



**NCN: [2023] UKFTT 00734 (GRC)**

**IN THE FIRST TIER TRIBUNAL  
(PENSIONS REGULATION)**

**APPEAL NO: PEN/2023/0106/AE**

**Heard by determination on the papers.  
Heard on 11 September 2023 by Judge Kennedy.  
Decision given on 11 September 2023.**

**BETWEEN:**

**BUNTING AND GREEN BUILDING CONTRACTORS LTD.**

**Appellant**

**and**

**THE PENSIONS REGULATOR**

**Respondent**

**Date and type of Hearing:** 11 September 2023 – an appeal to be decided on the papers.

**Date of decision:** 11 September 2023

**Decision:** The appeal is dismissed.

**REASONS**

**Introduction:**

1. This decision relates to an appeal in respect of a Fixed Penalty Notice ('FPN') issued on 13 April 2023 under s.40 of the Pensions Act 2008 ('PA08'). The penalty was issued because the Respondent believed the Appellant had failed to comply with the directions in the Compliance Notice ('CN'), issued under s.35 PA08 on 13 February 2023, by the deadline of 27 March 2023.
2. Section 3 of the Pension Act 2008 imposes on employers the duty to pay contributions to a qualifying person scheme used for automatic enrolment of eligible staff into a pension scheme.
3. If the Pensions Regulator considers there to have been a breach of this provision, it may issue a Compliance notice under section 35 of the 2008 Act, requiring the employer to take specified steps to rectify the contravention. The Regulator also has the power under section 37 to issue an Unpaid Contributions notice requiring an employer to pay contributions into a specified pension scheme by a specified date. In the event of a failure to comply with such notices, the Regulator has the power to issue Fixed or Escalating Penalty Notices under sections 40 and 41 of the 2008 Act.
4. The Respondent is responsible for the regulation of work-based pension schemes. Established by s.1 of the Pensions Act 2004 ('PA04'), its objectives are set out in s.5. These include maximising compliance with automatic enrolment duties under Chapter of Part 1 PA08 and safeguards in ss.50 and 54 PA081.
5. This appeal is concerned with the Appellant's duty under s.11 PA08 to give prescribed information, known as the declaration of compliance, to the Respondent.
6. The information is prescribed in Regulation 4 of the Employers' Duties (Registration and Compliance) Regulations 2010 (SI 2010/5) ('the 2010 Regulations'). It includes the number of workers automatically enrolled (or re-enrolled) into a pension scheme, the number already in a pension scheme, and the residual number not in either category.

7. Regulation 4(1) of the 2010 Regulations sets the deadlines for providing the information, which is five months after the employer's duties start date, being the date when the automatic enrolment legislation first applies to an employer.
8. If there is believed to be a contravention of the employer duties or certain safeguards, the Respondent has the power under PA08 to issue;
  - a. *A CN specifying steps that the employer must take to remedy a contravention of the employer duties or safeguard (s.35);*
  - b. *An FPN in the sum of £400, in the event of a failure to comply with the preceding notice (s.40); and*
  - c. *An Escalating Penalty Notice (EPN) (s.41).*

**Background and Chronology and Grounds of Appeal:**

9. The background and Chronology were set out on 27 June 2023 in the detailed Response to the Grounds of Appeal which were dated 27 April 2023, and which grounds in short while not contain an admission of failing in compliance, simply criticise the process, deny receipt of any compliance Notice and seeking relief of a financial penalty.
10. The Appellant, Bunting Green Building Contractors Ltd, is the employer for the purposes of the 'Employer Duties' under the PA08. The Appellant's staging date was 1 October 2016, meaning that the declaration of compliance date was five months later, 11 January 2017.
11. In addition to the initial declaration of compliance the Appellant is required to make various redeclarations of compliance every 2 years. Most recently a redeclaration of compliance was required on 13 January 2023. A number of email reminders were sent to the Appellant on 17 June 2022, 5 August 2022, all emails were sent to [Redacted]. This was the to the email address provided in the previous redeclaration of compliance dated 15 August 2019. A letter was also sent reminding the Appellant of the requirement to redeclare on 27 January 2023 sent to the Appellant's registered address of [Redacted]

