



Case Reference: PEN/2022/0168

[2023] UKFTT 00055 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Pensions Regulation**

**Heard by: CVP
Heard on: 11 January 2023
Decision given on: 12 January 2023**

Before

JUDGE SOPHIE BUCKLEY

Between

IRVING GEORGE LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:

For Appellant: Satvinder Sandhu

For the Respondent: Emma Cranfield

Decision: The reference is dismissed, and the matter is remitted to the Regulator. The penalty notice is confirmed.

REASONS

Background

1. By this reference Irving George Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by the Pensions Regulator on 28 July 2022 (Notice number 106483192543).
2. The Penalty Notice was issued under s 40 of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Compliance Notice dated 1 June 2022.
3. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer on 18 August 2022 that the Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 23 August 2022.

The Law

4. The Pensions Act 2008 imposed a number of legal obligations on employers in relation to the automatic enrolment of certain ‘jobholders’ into occupational or workplace personal pension schemes. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.
5. Each employer is assigned a ‘staging date’ from which the timetable for performance of their obligations is set. The Employer’s Duties (Registration and Compliance) Regulations 2010 specify that an employer must provide certain specified information to the Regulator within five months of their staging date. This is known as a ‘Declaration of Compliance’. An employer is required to make a re-declaration of compliance every three years. Where this is not provided, the Regulator can issue a Compliance Notice and then a Fixed Penalty Notice for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400.
6. Under s.44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice may make a reference to the Tribunal provided that an application for review has first been made to the Regulator. The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, considering the evidence before it.
7. The Tribunal may confirm, vary or revoke a Fixed Penalty Notice and when it reaches a decision, must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

Evidence

8. I heard evidence from Mr. Sandhu, on behalf of the Employer, and from Cathy Doherty, Compliance and Enforcement Manager for Capita plc, the outsources contractor for the Regulator. I read and took account of a bundle and one additional document.

The facts

9. The Employer's staging date was 6 December 2018. The Declaration of Compliance was completed on 17 July 2019, after the deadline of 7 May 2019. The re-declaration was not completed by the deadline of 5 May 2022, so the Regulator issued a Compliance Notice on 1 June 2022 with a deadline of 13 July 2022. As this was not complied with, the Penalty Notice was issued on 28 July 2022 requiring the Employer to pay a penalty of £400. The Employer completed the re-declaration of Compliance on 1 August 2022. On 12 August 2022 the Employer requested a review of the Penalty Notice. The penalty was confirmed on 18 August 2022. On 30 August 2022 the Employer referred the matter to the Tribunal.

Submissions

10. The Notice of Appeal relies on the following ground:
 - (i) The Employer did not receive any letters prior to the Penalty Notice. There have been problems in the past with Royal Mail.
 - (ii) It is unfair because the Employer is a small business.
11. The Regulator's response dated 26 September 2022 submits that the grounds of appeal do not amount to a reasonable excuse for failing to comply with the Compliance Notice or indicate that the Regulator has acted unfairly in any way.
12. The Regulator sent three reminder letters and the Compliance Notice to the Employer's registered address. The Fixed Penalty Notice sent to the same address was received by the Employer. There is no cogent evidence of issues with the postal service. The Regulator sent twelve emails to the Employer between 8 July 2021 and 5 May 2022.
13. It was fair, reasonable and appropriate to issue the Compliance Notice and the Penalty Notice.

Conclusions

14. The timely provision of information to the Regulator, so it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of

employers with their duties. It is for this reason that the provision of a re-declaration of compliance within a specified timeframe is a mandatory requirement. The fact that the Employer has now complied with this duty a short time after the deadline had expired does not excuse a failure to comply.

15. The requirement to pay £400 is a significant burden for a small business such as the Employer. However, the fact that it is burdensome is inherent in it being a 'penalty'. The amount is prescribed by regulations made under the Pension Act 2008. Its amount reflects both the importance of complying with the employer duty provisions and the seriousness with which a failure to do so will be viewed. The Regulator has no discretion to issue a penalty notice for a lesser amount, Nor does the Tribunal have the power to direct substitution of a lesser penalty.
16. I find that issuing the Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
17. I conclude that the Employer did not have a reasonable excuse for failing to comply.
18. All correspondence was sent to the Employer's current registered address, at which the Fixed Penalty Notice was received.
19. The Employer produced a letter from Adidas dated 16 August 2022 which stated that 'we've been informed by our carrier that they have lost your order during delivery'. This is evidence that, on one occasion, the carrier used by Adidas, lost a parcel. I do not accept that this is evidence that there were particular difficulties with receiving post at the Employer's registered address.
20. Mr. Sandhu stated that he had evidence, at home, of problems with postal delivery at his address. He stated that he had letters from, for example, Direct Line Insurance saying they had sent mail that had not been responded to. He stated that his father had stopped receiving his pension because they had sent mail which had not been responded to. I asked the Appellant why he had not produced this evidence for the Tribunal, and he replied that he had looked online and thought it was a waste of time, because he was not going to win the appeal anyway even if he produced all this evidence.
21. I accept, on the basis of Mr. Sandhu's oral evidence, that there have been some problems with receiving post in the past at the Employer's registered office address. However, in the absence of any clear evidence as to the extent of those difficulties, and in the absence of any supporting documentary evidence, I do not accept that this is sufficient to rebut the presumption of service of the Compliance Notice taking account of section 7 of the Interpretation Act 1978 and section 303 of the Pensions Act 2004. I find on the balance of probabilities that

the Compliance Notice was received. It makes no difference to my decision that the Regulator chooses to use first class post rather than recorded delivery.

22. There is no requirement on the Regulator to send reminder letters or emails. In any event in my view, it seems very unlikely that the problems with postal delivery were so serious that the claimant would not have received any of the three reminder letters. Further, there is no suggestion that the Employer attempted to take any action to deal with the postal difficulties. It is not reasonable for an employer who knows that there are difficulties with postal deliveries to its registered address to simply sit back and assume that it is thereby relieved from complying with its legal obligations.
23. The Employer also asserts that none of the twelve emails, sent to the correct address, were received. I accept that it is possible that these emails may have gone into the Employer's junk or spam folder. A reasonable employer should be aware of the possibility of important emails being redirected into the spam or junk folder and should have appropriate systems in place to deal with this issue.
24. Mr. Sandhu was asked about the courtesy telephone call that was made to his mobile number on 15 June 2022. Ms Doherty's evidence was that the note of the call showed that the call connected and that the person who answered was advised of the outstanding redeclaration and given the call centre number should they require assistance.
25. I asked Mr. Sandhu what he had to say about that call. His reply was that it was his number, he gets a lot of calls during the day and 'whether I did speak to someone... it is going back a bit of time to recollect the exact conversation. I note that this was not a denial that he received a reminder call from the Regulator. I find, on the balance of probabilities, that this reminder call was made.
26. Taking all the above into account, the Employer should have been aware of its obligations to redeclare compliance.
27. For the above reasons I am satisfied that the Employer has not provided a reasonable excuse for not complying with the Unpaid Contributions Notice. I determine that issuing the Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 11 January 2023