



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

Tribunal reference: PEN/2021/0282

Appellant: Pauline Foggo

Respondent: The Pensions Regulator

Judge: Hazel Oliver

DECISION NOTICE

1. By this reference Pauline Foggo (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 13 August 2021 requiring the appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.
2. The Pensions Act 2008 (the “Act”) imposes a number of requirements on employers in relation to the automatic enrolment of certain “job holders” in occupational or workplace personal pension schemes.
3. The Regulator has statutory responsibility for ensuring compliance with these requirements. Under Section 35 of the Act, the Regulator can issue a compliance notice if an employer has contravened one of more of its employer duties. A compliance notice requires the person to whom it is issued to take (or refrain from taking) certain steps in order to remedy the contravention and will usually specify a date by which these steps should be taken.
4. Under Section 40 of the Act, the Regulator can issue a fixed penalty notice if it is of the opinion that an employer has failed to comply with a compliance notice. This requires the person to whom it is issued to pay a penalty within the period specified in the notice. The amount is to be determined in accordance with regulations. Under the Employers' Duties (Registration and Compliance) Regulations 2010 (the “2010 Regulations”), the amount of a fixed penalty is £400.

5. Notification may be given to a person by the Regulator by sending it by post to that person's "proper address" (section 303(2)(c) of the Pensions Act 2004 (the "2004 Act")). The "last known address" is the proper address on which to serve notices from the Regulator someone who is not a corporate body or firm, as set out in section 303(6)(d) of the 2004 Act (applied by section 144A of the Act). Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. This includes compliance notices issued under the Act.

6. Section 44 of the Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal in respect of the issue of the notice and/or the amount of the penalty payable under the notice. A person may make a reference to the Tribunal provided that an application for a review has first been made to the Regulator under Section 43 of the Act. Under Section 103(3) of the 2004 Act, the Tribunal must then "determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it." The Tribunal must make its own decision following an assessment of the evidence presented to it (which may differ from the evidence presented to the Regulator), and can reach a different decision to that of the Regulator even if the original decision fell within the range of reasonable decisions (*In the Matter of the Bonas Group Pension Scheme* [2011] UKUT B 33 (TCC)). In considering a penalty notice, it is proper to take "reasonable excuse" for compliance failures into account (*Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 104 (AAC)). On determining the reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate.

7. Under section 11 of the Act, an employer who is subject to automatic enrolment duties must give prescribed information to the Regulator - known as a declaration of compliance. This information is prescribed in Regulation 3 of the 2010 Regulations. Under Regulation 4, an employer must also submit a re-declaration of compliance after the automatic re-enrolment date (which occurs on the third anniversary of the duties start date). This applies whether or not any staff are re-enrolled in the pension scheme.

Facts

8. The facts are set out in the appellant's notice of appeal document and the Regulator's response document, including the annexes attached to those documents. I find the following material facts from those documents.

9. The appellant is the employer for the purposes of the various employer duties under the Act, with a staging date of 6 January 2018. Automatic re-enrolment duties applied between October 2020 and April 2021. The appellant's re-declaration of compliance was due to be provided by 7 June 2021.

10. The Regulator sent the appellant two letters in October 2020 and March 2021 containing reminders about the automatic re-enrolment duties, including the deadline of 7 June. A final letter headed "urgent action is required" was sent on 16 June 2021. This letter gave a further 14 days to complete the re-declaration, and expressly stated "Failure to complete your declaration of compliance may result in you being fined".

11. The Regulator issued a compliance notice to the appellant on 1 July 2021. This stated, “You must tell us how you have met your employer duties by completing your re-declaration of compliance. This needs to be completed by 11 August 2021”. The notice expressly states, “If you don’t complete your declaration of compliance by 11 August 2021, we may issue you with a £400 penalty”.

12. The appellant did not comply with the compliance notice by 11 August 2021. The Regulator issued a fixed penalty notice to the appellant on 13 August 2021.

13. All correspondence was sent by the Regulator to the appellant’s address. This was the address that was provided as the address for the employer in the original declaration of compliance. The Regulator says there is no record of the appellant contacting them to update her employer contact details. None of these letters were returned as undelivered.

14. The appellant applied for a review to the Regulator. The Regulator confirmed the penalty notice on 22 August 2021. The appellant did complete the re-declaration of compliance on 14 August 2021.

Appeal grounds

15. The appellant says that she did not receive any letters from the Regulator to complete compliance, either to herself or Belhaven Accounting. She says that recent correspondence from the Regulator has been received very late.

16. The Regulator says that the appellant has not provided exceptional reasons that warrant revocation of the fixed penalty notice. The compliance notice was validly served by posting it to the appellant’s last known address, and the presumption of service applies. The appellant has not provided any detail or evidence to rebut this presumption, other than stating no other correspondence had been received. A bare assertion of non-receipt is not sufficient to overturn the presumption of service (referencing the Upper Tribunal’s decision in *London Borough of Southwark v Akhtar* 2017 UKUT 150).

Conclusions

17. The re-declaration of compliance is a central part of the Regulator’s compliance and enforcement approach. It is necessary so that the Regulator can ensure that employers are complying with their automatic enrolment duties, and this is why it is a mandatory part of the system. Employers are responsible for ensuring that these important duties are all complied with, and there needs to be a robust enforcement mechanism to support this system.

18. I do accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses. However, the Regulator goes to some lengths to provide employers with information about their duties and the relevant deadlines. The re-declaration of compliance is a separate and important part of the system, and the fact that an employer has complied with its other automatic enrolment duties does not mean that the re-declaration of compliance should not be enforced.

19. I have considered whether issuing the fixed penalty notice was an appropriate action for the Regulator to take in this case and find that it was. The Regulator had sent the appellant information in October 2020 and in March and June 2021 about the need to complete a re-declaration of compliance, including the relevant deadline. The appellant failed to comply with the further deadline set out in the compliance notice.

20. I have considered whether the compliance notice was legally served at the appellant's proper address and find that it was. Under the 2004 Act, the Regulator can serve this notice on an individual (who is not a company or firm) by sending it to their last known address. The notice was sent to the address given in the original declaration of compliance. I note that this is the same address as given in the re-declaration of compliance and the appeal document.

21. I do not find that the appellant had a reasonable excuse for failing to comply with the compliance notice.

22. I have considered the appellant's argument that they did not receive the compliance notice, or previous correspondence from the Regulator. Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. The appellant has not rebutted this presumption.

23. The fixed penalty notice was received by the appellant when it was sent to the same address. The appellant has provided no explanation as to why the correspondence about the declaration of compliance was not received by her, including the compliance notice itself, in circumstances where it appears to have been sent to the correct address and the fixed penalty notice was received. As noted by the Regulator, a mere assertion of non-receipt is not sufficient to overturn the presumption of receipt. The appellant does not say that the letters were incorrectly addressed.

24. I note the appellant's comments that other correspondence from the Regulator has been received very late. It is unclear what this refers to. In any event, this does not explain why the compliance notice was not received, when the fixed penalty notice was received. I also note that the appellant asked for a review on 14 August 2021, which indicates that the fixed penalty notice was received one day after it was sent. Applying the presumption of receipt, I find that the compliance notice was received by the appellant.

25. For the above reasons, I determine that issuing the fixed penalty notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the fixed penalty notice. No directions are necessary.

Hazel Oliver
Judge of the First-tier Tribunal
Dated: 22 February 2022
Date Promulgated: 24 February 2022