12. The Appellant did not make a redeclaration of compliance by the original deadline of 13 January 2023 and, as a result, a CN (Annex B) and subsequent FPN (Annex C) were issued by the Respondent. The notices in Annexes B and C were sent to the Respondent's registered office address of [Redacted]. This being the new registered address listed with Companies House following a change of registered address on [Redacted]
13. As the Appellant did not complete its redeclaration of compliance by the extended deadline set out in the CN (Annex B) of 27 March 2023, the Respondent issued an FPN to the Appellant on 13 April 2023 (Annex C). The FPN requested both a penalty payment of £400 and compliance with the CN, no later than 11 May 2023.
14. On 17 April 2023 the Respondent received a call from the Appellant complaining about receipt of the FPN (Annex J).
15. On 20 April 2023 the Appellant requested that the Respondent review the FPN with a view to overturning the imposition of the £400 penalty (Annex E). On the same day the Appellant made a redeclaration of compliance which was acknowledged by the Respondent on 21 April 2023 (Annex D).
16. The Respondent provided a review response to the Appellant on 25 April 2023 (Annex F), advising that a review had been conducted, but a decision had been made to confirm the notice. The Respondent stated that the CN and FPN had been issued to the correct registered address.
17. The Appellant issued a Notice of Appeal to the Tribunal dated 27 April 2023. The Respondent received a copy of the notice on 2 June 2023 (Annex G).
18. The grounds for the appeal as stated in the review request (Annex E) and appeal reference (Annex G) are broadly similar, except for the third and final ground, and can be summarised as follows:
  - a. *The Appellant did not receive any of the correspondence from the Respondents;*
  - b. *The Appellant is a small business and payment of the £400 penalty sent out in the FPN would lead to hardship;*
  - d. *The Appellant would have complied but there were business uncertainties.*

**Response:**

19. The Respondent opposes the appeal and asks the Tribunal to dismiss the case because the Appellant has not provided exceptional reasons that warrant revocation of the FPN. The Response sets out the Respondents detailed, and compelling submissions as follows;
20. The Respondent relies on the valid service and receipt of the CN and FPN Annexes B and C, respectively, relying on section 303(6)(a) of PA04 which provides that, for the purposes of s.7 of the Interpretation Act 1978 ('IA78') (service of documents by post), the proper address for a notice issued to a body corporate is the address of the registered or principal office of the body<sup>2</sup>. The presumption provided by s.7 of IA78 being that, unless the contrary intention appears, service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.
21. The CN and FPN (Annexes B and C) were all addressed to the Appellant as follows: *[Redacted]*. Attached at Annex H, is Companies House form AD01 (electronic format), being the application to change the Appellants registered address, which is recorded as being filed against the Appellant's Companies House records on 5 May 2022. The form records the change of registered office address from *[Redacted]*. The address used by the Respondent for the issuing of the CN and FPN was the registered office address as recorded at Companies House at the time of service namely *[Redacted]*.
22. Regulation 15 of the 2010 Regulations provides that:
  - (a) *Where a notice is given a date by the Regulator, it was posted or otherwise sent on that date;*
  - (b) *If a notice is posted or otherwise sent to the person's last known or notified address, it was issued on the day on which that notice was posted or otherwise sent; and*
  - (c) *A notice was received by the person to whom it was addressed."*

23. The Respondent argues that presumptions detailed above in the response, when taken together, set a high bar for the Appellant to overcome in evidencing that the issued documents were not properly served and received.
24. The Appellant made a review request on 20 April 2023 via the Respondents online portal (Annex E) in which the Appellant concedes receipt of the (Annex C). It should be noted that the FPN used the same registered office address as the CN (Annex B), which was the correct registered address at the time of service. However, the Appellant has not accounted as to why the FPN was received but not the CN despite the same address being used.
25. The Appellant's bare assertion of non-receipt of the CN not sufficient to overturn the presumption of service, as was the finding of the Upper Tribunal in the case of *London Borough of Southwark v Akhter* 2017 UKUT 150 at Annex K , where the Upper Tribunal stated at paragraph 82 that mere assertion of non-receipt was insufficient and that the Appellant would have to prove that the notice was not properly addressed, pre-paid and posted before the burden fell to the Respondent to prove otherwise. This decision was adopted in *Keith's Rubbish Clearance Limited v The Pensions Regulator* (PEN 2020 0203) (judgment dated 8 April 2021) ('Keith's Rubbish Clearance') at Annex L. In *Keith's Rubbish Clearance*, Judge Hunter found that "the Regulator is entitled to rely on the strong statutory presumptions... The Employer has made a bare "paper" assertion of non-delivery. That falls far short of the proof necessary to overturn the presumption" (paragraph 32).
26. It is the Respondent's position that there may have been a failure on the part of the Appellant to appreciate the importance of the correspondence, in particular the CN when it arrived and that as such it failed to act on it, wrongly handled it, ignored and/or discarded it. In any event, given the importance of a statutory notice sent to the Registered Office address for this employer, a lack of realisation of the importance of the Notice or a failure to act on it does not constitute reasonable excuse. It was the duty of the employer to ensure that it complied with the notices on receipt. The Appellant is claiming that it never received any of the correspondence relating to this

matter, but it is the Respondent's position that it sent all necessary correspondence were sent to the registered office address as legally required.

