



Neutral citation number: [2023] UKFTT 00005 (GRC).

Case Reference: PEN/2022/0164

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

**Heard by: remotely by video conference
Heard on: 3 January 2023**

Decision given on: 3 January 2023

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

THACKWRAY ROOFING LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:

For the Appellant: Mr Martin Worsnop

For the Respondent: Mr Mageed Gharib

Decision: The appeal is Dismissed

REASONS

1. By this reference Thackwray Roofing Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 7 July 2022, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.

2. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

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. Automatic enrolment duties apply from the date on which PAYE income is payable in respect of any worker. This date is the “duties start date”. The declaration of compliance must be provided within five months of the duties start date (Regulation 3(1)(b)).

Evidence

9. I had a set of documents which I have read, and which included the appeal, response and copies of the relevant notices. I also heard oral submissions from both parties.

Facts

10. I find the following material facts.

11. The Appellant is the employer for the purposes of the various employer duties under the Act. The duties start date was 15 November 2021. The Appellant's declaration of compliance was due to be provided by 14 April 2022. The Appellant did enrol its staff in a pension scheme but did not complete a declaration of compliance by the required date.

12. The Regulator sent a letter in January 2022 to the Appellant's registered office address, addressed to Mr Andrew Thackwray (the sole director of the Appellant). This letter set out the duties start date and gave the declaration deadline of 14 April 2022. The letter explained the duty to complete a declaration of compliance, including a web link for starting the declaration. The end of the letter stated, *"Do not ignore this letter, you need to act now. If you do not complete your legal duties, including submitting your declaration of compliance on time, you may be subject to fines."* The letter enclosed a guide to automatic enrolment. The Regulator also sent reminder letters to the Appellant about the declaration of compliance in February and March 2022, and a final reminder on 25 April 2022 (after the deadline had passed).

13. The Regulator issued a compliance notice to the Appellant on 12 May 2022, to the registered office address. This stated, *"You must tell us how you have met your employer duties by completing your declaration of compliance. This needs to be completed by 22 June 2022"*. The notice expressly states, *"If you don't complete your declaration of compliance by 22 June 2022, we may issue you with a £400 penalty"*. The notice also explains how to complete the declaration of compliance, including a web link for starting the declaration, postal address and telephone number.

14. The Appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the Appellant on 7 July 2022.

15. The Appellant applied for a review to the Regulator. The Regulator confirmed the penalty notice on 21 July 2022.

16. The Appellant did complete the declaration of compliance on 18 July 2022.

Appeal grounds

17. The Appellant's appeal grounds are:

- The Fixed Penalty Notice was the first correspondence that the Appellant received from the Regulator.

- The sole director of the Appellant is only living at the premises to which the notices were sent from time to time as they are going through a stressful divorce.
- The declaration of compliance was completed upon receipt of the Fixed Penalty Notice; and
- The penalty is unfair in the circumstances.

18. The Regulator opposes the appeal and says that there is no reasonable excuse for the failure. There was no response to multiple correspondence informing the Appellant about its duties, all correspondence was sent to the registered office address, and the Appellant's sole director had various options if he was struggling to comply.

Conclusions

19. 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.

20. 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 between January and April 2022 about the need to complete a 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.

21. 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.

22. I have considered the Appellant's argument that it did not receive any correspondence until the fixed penalty notice. Mr Worsnop acknowledged that this had all been sent to the correct registered office address. He said that it may well have been received at that address, but Mr Thackwray may not have read it due his personal circumstances at the time. 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, and I find on balance of probabilities that the compliance notice was received by the Appellant.

23. The main argument put forward by Mr Worsnop on behalf of the Appellant is that Mr Thackwray may have overlooked the compliance notice because of his stressful personal circumstances at the time. He is the sole director of the Appellant. His registered office is his home address, and he was going through a difficult divorce and was not living at the property. Mr Worsnop confirmed that paperwork for company accounts was also "all over the place". He said it was a traumatic time for

Mr Thackwray, and this meant he probably ignored the paperwork until he received the fixed penalty notice.

24. The Regulator acknowledges and sympathises with Mr Thackwray, but says that there were other options for the Appellant. It could have delegated this issue or instructed a third party such as an accountant, as it was not necessary for the sole director to deal with it. The Appellant could also have contacted the Regulator to ask for assistance or further time to comply. The Appellant should have put mail handling processes in place or updated its address if Mr Thackwray was not able to attend the registered office.

25. I do accept that Mr Thackwray was experiencing a stressful period of time. This may have caused him to overlook the compliance notice and previous correspondence, along with other paperwork relating to the Appellant. I do have sympathy for his personal position and appreciate that it is difficult to be a sole director of a small business when you are under personal stress. However, the Appellant had a period of six months between the first letter and final deadline during which it could have complied with its duties and avoided the penalty. This included a period of more than six weeks between the compliance notice and the penalty being issued. The Appellant took no steps at all during this period and did not contact the Regulator to ask for assistance.

26. It well may be that the Appellant did not appreciate the importance of this correspondence. I also accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses. However, the 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. It can be difficult running a small business, but employers are expected to act professionally and ensure that they comply with their legal duties.

27. Having considered all the circumstances, I do not find that the Appellant had a reasonable excuse for failing to comply with the compliance notice. I acknowledge that the Appellant has now completed its declaration of compliance, but only after the fixed penalty notice had already been issued.

28. 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

Dated: 3 January 2023