



Neutral citation number: [2024] UKFTT 00882 (GRC)

Case Reference: FT/PEN/2024/0127

**First-tier Tribunal
(General Regulatory Chamber)
Pensions**

**Decided without a hearing
Decision given on:**

Before

JUDGE MOAN

Between

PETER DEVEREUX T/A DEVEROAST

Appellant

and

THE PENSIONS REGULATOR

Respondent

The appeal was determined without a hearing.

Decision: The appeal is dismissed. The Fixed Penalty is payable and should be paid forthwith or in any event, within 28 days of receipt of this decision.

REASONS

Decision under appeal and background

1. The Respondent issued a fixed penalty notice 153929781984 to the Appellant by letter dated 7th February 2024. The £ 400 penalty was required to be paid by 6th March 2024. The Pensions Regulator considered that the Appellant had

failed to comply by 22nd January 2024 with one or more of the requirements of the compliance notice issued to him on 11th December 2023.

2. On 2nd March 2024, the Appellant sought a review of the fixed penalty notice. The Respondent reviewed the penalty but upheld the penalty on 12th March 2024.
3. The Appellant appealed the notice to the Tribunal on a notice dated 11th April 2024. The Appellant said he did not receive the compliance notice dated 11th December 2023. He said that there were fifty or so businesses working at his place of business and he did not receive the letter requiring compliance. Upon receiving the fixed penalty, the Appellant completed the online paperwork on 12th February 2024.

Appellant's grounds of appeal

4. The Appellant's grounds of appeal are that:-
 - (a) He did not receive compliance notice;
 - (b) He had to rely on whoever sorts the mail that comes into the building where the Appellant's business is situated;
 - (c) The Respondent should send Notices via recorded delivery or email;
 - (d) The Appellant took action on receipt of the fixed penalty notice; and
 - (e) The fine is not affordable

Respondent's response to the appeal

5. The Appellant's declaration of compliance deadline was 16th November 2023. The Appellant did not complete and submit the declaration of compliance by the required date. The Respondent issued a compliance notice on 11th December 2023 directing the Appellant to declare compliance and extending the deadline for compliance to 22nd January 2024. There was no response to this notice. The Appellant did not comply until 12th February 2024. All notices had been issued to the Appellant's principal office address as stated on the Appellant's website; the compliance notice was not returned undelivered and fixed penalty notice was clearly received at that address. The Respondent relied on the statutory presumptions contained in section 303(6) (a) of the Pensions Act 2004 and Regulation 15(4) of the Employers Duties (Registration and Compliance) Regulations 2010 in its submission that all notices were properly served and received. The Appellant's claim that the compliance notice was not received went no further than to state there are fifty or so separate businesses at its place of work so he was reliant on

“whoever is in charge of sorting the post” and was not supported with any evidence or other information. It is also clear the fixed penalty notice was received at that address and there was no explanation why the compliance notice was not.

6. The Respondent submitted that the appeal grounds did not amount to a reasonable excuse for the failure to comply with the requirements of the compliance notice or indicate that the Respondent had acted unfairly in any way. The grounds of appeal did not present a reasonable excuse for failing to complete the declaration of compliance by the extended deadline of 22nd January 2024.
7. The Appellant has not raised any plausible submission that the compliance notice was not received; the Respondent relied on the statutory presumption of service.
8. The Respondent submitted that the Appellant had failed to provide any persuasive argument regarding non receipt/service other than a bare assertion of non-receipt. Although the Appellant sought to rely on Royal Mail not being a reliable service and reliance on someone else sorting mail arriving at the location where the Appellant’s business was situated, there was no evidence in support that there were any difficulties with the Royal Mail service at the time the compliance notice was issued or that there were problems with internal mail sorting. In any event, all communications were sent to the Appellant’s principal office address and it was for the Appellant to ensure any internal processes allow important business correspondence is able to be received. In this case the fixed penalty notice was received without issue, so the grounds did not explain why the compliance notice was not.
9. The Respondent relied on **Southwark LBC v Akhtar 2017 UTKUT 150 (LC)** which set out the principle that a bare assertion of non-receipt is insufficient to rebut the presumption of service. This principle has been followed in a number of First Tier Tribunal General Regulatory Chamber cases, one of those being the case of **Keith’s Rubbish Clearance Limited v The Pensions Regulator (PEN/2020/0203)**.
10. Furthermore, the Appellant was sent letters reminding him of the requirement to complete the declaration of compliance between August and November 2023, the deadline and detailed guidance on how to comply, plus details of the Respondent’s website and a telephone number where further support could be sought. These letters included a letter dated 24th November 2023 affording the Appellant a further fourteen days before a compliance notice was issued.

These reminders were also sent to the Appellant's principal office address. The Respondent was not obliged to send reminders and even absent of them, a reasonable employer ought to be aware of its automatic enrolment duties. Each employer is responsible for understanding and complying with their legal duties in running a business.