27. No evidence of rebuttal has been provided by this Appellant in this appeal and so therefore it is the Respondent's case that the Notices in this case were correctly served and received by the Appellant. The Respondent has no record of the CN being returned as undelivered. Therefore, the CN was received by the Appellant.

**Hardship:**

28. The Respondent argues that Appellant asserts in their review request (Annex E) and in their grounds of appeal that they are a small company and would suffer hardship from the penalty. Whilst the Respondent sympathises with this employer as to the fact that the penalty may be difficult to pay, what is clear is that this Appellant failed to comply with its employer duties within the deadline provided in the CN (Annex B) and that it only complied with its duties some three months after the original deadline of 13 January 2023. Therefore, the FPN was lawfully issued.
29. The Respondent submits further that Employer duties are placed on all employers with workers, as defined in the Pensions Act 2008. Thus, the composition of an employer's workforce does not detract from the statutory duty to complete these duties, within the required deadline. The importance of completing the declaration and complying with employer's duties, irrespective of the size of the employer, has been recognised numerous times by the Tribunal.
30. Furthermore, the Respondent argues that as a responsible employer it is for the Appellant to be aware of its legal duties and to ensure full- and on-time compliance with them. Employers with workers as defined in the Pensions Act 2008 are required to comply with their statutory duties within the timescales provided by law. The Appellant failed to do so; it was therefore fair, reasonable, and appropriate for the Respondent to issue a CN and when the Appellant still failed to comply, to issue a FPN as a result.

31. Furthermore, the Respondent argues that as a responsible employer it is for the Appellant to be aware of its legal duties and to ensure full- and on-time compliance with them. Employers with workers as defined in the Pensions Act 2008 are required to comply with their statutory duties within the timescales provided by law. The Appellant failed to do so; it was therefore fair, reasonable, and appropriate for the Respondent to issue a CN and when the Appellant still failed to comply, to issue a FPN as a result.
32. In addition to the Notices at Annexes B and C the Respondent had provided reminder emails to the Appellant which had been sent to the email addresses provided by the Appellant themselves in a previous redeclaration (Annex I) as well as a letter reminder which sent to the Appellants registered address on 27 January 2023 and, having declared and redeclared in the past was fully aware of the legal requirements and duties places upon them as an employer. The Appellant has not provided a reasonable excuse for its failure to comply with its duties at that time.
33. The Respondent argues that the Appellant failed to comply despite the CN issued on 13 February 2023 (Annex C) which further extended the deadline for compliance from 13 January 2023. The Appellant finally filled its redeclaration of compliance on 20 April 2023 (Annex D) some 65 days after the original deadline for the redeclaration and 23 days after the extended deadline in the CN. When the Appellant did comply after the relevant deadlines, it acknowledgement that it had 5 members of staff and as such had employer duties.
34. The Respondent argues that what is apparent is that this Appellant is not disputing the fact that it has failed to meet its declaration duties within the required deadline and that the FPN was correctly issued. Neither has the Appellant provided a reasonable excuse for its failure to do so. The Respondent is of the view that penalty should stand unless the Appellant has a reasonable excuse for not complying with its duty, which it does not.
35. The Respondent argues that within the timeframe provided within the CN, it was open for the Appellant, or its representative, to access the Appellant's website, which is freely and readily available, to follow the steps to assist with the understanding of



their duties and to declare compliance on time. We note this could be easily done online as set out in the notice and correspondence. If the Appellant did not understand what was required of them and the deadline, it was open to them to contact the Respondent to clarify matters. The Appellant took no action until after the FPN was issued.

36. The Respondent understandably argues that there is an important public interest in consistently enforcing compliance with employers' duties under the PA 08 via penalty notices in order to deter breaches and promote compliance. The deterrent effect of these would be greatly diminished if the practice were to revoke penalty notices in all cases if compliance is achieved at some point (see §17 *The Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 104 (AAC)) (Annex M).
37. The Respondent reminds us that the Tribunal has also recognised the legitimacy of the Respondent's policy that, in most cases, where a person has not complied with the compliance notice, a monetary penalty will be issued, unless there is good reason not to do so. (see §8 *Rossendale Sports Club* PEN/2016/0011, for example) (Annex N).
38. In terms of payment the Respondent asserts that the notices were lawfully served and received by the Appellant having failed to meet their legal duties in respect of making a redeclaration of compliance. The amount set out in the FPN is set down in statute namely Regulation 12 of 2010 Regulations and, as such neither the Respondent, nor respectfully, the Tribunal have any jurisdiction to vary the amounts.
39. If the penalty will cause hardship to the Appellant, the Respondent would be willing to consider a reasonable repayment offer from the Appellant. If the Tribunal dismisses the Appellant's reference, the Appellant is invited to contact the Regulator directly to discuss any financial hardship issues it may have in paying the outstanding penalty amount and propose a payment plan.

