



NCN: [2023] UKFTT 00839 (GRC)

Appeal number: PEN/2023/0114P

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

RSPK 2022 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
9 October 2023**

DECISION

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

REASONS

Background

2. RSPK Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 11 April 2023 (Notice number 132222292709).

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 9 February 2023 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 Fixed Penalty Notice and informed the Employer 26 April 2023 that the decision was confirmed.

5. On 15 May 2023, the Employer 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 duties start date - to assess their staff, write to them, and automatically enrol them into a qualifying scheme if applicable.

9. The employer must, within five months after the 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 and then, if that Notice is not complied with by the stated deadline, a Fixed Penalty Notice can 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 Fixed 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 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 Fixed 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. The Employer's duties start date was 1 September 2022. The Employer therefore needed to submit to the Regulator a declaration of compliance by 31 January 2023.

14. In October 2022 - some months before the deadline - the Regulator wrote to the Employer about their declaration of compliance deadline of 31 January 2023.

15. The Regulator also sent a reminder letter to the Employer in November 2022. This letter again highlighted the Employer's declaration deadline of 31 January 2023. It also stated that if the Employer did not comply with their legal duty to submit a declaration of compliance in time, they may be subject to fines and/or prosecution.

16. A further letter – headed in red 'take immediate action to avoid a potential fine' – was sent to the Employer in January 2023, again advising of the declaration deadline of 31 January 2023 and warning of the consequences of failing to comply.

17. No declaration of compliance was completed in time so the Regulator issued a Compliance Notice dated 9 February 2023, requiring the declaration of compliance to be filed by an extended deadline of 22 March 2023. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

18. On 22 February 2023, the Regulator attempted to call the Employer but could not get through and left a voicemail message.

19. The extended deadline of 22 March 2023 was not met so, on 6 April 2023, the Regulator issued a Fixed Penalty Notice to the Employer. However, due to a systems failure, that penalty was revoked and a new Fixed Penalty Notice issued on 11 April 2023 requiring payment of the £400 penalty by 9 May 2023 and compliance with the Compliance Notice by the same date.

20. On 14 April 2023, the Employer asked for a review, stating that *'for the PAYE purposes the business address is 27 Kingston Road, London SW19 1JX'*.
21. On 17 April 2023, the Employer telephoned the Regulator and stated that previous correspondence had been sent to the wrong address.
22. On the same date, the Employer filed their declaration of compliance (late) and this was acknowledged by the Regulator on 18 April 2023. A revised declaration of compliance was filed on 11 May 2023 with similar information. Both declarations officially notified the Regulator of the Employer's alternative address of 27 Kingston Road SW19.
23. On 26 April 2023, the Regulator notified the Employer that it had completed a review of its decision to issue the Fixed Penalty Notice and confirmed that decision.

Submissions

24. The Employer's Notice of Appeal dated 15 May 2023 was accompanied by a letter dated 10 May 2023 which says that:
- (1) The Employer's PAYE correspondence address is 27 Kingston Road, London SW19 1JX.
 - (2) Unfortunately, the Employer never received any letter from the Regulator regarding any pension compliance: had they done so, they would have acted in time.
 - (3) The Employer is a very small company and cannot afford the £400 penalty.
 - (4) The Employer asked for understanding and for *'these unfair charges'* to be waived.
25. In its response dated 27 July 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:
- (1) The Employer bears a statutory responsibility for complying with their automatic enrolment duties, including providing the required information to the Regulator by the prescribed deadline.
 - (2) The Employer says that the Regulator's correspondence and Compliance Notice were not received. However, the Employer clearly received the Fixed Penalty Notice which was sent to the same address.
 - (3) The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address.
 - (4) There is no basis for displacing these statutory presumptions unless the contrary can be shown by evidence. Mere assertion that posted items have not been received is insufficient. The Employer in this case has provided no evidence or explanation for what is claimed to be non-delivery of the

Compliance Notice and previous correspondence. There is no record of any of the Regulator's correspondence having been returned undelivered.

(5) The Employer has also not explained why it received the Fixed Penalty Notice but not the Compliance Notice and other prior correspondence all sent to the same address, namely the Employer's registered office address of 12-13 Belgrave Promenade, Wilder Road, Ilfracombe, Devon.

(6) Moreover, on receipt of the Fixed Penalty Notice, the Employer immediately completed their declaration of compliance even though this requirement was not mentioned in that Notice. This suggests that the Compliance Notice and/or other correspondence was in fact received.

