



NCN: [2023] UKFTT 00842 (GRC)

Appeal number: PEN/2023/0144P

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

AQUA ENVIRONMENTAL MAINTENANCE 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
10 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. Aqua Environmental Maintenance Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 18 May 2023 (Notice number 113840755426).

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 20 March 2023 that required the Employer to provide the Regulator with information in respect of automatic enrolment.

4. The Regulator completed several reviews of the decision to impose the Fixed Penalty Notice and informed the Employer on each occasion, most recently on 20 June 2023 that the original decision was confirmed.

5. On 21 June 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. Under the Act, the Regulator is responsible for the regulation of work-based pension schemes, including securing compliance with employers' duties under the Act.

8. These duties apply to employers from their 'duties start date' (being the date when the legislation first applies to that employer). The employer's 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 also, within five months after the duties start date, provide certain specified information to the Regulator about their compliance with these duties. This is known as a 'declaration of compliance' ('DOC').

10. Crucially for the purposes of this case, the employer must *also* - every three years from their duties start date - assess and re-enrol eligible staff who have left the workplace pension scheme. The employer must then provide the Regulator with re-enrolment information by means of a 're-declaration of compliance' ('Re-DOC').

11. If the employer fails to provide a Re-DOC, 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.

12. 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.

13. 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

14. In November 2019, the Regulator sent a letter to a named director at the Employer. The letter was sent to 2 Trust Court, Histon, Cambridge CB24 9PW ('Histon address'). The letter stated that the Employer's duties start date was 1 October 2019 (being the date when the first member of staff started working). The letter stated that their DOC deadline was 2 March 2020, five months later.

15. In December 2019, the Regulator emailed the Employer at cambridgeadmin@astonshaw.co.uk, apparently a firm of accountants engaged by the Employer. The email included instructions that *'If any contact details need to be changed in the future, please use the 'nominate a contact' form to amend and re-submit them.'*

16. The Employer submitted their DOC on 21 January 2020 which the Regulator acknowledged by letter dated 22 January 2022 addressed to the named Managing Director of the Employer at 3 Blackstone Road, Stukeley Meadows Industrial Estate, Huntingdon, Cambs PE29 6EF ('Stukeley address'). That letter included an alert which said, *'You will be required to re-enrol certain staff into a pension scheme and re-declare with [the Regulator] in approximately three years' time.'*

17. On 3 May 2022, the Regulator sent an email to cambridgeadmin@astonshaw.co.uk stating that the third anniversary of the Employer's duties start date was 1 October 2022 and the Re-DOC deadline 28 February 2023. The email included a request that, if misdirected, it should be forwarded to a representative of the Employer so they could let the Regulator know who to contact instead.

18. In June 2022, the Regulator wrote a reminder letter to the Employer about their re-enrolment duties, including a reminder of their Re-DOC deadline of 28 February 2023. The letter was sent to the Histon address. This is apparently the address of the firm of accountants referred to at paragraph 15 above.
19. The Regulator sent further reminder emails about the Re-DOC deadline to cambridgeadmin@astonshaw.co.uk on 16 August 2022, 20 September 2022, 1 November 2022, 29 November 2022 and 3 January 2023.
20. The Regulator sent a second reminder letter in November 2022 to the named director of the Employer at the Histon address. This letter again highlighted the Employer's Re-DOC deadline of 28 February 2023. It also stated in bold text that if the Employer did not comply with their legal duty to submit a Re-DOC in time, they may be subject to fines and/or prosecution.
21. The Regulator received no reply to its reminder letters nor any of its emails, nor did the Employer file a Re-DOC by 28 February 2023. On 20 March 2023 the Regulator therefore issued a Compliance Notice to the Employer's registered office address. The Compliance Notice required the Employer to complete its Re-DOC by an extended deadline of 2 May 2023. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply
22. On 3 April 2023, the Regulator called the Employer and spoke to someone there, giving the Regulator's telephone number and asking to be called back with the Employer's PAYE reference.
23. The extended deadline of 2 May 2023 for the Re-DOC was not met.
24. On 18 May 2023, the Regulator issued a Fixed Penalty Notice requiring payment of the £400 penalty by 15 June 2023 and compliance with the Compliance Notice by the same date.
25. On 23 May 2023, the Employer's representative from Aston Shaw emailed the Regulator to ask for a review of the penalty notice as the Employer's duties start date of 7 September 202 was on their records. This would mean that the 3-year Re-DOC deadline would not yet be due. Aston Shaw's email also said their client had '*technological issues*' so '*they did not receive any reminders nor were able to submit this on time*'.
26. On 24 May 2023, the Regulator acknowledged receipt of the Employer's Re-DOC completed the preceding day.
27. On 26 May 2023, the Regulator notified Aston Shaw that it had conducted a review of its decision to issue the Fixed Penalty Notice and upheld the decision.
28. Aston Shaw submitted three further review requests to the Regulator – citing non-receipt of the reminders; inability to contact the Regulator; the letters being sent to the wrong address; that the Employer is linked to another company and the duties

