



NCN: [2023] UKFTT 767 (GRC)

Case Reference: PEN/2023/0113

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

Heard: Paper Consideration

**Heard on: 14 September 2023 in Chambers
Decision given on: 19 September 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

MONIKA PALKA HOSPITALITY LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Monika Palka Hospitality Limited (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 18 April 2023, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.
2. The parties have agreed to a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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 declaration of compliance must be provided within five months of the duties start date (Regulation 3(1)). A re-declaration of compliance must be provided within five months beginning with the third anniversary of the duties start date, and then within

five months beginning with the third anniversary of the previous automatic re-enrolment date (Regulation 4(1)).

Facts

9. 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.

10. The Appellant is the employer for the purposes of the various employer duties under the Act. The duties start date was 1 September 2019. The Appellant's re-declaration of compliance was due to be provided by 31 January 2023.

11. The Regulator issued a compliance notice to the Appellant on 17 February 2023, to the registered office address. This gives the deadline for the re-declaration of compliance as 31 January 2023, and explains the Regulator has no record of it being completed by the deadline. The notice expressly states, "*If you don't complete your re-declaration of compliance by 30 March 2023, we may issue you with a £400 penalty*". The notice also explains how to complete the re-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 18 April 2023.

13. The Appellant applied for a review to the Regulator on the grounds they had not received any the compliance notice or any other letters. The Regulator confirmed the penalty notice. The Appellant did complete the re-declaration of compliance on 19 April 2023.

14. Documents provided by the Regulator show that two reminder letters were sent to the Appellant in May and November 2022. All correspondence was sent to the Appellant's registered office address.

Appeal grounds

15. The Appellant's appeal grounds are:

- a. The director of the Appellant was unable to pass on the relevant information to their third party representative, as they were either unwell in hospital, or out of the country dealing with delicate family matters.
- b. They do not recall receiving any letters except for the fixed penalty notice, and the re-declaration was submitted as soon as this was received.

16. The Regulator says that the statutory presumption of service applies, and the Appellant has not overturned this and has not explained why the fixed penalty notice was received but not the compliance notice. It is not clear that the issues involving the director would have prevented compliance for the entirety of the period, and a reasonable employer should have made alternative arrangements or contacted the Regulator. Late compliance does not excuse the failure, and the Appellant has not shown a reasonable excuse for the failure to comply.

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 May and November 2022 about the need to complete a re-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 previous correspondence from the Regulator, including the compliance notice. 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.

22. The fixed penalty notice was received by the Appellant, and this was sent to exactly the same address by the Regulator. The Appellant has provided no explanation as to why the compliance notice may not have been received - in circumstances where it appears to have been sent to the correct registered office address, and the fixed penalty notice was received. A mere assertion that a notice was not received is not sufficient to overturn the statutory presumption of service (***London Borough of Southwark v (1) Runa Akhter & (2) Stel LLC*** [2017] UKUT 0150). I therefore find on balance of probabilities that the compliance notice was received by the Appellant. I also find that the reminders in May and November 2022 would have been received.

23. I have also considered the Appellant's argument that the director with responsibility for ensuring the re-declaration was submitted on time was unable to pass on any information to third-party accountants for six months, due to being in hospital and then out of the country dealing with delicate family issues. No evidence has been provided to support this argument, and it is not clear which time period is involved. It may well be that this individual was unwell and experiencing personal

difficulties, and I am not unsympathetic to their position. However, the Appellant company still had a responsibility to ensure that these important duties were complied with, and so it must delegate compliance with those duties appropriately.

24. I agree with the Regulator that a responsible employer, exercising reasonable care and diligence, should and would have made alternative arrangements to deal with the re-declaration of compliance. Responsibility could have been delegated to someone else in the organisation if the director with main responsibility was away. If this was not possible, the Appellant could have contacted the Regulator to explain the position. I note that the Appellant was able to submit the re-declaration of compliance only one day after receiving the fixed penalty notice. The director's absence does not provide a reasonable excuse, even if this occurred during all of the relevant time period.

25. I appreciate that the correspondence from the Regulator may have been overlooked, in part due to the relevant director's absence. It may be that the Appellant did not appreciate the importance of this correspondence. However, the declaration and re-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. 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

Date: 18 September 2023