Neutral citation number: [2024] UKFTT 00883 (GRC)

Case Reference: FT/PEN/2024/0154

First-tier Tribunal
(General Regulatory Chamber)
Pensions

Heard by Cloud Video Platform
Heard on: 30th September 2024
Decision given on: 17 October 2024

Before

JUDGE MOAN

Between

E L RECRUITMENT LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:
For the Appellant: Emma Lawson, Director of EL Recruitment Ltd
For the Respondent: Natasha Jones, Solicitor

Decision: The (appeal) reference is dismissed.

REASONS

Decision under appeal and background

1. The Appellant appeals against a fixed penalty notice 34845941014 dated 30th April 2024 on an appeal form dated 17th May 2024.

2. The Appellant, EL Recruitment Ltd, is the employer for all purposes of the 'Employer Duties' under the Pension Act 2008. The Appellant's duties start date was 10th August 2020, meaning that its three-year re-enrolment anniversary was 10th August 2023. The earliest re-enrolment date was 10th May 2023 and the latest date was 9th November 2023. The statutory deadline for completing and submitting its Re-declaration of Compliance ('Re-DOC'), was within five months beginning with the third anniversary of the employer's duties start date. This meant that the employer should have submitted its Re-DOC by 9th January 2024.

3. The Respondent sent two letters to the Appellant in May 2023 and October 2023. These communications contained key information to assist the Appellant to comply with its automatic re-enrolment duties and confirmed the deadline to submit the Re-DOC.

4. The Appellant failed to submit a Re-DOC by the deadline of 9th January 2024 and the Respondent issued a compliance notice to the Appellant on 29th January 2024. The compliance notice required the Appellant to complete and submit its Re-DOC by the extended deadline of 11th March 2024. The compliance notice specified that a £ 400 penalty fine may be imposed if the Appellant failed to comply.

5. On 21st February 2024, the Respondent unsuccessfully attempted to make telephone contact with the Appellant using the number held within its records. The record of the telephone call indicates that there was no answer and no option to leave a voicemail.

6. The Appellant did not complete its Re-DOC by the extended deadline of 11th March 2024 and the Respondent issued a fixed penalty notice to the Appellant on 27th March 2024. The fixed penalty notice required a penalty payment of £ 400 and compliance with the compliance notice, no later than 24th April 2024.

7. On 15th April 2024, the Appellant completed the re-declaration of compliance which was acknowledged by email.

8. The Appellant sent a review request to the Respondent on 15th April 2024.

9. The Respondent sent a review decision by email to the Appellant on 19th April 2024 advising that the fixed penalty notice was upheld.

Appellant's written grounds of appeal

10. The Appellant said -

I feel that the decision is wrong as i had been using a factoring company when i set up the business, they enrolled me and i received the attached email to which Quba said they would sort for me and they did. 2 years later i took my accounting in house, i did not receive a reminder via email from The Pensions regulator to which they have already confirmed on the phone that this was not sent.
Since trading i have been already paying into the Pension scheme for my workers.
I am a new business and had absolutely no idea i had to enrol.
I also moved out of my home on 9th December 2023 after a 7.5 year relationship. Changing my address for the Pension Regulator slipped my mind, i have been collecting my post, however it was some time after the notices were sent to my previous address, again no emails have been received. I am not disputing that i hadn't enrolled however would ask that under the circumstances stated that the fine be wavered.

The Appellant submitted an email which confirmed that Quba had submitted a declaration of compliance on behalf of the company on 7th January 2021. The Appellant sought for the £ 400 fixed penalty to be set aside.

Respondent's written response to the appeal

11. The Appellant had asked for a review and the response of the Respondent to the review was to confirm the fixed penalty for the following reasons **–**

The Appellant had stated that EL Recruitment Ltd had not received previous correspondence in a timely manner prior to the receipt of the fixed penalty notice.
Every three years when an employer completes their re-enrolment duties, they will also need to submit a re-declaration of compliance to tell the Regulator what they have done at re-enrolment. The re-declaration needs to be completed within five calendar months of the third anniversary of the employer's staging date. The employer will then need to do this again in another three years' time.
The compliance notice was issued to EL Recruitment Ltd due to the re-declaration not being submitted to the Regulator within the required timescale.
The Regulator can confirm that the compliance notice (34845941014) for EL Recruitment Ltd was issued to the registered address 6 Post Lane, Twickenham, TW2 6NZ.

