First-tier Tribunal
(General Regulatory Chamber)
Professional Regulation

Appeal Reference: PR/2018/0058

Decided without a hearing
on 13th March 2019

Before

TRIBUNAL JUDGE PETER HINCHLIFFE

Between

AVERYS LIMITED

Appellant

and

WESTMINSTER CITY COUNCIL

Respondent

DECISION

1. The Appeal is refused. The final notice served by the Westminster Borough Council ("Westminster") on Averys Limited ("Averys") dated 28th August 2018 was correct in identifying a breach by Averys of their duty to become a member of an approved redress scheme whilst engaging in property management work and imposed a monetary penalty that was reasonable in all of the circumstances of this appeal.

REASONS

A. Background

2. Averys appealed against a final notice dated 28th August 2018 served on it by Westminster (the "Final Notice"), which is the enforcement authority for letting agents and property managers carrying on business in Westminster. The Final Notice is addressed to Averys at its business address at 3 Chester Mews, London SW1X 7AH and concerns Averys' property management work being carried on in Westminster and elsewhere. The Final Notice requires Averys to pay a monetary penalty of £5,000 in respect of its failure between 9th March 2018 and 29th May 2018 to meet its duty under The Redress Scheme for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc. (England) Order 2014 (the "Order") to belong to an approved redress scheme whilst engaged in property management work.

B. Legislation

3. The Order was issued in order to permit the exercise of the powers conferred by the Enterprise and Regulatory Reform Act 2013 (the "Act"). The sections of the Act and the Order that are referred to in this decision or that are otherwise relevant to this appeal are set out below in the Annex, which forms a part of this decision.

4. Where the relevant enforcement authority is satisfied on the balance of probabilities that a letting agency has breached its duties under the Order, it may impose a monetary penalty under article 8 of the Order. It does so by serving first a notice of intent, considering any representations made in response, and then serving a final notice on the letting agent concerned.

5. The Order provides that a letting agent upon whom a financial penalty is imposed may appeal to this tribunal. The permitted grounds of appeal are (a) that the decision to impose the financial penalty was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the monetary penalty is unreasonable; or (d) the decision was unreasonable for any other reason. The tribunal may quash, confirm or vary the final notice which imposes the financial penalty

C. Guidance

6. The Act and the Order are the subject of Guidance for Local Authorities issued by the Department for Communities and Local Government in March 2015 (the "Guidance"). The Guidance is non-statutory but the relevant enforcement authority is expected to have regard to it when considering what fine is reasonable for a breach of the Order. The section of the Guidance that is of greatest relevance to this appeal is set out below:

"*The enforcement authority can impose a fine of up to £5,000 where it is satisfied, on the balance of probability that someone is engaged in letting or management work and is required to be a member of a redress scheme, but has not joined.*

……..

The expectation is that a £5000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agent or property manager makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; nevertheless an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue which could be considered is whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is open to the authority to give a lettings agent or property manager a grace period in which to join one of the redress schemes rather than impose a fine.' (See page 53 of the Guide.)

D. The Appeal and the Response

7. Westminster served a notice of intent dated 29th May 2018 (the "Notice of Intent") on Averys giving the following details of their breach of the Order:
   "as a person engaging in property management work – a failure to belong to an approved redress scheme for such work."
   The Notice of Intent stated that Westminster intended to impose a penalty of £5,000 and invited representations from Averys. The Notice of Intent was accompanied by a letter from Westminster withdrawing an earlier notice of intent that had been issued on the understanding that Averys were acting as a letting agent. Averys' representations in response to this earlier notice of intent had established that they were not letting agents.

8. Representations from Averys in response the Notice of Intent were not received by Westminster until 31st August 2018 as Averys had mistakenly sent them on 27th June 2018 to an internal e-mail address.

9. On 28th August 2018 Westminster issued a final notice (the "Final Notice") to Averys and referred to the Order and gave the following details of the basis for the Final Notice:
   "The Council is satisfied, on the balance of probabilities that you are or have been engaging in property management work whilst not being a member of a government approved redress scheme and you are therefore in breach of the above legislation"

10. Averys submitted a Notice of Appeal dated 25th September 2018 to Westminster setting out their grounds of appeal against the Final Notice. The main points of Averys' grounds of appeal are:

- The decision to impose the penalty was unreasonable. Their failure to join a redress scheme was an oversight only. No complaints had been received by Averys and no warning had been given by Westminster. A lesser remedy should have been pursued by Westminster.
- The amount of the monetary penalty is unreasonable. Westminster had discretion and had imposed the maximum penalty and relied on non-statutory guidance in doing so. It was unreasonable for the following reasons;
  - the failure was an oversight;
  -Averys is a responsible operator with no complaints and no previous enforcement action;
  - Averys had joined a redress scheme promptly;
  - this was a first breach; and
  - Westminster had started the process because of a mistaken belief that Averys is a letting agent.

