

**LONDON BOROUGH OF BEXLEY**

**MARY FAIRBURN**

**CASE No 1960132207 (PCN No BL06089562)**

**DECISION**

At 2.12pm on 3 May 1996, a Penalty Charge Notice ("PCN") was issued and attached to Ms Fairburn's car registration mark M62 RKN, in Avenue Road Pay & Display Car Park, Bexleyheath. The PCN was issued on the ground that the car was parked after the expiry of the time paid for, the time shown on the Pay & Display ticket having expired at 12 noon. The car was in apparent contravention of Article 6 of The London Borough of Bexley (Off-Street Parking Places) Order 1995.

The facts are not much in dispute. Ms Fairburn arrived at the car park at about 8am. At the entrance, there is a Pay & Display ticket machine. She paid £1.20. This was the amount she had paid on previous visits, for stays of over 4 hours and up to 24 hours. She parked the car: displayed the ticket in the windscreen: and left, to catch the train.

Until 31 March 1996, the charge in that car park for up to 24 hours was, indeed, £1.20. However, on 1 April, the charge was increased to £1.30. The next charge band down was 50p for up to 4 hours, which did not change at 1 April. The ticket received and displayed by Ms Fairburn showed her having paid £1.20, but also showed the expiry of paid for time as 12 noon, i.e. 4 hours after the ticket was purchased. The ticket machine indicated that it did not give change, and indeed it did not give Ms Fairburn any, although she had paid £1.20 (rather than 50p) for the 4 hours time shown on her ticket. (I was told that the Council do, upon request and proof of payment in the form of the ticket, make repayments of sums overpaid because of the machine's inability to give change: but there are no signs in the car park to indicate that this is the case.)

Ms Fairburn relies on a number of grounds of appeal, but these effectively fall under two heads. First, she says that the increased charges were not reasonably clear. She says: "I had used this car park frequently

and would argue that the signs showing the increased charges was (sic) not sufficiently visible at the entrance to the car park when I stopped to insert money in the machine". Second, she says that she made a genuine mistake and did not deliberately attempt to evade payment - which, she says, is clear from the fact that she paid £1.20 and not a lesser amount - and it is unfair and Draconian for the Council to seek a £40 penalty from her for her mistaken underpayment of 10p.

In respect of these grounds, both Ms Fairburn and the Council made writing submissions to me. Further, there was a hearing before me on 25 November 1996, at which Ms Fairburn and Mr Blake (for the Council) appeared.

With regard to the first ground, I am satisfied that the variation in charges effective from 1 April 1996 was properly made in accordance with the relevant regulations, namely The Local Authorities' Traffic Orders (Procedure) (England & Wales) Regulations 1989 as amended by The Local Authorities' Traffic Orders (Procedure) (England & Wales) (Amendment) Regulations 1993: and that the Council complied with their various obligations under those regulations to publicise the variation in the local press and the car park itself. However, such compliance alone would not necessarily be sufficient. In my view, even if the Council had complied with the statutory variation provisions, they would be unable to pursue a penalty if the relevant current charges were not reasonably well signed.

Ms Fairburn says the charges were not reasonably signed. It is common ground that, at the entrance to the car park, above the ticket machine, at a level of about 6 feet high, there was a list of charges showing £1.30 for up to 24 hours. Both the Council and Ms Fairburn helpfully produced photographs of this. Mr Blake for the Council said that a sticker, about 4 ins by 3 ins in size, was put on the ticket machine for a month prior to 1 April, saying "New Charges Apply From 1 April 1996": and this was replaced on 1 April by a similar notice saying "New Charges Now Apply". His evidence was that that sticker was on the machine on 3 May. That is disputed by Ms Fairburn.

In support of her submission that the new charges were not reasonably well marked, Ms Fairburn also relies upon the single page of the Parking Attendant's notebook which the Council have put into evidence, which shows that, as well as herself, apparently other drivers paid £1.20 for up to 24 hours, and received PCNs.

Even given the evidence the Council and the Appellant have submitted (including photographs), I have not

found the question as to whether the new charges were adequately marked an easy one. The sign at the entrance was high. The signing could, no doubt, could have been clearer. However, having taken into account all of the evidence, I have come to the view that the sign showing the charges at the entrance was reasonably clear in showing the (new) charges, whether or not there was a sticker on the ticket machine itself.

It is clear from her appeal notice - and her comments at the hearing before me - that Ms Fairburn's real complaint is that the Council are pursuing her for a genuine error on her part, which resulted in an underpayment of only 10p which she has subsequently offered to pay. Indeed, she has sent a cheque to the Council for that sum, but they have refused to accept it. Mr Blake made it quite clear at the hearing that Ms Fairburn's good faith was not in doubt, and the Council accept that she made a genuine error. In the correspondence, there is some suggestion that the Council may consider that, a contravention having occurred, they are bound to pursue Ms Fairburn for the penalty. For example, in Mr Jory's letter to Ms Fairburn of 19 July 1996, rejecting her representations, he said: "In the light of the above, I am therefore bound to reject your representations". This is, of course, not the case. The Council are not bound to pursue a penalty for every contravention. They have a discretion. Under Paragraph 2(7) of Schedule 6 to the Road Traffic Act 1991, the Council have a duty properly to consider representations made to them. They are able to take matters of mitigation into account, and waive a penalty, if it is appropriate so to do. Parliament cannot conceivably have intended mitigation to have no place in the statutory scheme, and the time when such matters must be taken into account is when the Council consider an owner's representations. That burden is imposed on the Council by the statutory scheme. Of course, over and above this specific obligation, it is open to the Council at any time to waive a penalty, in whole or on part.

However, Mr Blake told me (and I accept) that, in this case, that discretion has been exercised by the Council. The Council's Parking Manager, Mr Tollemache, reviewed the case and considered it a proper case in which to pursue the penalty from Ms Fairburn. Bearing in mind the compelling mitigation put forward by Ms Fairburn, that decision may be surprising to some, but it is a decision that I cannot question.

My jurisdiction is limited to deciding whether or not there has been a contravention of the statutory scheme. Unlike the Council, I cannot take account of matters of mitigation. Parliament has left it to the good sense of local authorities to ensure that penalties are not pursued in respect of a contravention when such pursuit would be inappropriate: and it has left it to the Council to decide whether, in light of the mitigation put forward, it is appropriate in this case to pursue Ms Fairburn for a penalty.

In these circumstances, having found the contravention to have occurred, I am bound to refuse this appeal. Whether or not the Council in fact pursue Ms Fairburn for this penalty, bearing in mind the mitigation she has put forward, is, as I have pointed out above, a matter for them.

**G R Hickinbottom**

**15 January 1997**