The Regulator was of the opinion that the notices were correctly served. As a result, the fixed penalty notice (127028564707) was confirmed and the penalty was still to be paid. It was noted that the re-declaration of compliance had been completed.

12. The Regulator provided the following response to the appeal –

The Respondent contended that neither individually nor collectively do the grounds of appeal amount to a reasonable excuse for the failure to comply with the compliance notice or comprise grounds to revoke the fixed penalty notice. The Appellant cannot dispute that it had a statutory responsibility for complying and providing the required information to the Respondent by the prescribed deadline.

Service and preceding communications

The Appellant denied receipt of emails but also appeared to dispute receipt of other communications. It was the Respondent's position that the compliance notice and fixed penalty notice were correctly served and received. The Respondent was entitled to rely upon the presumption of service of the compliance notice dated 29th January 2024 and the fixed penalty notice dated 27th March 2024 as per section 144A of the Pension Act 2008, the presumption of service provisions in section 303(6)(a) of the Pensions Act 2004, section 7 of the Interpretation Act 1978 and Regulation 15(4) of the Employers Duties (Registration and Compliance) Regulations 2010.

Section 303(6)(a) of the Pensions Act 2004 provides that, for the purposes of section 7 of the Interpretation Act 1978 c.30 (service of documents by post), the proper address for a notice issued to a corporate body such as the Appellant, was the 'registered or principal office address'. In addition, Regulation 15(4) of the Employers Duties (Registration and Compliance) Regulations 2010 provides a further presumption that a notice (subject to review) was received by the person to whom it was addressed. Taken together, there was a strong statutory presumption that notices sent to such an address were properly served and received.

The Appellant's current registered address on Companies House is: 13 Mereway Road, Twickenham TW2 6RF (the 'Mereway address'). According to Companies House, this address has been in force since 28th May 2024 and prior to this the Appellant's registered office address was 6 Post Lane, Twickenham, TW2 6NZ (the 'Post Lane address'). It was the Respondent's submission that the compliance and fixed penalty notices were served on the Appellant at its

registered office address which was in force at the time of service. The Appellant confirmed this address as being the address for the employer within the "Employer contact details" section within its original Declaration of Compliance which was submitted on 6th January 2021.

In the circumstances, the Respondent submitted that the compliance and fixed penalty notices were lawfully and correctly served and received by the Appellant. The Respondent has no record of any post being sent to this address being returned as undelivered.

The Respondent submitted that the Appellant's explanations were not sufficient to overturn the presumption of service. The Respondent relied on the case of **London Borough of Southwark v (1) Runa Akhtar v (2) Stel LLC 2017 UKUT 150** in which the Upper Tribunal stated at paragraphs 82 to 86 of that decision "mere assertion is insufficient" and that the Respondent would only have to prove service if the contrary was proved by the Appellant (see paragraph 82 in particular). This decision placed emphasis on the requirement of "proof" rather than a mere assertion. There was, in the Respondent's submission, no proof or evidence provided by the Appellant to sufficiently explain or demonstrate why it was not aware of the statutory obligation to complete its Re-DOC when it ought to have received the several reminders and statutory notices, all of which were sent to its registered office address.

This position was familiar to the Tribunal and had been confirmed in other First Tier Tribunal cases including the decision of the former Chamber President, Judge McKenna, in **Ahmads 786 Frist Ltd v TPR – (PEN.2019.0218)**. In this case, the Judge took the view that good evidence was required in order to rebut the presumption of service. No evidence had been provided by the Appellant in this appeal to rebut the presumption. The Respondent relied on the statutory notices as being sufficient for the Appellant to be aware of its duties (the Respondent accepts that previous decisions of the First Tier Tribunal are not binding and are simply persuasive).

Reminder communications and lack of awareness

The Appellant implied that it was unaware of the duty to complete and submit a Re-DOC. Initially it appeared that this was because they were using a "factoring" company to carry out their duties and understood that this had been done. They also submitted that no reminder communications were received.

