



NCN: [2024] UKFTT 00569 (GRC)

Case Reference: Pen/2024/0015/AE

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

Considered on the papers

05 June 2024

Decision given on: 01 July 2024

Before

TRIBUNAL JUDGE HUGHES

Between

BEEN LONDON DESIGN LIMITED

Appellant

And

THE PENSIONS REGULATOR

Respondent

Decision: The reference is accepted and the matter is remitted to the Regulator. The fixed penalty notice is revoked.

REASONS

1. By this reference Been London Design Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by the Pensions Regulator on 15 November 2023 (Notice number 161874711260).
2. The 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 20 September 2023.

3. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer on 12 December 2023 that the Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 20 December 2023.

4. The parties and the Tribunal agreed that this matter was 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 any submissions made by both parties.

The Law

5. 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.

6. Each employer is assigned a ‘staging 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 staging date. This is known as a ‘Declaration of Compliance’. An employer is required to make a re-declaration of compliance every three years. 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.

7. Under s.44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice may make a reference to the Tribunal provided that an application for review has first 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.

8. 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

9. The Employer’s registered office address has changed over the relevant period:

10. The Appellant is an employer with duties under the Pensions Act 2008. Its re-declaration deadline was 31 July 2023. The Appellant did not complete and submit its re-declaration of compliance by the required date confirming that the Employers’ Duties had been complied with by providing the prescribed information.

11. The Regulator submits in his response that they wrote to the Appellant on 9 August, 26 August and 6 September. All the letters were returned marked “gone away”. The letters were one compliance reminder and two Compliance Notices, they were all issued to the registered office address of Office 37, Innovation House, Discovery Park, Sandwich, Kent, CT13 9FF. According to Companies House, this was the correct registered office address for the Appellant at the time the notices were sent.

12. The Regulator has produced evidence from Companies House indicating that the Employer changed their registered office address, to Studio 21, 19 Rookwood Way, Fish Island, London, E3 2XT. The Regulator in its documents states that this occurred on 19 September and it issued

a compliance notice to this address on 20 September 2023 requiring compliance by 31 October.. In the bundle prepared by the Regulator is a copy of the Compliance notice with that date and address. However the Companies House record shows that that this filing occurred on 9 October 2023. It is worth examining the Regulator’s response to the appeal:

“11.The Respondent issued a 2nd Compliance Notice on the 6 September 2023. Again, this Notice was returned to the Respondent marked ‘addressee gone away’. (Annex E)

12.The above correspondence issued by the Respondent, consisting of one compliance reminder and two Compliance Notices, were all issued to the registered office address of Office 37, Innovation House, Discovery Park, Sandwich, Kent, CT13 9FF. According to Companies House, this was the correct registered office address for the Appellant at the time the notices were sent (Annex F).

13.Subsequently, the Appellant changed their registered office address, on the 9 October 2023 to Studio 21, 19 Rookwood Way, Fish Island, London, E3 2XT (Annex F).

14.The Respondent proceeded to issue a 3rd Compliance Notice on 20 September 2023 (Annex B). The 3rd Compliance Notice was sent to the current registered office address of Studio 21, 19 Rookwood Way, Fish Island, London, E3 2XT (Annex G). The 3rd Compliance Notice directed the Appellant to re-declare compliance, the step the Appellant deadline for compliance to 31 October 2023. The Respondent did not receive a response to this notice.

15.The deadline passed, and no re-declaration of compliance was submitted, so the Respondent elected to issue a Fixed Penalty Notice on 15 November 2023 (Annex A). The notice directed the Appellant to complete the re-declaration and pay the fine by 13 December 2023.”

13. For clarity it is worth stating that Annex F is a screenshot of a listing of filings by the company from the Companies House website. Annex B is indeed a compliance notice dated 20 September and is addressed to Fish Island. Since Fish Island was not the registered office at the date the notice was issued the Regulator in creating the bundle has relied on software to create the page from a model letter and the software has retrieved the address of the company held **at the time the page was created while dating the page with the date the 3rd Compliance notice was sent.** The Annex G which ;lists the current registered office is a summary page created in Companies House covering the date the company was created, the date the next accounts are due, etc as well as the the current registered office while the statement of case of the Regulator might read as though B and G are different copies of the same document; Annex G is simply an undated screengrab retrieved at some stage. The Employer completed the redeclaration of compliance on 17 November 2023 and it was acknowledged on 19 November.

14. On 1 December the Employer requested a review of the Penalty Notice stating that it had received a letter with the fine on 16/11/2023, *“but we never received a previous letter with the amount due to pay. I believe this is because it was sent to our previous registered address, to which we don't have access to anymore. For this reason we would like to appeal..”* On 12 December the Regulator confirmed that it had conducted a review and had upheld its decision:

“Where an employer fails to re-declare their compliance, the Regulator will issue a Compliance notice, and this notice will contain a deadline for when an employer must be

compliant. Been London Design Limited was issued with a Compliance notice on 20 September 2023.

