



Appeal number: PEN/2021/0234P

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

SKEWER HOUSE TAUNTON LIMITED

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
18 JANUARY 2022**

DECISION

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

REASONS

Background

2. Skewer House Taunton Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 26 July 2021 (Notice number 170161902300).

3. The Fixed Penalty Notice ('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 11 June 2021 that 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 on 18 August 2021 that the decision was confirmed.

5. On 26 August 2021, the Employer referred to the Tribunal the Regulator's decision to issue the Penalty Notice.

6. The parties and the Tribunal agreed that this matter was 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 'staging date' (being the date when the legislation first applies to that employer). These duties include the obligation - from the employer's staging date - to assess their staff, write to them, and automatically enrol them into a qualifying scheme if applicable.

9. The employer must, within five months of its staging 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 the Compliance Notice is not complied with, issue a Penalty Notice 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 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 make its own decision on the appropriate action for the Regulator to take, taking account of the evidence before it. The Tribunal may confirm, vary or revoke a Penalty Notice and when it reaches a decision, must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

The facts

14. The Employer needed to consider re-enrolment by the third anniversary of their staging date, namely by 1 January 2021. The Employer’s re-declaration of compliance deadline was 1 June 2021.

15. On 2 July 2020 - some 11 months before the deadline - the Regulator emailed the Employer’s nominated contact, CKSONLINE, with a reminder of the re-declaration of compliance deadline of 1 June 2021. The email said that if CKSONLINE was *not* setting up the re-enrolment for the Employer or helping them to do so, they should forward the email to a representative of the Employer who could let the Regulator know whom to contact instead.

16. The Regulator also sent a reminder letter direct to the Employer in September 2020. This stated that the deadline to *complete* any re-enrolment duties was 1 January 2021 and deadline to re-declare *compliance* by 1 June 2021. The letter also invited the Employer to check and update if applicable the details of their secondary contact as well as update the name of the most senior person at the Employer responsible for automatic enrolment if that had changed.

17. The Employer did not file a re-declaration of compliance with the Regulator by 1 June 2021. The Regulator therefore issued a Compliance Notice dated 11 June 2021, requiring the re-declaration of compliance to be filed by an extended deadline of 22 July 2021. The Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

18. The extended deadline was not met so, on 26 July 2021, the Regulator issued a Penalty Notice requiring payment of the fixed penalty sum of £400 by 23 August 2021, and compliance with the Compliance Notice by the same date.

19. On 6 August 2021, Tax Assist Accountants, as agents on behalf of the Employer ‘appealed’ to the Regulator on the basis that the Employer was previously unaware that the re-declaration was due to be completed as neither they nor the Employer had received any prior communication from the Regulator.

20. On 7 August 2021, the Regulator confirmed to the Employer completion of the re-declaration of compliance.

21. On 18 August 2021, the Regulator notified the Employer that it had completed a review of its decision to issue the Penalty Notice and confirmed that decision.

Submissions

22. The Employer’s Notice of Appeal dated 26 August 2021 from their representatives says that:

(1) The Employer did not receive any prior communication regarding their re-enrolment duties. The first time they were aware of their obligations was when they received the Penalty Notice.

(2) The Employer sent an initial appeal to the Regulator who said their records show that the Compliance Notice had been sent.

(3) Neither the Employer nor their registered office (the address of their representative) had received any communication from the Regulator prior to receiving the Penalty Notice.

(4) As soon as the Penalty Notice was received, the Employer complied by completing their re-enrolment and re-declaration duties, and then appealed the penalty.

(5) If the Compliance Notice was sent, it was never delivered. The Employer does not believe they ‘can be faulted for’ this, particularly as they are a small business still dealing with the effects of the pandemic.

(6) Since then, the Employer has complied fully with their duties, and ‘*dealt with the appeals in a timely manner*’.

(7) The deadline provided by the Regulator for full compliance was 1 September 2021. The Employer is now fully compliant but will not be paying the penalty pending this appeal.

23. In its response dated 24 September 2021, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address.

(2) The Employer has failed to overturn these statutory presumptions not least by failing to explain how the Penalty Notice was received but not the preceding Notice.