An employer was free to engage the services of a third party to assist with their duties, however, the Respondent made it clear in its communications and guidance that it was the employer who retains ultimate responsibility for compliance with their statutory duties. This included taking responsibility for the failures of professional advisers who act as their agents. The Tribunal have historically agreed that it was the employer who will retain ultimate responsibility for ensuing completion of its duties.

When the Appellant's Redeclaration of Compliance was submitted on 6th January 2021, not only was the agent who completed it sent an acknowledgement, but so was the employer (the Appellant). This acknowledgment was sent to the Appellant on 7th January 2021 to the Post Lane address, which was its registered office address in force at the time. The second page of the acknowledgement also stated: "You will be required to re-enrol certain staff into a pension scheme and re-declare with The Pensions Regulator in approximately three years' time." The Appellant was therefore informed that the duties were on-going and that action would again be required in three years' time.

The Respondent was not obliged to send reminder communications, but will do so where possible, as a matter of courtesy. In this case, the Respondent's records show that no email communications were sent to this particular employer. However, two letters were sent to the Appellant in May 2023 and October 2023 reminding the Appellant of its upcoming duties and where to seek support. The reminders also warned that the Appellant was at risk of a fine for failure to comply. Both reminder letters were sent to the Appellant at its registered office address which was in force at the time (the Post Lane address) and prior to the date submitted as the date that the director moved from this address.

Further, in the case of **Skewer House Taunton Ltd v The Pensions Regulator (PEN.2021.0234)**, Judge Marks concluded: "…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 legal obligations relating to re-enrolment…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." The pre-duty communications are not a legal requirement and the Appellant ought to be fully aware of its legal duties, even in the absence of reminder communications. The Respondent acknowledges that previous decisions of the First Tier Tribunal are merely persuasive and not binding.

In any event, it was the Respondent's submission that reminders were provided to the Appellant as January 2021 and later in May 2023 and October 2023. Therefore, the Appellant ought to have been aware of its duties, once it received the reminders and later the compliance notice by post.

Change of address and collection of post

The Appellant asserted that its director moved from the Post Lane address on 9th December 2023, but that the director was collecting post from the address occasionally and that the Appellant forgot to update its address with the Respondent.

The reminder letters were sent prior to the director leaving the Post Lane address. There was no explanation as to why these communications would not have been received and/or acted upon.

When the director moved away from the address on 9th December 2023, it was not clear why there was a delay in the Appellant updating its address with the Respondent, but also the significant delay in updating its registered office address on Companies House.

Further sections 1139 – 1142 of the Companies Act 2006, refers to service addresses. Section 1139 confirms that a document may be served on a company registered under that Act, by "leaving it at, or sending it by post to, the company's registered office". Section 1141 states that service address means "an address at which documents may be effectively served on that person." In the absence of any other information, including the delayed updating on Companies House, the Respondent was entitled to rely on the registered office address which was in force at the time.

The Appellant states that it was collecting post from time to time from the Post Lane address after 9th December 2023. It was for the Appellant to ensure regular attendance in the absence of updating its address.

As a responsible employer, it was important that their contact details are maintained with all relevant organisations/parties. Even if there were matters which delayed the updating of contact information, it was open to set up a mail redirection service, for example, to ensure the safe receipt of business post.

The Respondent also attempted to contact the Appellant (unsuccessfully) by telephone on 21st February 2024, in respect of its automatic re-enrolment duties, which was prior to the extended deadline for compliance. The Respondent had no record of the Appellant responding to that telephone call. The first contact made by the Appellant was on 15th (clarified later to be 12th) April 2024, after it received the fixed penalty notice dated 27th March 2024.

The Re-DOC was completed and submitted to the Respondent on 15th April 2024, and this was after the compliance notice deadline expired and after the fixed penalty notice was issued. The fixed penalty notice was issued in accordance with statute and all employers have an obligation to meet their duties. Had the Appellant responded to the compliance notice or the telephone call in February 2024 and completed their Re-DOC by the extended deadline, the fixed penalty notice may not have been issued.

