



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

Appeal Reference: PEN/2016/0069

**Decided without a hearing
On 24 November 2016**

Before

JUDGE J HOLBROOK

Between

MANAGEMENT INVESTMENTS LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

DECISION AND REASONS

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DECISION

The reference is dismissed and the matter is remitted to the Regulator. The Penalty Notice is confirmed.

REASONS

Preliminary

1. By this reference, Management Investments Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 21 July 2016 and bears the Notice Number: 130547028709.

2. The Penalty Notice was issued under section 40(1) of the Pensions Act 2008 (“the 2008 Act”). It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a compliance notice dated 8 June 2016.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 19 August 2016. The effect of the Penalty Notice is accordingly suspended until the reference has been determined, the Tribunal has remitted the matter to the Regulator, and any directions given by the Tribunal have been complied with.

4. The parties have agreed to the reference being determined upon consideration of the papers they provided, without an oral hearing being held. I have therefore considered, in addition to the application form and attached documents, the Regulator’s response (with supporting documentary evidence).

Statutory framework

5. The 2008 Act imposes a number of requirements on employers in relation to the automatic enrolment of certain ‘jobholders’ in occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with those requirements and has certain enforcement powers for this purpose.

6. Each employer is assigned a ‘staging date’ (which depends on the size of their workforce and their PAYE reference number) by reference to which the timetable for the performance of their duties is fixed.

7. Under regulation 3 of the Employers’ Duties (Registration and Compliance) Regulations 2010, an employer must provide specified information to the Regulator within five months of their staging date. That information includes details of the employer and any agent supplying the information, the numbers of jobholders of various categories enrolled in various types of pension scheme and a declaration that the information provided is correct and complete. It is referred to by the Regulator as

a 'declaration of compliance'. Under section 80 of the Pensions Act 2004 it is a criminal offence punishable with up to two years in prison to provide false information in a declaration of compliance.

8. Under section 35 of the 2008 Act the Regulator can issue a 'compliance notice' against an employer who has contravened any of the 'employer duty provisions' (which include the duty to provide a declaration of compliance within five months of the employer's staging date). Under section 40(1) the Regulator can issue a fixed penalty notice if it is of the opinion that the employer has failed to comply with the requirements of a compliance notice. The prescribed fixed penalty is £400.

Function of the Tribunal

9. Section 44 of the 2008 Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal. They may do so provided that an application for a review has first been made to the Regulator.

10. Section 103(3) of the Pensions Act 2004 provides that on a reference like this one the Tribunal "... must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it." The Tribunal must make its own decision on this issue following an assessment of the evidence presented to it. This may differ from the evidence which was available to the Regulator. There is no need for anyone to show that the Regulator's decision was wrong and the Tribunal can reach a different decision to that of the Regulator even if it thinks that the Regulator's decision fell within a range of reasonable decisions.

11. On determining the reference the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination. Those directions may include directions confirming, varying or revoking a notice issued by the Regulator.

Factual background

12. The material facts from which this reference arises are not in dispute. They are set out in the Regulator's Response document and may be summarised as follows:

13. The Employer's staging date was 1 January 2016 and the date by which it was obliged to provide the Regulator with a declaration of compliance was therefore 31 May 2016.

14. Between December 2014 and April 2016, a number of pro forma letters were sent by the Regulator to Mr Peter Phillips, the Employer's director, reminding him about the Employer's responsibilities in relation to automatic enrolment. The last three of these letters expressly mentioned the need to provide a declaration of compliance by the relevant date and warned that failure to do so could result in fines.

15. In addition, the Regulator sent Mr Phillips six email reminders about the Employer's automatic enrolment obligations. The last two of these emails stated the date by which the declaration must be provided and again warned of the risk of fines for non-compliance.

16. The Employer failed to provide the Regulator with a declaration of compliance before the deadline for doing so and, on 8 June 2016, the Regulator issued a compliance notice requiring the Employer to provide a declaration of compliance by 19 July 2016. The new deadline passed without a declaration of compliance being provided and, on 21 July 2016, the Regulator issued the Penalty Notice.

