



NCN: [2024] UKFTT 00356 (GRC).

Appeal number: PEN/2023/0246P

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

NWF SWIFTPAK 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
22 March 2024**

DECISION

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

REASONS

Background

2. NWF Swiftpak Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 20 September 2023 (Notice number 127971627741).

3. The Fixed Penalty Notice was issued under section 40 of the Pensions Act 2008 ('the Act'). It requires the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 26 July 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 on 30 September 2023 that its decision was confirmed.

5. On 11 October 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 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. Crucially for the purposes of this case, the employer must *also* - every three years from its 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'.

11. If the employer fails to provide a re-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.

12. Under section 44 of the Act, a person who has been issued with a Fixed Penalty Notice may make a reference (i.e. an appeal) 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. The Employer made previous declarations of compliance in June 2017 and March 2020.

15. In September and December 2022 the Regulator emailed the Employer reminders about their re-enrolment duties, including a reminder of their re-declaration of compliance deadline of 30 June 2023.

16. As the Employer did not file a re-declaration of compliance by 30 June 2023, the Regulator issued a Compliance Notice dated 26 July 2023 to the Employer's registered office. The letter was marked *'DO NOT IGNORE THIS COMMUNICATION'* and headed *'NWF Swiftpak Limited must comply with the directions in this notice by 5 September 2023. You may be issued a £400 penalty if you fail to comply by this deadline'*.

17. The Employer did not file a re-declaration of compliance as required by the Compliance Notice. As a result, on 20 September 2023 (two weeks after the extended deadline given by the Compliance Notice) the Regulator issued a Fixed Penalty Notice – again addressed to the Employer's registered office. This Penalty Notice required payment of the fixed penalty sum of £400 by 18 October 2023, and compliance with the Compliance Notice by the same date.

18. On 25 September 2023, the Employer emailed the Regulator asking for a review of the Penalty Notice. The email explained that:

- (1) The business had struggled to maintained overheads and premises costs at its original location.

(2) New premises were sought from around February 2023 to cut costs because of the adverse financial impact on the business of Covid.

(3) However, an assignee had to be found for the lease of the existing premises – and it took until May, with a completion date of 1 July 2023 – to find someone willing to take on the lease.

(4) During July, the business was reorganised and, though tight, kept its head above water.

(5) As a result of the move – and without internet, phones and the stress of the position – it was difficult to keep track of legal obligations with regard to the pension regulations timing.

(6) The Employer tried to keep the two employees in work with some capital injections into the business to assist with cashflow.

(7) The Fixed Penalty Notice was sent to the accounts office and was forwarded to the Employer's home address. It was the first correspondence received from the Regulator 'for a long time'.

19. On 30 September 2023, the Regulator notified the Employer that it had noted the Employer's reasons for requesting a review, and the fact that it had since submitted the re-declaration of compliance. However, the Regulator had completed a review of its decision to issue the Fixed Penalty Notice and confirmed that decision meaning the penalty is still to be paid.

Submissions

20. The Employer's Notice of Appeal dated 11 October 2023 says that:

(1) The business suffered during Covid and looked like it would fold.

(2) The Employer managed to keep the employees on by injecting capital personally.

(3) Because the business's premises were too expensive, the Employer found an assignee to take on the lease and moved the business on 30 June 2023 to smaller more affordable premises.

(4) The Employer had difficulty receiving emails and post.

(5) During this difficult time, re-enrolment duties were the last thing on the Employer's mind.

(6) Not receiving the Regulator's reminders meant the deadlines were missed.

(7) The Employer's priority was to ensure pension contributions were paid.

(8) The last email received from the Regulator was 2 September 2022.

(9) Re-enrolment has now taken place but the Employer is unsure if there are any other deadlines.

(10) A £400 penalty at this time seems harsh.

21. In its response dated 12 December 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Regulator is of the opinion that the Employer failed to comply with the requirements of a Compliance Notice.

(2) The Compliance Notice and Fixed Penalty Notice were sent to the Employer's registered office address. They were not returned undelivered. The Regulator therefore relied on the statutory presumptions that all notices were properly served and received.

(3) The Employer has not mentioned the Compliance Notice and Fixed Penalty Notice and says re-enrolment duties were 'the last thing' on their mind.

(4) No evidence about the date of the move to the new premises has been given (just an assertion that it was 30 June 2023) nor the new address. But in any event, the registered office address has remained unchanged since 2016 according to Companies House records.

(5) The Penalty Notice was clearly received because the Employer asked for a review of it.

(6) The Regulatory has no duty to send compliance reminders though the Employer's appeal included evidence of two email reminders dated 2 September 2022 and 2 December 2022. Therefore despite the Employer's claim that no reminders were received, this is not corroborated.

(7) The fact that pension contributions were paid on time and, for financial reasons, the business premises moved, do not amount to a reasonable excuse for the failure to comply with the Compliance Notice, nor indicate that the Regulator has acted unfairly in any way.

(8) Numerous previous decisions of the Tribunal follow the principle that bare assertion of non-receipt of correctly addressed correspondence and notices is insufficient to overturn the statutory presumptions of receipt.

(9) In this case, despite the Employer's claim of difficulty in receiving post and emails, the Employer does not expressly deny receiving the Notices.

