Neutral citation number: **[2023] UKFTT 440 (GRC)**

Case Reference: PEN/2022/0260

First-tier Tribunal
General Regulatory Chamber
Pensions

Heard remotely by video conference
Heard on: 17 May 2023

Decision given on: 20 May 2023

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

WINE-BOUTIQUE FRINTON LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:
For the Appellant: Mr J Greenwold
For the Respondent: Mr A Gharib

Decision: The appeal is Dismissed

REASONS

1. By this reference Wine-Boutique Frinton Ltd (the "Appellant") has appealed against a fixed penalty notice issued by the Pensions Regulator (the "Regulator") on 11 November 2022, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.

2. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The Pensions Act 2008 (the "Act") imposes a number of requirements on employers in relation to the automatic enrolment of certain "job holders" in occupational or workplace personal pension schemes.

4. The Regulator has statutory responsibility for ensuring compliance with these requirements. Under Section 35 of the Act, the Regulator can issue a compliance notice if an employer has contravened one of more of its employer duties. A compliance notice requires the person to whom it is issued to take (or refrain from taking) certain steps in order to remedy the contravention and will usually specify a date by which these steps should be taken.

5. Under Section 40 of the Act, the Regulator can issue a fixed penalty notice if it is of the opinion that an employer has failed to comply with a compliance notice. This requires the person to whom it is issued to pay a penalty within the period specified in the notice. The amount is to be determined in accordance with regulations. Under the Employers' Duties (Registration and Compliance) Regulations 2010 (the "2010 Regulations"), the amount of a fixed penalty is £400.

6. Notification may be given to a person by the Regulator by sending it by post to that person's "proper address" (section 303(2)(c) of the Pensions Act 2004 (the "2004 Act")). The registered office or principal office address is the proper address on which to serve notices on a body corporate, as set out in section 303(6)(a) of the 2004 Act (applied by section 144A of the Act). Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. This includes compliance notices issued under the Act.

7. Section 44 of the Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal in respect of the issue of the notice and/or the amount of the penalty payable under the notice. A person may make a reference to the Tribunal if an application for a review has first been made to the Regulator under Section 43 of the Act. Under Section 103(3) of the 2004 Act, the Tribunal must then "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 following an assessment of the evidence presented to it (which may differ from the evidence presented to the Regulator) and can reach a different decision to that of the Regulator even if the original decision fell within the range of reasonable decisions (***In the Matter of the Bonas Group Pension Scheme*** [2011] UKUT B 33 (TCC)). In considering a penalty notice, it is proper to take "reasonable excuse" for compliance failures into account (***Pensions Regulator v Strathmore Medical Practice*** [2018] UKUT 104 (AAC)). On determining the reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate.

8. Under section 11 of the Act, an employer who is subject to automatic enrolment duties must give prescribed information to the Regulator - known as a declaration of compliance. This information is prescribed in Regulation 3 of the 2010 Regulations. The declaration of compliance must be provided within five months of the staging date or duties start date (Regulation 3(1)). A re-declaration of compliance must be

provided within five months beginning with the third anniversary of the staging date, and then within five months beginning with the third anniversary of the previous automatic re-enrolment date (Regulation 4(1)).

Facts

9. The facts are set out in the Appellant's notice of appeal document and the Regulator's response document, including the annexes attached to those documents. I find the following material facts from those documents.

10. The Appellant is the employer for the purposes of the various employer duties under the Act. The original duties start date was 6 April 2019. The Appellant's re-declaration of compliance was due to be provided by 5 September 2022.

11. The Respondent sent seven emails and two letters to the Appellant between November 2021 and July 2022. Emails were sent to sue@wine-boutique.co.uk, the address which had been provided by the Appellant. The Respondent sent two letters to the Appellant in January 2022 and June 2022, to its registered office address. These were addressed to Susanna Roberts, Director. These communications all gave details about the re-enrolment and re-declaration duties and gave the re-declaration deadline of 5 September 2022. Mr Greenwold is the main owner of the Appellant and provided some further information at the hearing. The emails and letters were addressed to an individual who left the company formally in November 2021, although she remained involved for some time afterwards.

12. The Regulator issued a compliance notice to the Appellant on 16 September 2022, to the registered office address. This gives an extended deadline for the re-declaration of compliance as 27 October 2022. The notice expressly states, "*If you don't complete your re-declaration of compliance by 27 October 2022, we may issue you with a £400 penalty*". The notice also explains how to complete the re-declaration of compliance, including a web link for starting the declaration, postal address and telephone number.

13. The Respondent attempted to telephone the Appellant on 6 October 2022 but was told that the person they had contact details for no longer acted on behalf of the Appellant.

14. The Appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the Appellant on 11 November 2022. The Appellant applied for a review to the Regulator on the grounds the compliance notice was not received. The Regulator confirmed the penalty notice on the grounds that it was correctly served on the registered office address. The Appellant did complete the re-declaration of compliance on 28 November 2022.

Appeal grounds

15. The Appellant put forward various appeal grounds in their written appeal. They say that they didn't receive a reminder despite never failing to get post reliably at their shop. They have always done their very best to comply with the regulations and have only ever had one member of staff at a time who is over the threshold for auto-

enrolment. Hospitality is in terrible shape and their small business is no exception. The written appeal also complains about this being a way to inflict penalties on normally diligent business owners. Mr Greenwold provided some further arguments at the hearing, as set out below.

16. The Regulator says that the compliance notice was properly served, the presumption of service applies, and late or eventual compliance does not excuse the original failure to comply.