(7) The Employer says that all their correspondence from HMRC was sent to their 27 Kingston Road address. However, the Regulator is a different organisation from HMRC and sent documents and correspondence to the Employer at the address the Regulator had on record, namely the Employer's registered office address at 12-13 Belgrave Promenade, Ilfracombe. There is nothing to suggest that the Employer provided their alternative 27 Kingston Road address until they filed their declaration of compliance on 17 April 2023 – **after** the Fixed Penalty Notice had been served at the registered office address.

(8) Every employer, including the Employer, is legally obliged to complete a declaration of compliance which is a vital source of information for the Regulator and a central part of its compliance and enforcement approach.

(9) The five-month period for compliance is a generous period within which to complete the declaration. By the time the Fixed Penalty Notice was issued on 11 April 2023, more than seven months had elapsed since the Employer's duties start date.

(10) As a responsible employer, the Employer is expected to be aware of their legal duties and ensure full- and on-time compliance with them. There is considerable advice and guidance available from various sources including the Regulator's own website which supplements the correspondence which the Regulator sends to individual employers.

(11) There is no legal requirement for the Regulator to provide reminders: they are sent as a courtesy. Ultimately, it is the Employer's duty to comply with all their pensions obligations.

(12) The Regulator accepts that the Employer has now filed their declaration of compliance but it was received on 17 April 2023, more than eight weeks after the Compliance Notice was issued and **after** the extended compliance deadline of 22 March 2023 and only **after** the Fixed Penalty Notice had been issued.

(13) The decision to issue a Fixed Penalty Notice was fair, reasonable and proportionate for the reasons above and because:

(a) The Regulator has repeatedly made clear that action will be taken against employers who fail to provide a declaration of compliance on time.

(b) The Employer says that the Regulator should have used an alternative address – but the Regulator says that all correspondence was sent to the correct address, being the Employer’s registered office address, and was duly served according to the law.

(c) The amount of the penalty is prescribed and neither the Regulator nor the Tribunal has any discretion to alter that amount.

(d) No reasonable excuse in fact or law has been provided for the Employer’s failure to complete the declaration of compliance on time.

Conclusions

26. 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. The Employer has not explained how or why it received the Fixed Penalty Notice yet did not receive any previous correspondence nor the Compliance Notice from the Regulator sent to the same address.

28. Either of the two reminder letters (sent in November 2022 and January 2023) or the Compliance Notice (sent in February 2023) should have alerted the Employer to their legal duty to send the Regulator a declaration of compliance. These communications were sent to a named individual who apparently remains an officer of the Employer.

29. Each reminder letter clearly set out the steps required, including the declaration deadline date of 31 January 2023.

30. The Compliance Notice extended that deadline till 22 March 2023. This gave the Employer more than adequate time to comply with the obligations.

31. Both letters, and the Compliance Notice, were correctly addressed to the Employer’s registered office. None was returned to the Regulator undelivered. The same address was used for the Fixed Penalty Notice and the Employer clearly did receive this.

32. As for whether the Employer *received* these letters or the Compliance Notice:

(1) The Regulator does not have to *prove* that the documents were 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.

(2) 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 documents were not received but, beyond the simple statement that the reminder letters and the Compliance Notice were not in fact received, 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).

(3) 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 the legal obligation to send the Regulator a declaration of compliance by the required deadline.

33. The Employer accepts that the Fixed Penalty Notice was received, and shortly afterwards completed and sent the declaration of compliance to the Regulator. However, this was several weeks **after** the extended deadline, and **after** issue of the Fixed 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.

34. The Employer was - or should have been - aware of the obligation to send the Regulator a declaration of compliance by 31 January 2023, even **without** the Compliance Notice (the effect of which, as I have said, was to extend the deadline till 22 March 2023). I am satisfied that the Employer had ample time to comply with the obligation to complete and send to the Regulator a declaration of compliance by the deadline.

35. 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. In this instance, the Employer failed to do so.

36. In all the circumstances, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 11 April 2023 for non-compliance with the Compliance Notice dated 9 February 2023.

37. 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.

38. The Regulator has indicated that it would be willing to consider repayment options if the Employer contacts the Regulator and advises that payment would cause them financial difficulties.

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

40. No directions are necessary.

(Signed)

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

DATE: 9 October 2023