



Neutral citation number: [2024] UKFTT 00935 (GRC)

Case Reference: FT/PEN/2024/0169

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

**Heard by: Cloud Video Platform  
Heard on: 14 October 2024  
Decision given on: 24 October 2024**

**Before**

**JUDGE HAZEL OLIVER**

**Between**

**I J PLANT CO LIMITED**

Appellant

**and**

**THE PENSIONS REGULATOR**

Respondent

**Representation:**

For the Appellant: Mr Abu-Eisheh, director

For the Respondent: Ms Cranfield, solicitor

**Decision:** The appeal is Dismissed

**REASONS**

1. By this reference I.J. Plant Co. Ltd (the “Appellant”) has appealed against:
  - a. a fixed penalty notice (“FPN”) issued by the Pensions Regulator (the “Regulator”) on 15 January 2024, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice relating to a re-declaration of compliance; and
  - b. an escalating penalty notice (“EPN”) issued by the Regulator on 14 February 2024 for continued failure to comply with the compliance notice.
2. The proceedings were held by video (CVP). All parties joined remotely. I note that the Appellant had asked for an in-person hearing. This was considered by Registrar Bamawo on 19 September 2024 who decided that it was in the interests of justice to conduct the hearing

by online video link. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The Appellant had the assistance of a Jordanian Arabic interpreter at the hearing.

### **Applicable law**

3. Under the Pensions Act 2008 (the “Act”), employers are required to enrol “job holders” in occupational or workplace personal pension schemes.

4. The Regulator ensures 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 employer to take certain steps in order to comply with these duties. It will usually specify a date by which this must be done.

5. The Regulator can issue a fixed penalty notice if an employer has failed to comply with a compliance notice (under section 40 of the Act). This requires the employer to pay a penalty within a specified period. The amount of a fixed penalty is £400 (as set by the Employers' Duties (Registration and Compliance) Regulations 2010 (the “2010 Regulations”). The Regulator can also issue an escalating penalty notice if there is continued non-compliance with a compliance notice. An escalating penalty notice sets a daily penalty which continues to accrue until the employer complies or the Regulator decides to stop the ongoing penalty.

6. The Regulator sends notices by post to an employer’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. An employer can make a reference to the Tribunal in respect of the issue of a notice and/or the amount of the penalty payable under the notice (section 44 of the Act). This is only permitted if the Regulator has reviewed the notice or if an application for a review has 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 on the evidence presented to it (which may be different from the evidence presented to the Regulator). The Tribunal 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 Appellant's first declaration of compliance was submitted on 17 August 2017. Their first re-declaration of compliance was provided on 30 September 2020, after a compliance notice had been sent to them by the Regulator. The second re-declaration of compliance was due to be provided by 31 October 2023.

11. The Regulator sent letters to the Appellant reminding them of their duties and the deadline in February and August 2023. The Regulator also sent a series of emails to the address of the Appellant's accountant.

12. The Regulator issued a compliance notice to the Appellant on 16 November 2023, to the registered office address. This gives the deadline for the re-declaration of compliance as 31 October 2023, and explains the Regulator has no record of it being completed by the deadline. The notice expressly states, "*If you don't complete your re-declaration of compliance by 27 December 2023, we may issue you with a £400 penalty*". It goes on to say, "*If you continue not to comply we may give you an escalating penalty, which accrues at a daily rate varying from £50 to £10,000*". 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. On 30 December 2023 the Regulator sent an email to the Appellant's main business email address (ijplant@dial.pipex.com) warning that they were currently not compliant with the law.

13. The Appellant did not comply with the compliance notice, and the Regulator issued a FPN to the Appellant on 15 January 2024. The Regulator issued an EPN to the Appellant 14 February 2024 because they had not complied with the compliance notice. This set a further deadline for compliance of 12 March 2024, and a daily penalty of £500 from 13 March 2024 if the Appellant still did not comply. The Regulator sent the Appellant and escalating penalty reminder on 13 March 2024 which confirmed the penalty had started to accrue at £500 per day, and a penalty reminder letter on 26 March 2024 for a total of £5,400. Ms Cranfield explained at the hearing that the Regulator had stopped the escalating penalty at £5,000. The Appellant provided the re-declaration of compliance to the Appellant on 2 April 2024.

