



[2023] UKFTT 00112 (GRC).

Case Reference: PEN/2022/0197

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

Heard: Paper Consideration

**Heard on 26 January 2023 in Chambers
Decision given on 09 February 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

FLAIR SPORT & LEISURE LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Flair Sport & Leisure Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 26 August 2022, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.

2. 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.

3. 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 of 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.

4. 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.

5. 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).

6. 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.

7. 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. The declaration of compliance must be provided within five months of the staging date or duties start date (Regulation 3(1)). A re-declaration of compliance must be provided within five months beginning with the third anniversary of the staging date, and then within five months beginning with the third anniversary of the previous automatic re-enrolment date (Regulation 4(1)).

Facts

8. The facts are set out in the Appellant's notice of appeal document and the Regulator's response document, including the annexes attached to those documents. I find the following material facts from those documents.

9. The Appellant is the employer for the purposes of the various employer duties under the Act. The original staging date was 1 October 2015. The Appellant's second re-declaration of compliance was due to be provided by 31 May 2022.

10. The Regulator issued a compliance notice to the Appellant on 30 June 2022, to the registered office address. This gives the deadline for the re-declaration of compliance as 31 May 2022, and explains the Regulator has no record of it being completed by the deadline. The notice expressly states, "*If you don't complete your re-declaration of compliance by 10 August 2022, we may issue you with a £400 penalty*". The notice also explains how to complete the re-declaration of compliance, including a web link for starting the declaration, postal address and telephone number.

11. The Appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the Appellant on 26 August 2022.

12. The Appellant's bookkeeper applied for a review to the Regulator, saying that the prior bookkeeper had left them in the lurch, they had been working against the clock to submit accounts, and because of this missed the deadline. The Regulator confirmed the penalty notice, on the grounds that the re-declaration of compliance is the employer's responsibility, and there were no communications seeking assistance or asking for an extension prior to the deadline.

13. The Appellant did complete the re-declaration of compliance on 13 September 2022.

Appeal grounds

14. The Appellant's appeal grounds are that they have had bad bookkeepers/accountants for two years, who gave poor advice and did not act correctly. Their new bookkeeper was working against the clock to bring accounts up to date for filing with HMRC, and so current year work was put on hold. They will ensure future re-declarations are made in a timely manner. They have also struggled over the last couple of years and are not in a good cash position.

15. The Regulator says that employers can delegate, but it is still their responsibility to ensure the duties are complied with. The Appellant could have contacted the Regulator. Prioritising separate obligations to HMRC is not a reasonable excuse. Late or eventual compliance does not excuse the failure. The amount of the penalty is fixed by law, and is not unfair, unreasonable or disproportionate in light of the importance of the employer duties.

Conclusions

16. The declaration of compliance and re-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.

17. 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 sent a compliance notice with clear information about the need to complete a re-declaration of compliance and the relevant deadline. The Appellant failed to comply with the deadline set out in the compliance notice.

18. 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. The Appellant does not dispute receiving the compliance notice.

19. I do not find that the Appellant had a reasonable excuse for failing to comply with the compliance notice. I have considered the points made in the Appellant's appeal in turn.

20. ***They had bad bookkeepers/accountants for two years, who gave poor advice and did not act correctly.*** The Regulator says that compliance is the responsibility of the employer. They can delegate, but remain responsible for ensuring that they comply with all their duties. I understand that this issue may have caused the Appellant to miss the deadline for the re-declaration of compliance, as they were relying on a third party to do this correctly. I accept the Appellant's evidence that they were let down by their bookkeepers/accountants. However, I agree with the Regulator that delegation to a third party generally does not provide a reasonable excuse if that third party fails to take action. These important duties are the responsibility of the employer. A reasonable employer can delegate to accountants or others but remains responsible for making sure they delegate to someone competent and that the duties are complied with.

21. In this case, the Appellant says that there had been problems for two years. It is unclear when they became aware of the problems. Even if they were unaware for some time, they would have known there was an issue with the re-declaration of compliance when they received the compliance notice. The notice gave a clear warning that there could be fines if the Appellant did not meet the deadline. The Appellant had ample time between the date of the notice (30 June) and the deadline of 10 August to comply with their duties and avoid a penalty. The Appellant has not explained why they failed to take any action after receiving the compliance notice. The failure of their bookkeepers/accountants does not provide a reasonable excuse.

22. ***Their new bookkeeper was working against the clock to bring accounts up to date for filing with HMRC, and so current year work was put on hold.*** The Regulator says that prioritising separate obligations to HMRC is not a reasonable excuse. I agree. I do accept that there may have been a lot of work to be done once the Appellant discovered problems with the previous bookkeepers/accountants. However, the important issue of the declaration of compliance should not simply have been put on hold. The compliance notice was clear about what needed to be done in order to avoid a fine. If the new bookkeeper was unable to deal with the matter, the Appellant could have contacted the Regulator to explain the situation and asked for

an extension of time. Instead, the Appellant did not contact the Regulator at all until after the fine had been issued.

23. They will ensure future re-declarations are made in a timely manner. Compliance with future obligations does not provide a reasonable excuse for this failure to comply.

24. The Appellant has struggled over the last couple of years and they are not in a good cash position. The Appellant has not explained how this affected their ability to make the re-declaration of compliance on time. I have assumed this point is relevant to the size of the fine. I appreciate that a £400 fine may seem high for a small business. However, I am not able to reduce the fine, as it is fixed by law and I do not have any discretion to change the amount. I do not find that it would be appropriate to set aside the fine in this case, taking into account the failure of the Appellant to act on the compliance notice from the Regulator. As noted above, the system of automatic enrolment does need to be supported by a robust enforcement mechanism. I note that the Regulator says in its response that it is willing to accept payment in instalments, and the Appellant may want to contact the Regulator about this.

25. 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: 8 February 2023