Averys sought a quashing of the Final Notice, or failing that, a variation.

11. Westminster submitted a response to the appeal and outlined their dealings with Averys since March 2018. They stated that Averys had been in breach of their duty to join a redress scheme for some time and that they would have continued but for the intervention of Westminster Trading Standards in April 2018. They accepted that Averys had joined a redress scheme on 22nd June 2018, but they did not regard this as a prompt response given that their obligation had been pointed out to them in April 2018 and the Notice of Intent had been served on 29th May 2018. Westminster stated that Averys would have been aware, shortly after the Notice of Intent was issued, of a complaint that had been pursued with Newham Council in relation to a property that they manage in Newham. Westminster noted that Averys were not appealing on the basis that the penalty was unreasonable on affordability or financial grounds. Westminster referred to the Guidance and the expectation that a penalty of £5,000 is the norm for a breach of the Order unless there are extenuating circumstances. Westminster did not consider that there are any extenuating circumstances justifying a reduction in the penalty.

E. The hearing

12. The hearing of the appeal took place on 13th March 2019. Mr Mark Avery represented Averys. Westminster was represented by Ms Kirsty Panton. Three members of the Westminster Trading Standards team; Ms Cosgrove, Mr Silcock and Mr Akpom attended. Each had provided witness statement in advance of the hearing. The contents of the witness statements were accepted by Mr Avery. I am grateful to both parties for the clear manner in which they expressed their views and for their polite and focused dealings with each other during the hearing.

13. Ms Panton and Mr Avery separately confirmed that it was common ground between the parties that between 9th March 2018 and 29th May 2018 ("the Relevant Period") Averys did not belong to an approved redress scheme whilst engaged in property management work in Westminster. I find that the evidence supports these conclusions

and in the light of the agreement of the parties, I do not think it necessary to set out the evidence in full on these issues in this decision.

14. Ms Panton opened the hearing and set out the factual and legal basis for Westminster's decision on liability and on penalty. Ms Panton concentrated on the reasonableness of the penalty in the Final Notice and referred to the Guidance and to Westminster's conclusions that there were no extenuating circumstances that justified a reduction in the penalty from the £5,000 level that is both the maximum permitted under the Order and the "norm" set out in the Guidance in the absence of extenuating circumstances. Ms Panton pointed out the length of time since the Order had come into force and the obligation on Averys to ensure that they were familiar with the legal obligations falling on those engaged in property management work. Ms Panton stated that Mr Akpom had taken account of the representation that were submitted by Averys in response to the Notice of Intent, even though these were not received until after the Final Notice had been issued, and he had found that these did not give rise to any extenuating circumstances. Westminster did not believe that Averys had joined a redress scheme promptly after having their obligations pointed out to them. In the absence of any reference to financial difficulties in paying the penalty, Westminster could see no reason for it to be regarded as unreasonable.

15. Mr Avery accepted that Averys were in breach of their obligation to join a redress scheme and expressed his regret that this had happened. He repeated the points made in the Notice of Appeal and referred to above in support of their argument that the level of the Penalty was unreasonable. He also ran through the factual background to the appeal and pointed out that Averys had sought to remedy the position promptly. The earlier notice of intent had been issued in error and Averys had made representations pointing this out. Their representations in response to the Notice of Intent had also been prepared promptly and then sent in error to the wrong address. Averys had a long history and a good reputation, it had received no complaints prior to that referred to in the appeal in Newham and it offered a high standard of service to its customers and presently managed 20-25 blocks in London.

16. Mr Avery said that the level of fine was the real issue. He regarded it as unreasonable for a number of reasons: Averys is a small business and only employs two part-time members of staff in addition to himself. He had dealt with the breach as quickly as he could and had applied to be a member of a redress scheme on 13th June 2028 after taking a little time to investigate the three potential providers of the redress service. Averys had not been warned by Westminster that they faced a fine if they did not join a redress scheme and they would have done so immediately had they been warned. Their breach was a first offence. Mr Avery stated that these factors should have been taken into account in setting the penalty at a reasonable level.

17. Mr Avery went on to state that they he had not understood before the hearing that the financial position of Averys was relevant to the reasonableness of the penalty. He had not provided any financial information about Averys prior to the hearing and he did not recall being advised by Westminster that this was relevant during their visits or

correspondence with him. He did not have any accounts with him at the hearing. On being invited to provide details of Averys financial position, which he described as being very difficult, he stated that in the account for 2017 the turnover of Averys was £70,000, its profits were £10,000, staff cost for the two part-time staff members were £25,000 and Mr Avery had only received £5,000. Averys operate within an overdraft facility of £10,000. He was however optimistic about the future and their ability to win more business. When questioned he said that the impact on the business of a fine of the £5,000 would be detrimental to the business and that he may have to reduce staff working hours.