Conclusions

17. The declaration and re-declaration of compliance is a central part of the Regulator's compliance and enforcement approach. It is necessary so that the Regulator can ensure that employers are complying with their automatic enrolment duties, and this is why it is a mandatory part of the system. Employers are responsible for ensuring that these important duties are all complied with, and there needs to be a robust enforcement mechanism to support this system.

18. I have considered whether issuing the fixed penalty notice was an appropriate action for the Regulator to take in this case and find that it was. The Regulator had sent the Appellant information in various emails and letters about the need to complete a re-declaration of compliance, including the relevant deadline. This deadline was extended in the compliance notice. The Appellant failed to comply with the further deadline set out in the compliance notice.

19. I have considered whether the compliance notice was legally served at the Appellant's proper address and find that it was. Under the 2004 Act, the Regulator can serve this notice on a limited company by sending it to either the company's registered office or to its principal office. According to the documents I have seen, the notice was sent to the Appellant's registered office address.

20. Having considered all the Appellant's arguments, I do not find that the Appellant had a reasonable excuse for failing to comply with the compliance notice.

21. ***Receipt of compliance notice.*** Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. The Appellant has not rebutted this presumption. The fixed penalty notice was received by the Appellant, and this was sent to exactly the same address by the Regulator. The Appellant has provided no explanation as to why the compliance notice may not have been received and dealt with - in circumstances where it appears to have been sent to the correct registered office address, and the fixed penalty notice was received. Unlike the previous reminders, it was not addressed to the individual who had left the business. I therefore find on balance of probabilities that the compliance notice was received by the Appellant. Mr Greenwold complains that this requires him to prove that something didn't happen. I appreciate that this rule may seem harsh, but it is possible to provide evidence of why a particular notice may not have been received. As I explained to Mr Greenwold at the hearing, it is not sufficient to simply say that a compliance notice was not received or was overlooked. Otherwise, all employers could avoid the penalty by saying that they did not receive the compliance notice.

22. Mr Greenwold explained that there had been a change of manager from November 2021, but post sent to the shop would still be opened. At the hearing, Mr Greenwold did not dispute that the previous reminders were sent, but said he was not made aware of it and there had been a fault in their systems. The Appellant has a responsibility to ensure that its contact details with the Regulator are up to date. I also note that reminders from the Regulator are not legally required before a compliance notice is sent, although the Regulator usually does issue reminders to help business to comply and avoid any penalties.

23. ***Intention to comply.*** The Appellant says that they intended to comply, became compliant as soon as they were aware, and only ever had one member of staff at a time who is over the threshold. I accept that the Appellant did not deliberately fail to comply. However, late compliance does not provide an excuse. The fixed penalty was issued because the de-declaration of compliance was not provided by the extended deadline in the compliance notice. Even if previous reminders were not received, this gave some six weeks before a penalty would be issued. The re-declaration of compliance is a critical source of information which enables the Regulator to check and enforce compliance, and so it is very important that employers re-declare on time. It also makes no difference that only one employee was involved. The Regulator is responsible for ensuring compliance with every employee's rights under automatic enrolment, irrespective of the size of the business.

24. ***Illness.*** Mr Greenwold explained at the hearing that he had been unwell (and provided more detail which it is not necessary to record here). This meant he had a significant amount of time off work. He said that during this time he was still running the business, but in a slightly diminished capacity. I have every sympathy for Mr Greenwold. However, he did not indicate that this undoubtedly difficult time would have prevented him from dealing with the compliance notice.

25. ***Business difficulties.*** The appeal document referred to hospitality being in difficulties, and Mr Greenwold explained at the hearing how they were still struggling in the aftermath of Covid-19 and £400 is too much to for them to pay right now. I appreciate that £400 can be a significant sum for a small business. Nevertheless, the amount has been set at this level to provide a real deterrent to breach of these important duties. I have no discretion to reduce the amount. The Regulator did explain at the hearing that the Appellant could ask to pay in instalments by completing a hardship form.

26. ***The enforcement system.*** Mr Greenwold explained at the hearing that the system feels like vexatious trip wire, particularly for businesses like his which fall within the "red tape" zone but are too small to have a compliance officer. He complains that there are so many varied duties imposed on small businesses from every government. In this case, the amount of the fine is fixed and operates like a tax.

27. I do accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses. It may also seem harsh to be fined £400 for failing to provide information to the Regulator, where the Appellant has not actually failed to make proper pension contributions. However, the declaration and re-declaration of

compliance is a separate and important part of the system. As already explained, it is vital to ensuring that the Regulator can check and enforce compliance. Employers therefore have an obligation to pay attention to communications from the Regulator and act on them appropriately. The Regulator does try to help employers to comply by providing reminders and information in advance by letter and email, as in this case.

28. ***Information on reviews from the Regulator.*** This is not strictly relevant to reasonable excuse, but Mr Greenwold said at the hearing that he felt he had to bring matters to this tribunal. This is because the Regulator's website says that not receiving reminders is not a reasonable excuse, in relation to reviews of their decisions. He took this to mean that not receiving a compliance notice cannot ever be a reasonable excuse. I checked the information provided about reviews on the Regulator's website during the hearing. Under a list of what won't count as a reasonable excuse, it says "*You didn't get a reminder from us to complete your automatic enrolment duties*". It appears that this is intended to refer to reminders sent before a compliance notice. As noted above, there is no legal obligation to send these reminders. Not receiving the compliance notice itself can be a reasonable excuse (although only if there is evidence as to how and why this may have happened). The Regulator's representative said he would feed this point back to the Regulator, as it may be that the wording could be clarified.

29. For the above reasons, I determine that issuing the fixed penalty notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the fixed penalty notice. No directions are necessary.

Hazel Oliver

Judge of the First-tier Tribunal

Dated 20 May 2023