



NCN [2024] UKFTT 00464 (GRC)

.Appeal number: PEN/2023/0290P

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

SS EDGE 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
7 May 2024**

DECISION

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

REASONS

Background

2. SS Edge Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 12 October 2023 (Notice number 130642875103).

3. The Fixed Penalty Notice ('FPN') 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 17 August 2023 that required the Employer to provide the Regulator with information in respect of automatic enrolment.

4. On 20 October 2023, the Employer asked for a review of the decision to impose the FPN. On 7 November 2023, the Regulator informed the Employer that its decision was confirmed.

5. On 26 November 2023, the Employer referred to the Tribunal the Regulator's decision to issue the FPN.

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 pension 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 FPN 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 FPN 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 FPN 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. The Employer's start date was 6 March 2023 – so the deadline by which the Employer was to complete and submit its declaration of compliance was five months later, namely 8 August 2023.

14. In April 2023, the Regulator wrote an introductory letter to the Employer at her registered office address.

15. In May and July 2023, the Regulator sent reminder letters to the Employer at the same registered office address.

16. As the Employer failed to file a declaration by 8 August 2023, on 17 August 2023 the Regulator issued a Compliance Notice ('CN') to the same registered office address.

17. The CN was headed "**TAKE ACTION NOW – DO NOT IGNORE THIS NOTICE**". It explained what to do, how to contact the Regulator with any problems and that the Regulator might issue a £400 penalty for non-compliance by the extended deadline of 27 September 2023.

18. Having heard nothing from the Employer, the Regulator telephoned the Employer's mobile on 8 September, explaining the declaration was overdue and leaving a phone number on which to call back.

19. There was no response, nor was any declaration filed by 27 September 2023.

20. On 12 October 2023, the Regulator therefore issued a FPN to the registered office address.

21. On 20 October 2023, the Employer completed her declaration of compliance (which the Regulator acknowledged the following day).

23. On the same day as filing her declaration, the Employer emailed the Regulator, saying that she had recently received the FPN but as she had not received any other correspondence, she asked for the £400 penalty to be removed.

24. The Employer repeated her request on 30 October 2023 via the Regulator's online platform.

25. On 7 November 2023, the Regulator replied that, in all the circumstances of the case, it had decided to confirm the FPN.

Submissions

26. The Employer's Notice of Appeal dated 26 November 2023 in summary says:

(1) She had never received any correspondence about enrolment with the Regulator. The first correspondence was the FPN.

(2) As soon as the FPN was received, automatic enrolment was completed online. This was confirmed on 21 October 2023.

(3) Had the Regulator sent its previous correspondence by recorded/registered post?

(4) The Employer's office is in a building with nine other offices and the Regulator's previous letters were not in her postbox.

(5) Future correspondence should be emailed, or posted to her home address which is on Companies House.

(6) A letter **had** since been sent to her home address to say the FPN was outstanding. Why wasn't other paperwork sent there?

(7) The declaration of compliance was late because she had not received any of the previous letters.

27. In its response dated 9 January 2024, the Regulator said:

(1) Both the CN and FPN had been sent to the Employer's registered office address recorded at Companies House.

(2) All the Regulator's previous correspondence had been sent to that same address.

(3) The Regulator is entitled to rely on the statutory presumptions of service and receipt.

(4) The Employer could overturn these statutory presumptions with strong evidence to the contrary. No such evidence has been produced in this case.

(5) The Employer's bare assertion of non-receipt of the CN is not sufficient to overturn the statutory presumptions.

(6) The FPN was sent to the same postal address as the CN. The FPN **was** received. This supports the presumption of service of the CN.

(7) There is no requirement for the Regulator to send statutory Notices by recorded or signed-for delivery. The Regulator does not use such services because it would enable an employer to refuse to sign and then claim non-receipt. Instead, the Regulator uses first-class post and relies on the statutory presumptions.

(8) Despite the Regulator's voicemail message to the Employer on 8 September 2023, there is no record of the Employer calling back.

(9) No reasonable excuse has been raised for failing to complete the declaration on time. Instead, the declaration was completed late – and only after the FPN had been issued.

Conclusions

28. Based on the evidence provided to me, I conclude that the Employer has given no '*reasonable excuse*' for non-compliance in this case.

29. Even if none of the Regulator's letters were in fact received, this does not provide a reasonable excuse for the Employer's failure to complete a declaration of compliance on time. This is because:

(a) the law does not require the Regulator to send **any** information or reminders before taking the enforcement action it did by issuing the CN and then the FPN; and

(b) employers are expected to be responsible and therefore aware of the legal obligations to which they are subject. These include the deadline for a declaration of compliance five months after the employer's duties start date.

30. In this case, the Employer says that the CN was not received but accepts that the FPN was received. Both Notices were correctly addressed to the Employer's then (and now) registered office address.

31. Even if the Compliance Notice was not **actually** received, the Regulator – having sent it to the Employer's correct registered office address – is entitled to rely on the statutory presumptions of proper service and receipt unless there is strong evidence to the contrary.

32. In this case, the Employer has not provided any evidence to the contrary apart from an unsubstantiated suggestion that her post may have erroneously been placed in the post-box of one of the other occupants of the building. This is insufficient to overturn the statutory presumptions.

33. Based on the evidence before me, I find that the CN **was** - more likely than not - delivered to the Employer's registered office address. Even if the Employer did not

actually receive it, the Employer has not provided sufficient evidence to overturn the statutory presumptions that it **was** properly served and received.

34. Finally, although the Employer completed the declaration on 20 October 2023 – this was only **after** the FPN had been served. Eventual compliance does not excuse the previous breach or lead to quashing of the penalty.

35. 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.

36. 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 apply for this

37. I confirm the Fixed Penalty Notice in this case and remit the matter to the Regulator.

38. No directions are necessary.

(Signed)

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

DATE: 4th June 2024