



Appeal number: PEN/2021/0264P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PENSIONS REGULATION)**

TOTAL INDUSTRIAL MACHINES LIMITED

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL:

**ALEXANDRA MARKS CBE
(SITTING AS A FIRST TIER
TRIBUNAL JUDGE)**

**Sitting in Chambers (and therefore decided on the papers without a hearing) on
18 JANUARY 2022**

DECISION

1. The reference is dismissed, and the matter is remitted to the Respondent. The Fixed Penalty Notice is confirmed.

REASONS

Background

2. Total Industrial Machines Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 26 July 2021 (Notice number 121675748069).

3. The Fixed Penalty Notice ('Penalty Notice') was issued under section 40 of the Pensions Act 2008 ('the Act'). It required the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 11 June 2021 that required the Employer to provide the Regulator with information in respect of automatic enrolment.

4. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer on 24 August 2021 that the decision was confirmed.

5. On 6 September 2021, the Employer referred to the Tribunal the Regulator's decision to issue the Fixed Penalty Notice.

6. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered all the evidence and submissions made by both parties.

The Law

7. The Act imposes various legal obligations on employers in relation to the automatic enrolment of certain 'jobholders' into occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.

8. Since 1 October 2017, automatic enrolment duties apply to employers from their 'staging date' (being the date when the legislation first applies to that employer). These duties include the obligation - from the employer's staging date - to assess their staff, write to them, and automatically enrol them into a qualifying scheme if applicable.

9. The employer must, within five months of its staging date, provide certain specified information to the Regulator about its compliance with these duties. This is known as a ‘declaration of compliance’.

10. Crucially for the purposes of this case, the employer must *also* - every three years from its staging date - assess and re-enrol eligible staff who have left the workplace pension scheme. The employer must then provide the Regulator with re-enrolment information by means of a ‘re-declaration of compliance’.

11. If the employer fails to provide a re-declaration of compliance, the Regulator can issue a Compliance Notice and then, if the Compliance Notice is not complied with, issue a Penalty Notice for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400.

12. Under section 44 of the Act, a person who has been issued with a Penalty Notice may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

13. The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, taking account of the evidence before it. The Tribunal may confirm, vary or revoke a 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.

The facts

14. The Employer needed to consider re-enrolment by the third anniversary of their staging date, namely by 1 January 2021. The Employer’s re-declaration of compliance deadline was 1 June 2021.

15. On 3 July 2020 - some 11 months before the deadline - the Regulator emailed the Employer’s nominated contact, Higson Accountants, with a reminder of the re-declaration of compliance deadline of 1 June 2021. The email said that if Higson Accountants was *not* setting up the re-enrolment for the Employer or helping them to do so, they should forward the email to a representative of the Employer who could let the Regulator know whom to contact instead.

16. The Regulator also sent a reminder letter direct to the Employer in September 2020. This stated that the deadline to *complete* any re-enrolment duties was 1 January 2021 and deadline to re-declare *compliance* by 1 June 2021. The letter also invited the Employer to check and update if applicable the details of their nominated contact (Higson Accountants) as well as update the name of the most senior person at the Employer responsible for automatic enrolment if that had changed.

17. The above letter was sent to the Employer's old registered office address at Unit 9 Farrar Close, Newark, Notts. However, the Employer's registered office address had changed to Units 4 & 4a Hawker Business Park, Melton Road, Burton on the Wolds, Leicestershire LE12 5TH. The Regulator sent a letter to the Employer at their new registered office address in October 2020, setting out the requirements for re-enrolment between 1 October 2020 and 31 March 2021, and stating the re-declaration deadline date as 1 June 2021.

18. The Regulator sent a further reminder letter direct to the Employer's new registered office address in February 2021, again mentioning the re-declaration deadline of 1 June 2021. The letter warned that failure to complete the legal duties on time might render the Employer '*subject to fines and/or prosecution.*'

19. The Employer did not file a re-declaration of compliance with the Regulator by 1 June 2021. The Regulator therefore issued a Compliance Notice dated 11 June 2021, requiring the re-declaration of compliance to be filed by an extended deadline of 22 July 2021. The Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

20. The extended deadline was not met so, on 26 July 2021, the Regulator issued a Penalty Notice requiring payment of the fixed penalty sum of £400 by 23 August 2021, and compliance with the Compliance Notice by the same date.

21. On 2 August 2021, the Employer applied to the Regulator for review of the Penalty Notice on the basis that it referred to a Compliance Notice dated "11/07/2021" (sic) which the Employer had not received.

22. On 24 August 2021, the Regulator notified the Employer that it had completed a review of its decision to issue the Penalty Notice and confirmed that decision.

Submissions

23. The Employer's Notice of Appeal dated 6 September 2021 says that:

(1) The decision to impose a penalty is unfair as they did not receive the Compliance Notice said to have been sent on 11 June 2021.

(2) The Employer is a very small company struggling to survive in these troubled times.

(3) The Employer does not have an internal accounts department and does not understand the accounting process. For this reason, they employ and rely on an external book-keeper and accountant to ensure they stay '*legal and compliant*'.

(4) If the Employer had received the Compliance Notice they would have forwarded it to their book-keeper and accountant. It would certainly have been acted on and not ignored.

(5) The Employer as a company were unaware of the re-enrolment requirements. Now they are aware, they will certainly comply in future.

(6) The £400 penalty is a large amount to find but this was a genuine mistake, not a deliberate act. It had come about by the Employer not knowing the system and the letter informing them what they needed to do not arriving.

24. In its response dated 28 September 2021, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Employer's grounds of appeal do not amount to a reasonable excuse for the failure to comply with the Compliance Notice nor indicate that the Regulator as acted unfairly in any way.