Additionally, the Appellant appears to have completed and submitted the Re-DOC with relative ease, which suggests that some of the automatic re-enrolment communications were in fact received including the compliance notice.

Regardless of the position, given the importance of a statutory notice sent to the registered office address of the employer, a lack of realisation of importance or mishandling of a notice, or failure to act upon it, did not constitute a reasonable excuse. In short, statute presumed that the notice was properly served, and received, at the registered office address, and ongoing or eventual compliance did not invalidate a penalty already issued once a deadline had expired.

It was also reasonable to expect that official correspondence, addressed in such a way, should have been properly handled by the Appellant, and that those running a business would ensure that such communications could be properly received and acted upon, and/or that they seek help if unsure. There was no record that the Appellant did so until after the fixed penalty notice was received. The Respondent relied on the statutory notices as being sufficient for the Appellant to be aware of and implement their enrolment duties. It was evident that the Appellant received correspondence and as a result, was able to comply with its underlying duties.

Compliance on receipt of the FPN

Within the grounds of appeal the Appellant states: “I am not disputing that I hadn't enrolled however would ask that under the circumstances stated that

the fine be wavered." This indicates that the Appellant was not compliant with its underlying re-enrolment duties, despite the reminder letters and compliance notice which was issued.

As a responsible employer, it was for the Appellant to be aware of their legal duties and to ensure full compliance with them. The Appellant first made contact with the Respondent in April 2024. The Re-DOC was completed and submitted on 15th April 2024. This communication and submission of the Re-DOC occurred after the fixed penalty notice had been issued. Employers with workers as defined in the Pensions Act 2008 are required to comply with the duties under the Act and to do so within the timescales provided by law. The Appellant failed to do so and incurred a penalty as a result. No reasonable excuse is provided for the failure to do so.

The importance of re-declaring on time was recognised by the Tribunal. Automatic enrolment had been implemented across the UK since 2012. There is a plethora of information and guidance available and the Respondent had conducted an extensive communication and media campaign (radio, television and other) to raise awareness of automatic enrolment and alert employers of their duties. There was also considerable advice and guidance on the Respondent's website, as well as from trade bodies, pension providers, accountants, payroll companies and financial advisers.

The Respondent's website contains simple, step-by-step guidance for employers undertaking automatic enrolment, and was written in language designed to be accessible and easily understood by businesses new to pensions, or without wider financial knowledge. These sources of information supplement the communications (letters, and emails where an email address is supplied) which the Respondent may send to individual employers about their legal duties, noting (importantly) what the Pensions Act 2008 requires of them.

For completeness, late or eventual compliance does not excuse the failure or comprise exceptional grounds to revoke a penalty served following expiry of the deadline in a statutory compliance notice. Nor does compliance with other automatic enrolment excuse or explain a failure to undertake the duty to re-declare compliance under section 11 of the Pensions Act 2008.

Other Considerations

The Respondent accepted that the Appellant had filed its Re-DOC, approximately a month after the compliance notice deadline and after the

issuing of the fixed penalty notice. It is the Respondent's position that as the Appellant had failed to provide a reasonable excuse for the failure to comply with its statutory deadline of 9th January 2024 and the extended deadline provided by the compliance notice, the penalty should stand. Neither had the Appellant provided exceptional reasons which warranted the revocation of the fixed penalty notice.

Despite the plethora of guidance, which was widely available regarding automatic re-enrolment duties and the compliance notice clearly stating the deadline for providing the Re-DOC, it was only once the fixed penalty notice was issued that the Appellant complied with its employer duties by filing the Re-DOC.

In any event, even if the Appellant had complied with the underlying duties it does not explain the Appellant's failure to submit the Re-DOC, the failure to comply with the compliance notice and nor do they provide exceptional reasons to revoke the fixed penalty notice. The obligation to complete and submit a Re-DOC was a separate statutory duty. The declaration was a vital source of information for the Respondent, and a central part of its compliance and enforcement approach.

