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Case Reference: PEN/2022/0151
PEN/2022/0159

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

Heard: Paper Consideration

Heard on 3 January 2023 in Chambers

Decision given on 13 January 2023

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

BOLTON GATE FARM LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Allowed

REASONS

1. Bolton Gate Farm Limited (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 25 April 2022, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice. The Appellant has also appealed against an escalating penalty notice issued by the Regulator on 25 May 2022.

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 or 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. The Regulator can also issue an escalating penalty notice for continued non-compliance under section 41 of the Act.

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 registered office or principal office address is the proper address on which to serve notices on a body corporate, as set out in section 303(6)(a) 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 and an escalating penalty notice has been issued to make a reference to the Tribunal in respect of the issue of the notices and/or the amount of the penalty payable under the notices. A person may make a reference to the Tribunal if 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. This date is the "duties start date". The declaration of compliance must be provided within five months of the duties start date (Regulation 3(1)(b)).

Facts

8. The facts are set out in the Appellant's notice of appeal documents, the Regulator's response document and the Appellant's reply, 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. The Appellant's duties start date was 27 August 2021. The Appellant's declaration of compliance was due to be provided by 26 January 2022. The Appellant did enrol its staff in a pension scheme, but did not complete a declaration of compliance by the required date.

10. The Regulator sent the Appellant three letters between October 2021 and January 2022 about the duty to complete a declaration of compliance. These letters were all addressed to "**Bolton Gate Farm Limited, Bolton Gate Farm, Leek Road, Weston Coyney, Stoke on Trent, ST3 5BD**"

11. The Regulator issued a compliance notice to the Appellant on 24 February 2022. The Appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the Appellant on 25 April 2022. The Appellant did not pay the penalty or comply with the compliance notice. The Regulator issued an escalating penalty notice on 24 May 2022, with a deadline for compliance of 21 June 2022. All of these notices were sent to the same address as above.

12. The Appellant telephoned the Regulator on 17 June 2022 to say he had recently emptied a mailbox and found the notices. He submitted a review request for all three notices on the same date. The Regulator applied for a review to the Regulator. The Regulator took the view that the fixed penalty notice could not be reviewed as it was more than 28 days after it was issued. The Regulator upheld the escalating penalty notice but extended the deadline until 21 August 2022. The Appellant completed the declaration of compliance on 15 July 2022, and so no penalty was actually imposed under the escalating penalty notice.

13. The Regulator conducted a review of both penalty notices after receiving the appeal notice but decided that both notices should be confirmed.

14. The address used by the Regulator is not the Appellant's registered office address, which is 40 Carter Street, Uttoxeter ST14 8EU (and also the address of the Appellant's accountant).

Appeal grounds

15. The Appellant's appeal grounds are that they did not receive the notices, as they were sent to the post box of another business located at the same address. As a new business, it would not know about auto-enrolment obligations without receiving the relevant information. The registered office address is deliberately the address of their accountants who help with PAYE and auto-enrolment, with a functioning post box that is managed for their clients. The post box that was used for the correspondence from the Regulator is 100 metres from their trading address, which is why they use their accountant's address to avoid mishap.

16. In response, the Regulator says that there is some confusion about dates, and arguably the Tribunal did not have jurisdiction at the time the appeal was issued – but they are not requiring a further appeal to be lodged as they conducted their own review of both notices under section 43 of the Act.

17. The Regulator maintains that the notices should be upheld, and says the appeal grounds do not amount to a reasonable excuse. A google search for the Appellant's website shows the address that was used for sending the notices. This is the principal office address, and so the notices were properly served. Whether the Appellant chooses to ignore post and how they manage post sent to this address is a matter for them, and the Appellant did eventually empty the post box at their principal office and find the notices sent by the Respondent.

18. The Appellant submitted a reply to the Regulator's response, which is discussed below.

Conclusions

19. The 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.

20. I have considered whether the compliance notice was legally served at the Appellant's proper address. Under the 2004 Act, the Regulator can serve this notice on a limited company by sending it to either the company's registered office or to its principal office.

21. The Regulator says that the compliance notice was sent to the principal office address. The Appellant disputes this. The Appellant's reply says that the principal office address, defined as where the business records, accounts, paperwork and other administration is carried out, is either the owner's home address or his account's address. The Appellant's café business shares the same address as Bolton Gate Saddlery, Horseshoe Cottage and Bolton Gate Farm House.

22. The Regulator has not explained where it obtained the address it used for correspondence, or why it did not use the registered office address. It appears that the address that was used is the correct address for the Appellant's actual café business, although this address is shared with other properties. This is the principal office address in that it is the address where the Appellant's business actually operates. The notice was therefore served at the Appellant's proper address, as it was addressed to the Appellant at its main business address.

23. Even if the compliance notice was properly addressed to the principal office, the Appellant may still have a reasonable excuse for failing to comply with the compliance notice.

24. The Appellant's reply provides further detail about what happened. The Appellant says that the mailbox that the correspondence was delivered to was there long before Bolton Gate Farm Ltd was established as a company and was specifically for the tenant at Horseshoe Cottage. The tenant left the property in spring 2021 and had all mail diverted to her new address. The box was left locked. It overflowed when the diversion came to an end, and the Appellant then forced the lock and opened the box. It mainly contained junk mail addressed to Horseshoe Cottage. It also had unwanted mail for Bolton Gate Farm House and the Saddlery, and correspondence to the Appellant from the Regulator. The Appellant says that business administration is dealt with by email, and packages are successfully delivered to the café on a daily basis. The Appellant says that the mailbox was never used as part of effective running of the café and provided some photographs to show the location of the box.

25. I accept this evidence from the Appellant. I find that the Appellant genuinely did not see the compliance notice, fixed penalty notice or escalating penalty notice until the locked mailbox was forced open in June 2022. The compliance notice was not received by the Appellant until after its deadline had expired. Although the notice was correctly served, the Appellant has rebutted the presumption of service.

26. I have also considered whether the Appellant ought to have been checking the mailbox more regularly. The Regulator suggests that the Appellant chose to ignore post and did not manage their post properly. I do not agree, based on the information in the Appellant's reply. The mail was in a locked box that did not belong to the café. The Appellant was not expecting correspondence from the Regulator, or other correspondence relating to the business, to be sent to this mailbox instead of to the registered office address.

27. I therefore find that the Appellant did have a reasonable excuse for failing to comply with the compliance notice. The Appellant did not receive the notice before the deadline for compliance, and this happened because it was placed in a locked mailbox that was not used by the Appellant's business. This means that penalties for non-compliance should not have been issued.

28. For the above reasons, I determine that issuing the fixed penalty notice and the escalating penalty notice was not the appropriate action to take in this case. I remit the matter to the Regulator and direct that both penalty notices should be set aside.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 11 January 2023