



[2023] UKFTT 00111 (GRC).

Case Reference: PEN/2022/0186

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

Heard: Paper Consideration

**Heard on 26 January 2023 in Chambers
Decision given on 09 February 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

A GREENER LONDON LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference A Greener London Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 4 August 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 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).

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 2 April 2020. The Appellant's declaration of compliance was due to be provided by 1 September 2020.

10. It appears that the Regulator was not aware of the Appellant's failure to provide a declaration of compliance until 2022. The Regulator sent a letter dated March 2022 to the Appellant's registered office address, addressed to Mr Elliot Thorpe, director. This letter gave an extended declaration deadline of 12 May 2022. It was headed "*Automatic enrolment: take immediate action to avoid a potential fine*". 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 letter also enclosed a document, "The essential guide to automatic enrolment".

11. The Regulator sent a further letter on 20 May 2022 headed "*Urgent action is required – your declaration deadline was 1 September 2020*". This gave a further 14 days to complete the declaration.

12. The Regulator issued a compliance notice to the Appellant on 8 June 2022, 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 19 July 2022*". The notice expressly states, "*If you don't complete your declaration of compliance by 19 July 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 4 August 2022.

14. The Appellant applied for a review to the Regulator, saying they believed it was completed and was dealt with by the accountant, and the pensions funds set up took longer than expected but everything else was completed before 19 July. The Regulator confirmed the penalty notice, on the grounds that the declaration of compliance had not been completed.

15. The Appellant did complete the declaration of compliance on 12 September 2022.

Appeal grounds

16. The Appellant's appeal grounds are that they started employing staff on probationary 6 month contracts and were not aware they would need pensions, and two remaining employees had pensions set up correctly in July 2022. They also say that they were waiting for accountants to organise this, and the fine of £400 is incredibly high for a small business of two employees.

17. The Regulator says that the declaration of compliance is a separate duty from the duty to enrol eligible job holders in a pension scheme. Several letters about this duty were sent to the registered office. Delays caused by an accountant are not a reasonable excuse. The amount of the penalty is fixed by law, and a penalty is fair, reasonable and proportionate in light of the multiple warnings and reminders.

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 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 March 2022 about the need to complete a declaration of compliance, including the relevant extended deadline. This deadline was extended again on 20 May 2022, and again in the compliance notice. The Appellant failed to comply with the further deadline set out in the compliance notice.

20. 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. The Appellant does not dispute receiving the compliance notice.

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

22. I have considered the Appellant's argument that they did set up pensions correctly for two employees. They may have done so (this is not clear from the information I have). However, the fine was not issued for failing to set up pension automatic enrolment correctly. The fine was issued for failing to complete the declaration of compliance. This declaration must be completed by all employers who operate automatic enrolment for their employees.

23. Both the correspondence from the Regulator (in March and May 2022) and the compliance notice gave the Appellant clear information about the need to complete a declaration of compliance. There was a clear warning that there could be fines if the Appellant did not meet the deadline. The deadline was extended in the second letter. The Appellant had ample time to comply with its duties and avoid a penalty. The Appellant has not explained why they failed to take any action after receiving these letters.

24. I have also considered the Appellant's point that they were waiting for their accountants. This generally does not provide a reasonable excuse, as the employer is responsible for complying with all automatic enrolment duties. An employer can delegate to a third party, but still remains responsible for compliance. I also note from correspondence provided in the bundle (pages 48 and 49) that the Appellant only asked their accountant to help set up a pension scheme on 12 July 2022 (one week before the final deadline). It appears that the accountant asked if the Appellant wanted her to complete the declaration of compliance, but I have not seen any reply

from the Appellant. In any event, the deadline had been made clear to the Appellant and they failed to comply.

25. It may be that the Appellant did not appreciate the importance of the correspondence that they had been sent by the Regulator. I also 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 an extended deadline.

26. I have considered the Appellant's point that a £400 fine is high for a small business. They have asked for it to be reduced. I am not able to reduce the fine, as it is fixed by law and I do not have any discretion to reduce the amount. I do not find that it would be appropriate to set aside the fine, taking into account the failure of the Appellant to act on the correspondence and the compliance notice from the Regulator. As noted above, the system of automatic enrolment does need to be supported by a robust enforcement mechanism. I note that the Regulator says in its response that the Appellant can request a repayment plan, and the Appellant may want to contact the Regulator about this.

27. 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: 8 February 2023