A generous and objectively wholly adequate period of within five months beginning with the third anniversary (10th August 2023) of the employer's duties start date (10th August 2020) for employers to then re-declare compliance which in this case was 9th January 2024. Furthermore, the compliance notice gave the Employer a further 42 days to ensure their Re-DOC had been submitted. This was, objectively and by any reasonable standard, more than adequate for a business, especially given the guidance as to what was required. Various methods of contact were also provided in the event of difficulty. It was reasonable to expect that official correspondence, addressed in such a way, should have been properly handled by the Appellant, and that those running a business would act on such communications, and/or seek help if unsure. The Respondent relied on the statutory notice as sufficient for the Appellant to be aware of and complete their Re-DOC.

The Respondent accepted that the penalty was burdensome for a smaller businesses like the Appellant's. However, the amount of the penalty was fixed by law (Regulation 12 of the 2010 Regulations) and neither the Tribunal nor the Respondent have the power to vary the amount imposed. Furthermore, it is not disproportionate to the breach, bearing in mind the importance of the re-declaration of compliance.

If the Tribunal found in favour of the Respondent, the Respondent would be willing to consider repayment options, should the Appellant indicate that a single payment would cause financial difficulties.

Conclusion:

The Respondent submitted that in light of the information provided, the decision to issue a fixed penalty notice was fair, reasonable and proportionate, for the reasons above and in light of the following:

The Re-DOC was not a mere administrative detail; it was a vital source of information for the Respondent and a central part of its compliance and enforcement approach.

The Respondent had made it clear that action would be taken against employers who fail to provide a Re-DOC, in its published Compliance and Enforcement policy and in letters sent to employers.

The legislation allowed employers a generous period within five months beginning with the third anniversary of the employer's duties start date and by the time the fixed penalty notice was issued, almost three months had elapsed since their Re-DOC was due.

The Appellant's main grounds for failing to submit its Re-DOC was due to not receiving correspondence. It is the Respondent's submission that the Appellant ought to have been aware of its relevant duties in any event, including completing the Re-DOC, but particularly in view of the pre-duties communications and compliance notice. When the Appellant failed to respond to the correspondence which was sent to it, the Respondent opted to send its statutory communications to the Appellant at its registered office address. The Respondent contends that this was a reasonable step to take in the circumstances and that both Notices were properly sent and received as indicated already.

The amount of the fixed penalty notice is prescribed in Regulation 12 of the Employers' Duties (Registration and Compliance) Regulations 2010. The Respondent has no discretion as to the amount of the penalty.

There was, no reasonable excuse advanced, in fact or law, for the failure to complete the Re-DOC on time.

In conclusion, the appeal provides no persuasive justification for revoking the penalty and the Tribunal was therefore invited to dismiss the reference on the merits.

The Appellant's reply to the regulator's response dated 8th July 2024

13. The Appellant said that she understood the fixed penalty notice however she appealed because the £ 400.00 fine was hasty only three months after the deadline. As explained, she set up the own business in lockdown after being made redundant working for the same company for eleven years. She was not an expert in running a business and considered that mistakes would be made and that the fine was unfair.

14. She used to use a factoring company that submitted the previous pensions enrolment Since then, she had not received an email reminder. The factoring fees were becoming very expensive, so she decided to do it herself. She had never run payroll before. She had since paid for training on NEST Pensions and submitting them.

15. She split up from her partner in a 7.5 year relationship and moved out on the 9th December –which is why she had not received the letter. This was an upsetting, emotional and distraught time for her and she had had forgot to divert the post. She did not state that she did not receive the letters, she just did not collect them in the timescales that the Regulator required. Once she had received the letters, she had made contact with the Pensions Regulator to resolve the problem. The people on the phoneline from the Regulator's offices were unhelpful.

16. Details were changed at Companies House, but she did not know that she had to change the address in three separate departments. Once she realised it had to be done more than once, she did it immediately.

17. She considered that the Regulator's decision was somewhat harsh, she received letters but no emails.

The Respondent's response to the Appellant's reply dated 17th September 2024

18. The Appellant maintained her assertion that no email communications were received. It was not disputed that no email reminders were issued in this case. In summary, the Respondent contended that the Appellant ought to have been

aware from the correspondence dated 7th January 2021 that duties would become due again in three years' time, and the Respondent was not obliged under legislation to send any reminder communications. Nonetheless, two reminder letters were sent out of courtesy, and these were issued *before* the date that the Appellant states that they were no longer present at the address (but visiting periodically to collect its post).