(2) The Employer has merely asserted that the Compliance Notice was not received but has no provided supporting evidence. The Employer has also failed to explain why they received the Penalty Notice but not the Compliance Notice which was sent to the same address.

(3) The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address. The Regulator submits that the Employer has not provided any evidence to overturn those presumptions.

(4) The Regulator sent correspondence reminding the Employer of their duties between 3 July 2020 and 1 June 2021. These communications informed the Employer that their re-declaration deadline was approaching, and that if they did not comply with their legal duty, they might be issued with a fine.

(5) While the Regulator understands the magnitude of the COVID pandemic, there is no clear justification for failing to complete the re-declaration or delegate it to another member of staff in this case: many businesses have managed to comply with the requirements despite the pandemic.

(6) The Employer should have been aware of their legal duties and ensured full and timely compliance with them. The Employer failed to comply. It was therefore fair, reasonable and appropriate for the Regulator to issue a Compliance Notice and, when that was not complied with, issue a penalty.

(7) The Employer completed their original declaration of compliance and have continued to comply with other enrolment duties so it is not plausible that they were not aware of the requirement to re-declare and were unable to do so.

(8) At the date of the Regulator's response, the Employer had still not completed their re-declaration.

(9) The amount of the penalty is fixed by law. Given the multiple warnings and reminders, the penalty is fair, reasonable and proportionate.

(10) If this appeal is dismissed, it is open to the Employer to request a payment plan to meet the penalty.

Conclusions

25. For the reasons set out below - and taking account of all the evidence provided to me - I conclude that the Employer has given no 'reasonable excuse' for non-compliance in this case.
26. The Employer has not explained how or why they received the Penalty Notice yet did not receive any previous correspondence from the Regulator sent to the same address.
27. Either of the two reminder letters (sent in October 2020 and February 2021) or the Compliance Notice (sent in June 2021) - even disregarding the numerous emails sent to the Employer's previously nominated contact - should have alerted the Employer to their legal duties of re-enrolment.
28. Each letter, as well as the Compliance Notice, clearly sets out the steps required, including the re-declaration deadline of 1 June 2021. Both letters were correctly addressed to the Employer's registered office. Neither of them was returned to the Regulator undelivered, nor has the Employer denied receiving these. The Compliance Notice was sent to the same address as the Penalty Notice and the Employer clearly did receive the Penalty Notice.
29. As for whether the Employer *received* the Compliance Notice:
 - (1) The Regulator does not have to *prove* that the document was received. This is because the Act and related Regulations say that if a document is sent to a company's registered office by post, which is its proper address, it is *presumed* that it was received by the person to whom it was addressed. This is only a presumption and, if there were strong evidence to the contrary, the presumption can be displaced. The Employer does not have to *prove* that the document was not received but, beyond the simple statement that the Compliance Notice was not in fact received, the Employer has produced *no* evidence in support of this position (such as evidence from the Post Office of post being disrupted in the local area; or post being wrongly delivered to another similar address).
 - (2) Secondly, even if the Employer received neither the Compliance Notice nor either of the reminder letters (all of which were sent to the same registered office address), none of these are required by law but are sent out of courtesy and to offer guidance and support if needed. Because neither reminders nor Compliance Notice are legal requirements, failure to receive them would not relieve the Employer of the duty to comply with the legal obligations relating to re-enrolment. Such obligations include filing with the Regulator a re-declaration of compliance by the required deadline. Whether or not an employer receives reminders, as a responsible employer it is for them to be aware of their legal duties, and to ensure full and timely compliance with them.

30. In this case, the re-declaration deadline was in fact extended under the Compliance Notice from 1 June 2021 till 22 July 2021.
31. The Compliance Notice was served at a time when businesses were trading despite the pandemic so, even taking account of the difficulties that businesses may have faced during the pandemic and periods of lockdown, no evidence or reason has been given for the Employer's failure to comply within this extended timescale. I therefore do not consider that the pandemic or successive lockdowns provide a reasonable excuse for the Employer not to comply with the obligation to file a re-declaration of compliance in time.
32. The Employer accepts that the Penalty Notice was received. The Employer then asked the Regulator to review the penalty, and when the Regulator upheld the penalty, appealed to this Tribunal.
33. The Employer had – by the date of the Regulator's response to the appeal – still not filed their re-declaration. Even had they had by then complied, this would have been *after* the deadline, and *after* issue of the Penalty Notice. It would therefore have been too late to avoid the penalty because late compliance does not excuse a failure to do so by the deadline.
34. I am satisfied that the Employer - or advisers on their behalf - had ample time to comply with their obligation to file a re-declaration of compliance by the deadline. The Employer failed to do so. That failure entitled the Regulator to issue a Penalty Notice.
35. In all the circumstances, I determine that the Regulator was entitled to issue a Penalty Notice for non-compliance with the Compliance Notice dated 11 June 2021.
36. The amount of the penalty is fixed by law, so the Regulator has no discretion to reduce the penalty below £400. I accept that the £400 penalty is burdensome for smaller businesses such as the Employer, but I consider it is not disproportionate to the breach bearing in mind the importance of the re-declaration to the Regulator's role in ensuring employers comply with their legal duties.
37. The Regulator has indicated that if the £400 penalty would have financial implications for the business, it is open to the Employer to apply to the Regulator for a payment plan.
38. I confirm the Penalty Notice, and I remit the matter to the Regulator.
39. No directions are necessary.

(Signed)

**ALEXANDRA MARKS CBE
(SITTING AS A JUDGE OF
THE FIRST TIER TRIBUNAL)**

DATE: 4th February 2022