11. The Respondent does not use recorded delivery or other registered mail services as this would allow intended recipients to refuse to sign for, or accept, notices and other important communication from the Respondent and default on their duties, claiming lack of knowledge or receipt.
12. The importance of declaring compliance on time should be recognised. As a responsible employer it is for the Appellant to be aware of their legal duties and to ensure full and timely compliance with them. Employers with workers as defined in the Pensions Act 2008 are required to comply with their statutory duties within the timescales provided by law. The Appellant failed to do so until 12th February 2024; it was therefore fair, reasonable and appropriate for the Respondent to issue a compliance notice and when the Appellant still failed to comply, to issue a penalty, as a result. It is irrelevant that the underlying duties may have been met in this case, the declaration of compliance was not, and this is an important statutory duty.
13. The amount of the penalty was fixed by law. In all the circumstances, and with particular regard to the warnings and reminders given to the Appellant, the penalty was fair, reasonable and proportionate. The Respondent accepted it may be burdensome for smaller employers such as the Appellant and the Appellant was able to contact the Respondent to discuss a payment plan

Procedural matters relating to the determination of the appeal

14. The Tribunal considered the bundle (63 pages) prepared by the Respondent.
15. The Tribunal has determined this matter without a hearing in accordance with Rule 32 of the Tribunal Procedure (First-tier Tribunal) (General 2 Regulatory Chamber) Rules 2009. Both parties have consented to the matter being determined without a hearing and the Tribunal was satisfied that it can properly determine the issues without a hearing.

The Legal Framework

16. The Pensions Act 2008 imposed a legal obligation on employers in relation to the automatic enrolment of certain “jobholders” into occupational or workplace personal pension schemes and to maintain their membership of a qualifying pensions scheme. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise enforcement powers provided by the Act.

17. Each employer is assigned a date from which the timetable for performance of their obligations is set. From that date an employer has a duty to pay contributions to a qualifying pension scheme under section 3 (automatic enrolment of eligible staff into a pension scheme). The employer must regularly and periodically pay its own and its employees’ contributions to the managers or trustees of the pension scheme. Chapter 2 of the 2008 Act includes detailed provisions about non-compliance.

18. Under the Act the Regulator may issue –

(i) a **compliance notice** under sections 35 or 36 requiring specific steps to be taken to comply with the obligations imposed by the Act;

(ii) an **unpaid contributions notice** under section 37 which requires an employer to pay the missed contributions by a specified date;

And where there has been non-compliance with a section 35/36 compliance notice or a section 37 unpaid contributions notice, the Regulator may issue –

(iii) a **fixed penalty notice** under section 40; – the current prescribed fixed penalty is £ 400.

And/Or where there is continuing non-compliance, the Regulator may issue –

(iv) an **escalating penalty notice** under section 41 – The penalty will escalate at a rate between £ 50 and £10,000 per day.

19. Penalties may be recovered in the same way as a debt through the County Court and can be enforced in the same way.

20. The employer may ask for a review of the notice under section 43 of the Act within 28 days of the notice and the effect of the notice will be suspended whilst a review is taking place. The Regulator may confirm, vary or replace the notice after the review.

21. Under section 44 of the 2008 Act, an employer who has been issued with a fixed or escalating penalty notice may make a reference to the Tribunal provided 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, having regard to the evidence before it. The notice is suspended whilst the appeal process is underway. The Tribunal may confirm, vary or revoke a penalty and when it reaches a decision, and must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

22. On a reference to the Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning with when the Tribunal receives notice of the reference and ending when the reference has been determined, the Tribunal has remitted the matter to the Regulator and any directions of the Tribunal for giving effect to its determination have been complied with.

Service of documents

23. Section 144A of the Pensions Act 2008 provides that sections 303 to 305 of the Pensions Act 2004 which relate to service of documents apply to Chapter 2 of Part 1 of the 2008 which contains the provisions about compliance letters and notices including penalty notices. Section 303(2) of the 2004 Act confirms that documents are either to be delivered or left at the address or sent by post. The relevant address is the address of the principal office of the firm, body or association. Documents can only be sent by email when the recipient has expressly agreed to receive them in that manner pursuant to s304. Sending documents by email absent the express consent required by section 304 would result in defective service of those documents and notices.

24. Various Rules and legal provisions across jurisdictions provide for effective service by post and the date that documents are deemed to be served after posting. In particular, section 7 of the Interpretation Act 1978 provides -
"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

25. In addition, Regulation 15 of the Employers' Duties (Registration and Compliance) Regulations 2010 ("the Employers' Duties Regs") provides -

15.—(1) The period within which an application to review a notice may be made under section 43(1)(a) of the Act (written application of a person) is 28 days, starting from the day a notice is issued to a person.

(2) The period within which a notice may be reviewed under section 43(1)(b) of the Act (review by the Regulator) is 18 months, starting from the day a notice is issued to a person.

(3) The presumptions in paragraph (4) apply where notices to which section 43 applies are issued (including compliance notices issued under section 51 of the Act and penalty notices issued under section 52 of the Act).