14. The Appellant applied for a review to the Regulator on 30 April 2024. This was out of time for an employer-initiated review. However, the Regulator did a statutory review after receiving these appeals and upheld both notices, and has responded to these appeals.

## Appeal grounds

15. The Appellant's appeal grounds in relation to both penalty notices are:

- a. They had always complied with the rules.
- b. They did not receive any dates for declarations through the post or any emails or telephone calls relating to non-compliance, and acted immediately when the matter came to light on 2 April 2024.
- c. They had told the Regulator that their staff had opted out from the pension scheme.
- d. They had reduced staffing so that a company director and an employee in charge of payroll/pension management left on 30 June 2023.
- e. They are attempting to sell their building and the disruption meant the directors preferred working from home.

f. The company is in a dire financial situation.

16. The Regulator says that the appeal should be dismissed, because the Appellant has not rebutted the presumption of service and there are no other grounds that would amount to a reasonable excuse for non-compliance.

## **Conclusions**

17. The 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 FPN and EPN was an appropriate action for the Regulator to take in this case, and find that it was. The Appellant says that they did not receive email addressed to their accountant. However, the Regulator had sent the Appellant information by post in February and August 2023 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, and also failed to comply after receiving the FPN.

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. The compliance notice contained clear information about how to complete the declaration of compliance and an extended deadline.

### ***Were the notices correctly served on the Appellant?***

20. 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. A mere assertion that a notice was not received is not sufficient to overturn the statutory presumption of service (***London Borough of Southwark v (1) Runa Akhter & (2) Stel LLC*** [2017] UKUT 0150).

21. The Appellant says that they did not receive any dates for declarations through the post, and did not receive either the FPN or EPN. They say that they only received the escalating penalty reminder dated 13 March 2024. I note that this reminder was sent to exactly the same address as the notices.

22. At the hearing, the Appellant said that they did check their post during this period and they did not receive any of the notices. I note that their request for a review to the Regulator said there had been an "oversight" and that "*company correspondence including your letters were not being passed on to them by the estate agents*". This suggests that the notices were delivered correctly. I asked Mr Abu-Eisheh about this at the hearing. He said that this was a mistake by the accountants who had submitted the request for a review, and the estate agents did not have authority to deal with the post – he would open and check post himself whenever he went to the office. He confirmed that all notices were correctly addressed.

23. The Appellant has provided no explanation as to why these notices may not have been received – taking into account the fact they were all sent to the correct registered office address, and the escalating penalty reminder notices were received. Having considered the written evidence and submissions at the hearing, I find that the Appellant has not rebutted this presumption of service. On the balance of probabilities I find that the compliance notice,

FPN and EPN were received by the Appellant at their registered office address. I accept that the notices may have been overlooked, for one or more of the reasons discussed below. However, this is different from not being received at the correct address in the first place.

***Does the Appellant had a reasonable excuse for failing to comply with the compliance notice, FPN and EPN.***

24. I have considered the following arguments from the Appellant. I do not find that the Appellant had a reasonable excuse for the failures to comply.

