



Neutral citation number: [2022] UKFTT 00321 (GRC)

Case Reference: PEN/2022/0069

**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

BERKELEY & LORDS LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Berkeley & Lords 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 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 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.

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 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.

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. The system has changed for employers who have taken on their first member of staff after 1 October 2017, known as "newborn employers" or "newborns". 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 appellant is a newborn employer, and the duties start date was 1 July 2021. The appellant's declaration of compliance was due to be provided by 1 December 2021. The appellant did enrol its staff in a pension scheme but did not complete a declaration of compliance by the required date.

10. The Regulator became aware of the appellant as a newborn employer on 13 August 2021 and sent a letter in August to the appellant's registered office address. This letter set out the duties start date and gave the declaration deadline of 1 December 2021. It also included a guidance document, "the essential guide to automatic enrolment". 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.*"

11. The Regulator sent a further reminder letter to the appellant in November 2021, which stated in red text, "*take immediate action to avoid a potential fine*", and "*Do not ignore this letter, you need to act now*". The Regulator sent a final reminder letter on 10 December 2021, making it clear there were 14 days to complete the declaration. The appellant did not complete the declaration of compliance on time.

12. The Regulator issued a compliance notice to the appellant on 29 December 2021, also to the registered office address. 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*". The notice also explains how to complete the declaration of compliance, including a web link for starting the declaration, postal address and telephone number.

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

14. The appellant applied for a review to the Regulator. The Regulator confirmed the penalty notice.

Appeal grounds

15. The appellant's appeal grounds are that they did not receive any correspondence from the Regulator. They have checked with neighbours, but nothing was delivered to them either. The appellant says that they are a new company that is still dealing with the fallout from the pandemic, and they cannot afford to pay £400.

16. The Regulator relies on the presumption of service and says that the declaration of compliance was correctly served on the appellant's registered office address referring to the case of ***London Borough of Southwark v (1) Runa Akhter (2) Stel LLC*** 2017 UKUT 0150. The Regulator says that the appellant was given ample warning and provided with information to assist new employers to comply with their

duties. The appellant has not provided a reasonable excuse for the failure to comply. It has also still failed to complete the declaration of compliance. The penalty may be burdensome, but it is not disproportionate, and the Regulator would be willing to consider repayment options.

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 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 August, November 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.

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.

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 argument that it did not receive any notices before the deadline, or the compliance notice. Newborn employers do receive less correspondence from the Regulator about their automatic enrolment duties than established employers who had staging dates. This is because the Regulator relies on PAYE information to identify new employers and can only contact them once they have this information. However, detailed correspondence from the Regulator is not a legal requirement. The Regulator in this case did send three clear letters to the appellant's registered office address, which contained all of the information needed to complete the declaration of compliance.

22. The appellant was also sent the compliance notice, which contained clear information about how to complete the declaration of compliance and an extended deadline. 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.

23. The fixed penalty notice was received by the appellant, and this was sent to exactly the same address by the Regulator. The appellant says that no other notices or correspondence were received by them, even though they were sent to the correct address. However, the appellant has provided no explanation as to why the

compliance notice may not have been received. It appears to have been sent to the correct registered office address. As stated by the Upper Tribunal in the **London Borough of Southwark** case, mere assertion of non-receipt is not sufficient to rebut the presumption of receipt. It is also implausible that three reminder letters and the compliance notice all went astray, when the fixed penalty notice (sent to the same address) did not. I therefore find on balance of probabilities that the compliance notice was received by the appellant.

24. It may be that the appellant did not appreciate the significance of the correspondence and it was overlooked. I note from the appellant's request to the Regulator for a review that they were expecting a letter giving their "employer reference and staging date". The appellant may have misunderstood the process. The letter from the Regulator in August 2021 about the declaration of compliance set out what the appellant needed to do.

25. I do 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.

26. I have also considered the appellant's argument that they are a new company that is still dealing with the fallout from the pandemic, and they cannot afford to pay £400. I appreciate that the COVID-19 pandemic was a difficult time for many small businesses. However, a reasonable employer was still expected to comply with its automatic enrolment duties. In this case, the appellant was contacted some four months before the relevant deadline, and this was extended by a further two months in the compliance notice. This was ample time in which to understand what they needed to do. The sum of £400 may be burdensome for a small business, but it is set at an appropriate level to act as a real deterrent to breach of these important duties. I also note that the Regulator would be willing to consider repayment options.

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

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 2 September 2022