Our records show that the Compliance notice and Fixed penalty notice were issued to the correct registered address of Studio 21, 19 Rookwood Way, Fish Island, London, E3 2XT. The notices have therefore been correctly issued.

The re-declaration of compliance was completed on 17 November 2023 after the Compliance notice deadline date of 31 October 2023. As a result, the Regulator has confirmed the Fixed penalty notice.”

15. The Employer received the outcome of the review on 12 December 2023 and appealed on 9 January 2024.

Submissions

16. The Notice of Appeal relies on the following grounds:

(i) We are appealing because we have not received a previous notice other than the Fixed penalty notice. We confirm that we never received the compliance notice at the address Studio 21, 19 Rookwood Way, Fish Island, London, E3 2XT. As soon as we received the Fixed penalty we immediately completed the re-enrolment duties.

17. The Regulator’s response dated 8 February 2024 submits that there is not reasonable excuse for failing to comply and that the decision to issue the Penalty Notice was fair, reasonable and proportionate.

18 The Compliance Notice and the Penalty Notice were correctly served. The Regulator sent a number of reminder letters.

19 The Regulator submits that the Employer has not disputed receipt of the Penalty Notice. There is a mere assertion of non-receipt of the Compliance Notices which does not rebut the statutory presumptions.

20. The Regulator says that it is clear is that this Employer failed to comply with its employer duties within the deadline provided in Compliance Notice and that it only complied with its duties some four months after the original deadline of 31 July 2023. Therefore, the Regulator says that the Penalty Notice was lawfully issued.

Conclusions

21. 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 of some value to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it has less information about the compliance of employers with their duties (they may or may not be complying with the fundamental duty – making payment of pension contributions, however they have not said to the Regulator that they are). It is for this reason that the provision of a re-declaration of compliance within a specified timeframe is a mandatory requirement.

22. The Regulator argues that 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.

23. The Employer asserts that the Compliance Notice was not received. The Regulator responds that it was sent to the registered office address, at which the Penalty Notice was received. Indeed it argued:

The grounds assert that as soon as the Fixed Penalty Notice was received, re-enrolment duties were immediately complied with. The Respondent acknowledges that the Appellant has now completed their declaration of compliance. However, the declaration of compliance was completed after the extended deadline in the 3rd Compliance Notice and after the issue of the Fixed Penalty Notice. Late or eventual compliance does not excuse the failure to comply with all the directions in the Compliance Notice or comprise exceptional grounds to revoke a penalty served following the failure to comply within the deadline in the Compliance Notice. In addition, the appellant concedes receipt of the Fixed Penalty Notice which was served at the same registered office address as the 3rd Compliance Notice. As no explanation has been provided why the Fixed Penalty Notice was received and not the 3rd Compliance Notice, the Respondent would argue the 3rd Compliance Notice was received and therefore the Appellant was fully aware of their automatic enrolment duties.

24. The Regulator has adopted an approach to cases such as this which relies entirely on the fiction that notices sent to a company's registered office are received by the directors. However they have reified this rebuttable presumption and appear to treat structuring operations to secure the collection of a penalty as the key proximate aim rather than the ensuring that employers are effectively reminded of their duties.

25. In many cases the Regulator has access to actual email business addresses or to email addresses of company officers which could be used to prompt companies to comply, however rather than seeking effective communication (there is no evidence in the papers before me that they have used other channels of communication) the Regulator relies on what is widely known to be an unreliable means of conveying information (registered offices are often not at a place of business for the company, they may be the address of an organisation which creates and sells companies, or of the company accountant who may have retired or moved, furthermore the underlying issue in this case is not compliance with the Companies Act, but ensuring pensions contributions are paid) – as distinct from meeting a legal test.

26. With this reification, when confronted with the claim that a notice was not received, in carrying out its review the Regulator blinded itself to the fact that compliance notices were not received and sought to protect the penalty rather than responding to the facts notified to it in its review. If it had properly addressed itself to the issues it would have revoked the penalty. I revoke the penalty

27. Furthermore in creating the bundle the Regulator (no doubt inadvertently) created a document for the purpose of litigation which was false and misleading.

28. The GRC rules provide:

10.—(1) Subject to paragraph (1A) the Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; or

29. I invite the Regulator and Employer to make submissions by 21 July on whether the Tribunal should or should not make an order for costs under Rule 10(1)(b) against the Regulator.

Signed Hughes

Date: 1 July 2024