



[2022] UKFTT 00316 (GRC)

Case Reference: PEN/2022/0092

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

Heard: Paper Consideration

**Heard on: 1 September 2022 in Chambers
Decision given on: 05 September 2022**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

THE HEALTHY KITCHEN LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed.

REASONS

1. By this reference the Healthy Kitchen Limited (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 23 February 2022 requiring the appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber’s Procedure Rules.

3. The Pensions Act 2008 (the “Act”) imposes a number of requirements on employers in relation to the automatic enrolment of certain “job holders” in occupational or workplace personal pension schemes.

4. The Regulator has statutory responsibility for ensuring compliance with these requirements. Under Section 35 of the Act, the Regulator can issue a compliance notice if an employer has contravened one or more of its employer duties. A compliance notice requires the person to whom it is issued to take (or refrain from taking) certain steps in order to remedy the contravention, and will usually specify a date by which these steps should be taken.

5. Under Section 40 of the Act, the Regulator can issue a fixed penalty notice if it is of the opinion that an employer has failed to comply with a compliance notice. This requires the person to whom it is issued to pay a penalty within the period specified in the notice. The amount is to be determined in accordance with regulations. Under the Employers' Duties (Registration and Compliance) Regulations 2010 (the “2010 Regulations”), the amount of a fixed penalty is £400.

6. Notification may be given to a person by the Regulator by sending it by post to that person’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 from the Regulator 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. Section 44 of the Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal in respect of the issue of the notice and/or the amount of the penalty payable under the notice. A person may make a reference to the Tribunal provided that an application for a review has first 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 following an assessment of the evidence presented to it (which may differ from the evidence presented to the Regulator), and 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 5 months from the start date of the employer’s duties (Regulation 3(1) of the 2010 Regulations).

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. Their duties start date was 29 June 2021, meaning that the deadline for submitting their declaration of compliance was 29 November 2021.

11. The Regulator sent the appellant a letter in July 2021 which explained the automatic enrolment duties and confirmed the declaration deadline, and enclosed the "essential guide to automatic enrolment". The Regulator sent the appellant a further letter on 10 December 2021, headed "Urgent action is required – your declaration deadline was 29 November 2021". This letter gave a further 14 days to complete the declaration, and expressly stated "Failure to complete your declaration of compliance may result in you being fined".

12. The Regulator issued a compliance notice to the appellant on 29 December 2021. This stated, "You must tell us how you have met your employer duties by completing your declaration of compliance. This needs to be completed by 8 February 2022". The notice expressly states, "If you don't complete your declaration of compliance by 8 February 2022, we may issue you with a £400 penalty".

13. The appellant did not comply with the compliance notice by 8 February 2022. The Regulator issued a fixed penalty notice to the appellant on 23 February 2022.

14. The appellant completed the declaration of compliance on 22 March 2022. The appellant applied for a review to the Regulator on the same date, on the grounds that the penalty notice was the first correspondence received regarding the failure to comply. The Regulator confirmed the penalty notice on 25 March 2022.

15. All correspondence was sent by the Regulator to the appellant's registered office address.

Appeal grounds

16. The appellant says that as far as they were aware they had completed everything correctly, and the fine was the first correspondence they had received. They say that they are unable to pay the penalty as they have been struggling as a business due to COVID-19 and staff being off sick.

17. The Regulator says that the appellant has not provided a reasonable excuse for the failure. As a responsible employer, the appellant should be aware of their legal duties and ensure full compliance. The compliance notice was sent to the appellant's registered office address, and the presumption of service applies. A bare assertion of non-receipt is not sufficient to overturn the presumption of service (referencing the Upper Tribunal's decision in *London Borough of Southwark v Akhtar* 2017 UKUT 150). It is not clear how COVID-19 is said to have impacted on compliance, and many other employers have managed to comply during this time. The compliance

notice gave six weeks, and a further two-week grace period was introduced to help combat the impact of COVID-19 on employers. Lack of intent is not a reasonable excuse, and late compliance does not excuse the failure to comply with the notice.

Conclusions

18. 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.

19. I do accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses. However, the Regulator goes to some lengths to provide employers with information about their duties and the relevant deadlines. The declaration of compliance is a separate and important part of the system, and the fact that an employer has complied with its other automatic enrolment duties does not mean that the declaration of compliance should not be enforced.

20. I have considered whether issuing the fixed penalty notice was an appropriate action for the Regulator to take in this case, and find that it was. The Regulator had sent the appellant information in July and December 2021 about the need to complete a declaration of compliance, including the relevant deadline. The appellant failed to comply with the further deadline set out in the compliance notice.

21. 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 company by sending it to their registered office address. The notice was sent to this address.

22. I do not find that the appellant had a reasonable excuse for failing to comply with the compliance notice.

23. I have considered the appellant's argument that they did not receive the compliance notice, or previous correspondence from the Regulator. 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. The appellant has not rebutted this presumption.

24. The fixed penalty notice was received by the appellant when it was sent to the same address. The appellant has provided no explanation as to why the correspondence about the declaration of compliance and the compliance notice were not received, in circumstances where they appear to have been sent to the correct address and the fixed penalty notice was received. As noted by the Regulator, a mere assertion of non-receipt is not sufficient to overturn the presumption of receipt. The appellant does not say that the letters were incorrectly addressed or give any other reason as to why they say only the fixed penalty notice was received.

25. I have taken into account the appellant's reference to the COVID-19 pandemic and staff being off sick. I appreciate that the pandemic was a difficult time for many employers and may have caused delays in dealing with paperwork. However, the Regulator first wrote to the appellant about the need to complete a declaration of compliance in July 2021, and the penalty was not issued until some seven months later. This included an additional two weeks after the final deadline in the compliance notice. The appellant has not explained how the pandemic would have prevented them from dealing with their employer duties for that period of time.

26. I have also taken into account the appellant's position that they are unable to pay the penalty due to the effect of the COVID-19 pandemic and staff being off sick. I am aware that this was particularly difficult for employers in many sectors, particularly hospitality. However, the fine was issued in 2022 when all restrictions on daily life had been lifted. The appellant has not explained why the pandemic was still affecting them at this time.

27. I note that £400 may be a significant sum of money for a small business. However, the penalty for non-compliance needs to be significant in order to act as a real deterrent to breach of these important employer duties. I also note that the Regulator has said in the response to the appeal that they would be willing to accept payment of penalties in instalments if a single payment will cause particular hardship.

28. For the above reasons, 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.

Hazel Oliver

Judge of the First-tier Tribunal

Dated 1 September 2022