter was sent on 18 August 2020 to the address listed on the Commissioner's register. A further email reminder was sent on 25 February 2021, confirming that the registration had expired and requesting payment of the £60 charge within 14 days.

20. The Commissioner's response says that she sent a Notice of Intent by post with a covering letter dated 4 May 2021. This gave the appellant until 25 May 2021 to pay the charge of £60 or make representations. The appellant did not pay the charge or provide any representations. The Commissioner therefore issued the Penalty Notice on 9 June 2021. The letter was sent to the appellant at the same address as that given by the appellant in the appeal document.

21. The appellant did receive the Penalty Notice. The appellant says it did not receive any other communications from the Commissioner.

## **Discussion and Conclusions**

22. The appellant's case is that it did not receive any correspondence prior to the Penalty Notice, including the Notice of Intent. The appellant says that there were no staff in its office due to a combination of furlough and working from home.

23. The Commissioner says that all communications were sent to the email and postal addresses provided by the appellant on its register. The appellant had not updated its contact details. The Commissioner says it is unclear how the appellant received the Penalty Notice (within 5 days of posting) but not prior communications. The Commissioner also says that the appellant should have had appropriate systems in place to comply with its legal obligations, and could have arranged for a nominated person to collect post or have it redirected to a suitable address.

24. The Notice of Intent was sent to the appellant's correct address in accordance with section 141 DPA. The appellant has not said that this was an incorrect registered office address, or was otherwise incorrect. Applying section 7 of the Interpretation Act, the Notice of Intent is presumed to have been received in the ordinary course of post, unless the appellant proves otherwise. The appellant has not provided any evidence or explanation as to why the Notice of Intent may not have been received at its registered office. We therefore find that the notice of Intent was given to the appellant by post in accordance with paragraph 2, schedule 16 DPA.

25. We note that the Commissioner did not provide any proof of posting in this case, information as to whether the letter was sent by first class or second class post, or confirm the date on which the Notice of Intent was actually sent. Paragraph 17 of the response to the appeal says it was sent with a covering letter of 4 May 2021, but does not expressly confirm it was posted on that date. The precise dates are not material in this case, but it would be helpful

for the Commissioner to confirm dates and method of posting in responses to these appeals so that the presumption of receipt can be applied accurately.

26. We have considered whether the appellant has a reasonable excuse for failing to comply with its legal duty to pay the annual charge as a data controller.

27. We note that the Commissioner sent reminders by email and post, so the appellant should not have been unaware of its obligations. The appellant says that there were no staff in the office to collect post as they were all on furlough or working from home. The relevant date is when the Notice of Intent was sent and delivered, so around 4 May 2021. We accept that many businesses were in serious difficulties at the start of the pandemic, when offices were suddenly closed and staff sent home or put on furlough. There was a period of time during which it may have been reasonable for a small business to fail to deal with post sent to its office. However, the Notice of Intent was sent more than a year after the first country-wide lockdown in March 2020. Any reasonably conscientious business-owner would have put mechanisms in place by this time in the pandemic to deal with incoming post relating to business and regulatory matters, and any associated legal obligations. The appellant has not explained what, if any, arrangements were in place to deal with its post at this time.

28. We also note that the appellant did receive the Penalty Notice, which was sent to the same address the following month. The appellant has not explained why this was received when the Notice of Intent was not.

29. We therefore find that the appellant did not have a reasonable excuse for failing to pay the £60 charge to the Commissioner. The Commissioner's decision to impose a fixed penalty of £600 was in accordance with the law. We dismiss the appeal.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 11 December 2021