



NCN [2024] UKFTT 00423 (GRC).

Case reference: PEN-2024-0010-AE

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

**Heard: On the papers
Heard on: 24 May 2024
Decision given on: 24 May 2024**

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

Between

NIGEL ROSE LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision

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

REASONS

Background

1. In this reference Nigel Rose Limited (“the Employer”) challenges a fixed penalty notice (“the Fixed Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 29 November 2023 (Notice number 152710157024).
2. The Fixed Penalty Notice was issued under s 40 of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Compliance Notice dated 4 October 2023.
3. The Regulator completed a review of the decision to impose the penalty notices and informed the Employer on 21 December 2023 that the Fixed Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 3 January 2024.

The Law

4. The Pensions Act 2008 imposed a number of legal obligations on employers in relation to the automatic enrolment of certain ‘jobholders’ into occupational or workplace personal pension schemes. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.
5. Each employer is assigned a duties start date from which the timetable for performance of their obligations is set. The Employer’s Duties (Registration and Compliance) Regulations 2010 specify that an employer must provide certain specified information to the Regulator within five months of their duties start date. This is known as a ‘Declaration of Compliance’. An employer is required to make a re-declaration of compliance every three years. Where this is not provided, the Regulator can issue a Compliance Notice and then a Fixed Penalty Notice for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400.
6. Under s.44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice or an Escalating Penalty Notice may make a reference to the Tribunal provided that a review has been carried out or an application for review has been made to the Regulator. The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, considering the evidence before it.
7. 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.

Evidence

8. I read and took account of a bundle of documents.

The facts

9. The Employer’s duties start date was 1 January 2017. The initial declaration of compliance was filed on 19 January 2017. The first re-declaration of compliance was

filed on 17 April 2020. The deadline for the Employer's second re-declaration of compliance was 30 August 2023.

10. When the Employer completed its first re-declaration of compliance in April 2020, it made a mistake when filling in the email address in the 'Employer contact details' section. Instead of nigel@nigelrosems.co.uk the employer wrote nigel@igelrosesms.co.uk. Unfortunately under the Regulator's automated systems whatever is put in this box is automatically used as the contact email address without any human checking or intervention.
11. The Regulator attempted to send email reminders to the Employer on 2 November 2022, 2 February 2023, 22 February 2023, 3 May 2023, 31 May 2023, 5 July 2023, 9 August 2023, 16 August 2023 and 23 August 2023. Unfortunately these reminders were sent to the incorrect email address that the Employer had provided. 'Bouncebacks' were received by the Regulator but the system does not pick these up or trigger any action. The explanation of the Regulator for this is:

“However, as the Respondent's IT system is totally automated this was not specifically actioned as bounced/ non-received emails – as it does not automatically mean there has been a failure of delivery and that the email has not been received as it could be that the email box is full or just not be delivered immediately due to an out of office reply. As such this email address will continue to be used by the Respondent until the employer notifies it of a new email address or manual interference takes place on the Respondent's system.”
12. The Employer accordingly did not receive any of the email reminders.
13. The Employer also provided a postal address in the 'Employer contact details' section of the 2020 re-declaration of compliance. That was an address on Layters Green Lane ('the Layters Green address'). Presumably that was the correct address for the director of the Employer in 2020.
14. I accept that, at some point between 17 April 2020 and November 2022, the director changed address to an address in Hempton. The Employer did not inform the Regulator of this change of address.
15. The Regulator wrote to the Employer, using the Layters Green address, in December 2022 to remind the Employer of its duties to submit a re-declaration of compliance and of the deadline of 30 August 2023. That letter was not received by the Employer, because its director had changed address.
16. The Regulator wrote to the Employer again in May 2023 at the Layters Green address stating that the Employer should 'Act now', setting out the deadline for the re-declaration of compliance and making clear that the Employer may be subject to fines and/or prosecution if it did not complete its duties on time. That letter was not received by the Employer, because its director had changed address.
17. The Employer's second re-declaration of compliance was not filed by the deadline of 30 August 2023. The Regulator did not immediately issue a Compliance Notice. Instead it sent a letter on 16 September 2023 to the Employer's registered office address in Potters

Bar giving an extension of time. This has been the Employer's registered office address since 24 October 2019 and remains the registered office address.

18. This letter is headed 'Urgent action is required - your re-declaration deadline was 30 August 2023'. In a red box the letter sets out in bold: 'It is your legal duty to make sure your re-declaration is completed. You have 14 days from the issue date of this letter to complete your re-declaration. Failure to complete your re-declaration of compliance may result in you being fined.'
19. The registered office address is the address of the accountant. The Employer states 'this letter was not communicated to the company'. From this I presume that the accountant failed to inform the director or anyone else at the Employer that this letter had been received.
20. The Employer's second re-declaration of compliance was not filed by the extended deadline so the Regulator issued a Compliance Notice on 4 October 2023 with a further extended deadline of 14 November 2023. The Compliance Notice was sent to the Employer's registered office address. Again, the Employer states 'this letter was not communicated to the company'. From this I presume that the accountant failed to inform the director or anyone else at the Employer that the Compliance Notice had been received.
21. As the Employer did not complete a re-declaration of compliance by the deadline in the Compliance Notice, the Fixed Penalty Notice was issued on 29 November 2023 requiring the Employer to pay a penalty of £400. The Fixed Penalty Notice required the Employer to comply with the Compliance Notice by 27 December 2023. This letter was 'communicated to the company' on 12 December 2023. From this I presume that the accountant did pass on the Fixed Penalty Notice to the director or someone else at the Employer.
22. The Employer submitted a review request on 20 December 2023. The grounds for review state that the Employer had not received any notification 'regarding the compliance due for renewal on 4 October 2023'. It was explained that 'the notice was sent to an incorrect address, that being the address of the Company's Accountants. The company moved location from High Wycombe to Marlow some time ago and I would suspect that is when the new address was confused with the Accountants.'
23. The Regulator upheld the Fixed Penalty Notice on review on 21 December 2023.
24. The Employer completed the re-declaration of compliance on 4 January 2024.

