



[2023] UKFTT 467 (GRC)

Appeal number: PEN/2023/0024P

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

THE BREAD BOXX 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
11 MAY 2023**

DECISION

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

REASONS

Background

2. The Bread Boxx Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 29 November 2022 (Notice number 159362061024).

3. The Fixed 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 3 October 2022 which 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 Fixed Penalty Notice and informed the Employer on 17 December 2022 that the decision was confirmed.

5. On 26 January 2023, the Employer (through its advisers) referred to the Tribunal the Regulator's decision to issue the Fixed Penalty Notice.

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 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. If that Notice is not complied with by the stated deadline, a Fixed Penalty Notice ('Penalty Notice') can then 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 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 take account of all 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 Penalty Notice. When the Tribunal reaches a decision, it 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 in this case was 7 March 2022. The Employer's declaration of compliance deadline was therefore 8 August 2022, five months later.

14. In July 2022, the Regulator sent the Employer a letter headed '*Automatic enrolment: take immediate action to avoid a potential fine*'. The letter explained what the Employer needed to do, and gave the Employer until 8 September 2022 to complete its declaration of compliance. The letter enclosed the Regulator's '*Essential Guide to automatic enrolment*', setting out in plain language employers' legal duties.

15. By neither 8 August 2022 (the statutory deadline for compliance) nor 8 September 2022 (the extended deadline provided by the July reminder letter), the Employer had not completed the declaration of compliance to confirm that it had complied with its duties by providing the prescribed information.

16. The Regulator therefore wrote to the Employer again on 16 September 2022 headed '*Urgent action – your declaration deadline was 8 August 2022*' explaining what to do, and giving a telephone number to call if the Regulator's assistance was required. The letter also emphasised that failure to complete the declaration of compliance may result in the Employer being fined.

17. In the absence of any response from the Employer, and the continuing absence of the declaration of compliance, on 3 October 2022 the Regulator issued a Compliance Notice. This Notice required the Employer to file its declaration of compliance by a further extended deadline of 14 November 2022. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

18. The extended deadline of 14 November 2022 was not met so, on 29 November 2022, the Regulator issued a Penalty Notice requiring payment of the fixed penalty sum of £400 by 28 December 2022 and compliance with the Compliance Notice by the same date.

19. On 6 December 2022, Ms Page of W White & Co Accountants emailed the Regulator to explain that her firm had recently taken on the Employer as a client. She said the Employer's previous accountants had failed to submit the declaration of compliance. Ms Page said the Employer's payroll started from September 2022, and that some staff were on minimum hours so did not require adding to the pension scheme. Ms Page said she looked to appeal the penalty on the assurance that the declaration would now be completed.

20. On 17 December 2022 the Regulator emailed Ms Page notifying her that it had completed a review of its decision to issue the Penalty Notice and confirmed its decision.

20. On 6 January 2023, the Regulator confirmed to both Ms Page at the Employer's new accountants and the Employer that the declaration of compliance had been completed.

21. On 26 January 2023, the Employer's new accountants submitted a Notice of Appeal to the Tribunal.

Submissions

22. The Notice of Appeal says that:

(1) Between 3 October and 14 November 2022, the Employer was changing over accountancy firms.

(2) All correspondence about pensions was given to the Employer's previous accountants.

(3) The previous accountants did not submit the declaration of compliance on time but the Employer was unaware of this because they had been told that the declaration had been submitted.

(4) The issue only came to light when the Employer changed accountants, and a further letter imposing penalties was sent.

(5) The Employer would like to have the penalty removed.

23. In its response dated 23 February 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) It was for the Employer to be aware of their legal duties and to ensure compliance in full and on time. This includes the duty to provide a declaration of compliance within the prescribed time which the Employer failed to do. It was therefore fair, reasonable and appropriate for the Regulator to issue a Compliance Notice and when the Employer still failed to comply, to issue a Fixed Penalty Notice.

(2) Other similar sized employers have complied with their duties within the relevant timescales and without the assistance of third party advisers.

