



Appeal number: PEN/2017/0113

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

NEASDEN CAR CARE LTD

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL: JUDGE CLAIRE TAYLOR

DECISION

The reference is allowed and the matter is remitted to the Regulator.

REASONS

Background

1. By this reference M O'Mahoney, on behalf of Neasden Car Care Ltd ("the Employer") challenges a fixed penalty notice issued by the Regulator (Notice number 173908267748).
2. 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. I am satisfied that I have sufficient to reach a decision on that basis.
3. The Tribunal has carefully considered the evidence and submissions made by both parties.

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 Employers’ Duties (Registration and Compliance) Regulations 2010 (the ‘2010 regulations’) states 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”. 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 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, taking into account the evidence before it. 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.

The Facts

7. The Employer’s staging date was 1 August 2016, so its declaration was due by 4 January 2017.
8. On 27 January 2017, the Regulator served a Compliance Notice. No response was received within the deadline of 9 March 2017. On 13 March 2017, a Fixed Penalty Notice was issued under s.40(1) of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply.
9. On 5 April 2017, the Appellant completed the Declaration of Compliance. After the Appellant requested a review of the notice, the Respondent confirmed the penalty and the Employer referred the matter to the Tribunal.

Submissions

10. The Employer’s grounds of appeal include the following. (I have added subject headings purely for ease of reference.)
 - a. He seeks for the Fixed Penalty Notice be cancelled due to the exceptional circumstances beyond the control of the sole Director.

Personal Family Event

- a. Since the July 2016 due to health and personal family reasons, the sole director was unable to give his full attention and manage the garage business. His father's health circumstances brought big stress and pressure on day-to-day life. His father, died late January 2017, and the bereavement took a toll within his family.
- b. As a result, the VAT Returns since July 2016 were not prepared and submitted to HMRC within the quarterly dates, and had only just been finalized. The financial statements and annual accounts could not be prepared within the statutory time limit for submission to

the Companies House, and HMRC. They granted an exceptional 30 more days' extension to file, which has been completed and done now.

Financial Hardship

- c. The company is a very small operating vehicle garage providing a livelihood of the sole director, one mechanic and wages payment to two other administrative part-time staff.
- b. Neasden Car Care Limited has now fulfilled all the obligations of the Pensions Regulator. The Declaration of Compliance was submitted, and all staff enrolled into the Pension Provider, backdating to August 2016, with payments made.
- c. This is a very small business with no loan nor any overdraft facility being offered by any lender or other resources. There are no Assets available to put forward since it has a negative equity.
- d. The day-to-day business activity cash flow is "being difficult with other creditors outstanding in the Balance Sheet".

11. The Regulator's response includes the following:

Fair and Reasonable

- a. Whilst the penalty is a more significant burden for a small business like the Appellant's, it is fair and proportionate.
- b. The Respondent is sympathetic to the loss of the Appellant's father. However, the Appellant had recourse to professional advice and therefore should have been in a strong position to comply, particularly as compliance was met in all other aspects. The accountant was presumably employed on the basis of having sufficient automatic enrolment knowledge to effect compliance. The accountant completed the declaration of compliance, submitted the review request and received the Respondent's decision. The Respondent's records also show that a partial declaration of compliance was initiated on 11 February 2017 by the Appellant's accountant. It is reasonable to expect a higher level of knowledge and efficiency on the part of professional advisers who provide automatic enrolment services in a commercial setting. The partial declaration shows the accountant understood what was required to achieve compliance. Further, the Appellant and accountant presumably had an effective means of communication in regards the declaration. Although the responsibility of submitting the declaration ultimately rests with the Appellant, this task had been delegated to an accountant so the Respondent considers the Appellant had sufficient professional support to ensure it was so completed in spite of the difficult circumstances the Appellant had endured.
- c. It seems that as an extension was granted by HMRC, the Appellant expected a similar approach from the Respondent. In fact, an extension was granted by the Respondent as the compliance notice extended the date for submission from 4 January 2017 to 9 March 2017. The declaration was not, in fact, completed until 5 April 2017, two months after the original deadline and one after the extended deadline.
- d. The Declaration of Compliance is a vital source of information for the Respondent and a central part of its compliance and enforcement approach. It is a criminal offence,

- punishable on conviction on indictment with up to two years' imprisonment, to knowingly provide false or misleading information. (*See s.80(1)(a)(v) of the Pensions Act 2004.*)
- e. The legislation allows employers a generous period of 5 months to complete the Declaration of Compliance.
 - f. The Respondent contacted the Appellant numerous times regarding automatic enrolment reminding the Appellant to make the declaration. The Appellant received a further formal reminder in the Compliance Notice. The notice made it clear that a £400 fixed penalty might be imposed if the Appellant did not complete the declaration by the new deadline of 9 March 2017. By the time the notice was issued, more than seven months had passed since the Appellant's staging date and the automatic enrolment duties first applied.
 - g. The amount of the fixed penalty is prescribed in regulation 12 of the 2010 regulations. The Respondent has discretion as to whether or not to issue a notice, but not as to the amount of the penalty.
 - h. Compliance with the underlying automatic enrolment duties does not excuse the failure to complete the declaration. Had the penalty not been imposed, there is no way of knowing when, or if, the declaration of compliance would have been completed.

Conclusion

12. I accept that the Employer set up a pension scheme and has now declared compliance. However, it failed to comply with its separate legal duty to declare compliance for some weeks past the deadline for doing so. The Appellant has made the case of there being exceptional circumstances that should be taken into account. It pleads financial hardship and extenuating personal circumstances. The Respondent has not sought to dispute the veracity of these claims. Accordingly, I find no reason to do so. The Respondent argues that it is reasonable to expect that as the Employer appointed an accountant, a higher level of efficiency is expected. However, the Appellant has made clear that the company is very small, has negative equity, has no access to an overdraft facility and cash-flow difficulties. In those circumstances, it is reasonable to assume that the company does not employ an accountant to provide the highly active level of support that seems to have been envisaged by the Respondent.
13. The Respondent also argues that an extension had been given by means of the issuance of the (standard) Compliance Notice. I accept this. However, it seems to me that the Appellant was likely pleading that as HMRC had considered that these circumstances warranted making a specific exception, so too might the Respondent. I accept the Respondent's other arguments. Nonetheless, I consider the Employer to have provided a reasonable excuse for non-compliance of the declaration and that the combined factors of the effect of the ill health and eventual death of the director's father along with the financial difficulties of the business constituted an exceptional circumstance which should be given weight.
14. For the above reasons, I allow the reference. I remit the matter to the Regulator with a direction to revoke the fixed penalty notice.

Judge Taylor

Date 8 September 2017

Promulgation date 13 September 2017