Submissions

25. The Notice of Appeal relies on the following grounds:
 - (i) The Employer is a very small company and the fine is large.
 - (ii) The Employer complies with its other duties.
 - (iii) The Employer has complied with previous requests from the Regulator which have always come through to the company email or the email of the payroll officer.

- (iv) The Regulator sent all documentation to the company accountants rather than to the Employer's new address. The accountants wrongly assumed that the Employer would have received their normal emails.
 - (v) The Employer complied promptly after it received the Fixed Penalty Notice.
 - (vi) The Employer did not receive any related emails until after it had an email address in a telephone call.
26. In its reply to the Regulator's response the Employer states that:
- a. The email address used to send the email reminders was wrong.
 - b. The contact address for the two letter reminders was wrong (it was the director's old address)
 - c. The letter sent to the accountant's address and the Compliance Notice were not communicated to the Employer.
27. The Regulator submits, in its response and its reply to the Employer's reply, that the Compliance Notice and the Fixed Penalty Notice were sent to the registered office address. The Regulator relies on the statutory presumption of service.
28. The Regulator submits that it is the Employer's responsibility to communicate with its accountant when it receives correspondence on its behalf. Further it remains the responsibility of the Employer to comply with its duties. A lack of realisation of the importance of a notice or a failure to act does not constitute a reasonable excuse.
29. The Regulator submits that it has no duty to send reminders. The incorrect email address, to which the email reminders were sent, was provided by the Employer and the Regulator's automated systems are not equipped to pick up the error or to detect such bouncebacks. The correspondence address in Layters Green was the address supplied by the Employer in its re-declaration of compliance in 2020.
30. The Regulator submits that late or eventual compliance does not excuse the failure or comprise reasonable grounds to revoke a penalty served following expiry of the deadline in a statutory Compliance Notice.
31. The Regulator notes that there is no discretion as to the amount of the penalty.
32. The Regulator submits that the decision to issue the Fixed Penalty Notice was fair, reasonable, and proportionate.

Conclusions

33. The Compliance Notice was sent to the Employer's correct registered office address. The Compliance Notice was received by the Employer's accountants at that address who simply failed to take any or any appropriate action.
34. The Compliance Notice was therefore properly served and received at the registered office address of the Employer.
35. The timely provision of information to the Regulator, so it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this

information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that the provision of a re-declaration of compliance within a specified timeframe is a mandatory requirement.

36. The fact that an Employer otherwise complies with its duties, and that the re-declaration was filed promptly after the Fixed Penalty Notice was issued does not excuse a failure to comply.
37. I find that issuing the Fixed Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
38. I conclude that the Employer did not have a reasonable excuse for failing to comply.
39. I accept that the reminder emails were not received by the Employer, because it had mistakenly given the Regulator the incorrect email address. I accept that it is unfortunate that the Regulator's system did not pick up the 'bouncebacks' and therefore kept sending the reminder emails to the wrong address.
40. Further, I accept that the Employer did not receive the reminders sent by post, because it had not updated the Regulator about a change of address for the director. It is the Employer's responsibility to ensure that the information provided to the Regulatory is accurate and up to date.
41. The Employer should, in any event, be aware of its duties and even in the absence of any reminders would have been aware of the relevant date for compliance due to having previously re-declared compliance. There is no requirement on the Regulator to send reminders, and the fact that no reminders have been received does not amount to a reasonable excuse for failing to comply.
42. The Regulator gave the Employer an extension of time before issuing a Compliance Notice. This was sent to the registered office address. So was the Compliance Notice. Both these documents set out clearly the steps that needed to be taken, the date for compliance and the consequences of failing to comply.
43. Any reasonable Employer would make sure there was a system in place to ensure that post sent to its registered office address was acted upon. The Employer cannot delegate the responsibility for complying with its legal duties to its accountant, and it remains responsible for ensuring compliance, even if the accountant has failed to take appropriate action.
44. A failure to act upon documents sent to the registered office address cannot amount to a reasonable excuse for failing to comply, whether the fault lies directly with the Employer or with its accountant.
45. I accept that the requirement to pay £400 is a significant burden for a small business such as the Employer. The fact that the penalty is burdensome is inherent in it being a 'penalty'. The tribunal has no power to reduce the amount of the penalty. The Regulator has invited the Employer to contact it directly to discuss any financial hardship issues it may have in paying the outstanding penalty amount and propose a payment plan.

46. For the above reasons I am satisfied that the Employer has not provided a reasonable excuse for not complying with the Compliance Notice. 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.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 24 May 2024