start date was incorrect; Covid issues meant the Re-DOC could not be submitted on time; and there were *'issues with the systems'* used by the Regulator.

29. The Regulator rejected all these reasons for the Employer failing to complete their Re-DOC on time. The Regulator maintained its decision to issue the Fixed Penalty Notice.

Submissions

22. Aston Shaw submitted a Notice of Appeal on the Employer's behalf dated 21 June 2023 saying that:

(1) The Employer had not received any correspondence from the Regulator stating the date that the Re-DOC was due.

(2) There were technological issues meaning the Re-DOC could not be submitted.

(3) The 'staging date' – now known as the duties start date – provided by the Regulator was incorrect.

(4) The Re-DOC had since been filed but if the information from the Regulator had been received, it would have been submitted on time.

(5) The wrong address had been used for correspondence. It would have been helpful if it had also been sent to the agent's address.

(6) Everything would have been submitted on time if the information with the due date had been provided.

(7) Revocation of the penalty was sought.

25. In its response dated 14 August 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address. The proper address is the *'registered or principal office address.'*

(2) The Compliance Notice and the Fixed Penalty Notice were both sent to the Stukeley address which was the Employer's registered office address.

(3) The Regulator says that both Notices were lawfully and correctly served *and received* by the Employer.

(4) The Employer says that reminders were not received. The Regulator says that this bare assertion of non-receipt is not sufficient to overturn the presumption of service: proof is required. In this case there is no proof or evidence provided by the Employer to explain why it received the Fixed Penalty Notice but not the Compliance Notice nor the Regulator's previous correspondence.

(5) The Employer says that due to technological issues they did not receive any reminders. The Regulator says that the reminder letters and emails were sent – and even if technological issues affected the receipt of email communications (which the Employer has neither explained nor evidenced), they would have received the postal communications.

(6) Those letters were sent to the Histon address which is listed at the Regulator as the correspondence address for the main contact of the Employer. The Regulator has no record of any post sent to this address being returned as undeliverable. These letters highlighted the deadline date for the Re-DOC.

(7) Similarly, email reminders were sent to the email address for the Employer held by the Regulator – and there is no record of emails sent to this address as having bounced.

(8) The Regulator’s position is that lack of realisation of the importance of a statutory notice sent to the registered office or mishandling of it, or failure to act on it, does not amount to a reasonable excuse for failing to comply with it.

(9) It is reasonable to expect that official correspondence would be properly handled and that those running a business would act on such communications and/or seek help if unsure. There is no record that the Employer did so, yet they submitted (or there were submitted on their behalf) multiple review requests.

(10) It seems that the Employer received some correspondence from the Regulator because the Re-DOC was submitted shortly after the Fixed Penalty Notice even though the Notice did not specify that the Re-DOC was outstanding.

(11) There is no legal requirement for the Regulator to send reminders: employers ought to be fully aware of their legal duties even without such reminders.

(12) The Employer says that their ‘staging’ (or duties start) date is incorrect. It is unclear why the Employer suggests their duties start date is 7 September 2020 but if the Employer provides any evidence of this, the Regulator will consider it.

(13) The Regulator repeatedly informed the Employer that their duties start date was 1 October 2019 yet has no record of any request from the Employer to amend or correct this date. If the Employer has evidence of a different duties start date, the Regulator will consider it.

