



NCN: [2023] UKFTT 761 (GRC)

Case reference: PEN-2023-0094

PEN-2023-0095

**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

ONE POUND BAGUETTES BAKES AND CAKES LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision in PEN/2023/0094

The reference is dismissed and the matter is remitted to the Regulator. The Fixed Penalty Notice is confirmed.

Decision in PEN/2023/0095

The reference is dismissed and the matter is remitted to the Regulator. The Escalating Penalty Notice is confirmed.

REASONS

Background

1. Given the overlap between these two references I have heard them together.
2. In reference PEN/2023/0094 One Pound Baguettes Bakes and Cakes Ltd (“the Employer”) challenges a fixed penalty notice (“the Fixed Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 28 July 2022 (Notice number 175866647266).
3. In reference PEN/2023/0095 the Employer challenges an escalating penalty notice (“the Escalating Penalty Notice”) issued by the Pensions Regulator (“the Regulator”) on 13 January 2023 (Notice number 230971865822).
4. 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 1 June 2022.
5. The Escalating Penalty Notice was issued under s 40 of the Pensions Act 2008. It required the Employer to comply with the Compliance Notice by no later than 9 February 2023. If the Employer failed to comply a penalty would accrue at a daily rate of £500 from 10 February 2023.
6. The Regulator completed a review of the decision to impose the penalty notices and informed the Employer on 24 March 2023 that the Escalating and Fixed Penalty Notices were confirmed. The Employer referred the matter to the Tribunal on 19 April 2023.

The Law

7. 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.
8. 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. Where the Regulator is of the opinion that an employer has failed to comply with a Compliance Notice the Regulator can issue an Escalating Penalty Notice.

9. 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.
10. 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

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

The facts

12. The Employer's staging date was 1 January 2018. The Declaration of Compliance was completed on 29 June 2018. The re-declaration of compliance was not completed by the deadline of 1 June 2021, so the Regulator issued a Compliance Notice on 17 October 2022 with a deadline of 28 November 2022. As this was not complied with, the Fixed Penalty Notice was issued on 14 December 2022 requiring the Employer to pay a penalty of £400. The Fixed Penalty Notice required the Employer to comply with the Compliance Notice by 11 January 2023. As the Employer did not comply, the Escalating Penalty Notice was issued on 13 January 2023.
13. The re-declaration of compliance was completed on 15 March 2023, although the Regulator submits that it has since discovered that the information provided in it is wrong.
14. On 20 March 2023 the Employer requested a review of the Penalty Notice. This was out of time but the Regulator conducted a review of its own initiative and the penalties were confirmed on 18 August 2022.
15. On 19 April 2023 the Employer referred the matter to the Tribunal.

Submissions

16. The Notice of Appeal relies on the following ground:
 - (i) The Employer did not receive 'the first letters' from the Regulator.

- (ii) Once the Employer received the letter stating that he had received a £14,000 fine he acted quickly.
 - (iii) The Employer is a small independent business.
17. The Regulator's response dated 17 July 2023 submits that there is no basis for displacing the statutory presumption of service of the Compliance Notice, Fixed Penalty Notice or Escalating Penalty Notice. The Regulator sent fourteen emails to the Employer between 1 July 2020 and 3 October 2022.
 18. The Regulator has made enquiries since receipt of the appeal and the Employer is yet to place 10 of its employees into a pension scheme as required by law.
 19. It was fair, reasonable and appropriate to issue and maintain the penalty at at the amount set by Regulation 12 and 13 of the 2010 Regulations.
 20. 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.

Conclusions

21. 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. Even if the Employer had now complied with this duty a short time after the deadline had expired, this would not excuse a failure to comply. In fact it is apparent from correspondence in the bundle that the Employer has not complied with his duties, because he has failed to declare 10 members of staff.
22. The requirement to pay £400 is a significant burden for a small business such as the Employer. The escalating penalty of £14,400 is an extremely significant amount, and the Employer indicates in his application for a review that he 'would need to cease trading' as a result.
23. The fact that the penalty 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. The Regulator has offered to discuss financial hardship issues and to consider a proposal for a payment plan from the Employer.

24. I find that issuing the Fixed Penalty and the Escalating Penalty Notice was appropriate, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice.
25. I conclude that the Employer did not have a reasonable excuse for failing to comply.
26. The Employer should have been aware of its obligations in any event. The declaration of compliance had been completed, and the Employer ought to have known when the re-declaration was due. The Regulator is not obliged to send reminders. It does however send reminders and a large number of those were sent to the Employer.
27. All letters and notices were sent to the Employer's current registered address. The Employer states that he received a letter stating that he had received a £14,400 fine, after which he acted promptly. Given the date of the re-declaration of compliance (15 March 2023), the letter he accepts that he received is likely to have been the penalty reminder letter of 13 March 2023. This was sent to the same address as the other correspondence. The Employer has provided no explanation of why the other letters and notices might not have been received when this one was received at the same address.
28. The Regulator has also sent the Employer a number of emails and letters setting out the deadlines and the consequences of the failure to comply.
29. It is inconceivable that none of these emails or letters were received, when later emails and letters sent to the same address arrived without difficulty.
30. Taking into account the rebuttable presumption of service, and looking at all the evidence I find that the Compliance Notice, the Fixed Penalty Notice and the Escalating Contributions Notice were all received by the Employer.
31. 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 and the Escalating Penalty Notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the Fixed Penalty Notice and the Escalating Penalty Notice. No directions are necessary.

Signed **SOPHIE BUCKLEY**

Judge of the First-tier Tribunal

Date: 14 September 2023