



NCN [2024] UKFTT 00419 (GRC).

Case Reference: PEN-2024-0012-AE

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

**Heard by: On the papers
Heard on: 23 May 2024
Decision given on: 24 May 2024**

Before

JUDGE SOPHIE BUCKLEY

Between

ALLEN SHAW

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 Allen Shaw (“the Employer”) challenges a Fixed Penalty Notice (“the Penalty Notice”) issued by the Pensions Regulator on 23 November 2023 (Notice number 104454689506).
2. 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 28 September 2023.
3. The Regulator has completed a review of the decision to impose the Penalty Notice and informed the Employer on 5 December 2023 that the Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 4 January 2024.
4. 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. The Tribunal considered all the evidence and any submissions made by both parties.

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 duties start 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 duties start 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 section 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 duties start date was 3 April 2023. The Regulator wrote to the Appellant twice in May 2023 confirming the duties start date and the deadline for completing the Declaration of Compliance by no later than 4 September 2023. The

Regulator included a 'Welcome Pack', which outlines the employer's responsibilities and key dates.

10. The Declaration of Compliance was not completed by the deadline of 4 September 2023. The Regulator sent a reminder letter on 13 September 2023 giving an extended deadline of 14 days from the date of the letter. This was not complied with so the Regulator issued a Compliance Notice on 28 September 2023 with a further extended deadline of 8 November 2023. As this was not complied with, the Penalty Notice was issued on 23 November 2023 requiring the Employer to pay a penalty of £400.
11. The Employer completed the Declaration of Compliance on 24 November 2023. On the same date the Employer requested a review of the Penalty Notice. The penalty was confirmed on 5 December 2023.
12. All communications, including the Penalty Notice and Compliance Notice, were sent to the correct address. This is the same address as was given in the declaration of compliance.

Submissions

13. The Notice of Appeal relies on the following grounds:
 - a. The Employer has a pension in place for his employee and has been paying contributions from the start.
 - b. The Employer thought that the Regulator would be able to obtain the information from Nest.
 - c. Failure to fill in a form does not deserve a fine of £400.
 - d. The Employer is a small business and employs a young person who is likely to be made redundant if the fine has to be paid.
14. Although not repeated in the Notice of Appeal, the request for a review asserts that the Employer did not receive any letters prior to the Penalty Notice and I have considered this as an additional ground of appeal.
15. The Regulator's response submits that the grounds of appeal do not amount to a reasonable excuse for failing to comply with the Compliance Notice or indicate that the Regulator has acted unfairly in any way in respect of that penalty notice.
16. The Employer has not given any explanation as to why the Fixed Penalty Notice was received but not the Compliance Notice beyond suggesting that they did not receive it. There is no evidence to support that post frequently is misdirected or that the post may go awry. The Regulator relies on the statutory presumptions of service and does not consider the Appellant has rebutted them
17. The Regulator submits that the Employer's assertion that it was not aware it needed to complete its declaration is not a reasonable excuse. The Regulation sent reminder communications to the Employer.
18. The Regulator submits that compliance with the other duties is irrelevant and the amount of the penalty is fixed by law.

Conclusions

19. 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 and has complied with its other duties does not excuse a failure to comply.
20. The requirement to pay £400 is a significant burden for a small business such as the Employer and I accept that there may be a risk of a redundancy as a result.
21. The fact that the penalty 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. The Regulator has offered to discuss a proposal for a payment plan from the Employer.
22. 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.
23. I conclude that the Employer did not have a reasonable excuse for failing to comply.
24. All correspondence was sent to the correct address, at which the Fixed Penalty Notice was received. The Employer has made a bare assertion that the Compliance Notice and the previous correspondence was not received, without any explanation or evidence to support that assertion. I do not accept that this is sufficient to rebut the presumption of service of the Compliance Notice taking account of section 7 of the Interpretation Act 1978 and section 303 of the Pensions Act 2004. I find on the balance of probabilities that the Compliance Notice was received.
25. There is no requirement on the Regulator to send reminder letters or emails. In any event, in the absence of any evidence as to why letters might not have been received, it is in my view probable that the claimant would have received the reminder letters. In any event, given the information that is publicly available, the Employer should have been aware of its obligations to declare compliance.
26. 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: 23 May 2024