



NCN [2024] UKFTT 00425 (GRC).
AE

Case reference: PEN-2024-0011-

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

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

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

Between

MR. M HUSSAIN and MR. M ZAKARI T/A ANISEED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision

The reference is dismissed and the matter is remitted to the Regulator. The Fixed Penalty Notice is confirmed.

REASONS

Background

1. In this reference Mr. M Hussain and Mr. M Zakari t/a Aniseed (“the Employer”) challenge a fixed penalty notice (“the Fixed Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 23 November 2023 (Notice number 100910502622).
2. The Fixed 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 27 September 2023.
3. The Regulator completed a review of the decision to impose the penalty notice and informed the Employer on 20 December 2023 that the Fixed Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 2 January 2024.

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 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’. An employer is required to make a re-declaration of compliance every three years. 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 or an Escalating Penalty Notice may make a reference to the Tribunal provided that a review has been carried out or an application for review has 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.
7. The Tribunal may confirm, vary or revoke a 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.

Evidence

8. I read and took account of a bundle of documents.

The facts

9. The Employer’s duties start date was 1 January 2017. The Employer completed its declaration of compliance on 24 June 2017. The Employer did not complete their first re-declaration by the deadline of 1 June 2020. The deadline for the Employer’s second re-declaration of compliance was 30 August 2023.

10. The Regulator sent two reminder letters to the Employer in December 2022 and May 2023.
11. The Employer's second re-declaration of compliance was not filed by the deadline of 30 August 2023. The Regulator did not immediately issue a Compliance Notice. Instead it sent a letter on 11 September 2023 giving an extension of time. This letter is headed 'Urgent action is required - your re-declaration deadline was 30 August 2023'. In a red box the letter sets out in bold: 'It is your legal duty to make sure your re-declaration is completed. You have 14 days from the issue date of this letter to complete your re-declaration. Failure to complete your re-declaration of compliance may result in you being fined.'
12. The Employer did not complete a re-declaration of compliance by the extended deadline so the Regulator issued a Compliance Notice on 27 September 2023 with a deadline for compliance of 7 November 2023.
13. As the Employer did not complete a re-declaration of compliance by the deadline in the Compliance Notice, the Fixed Penalty Notice was issued on 23 November 2023 requiring the Employer to pay a penalty of £400. The Fixed Penalty Notice required the Employer to comply with the Compliance Notice by 21 December 2023.
14. The Employer completed the first and the second re-declaration of compliance on 8 December 2023.
15. The Employer submitted a review request on 11 December 2023. The grounds for review state that Employer had never received a letter in regards to declaring compliance by 7 November 2023. Mr. Hussain, on behalf of the Employer stated that he had now provided the Regulator with an updated email and telephone number. Finally he stated that the penalty would have a negative impact on the Employer which was already struggling to keep open.
16. The Regulator upheld the Fixed Penalty Notice on review on 20 December 2023.

Submissions

17. The Notice of Appeal relies on the following grounds:
 - (i) The Regulator has not listened to his case in its review.
 - (ii) The Employer did not receive the Compliance Notice or the reminders by post. The last post that the Employer received was in July 2020. The Employer believes that it was lost in the post or failed to be delivered.
 - (iii) The restaurant has been partially closed since Covid due to financial difficulties and is only open in the evening.
 - (iv) The Employer has no employees enrolled in the scheme.
 - (v) The Employer has no reason not to have complied and would have complied if it had received the notice.
 - (vi) The Employer cannot afford the £400 fine.
 - (vii) The contact details that the Regulator had were not up to date.
 - (viii) The Employer has now complied.

18. The Regulator submits that the decision to issue the Fixed Penalty Notice was fair, reasonable, and proportionate.
19. The letters sent in December 2022, May 2023 and September 2023 were sent to the appellant's last known address in Westferry Road. The statutory notices were also sent to this address. The appellant accepts that it received the Fixed Penalty Notice, The address in Westferry Road was the address provided by the appellant in their declaration of compliance in June 2017. The same address was provided in the re-declaration of compliance. It is submitted that the notices were properly served relying on the statutory presumption of service.
20. Given the importance of a statutory notice sent to the last known address of the Appellant, the Regulator submits that a lack of realisation or other mishandling would not constitute reasonable grounds for a failure to comply with it.
21. The Regulator submits that the penalty is not disproportionate to the breach, bearing in mind the importance of the Employer duties and completing the declaration of compliance. Furthermore, the amount of the penalty is fixed by law; whilst the Respondent has discretion as to when to issue a Fixed Penalty Notice, there is no discretion as to the amount of the penalty. The penalty is therefore fair, reasonable and proportionate.

Conclusions

22. The two reminder letters and the letter extending time were sent to the correct address. The Compliance Notice was sent to the correct address. The Employer states that he received none of these letters. The Fixed Penalty Notice was sent to the same address and was received by the Employer. Although the email and telephone details held by the Regulatory may have been out of date, the address was not.
23. The Employer has provided no explanation for why the letters and the Compliance Notice were not received, other than a belief that the Compliance Notice was lost in the post or failed to be delivered. I do not think that the Employer puts forward the fact that the restaurant was only open in the evenings as an explanation of why the Notice may not have been received, and, in any event, I do not accept that this is relevant.
24. It is always possible that letters are not delivered or get lost in the post. As the Compliance Notice was sent to the Employer's last known address, the statutory presumption of service applies. The Employer has provided no evidence that could rebut the presumption of service. I find that the Compliance Notice was properly served and received by the Employer.
25. 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 re-declaration of compliance within a specified timeframe is a mandatory requirement. It is an important duty and does not depend on the Employer having any eligible job holders. The fact that the Employer has now complied does not excuse non-compliance.

26. I find that issuing the Fixed Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
27. I conclude that the Employer did not have a reasonable excuse for failing to comply.
28. The Employer should be aware of its duties and even in the absence of any reminders would have been aware of the relevant date for compliance due to having previously declared compliance. There is no requirement on the Regulator to send reminders, and even if no reminders were received this would not amount to a reasonable excuse for failing to comply.
29. The Compliance Notice and the reminder letters were sent to the correct address. Even disregarding the presumption of service, I find that the reminder letters and the Compliance Notice was received on the balance of probabilities. In the absence of any explanation as to why they were not received, I find that it is more likely that they received but mishandled, not acted upon, ignored or discarded. This does not amount to a reasonable excuse. A reasonable employer would ensure that important documentation is acted upon.
30. The requirement to pay £400 is a significant burden for a small business such as the Employer and I accept that the Employer is likely to suffer some hardship as a result. The fact that the penalty is burdensome is inherent in it being a 'penalty'. The amount of the penalty is fixed by law and the Regulator and the tribunal have no power to vary it.
31. 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 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.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 24 May 2024