



NCN: [2023] UKFTT 759 (GRC)

Case reference: PEN-2023-0136

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

**Heard: On the papers
Heard on: 14 September 2023
Decision given on: 19 September 2023**

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

Between

MARK 1 MOTOR CYCLES 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. Mark 1 Motor Cycles Limited (“the Employer”) challenges a fixed penalty notice (“the Fixed Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 22 May 2023 (Notice number 157084029667).

2. The Fixed 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 24 March 2023.
3. The Regulator completed a review of the decision to impose the penalty notices and informed the Employer on 2 June 2023 that the Fixed Penalty Notice was confirmed. The Employer referred the matter to the Tribunal on 8 June 2023.

The Law

4. 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.
5. 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'. An employer is required to make a re-declaration of compliance every three years. 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.
6. Under s.44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice or an Escalating Penalty Notice may make a reference to the Tribunal provided that a review has been carried out or an application for review has 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.
7. The Tribunal may confirm, vary or revoke a 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.

Evidence

8. I read and took account of a bundle of documents.

The facts

9. The Employer's second re-declaration of compliance was not completed by the deadline of 28 February 2023, so the Regulator issued a Compliance Notice on

24 March 2023 with a deadline of 4 May 2023. As this was not complied with, the Fixed Penalty Notice was issued on 22 May 2023 requiring the Employer to pay a penalty of £400. The Fixed Penalty Notice required the Employer to comply with the Compliance Notice by 19 June 2023.

10. On 29 May 2023 the Employer requested a review of the Penalty Notice. The penalty was confirmed on 7 June 2023.
11. On 8 June 2023 the Employer referred the matter to the Tribunal.

Submissions

12. The Notice of Appeal relies on the following grounds:
 - (i) The Compliance Notice was not received.
 - (ii) No letters were received from the Regulator.
 - (iii) Due to the Employer's address and its location he often gets other people's post. If the letters were sent he assumes they have possibly ended up in Montgomery Street and not Montgomery Street Lane.
 - (iv) It is unfair that the first letter he gets is a penalty notice.
13. The Regulator's response dated 28 July 2023 submits that the appeal grounds do not amount to a reasonable excuse for the failure to comply with the Compliance Notice or indicate that the Regulator has acted unfairly in any way in respect of the Fixed Penalty Notice.
14. The Employer has not given any explanation as to why the Fixed Penalty Notice was received but not the Compliance Notice beyond suggesting it may have gone to a neighbour. There is no evidence to support that post frequently is misdirected or that the Appellant checks with its neighbours for such post if it is acknowledged it may go awry. The Regulator relies on the statutory presumptions of service and does not consider the Employer has rebutted them.
15. As a responsible employer it is for the Employer to be aware of their legal duties and to ensure full and timely 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 Employer failed to do so; it was therefore fair, reasonable and appropriate for the Respondent to issue a Compliance Notice and when the Appellant still failed to comply, to issue a penalty, as a result.
16. The amount of the fixed penalty is fixed by law. In the circumstances, the penalty is fair, reasonable and proportionate.

Conclusions

17. 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 re-declaration of compliance within a specified timeframe is a mandatory requirement. Late compliance does not excuse a failure to comply.
18. I find that issuing the Fixed Penalty was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
19. I conclude that the Employer did not have a reasonable excuse for failing to comply.
20. The Fixed Penalty Notice and the Compliance Notice were sent to the Employer's registered office address. The Fixed Penalty Notice was received but the Employer states that he did not receive the Compliance Notice.
21. There is a statutory presumption of service. The Employer states that he often gets other people's post and therefore he 'can only assume that they have possibly ended up in Montgomery Street and not Montgomery Street Lane'.
22. I accept that the Employer has received other people's post in the past. I accept that there is a *possibility* that post addressed to 8 Montgomery Street might be delivered to Montgomery Street Lane. I do not accept that this possibility is sufficient to displace the presumption of service of the Compliance Notice.
23. Taking all the above into account I find that the Compliance Notice was received by the Employer.
24. 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 Fixed Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Fixed Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 14 September 2023