



Appeal number: EA/2018/0256

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

**FACEBOOK IRELAND LIMITED
FACEBOOK INC**

Appellants

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE ALISON McKENNA

Sitting in Chambers on 27 June 2019

PRELIMINARY ISSUE RULING

Background

1. Further to the Case Management Hearing (“CMH”) of 14 June 2019 and my Direction of the same date that the Appellants are permitted to rely in this appeal on their pleaded grounds concerning procedural fairness, I now set out my reasons for that Direction in this Preliminary Issue Ruling.
2. The Respondent has raised in its Response an objection to the Appellants’ Grounds of Appeal, settled by counsel and dated 21 November 2018. That objection (as clarified in oral submission at the CMH) is not that the grounds alleging procedural unfairness by the Information Commissioner are out-with the jurisdiction of the Tribunal and should be struck out, but rather that the Tribunal ought to exercise its discretion to

prevent the Appellants relying on them. It was acknowledged by both parties that there is no direct precedent for the issues raised in this Ruling. However, I have had the benefit of full written and oral submissions from Anya Proops QC for the Appellants and Timothy Pitt-Payne QC for the Respondent and I am grateful to them both for their assistance.

3. I have considered the four-volume bundle prepared for the CMH, including an agreed bundle of authorities, to which I shall refer in this Ruling. I am grateful for the parties' Statement of Agreed Facts, which is to be added to the hearing bundle in due course and on which I have relied, to the extent necessary, in making this Ruling.
4. The matter before the Tribunal in this appeal is a Monetary Penalty Notice ("MPN") dated 24 October 2018 which imposes a penalty of £500,000 on the Appellants for what is therein described as a serious contravention of Data Protection Principles 1 and 7. The MPN was issued before the commencement of the Data Protection Act 2018, under s. 55A of the Data Protection Act 1998 ("DPA")¹. S.55B(5) DPA confers a right of appeal to this Tribunal on a person upon whom such an MPN is served. The appeal may be against (a) the issue of the MPN and/or (b) the amount of the penalty. The Appellants' Grounds of Appeal in this case engage both limbs (a) and (b).
5. By virtue of article 7 of the Data Protection Act (Monetary Penalties) Order 2010², the s. 55B(5) right of appeal is to be determined in accordance with s. 49 DPA. This provides that the Tribunal shall allow the appeal and ("or") substitute another Notice if the Notice is "not in accordance with the law" or to the extent that the Commissioner exercised her discretion, it should have been exercised differently.

Argument

6. The Appellants' Grounds of Appeal raise serious criticisms of the Information Commissioner's process for deciding to issue the MPN in this case. Their pleaded case includes allegations of bias, pre-determination and procedural irregularity. It is submitted that the MPN was imposed on a different basis than that set out in the Notice of Intent so that the statutory process for making representations was tainted, that the Information Commissioner herself made inaccurate public statements about the imposition of an MPN prior to the conclusion of the statutory process for making representations, and that relevant evidence was withheld from the Appellants during the process.
7. The terms of s. 49 DPA are of course very familiar to this Tribunal as they also describe the nature of its jurisdiction in relation to appeals under FOIA and EIR. Mr Pitt-Payne referred me to a number of familiar authorities³ in which the Upper

¹ http://www.legislation.gov.uk/ukpga/1998/29/pdfs/ukpga_19980029_en.pdf

² <http://www.legislation.gov.uk/ukdsi/2010/9780111490723>

³ *Birkett* [2011] UKUT 39 AAC <http://www.bailii.org/uk/cases/UKUT/AAC/2011/39.html>; *IC v Bell* [2014] UKUT 0106 (AAC) at [22]; *Gaskin v IC and Norwich City Council* [2016] UKUT 0382 (AAC), at [27]

Tribunal has confirmed that an appeal against a Decision Notice made under FOIA or EIR is to be regarded as an appeal by way of re-hearing. The most recent and authoritative support for that approach may be found in the Decision of a three-judge panel of the Upper Tribunal (AAC) in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)⁴.