17. On 22 July 2016 the Employer provided the Regulator with a declaration of compliance.

18. On the same day, the Employer requested a review of the Penalty Notice. The Regulator conducted a review and, on 27 July 2016, it wrote to Mr Phillips informing him that the outcome of the review was that the Penalty Notice was confirmed. Written reasons for the decision were provided – which were, essentially, that the Employer had failed to provide a declaration of compliance until after the deadline specified in the compliance notice despite having been sent various reminders beforehand about the need to provide a declaration.

Grounds of appeal

19. On behalf of the Employer, Mr Phillips challenges the Penalty Notice on two principal grounds. First, he asserts that relevant jobholders were given the necessary information about their pension options and that the Employer has paid the appropriate contributions into the NEST pension scheme. Second, Mr Phillips refers to unspecified difficulties experienced in using the Regulator's online services. He says that the penalty imposed is unjustified and unreasonable and asks for the Penalty Notice to be revoked.

20. In addition, Mr Phillips queries whether the Employer's staging date of 1 January 2016 has been correctly assigned. He does so because an associated company (Philip Phillips & Co Ltd) has been assigned a later staging date.

Discussion

21. In the absence of any evidence to the contrary, I find that the Regulator had valid grounds to issue the Penalty Notice under section 40(1) of the 2008 Act. In particular, I am satisfied that the correct staging date was assigned to the Employer: for the reasons explained in paragraph 10.5 of the Regulator's response, staging dates for different employers are assigned by reference to their size and PAYE reference and it is thus entirely possible for associated companies to be assigned different staging dates. Given this finding, the question for determination is whether issuing the Penalty Notice was the appropriate action for the Regulator to take in this case.

22. The timely provision of information to the Regulator, so that 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 that information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that the provision of a declaration of compliance within a specified timeframe is a mandatory requirement.

23. Bearing these factors in mind, it seems to me that issuing the Penalty Notice was an entirely appropriate step for the Regulator to take unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the compliance notice. I do not consider that there was any such excuse in the circumstances of this case. All the Employer needed to do was to provide a declaration of compliance by 19 July 2016 (more than a month and a half after the standard deadline for doing so). The Regulator had gone to considerable lengths in the preceding weeks and months to alert the Employer to its obligations under the 2008 Act and to explain the steps it needed to take in order to comply with them.

24. The automatic enrolment scheme is undoubtedly complex and represents a significant burden for many small businesses. However, the Regulator appears to have taken reasonable steps in this case to facilitate compliance by the Employer. The Employer's failure to provide a declaration of compliance in a timely fashion is not excused by the fact that it was nevertheless making regular pension contributions on behalf of its workers and had informed them of their pension options: for the reasons explained above, providing a declaration of compliance is an integral part of the employer duty provisions under the 2008 Act and, unless the employer has provided the declaration, it has not complied with those provisions. Given the importance of the declaration in terms of facilitating the effective operation of the automatic enrolment scheme, making the declaration should not be viewed merely as a tick-box exercise.

25. Nor do I accept that the Employer's alleged difficulties in making use of the Regulator's online services amount to a reasonable excuse for its failure to provide a declaration of compliance within the time permitted for doing so. No details of those difficulties have been provided. On the other hand, I note (and accept) the Regulator's assurance that its electronic system for the submission of declarations of compliance was functioning throughout the period in question. I also note that, where an employer notifies it of technical difficulties, the Regulator accepts declarations of compliance by telephone. The Employer did not notify the Regulator that it was experiencing technical difficulties and did not attempt to provide the declaration by telephone.

26. The requirement to pay a £400 penalty is clearly a more significant burden for a small business than for a larger one. However, the fact that the penalty is burdensome is inherent in the fact that it is 'a penalty'. The amount of the penalty is prescribed by regulations made under the 2008 Act. Its amount reflects both the

importance of complying with the employer duty provisions and the seriousness with which a failure to do so should be viewed. The Regulator has no discretion under section 40 of the Act to issue a penalty notice for a lesser amount. Nor does the Tribunal have power to direct substitution of a lesser penalty.

Outcome

27. For the above reasons, 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 Judge Holbrook

Judge of the First-tier Tribunal

Date: 28 November 2016