



NCN: [2023] UKFTT 735 (GRC)

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

APPEAL NO: PEN/2023/0109/AE

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

BETWEEN:

THOMAS DOONAN T/A MILANO HAIR

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 29 March 2023 under s.44 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 30 January 2023, by the deadline of 13 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 4 July 2023 in the detailed Response to the Grounds of Appeal dated 8 May 2023, which the said grounds of appeal, in short contain an admission of failing in compliance and seeking relief of a financial penalty.
10. The Appellant does not dispute receipt of the CN or FPN, nor receipt of any of the earlier correspondence. The Appellant also accepts that they failed to comply on time. The Appellant's grounds for appeal are mitigation around the imposition and amount of the penalty notice.
11. Whilst the Respondent acknowledges that the employer is a small business currently only employing one person, the legislation is drafted specifically to

bind employers to pensions duties when they employ their first (and any subsequent) employee. It requires an employer to first assess an employee to see if automatic enrolment duties apply and, if they do, to comply with any statutory duties to automatically enrol that individual into a prescribed pension scheme. Where an employer recruits its first employee there is also a duty to complete a declaration of compliance, as was the case here. The Respondent has no discretion to disapply the statutory regime where there is only one employee. To do so would be ultra vires.

Response:

12. The Respondent argues that the Appellant's grounds for appeal have failed to demonstrate that the Respondent's behaviour was disproportionate or unreasonable when considering the extent of the breach. In addition to statute providing five months within which an employer needed to comply with their automatic enrolment duties following their duties start date, the Respondent further extended the deadline for compliance on two occasions. It first did so in its letter dated 13 January 2023 (Annex D) where it extended the deadline to 29 January 2023. The Respondent then extended the deadline again by a further 42 days when it issued the CN on 30 January 2023 and set the deadline to 13 March 2023 (Annex E). It should also be noted that, following the deadline of 13 March 2023 passing, the Respondent did not issue the Fixed Penalty Notice for an additional 16 days, the date of issue being 29 March 2023 (Annex I). The Appellant had these additional 16 days to comply with the CN where a penalty had not been issued.

13. Further, the Respondent proactively telephoned the Appellant on 14 February 2023, six weeks before the FPN was issued (Annexes H and O). The customer service adviser who spoke to the Appellant's representative clearly advised that the Appellant needed to comply by 13 March 2023 otherwise a penalty of

£400 would be issued. The Appellant's representative advised that they would complete the declaration of compliance that day (14 February 2023) or by the end of the week at the latest. The customer service adviser gave a telephone number to the Appellant to call should they need any assistance, but there is no record of any call being received from the Appellant prior to the FPN being issued. Information on addresses used for correspondence.

14. Whilst there is no dispute on service, the Respondent is satisfied that all correspondence, including the CN and FPN, were duly served to the correct address where it can rely upon the statutory presumptions of service.

15. The Respondents submissions further argue as follows;

(a) The CN and FPN were correctly served on the Appellant and the Appellant has not disputed receipt.

(b) The Appellant failed to take timely steps to make the declaration. Accordingly, the Respondent issued an FPN following service of a CN, which were steps it was entitled to take bearing in mind the continued non-compliance.

(c) A declaration of compliance is not a mere administrative detail; it is 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 correspondence 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 and, by the time the FPN was issued on 29 March 2023, almost an additional three months had been provided for compliance from the original deadline of 4 January 2023.

(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. The Respondent notes the comments made by the Appellant as to the impact of the fine and would advise that a repayment plan could be considered if the issuing of the penalty and the amount imposed is upheld.

16. 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.

Conclusion:

17. The Tribunal accept the above compelling submissions made by the Respondent and accordingly must dismiss this appeal.

Brian Kennedy KC

11 September 2023.