**Business Uncertainties:**

40. The Appellant asserts, in their appeal reference (Annex G), that they were suffering business uncertainties resulting from recovery from Covid and the passing of an employee and were unable to comply with the requirement to make a redeclaration

within the prescribed time. This ground is not raised in the review request made to the Respondent on 20 April 2023 (Annex E) and the Appellant provides no evidence as to how the passing of employee has impacted to their business to the extent that they were unable to comply with the legal requirement to make a redeclaration of compliance.

41. The Respondent asserts that whilst the business may have suffered the loss of a staff member and other business uncertainties the Appellant was fully aware of the need to make a redeclaration having completed the process previously and having received the email and letter reminders, CN and FPN. The extension provided in the CN allowed the Appellant additional time to comply with its legal duties, but the Appellant failed to do so until 20 April 2023.
42. If the Appellant was suffering business uncertainties that may have impacted its ability to redeclare, it was perfectly open to the Appellant to contact the Respondent and seek advice or a further extension. No contact was made until 17 April 2023 when the Appellant called the Respondent in respect of the FPN (Annex J).
43. Irrespective of whether there were business related issues the Appellant was too work pressured to comply, or just forgot this does not afford the Appellant a reasonable excuse for failing to meet its pensions duties. The statutory duties to redeclare are on the employer and as such the onus is on the employer to ensure that those duties are duly executed in a timely fashion.
44. The Respondent submits that considering the information provided and the reasons above, the decision to issue an FPN was fair, reasonable, and proportionate, as summarised below.

*(a) The CN and FPN were correctly served on the Appellant at its registered office address. The Appellant has failed to overturn the presumption of service for the CN and FPN. The Appellant has confirmed receipt of the FPN, which had been sent to the same address as the CN.*

*(b) The Appellant was made aware in a number of email reminders that a redeclaration of compliance was due, but the Appellant failed to take any steps to make the redeclaration. Accordingly, the Respondent issued an FPN following*

*service of a CN, which was a step it was entitled to take bearing in mind the continued noncompliance.*

*(c) Redclarations of compliance are not a mere administrative detail; they are a vital source of information for the Respondent and a central part of its compliance and enforcement approach.*

*(d) The Respondent has made it clear that action will be taken against employers who fail to provide a declaration in its published Compliance and Enforcement policy and in letters sent to the Appellant.*

*(e) The legislation allows employers a generous period of five months to complete the declaration from the date when the declaration falls due.*

*(f) The amount of the FPN is prescribed in regulation 12 of the 2010 Regulations. Neither the Respondent nor, respectfully, the Tribunal has any discretion as to the amount of the penalty.*

45. The Respondent further submits that the appeal provides no persuasive argument as to why it was reasonable for the Appellant to have failed to comply with their employer duties, namely the completion of the declaration of compliance;

*(a) There does not appear to be any dispute that the statutory grounds for issuing the FPN were made out. The chronology confirms that the Appellant only made a declaration of compliance on 16 April 2023, after the expiry of the extended deadline of 13 March 2023, as provided for in the CN, and after the FPN had been issued on 29 March 2023.*

*(b) The issue is therefore whether it was appropriate for the Respondent to issue the penalty, which turns on whether the Appellant has a reasonable excuse for failing to comply with the earlier notice.*

*(c) As such, no reasonable excuse has been advanced in fact or law for the failure to complete the declaration on time.*

46. Finally, the Respondent submits that the appeal provides no persuasive justification for revoking the penalty:

*(a) There does not appear to be any dispute that the statutory grounds for issuing the FPN were made out to the extent that the chronology confirms that the Appellant only made a redeclaration of compliance on 20 April 2023, after the expiry of the extended deadline of 27 March 2023, as provided for in the CN, and after the FPN*

*had been issued.*

*(b) The issue is therefore whether it was appropriate for the Respondent to issue the penalty, which turns on whether the Appellant has a reasonable excuse for failing to comply with the earlier notice.*

*(c) No reasonable excuse has been advanced in fact or law for the failure to complete the declaration on time.*

## **Conclusion:**

The Tribunal accept and adopt the above compelling reasoning in the above submissions made by the Respondent and accordingly, although with some sympathy, must dismiss this appeal but welcomes the suggestion for discussions as indicated at Paragraph 42 above in accordance with The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

See Part 1 Rule 2 which states as follows;

### **Overriding objective and parties' obligation to co-operate with the tribunal.**

2.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. (2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs, and the resources of the parties.

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it— (a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must— (a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Brian Kennedy KC

11 September 2023.