(3) All postal correspondence, including the Notices, were sent to the Employer's registered office which appears to be the address of the Employer's accountant. This address was given in the Employer's original declaration of compliance in 2018; the re-declaration of compliance in August 2021; their Notice of Appeal; and appears on the Employer's website as their address. This address therefore appears to have been in use by the Employer for some time and remains current.

(4) There is no record of any post sent to this address having been returned to the Regulator as undelivered.

(5) The Regulator does not use recorded delivery or other registered mail services as this would allow intended recipients to refuse to sign for or accept notices and other important communications from the Regulator.

(6) The Regulator submits that the Employer may be mistaken and did in fact receive the Compliance Notice but failed to appreciate its importance and failed to act on it, wrongly handled it, ignored and/or discarded it. None of these constitute a reasonable excuse for failing to comply.

(7) It is reasonable to expect that official correspondence would be properly handled, and that those running a business would act on such communications and/or seek help if unsure. There is no record that they did so.

(8) The Employer has not provided any explanation and/or evidence as to why the correspondence might not have been received. The burden rests with the Employer to explain why it did not receive the Notice. Mere assertion that it did not is insufficient. In this case the Employer has provided no evidence to demonstrate why they did not receive the Compliance Notice even though they acknowledge receiving the Penalty Notice.

(9) Some of the Regulator's reminder emails were sent to the Employer's accountants CKSONLINE who completed the Employer's original declaration of compliance in March 2018. Those accountants were named to the Regulator as the Employer's 'secondary contact' from November 2016. Emails from the Regulator to this email address did not 'bounce back'.

(10) The Employer was directly reminded of their duty to re-enrol employees as far back as April 2018 when they first declared compliance. Further direct correspondence was sent by post and email to the Employer in September 2020 and February 2021. The first reminder letter reminded the Employer of its duties and offered assistance. It also asked the Employer to check the contact information for its secondary contact. The second letter informed the Employer of relevant dates and warned the Employer that they risked a penalty for non-compliance.

(11) The Compliance Notice set out the requirements of the Employer; the extended deadline for compliance (22 July 2021); step-by-step instructions and contact details for the Regulator in case the Employer had any queries. The Employer took no action until they received the Penalty Notice which was sent to the same address as previous correspondence.

(12) None of the reminders and other correspondence sent to the Employer and their secondary contact is required by law but is sent out of courtesy and to offer guidance and support if needed. The Compliance Notice itself provided a further six weeks for compliance which is more than adequate. The Regulator has made clear throughout the pandemic that the statutory duties continue to apply.

(13) Automatic enrolment and re-enrolment have been implemented across the UK since 2012. There is much guidance and advice available to employers, including on the Regulator's website, the Department for Work and Pensions website and from other bodies and advisers. It is unclear why the Employer was not aware of its statutory obligations in relation to automatic re-enrolment.

(14) By its grounds of appeal, the Employer seems to accept that they were not compliant until after the Penalty Notice had been issued i.e. out of time. Late or eventual compliance does not excuse the failure to comply by the deadline.

(15) The re-declaration of compliance is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach.

(16) The Employer submits that their size and the exceptional circumstances due to the pandemic should be taken into consideration. The Regulator is sympathetic to the problems faced by employers due to the pandemic. However, it is not clear why the Employer was unable to comply with its duties until after the Penalty Notice was issued.

(17) The Regulator accepts that the £400 penalty is burdensome for smaller businesses like the Employer, but the amount of the penalty is fixed by law and is not disproportionate to the breach bearing in mind the importance of the re-declaration.

(18) A five-month period for compliance, starting with the third anniversary of the employer's staging date, is adequate time to complete the re-declaration. Moreover, the Compliance Notice gave the Employer a further 42 days to comply. This was more than adequate for a business of the Employer's size.

(19) The Regulator acknowledges the challenges faced by employers at the present time. If this appeal is dismissed and the Employer would find it difficult

to pay the penalty in one payment, on request the Regulator would be willing to consider payment options.

(20) In short, the Employer is not disputing that they failed to meet their re-declaration duties within the required deadline, nor have they provided a reasonable excuse for failure to do so. The decision was fair, reasonable and proportionate. The Employer ought to have been aware of their statutory duties, particularly in light of the correspondence sent to their principal office address which, beyond a mere assertion of non-receipt, they have not provided evidence to support their claim and thus overturn the presumption of service.