18. Miss Panton asked Mr Avery about the state of the business and Mr Avery confirmed that the size of the business in terms of staff was the same now as it had always been. Ms Panton pointed out that Westminster had had no opportunity to assess the financial position of Averys or verify any on the information provided by Mr Avery. Mr Avery stated that he had not understood the significance of Averys financial position before today and that he had legal assistance in preparing the Notice of Appeal and he had not seen the Guidance until the evening before the hearing. Therefore he had not understood the need for financial information to be provided.

G. Findings on liability

19. In reaching a decision in this case I have had regard to all of the oral and written submissions of the parties and to the evidence and other documentation contained in the hearing bundle.

20. I note that Averys have agreed that they were carrying on property management work in Westminster in the Relevant Period and they were not a member of an approved redress scheme at that time. The submission and evidence of both parties appears to support this conclusion. I conclude that Averys was in breach of its obligations under the Order and Westminster was justified in issuing the Final Notice and imposing a monetary penalty.

H. Findings on penalty

21. I have considered whether the amount of the monetary penalty is unreasonable as Averys have claimed in their grounds of appeal. In deciding that issue, which is left open by the primary legislation, I accept that it is helpful and appropriate to have regard to the Guidance. The Guidance says the expectation is a "*fine*" (i.e. penalty) of £5,000 and that a lower sum should be imposed only if the authority is satisfied there are "*extenuating circumstances*". The Guidance does not purport to be exhaustive as to what might constitute extenuating circumstances; however, it goes on to indicate some considerations that may be relevant. It recognises that an issue that should be considered in this regard is whether a £5000 fine is disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is clear that the Act must take precedence over the Guidance and that, in any event, enforcement authorities such as Westminster must consider the issue of reasonableness

and proportionality of a penalty in the round and that they should not follow the advice in the Guidance to the exclusion of all other matters. The Act is intended to reduce harm and the risk of harm to consumers from letting agents and property managers. The penalty needs to be set at a level that reflects the public benefit in ensuring compliance with the Act whilst being proportionate to the scale of the business and the severity of the failure.

22. It is the responsibility of any business to understand the legal obligations that it must comply with in the markets in which it operates. Averys failed to take the steps required by the 2014 Order until 13th June 2018. I have no information that would enable me to assess whether or not any consumer has suffered harm by reason of Averys' failure. The purpose of requiring businesses carrying on property management work to become a member of a redress scheme is to make it easier for customers to pursue their concerns. Averys' do not appear to understand that its failure may have prevented any harm from coming to light. Averys appear to lack the systems and processes required to recognise changes in the legal environment in which it operates. Averys' difficulties in submitting its representations to Westminster in time, joining a redress scheme after Westminster's first visit to its premises in April 2018 and in understanding the significance of its financial position all point to a limited understanding of, or lack of attention to, the legal framework in which it operates.

23. The inability of a business to pay a penalty imposed under the Order is likely to be an extenuating circumstance giving rise to a reduction in the penalty. However, it is up to the business to persuade the local authority or the tribunal that the level of a penalty is such that it will pose a risk to their continued ability to trade or is otherwise disproportionate. Averys had not sought to put forward such a claim until the hearing, which makes it difficult for Westminster and the Tribunal to assess the overall impact of the penalty on the business of Averys. I find that Mr Averys account of the small size and limited financial capability of Averys to be persuasive, but it was not clear from Mr Avery's submissions that a penalty of £5,000 would have a material impact on Averys' ability to continue in business at its current scale and size. I also note that the impact of the penalty had not been so great a concern that it had been mentioned in Mr Avery's previous representations or submissions, as might have been expected had the future of the business been in jeopardy. I am not persuaded on the basis of the limited evidence available to me that the level of penalty proposed is unreasonable;

24. In all of the circumstances of this case, I conclude that Averys has not established that there are extenuating circumstances that make the amount of the penalty unreasonable. Averys have failed to comply with the obligation under the Order for an extended period. I conclude that the level of the penalty is not disproportionate to the breach of Averys' legal obligation set out in the Final Notice and is reasonable.

H. ***Decision***

25. By virtue of Article 9 of the Order, the Tribunal may quash, confirm or vary a final notice.

26. I conclude that the Final Notice was correct in identifying a breach by Averys of their duty to be a member of an approved redress scheme whilst engaging in property management work during the Relevant Period and that the monetary penalty of £5,000 imposed in the Final Notice is reasonable in all of the circumstances of this appeal.

