FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2012/0260
Appellant:	Christopher Niebel
Respondent:	The Information Commissioner
Judge:	NJ Warren
Member:	S Cosgrave
Member:	J Nelson
Hearing Date:	2 and 3 October 2013
Decision Date:	14 October 2013

DECISION NOTICE

A. Introduction

1. On 26 November 2012 the Information Commissioner (ICO) issued a penalty notice against Mr Niebel requiring him to pay £300,000. He now appeals to the Tribunal against that decision.

2. The material before us demonstrates that Mr Niebel and his company, Tetrus, has been engaged in sending unwanted text messages on an industrial scale. There were hundreds of thousands of them sent from hundreds of unregistered sim cards seeking out potential claims for mis-selling of PPI loans or for accidents. There is certainly no evidence from Mr Niebel to show that he made any effort to make sure that the recipients consented or that he retained any record of consents. He did not even bother to register with the ICO under the Data Protection Act (DPA) as a controller of data.

B. The Law

3. For some ten years it has been unlawful to use text messages for direct marketing unless the recipient has either asked for or consented to such a communication. See Regulation 22 Privacy and Electronic Communications (EC Directive) Regulations 2003. These Regulations are referred to by the acronym PECR. The Regulations also require that the identity of the sender should be plain and the text must also contain a valid address which permits the recipient to request that the text messages should cease. See Regulation 23 PECR.

4. Until 26 May 2011 individuals could sue for compensation if they suffered damage by reason of any contravention of PECR. From that date the Secretary of State amended PECR by bringing such contraventions also within the scope of Sections 55A-E DPA. These sections were inserted in to the DPA by the Criminal Justice and Immigration Act 2008 and they give the ICO power to impose monetary penalties, in plain language fines, up to a maximum of £500,000. There are certain preconditions. First, the contravention must be serious. It must also be "of a kind likely to cause substantial damage or substantial distress". There are also rules, not relevant to the disputed issues in this appeal, about the "guilty mind" which the person being penalised ("the offender") must have in respect of the contravention.

5. It is apparent that there is a need, when applying these new provisions, to identify the contravention and the circumstances surrounding it reasonably clearly. The detail may of course change in the course of proceedings. That is implicit in the statutory procedure whereby the ICO first sends a "notice of intent" giving the offender an opportunity to make representations and enter into discussion.

6. A clear statement of the contravention is necessary in order to apply the words of the statute; to make a judgement on whether the contravention is "serious"; or to consider whether it is "of a kind likely to cause substantial damage or substantial distress".

7. Such a clear statement is also required by the ordinary rules of fairness which attach to sanctions or penalty proceedings. It is essential that the offender should know

what the case is against him or her. It is important to know the period of time which the contravention covers so that there is no repeat penalty covering the same period. In the early days, this is also important to ensure that a penalty is not issued in respect of activity before 26 May 2011. This too would be unfair. Fairness also requires that the acts or omissions for which a penalty is being imposed should be described clearly enough to ensure that any penalty relates to the stated contravention, rather than to any other behaviour of the offender.

8. The content of the contravention statement will vary according to the circumstances. We accept the submission of Mr Hopkins on behalf of Mr Niebel that it should at the very least indicate the regulation which has been contravened; the content of the contravention; and its scale – in other words roughly how many individual acts there were and how many people were affected. We would add that a statement will in most cases also identify the period of the contravention and the elements of the "guilty mind" that have been found proved.

9. Both Mr Hopkins and Mr Cornwell, who appeared for the ICO, gave us the benefit of a detailed textual analysis of the DPA provisions for which we were grateful – although our task really involves the application of the ordinary English words contained in the statute. We should perhaps mention a couple of points of interpretation concerning the phrase "of a kind likely to cause substantial damage or substantial distress".

10. First, the original ICO guidance confused the use of the word "likely" with the civil standard of proof "on the balance of probabilities". Both advocates submitted that this was wrong and we agree. See R(Lord) v Secretary of State for the Home Department (2003) EWHC 2073 (Admin) especially at paras 99-100. The "balance of probabilities" test is designed to produce just one outcome whereas, as a matter of common experience, an event can have more than one "likely outcome".

11. The advocates were also agreed that distress can acquire the label "substantial" both qualitatively and quantitatively; in other words because of its depth or acuity or because of its widespread nature. It all depends on the facts.

12. Finally, Mr Cornwell asked us to adopt a definition of distress produced by the ICO. This describes it as "any injury to feeling, harm or anxiety suffered by an individual". We doubt the wisdom, for the purposes of applying the statute, in dividing up the phrase "substantial distress" into two words. If the ICO definition involves the proposition that it is not possible to have "any injury to feelings" which falls short of "distress" then, it seems to us, that the definition is at odds with common experience and with the ordinary use of English.

C. Some Procedural Difficulties

13. This case has been beset by a number of procedural difficulties with the result, in our judgement, that it comes before us for decision on a basis different from its actualities.

14. First, the ICO penalty notice did not contain a section clearly describing the contravention.

15. The contravention (see especially para 38) seems to be confined to those cases in which the recipients complained to the ICO. These were 411 in number involving a total of 732 texts between them. Other parts of the penalty notice suggest a different line of thinking. For example, para 59, describing the nature of the contravention, refers to "the sheer volume of unsolicited texts" and para 60, discussing the effect of the contravention, described the numbers of persons affected as "extremely large".

