



[2023] UKFTT 00057 (GRC).

Case Reference: PEN/2022/0158

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

**Heard by: On the papers  
Heard on: 11 January 2023  
Decision given on: 12 January 2023**

**Before**

**JUDGE SOPHIE BUCKLEY**

**Between**

**TRAWLER LIMITED**

Appellant

**and**

**THE PENSIONS REGULATOR**

Respondent

**Decision:** The reference is dismissed, and the matter is remitted to the Regulator. The penalty notice is confirmed.

**REASONS**

*Background*

1. By this reference Trawler Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by the Pensions Regulator on 21 June 2022 (Notice number 12679631100).
2. The parties have agreed to the Reference being determined on the papers under rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and I am satisfied that I can properly determine the issues without a hearing. I have therefore considered the Employer’s Notice of Appeal and supporting documents, the Regulator’s response and its annexes.
3. 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 25 April 2022.
4. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer on 28 June 2022 that the Penalty Notice was confirmed. The Employer referred the matter to the Tribunal.

#### *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’. 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 staging date was 4 October 2021. The statutory deadline for completing the Declaration of Compliance was 3rd March 2022. As the Regulator had not come aware of the Employer until on or around 17 January 2022 the Regulator extended the deadline to 24 March 2022.

10. The Regulator sent an initial letter and guidance, including notice of an extended deadline for submitting the Declaration of Compliance, to the Employer in January 2022. The letter stated that the Employer had to ‘take immediate action to avoid a potential fine’. The letter set out the steps that had to be taken and enclosed a document entitled ‘The essential guide to automatic enrolment’.

11. The letter contained the following:

**If you don't comply**

Although you have until 24 March 2022 to complete your declaration of compliance, your statutory declaration of compliance deadline is 3 March 2022, which is five months from your duties start date. If we need to take any enforcement action, this will be based on your statutory declaration of compliance deadline.

**Do not ignore this letter, you need to act now. If you do not complete your legal duties, including submitting your declaration of compliance on time, you may be subject to fines.**

12. The Declaration of Compliance was not completed by the deadline of 24 March 2022.

13. On 8 April 2022 the Regulator sent a letter informing the Employer that ‘urgent action was required’. The letter gave the Employer a further 14 days to complete the Declaration of Compliance and informed the Employer that failure to complete a Declaration of Compliance may result in a fine.

14. On 13 April 2022 the Regulator received a call from Mohammed Hafiz in response to the letter of 8 April 2022. The note of the call states:

MH called in relation to the WL on the org record he has stated he needs help with the DOC csa will guide the customer to compliance.

15. The Declaration of Compliance was created by an agent for the Regulator, during the telephone call which took place on 13 April 2022. The Regulator’s records show that the Declaration of Compliance could not be completed at that time because the Employer was not able to confirm its PAYE number.

16. The Declaration of Compliance was not completed by the extended deadline, so the Regulator issued a Compliance Notice on 25 April 2022 with a deadline of 6 June 2022.

17. On 12 May 2022 there was a phone conversation between the Regulator and the Employer. The note of the call states:

OC attempted – IDV not cleared, Advised Caller org has outstanding AE duties. Caller stated this is currently being looked into.

18. ‘OC attempted – IDV not cleared’ means that the call could not take in place in full because the Employer was not able to protect provide the correct ID validation information.

19. As the Compliance Notice was not complied with, the Penalty Notice was issued on 21 June 2022 requiring the Employer to pay a penalty of £400.
20. The Employer completed the Declaration of Compliance on 22 June 2022 stating that the business had no workers employed within the organisation.
21. On 22 June 2022 a review request was made by Mohammed Hafiz, stated to be the owner of the company. The review request states:

Am appealing against the penalty notice of £400 fine, due to mis communication with my accountant, who was originally supposed to fill the pension regulator, but due to him being on long holiday in Pakistan, he forgot to notify and fill the form for pension scheme, (online pension regulator)

22. On 24 June 2022 an email was sent to the Regulator by Haroon Raja of H Raja Associates, the Employer's accountants. It states:

We act as accountants to the above and have been passed on correspondence from yourselves dated 21st June which asks our client to pay a penalty of 400 pounds for non compliance.

We would bring to your attention that previously when the correspondence was passed onto us we did go on our website and tried to enter the details in order to complete the compliance but unfortunately every time we tried to do that we were not successful. We do not know what the issue is with this client. For your information, our client employees staff on part time basis and their pay is well below the level required for any staff to be put into a workplace pension. We look forward to your comments and further instructions.

23. The penalty was confirmed on 28 June 2022 in response to the review request dated 22 June 2022.
24. On 4 July 2022 the Regulator wrote to the accountant in response to the e-mail of 24 June 2022, highlighting, amongst other things, that the declaration of compliance had indicated that there were no employees, contrary to the e-mail of 24 June 2022.
25. Mr. Raja wrote again to the Regulator on 8 July 2022 stating as follows:

I can assure you that I tried to comply with the declaration of compliance prior to the deadline but unfortunately whatever the reason the portal did not allow me to do so. This has happened on two previous occasions with different clients. Every time a notice came I tried to go online and same problem occurred. On 22 June when I tried yet again it worked and I was able to complete the declaration of compliance.

Its not that difficult to complete the declaration which takes only a few minutes but the system or the portal did not allow me to do so. To penalise the client with a penalty of £400 is a huge financial strain on a small business which is trying to take off the ground during these difficult times.

