



NCN: [2023] UKFTT 00841 (GRC)

Appeal number: PEN/2023/0141P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PENSIONS REGULATION)**

PECKOVER STREET LTD

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL:

**ALEXANDRA MARKS CBE
(SITTING AS A FIRST TIER
TRIBUNAL JUDGE)**

**Sitting in Chambers (and therefore decided on the papers without a hearing) on
9 October 2023**

DECISION

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

REASONS

Background

2. Peckover Street Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 3 May 2023 (Notice number 136049595103).
3. The Fixed Penalty Notice was issued under section 40 of the Pensions Act 2008 ('the Act'). It required the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 6 March 2023 that required the Employer to provide the Regulator with information in respect of automatic enrolment.
4. The Regulator completed a review of the decision to impose the Fixed Penalty Notice and informed the Employer 23 May 2023 that the decision was confirmed.
5. On 15 June 2023, the Employer referred to the Tribunal the Regulator's decision to issue the Fixed Penalty Notice.
6. The parties and the Tribunal agree that this matter is suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered all the evidence and submissions made by both parties.

The law

7. The Act imposes various legal obligations on employers in relation to the automatic enrolment of certain 'jobholders' into occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.
8. Since 1 October 2017, automatic enrolment duties apply to employers from their 'duties start date' (being the date when the legislation first applies to that employer). These duties include the obligation - from the employer's duties start date - to assess their staff, write to them, and automatically enrol them into a qualifying scheme if applicable.
9. The employer must, within five months after the duties start date, provide certain specified information to the Regulator about its compliance with these duties. This is known as a 'declaration of compliance'.

10. Crucially for the purposes of this case, the employer must *also* - every three years from its duties start date - assess and re-enrol eligible staff who have left the workplace pension scheme. The employer must then provide the Regulator with re-enrolment information by means of a 're-declaration of compliance'.

11. If the employer fails to provide a re-declaration of compliance, the Regulator can issue a Compliance Notice and then, if that Notice is not complied with by the stated deadline, a Fixed Penalty Notice can be issued for failure to comply with the Compliance Notice. The prescribed Fixed Penalty is £400.

12. Under section 44 of the Act, a person who has been issued with a Fixed Penalty Notice may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

13. The role of the Tribunal is to take account of the evidence before it, and make its own decision on the appropriate action for the Regulator to take. 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

14. The Employer's first submitted a declaration of compliance on 27 April 2020 which the Regulator acknowledged by letter dated 28 April 2020. That letter stated, '*You will be required to re-enrol certain staff into a pension scheme and re-declare with [the Regulator] in approximately three years' time.*'

15. In May 2022, the Regulator wrote a reminder letter to the Employer about their re-enrolment duties, including a reminder of their re-declaration of compliance deadline of 31 January 2023.

16. The Regulator sent a second reminder letter to the Employer in November 2022. This letter again highlighted the Employer's re-declaration deadline of 31 January 2023. It also stated in bold text that if the Employer did not comply with their legal duty to submit a declaration of compliance in time, they may be subject to fines and/or prosecution.

17. As the Employer did not file a re-declaration of compliance by 31 January 2023, the Regulator sent yet another reminder dated 17 February 2023. The letter was marked '**DO NOT IGNORE THIS COMMUNICATION**' and headed '*Urgent action is required – your re-declaration deadline was 31 January 2023*'. An extended deadline of a further 14 days of the issue date of the letter was given to comply, namely 3 March 2023. The letter also prominently stated that if the Employer failed to complete their re-declaration of compliance within the extended deadline, a fine might be imposed.

18. No declaration of compliance was completed in time so the Regulator issued a Compliance Notice dated 6 March 2023, requiring the re-declaration of compliance to

be filed by an extended deadline of 17 April 2023. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

19. The extended deadline of 17 April 2023 was not met so, on 3 May 2023, the Regulator issued a Fixed Penalty Notice requiring payment of the £400 penalty by 31 May 2023 and compliance with the Compliance Notice by the same date.

20. On 17 May 2023, the Employer emailed the Regulator to ask for a review of the Fixed Penalty Notice as '*notifications to submit the declaration of compliance were not received*'. The email went on to say that the only notice received was the Fixed Penalty Notice dated 3 May 2023 and that they '*suspect this is due to the ongoing royal mail strikes and the impact this has had on deliveries*'. The email added that the declaration had since been submitted and '*there are no employees opted into the pension scheme and therefore there has been no impact to any contributions.*'

21. On 23 May 2023, the Regulator notified the Employer that it had completed a review of its decision to issue the Fixed Penalty Notice and confirmed that decision.

Submissions

22. The Employer's Notice of Appeal dated 15 June 2023 says that:

- (1) The Employer has not received any correspondence from the Regulator prior to receiving the penalty notice.
- (2) The Employer assumed that this was due to postal strikes but the Regulator does not agree so the Employer assumes either the letters were not sent or were lost in transit.
- (3) The penalty notice arrived in their office on 17 May 2023 and the re-declaration of compliance was processed immediately.
- (4) The Employer does not agree with the penalty being issued as they were unaware of the issue and did not receive any correspondence prior to the penalty notice.