(4) For the purposes of this regulation, it is presumed that—

(a) where a notice is given a date by the Regulator, it was posted or otherwise sent on that day;

(b) if a notice is posted or otherwise sent to a person's last known or notified address, it was issued on the day on which that notice was posted or otherwise sent; and

(c) a notice was received by the person to whom it was addressed."

26. The Upper Tribunal case of **Philip Freeman Mobile Welders Ltd v The Pensions Regulator: [2022] UKUT 62 (AAC)** confirmed that:

(i) compliance and penalty notices may be sent to an employer include sending it by post to, where it is a company, its registered address. By virtue of section 7 of the Interpretation Act 1978, a posted notice is deemed to have been received unless the contrary is proved. An employer who wishes to rebut the presumption must prove the notice was not received, and bare denial is unlikely to be sufficient. Regulation 15(4) does not create an irrebuttable presumption.

(ii) where the statutory regulator proceeds on the basis that the scheme can operate effectively and lawfully by the presumption(s) in regulation 15(4) being capable of rebuttal, [the Tribunal] should be slow to decide to the contrary save where the statutory language points clearly against such a result (para 36).

(iii) Where regulations 15(3) and (4) of the Employers' Duties Regs refer to "presumptions" and "it is presumed that", these must be read, so as to maintain consistency with the Act, as being presumptions that are capable of being rebutted on the basis of contrary evidence (para 45).

27. The cases demonstrate that it is for the Appellant to place sufficient evidence before the Tribunal to rebut the presumption that the compliance notice had been served.

Analysis of the evidence and findings on appeal

28. There was no dispute that the Appellant needed to comply with the legislation in setting up a workplace pension for his employee and indeed had subsequently done so. The sole issue was whether the Appellant had deemed notice of the compliance notice which was sent by post but, as submitted by the Appellant, not received by him.
29. It is a pre-requisite of a fixed penalty notice that a notice has already been issued under ss35, 36 or 37 of the Act which in effect places the employer on notice that they must comply together with details of what how compliance is achieved. There is no other obligation on the Regulator to issue further reminder notices and no power to issue correspondence by email, save where the recipient has expressly agreed to that communication method. The Appellant contends that he should have received correspondence by recorded delivery or by email. There is no legal basis for requiring service in either way, service by post is common across many jurisdictions, is permitted by the legislation and the Appellant does not assert that he had consented to correspondence by email to engage section 304.
30. The fixed penalty had not come out of the blue. As an employer, the Appellant is required to have regard to his statutory responsibilities without reminder. The Respondent had written to the Appellant in August 2023 and November 2023 to remind him to enrol his employee, even before the compliance notice was issued. The Appellant could have asked for help or advice if he was unsure of his obligations.
31. The initial reminder letter from the Regulator was sent to the Appellant in August 2023 to his business address. A second reminder letter was sent to the same address in November 2023. The compliance notice dated 11th December 2023 was similarly sent and the fixed penalty notice was dated 7th February 2023.
32. The Appellant contends that he did not receive the first three written communications sent to his office address but that he did receive the fixed penalty. It is inherently less likely and less credible that three communications were lost and the final one that included the penalty was properly delivered.
33. The Appellant indicated that he operated in a building that housed many other businesses and so mail may not be delivered correctly. He does not submit that the notices were not issued but that they were not delivered to him. Whilst

it may be correct that many businesses operate out of one building, there must be a procedure in place to separate mail and deliver/leave accordingly. The Appellant has not provided any additional evidence as regards the post distribution and any difficulties encountered previously by himself or other businesses as regards the distribution of the post. There is no statement from the Royal Mail or the person who received the mail as to the procedures adopted. In addition, had the Appellant been alive to issues of post-misdirection, it was incumbent on him to raise the same with the landlord or buildings manager, put in place reasonable remedial systems, and not simply close his eyes to the prospect of missing (important) communications. Such conversations with the landlord, buildings manager or post handler could have been exhibited had they taken place. As such his assertion that post had been mis-directed is a bare assertion.

34. The implication is that his mail has been delivered to other businesses within the building. The Appellant does not address why other businesses would retain his mail had it been delivered incorrectly. There would be at least a realistic probability that other businesses would have given the mail to him, given his mail to whomever was responsible for sorting the post or send it back to Royal Mail. If this was a known problem, then other businesses would hope for the same courtesy to be returned as regards their mail. There were no enquires made of fellow business owners in the building and no evidence exhibited from them of such issues.

35. The submission of the Appellant, is in my judgment, a bare denial and unsupported by evidence or detail. The Appellant has not rebutted the presumption that the compliance notice was correctly served at his place of business. The Appellant is unable to abrogate his responsibilities as regards the safe receipt of his mail and then claim it had not been received. There was no basis for requiring the Regulator to serve notices by recorded delivery or email. His compliance shortly after the fixed penalty notice is mitigation against an escalating fine but did not detract from the continued non-compliance up until 12th February 2024. The fine is a fixed level and represents what the Government consider to be the appropriate penalty for non-compliance. There was no basis to vary or discharge the fixed penalty.

36. The appeal is dismissed.

District Judge Moan sitting as a Judge of the First-Tier Tribunal

30th September 2024

