



Appeal number: PEN/2021/0227P

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

CONDOR ESTATES LIMITED

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
18 JANUARY 2022**

DECISION

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

REASONS

Background

2. Condor Estates Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 9 June 2021 (Notice number 153185456867).

3. The Fixed Penalty Notice ('Penalty Notice') was issued under section 40 of the Pensions Act 2008 ('the Act'). It required the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 26 April 2021 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 Penalty Notice and informed the Employer on 13 July 2021 that the decision was confirmed.

5. On 20 August 2021, the Employer referred to the Tribunal the Regulator's decision to issue the Penalty Notice.

6. The parties and the Tribunal agreed that this matter was 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 immediately on them taking on their first member of staff. These duties include the obligation – from the employer's Duties Start Date (or 'staging date') - to assess their staff, write to them, and automatically enrol them into a qualifying scheme if applicable.

9. Crucially, the employer is also obliged within five months of its Duties Start Date to 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 the Compliance Notice is not complied with, a Penalty Notice 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 Penalty Notice may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

12. The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, taking account of the evidence before it. 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.

The facts

13. There is a slightly convoluted history to this matter. Following receipt of a Compliance Notice on 10 February 2021, the accountants acting for the Employer emailed the Regulator saying that the Employer's original PAYE scheme had been closed as it had no employees at that time; that the Employer re-registered for PAYE from 1 April 2020; and asking for an update of the Employer's staging date.

14. On 23 March 2021, in response to the Regulator's enquiries, the accountant confirmed the reference number of the old PAYE scheme which had closed in 2015 or 2016 and gave the Employer's new PAYE scheme reference number which had been active from April 2020.

15. The Regulator replied by email to the Employer's accountants the same day, explaining that where an employer has set up a new PAYE scheme but has remained the same contractual employer, the original staging date will remain for the employer. The Regulator went on to say that the new PAYE scheme '*will be attached to the employer's existing record*' and set out the information held on its records about the Employer's PAYE reference numbers. The Regulator stated that if these were correct, '*you will need to complete the re-enrolment duties before the compliance deadline*'.

16. The accountants replied by email to the Regulator the same day, stating the Employer's old and new PAYE reference numbers. These were the same as those set out in the Regulator's email as being the information on their records.

17. A week later, on 1 April 2021, the Regulator wrote a letter to the Employer's accountants. This stated letter code 1268906941. The letter explained that the Compliance Notice dated 10 February 2021 had been revoked on the basis that it was issued with an incorrect duties start date of 1 July 2017. The letter went on to say that the correct duties start date for the Employer was 1 April 2020. The letter also said

that the updated duties start date for the Employer could take ‘3-5 working days after which [the Employer] will be able to submit their Declaration of Compliance.’

18. A further week later, on 9 April 2021, the Regulator wrote a letter direct to the Employer at its registered office address. The letter was headed ‘*Urgent action is required – your declaration deadline was 1 September 2020*’. The letter clearly stated the Employer’s new PAYE reference, and the same letter code as in the letter to the Employer’s accountants a week earlier. Additionally, the letter set out, in emboldened text, that it was the Employer’s legal duty to make sure their declaration of compliance was completed and giving the Employer 14 days from the date of the letter to do so.

19. The Employer failed to complete and submit its declaration within 14 days of the letter, namely by 23 April 2021. The Regulator therefore issued a new Compliance Notice on 26 April 2021 (setting out the same letter code as in the previous letters), requiring the Employer to submit its declaration of compliance by the extended deadline of 7 June 2021. The Notice set out step by step what the Employer needed to do and warned that a £400 penalty might be imposed if the Employer failed to comply.

20. The Employer did not meet the extended deadline so, on 9 June 2021, the Regulator issued a Penalty Notice. This required payment of the fixed penalty sum of £400 by 7 July 2021 and compliance with the Compliance Notice by the same date.

21. On 17 June 2021, the Employer completed and filed their declaration of compliance and on the same date applied to the Regulator for review of the Penalty Notice.

22. On 13 July 2021, the Regulator notified the Employer that it had completed a review of its decision to issue the Penalty Notice and confirmed that decision.

Submissions

23. The Employer’s accountants filed a Notice of Appeal dated 20 August 2021 saying that:

(1) The first Compliance Notice related to a previous scheme which had been closed. This was raised with the Regulator and after several exchanges of emails, nothing further was heard after 23 March 2021.

(2) Neither the Employer nor their accountants had received any confirmation of resolution of this issue either by email, nor any correspondence about filing a declaration of compliance in relation to the new scheme which commenced on 1 April 2020.

