



Neutral citation number: [2022] UKFTT 320 (GRC)

Case Reference: PEN/2022/0064

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

Heard: Paper Consideration

**Heard on: 2 September 2022 in Chambers
Decision given on: 5 September 2022**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

KEVIN JONES T/A CROSSHANDS HOTEL

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference, Kevin Jones (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 16 March 2022, requiring the appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.
2. 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.
3. 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 of 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.

4. 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.

5. 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 last known address of a person is the proper address on which to serve notices on an individual, as set out in section 303(6)(d) 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.

6. 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 if 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.

7. 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. Automatic enrolment duties apply from the date on which PAYE income is payable in respect of any worker. This date is the "duties start date". The declaration of compliance must be provided within five months of the duties start date (Regulation 3(1)(b)).

Facts

8. 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.

9. The appellant is the employer for the purposes of the various employer duties under the Act. The duties start date was 10 August 2021. The appellant's declaration of compliance was due to be provided by 10 January 2022. The appellant did provide his staff with the opportunity to join a pension scheme but did not complete a declaration of compliance by the required date.

10. The Regulator became aware that the appellant was an employer on September 2021 and sent a letter to the appellant. This letter set out the duties start date and gave the declaration deadline of 10 January 2022. The letter explained the duty to complete a declaration of compliance, including a web link for starting the declaration. The end of the letter stated, "*Do not ignore this letter, you need to act now. If you do not complete your legal duties, including submitting your declaration of compliance on time, you may be subject to fines.*" The Regulator also sent three reminder emails about the declaration of compliance, in October and November 2021. These were addressed to an accountancy firm email address, as they set up PAYE for the appellant. The Regulator also sent a further reminder letter to the appellant in December 2021.

11. The Regulator issued a compliance notice to the appellant on 19 January 2022. This has a large bold heading, "Act now or you may be fined – what you need to do". It then says, "*You must tell us how you have met your employer duties by completing your declaration of compliance. This needs to be completed by 1 March 2022*". The notice expressly states, "*If you don't complete your declaration of compliance by 1 March 2022, we may issue you with a £400 penalty*". The notice also explains how to complete the declaration of compliance, including a web link for starting the declaration, postal address and telephone number.

12. The appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the appellant on 16 March 2022.

13. The appellant applied for a review to the Regulator. The Regulator confirmed the penalty notice on 23 March 2022.

Appeal grounds

14. The appellant's appeal grounds say that he became a sole trader from 1 May 2021. He says that he has five employees, four of whom are part-time, and two of whom are under 16. The appellant says that all employees were provided with automatic enrolment forms with NEST. Two joined the scheme (one of whom has since left and been replaced by another person). Four did not want to be enrolled, and he advised them to contact NEST. The appellant says that he believes he has done everything correctly as required. The grounds of appeal do not explain why the appellant did not complete a declaration of compliance.

15. The Regulator says that the declaration of compliance was correctly served and received. Late or eventual compliance does not excuse the failure or comprise exceptional grounds to revoke a penalty, and compliance with other automatic enrolment duties does not excuse or explain a failure to undertake the duty to declare compliance. The appellant says that all workers have been provided with the relevant paperwork, but it is the employer's duty to automatically enrol workers and declare

compliance. The Regulator says that there is no record of the appellant attempting to complete the declaration of compliance to date.

Conclusions

16. 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.

17. 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 September and December 2021 about the need to complete a 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.

18. 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 by sending it to an individual's last known address. The Regulator says that the address they used was sourced from HMRC, and it is the address of the appellant's previous limited company. I note that it is also the address used by the appellant in his notice of appeal.

19. The grounds of appeal from the appellant do not dispute that he received the compliance notice or other previous correspondence. The Regulator's response says that the appellant's case is he did not receive the correspondence, and spends considerable time addressing the presumption of service. I am not sure why. This point may have been raised by the appellant in his request for a review, but is not one of his grounds of appeal. I therefore find that the appellant did receive the compliance notice.

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

21. I have considered the appellant's position as set out in the notice of appeal. I accept that he may believe he has done everything correctly. However, it is clear that he has not. The appellant did not submit a declaration of compliance on time. He did not comply with the compliance notice. It also appears that he has still not submitted a declaration of compliance (as he had not done so when the Regulator responded to the appeal).

22. The appellant does not explain why he did not complete the declaration of compliance on time. In fact, his appeal grounds do not refer to the declaration of compliance at all. It seems that the appellant may not have understood his duties. It was his responsibility to enrol all eligible staff in the pension scheme. They could then opt out if they wished to do so. It was also his responsibility to complete the

declaration of compliance. This shows the Regulator that he has complied with his employer duties.

23. It may be that the appellant did not appreciate the importance of the correspondence from the Regulator. I also accept that the automatic enrolment scheme can appear both complex and burdensome for sole traders and 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.

24. It is concerning that the appellant had not submitted the declaration of compliance by the time the Regulator submitted the response to the appeal. If the appellant has still not done so, he should comply as soon as possible to avoid the possibility of further fines.

25. 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 2 September 2022