8. Both counsel referred me to *Central London Community Healthcare NHS Trust v Information Commissioner* [2013] UKUT 0551 (AAC)⁵, in which UTJ Wikeley preferred to describe the FTT’s jurisdiction as a “*an appeal by way of a full merits review*”. That case is a rare authority on appeals against MPNs, and Mr Pitt-Payne took me to the Decision at [56] where the UTJ advised the First-tier Tribunal to focus on whether the statutory conditions for issuing an MPN have been met and not to “*painstakingly [follow] all the twists and turns of the Commissioner’s internal decision-making process*”.
9. In her Case Management Directions of 30 November 2018, the Registrar referred the parties to *R (Hope and Glory Public House Limited) v City of Westminster Magistrates’ Court* [2011] EWCA Civ 31⁶, which was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at paragraph 45⁷. She correctly described the general approach of this Chamber as that of considering what weight to attach to the Respondent’s reasons for making the decision under appeal and taking a fresh decision rather than reviewing its procedure for doing so.
10. Mr Pitt-Payne agreed with the Registrar’s approach. As he put it, an appeal by way of rehearing cures any procedural irregularity by the administrative decision maker as the Tribunal makes a fresh decision on the evidence before it. He referred me in support of this submission to the House of Lords’ judgment in *Lloyd v McMahon* [1987] 1 AC 625⁸ at p.709G. Accordingly, he submitted, it would not be a sensible use of the Tribunal’s time, nor in accordance with the overriding objective, for the Tribunal to permit the Appellants in this case to pursue Grounds of Appeal based on alleged procedural irregularity by the Information Commissioner. He asked me to make a discretionary case management direction under rule 5 so that the Appellants were not to be permitted to rely on the Grounds of Appeal which raise matters of procedural

<https://www.gov.uk/administrative-appeals-tribunal-decisions/gaskin-v-information-commissioner-and-norwich-city-council-2016-ukut-382-aac>

⁴ https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf

⁵ <https://www.bailii.org/uk/cases/UKUT/AAC/2013/551.html>

⁶ <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>

⁷ <https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf>.

⁸ <https://www.bailii.org/uk/cases/UKHL/1987/5.html>

irregularity. He submitted that the only outcomes available to the Appellants were for the Tribunal to confirm or quash the MPN, or to issue an amended MPN and that determining the Appellants' procedural complaints would not assist the Tribunal to decide on any of those outcomes in determining the appeal.

11. Mr Pitt-Payne also submitted that the format of the Appellants' Grounds of Appeal was such that the procedural irregularity matters should not be regarded as a substantive ground of appeal (see Grounds of Appeal paragraph 71).
12. Ms Proops' short submission on this last point was that the Appellants' Grounds of Appeal read as a coherent whole fairly and squarely put the issues of procedural fairness on the table and that the Respondent's Response had engaged with them as such.
13. Ms Proops' case was not merely that the Tribunal should allow the Appellants' Grounds of procedural irregularity to proceed as a matter of discretion, but that it was positively obliged to do so in order to provide robust judicial oversight of the Information Commissioner's monetary penalty regime and protect Appellants' rights under ECHR Article 1 of the First Protocol. She described this as an exceptionally important case in which serious allegations of procedural unfairness were being made against a regulator whose powers to issue MPNs have recently been expanded by Parliament. She referred me to the Supreme Court's judgment in *R (Osborn) v Parole Board* [2014] AC 1115⁹, in which procedural fairness was described at [71] as of value to the rule of law.
14. Ms Proops referred me to the particular terms of s. 49 DPA which directed the Tribunal to consider whether the MPN was "*in accordance with the law*". She submitted that questions of natural justice and procedural fairness necessarily lay at the heart of such a test. She referred me to *Calvin v Carr* [1980] AC 574 at p.593D, where the Privy Council commented that where a procedural defect is so flagrant and the consequences so severe, the most perfect of appeals and re-hearings would not be sufficient to produce a just result. Also in reliance on this authority, Ms Proops accepted that a technically void MPN would still be capable of appeal in a full merits review jurisdiction (see p.589G) and that if a MPN had not been issued in accordance with the law for procedural reasons, then the Tribunal must allow the appeal but may still consider substitution of another MPN.
15. Referring to UTJ Wikeley's guidance in *Central London Community Healthcare* (see paragraph [8] above), Ms Proops distinguished the issues in this case from those cases seeking to mount a critique of the twists and turns of the Commissioner's internal decision-making process. This was in her submission a case in which the pleaded procedural challenges struck at the heart of the Commissioner's decision to issue the MPN and would exceed any threshold of seriousness for the exercise of the Tribunal's discretion to allow them to proceed.

