



NCN: [2024] UKFTT 00355 (GRC). Appeal number: PEN/2023/0236P/AE

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

SELECTIAL RECRUITMENT 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
22 March 2024**

DECISION

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

REASONS

Background

2. Selectial Recruitment Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 24 August 2023 (Notice number 130593067742).

3. The Fixed Penalty Notice was issued under section 40 of the Pensions Act 2008 ('the Act'). It requires the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 29 June 2023 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 20 September 2023 that its decision was confirmed.

5. On 9 October 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 'duties start date' (being the date when the legislation first applies to that employer). These duties include the obligation - from the employer's duties start 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 duties start date, provide certain specified information to the Regulator about its compliance with these duties. This is known as a ‘declaration of compliance’.

10. If the employer fails to provide a 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 can be issued for failure to comply with the Compliance Notice. The prescribed fixed penalty is £400.

11. Under section 44 of the Act, a person who has been issued with a Fixed Penalty Notice may make a reference (i.e. an appeal) to the Tribunal provided an application for review has first been made to the Regulator.

12. 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 Fixed 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

13. On 29 June 2023, the Regulator issued a Compliance Notice addressed to the Employer’s registered office. The letter was marked *‘DO NOT IGNORE THIS COMMUNICATION’* and headed *‘Selectial Recruitment Ltd must comply with the directions in this notice by 9 August 2023. You may be issued a £400 penalty if you fail to comply by this deadline’*.

14. The Employer did not file a declaration of compliance as required by the Compliance Notice. As a result, on 24 August 2023 (two weeks after the extended deadline granted by the Compliance Notice) the Regulator issued a Fixed Penalty Notice – again addressed to the Employer’s registered office. This Penalty Notice required payment of the fixed penalty sum of £400 by 21 September 2023, and compliance with the Compliance Notice by the same date.

15. On 13 September 2023, the Employer emailed the Regulator asking for a review of the Penalty Notice. The email explained that the Employer had changed his accountant because of the previous accountant’s unprofessionalism – apparently by failing to action the Employer’s repeated requests to focus on pensions. The Employer said he had not received any letters from the Regulator until the fine. The new accountant submitted the declaration of compliance straightaway. The Employer asked for the penalty to be withdrawn as, under the financial crisis, it is very difficult to survive.

16. On 20 September 2023, the Regulator notified the Employer that it had completed a review of its decision to issue the Fixed Penalty Notice and, while noting the Employer’s reasons for requesting and review and that the Employer had completed its re-declaration of compliance, confirmed its decision to impose a fixed penalty.

Submissions

17. The Employer's Notice of Appeal dated 9 October 2023 repeats what he said in his review request to the Regulator (summarised in paragraph 15 above) adding:

- (1) It was not his fault and was a totally unintentional error.
- (2) His appeal was not granted. By this I assume he means that his review request of the Regulator did not result in the penalty being overturned.
- (3) The Employer did not receive the fine letter on time. I presume by this that he means the Fixed Penalty Notice but it is unclear what he means by saying he did not receive it 'on time'. If he is referring to the Compliance Notice, this gave an extension of time of over two months to submit the declaration of compliance.
- (4) The business premises are situated in a block of offices and post goes missing: the Employer said it 'is a very normal culture here'.

18. In its response dated 30 November 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

- (1) The appeal grounds do not amount to a reasonable excuse for the failure to comply with the requirements of the Compliance Notice nor indicate that the Regulator has acted unfairly in any way.
- (2) The Employer suggests that his accountant was to blame but no detail or evidence of this is supplied. In any event, while an employer can delegate their auto-enrol duties to a third party, the responsibility to comply rests with the employer.
- (3) The Employer has not raised any plausible explanation for the Compliance Notice not being received. He simply states that 'letters' were not received and that the Fixed Penalty Notice was 'late'. However, the Employer was able to – and did – make an in-time request for a review.
- (4) The Regulator relies on the statutory presumptions of service and receipt. The Employer relies on a bare assertion that the Compliance Notice was not received but the Fixed Penalty Notice was. No explanation has been given why the later notice was received but not the earlier one.
- (5) Case law sets the principle that a bare assertion of non-receipt is insufficient to rebut the presumption that correctly addressed correspondence and notices have been properly served and received.
- (6) The Employer has not put forward any evidence to support rebuttal of the presumption of service.
- (7) The Employer has not provided any reasonable excuse, supported by evidence, for non-compliance with the statutory duty to send a declaration of compliance to the Regulator on time.

(8) The Regulator does not use recorded delivery or other registered mail services as this would allow intended recipients to refuse to sign or accept notices and other important communications and then claim lack of knowledge or receipt.

(9) Each employer is responsible for understanding and complying with their legal duties in running a business.

(10) The importance of declaring compliance with pension obligations on time is recognised by the Tribunal. As a responsible employer it is for the Employer to be aware of their legal duties and ensure full and timely compliance with them.

(11) As the Employer failed in this case to comply, it was fair, reasonable and proportionate for the Regulator to issue a Compliance Notice and then, when the Employer still failed to comply, to issue a penalty.

(12) The amount of the penalty is fixed by law. In all the circumstances, the penalty is fair, reasonable and proportionate.

Conclusions

19. Taking into account 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.

20. It is the Employer’s duty to be aware of all their pensions obligations and to ensure full and timely compliance with them.

21. In this case, a Compliance Notice was sent in August 2023 giving the Employer additional time to comply with his legal obligation to send a declaration of compliance to the Regulator.

22. The Employer seems to suggest that the Compliance Notice was not received – saying ‘I never received any letter’. Even if the Compliance Notice was not received, the Regulator – having sent it to the correct registered office address (which to this day remains unchanged) – is entitled to rely on the statutory presumptions of proper service and receipt unless there is strong evidence to the contrary. No evidence to the contrary has been provided in this case.

23. The Employer explained in an email to the Regulator that the business’s previous accountant was unprofessional so he changed to a new accountant who submitted the declaration straightaway.

24. However, the declaration was submitted only after expiry of the extended deadline granted by the Compliance Notice – and indeed only after the Fixed Penalty Notice had been served (meaning the Employer had had over seven months rather than five months to send the Regulator a declaration of compliance).

25. There is no evidence that the Employer made any attempt to contact the Regulator to explain any difficulties in complying with his obligations or to seek an extension of time to do so.
26. It seems from the Employer's statement that he asked his previous accountant 'to focus on pensions' that he was aware of employers' duties in relation to pensions. He should also have been aware of the deadline to submit a declaration of compliance. This is an important tool to enable the Regulator to check that employers are complying with their legal obligations.
27. While the Employer seeks to blame his previous accountant for failing to submit the required declaration of compliance, it remains the employers' obligation to comply with their statutory duties even if they engage professionals to assist them in doing so. If the Employer in this case considers that his previous accountant behaved unprofessionally in failing to act on his instructions, it is open to him to take action against that professional.
28. In all the circumstances of this case, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 24 August 2023 for non-compliance with the Compliance Notice dated 29 June 2023.
29. The amount of the penalty is fixed by law, so neither the Regulator nor the Tribunal has any power to reduce the penalty below £400.
30. However, the Regulator can accept the payment of a penalty in instalments if a single payment will cause particular hardship. It is open to the Employer to advise the Regulator if one single payment would cause financial difficulties and seek to pay by instalments.
31. I confirm the Fixed Penalty Notice, and I remit the matter to the Regulator.
32. No directions are necessary.

(Signed)

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

DATE: 25th April 2024