Conclusions

24. For the reasons set out below - and 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.

25. The Employer has not explained how or why they received the Penalty Notice yet did not receive any previous correspondence from the Regulator sent to the same address.

26. Either of the two reminder letters (sent in September 2020 and February 2021) or the Compliance Notice (sent in June 2021) - even disregarding the numerous emails sent to the Employer's previously named 'secondary contact' - should have alerted the Employer to their legal duties of re-enrolment. These communications were sent to a named individual who apparently remains an officer of the Employer. Each letter, and the Compliance Notice, clearly set out the steps required, including the re-declaration deadline of 1 June 2021 (in fact extended till 22 July 2021 by the Compliance Notice). Both letters, and the Compliance Notice, were correctly addressed to the Employer's registered office. None of them was returned to the Regulator undelivered. The same address was used for the Penalty Notice and the Employer clearly did receive this.

27. As for whether the Employer *received* these letters or the Compliance Notice:

(1) The Regulator does not have to *prove* that the documents were received. This is because the Act and related Regulations say that if a document is sent to a company's registered office by post, which is its proper address, it is *presumed* that it was received by the person to whom it was addressed. This is only a presumption and, if there were strong evidence to the contrary, the presumption can be displaced. The Employer does not have to *prove* that the documents were not received but, beyond the simple statement that the reminder letters and the Compliance Notice were not in fact received, the Employer has produced *no* evidence in support of this position (such as evidence from the Post Office of post being disrupted in the local area; or post being wrongly delivered to another similar address).

(2) Secondly, even if the Employer received neither the Compliance Notice nor either of the reminder letters (all of which were sent to the same registered

office address), that would not relieve the Employer of the duty to comply with the legal obligations relating to re-enrolment. Such obligations include filing with the Regulator a re-declaration of compliance by the required deadline. 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 them.

28. In this case, the re-declaration deadline was in fact extended under the Compliance Notice from 1 June 2021 till 22 July 2021.

29. The Compliance Notice was served at a time when businesses were trading despite the pandemic so, even taking account of the difficulties that businesses may have faced during the pandemic and periods of lockdown, no evidence or reason has been given for the Employer's failure to comply. I therefore do not consider that the pandemic or successive lockdowns provide a reasonable excuse for the Employer not to comply with the obligation to file a re-declaration of compliance in time.

30. The Employer accepts that the Penalty Notice was received. It seems that the Employer then instructed a firm of accountants to ask the Regulator to appeal the Penalty Notice and meanwhile file the re-declaration. However, that was several days *after* the deadline, and *after* issue of the Penalty Notice. It was therefore too late to avoid the penalty because late compliance does not excuse a failure to do so by the deadline.

31. The Employer was - or should have been - aware of the obligation to send the Regulator a declaration of compliance by 1 June 2021, even *without* the Compliance Notice. It was first mentioned when the Employer originally enrolled and filed their declaration of Compliance in April 2018, and the Regulator sent two reminder letters direct to the Employer's registered office address in the months leading up to the re-enrolment deadline.

32. I am satisfied that the Employer - or advisers on their behalf - had ample opportunity to comply with the obligation to file a re-declaration of compliance in time. The Employer failed to do so. That failure entitled the Regulator to issue a Penalty Notice.

33. Even if an employer engages a third party to assist, it is the employer who retains ultimate responsibility for compliance with statutory duties. The duty to comply with pensions obligations - including those set out in a Compliance Notice - rests with the Employer. 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 Notice.

34. In all the circumstances, I determine that the Regulator was entitled to issue a Penalty Notice for non-compliance with the Compliance Notice dated 11 June 2021.

35. The amount of the penalty is fixed by law, so the Regulator has no discretion to reduce the penalty below £400.

36. The Regulator has indicated that, on request by the Employer, it would be willing to consider payment options if the £400 penalty would have financial implications for the business.

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

38. No directions are necessary.

(Signed)
ALEXANDRA MARKS CBE
(SITTING AS A JUDGE OF
THE FIRST TIER TRIBUNAL)

DATE: 4th February 2022