The Appellant stated at paragraph four of its Reply: "*I have never stated that I did not receive the letters, I just didn't collect them in the timescales you see fit*." The statutory deadline for complying with the *underlying* duties was between 10th May 2023 and 9th November 2023. The deadline for completing and submitting the Re-Declaration of Compliance was 9th January 2024. The compliance notice was issued almost three weeks after the original deadline and provided an additional six weeks to comply. The fixed penalty notice was issued two weeks after the deadline in the compliance notice expired. The Re-Declaration of Compliance was submitted on 15th April 2024, more than three months after the original deadline, and after significant amount of time was given to the Appellant to comply. There was in the Respondent's submission sufficient time afforded to the Appellant to receive and action the relevant correspondence and Notices.

Within the fourth paragraph, the Appellant referred to the agent for the Respondent as "*getting rid of me off the phone to tell me I now had to appeal… they can confirm how unhelpful the guy was that I spoke to on the phone…*" The agents for the Respondent explained the review / appeal process. The customer support agents are able to support by giving information and/or signposting and/or directing to appropriate department within The Pensions Regulator, depending on the query. The agents in the calls spent significant time with the Appellant advising how to appeal against the fine and then how to comply with its re-enrolment duties.

The Appellant provided an email chain regarding its change of address on Companies House. The Appellant states that it changed its address but that this had to be done with three departments. In the absence of any other information, it appears that this change was actioned and took place at the end of May 2024, almost six months after the Appellant states that its director was no longer present at the registered office address, and several weeks after the review request was submitted. This accords with when the address was updated on Companies House.

In the last paragraph, the Appellant stated: "*I feel your decision of me being 3 months out of reporting my exact companies details on your website is somewhat*

harsh". Based on the telephone call dated 15th April 2024, it was evident that the employer was not compliant with its underlying duties, as well as the separate statutory duty to Re-Declare Compliance. The Respondent maintained that issuing a fixed penalty notice was therefore an appropriate step to take in all of the circumstances, as it was not clear when the Appellant would otherwise have become compliant.

The Appellant provided a copy of its email correspondence with the "factoring company". It was the responsibility of employer to ensure that there was compliance with statutory duties, and this encompassed ensuring that third parties, including accountants, are properly monitored. In *PEN.2018.0385*, Judge Hunter QC, made it clear that reliance on third parties would not constitute a reasonable excuse:

> *"So far as the relationship between the Employer and its accountants was concerned, it is well established that the ultimate statutory responsibility for making the declaration of compliance rests on, and remains with the Employer, and that "any … oversight of the third party engaged to assist the employer cannot afford the latter a reasonable excuse for the default in compliance. In general terms, delegation to another of the material statutory duties resting on the Employer does not relieve the Employer of ensuring that those duties are duly executed in a timely fashion…"*

The Respondent acknowledged that decisions of the First Tier Tribunal were not binding and were merely persuasive[1].

Conclusion:

The Respondent maintained its arguments which were put forward within its original Response dated 20th June 2024, including its conclusions.

The Respondent contended that the reasons provided for the Appellant failing to comply by 9th January 2024 (nor the extended deadline of 11th March 2024) do not comprise grounds to consider revoking the compliance notice and nor do they comprise exceptional reason(s) to warrant revocation of the fixed penalty notice.

The Appellant accepted that postal correspondence was served and received, but that there were reasons for delayed receipt. The Respondent maintained that sufficient notice of the upcoming duties was provided, and when the statutory deadline was missed, sufficient additional time provided to allow for compliance, before the fixed penalty notice was issued.

[1] See also *GH Media Ltd v TPR - PEN.2020.0028* determined by Judge McKenna.

In conclusion, the appeal provided no persuasive justification for revoking the penalty and the Tribunal was therefore invited to dismiss the reference on the merits.

Procedural matters relating to the determination of the appeal

19. The Tribunal considered the bundle prepared by the Respondent and all other documents on the e-file held by the GRC.

20. The hearing was attended by Ms Lawson for the Appellant and Ms Jones for the Respondent.

21. The hearing took place remotely via video (CVP). There were no objections to this as a suitable method of hearing and no technical or other difficulties during the hearing.

