



[2023] UKFTT 00058 (GRC).

Case Reference: PEN/2022/0161

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

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

Before

JUDGE SOPHIE BUCKLEY

Between

LOPOKA TRANS LTD

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 Lopka Trans Ltd (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by the Pensions Regulator on 1 June 2022 (Notice number 1478256841).
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 6 April 2022.
4. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Employer that the Penalty Notice was confirmed. The outcome letter is dated 1 June 2022 in error, but I understand that it was sent to the Employer on 17 June 2022.
5. Employer referred the matter to the Tribunal.

The Law

6. 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.
7. 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.
8. 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.
9. 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

10. The Employer's staging date was 11 October 2021. The Declaration of Compliance was not completed by the deadline of 10 March 2022. In October 2021 the Regulator sent a letter and welcome back to the Employer including a checklist of steps to be taken to complete the Declaration of Compliance. Further reminder letters were sent in November 2021 and February 2022.
11. On 21 March 2022 a letter was sent to the Employer setting out the Declaration of Compliance requirement and providing an additional two weeks for compliance.
12. The Declaration of Compliance was not completed by the extended deadline, so the Regulator issued a Compliance Notice on 6 April 2022 with a deadline of 17 May 2022. As the Compliance Notice was not complied with, the Penalty Notice was issued on 1 June 2022 requiring the Employer to pay a penalty of £400. The Employer completed the Declaration of Compliance on 6 June 2022. On 8 June 2022 the Employer requested a review of the Penalty Notice. The penalty was confirmed on 17 June 2022. The Employer referred the matter to the Tribunal.

Submissions

13. The ground of appeal is that the Employer did not receive any correspondence prior to the Penalty Notice.
14. The Regulator's response dated 16 September 2022 submits that the grounds of appeal do not amount to a reasonable excuse for failing to comply with the Compliance Notice.
15. The Regulator relies on the valid service and receipt of the reminder letter and the Compliance Notice, in the absence of any evidence to rebut the presumption of service. An assertion of non-receipt is not sufficient.
16. The Employer was more than aware of their duties as a result of the letter and essential guide sent in February 2022. A further reminder was given by phone on 17 May 2022. The Compliance Notice further sets out the duties that need to be met.
17. The fact that the Employer is small does not detract from its statutory duties. As a responsible employer it is for the Employer to be aware of its legal duties and to ensure compliance. It was fair, reasonable and appropriate to issue the Compliance Notice and the Penalty Notice. Neither the Regulator nor the tribunal has any jurisdiction to vary the amount of the Penalty Notice.

Conclusions

18. 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.

19. The requirement to pay £400 is a significant burden for a small business such as the Employer. However, the fact that it is burdensome is inherent in it being a 'penalty'. The amount is prescribed by regulations made under the Pension Act 2008. Its amount reflects both the importance of complying with the employer duty provisions and the seriousness with which a failure to do so will be viewed. The Regulator has no discretion to issue a penalty notice for a lesser amount, Nor does the Tribunal have the power to direct substitution of a lesser penalty.
20. 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.
21. I conclude that the Employer did not have a reasonable excuse for failing to comply. All correspondence was sent to the Employer's current registered address, at which the Fixed Penalty Notice was received. Other than a bare assertion that none of the correspondence was received there is no evidence to rebut the presumption of receipt of the Compliance Notice, nor any explanation as to why the other correspondence might not have been received.
22. I find, on the balance of probabilities, that the Employer received the reminder letters and the Compliance Notice. 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.
23. 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