16. In the original appeal documents and at the case management hearing, Mr Niebel's representatives indicated a range of issues on which the appeal was to be contested and it was estimated that the case would last five days. Then about a fortnight before the hearing the appellant changed tack. His solicitors wrote to the ICO and to the Tribunal saying that the case should now only last about half a day. Mr Niebel would not be filing any evidence, nor would he be contesting the evidence produced by the ICO. He would contest the case on one short point under Section 55A(1)(b). This was the question of whether the contravention was of a kind likely to cause substantial damage or substantial distress. Mr Niebel was relying, in the words of his counsel at the hearing, on this one "knock out blow".

17. This volte-face on behalf of the appellant followed a significant shift in the ICO's own position. The ICO had discovered that the majority of the texts referred to in para 38 of his penalty notice had in fact been sent before 26 May 2011. He accepted that it was unfair to treat these as part of a contravention in respect of which the power to issue a monetary penalty was being exercised. He now relied on just 286 texts. We were not given information about the number of individuals affected but if the ratio of complaints to numbers of texts is consistent then the recipients numbered about 160.

18. We were concerned in case the late change on behalf of the appellant might skew our approach to the issues. Shortly before the hearing the Tribunal sent both parties a note referring to the importance of establishing what the contravention was.

19. At the start of the hearing we were keen to ensure that the apparent absence of dispute about the facts was not illusory.

20. Mr Hopkins stated that he was ready to argue, based on a contravention now described as relating to just 286 texts, that Section 55A(1)(b) was not satisfied. Mr Cornwell told us that he asked us to proceed on the same basis so far as the contravention was concerned but in deciding the Section 55A(1)(b) issue, he wanted us to take into account the other evidence about the flood of unwanted text messages emanating from Mr Niebel and Tetrus.

21. This seemed to us to be problematic. Put shortly, a contravention involving 286 text messages seems to us to be of a very different kind from one involving hundreds of thousands of text messages. It is not possible to import the very much larger number in order to determine the nature of a contravention involving a much smaller one.

22. Put another way, the scale of the contravention must be included in the description of the contravention which forms the basis on which the Tribunal deliberates when answering the questions asked by the statute. Otherwise it is not possible to tell whether the penalty has been imposed in respect of the smaller number of texts or in respect of the very much larger number of texts.

23. After allowing time for consideration of this point, we indicated to Mr Cornwell that in asking ourselves whether the contravention was "of a kind likely to cause substantial damage or substantial distress" we would, so far as the question of scale was concerned, rely on the description contained in the account of the contravention. We enquired whether the ICO wished to proceed on the basis that the contravention was actually the sending of hundreds of thousands of unwanted text messages . He told us that he had express instructions not to proceed on that basis.

D. The Contravention

24. We are therefore concerned with a contravention in which Mr Niebel sent out 286 unwanted text messages. They were in breach of Regulation 22 PECR because they were unsolicited and he did not hold any relevant consent. They were in breach of Regulation 23 PECR because he withheld his own name and address. His actions were deliberate and designed for financial gain. He used unregistered sim cards which aided his concealment and he had no effective method of screening a number from receiving further texts when the recipient asked for them to stop. The content of the messages varied. The six variants are shown in the "key" to the schedule prepared by ICO investigators. The period of the contravention was from 26 May 2011 to 9 November 2011.

25. The ICO has provided us with a schedule of the complaints received. Of course, the test we have to apply is not whether actual distress or damage was caused but we accept Mr Cornwell's submission that the actual complaints are relevant material which can assist us in our consideration of what was "likely". We must be cautious though because the 286 examples are not a random selection. They are a self selecting sub set of many hundreds of thousands.

E. Substantial Damage

26. It is likely in our judgement that the contravention was of a kind to lead to people incurring charges for replying "stop" – though many phone users are on packages and do not exceed their text limits. A person abroad who received a message would have to pay a small charge. The ICO also suggests that damage would be caused

because of a text message filling up the memory store on a phone. We regard this as a possible but unlikely outcome. The ICO also refers to loss of "opportunity costs". It takes a very short time indeed to give a tut of irritation and delete a spam message such as these and we would regard any loss of opportunity costs as more notional than real.

27. In our judgement it would be most unlikely for a contravention of the nature and scale described in para 24 above to cause substantial damage and the contravention is therefore not of a kind likely to do so.

F. Substantial Distress

28. The ICO suggests that recipients of the accident claim texts might become concerned for the safety of members of their family or be disturbed by being reminded of a previous accident. Having looked at the wording of the texts, we judge this to be highly unlikely. Almost all mobile phone users, in our judgement, will recognise these texts for what they are. We also regard it as highly unlikely that the texts would evoke distress by raising false expectations of compensation.

29. In our judgement the effect of the contravention is likely to be widespread irritation but not widespread distress. Given the scale of the contravention, there is the possibility of some distress in very unusual circumstances but we cannot construct a logical likelihood of substantial distress as a result of the contravention. We conclude that the contravention is not of a kind likely to cause substantial distress.

30. For these reasons, Section 55A(1)(b) is not satisfied. Given the path these proceedings have taken there seemed no purpose in considering whether other action might be appropriate. Our decision therefore is to cancel the penalty notice.

NJ Warren
Chamber President
Dated 14 October 2013