(3) No information or letter code was given to file such a declaration. The Employer's accountants received this over the telephone only after their client had received the Penalty Notice.

(4) The declaration of compliance was filed promptly as soon as the accountants became aware of the need to do so.

24. In its response dated 23 September 2021, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Regulator relies on the statutory presumptions about the service and receipt of documents sent to the proper address. The Regulator submits that the Compliance Notice (as well as the Penalty Notice) was properly sent to the Employer's registered office address and was therefore lawfully and correctly served. The presumption of receipt applies unless the Employer can show to the contrary.

(2) The Employer appears to assert that it never received any correspondence relating to this matter and that their accountants were awaiting an email response to their email dated 23 March 2021 about a previous closed scheme.

(3) However, the Regulator wrote letters to the Employer's accountant on 1 April 2021 making clear that the Employer would need to declare, and direct to the Employer on 9 April 2021 giving them 14 days in which to respond.

(4) The Employer has not provided any evidence to explain why these letters and the Compliance Notice - all sent to the correct addresses - did not arrive. The Regulator has no record of the reminder letters or Compliance Notice having been returned. The mere assertion - without any stated reason and supporting evidence - that the correspondence was not received is insufficient to overturn the statutory presumption of receipt.

(5) The Employer has also failed to explain how they received the Penalty Notice but not the Compliance Notice which was sent to the same registered office address.

(6) It is the Regulator's position that the Employer may have failed to appreciate the importance of the correspondence, including the Compliance Notice – and failed to act on it, wrongly handled it, ignored and/or discarded it. None of these constitute a reasonable excuse for failing to comply.

(7) It is reasonable to expect that any official correspondence, addressed to a business should have been properly handled and read by the employer and that those running a business would act on such communications, and/or seek assistance if they had any difficulties or refer such to their accountants to action. Neither the Employer nor their accountants took any action until the Penalty Notice was issued in June 2021.

(8) At no time did the Employer contact the Regulator to query what it was required to do if it did not understand the correspondence or if it had any difficulties with its enrolment or declaration duties. Rather the Employer claims to have received no correspondence reminding it of its duties.

(9) It is the Regulator's position is that even during the pandemic, employers are expected to ensure that they make the necessary arrangements to collect their post even if working from home.

(10) It is not a reasonable excuse that the accountants were awaiting a reply to their email dated 23 March 2021 (about a previous scheme). On 1 April 2021, a letter was sent to the accountants explaining that the original Compliance Notice had been revoked and that the Employer's duties start date was being updated.

(11) On 9 April 2021, a letter was sent direct to the Employer at their registered office address informing them they had 14 days from the date of the letter to complete their declaration. It was up to the Employer to act on this correspondence and, if they chose, to inform their accountants of the deadline.

(12) It is the responsibility of employers to ensure their compliance with statutory duties and this includes ensuring that third parties, such as their accountants, are properly monitored: blind reliance on third parties does not constitute a reasonable excuse for employers' failure to comply.

(13) The Regulator acknowledges that the Employer has set up a pension scheme and enrolled an employee – and that the Employer has since completed and filed a declaration of compliance. However, the Employer did not file the declaration by the deadline.

(14) The declaration of compliance is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach. Any failure to comply is the responsibility of the Employer and can, as in this case, result in a penalty being issued.

(15) The Employer is not disputing the fact that they have failed to meet their declaration duties within the required deadline nor that the Penalty Notice was correctly issued. Neither has the Employer provided a reasonable excuse for their failure to comply.

(16) The Regulator accepts that the £400 penalty is burdensome for smaller businesses like the Employer's. However, the amount of the penalty is fixed by law. It is not disproportionate to the breach, bearing in mind the importance of the declaration; the fact that the Employer was sent a reminder about their duties and the deadline for complying; and the Employer had the services of an accountant to assist them.

(17) In all the circumstances, particularly the extended deadline within which to comply, the penalty is fair, reasonable and proportionate.

(18) If this appeal is dismissed and payment of the £400 penalty will have financial implications, the Regulator would be willing to consider a payment plan on request by the Employer.

Conclusions

25. For the reasons set out below - and taking account of all the evidence provided to me - I conclude that the Employer has given no 'reasonable excuse' for non-compliance in this case.

26. The Employer has not explained how or why they received the Penalty Notice yet did not receive any previous correspondence from the Regulator sent to the same address. I am satisfied that the Employer has not overturned the statutory presumption that the letter dated 9 April 2021 and the Compliance Notice dated 26 April 2021 – both of which were correctly addressed – were properly served and received.