26. The Employer referred the matter to the Tribunal.

### *Submissions*

27. The Notice of Appeal relies on the following:
- (i) The accountants tried on several occasions to complete the Declaration of Compliance but the details could not be entered. The accountants tried again successfully on 22 June;
  - (ii) The Employer employs two part-time employees and their pay is below the amount required to make any pension contributions;
  - (iii) The email address held by the Regulator is not valid;
  - (iv) No notices were received.
28. The Regulator's response dated 29 September 2022 submits that the grounds of appeal do not amount to a reasonable excuse for failing to comply with the Compliance Notice or comprise ground to revoke the Fixed Penalty Notice.
29. The Regulator relies on the presumption of due service and receipt of the Compliance Notice. The Employer has failed to overturn that presumption. The Compliance Notice was sent to the registered office address and was not returned undelivered. The Fixed Penalty Notice was received at the same address. The letter of 8 April 2022 was received because the Employer telephoned the Regulator in response to that letter on 13 April 2022. The Fixed Penalty Notice states that the Employer has failed to comply with the Compliance Notice. It does not state that the Employer has failed to file a Declaration of Compliance. The fact that the Employer completed and submitted its Declaration of Compliance upon receipt of the Fixed Penalty Notice suggests that it had received preceding correspondence. The first mention of non-receipt of correspondence was in the grounds of appeal.
30. The Employer asserts that the email address held by the Regulator is not valid. It is not clear to which email address this refers or to which correspondence this relates.
31. No detail has been provided of any technical difficulties in completing the Declaration of Compliance. There is no supporting evidence.
32. The Regulator's records show that the Declaration of Compliance was originally created by an agent for the Regulator, during the telephone call which took place on 13 April 2022. The records also show that the Declaration of Compliance could not be completed at that time because the Employer was not able to confirm its PAYE number. In addition, the Regulator's records show that an online account was created by "Mohammed Hafiz" (the Appellant's director) on 22 June 2022 at 20.36. This suggests that 22 June 2022 was the first attempt by the Employer itself to submit its Declaration of Compliance.
33. Technical difficulties do not amount to a reasonable excuse for a failure to comply because it was open to the Employer to telephone the Regulator for assistance. The Employer did not follow up the telephone call on 13 April 2022.
34. Even if the employees do not meet the criteria for automatic enrolment the Employer is still obliged to complete the Declaration of Compliance.
35. If miscommunication/ the accountant being away is relied on as a ground of appeal, this is not a reasonable excuse for non-compliance.

### *The Employer's reply*

36. By email dated 7 October 2022 the Employer provided the following reply:

The only response we have to The Pension Regulator is that the person who responded to their email or had any contact with The Pensions Regulator is not connected to the business, has no authority to act on behalf of Trawler Ltd, the email address does not belong to any authorised person connected to Trawler Ltd. We are officially appointed Accountants who deal with PAYE, Pensions, Annual accounts, Companies House, HMRC.

### *Conclusions*

37. 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 crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that the provision of a Declaration of Compliance within a specified timeframe is a mandatory requirement. The fact that the Employer has now complied with this duty does not excuse a failure to comply.

38. I find that issuing the Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.

39. I conclude that the Employer did not have a reasonable excuse for failing to comply.

40. I find on the balance of probabilities that the postal correspondence and the Compliance Notice were received by the Employer for the following reasons:

- a. The correspondence and the Compliance Notice were sent by post to the correct registered office address.
- b. The assertion that notices had not been received was not made in the application for a review, nor in the previous correspondence from the accountants dated 24 June 2022 and 8 July 2022.
- c. Mr. Raja states in his email dated 8 July 2022 that he tried to comply with the declaration of compliance prior to the deadline. This strongly suggests that he was aware of the Compliance Notice.
- d. The Declaration of Compliance was completed shortly after the Fixed Penalty Notice was received, even though the Fixed Penalty Notice makes no mention of a Declaration of Compliance.
- e. The letter of 8 April 2022 and the Fixed Penalty Notice were received at the same address.
- f. There is a bare assertion in the notice of appeal that notices were not received, but no evidence to support this.
- g. There is a rebuttable presumption of service and receipt of the Compliance Notice. It has not been rebutted in this case.

41. The reference to the Regulator having the wrong email address is unclear. In any event the Compliance Notice and the letters were sent by post.

42. The duty to make a Declaration of Compliance was set out clearly in the letter in January 2022. It was further explained to the Employer in the telephone conversation of 13 April 2022, at a point at which the Employer could still have complied before the deadline. The Declaration of Compliance was started during that telephone call but could not be completed because the Employer was not able to confirm its PAYE number. There is no explanation why the Employer did not call back with its PAYE number. If it had, the declaration could have been completed in time.
43. I find that the Employer ought to have been aware of the duty to make a Declaration of Compliance and the consequences of not doing so.
44. It is not clear when the accountant attempted to submit the Declaration of Compliance. The accountant states that this was prior to the deadline but the Regulator's records show that the account was only set up on 22 June 2022. I accept that it is possible that the difficulties were so extensive that the accountant was not even able to set up an account. However, it would have been reasonable for the accountant to telephone the Regulator for assistance, rather than letting the deadline pass. He did not do so.
45. The fact that the Employer's employees did not meet the criteria for automatic enrolment is irrelevant.
46. To the extent that the Employer relies on mistakes by his agent (the accountant) this does not absolve the Employer of his legal responsibilities.
47. The reply by the Employer to the Regulator's response is ambiguous. It is unclear which response to the Regulator's emails or contact with the Regulator are said to have been with an unauthorised person. None of my findings above rely on correspondence sent by email. Any contact with the Regulator was either with Mohammed Hafiz, the director, or Mr. Haja, the accountant. In the circumstances this does not alter my conclusions set out above.
48. For the above reasons I am satisfied that the Employer has not provided a reasonable excuse for not complying with the Compliance Notice. I determine that issuing the Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 11 January 2023