(10) The Employer successfully completed Declarations of Compliance in both June 2017 and March 2020. It is implausible that the Employer was unaware of the duty to complete a re-declaration in 2023.

(11) Each employer is responsible for understanding and complying with their legal duties in running a business.

(12) It was fair, reasonable and proportionate for the Regulator to issue a Compliance Notice and then, when the Employer still failed to comply, to issue a penalty.

(13) It is irrelevant that the underlying duties (e.g. to pay pension contributions) were met because the re-declaration of compliance was not made on time, and this is an important statutory duty.

(14) The amount of the penalty is fixed by law. Given the multiple warnings and reminders, the penalty is fair, reasonable and proportionate.

22. In reply to the Regulator's response, the Employer added by email dated 18 December 2023 that:

(1) The business's move of premises took place in June 2023 – a process which had taken over four months to complete.

(2) Phone lines are still not installed so emails are sent and received via mobile hotspot connections.

(3) The business address registered with Companies House is that of the accountant who deals with the business's accounts so there was no need to change the registered office address when the business itself moved.

(4) The business's bank statements for the last two months show cash injections made into the business by the Director personally to pay employees' wages and pensions.

(5) The two emails in September and December 2022 were the last emails ever received from the Regulator.

(6) The business is still recovering from a shrinking packaging market, and one regular customer has just filed for voluntary liquidation makes the position worse.

(7) Continued employment for the business's two employees (in addition to the Director himself) is the first priority and will continue to be so as far as funds are concerned to cover this expense.

(8) The penalty seems really harsh considering the circumstances the business has found itself in with only two paid employees and moving premises after a tough two years following lockdown.

23. The Regulator replied to those submissions by email dated 20 December 2023 that:

(1) The additional information about the Employer's change of premises had been noted.

(2) The Regulator continues to rely on the statutory presumptions that all notices were properly served and received:

(3) The amount of the fixed penalty is fixed by law and the Regulator considers it fair, reasonable and proportionate in all of the circumstances.

(4) If the Tribunal dismisses the Employer's appeal, the Regulator would be willing to consider payment options if the Employer contacts the Regulator to advise that one single payment will cause financial difficulties.

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.

25. There is no legal requirement for the Regulator to provide any reminders to employers: they are sent as a courtesy only. Ultimately, it remains the Employer's duty to comply with all their pensions obligations whether reminded of them or not.

26. In this case, two reminder emails were sent to the Employer (in September 2022, and December 2022). The Employer does not deny receiving these: on the contrary, he attached copies of them to his notice of appeal. Further, a Compliance Notice was sent in July 2023. Receipt of any one of these communications should have alerted the Employer to his legal duties of re-enrolment, re-declaration of compliance and the deadline of 30 June 2023.

27. Each email gave the Employer more than adequate time to comply with his obligations. Whether or not an employer receives reminders, it is for them to be aware of their legal duties, and to ensure full and timely compliance. In this instance, the Employer failed to do so. That failure entitled the Regulator to issue a Compliance Notice.

28. The Employer seems to suggest that the Compliance Notice was not received – saying the Fixed Penalty Notice was the first correspondence received 'for a long time'. Even if the Compliance Notice was not received, the Regulator – having sent it to the correct registered office address (which to this day remains unchanged) – is entitled to rely on the statutory presumptions of proper service and receipt unless there is strong evidence to the contrary. No evidence to the contrary has been provided in this case.

29. The Employer has explained that the business's registered office is that of the accountant dealing with the company accounts so there was no need to change it when the business moved premises. The Employer has not explained why the company accountant would forward to the Director's home address the Fixed Penalty Notice (as the Director stated in his email review request to the Regulator) but not the Compliance Notice sent two months earlier.

30. The Employer has since provided evidence of the date of the business's move to new premises, and stresses the small size of the business as well as upheaval of the move, plus his priority in preserving the business and continued employment/payment of pensions of employees. Unfortunately, none of these issues excuse the failure to complete a re-declaration of compliance.

31. Only after the extended deadline granted by the Compliance Notice had passed – and indeed only after the Fixed Penalty Notice was served (meaning the Employer had had over seven months rather than five months to comply) – did the Employer apparently make any attempt to contact the Regulator to explain the business’s recent difficulties.

32. While I have some sympathy with the Employer’s distraction of pressing business and financial issues post-Covid, as a responsible employer he should have been aware long before the deadline in June 2023 of the need to submit to the Regulator a re-declaration of compliance. This is an important tool to enable the Regulator to check that employers are complying with their legal obligations. Understandable though the Employer’s action, or rather omission, in this case may be, regrettably it does not amount in law to a reasonable excuse for failing to comply with statutory duties.

33. In all the circumstances, I therefore determine that the Regulator was entitled to issue a Fixed Penalty Notice on 20 September 2023 for non-compliance with the Compliance Notice dated 26 July 2023.

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

35. However, the Regulator is able to accept the payment of penalties in instalments if a single payment will cause particular hardship. In this case, the Regulator has indicated that it would be willing to consider repayment options should the Employer advise that one single payment would cause financial difficulties.

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

37. No directions are necessary.

(Signed)

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

DATE: 25th April 2024