- a. *They had always complied with the rules.* This is not correct, as the Appellant had received a previous compliance notice in September 2020 for failing to submit their first re-declaration of compliance on time. In any case, previous compliance with the rules is not a reasonable excuse for the current failure.
- b. *They did not receive any dates for declarations through the post or any emails or telephone calls relating to non-compliance, and acted immediately when the matter came to light on 2 April 2024.* I accept the explanation from Mr Abu-Eisheh that he was not aware of the non-compliance with the rules or the penalty notices until the escalating penalty reminder notices were brought to his attention. However, as explained above, I find that all of the notices were correctly delivered by post. For some reason, they were not brought to the attention of the correct people at the Appellant. I do not find that this is a reasonable excuse for non-compliance. A responsible employer needs to have a reliable method for checking communications sent by the Regulator to their registered office. Mr Abu-Eisheh also confirmed that the email reminder of 30 December 2023 was sent to the correct address, but said he did not see this email. He said that he would not have been checking emails over the Christmas period, he would have had hundreds of emails after returning to work, and would have opened emails he knew would bring business to the company. Failing to check the email from the Regulator for this reason is not a reasonable excuse for the failure to comply.
- c. *They had told the Regulator that their staff had opted out from the pension scheme.* Mr Abu-Eisheh explained that all six employees of the company, including himself, opted out from the pension scheme in November 2022. He says that the Appellant had no calls, letters or other correspondence from the pension scheme since then, and they thought nothing further was required. I accept that the Appellant may have assumed they did not need to send a further re-declaration of compliance because all of the employees had opted out. In fact, even if all employees have validly opted out, it is still necessary for the Appellant to continue to provide this information to the Regulator. It is understandable that they may not have known this. However, the Regulator sent them a number of clear letters explaining that the re-declaration of compliance was due on 31 October 2023. Ignorance of the legal requirement is not a reasonable excuse in these circumstances.
- d. *They had reduced staffing so that a company director and an employee in charge of payroll/pension management left on 30 June 2023.* I accept that the Appellant was in financial difficulties, and key members of staff had left. However, a responsible employer needs to make alternative arrangements to ensure that all of its pension duties are complied with correctly. The loss of the employee in charge of payroll/pension is not a reasonable excuse for failure to comply – particularly where, as here, a reminder letter and the various notices were sent directly to the Appellant after that employee had left the company. This is not a situation where a key employee has suddenly left and the employer had no other way of knowing what the pension duties were.

- e. *They are attempting to sell their building and the disruption meant the directors preferred working from home.* This is a potential explanation for why the various notices may not have come to the attention of the Appellant. However, this is not a reasonable excuse for the failure to comply. Again, a responsible employer needs to have a reliable method for checking communications sent by the Regulator to their registered office.
  
- f. *The company is in a dire financial situation.* Mr Abu-Eisheh explained at the hearing that the business has been in difficulties since the pandemic and the steps they have taken to keep the company running, including selling their own private cars. I accept and have empathy for the Appellant's position that the company is not doing well financially. However, I do not find that this is a reason to set aside the FPN and EPN. I appreciate that the EPN of £5,000 is a significant amount. However, it needs to be set at this level to act as a real deterrent to ongoing failure to comply with these important duties. It is important to remember that the EPN is only imposed after an employer has failed to make a re-declaration of compliance on time despite reminders, has failed to comply with the extended deadline in a compliance notice, and has continued to fail to comply after receiving the FPN. I note that the daily rate of £500 was set in accordance with the size of the Appellant company, and the Regulator chose to limit the total to £5,000.

25. The Appellant says that they do not see that they did anything wrong. It may be that the Appellant did not appreciate the importance of this correspondence from the Regulator. I also accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses. However, the declaration of compliance is a separate and important part of the system. Employers have an obligation to pay attention to communications from the Regulator and act on them appropriately. Failure to understand the automatic enrolment duties does not provide a reasonable excuse when the Regulator has provided clear information to the employer well in advance of the relevant deadline.

### **Conclusions**

26. For the above reasons, I determine that issuing both the FPN and the EPN was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the FPN and the EPN. No directions are necessary.

27. During the hearing, the Regulator's representative said that she appreciated the Appellant was struggling and they could make a hardship application by contacting the debt team. The Appellant may want to do this after receiving this decision.

28. There was some brief discussion at the hearing about whether the Appellant's employees had validly opted out from the pension scheme. Mr Abu-Eisheh explained that each employee had sent an individual opt-out letter but they had not heard anything from the pension provider. As I made clear at the hearing, this was only an appeal against the FPN and EPN. I am not making any decision about whether these opt-outs were valid.

**Signed:** Judge Hazel Oliver

**Date:** 21 October 2024