- (3) The declaration of compliance is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach.
- (4) Automatic pensions enrolment was implemented in the UK in 2012. There is plenty of information and guidance available to alert employers of their duties. There is also advice and plain language guidance on the Regulator's website designed to be accessible and easily understood by businesses new to pensions.
- (5) The Regulator sent the Employer reminder letters in July 2022 (enclosing the Regulator's 'Essential Guide' document) and again in September 2022. These letters not only informed the Employer of the immediate steps required but also extended the deadlines for compliance and warned that fines might be issued if the declaration of compliance was not completed in time.
- (6) The Compliance Notice issued on 3 October 2022 gave a further six weeks to complete the declaration of compliance. An additional two week grace period followed before any penalty was issued.
- (7) The Employer has not disputed receipt of these various letters and notices but says that they were all passed onto their accountants.
- (8) On 6 December 2022, after receipt of the Fixed Penalty Notice, Ms Page of the Employer's new accountants telephoned the Regulator to ask how to comply. She also indicated in her review request the same day that the Employer's duties start date needed to be updated as payroll for the Employer only started in September 2022.
- (9) Information available to the Regulator from HMRC indicates that the Employer employed workers from before September 2022 so in the absence of evidence to the contrary, the Regulator considers the correct duties start date has been applied for the Employer.
- (10) Similarly, while Ms Page indicated that the Employer employs some non-eligible jobholders and therefore some of their staff do not need to be automatically enrolled, HMRC data available to the Regulator shows that the Employer also employs at least one *eligible* jobholder who needs to be automatically enrolled. This was explained to Ms Page in the Regulator's notification of review decision on 17 December 2022.
- (11) The Employer's declaration of compliance (eventually completed on 6 January 2023) states that no pension scheme has been set up and no workers have been enrolled. This is inconsistent with information available to the Regulator that there is in fact an eligible job-holder who needs to be automatically enrolled. The Regulator therefore encourages the Employer to update their declaration to prevent further enforcement action and penalties.
- (12) Employers are free to delegate their Employer duties to others such as third party accountants if they wish. However, the legal responsibility remains with the Employer and any third parties' failure to comply with the statutory requirements cannot amount to a reasonable excuse for the Employer's failure.
- (13) Given repeated reminders from the Regulator to the Employer, even if these were passed straight to their accountants, the Employer should have

realised that regulatory matters remained outstanding. Had the Employer (or their accountants) contacted the Regulator before the various deadlines, the Regulator may have been able to assist. However, no contact was made until the Fixed Penalty Notice had already been issued.

(14) In this case, the change of accountants was said to have occurred after the issue of the Compliance Notice, between 3 October 2022 and 14 November 2022. Whilst the change of accountancy firm is acknowledged, the Regulator submits that this does not represent a reasonable excuse for the Employer's continued failure to comply until January 2023.

(15) While the Employer may not have intentionally breached their duties, lack of intent does not amount to a reasonable excuse. Similarly, the Regulator submits that the Employer's failure, even if an honest mistake, does not provide a reasonable excuse for failing to complete the declaration of compliance by the deadline in the Compliance Notice.

(16) The Regulator acknowledges that the Employer has now completed its declaration of compliance but only after the issue of the Fixed Penalty Notice. Late or eventual compliance does not excuse the failure to comply on time or comprise exceptional grounds to revoke a penalty.

(17) The Regulator submits that the penalty is not disproportionate to the breach, bearing in mind the importance of the Employer duties including completion of the declaration of compliance. Furthermore, the amount of the penalty is fixed by law; whilst the Regulator has discretion as to *when* to issue a Fixed Penalty Notice, there is no discretion as to the amount of the penalty.

Conclusions

24. 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. My reasons are set out below.

27. Each of the two reminder letters, and the Compliance Notice, clearly set out the steps required to be taken by the Employer, including the deadline of 8 August 2022 (in fact extended till 14 November 2022 by the Compliance Notice).

28. The Employer has not denied receiving the letters and Notice but explains they were passed to their accountants. The letters and Notice are designed to be eye-catching and clearly indicate that they are important, impose deadlines, and can result in fines if not actioned.

29. The Employer accepts that these communications from the Regulator were received, and says they instructed a firm of accountants to take action on their behalf. They add that the accountants claimed that they had filed the necessary declaration – and they only found out afterwards that the accountants had not done so.

30. However, in my judgment:

(1) the Employer was - or should have been - aware of the obligation to send the Regulator a declaration of compliance by 8 August 2022, even *without* the Compliance Notice (the effect of which, as I have said, was to extend the deadline till 14 November 2022). I am satisfied that the Employer - or advisers on their behalf - had ample time to comply with the obligation to file a re-declaration of compliance by the deadline.

(2) 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 such. In this instance, the Employer failed to do so. That failure entitled the Regulator to issue a Penalty Notice.

(3) even if an employer pays for the services of a third party to assist, it is the employer who retains ultimate responsibility for compliance with statutory duties. Although it appears that in this case the Employer engaged advisers to act on their behalf, that does not relieve the Employer of the responsibility to ensure that the duties were met.

(4) the receipt by the Employer of repeated correspondence and a Compliance Notice from the Regulator should have alerted them that required actions were outstanding and that they therefore needed to verify that their advisers had taken the action they claimed to have done.

(5) if the Employer considers that their (previous) accountants were at fault, it is open to them to seek recourse from those accountants.

31. The Employer has since completed the declaration, but only after the deadline had passed and after the Penalty Notice was issued. This late compliance does not excuse the failure to complete it on time, nor provide a reason for revoking the Penalty Notice. Further, it appears that the declaration may be incorrect, and the Employer is therefore encouraged to verify its accuracy to avoid further penalties.

32. In all the circumstances, I determine that the Regulator was entitled to issue a Penalty Notice on 29 November 2022 for non-compliance with the Compliance Notice dated 3 October 2022.

33. The amount of the penalty is fixed by law, so neither the Regulator nor the Tribunal has any discretion to reduce the penalty below £400.

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

35. No directions are necessary.

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

DATE: 6 June 2023