



Neutral citation number: [2024] UKFTT 766 (GRC)

Case Reference: FT/PEN/2024/0069

**First-tier Tribunal
(General Regulatory Chamber)
Pensions**

**Heard by Cloud Video Platform
Heard on: 15 August 2024
Decision given on: 29 August 2024**

Before

JUDGE NEVILLE

Between

ETHAS (GB) LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:

For the Appellant: Mr Mayor, director of appellant company

For the Respondent: Ms Cranfield, solicitor

Decision: The reference is dismissed and the matter remitted to the Regulator.

REASONS

1. This appeal concerns a fixed penalty notice in the sum of £400 issued to the appellant by the respondent on 13 February 2024 under reference number 149316047583 in response to the appellant's failure to comply with the requirements of a Compliance Notice issued to it on 18 December 2023.

Legal framework

2. The respondent was established by section 1 of the Pensions Act 2004. Its objectives at section 5 include maximising compliance by employers with their duties arising

under Chapter 1 of Part 1 of the Pensions Act 2008, which concerns Automatic Enrolment.

3. The Employers' Duties (Registration and Compliance) Regulations 2010 are made under section 11 of the 2008 Act. These require employers to provide information to the respondent including the number of workers automatically enrolled, into a pension scheme, those already in a pension scheme, those not in either category, and details of the pension provider and scheme. That information must be provided within five months starting from the employer's staging date (which is when the automatic enrolment legislation first applies to that employer) and again every three years after that. It must be accompanied by a declaration that it is correct and complete to the best of the employer's knowledge and belief.
4. Where an employer fails to comply with its duties, the 2008 Act provides an escalating series of enforcement powers. First, section 35 provides that the respondent may issue a Compliance Notice directing the employer to take particular steps within a specified period. Second, if the employer fails to comply with the notice, section 40 provides that the respondent may issue a Fixed Penalty Notice ("FPN"). The Regulations set the amount of a FPN at £400. Third, again if the employer fails to comply with a Compliance Notice, section 41 provides that the respondent may issue an Escalating Penalty Notice ("EPN"). While not a statutory requirement, this is usually done when the employer has still not complied despite a FPN having been issued. An EPN specifies a further date by which the employer must comply with the Compliance Notice, and an accruing daily penalty for every day thereafter until it does. The Regulations set the daily penalty at a figure between £50 and £10,000, depending on how many relevant employees the employer has.
5. Insofar as is relevant in this case, and as explained by the Upper Tribunal in Philip Freeman Mobile Welders Ltd v The Pensions Regulator (Tribunal procedure and practice - tribunal jurisdiction) [2022] UKUT 62 (AAC), the ways in which compliance and penalty notices may be sent to an employer include sending it by post to, where it is a company, its registered address. By virtue of section 7 of the Interpretation Act 1978, a posted notice is deemed to have been received unless the contrary is proved. An employer who wishes to rebut the presumption must prove the notice was not received, and bare denial is unlikely to be sufficient.

The hearing

6. At the hearing I heard evidence from Paul Mayor, the appellant's director, and from Cathy Doherty, the respondent's relevant compliance officer. Each party made closing submissions and the Tribunal's decision was reserved.

Issues

7. There is no dispute that the FPN was received by the appellant. Arising from the parties' submissions, the issues for me to decide are as follows:

- a. First, was the Compliance Notice posted to the proper address? If not, then the appellant was never required to comply with it and the basis upon which the FPN was issued falls away.
- b. Second, has the appellant rebutted the presumption that it was received? If so, then again the basis for issuing the FPN falls away.
- c. Third, if the FPN was received, should the penalty of £400 be upheld?

Was the Compliance Notice posted to the proper address?

8. Ms Doherty is a Compliance & Enforcement Manager at the respondent, and gave evidence as to the systems it employs to generate and send notices. The arrangement with Capita described in Philip Freeman Mobile Welders Ltd v Pensions Regulator [2024] UKFTT 91 (GRC) came to an end with effect from 1 February 2022.
9. Sending of reminders and notices is automated by the respondent using its own computer system that records all interactions with employers, and initiates particular tasks based on a set of rules. For example, when an employer is approaching the three-yearly re-declaration obligation described at paragraph 3 above, the system will generate reminders to be sent by post and email according to particular templates. If the deadline passes without the necessary declaration being received, then a Compliance Notice is generated by the corresponding template being populated with the information held by the respondent. The resulting file is then sent at night or in the early morning to a company called Allied Publicity Services, who print it, put it in an envelope and send it by first class post on the same day. The files are all saved and associated with the employer's file. Where post is returned marked undelivered, this is logged and noted on file. The quality assurance checks undertaken across the process are described. Specifically with reference to this appeal, Ms Doherty has provided screenshots showing the Compliance Notice having been produced and posted on 18 December 2023.
10. Ms Doherty's evidence was coherent and comprehensive. Mr Mayor was unable to gainsay any of it. On the balance of probabilities, I find that the Compliance Notice was posted.

Has the appellant rebutted the presumption that the Compliance Notice was sent?

11. Mr Mayor accepts that the notice bears the correct address, this being the appellant's registered address at Companies House at the relevant time. It is the address of the appellant's accountant. The subsequent FPN was also sent to that address, and the accountant passed it on. That is, Mr Mayor says, the first he knew of any non-compliance. The Compliance Notice was not passed to him by his accountant. Mr Mayor had not checked with his accountant whether the Compliance Notice might have been received but not passed on to him, nor was any evidence adduced as to the reliability or otherwise of the system by which the unnamed accountant passes formal notices to the companies for whom it is the registered address. This is wholly insufficient to rebut the presumption that the notice was received, and I find that it

was. The appellant was thereby obliged to carry out the steps in the notice, and the respondent accordingly entitled to issue the FPN when it did not do so.

Should the penalty be upheld?

12. I should say immediately that Mr Mayor's credibility is not in doubt, and his evidence was entirely candid and honest. He explained that the first declaration of compliance had been made in 2017, he thought with the assistance of his payroll provider at the time. The payroll provider's email address was the one held by the respondent. The provider also submitted the re-declaration of compliance in 2020. After that, Mr Mayor moved to a new provider. Handover was done directly between providers, and he had assumed that pensions compliance moved with it. When he received the FPN he had asked the new provider why the re-declaration had not been done, and was told that it wasn't part of what had been handed over. Mr Mayor had never checked as he had forgotten that there was a three yearly requirement to submit a declaration. The relevant email reminders all bear the email address of the old provider and Mr Mayor was unable to say if she had received them or, if she had, what she had done with them. There are numerous posted reminders that bear the name of the appellant's trading premises, where Mr Mayor works, but he was adamant that none had arrived.

13. I have some sympathy with Mr Mayor, who is clearly someone to whom compliance with obligations is important. He had placed this particular obligation in the hands of others and assumed that it would be dealt with. While delegating regulatory compliance can be sensible for a business, here the appellant did not ensure that this particular task was contracted to be undertaken by his new provider, did not update the respondent with the correct email details following departure of the old provider, and has not sought any redress against his new provider, old provider or his accountant. The overall integrity of the Automatic Enrolment scheme depends on the effectiveness of the enforcement methods described at paragraph 4 above, which would be undermined if penalties could be avoided through the delegation I have described. The issue of the FPN in response to the appellant's breach is appropriate, and there are no circumstances in the present case that render the penalty unreasonable or unfair.

Signed

Date:

UTJ Neville

15 August 2024

(sitting as a Judge of the First-tier Tribunal)