



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PENSIONS**

Tribunal Reference: PEN/2021/0179

Decided without a hearing

Decision Date: 10th January 2022

Judge David Hunter QC

Between

PELAW MOT LTD

Appellant (by Reference)

And

THE PENSIONS REGULATOR

Respondent

DECISION

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

REASONS

Preliminary

1. By this Reference Pelaw MOT Ltd (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 6th May 2021 and bears the Notice Number: 149061276387.

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 24th March 2021.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 23rd June 2021. 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 the Employer’s application form for the Reference (described in the papers as the Notice of Appeal, and containing “Grounds of Appeal”), the Employer’s request for a review, and 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. From 1st October 2017 each employer has a “Duties Start Date” (“DSD”), by reference to which the timetable for the performance of their duties is fixed.

7. Amongst those duties, in terms of automatic enrolment, 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 DSD. 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 (which may differ from the evidence which was available to the Regulator). The Tribunal does not sit as

an appellate body from a decision of the Regulator; it is not necessary to show that the Regulator was in error, 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 DSD was 1st October 2020 and the date by which it was obliged to provide the Regulator with a declaration of compliance was therefore 1st March 2021.

14. In November 2020 the Regulator wrote to the Employer. That letter headlined the DSD and the deadline for the provision of the DOC. The letter began: "You must act now: your automatic enrolment duties", and, in a clearly defined box in the letter, set out equally clearly that what the Employer needed to do "immediately" was to complete the declaration of compliance by the aforesaid deadline of 1st March 2021. The letter was accompanied by a comprehensive guide, "The essential guide to automatic enrolment", which contained detailed information and instructions with regard to automatic enrolment duties, including the duty to make a timely declaration of compliance. The letter concluded: "Do not ignore this letter, you need to act now. If you do not complete your legal duties, including submitting your declaration of compliance on time, you may be subject to fines." In February 2021 the Regulator wrote again to the Employer. Again the declaration deadline was headlined, in red typescript, and, again in red typescript, the letter was headed: "take immediate action to avoid a potential fine", and again in a clearly defined box set out the need for compliance with the law by completing the declaration. This letter concluded by referring again to the deadline in red typescript, and again referred to fines in the event of non-compliance. Finally by way of correspondence, the Regulator wrote to the Employer on 9th March 2021, specifying the need for urgent action by reason of the passing of the deadline date of 1st March, and afforded the Employer an extended deadline of 14 days from the date of that letter, for the submission of the declaration of compliance.

15. The Employer failed to provide the Regulator with a declaration of compliance before the extended deadline for doing so and, on 24th March 2021, the Regulator issued a Compliance Notice requiring the Employer to provide a declaration of compliance by 4th May 2021.

17. That new deadline passed without a declaration of compliance being provided and, on 6th May 2021, the Regulator issued the Penalty Notice.

18. The Employer did complete its declaration of compliance on 12th May 2021, after the expiration of the ultimate deadline.

19. The Employer made a request for a review of the Fixed Penalty Notice. The Regulator conducted a review, and, on 16th June 2021, it wrote to the Employer informing it that the outcome of the review was that the Penalty Notice was confirmed.

20. As stated aforesaid, the Employer referred this matter to the Tribunal by its Notice of Appeal dated 23rd June 2021.

Grounds of Appeal

21. In the request for a review, on behalf of the Employer, an agent from a payroll firm said simply that the Employer had set up a pension scheme and made all relevant contributions and believed that it was fully compliant with “the pension regulations”. The agent, upon “receiving notice” that the declaration of compliance had not been completed, completed it on that same day. In the Grounds of Appeal the employer said only that the fine was unaffordable, that its business was new, and that the failure of compliance was “an oversight” by a business owner dealing with multiple tasks and working long hours. The employer also said that “the notice” (the Compliance Notice) had not been read properly, that it was hard running a small business and that the fine (of £400) was very unfair.

The Submissions of the Regulator

22. These are contained in the Response of the Regulator to the Reference.

23. The Regulator relies upon that correspondence, which is set out in paragraph 14 above, and the Compliance Notice. No issue is raised as to the receipt of that correspondence, including the Guide, nor is there any dispute as to the receipt of the Compliance Notice. The Regulator asserts that by that correspondence and Notice reasonable and ample notice and information were given to the Employer with regard to the statutory duty to make a timely declaration of compliance with the automatic enrolment process, and that the Employer has offered no reasonable excuse for the material failure of compliance.

Discussion

24. In the absence of any evidence to the contrary, I find that the Regulator had valid grounds to issue this Penalty Notice under Section 40 (1) of the Act. The question for determination is whether that was the appropriate action for the Regulator to take in this case.

25. 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 this 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, as a specific and separate statutory duty.

26. Bearing these factors in mind, it seems to me that issuing this 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. All the Employer needed to do, in the context of this Reference, was to provide a declaration of compliance by an extended deadline of 4th May 2021 (over two months

after the original deadline date, and over 5 months after the initial material correspondence (letter and Guide) of November 2020. I accept the submissions of the Registrar, and consider that the Employer was given reasonable and indeed ample notice of its obligations and of the deadline for compliance, and ample information about the material process, by the aforesaid correspondence and accompanying Guide, and by the Compliance Notice.

27. I accept also the submission of the Regulator that the Employer has put forward no reasonable excuse for the failure of compliance. Although the declaration was ultimately made, on 12th May 2021, it was made only after the expiration of the generously extended deadline date for doing so, which was preceded by all of that material correspondence and information set out above and by the Compliance Notice. The deadline date was in fact extended twice, firstly by the letter of 9th March 2021 and secondly by the Compliance Notice. To assert merely an “oversight” in reading a formal Notice, in respect of an important regulatory duty with regard to the pension matters with which the Employer had already engaged, which had been preceded by cumulatively urgent correspondence and an abundance of material information with regard to that duty, is to fail entirely to provide a reasonable excuse for failing to make the time, within the generous timeframe set out above, to deal with the duty of declaration, no matter how busy the Employer may have been with other matters.

28. As to penalty, the Tribunal recognises that the requirement to pay a £400 penalty is clearly a more significant burden for a small (and relatively new) business than a larger one. However, the fact that the penalty may be 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 regulations and the seriousness with which a failure to do so should be viewed. The Registrar 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 order the substitution of a lesser amount. The Tribunal is aware that, if payment of the penalty in a single amount would occasion hardship, the Regulator is prepared to engage with Employers of this kind with regard to accepting payment in instalments, and assumes that this facility would be offered in this case if the Employer does so engage.

29. For these reasons I determine that the issuing of the Fixed Penalty Notice was the appropriate action to take in this case. Accordingly, I dismiss the Reference and remit the matter to the Regulator under Section 44 (4) (b) of the Act. No directions are given pursuant to Section 44 (4) (c) of the Act.

David Hunter QC

Date of Decision: 10th January 2022

Date Promulgated 11th January 2022