



NCN [2024] UKFTT 00420 (GRC).
0296

Case reference: PEN-2023-
PEN-2023-0297

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

**Heard: On the papers
Heard on: 23 May 2024
Decision given on: 24 May 2024**

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

Between

CATFORD SUPERMARKET LTD

and

THE PENSIONS REGULATOR

Appellant

Respondent

Decision in PEN/2023/0296

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

Decision in PEN/2023/0297

The reference is dismissed and the matter is remitted to the Regulator. The Escalating Penalty Notice is confirmed.

REASONS

Background

1. Given the overlap between these two references I have heard them together.
2. In reference PEN/2023/0296 Catford Supermarket Ltd (“the Employer”) challenges a fixed penalty notice (“the Fixed Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 4 August 2023 (Notice number 169379893988).
3. In reference PEN/2023/0095 the Employer challenges an escalating penalty notice (“the Escalating Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 5 September 2023 (Notice number 276856240862).
4. The Fixed Penalty Notice was issued under s 40 of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Compliance Notice dated 9 June 2023.
5. The Escalating Penalty Notice was issued under s 41 of the Pensions Act 2008. It required the Employer to comply with the Compliance Notice by no later than 2 October 2023. If the Employer failed to comply a penalty would accrue at a daily rate of £500 from 3 October 2023.
6. The Regulator completed a review of the decision to impose the notices and informed the Employer on 7 November 2023 that the notices were confirmed. The Employer referred the matter to the Tribunal on 23 November 2023.

The Law

7. The Pensions Act 2008 imposed a number of legal obligations on employers in relation to the automatic enrolment of certain ‘jobholders’ into occupational or workplace personal pension schemes. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.
8. Each employer is assigned a ‘duties start date’ from which the timetable for performance of their obligations is set. The Employer’s Duties (Registration and Compliance) Regulations 2010 specify that an employer must provide certain specified information to the Regulator within five months of their duties start date. This is known as a ‘Declaration of Compliance’. Where this is not provided, the Regulator can issue a Compliance Notice and then a Fixed Penalty Notice for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400. Where the Regulator is of the opinion that an employer has failed to comply with a Compliance Notice the Regulator can issue an Escalating Penalty Notice.
9. Under s.44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice or an Escalating Penalty Notice may make a reference to the Tribunal provided that a review has been carried out or an application for review has been made to the Regulator. The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, considering the evidence before it.

10. The Tribunal may confirm, vary or revoke a 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.

Evidence

11. I read and took account of a bundle of documents.

The facts

12. The Employer's duties start date was 1 January 2023. The Regulator wrote to the Employer twice in March 2023 reminding the Employer of its duties and of the deadline of 31 May 2023. One of the letters included a booklet which clearly sets out the Employer's obligations, including the fact that all Employers, whether or not they have eligible jobholders, must submit a declaration of compliance. The Regulator sent a further letter in May 2023 which stated, in red type, 'take immediate action to avoid a potential fine...Your declaration deadline is 31 May 2023. Do not ignore this letter, you need to act now.' These letters were sent to the registered office address of the Employer.
13. The Declaration of Compliance was not completed by the deadline of 31 May 2023, so the Regulator issued a Compliance Notice on 9 June 2023 with a deadline of 20 July 2023. As this was not complied with, the Fixed Penalty Notice was issued on 4 August 2023 requiring the Employer to pay a penalty of £400. The Fixed Penalty Notice required the Employer to comply with the Compliance Notice by 1 September 2023. As the Employer did not comply, the Escalating Penalty Notice was issued on 5 September 2023. All the notices were sent to the Employer's registered office address.
14. The declaration of compliance was completed on 17 October 2023.
15. On 1 November 2023 the Employer requested a review of the Penalty Notice. This was out of time but the Regulator conducted a review of its own initiative and the penalties were confirmed on 7 November 2023.

Submissions

16. The Notice of Appeal relies on the following grounds:
 - (i) The Employer did not receive 'the first 2 letters' from the Regulator and the Employer is unable to confirm why they did not receive the post.
 - (ii) As soon as the Employer received the letter they filed the declaration of compliance.
 - (iii) The Employer was not aware that it needed to file a declaration of compliance because all its employees were under the limit of the requirement to contribute to a pension scheme.
 - (iv) The Employer is a very small business and unable to pay the huge penalty in the current situation.
17. The Regulator's response dated 13 February 2024 submits that the notices were properly served and there is no reasonable excuse for not complying.

18. The Regulator submits that there is no basis for displacing the statutory presumption of service.
19. The Regulator submits that the Employer received several reminder letters, including an easy-to-read booklet setting out its obligations. As a responsible employer it is for the Employer to be aware of their legal duties and to ensure full- and on-time compliance with them.
20. The Regulator does not have any discretion in terms of the amount of the fine, these are set at £400 for an FPN and the amount of the daily accrual for an EPN is dictated by the size of the workforce.
21. If the Notices are upheld by the Tribunal the Regulator can discuss the possibility of a hardship application and payment plan options.

Conclusions

22. The statutory notices were sent to the Employer's correct registered office address. The Employer has not provided any evidence that might rebut the presumption of service. Taking into account the rebuttable presumption of service, and looking at all the evidence, I find that the notices were served on and received by the Employer.
23. The timely provision of information to the Regulator, so it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that the provision of a declaration of compliance within a specified timeframe is a mandatory requirement. Compliance with this duty a short time after the deadline has expired does not excuse a failure to comply.
24. I find that issuing the Fixed Penalty and the Escalating Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the applicable notice.
25. The letters sent to the Employer, along with easily accessible publicly available information, make clear that an Employer has to complete a declaration of compliance even if it has no eligible job holders. It is highly unlikely that none of these letters were received, when later correspondence sent to the same address arrived without difficulty. In any event, the Employer is responsible for ensuring that it is aware of and complies with its legal obligations. Lack of awareness is not a reasonable excuse.
26. The requirement to pay £400 is a significant burden for a small business such as the Employer. The escalating penalty of £5000 is a very significant amount of money for such a business.
27. The fact that the penalty is burdensome is inherent in it being a 'penalty'. The amount is prescribed by regulations made under the Pension Act 2008. Its amount reflects both the importance of complying with the employer duty provisions and the seriousness with which a failure to do so will be viewed. The Regulator has no discretion to issue a penalty notice for a lesser amount, nor does the Tribunal have the power to direct

substitution of a lesser penalty. The Regulator has offered to discuss financial hardship issues and to consider a proposal for a payment plan from the Employer.

28. For the above reasons I am satisfied that the Employer has not provided a reasonable excuse for not complying with the Compliance Notice. I determine that issuing the Fixed Penalty Notice and the Escalating Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Fixed Penalty Notice and the Escalating Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 23 May 2024