



**[2023] UKFTT 468 (GRC).**

**Appeal number: PEN/2023/0030P**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(PENSIONS REGULATION)**

**KISMET RESTAURANT (STOKE) LTD**

**Appellant**

**- and -**

**THE PENSIONS REGULATOR**

**Respondent**

**TRIBUNAL:**

**ALEXANDRA MARKS CBE  
(SITTING AS A FIRST TIER  
TRIBUNAL JUDGE)**

**Sitting in Chambers (and therefore decided on the papers without a hearing) on  
11 MAY 2023**

## DECISION

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

## REASONS

### *Background*

2. Kismet Restaurant (Stoke) Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 20 December 2022 (Notice number 148283855580).
3. The Fixed Penalty Notice was issued under section 40 of the Pensions Act 2008 ('the Act'). It required the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 24 October 2022 which required the Employer to provide the Regulator with information in respect of automatic enrolment.
4. The Regulator completed a review of the decision to impose the Fixed Penalty Notice and informed the Employer's advisers on 26 January 2023 that the decision was confirmed.
5. On 3 February 2023, the Employer (through its advisers) referred to the Tribunal the Regulator's decision to issue the Fixed Penalty Notice.
6. The parties and the Tribunal agree that this matter is 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 submissions made by both parties.

### *The law*

7. The Act imposes various legal obligations on employers in relation to the automatic enrolment of certain 'jobholders' into occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.
8. Since 1 October 2017, automatic enrolment duties apply to employers from their 'duties start date' (being the date when the legislation first applies to that employer). These duties include the obligation - from the employer's start date - to assess their staff, write to them, and automatically enrol them into a qualifying pension scheme if applicable.

9. The employer must, within five months of its duties start date, provide certain specified information to the Regulator about its compliance with these duties. This is known as a ‘declaration of compliance’.

10. Crucially for the purposes of this case, the employer must *also* - every three years from its staging date - assess and re-enrol eligible staff who have left the workplace pension scheme. The employer must then provide the Regulator with re-enrolment information by means of a ‘re-declaration of compliance’.

11. If the employer fails to provide a re-declaration of compliance, the Regulator can issue a Compliance Notice and then, if that Notice is not complied with by the stated deadline, a Fixed Penalty Notice can be issued for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400.

12. Under section 44 of the Act, a person who has been issued with a Fixed Penalty Notice may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

13. The role of the Tribunal is to take account of all the evidence before it, and make its own decision on the appropriate action for the Regulator to take. The Tribunal may confirm, vary or revoke a Fixed Penalty Notice. When the Tribunal reaches a decision, it must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

### ***The facts***

13. The Employer’s re-declaration deadline in this case was 3 December 2021.

14. The Employer did not complete and submit its re-declaration of compliance by that date.

15. The Regulator issued a Compliance Notice on 24 October 2022 directing the Employer to re-declare compliance, setting out the steps required and extending the deadline for compliance until 5 December 2022. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply. The Employer did not respond to this Notice.

16. By neither 3 December 2021 (the statutory deadline for compliance) nor 5 December 2022 (the extended deadline provided by the Compliance Notice), the Employer had not completed the declaration of compliance to confirm that it had complied with its duties by providing the prescribed information.

17. The Regulator therefore issued a Fixed Penalty Notice on 20 December 2022 requiring payment of the fixed penalty sum of £400 by 17 January 2023 and compliance with the Compliance Notice by the same date.

18. On 11 January 2023, the re-declaration of compliance was completed.
19. On 13 and 25 January 2023, the Employer's accountants sought review of the Fixed Penalty Notice.
20. On 26 January 2023, the Regulator responded to the review request, upholding the penalty.
21. On 3 February 2023, the Employer's accountants submitted a Notice of Appeal to the Tribunal.

### ***Submissions***

22. The Notice of Appeal says that:

- (1) The Employer's payroll software is set up automatically to re-assess all employees and enrol for auto-enrol pension any who are eligible on their relevant staging date. There were eight employees at the time, and four employees were re-enrolled.
- (2) The re-declaration information was input onto the Regulator's website on 23 July 2021 and submitted but it appears that the actual submission did not go through.
- (3) The first indication of this was when the Employer received a Compliance Notice in October 2022. The re-declaration was immediately re-submitted with the original data.
- (4) As the Employer has since received a Fixed Penalty Notice, it seems the re-submitted re-declaration did not reach the Regulator either.
- (5) The re-declaration was immediately re-submitted and has now been acknowledged.
- (6) There may have been a technical issue which prevented the earlier submissions going through.
- (7) The assessment reports from payroll show the employee eligibilities for the relevant period.
- (8) The Employer seeks revocation of the notice and fine.

