



[2023] UKFTT 00056 (GRC).

Case Reference: PEN/2022/0162

**First-tier Tribunal
General Regulatory Chamber
Pensions Regulation**

**Heard by: On the papers
Heard on: 11 January 2023
Decision given on: 12 January 2023**

Before

JUDGE SOPHIE BUCKLEY

Between

BEAUTY WORLD COSMETICS LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The reference is dismissed, and the matter is remitted to the Regulator. The penalty notice is confirmed.

REASONS

Background

1. By this reference Beauty World Cosmetics Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by the Pensions Regulator on 7 July 2022 (Notice number 135151260381).
2. The parties have agreed to the Reference being determined on the papers under rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and I am satisfied that I can properly determine the issues without a hearing. I have therefore considered the Employer’s Notice of Appeal and supporting documents, the Regulator’s response and its annexes.
3. The Penalty Notice was issued under s 40 of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Compliance Notice dated 12 May 2022.
4. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer on 14 July 2022 that the Penalty Notice was confirmed. The Employer referred the matter to the Tribunal.

The Law

5. 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.
6. Each employer is assigned a ‘staging date’ from which the timetable for performance of their obligations is set. The Employer’s Duties (Registration and Compliance) Regulations 2010 specify 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.
7. 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 that 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, considering the evidence before it.
8. 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

9. The Employer’s staging date was 1 May 2021. The Declaration of Compliance was not completed by the deadline of 30 September 2021. In February 2022 the Regulator sent a letter informing the Employer that it needed to ‘take immediate action to avoid a potential fine’, setting out the steps that needed to be taken and giving an extended

deadline of 11 April 2022 to complete the Declaration of Compliance. The letter enclosed a document entitled 'The essential guide to automatic enrolment'. A second reminder letter was wrongly addressed and returned to the Regulator.

10. The Declaration of Compliance was not completed by the extended deadline, so the Regulator issued a Compliance Notice on 12 May 2022 with a deadline of 22 June 2022. On 17 May 2022 there was a phone conversation between the Regulator and the Employer in which the Regulator stated that there was an outstanding Declaration of Compliance and that a penalty may be incurred if it was not made. As the Compliance Notice was not complied with, the Penalty Notice was issued on 7 July 2022 requiring the Employer to pay a penalty of £400. The Employer completed the Declaration of Compliance on 8 July 2022. On 8 July 2022 the Employer requested a review of the Penalty Notice. The penalty was confirmed on 14 July 2022. The Employer referred the matter to the Tribunal.

Submissions

11. The Notice of Appeal relies on the following:
 - (i) The Employer did not know that it had to file a Declaration of Compliance;
 - (ii) The Employer complied with its other duties by enrolling the employee in a pension scheme;
 - (iii) The Employer is a struggling business.
12. The Regulator's response dated 16 September 2022 submits that the grounds of appeal do not amount to a reasonable excuse for failing to comply with the Compliance Notice.
13. The Regulator relies on the valid service and receipt of the reminder letter and the Compliance Notice, in the absence of any evidence to rebut the presumption of service. An assertion of non-receipt is not sufficient. In any event the note of the telephone call on 17 May 2022 shows that the Employer was aware of the Compliance Notice.
14. The Employer was more than aware of their duties as a result of the letter and essential guide sent in February 2022. A further reminder was given by phone on 17 May 2022. The Compliance Notice further sets out the duties that need to be met.
15. The fact that the Employer is small does not detract from its statutory duties. As a responsible employer it is for the Employer to be aware of its legal duties and to ensure compliance. It was fair, reasonable and appropriate to issue the Compliance Notice and the Penalty Notice. Neither the Regulator nor the tribunal has any jurisdiction to vary the amount of the Penalty Notice.

Conclusions

16. The timely provision of information to the Regulator, so 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. The fact that the Employer has now complied with this duty does not excuse a failure to comply.

17. The requirement to pay £400 is a significant burden for a small business such as the Employer, particularly if that business is struggling. However, the fact that it is burdensome is inherent in it being a 'penalty'. The amount is prescribed by regulations made under the Pension Act 2008. Its amount reflects both the importance of complying with the employer duty provisions and the seriousness with which a failure to do so will be viewed. The Regulator has no discretion to issue a penalty notice for a lesser amount, nor does the Tribunal have the power to direct substitution of a lesser penalty.
18. I find that issuing the Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
19. I conclude that the Employer did not have a reasonable excuse for failing to comply. The Compliance Notice and the letter of February 2022 were sent to the Employer's current registered address, at which the Fixed Penalty Notice was received. The Employer does not explicitly assert that that correspondence was not received and it is clear from the telephone call of 17 May 2022 that the Employer knew about the Compliance Notice. I find, on the balance of probabilities, that the Employer received the letter of February 2022 and the Compliance Notice.
20. The duty to make a Declaration of Compliance was set out clearly in the letter of February 2022, the accompanying guide and in the Compliance Notice. It was further explained to the Employer in the telephone conversation of 17 May 2022, at a point at which the Employer could still have complied before the deadline. I find that the Employer ought to have been aware of the duty to make a Declaration of Compliance and the consequences of not doing so.
21. For the above reasons I am satisfied that the Employer has not provided a reasonable excuse for not complying with the Compliance Notice. I determine that issuing the Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 11 January 2023