27. The Final Notice is confirmed.

Peter Hinchliffe
Judge of the First-tier Tribunal
13th March 2019
Promulgation Date 20th March 2019

ANNEX

1. Section 83(1) of the Enterprise and Regulatory Reform Act 2013 (the 'Act') provides:

> '(1) The Secretary of State may by order require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work which is either—
> (a) a redress scheme approved by the Secretary of State, or
> (b) a government administered redress scheme.'

2. Section 83(2) provides:

> '(2) A 'redress scheme' is a scheme which provides for complaints against members of the scheme to be investigated and determined by an independent person.'

3. Subject to specified exceptions in subsections (8) and (9) of section 83, lettings agency work is defined as follows:

> '(7) In this section, 'lettings agency work' means things done by any person in the course of a business in response to instructions received from-
> (a) a person seeking to find another person wishing to rent a dwelling-house in England under a domestic tenancy and, having found such a person, to grant such a tenancy ('a prospective landlord');
> (b) a person seeking to find a dwelling-house in England to rent under a domestic tenancy and, having found such a dwelling-house, to obtain such a tenancy of it ('a prospective tenant').'

4. Section 84(1) enables the Secretary of State by order to impose a requirement to belong to a redress scheme on those engaging in property management work. Subject to certain exceptions section 84 (6) provides that;

> " 'property management work' means things done by any person ('A') in the course of a business in response to instructions received from another person ('C') where-
> (a) C wishes A to arrange services, repairs, maintenance, improvements or insurance or to deal with any other aspect of the management of premises in England on C's behalf, and
> (b) the premises consist of or include a dwelling-house let under a relevant tenancy."

5. Pursuant to the Act, the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) England Order 2014 (SI 2014/2359) (the 'Order') was introduced. It came into force on 1 October 2014. Article 3 provides:

'Requirement to belong to a redress scheme: lettings agency work
3.—(1) A person who engages in lettings agency work must be a member of a redress scheme for dealing with complaints in connection with that work.
(2) The redress scheme must be one that is—
(a) approved by the Secretary of State; or
(b) designated by the Secretary of State as a government administered redress scheme.
(3) For the purposes of this article a 'complaint' is a complaint made by a person who is or has been a prospective landlord or a prospective tenant.'

6. Article 5 imposes a corresponding requirement on a person who engages in property management work.

7. Article 7 of the Order provides that it shall be the duty of every enforcement authority to enforce the Order.

8. Article 8 provides that where an enforcement authority is satisfied on the balance of probabilities that a person has failed to comply with the requirement to belong to a redress scheme, the authority made by notice require the person to pay the authority a monetary penalty of such amount as the authority may determine. Article 8(2) states that the amount of the penalty must not exceed £5000. The procedure for the imposition of such penalty is set out in the Schedule to the Order. This requires a 'notice of intent' to be sent to the person concerned, stating the reasons for imposing the penalty, its amount and information as to the right to make representations and objections. After the end of that period, the enforcement authority must decide whether to impose the monetary penalty, with or without modification. If it decides to do so, the authority must serve a final notice imposing the penalty, which must include specified information, including about rights of appeal. (See Paragraph 3 of Schedule to the Order).

9. Article 9 of the Order provides as follows:

'Appeals
9.—(1) A person who is served with a notice imposing a monetary penalty under paragraph 3 of the Schedule (a 'final notice') may appeal to the First-tier Tribunal against that notice.
(2) The grounds for appeal are that—
(a) the decision to impose a monetary penalty was based on an error of fact;
(b) the decision was wrong in law;
(c) the amount of the monetary penalty is unreasonable;
(d) the decision was unreasonable for any other reason.
(3) Where a person has appealed to the First-tier Tribunal under paragraph (1), the final notice is suspended until the appeal is finally determined or withdrawn.
(4) The Tribunal may —
(a) quash the final notice;

(b) confirm the final notice;
(c) vary the final notice.

10. The Schedule to the Order provides as follows:

"Final notice

3.

(1) After the end of the period for making representations and objections, the enforcement authority must decide whether to impose the monetary penalty, with or without modifications.

(2) Where an enforcement authority decides to impose a monetary penalty on a person, the authority must serve on that person a final notice imposing that penalty.

(3) The final notice must include—

(a) the reasons for imposing the monetary penalty;
(b) information about the amount to be paid;
(c) information about how payment may be paid;
(d) information about the period in which the payment must be made, which must not be less than 28 days;
(e) information about rights of appeal; and
(f) information about the consequences of failing to comply with the notice.