27. The Employer's accountants imply that they were expecting an email from the Regulator following their email communications in March 2021 but have not denied receiving the Regulator's letter sent to their address on 1 April 2021. This letter not only revoked the original Compliance Notice but also clearly set out the Employer's correct duties start date of 1 April 2020. It also stated the letter code.

28. I do not accept the accountants' claim that '*they had no information regarding the letter code attached to the new PAYE scheme.*' The letter code was clearly stated on the letter sent direct to the accountants' address on 1 April 2021. The letter code was in fact the same as the Employer's previous letter code.

29. The Regulator's letter dated 9 April 2021 sent direct to the Employer's registered office address and the Compliance Notice (dated 26 April 2021) also sent to that same address should have alerted the Employer themselves as to their legal duties of enrolment. Both these documents also set out the letter code.

30. The Regulator has no record of their letter to the accountants nor their letter to the Employer being returned undelivered. Nor was the Compliance Notice - which was sent to the same address as the Penalty Notice - returned. The Employer clearly did receive the Penalty Notice.

31. As for whether the Employer *received* the Compliance Notice:

(1) The Regulator does not have to *prove* that the document was received. This is because the Act and related Regulations say that if a document is sent to a company's registered office by post, which is its proper address, it is *presumed* that it was received by the person to whom it was addressed. This is only a presumption and, if there were strong evidence to the contrary, the presumption can be displaced. The Employer does not have to *prove* that the document was not received but the Employer has produced *no* evidence in support of this position (such as evidence from the Post Office of post being disrupted in the

local area; or post being wrongly delivered to another similar address). The Employer seemingly relies on their accountants' suggestion that they and their client '*...received no correspondence to file the declaration with respect to the new PAYE scheme which commenced from 1st April 2020...*' They do not state that the Compliance Notice was not in fact received.

(2) Secondly, even if the accountants received no letter, and even if the Employer received neither the Compliance Notice nor the reminder letter (both of which were sent to the same registered office address), none of these are required by law but are sent out of courtesy and to offer guidance and support if needed. Because neither reminders nor a Compliance Notice are legal requirements, failure to receive them would not relieve the Employer of the duty to comply with the legal obligations to complete and file a declaration of compliance by the required deadline. 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 Employer failed to do so.

32. In this case, the declaration deadline was in fact extended under the Compliance Notice from 1 September 2020 (five months after the Employer's duties start date) till 7 June 2021 (some 10 months later).

33. The Compliance Notice was served at a time when businesses were trading despite the pandemic so, even taking account of the difficulties that businesses may have faced during the pandemic and periods of lockdown, no evidence or reason has been given for the Employer's failure to comply within this extended timescale. I therefore do not consider that the pandemic or successive lockdowns provide a reasonable excuse for the Employer not to comply with the obligation to file a declaration of compliance in time.

34. The Employer accepts that the Penalty Notice was received. The Employer then asked the Regulator to review the penalty and, when the Regulator upheld the penalty, appealed to this Tribunal.

35. Even though the Employer had filed their declaration by the date they asked the Regulator to review the penalty, this was 10 days *after* the extended deadline, and *after* issue of the Penalty Notice. It was therefore too late to avoid the penalty because late compliance does not excuse a failure to do so by the deadline.

36. I am satisfied that the Employer - or advisers on their behalf - had ample opportunity to comply with the obligation to file a declaration of compliance in time. Their failure to do so entitled the Regulator to issue a Penalty Notice.

37. As the Regulator points out in its response to this appeal, the First Tier Tribunal decision in *G&T Nutrition Ltd - Ref. PEN/2018/0186* (which is of persuasive but not binding effect on this Tribunal) said, '*if and to the extent that the company was let down by its advisers, it must look to them for recompense*' (at paragraph 16).

38. In all the circumstances, I determine that the Regulator was entitled to issue a Penalty Notice for non-compliance with the Compliance Notice dated 26 April 2021.

39. The amount of the penalty is fixed by law, so the Regulator has no discretion to reduce the penalty below £400. I accept that the £400 penalty is burdensome for smaller businesses such as the Employer, but I consider it is not disproportionate to the breach bearing in mind the importance of the declaration to the Regulator's role in ensuring employers comply with their legal duties.

40. The Regulator has indicated that if the £400 penalty would have financial implications for the business, it would be willing to consider a payment plan on request from the Employer.

41. I confirm the Penalty Notice, and I remit the matter to the Regulator.

42. No directions are necessary.

(Signed)
ALEXANDRA MARKS CBE
(SITTING AS A JUDGE OF
THE FIRST TIER TRIBUNAL)

DATE: 4th February 2022