(14) The Employer has not explained how ‘technological issues’ impacted their ability to comply with their re-enrolment and Re-DOC obligations. If the Employer was experiencing difficulties with these, they could have contacted the Regulator and asked for an extension of time.

(15) There is a plethora of information and guidance available as well as considerable advice and guidance on the Regulator’s website as well as available from numerous third parties.

(16) The Employer did not make contact with the Regulator until 23 May 2023 which was after the Fixed Penalty Notice had been served.

(17) On that same day, the Employer completed the Re-DOC without assistance from the Regulator – but late compliance does not excuse the failure to complete it on time, nor comprise exceptional grounds for revoking a penalty.

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

(a) The Re-DOC is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach.

(b) The Regulator has made clear in its published policy and correspondence sent to the Employer that action will be taken against employers who fail to provide a Re-DOC on time.

(c) The five-month period to complete the Re-DOC is a generous period. In this case, by the time the Fixed Penalty Notice was issued on 18 May 2023, a further period of nearly three months had elapsed beyond the original deadline of 28 February 2023.

(d) The Employer's main grounds for failing to submit their Re-DOC was not receiving the Regulator's reminder letters and emails – but the Regulator's position is that the Employer ought in any event to have been aware of their duties, including completing the Re-DOC. The Regulator sent statutory notices to the Employer's registered office address. This was a reasonable step to take in the circumstances.

(e) The amount of the penalty is prescribed: the Regulator has no discretion as to the amount.

(f) No reasonable excuse in fact or law has been provided for the Employer's failure to complete the Re-DOC on time.

(19) The appeal provides no persuasive justification for revoking the penalty.

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. Either of the two reminder letters sent to the Employer (in May and November 2022) or the Compliance Notice (in March 2023) should have alerted the Employer to their legal duty to send the Regulator a completed Re-DOC.

28. Each reminder letter clearly set out the required steps and included the Re-DOC deadline date of 28 February 2023 in bold text.

29. Each letter, and the Compliance Notice, were correctly addressed to the last notified address for the Employer or their registered office address. None was returned to the Regulator undelivered. The same address was used for the Fixed Penalty Notice and the Employer clearly did receive this.

30. 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 or principal office address by post, being the company's '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 received and unspecified technological issues prevented the arrival of reminder emails, the Employer has produced **no** evidence in support of this position.

(3) The Employer has not explained how or why it received the Fixed Penalty Notice yet, they claim, did not receive the Compliance Notice sent by the Regulator to the same address.

(4) Even if the Employer received neither the Compliance Notice nor any of the reminder letters, that would not relieve the Employer of the duty to comply with their legal obligation to send the Regulator a Re-DOC by the required deadline.

(5) The reminders sent by the Regulator are a courtesy: ultimately, it is the Employer's duty to comply with all their pensions obligations, whether or not reminded of them.

32. The Employer has had considerable time to notify the Regulator of their correct duties start date if they claim that the date the Regulator has on record is wrong. However, if the Employer still disputes the date, they could provide evidence to the Regulator in support of their claim.

33. However, from the evidence before me, it seems highly unlikely that the Employer's duties start date was 7 September 2020. I have seen the Regulator's acknowledgement of the first DOC the Employer submitted in **January** 2020, eight months **before** the duties start date the Employer now, belatedly, claims.

34. At some point, the Employer apparently instructed accountants, Aston Shaw, who submitted various review requests to the Regulator after service of the Fixed Penalty Notice. Aston Shaw also completed the Re-DOC and gave the Histon address to the Regulator. It was to this address that the Regulator had sent their reminder letters. However:

(a) the Re-DOC completion, review requests and request to remove the penalty were all done **after** the Re-DOC deadline, and **after** issue of 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; and

(b) even if an employer engages a third party to assist in carry out their obligations, it is the employer who retains ultimate responsibility for compliance with statutory duties. The engagement of accountants to act on their behalf does not relieve the Employer of the responsibility to ensure that their duties were met.

35. In all the circumstances, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 18 May 2023 for non-compliance with the Compliance Notice dated 13 April 2023.

36. 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.

37. However, the Regulator says it would be willing to consider repayment options should the Employer indicate that a single payment would cause financial difficulties.

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

39. No directions are necessary.

(Signed)

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

DATE: 10 October 2023