⁹ <https://www.bailii.org/uk/cases/UKSC/2013/61.html>

16. Ms Proops additionally submitted that, as the Information Commissioner has adopted a system for discounting MPNs where early payment is made, the Appellants argued that they were excluded from that process because they were forced by the pleaded procedural irregularities to pursue an appeal. Further, that this Tribunal has discretion to award costs where the decision under appeal was itself unreasonable (rule 10 (1) (c)), so that it must form a view on the procedural issues after hearing evidence and argument in order to determine such an application.
17. I referred both counsel prior to the CMH to the Decision of the UT (TCC) in *HMRC v Abdul Noor* [2013] UKUT 071 (TCC),¹⁰ which confirms that the First-tier Tribunal's statutory authority is derived from s. 3 of the Tribunals, Courts and Enforcement Act 2007 and that it has no inherent or supervisory jurisdiction. Mr Justice Warren and Judge Bishopp's approach to the question of whether the FTT (Tax) could determine a submission about legitimate expectation in the context of a VAT appeal at [31] was that it was open to the FtT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. Taking this approach, Ms Proops submitted that there were key differences between appeals against the Information Commissioner's Decision Notices under FOIA and EIR and the issues involved in the fair conduct of a penal regime as in this case. She submitted that the Tribunal could not, in the context of an MPN appeal, rely on the FOIA and EIR authorities relied on by Mr Pitt-Payne as the identification of the issues clearly falling within the Tribunal's jurisdiction depended upon the subject-matter of the appeal.

Conclusion

18. Firstly, I reject Mr Pitt-Payne's submission that the Appellants' case as to procedural unfairness has not been properly pleaded. I understand the Appellants' pleadings to make a clear case in this regard and indeed the Response has engaged with that case.
19. Secondly, having considered the issues most carefully, I am persuaded that in the particular circumstances of this case it would be fair and just for the Appellants' Grounds of Appeal relating to procedural unfairness to be considered by the Tribunal. That is not to say that every information rights case before this Tribunal in which procedural impropriety is alleged should be permitted to take up the Tribunal's time and increase the Information Commissioner's costs in undertaking a procedural review. In the majority of cases the Tribunal may well take the view that its discretion should be exercised to exclude evidence and argument related to alleged procedural failings which can adequately be cured by the Tribunal in undertaking a "full merits review".
20. However, in this case I am satisfied that I should distinguish the operation of a monetary penalty regime and the imposition of a very substantial financial penalty from the FOIA and EIR cases relied on by Mr Pitt-Payne, where different issues were at stake. I accept that *Central London Community Health Trust* took a different

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http://taxandchancery.ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

approach in the context of an MPN, but it seems to me that UTJ Wikeley was there considering a more familiar type of procedural challenge and arguably a much less serious complaint than is made in this case.

21. I consider that the authorities relied on by Ms Proops support the approach of agreeing to consider the most serious allegations of procedural unfairness even in the context of an appeal by way of rehearing. I am satisfied that the alleged bias and predetermination pleaded by counsel in this case falls into the most serious of categories. I conclude that fairness and justice require the Tribunal to consider whether the Appellants' challenge strikes at the heart of the decision to issue the MPN so that that decision is not in accordance with the law or the discretion to issue it should have been exercised differently. I have directed accordingly.
22. It was agreed at the CMH that no further steps would be taken to prepare this matter for hearing until the parties had had an opportunity to consider whether they wished to apply for permission to appeal this ruling. I would be grateful if the parties could approach the Tribunal for further directions once that decision has been taken.

**Alison McKenna
Chamber President**

DATE: 27 June 2019