23. In its response dated 17 February 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

- (1) The appeal grounds do not amount to a reasonable excuse for the failure to comply with the requirements of the Compliance Notice or indicate that the Regulator has acted unfairly in any way.

(2) The Employer has provided payroll information which purports to show that the underlying duties were met. However, this is not the subject of the appeal; the issue is whether the Employer failed to complete the re-declaration of compliance by the statutory deadline.

(3) The Employer has suggested that technical issues/internet connection may have caused the re-declaration submissions to the Regulator to fail. However, no evidence of any internet or technical issues has been provided: it is simply conjecture. There is also no explanation as to why any technical issues dissipated following the third and final (successful) attempt at submission after receipt of the Fixed Penalty Notice.

(4) It was open to the Employer and its advisers to contact the Regulator on receipt of the Compliance Notice, having apparently already completed the re-declaration, to check that it had in fact been submitted. Neither did so.

(5) The Tribunal recognises the importance to the Regulator of Employers re-declaring their compliance on time: it is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach.

(6) The Employer's failure to complete the required re-declaration of compliance is not excused by the fact that its underlying automatic enrolment duties had been met: the re-declaration is a separate and important statutory duty.

(7) As a responsible employer it is for the Employer to be aware of their legal duties and to ensure full and timely compliance with them. The Employer failed to comply on time; it was therefore fair, reasonable and appropriate for the Regulator to issue a Compliance Notice and, when the Employer still failed to comply, to issue a penalty.

(8) The amount of the penalty is fixed by law; whilst the Regulator has discretion as to *when* to issue a Fixed Penalty Notice, there is no discretion as to the amount of the penalty.

### ***Conclusions***

24. Taking account of all the evidence provided to me, I conclude that the Employer has given no 'reasonable excuse' for non-compliance in this case. My reasons are set out below.

28. The Employer has not denied receiving the Compliance Notice but did not take the opportunity to check that their re-declaration of compliance had been properly submitted to the Regulator as they believed. The Compliance Notice is designed to be eye-catching and clearly indicates that it is important, imposes deadlines, and can result in fines if not actioned.

29. Employers are free to delegate their duties to third party professionals such as accountants if they wish. However, the legal responsibility remains with the Employer and any third parties' failure to comply with the statutory requirements cannot amount to a reasonable excuse for the Employer's failure.

30. In this case, in my judgment:

(1) the Compliance Notice extended the deadline for completion of the re-declaration of compliance from 3 December 2021 until 5 December 2022: this was more than a year. I am therefore satisfied that the Employer – and their advisers on their behalf - had ample time to comply with the obligation to file a re-declaration of compliance by the deadline.

(2) whether or not an employer receives reminders, as a responsible employer it is for them to be aware of their legal duties, and to ensure full and timely compliance with such. In this instance, the Employer failed to do so. That failure entitled the Regulator to issue a Fixed Penalty Notice.

(3) even if an employer pays for the services of a third party to assist, it is the employer who retains ultimate responsibility for compliance with statutory duties. Although it appears that in this case the Employer engaged advisers to act on their behalf, that does not relieve the Employer of the responsibility to ensure that the duties were met.

(4) the receipt by the Employer of a Compliance Notice from the Regulator should have alerted them that required actions were outstanding and that they therefore needed to verify that their advisers had taken the action they claimed to have done.

(5) had the Employer (or their accountants) on receipt of the Compliance Notice contacted the Regulator, the Regulator may have been able to assist. However, no contact was made until the Fixed Penalty Notice had already been issued.

(6) while the Employer may not have intentionally breached their duties, lack of intent does not amount to a reasonable excuse. Similarly, even if the Employer's failure was an honest mistake, that does not provide a reasonable excuse.

(7) if the Employer considers that their advisers were at fault, it is open to them to seek recourse from those accountants.

31. The Employer has since completed the declaration, but only after the deadline had passed and after the Fixed Penalty Notice was issued. This late compliance does not excuse the failure to complete it on time, nor provide a reason for revoking the Fixed Penalty Notice.

32. In all the circumstances, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 20 December 2022 for non-compliance with the Compliance Notice dated 24 October 2022.

33. The amount of the penalty is fixed by law, so neither the Regulator nor the Tribunal has any discretion to reduce the penalty below £400.

34. I confirm the Fixed Penalty Notice, and I remit the matter to the Regulator.

35. No directions are necessary.

**(Signed)**  
**ALEXANDRA MARKS CBE**  
**(Sitting as a Judge of the First Tier Tribunal)**

**DATE: 6 June 2023**