22. I heard evidence from Ms Lawson who reiterated that she considered the penalty to be unfair noting her compliance and her lack of experience in business. Ms Jones asked me to uphold the penalty.

The Legal Framework

23. The Pensions Act 2008 imposed a legal obligation on employers in relation to the automatic enrolment of certain "jobholders" into occupational or workplace personal pension schemes and to maintain their membership of a qualifying pensions scheme. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise enforcement powers provided by the Act.

24. Each employer is assigned a date from which the timetable for performance of their obligations is set. From that date an employer has a duty to pay contributions to a qualifying pension scheme under section 3 (automatic enrolment of eligible staff into a pension scheme). The employer must regularly and periodically pay its own and its employees' contributions to the managers or trustees of the pension scheme. Chapter 2 of the 2008 Act includes detailed provisions about non-compliance.

25. Under the Act the Regulator may issue –

(i) a **compliance notice** under sections 35 or 36 requiring specific steps to be taken to comply with the obligations imposed by the Act;
(ii) an **unpaid contributions notice** under section 37 which requires an employer to pay the missed contributions by a specified date;

And where there has been non-compliance with a section 35/36compliance notice or a section 37 unpaid contributions notice, the Regulator may issue -
(iii) a **fixed penalty notice** under section 40; - the current prescribed fixed penalty is £ 400.

Or where there is continuing non-compliance, the Regulator may issue -
(iv) an **escalating penalty notice** under section 41 - The penalty will escalate at a rate between £ 50 and £10,000 per day.

26. Penalties may be recovered in the same as a debt through the County Court and can be enforced in the same way.

27. The employer may ask for a review of the notice under section 43 within 28 days of the notice and the effect of the notice will be suspended whilst a review is taking place. The Regulator may confirm, vary or replace the notice after the review.

28. Under section 44 of the 2008 Act, an employer who has been issued with a fixed or escalating penalty notice may make a reference to the Tribunal provided an application for review has first 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, having regard to the evidence before it. The notice is suspended whilst the appeal process is underway. The Tribunal may confirm, vary or revoke a penalty and when it reaches a decision, and must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

29. On a reference to the Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning with when the Tribunal receives notice of the reference and ending when the reference has been determined, the Tribunal has remitted the matter to the Regulator and any directions of the tribunal for giving effect to its determination have been complied with.

Analysis of the evidence and findings on appeal

30. I have set out the respective comprehensive written submissions of both parties which avoided the need for extensive evidence or submissions. They

set out the issues in the appeal and to some degree, are a salutary lesson to less-experienced business owners who may be faced with a plethora of new and unfamiliar legal requirements. This decision, perhaps, emphasises the importance of attending to correspondence and in getting advice early.

31. It is a pre-requisite of a fixed penalty notice that a notice has already been issued under ss35, 36 or 37 of the Act which in effect places the employer on notice that they must comply together with details of what how compliance is achieved. There was no dispute that the compliance notice and fixed penalty notice had been served.

32. The Appellant disputed that she had received the reminder letters sent in May and October 2023. The Regulator is not obliged to send those notices and so the non-receipt of those letters did not materially affect the outcome in this appeal.

33. The basis of the Appellant's appeal is that she did not collect the post from the old address quickly enough to act in accordance with the compliance notice to avoid the fixed penalty. The compliance notice and fixed penalty were both sent to the address registered at Companies House which was the correct address for service. Had the Appellant put in place a Royal Mail re-direction service or even arranged for her post to be sent/collected more frequently, she would have received the compliance notice pending any change of address registered at Companies House. As I explained to the Appellant, it was very dangerous not to have post or legal documents provided to her promptly. In this case the Regulator gave her six weeks to comply; in other legal disputes, she may only have fourteen days to comply.

34. The Regulator's own website gives examples of what is and what is not a reasonable excuse for non-compliance. Whilst they do not bind the Tribunal, they are examples of extreme difficulties or computer-issues; which would need to be supported by evidence. Clearly those are unusual and compelling circumstances out of an Appellant's control.

35. The Guidance on the Pensions Regulators own website provides –

When is a review application likely to succeed?

