



[2023] UKFTT 466 (GRC).

Appeal number: PEN/2023/0020P

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

L'ORO DI NAPOLI EALING 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. L'Oro di Napoli Ealing Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 20 December 2022 (Notice number 123789120227).
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 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 10 January 2023 that the decision was confirmed.
5. On 19 January 2023, the Employer 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 '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 that Notice is not complied with by the stated deadline, a Fixed Penalty Notice ('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 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 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 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's staging date was 1 October 2018. The Employer therefore needed to consider re-enrolment by the third anniversary of their staging date, namely by 1 October 2021. The Employer's re-declaration of compliance deadline was 28 February 2022, five months after that third anniversary.
15. In June 2021 - some 8 months before the deadline - the Regulator wrote to the Employer about re-enrolment duties, and the re-declaration of compliance deadline of 28 February 2022.
16. The Regulator also sent a reminder letter to the Employer in November 2021. This stated that the deadline to *complete* any re-enrolment duties was 31 December 2021 and the deadline to re-declare *compliance* was 28 February 2022. The letter also stated that if the Employer did not complete the legal duties on time, including the re-declaration of compliance, it may be subject to fines and/or prosecution.
17. The Employer did not file a re-declaration of compliance with the Regulator by 28 February 2022. The Regulator therefore issued a Compliance Notice dated 24 October 2022, requiring the re-declaration of compliance to be filed by an extended deadline of 5 December 2022. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

18. The extended deadline was not met so, on 20 December 2022, the Regulator issued a Penalty Notice requiring payment of the fixed penalty sum of £400 by 17 January 2023 and compliance with the Compliance Notice by the same date.

19. On 23 December 2022, Mr Kaya of DK Accountancy, filed the re-declaration of compliance on behalf of the Employer. On 24 December 2022 the Regulator confirmed to Mr Kaya and the Employer completion of the re-declaration of compliance.

20. On 26 December 2022, DK Accountancy asked the Regulator to carry out a review of its decision to impose a penalty.

21. On 10 January 2023, 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 19 January 2023 says that:

- (1) She had been running two business for almost 10 years and has never received any penalties from any government departments.
- (2) She always follows correspondence from the Regulator: both her businesses are registered with NEST for workplace pensions.
- (3) Before the £400 penalty notice, she did not receive any letter so did not respond and submit the re-declaration on time.
- (4) Although she explained this to the Regulator, they rejected her appeal.
- (5) She would like the penalty cancelled as she is a law-abiding citizen who always does her returns promptly.

23. In its response dated 22 February 2023, 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) There is no basis for displacing these statutory presumptions unless the contrary can be shown by evidence. Mere assertion that posted items have not been received is insufficient. The Employer in this case has provided no evidence or explanation for what she claims is non-delivery of the Compliance Notice. There is no record of any of the Regulator's correspondence having been returned undelivered.
- (3) The Employer has also not explained why it received the Penalty Notice but not the Compliance Notice and other prior correspondence all sent to the

same address, namely the Employer's registered office address of L'Oro Di Napoli, 6 The Quadrant, London W5 4EE.

(4) The Employer was directly reminded of her duty to re-enrol employees and then file a re-declaration of compliance as far back as June 2021, and then again in November 2021. These reminder letters advised of the deadline of 28 February 2022 for making the re-declaration of compliance. There is no legal requirement for the Regulator to provide such reminders: they are sent as a courtesy. Ultimately, it is the Employer's duty to comply with all its pensions obligations.

(5) The decision to issue a Penalty Notice was fair, reasonable and proportionate because:

(a) The Compliance Notice as well as the Penalty Notice was correctly served on the Employer at its proper address, namely its registered office address. The Employer has failed to produce any evidence to overturn the presumption of service of these Notices.

(b) In any event, the Employer failed to take timely steps to make the re-declaration so the Regulator was entitled to issue the Penalty Notice.

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

(d) The Regulator has repeatedly made clear that action will be taken against employers who fail to provide a re-declaration of compliance.

(e) The five-month period for compliance, starting with the third anniversary of the employer's staging date, is a generous period within which to complete the re-declaration. By the time the Penalty Notice was issued on 20 December 2022, more than nine months had elapsed since the original deadline of 28 February 2022.

(f) The amount of the Penalty is prescribed and neither the Regulator nor the Tribunal has any discretion to alter that amount.

(g) No reasonable excuse in fact or law has been provided for the Employer's failure to complete the re-declaration on time.

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.

25. The Employer has not explained how or why she 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 June 2021 and November 2021) or the Compliance Notice (sent in October 2022) should have alerted the Employer to her

legal duties of re-enrolment and re-declaration of compliance. These communications were sent to a named individual who apparently remains an officer of the Employer.

27. Each letter clearly set out the steps required, including the re-declaration deadline of 28 February 2022.

28. The Compliance Notice was not sent until nearly *eight* months after the original deadline, and in fact extended that deadline till 5 December 2022. This gave the Employer more than adequate time to comply with her obligations.

29. Both letters, and the Compliance Notice, were correctly addressed to the Employer's registered office. None was returned to the Regulator undelivered. The same address was used for the Penalty Notice and the Employer clearly did receive this.

30. 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, and that further checks were made, 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.

31. The Employer accepts that the Penalty Notice was received, and the Employer then instructed a firm of accountants to file the re-declaration and ask the Regulator to remove the penalty. 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.

32. The Employer was - or should have been - aware of the obligation to send the Regulator a re-declaration of compliance by 28 February 2022, even *without* the Compliance Notice (the effect of which, as I have said, was to extend the deadline till 5 December 2022). I am satisfied that the Employer - or advisers on her behalf - had ample time to comply with the obligation to file a re-declaration of compliance by the deadline.

33. 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. In this instance, the Employer failed to do so. That failure entitled the Regulator to issue a Penalty Notice.

34. Furthermore, 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 her behalf, that does not relieve the Employer of the responsibility to ensure that the duties were met. 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.

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

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

37. 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.

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

39. No directions are necessary.

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

DATE: 6 June 2023