



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Pensions Regulation**

Tribunal Reference: PEN/2016/0019
Appellants: S R and K S Kotecha (t/a Hewlett Stores)
Respondent: The Pensions Regulator

Judge: Anthony Snelson

DECISION NOTICE

1. By this reference, Mr Sandip Kotecha and his partner K S Kotecha ('the Appellants'), who jointly run a small retail business in Cheltenham under the trading name of Hewlett Stores, challenge a Fixed Penalty Notice ('FPN') issued by The Pensions Regulator ('TPR'), requiring them to pay a penalty of £400 for failing to comply with a Compliance Notice ('CN') by the deadline of 7 December 2015.

The statutory framework

2. The Pensions Act 2008 ('the Act') imposes a number of requirements on employers in relation to the automatic enrolment ('AE') of certain 'job holders' in occupational or workplace personal pension schemes. TPR has statutory responsibility for securing compliance with those requirements. Section 35 of the Act (hereafter, section numbers will be given as, say, s1, s35 etc) empowers it to issue a CN if satisfied that a person has contravened one or more of the employer duty provisions.

3. By s40 of the Act, TPR may issue a fixed penalty notice in the sum of £400¹ to a person if it is of the opinion that he/she has failed to comply with (among other things) a CN.

¹ The figure is prescribed by the Employers' Duties (Registration and Compliance) Regulations 2010, reg 12.

4. TPR may review a FPN on the application of the person affected (s43(1)(a)). The effect is to suspend the FPN pending the outcome of the review (s43(4)). The possible outcomes are confirmation, variation and revocation of the FPN; in the event of revocation, TPR may substitute a different Notice (s 43(6)).

5. By s44 of the Act, provision is made for references to the First Tier Tribunal ('FTT') or (in circumstances which do not apply here) Upper Tribunal ('UT') in (so far as material) the following terms:

- (1) A person to whom a notice is issued under section 40 or 41 may, if one of the conditions in subsection (2) is satisfied, make a reference to the Pensions Regulator Tribunal in respect of—**
 - (a) the issue of the notice;**
 - (b) the amount of the penalty payable under the notice.**
- (2) The conditions are—**
 - (a) that the Regulator has completed a review of the notice under section 43;**
 - (b) that the person to whom the notice was issued has made an application for the review of the notice under section 43(1)(a) and the Regulator has determined not to carry out such a review.**
- (3) On a reference to the Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning when the Tribunal receives notice of the reference and ending—**
 - (a) when the reference is withdrawn or completed, or**
 - (b) if the reference is made out of time, on the Tribunal determining not to allow the reference to proceed.**
- (4) For the purposes of subsection (3), a reference is completed when—**
 - (a) the reference has been determined,**
 - (b) the Tribunal has remitted the matter to the Regulator, and**
 - (c) any directions of the Tribunal for giving effect to its determination have been complied with.**

6. In dealing with a reference the powers of the FTT are very wide. The Pensions Act 2004, s103 includes:

- (3) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.**

In *In the matter of the Bonas Group Pension Scheme* [2011] UKUT B 33 (TCC) Warren J, sitting in the UT, held that there was nothing in s103 or elsewhere to constrain the tribunal's approach to a reference. Its function is not that of an appellate court considering an appeal.² It must simply make its own decision on the evidence before it (which may differ from that before the Regulator).

7. By the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r8(3)(c) the Tribunal may strike out proceedings in whole or in part if satisfied that they (or the material part) have/has no reasonable prospect of success. I remind myself that the norm is for an aggrieved party to be permitted to raise his challenge to an exercise of executive power (particularly

² Although the terminology of 'appeal', 'appellant' etc is used

one involving a sanction or penalty) at a hearing. The power to strike out is to be used sparingly, particularly where the facts are in question.

The key facts

8. The material facts are not in dispute. They can be summarised shortly as follows (I borrow from TPR's 'Response' document).

8.1 TPR wrote to the Appellants between June 2014 and September 2015, to remind them of their AE obligations. Letters sent in June and September 2015 focussed particularly on their duty to make a timely declaration of compliance, drawing attention to the deadline of 2 November 2015 for doing so.

8.2 The Appellants did not meet the deadline for completion of that task and TPR therefore issued a CN dated 10 November 2015 requiring them to deliver a declaration of compliance by 7 December 2015. The CN contained, among other things, (a) the standard warning that if the Appellants did not comply with the Notice, TPR might issue them with a FPN requiring payment of a £400 penalty, and (b) details of the website through which the declaration of compliance could be submitted and, as an alternative, a postal address to which the declaration could be sent in hard copy.

8.3 The Appellants failed to deliver the declaration by the due date and, on 9 December 2016, in accordance with its standard policy, TPR issued a FPN. In the usual way, the document drew attention to the right to apply for a review.

8.4 The Appellants presented an application for a review of the FPN which, on 2 February 2016, TPR rejected on the basis that the FPN was validly and appropriately served. A fresh CN was issued, together with a revised FPN.

8.5 It seems to be agreed that the Appellants' declaration of compliance was delivered to TPR quite soon after they became aware of their default.

8.6 The notice of appeal is dated 24 February 2016.

The appeal

9. In their grounds and supporting documents, the Appellants acknowledge a "slight oversight" in failing to declare compliance by the due date, but argue in mitigation that their omission was minor, that the AE compliance procedure was "daunting" and entirely new not only to them but to their accountant on whom they had relied, that the accountant had advised them that "all seemed fine", and that the penalty of £400 was "very harsh and crippling to the cash flow of [their] very small business". No evidence is before me to support the last point.

10. In its response, TPR contends that the Appellants have failed to demonstrate a "valid or reasonable" excuse for their non-compliance and seeks a strike-out of the appeal on the ground that it has no reasonable prospect of success. TPR contends that there is no such thing as a minor breach of a duty to

do something by a specified date: if the deadline is not met the breach is complete. Nor (says TPR) do the Appellants make out mitigating circumstances capable of justifying the upholding of the appeal. It is further pointed out that the FPN is in a set sum and TPR has no discretion to impose a penalty of less than £400.

Discussion and conclusions

11. I accept that the Appellants may well have found the requirements of the AE regime daunting and difficult to get to grips with. Many employers – particularly small employers – do. I also accept that they did not wilfully put themselves in breach and that they sought assistance. And, belatedly, they have declared compliance. This is not a case of wholesale failure to engage. But I do not consider that these factors warrant the conclusion that imposing the penalty was anything other than appropriate having regard to all the other circumstances, and in particular (a) the salutary purposes which the AE regime is designed to achieve (including ensuring that qualifying workers have the chance through occupational pensions to enjoy dignity and comfort in retirement); (b) the need for the mandatory requirements of the scheme to be backed up by an effective and robust enforcement mechanism; (c) the need for other employers to understand that those requirements will be enforced; and (d) the fact that the Appellants received ample notice from TPR of the existence and nature of the AE scheme in general and of its specific obligations in relation to the declaration of compliance in particular. In my view, the correct approach is to look to the Appellants to show a good reason why TPR should not have followed its usual practice of meeting a breach of a CN with a FPN. On that test, I am satisfied that they fall a very long way short.

12. Is the appeal so weak as to warrant a strike-out? In my view it is. I am satisfied that it raises no arguable challenge to the FPN and has no reasonable prospect of success.

Outcome

13. For the reasons stated, I strike the reference out and remit the matter to the Regulator. No further direction is required.

Anthony Snelson

Judge of the FTT

Dated 16 September 2016