We will revoke the notice if you can show that the employer duties don't apply to you, that you did actually comply on time, or that you had a reasonable excuse for failing to comply.

What may count as a reasonable excuse?

The following are examples of circumstances that might be considered a reasonable excuse:

- *if you, or a key member of staff, has prolonged and serious ill health or are bereaved, and there were no alternative staff who could reasonably be expected to carry out the work. You'll need to provide evidence that this has affected you over the time that we have been communicating with you*
- *loss of business records through flood or fire, and the records could not be replaced*
- *If you can show that you've had major technical problems with the on-line declaration of compliance (you will need to provide the date and time, and supporting details such as screenshots of error messages, and explain why you didn't contact us by phone)*
- *delays beyond your control, eg delays caused solely by your pension scheme provider (you'll need to explain why you couldn't switch to a different provider)*
- *if you claim that you can't afford to carry out your automatic enrolment duties, you will need to complete the financial hardship form and submit it with your review application along with supporting documents.*

What won't count as a reasonable excuse?

- *Lack of understanding of how to comply with your automatic enrolment duties.*
- *You didn't get a reminder from us to complete your automatic enrolment duties.*
- *You were unable to comply in time due to pressure of work.*
- *You are a small business and didn't have anyone to help you comply.*
- *You relied on someone else to carry out automatic enrolment for you and they didn't.*
- *You relied on someone else to complete your declaration of compliance for you and they didn't.*
- *You found it too difficult to complete the declaration of compliance online but didn't contact us to find out other ways to complete it, for example by telephone or by post.*
- *You thought you had completed the declaration of compliance online but had failed to tick the box at the end of the online form to confirm your declaration.*
- *Your staff didn't want to be put into a pension scheme.*
- *You complied late but only by a few days.*

36. It is fair to describe the Appellant's explanation as ones that best fall within "What won't count as a reasonable excuse".

37. The statutory period for compliance ended on 9th January 2024. The declaration of compliance was completed on 15th April 2024 and so another three months after the statutory deadline. The compliance notice was sent to the registered address on 29th January 2024. The notice generously gave until 11th March 2024 for compliance. Whilst the Appellant avers that she was not at that address due to a relationship breakdown, it was not disputed that the compliance notice was sent to the correct address, that she received it and had not complied with it. The Appellant indicated that she collected the post from time-to-time. It is reasonable to infer that she was not collecting her post every six weeks or less which I have already described as a very precarious practice. A simple re-direction could have been put in place online and very quickly.

38. By the time the compliance notice was issued, she had not put in place a system to ensure that the mail would be sent/forwarded to her without delay. That was entirely within her gift. The address was updated on Companies House on 28th May 2024.

39. Due to the repeated failure to comply and the length of time it took for compliance to be achieved, the Pensions Regulator was entirely reasonable in issuing a fixed penalty notice. The Appellant had notice of her obligations in 2021. As a new business owner, she had adequate time to acquaint herself with her obligations noting that she used a company to file her initial declarations in 2020/21.

40. The Regulator was not obliged to issue reminder letters, but in this case issued two. I note that the Appellant disputed received them but said that she had not received any email communications. A Regulator is not able to send document by email unless an email has been provided to the Regulator and the Company have agreed to documents being sent in that way. There can be no criticism of the lack of Regulator's email correspondence in this case. If the Appellant wants documents by email in the future, then she should notify the Regulator so.

41. It is very unfortunate that the Appellant was a new business owner and had not seen the compliance notice when it was sent. She would have had time to get advice on how to comply with her legal obligations. A very simple action regarding the post could have prevented the penalty. That was within her gift. The Regulator has had to chase the Appellant a number of times. Compliance was significantly outside of the statutory deadline and the period for compliance under the compliance notice.

42. The fixed penalty was reasonable and proportionate in all the circumstances. There was no reasonable excuse.

43. The Tribunal upholds the fixed penalty and the Appellant should now make arrangements to pay it, whether by lump sum or instalments. Failure to pay will lead to further enforcement and a claim for the costs of enforcement being added.

District Judge Moan sitting as a First Tier Tribunal Judge

30th September 2024

Promulgated on: 17 October 2024