25. In its response dated 8 August 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

- (1) The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address.
- (2) The Employer's last notified address (as stated in the Employer's first declaration of compliance in April 2020) as well as the Employer's registered office address is Albion House, 64 Vicar Lane, Bradford, West Yorkshire BD1 5AH. The Regulator sent all its correspondence and statutory notices to that address.

(3) On the basis of the available evidence, there is no reason to displace the statutory presumption that correspondence properly addressed and sent by post to a company's registered or principal office has been lawfully and correctly served *and received*.

(4) The Employer has not explained why it received the Fixed Penalty Notice but not the Compliance Notice or the Regulator's previous correspondence - all of which was sent to the same address - other than to suggest that disruption to mail arising from industrial action could have caused the mail to go missing.

(5) The Regulator's position is that it is improbable that industrial action in December 2022 could have interfered with the Compliance Notice which was sent in March 2023. Moreover, the Regulator sent two reminder letters to the Employer at the same address *prior* to the industrial action – in July and November 2022. These letters clearly stated the deadline for the re-declaration of compliance and set out the steps needed to comply.

(6) The Regulator's position is that the Employer may have failed to appreciate the importance of the correspondence, in particular the Compliance Notice, and/or failed to act on it, wrongly handled it, ignored and/or discarded it. However, lack of realisation of the importance of a statutory notice or failure to act on it does not amount to a reasonable excuse.

(7) As to whether the Employer actually received the notices, the Upper Tribunal has said that mere assertion that posted items have not been received is insufficient. There is no basis for displacing the statutory presumptions of proper service and receipt unless the contrary can be shown *by evidence*.

(8) The Employer in this case has provided no evidence of non-delivery of the Compliance Notice and previous correspondence. The Regulator has no record of any of the Regulator's correspondence having been returned undelivered. The Regulator's position is therefore that the reminders and Notices in this case were correctly served and received by the Employer.

(9) Every employer is legally obliged to inform the Regulator of their automatic enrolment arrangements. The Employer in this case has failed to provide a reasonable excuse for non-compliance. The Regulator's view is that a responsible employer must be aware of their re-declaration duties.

(10) The decision to issue a Fixed Penalty Notice was fair, reasonable and proportionate for the reasons above and because:

(a) The Compliance Notice and Fixed Penalty Notice were correctly served on the Employer at an address which was its registered office, principal office and last notified address.

(b) The Employer was made aware in correspondence that a re-declaration of compliance was required but the Employer failed to take any steps to comply.

(c) The re-declaration of compliance is a vital source of information for the Regulator, and a central part of its compliance and enforcement approach.

- (d) The Regulator has made clear in its published policy and correspondence sent to the Employer that action will be taken against employers who fail to provide a re-declaration of compliance on time.
- (e) The five-month period to complete the re-declaration of compliance, starting with the date when it falls due, is a generous period within which to complete the re-declaration. In this case, by the time the Fixed Penalty Notice was issued on 3 May 2023, a further period of more than three months had elapsed beyond the original deadline of 31 January 2023.
- (f) No reasonable excuse in fact or law has been provided for the Employer's failure to complete the declaration of compliance on time.

Conclusions

26. Taking account of all the evidence provided to me, I conclude that the Employer has given no 'reasonable excuse' for non-compliance in this case. My reasons are set out below.

27. As a responsible employer, the Employer is expected to be aware of its legal duties and ensure full- and on-time compliance with them. There is considerable advice and guidance available from various sources including the Regulator's own website which supplements the correspondence which the Regulator sends to individual employers.

30. Any one of the three reminder letters sent to the Employer (in May 2022, November 2022 and February 2023) or the Compliance Notice (in March 2023) should have alerted the Employer to its legal duty to send the Regulator a re-declaration of compliance.

31. Each reminder letter clearly set out the steps required, and included the re-declaration deadline date of 31 January 2023 stated in bold text.

32. Each letter, and the Compliance Notice, were correctly addressed to the Employer's registered office, principal office and last notified address. None was returned to the Regulator undelivered. The same address was used for the Fixed Penalty Notice and the Employer clearly did receive this.

32. As for whether the Employer *received* these letters or the Compliance Notice:

(1) The Regulator does not have to *prove* that the documents were received. This is because the Act and related Regulations say that if a document is sent to a company's registered office by post, which is its proper address, it is **presumed** that it was received by the person to whom it was addressed. This is only a presumption and, if there were strong evidence to the contrary, the presumption can be displaced.

(2) The Employer does not have to **prove** that the documents were not received but, beyond the simple statement that the reminder letters and the Compliance

Notice were not received and perhaps this was due to Royal Mail strikes, the Employer has produced **no** evidence in support of this position (such as evidence from the Post Office of post being disrupted in the local area apart from the national postal strikes on 3 May 2022; 4 June 2022; 11 and 14 July 2022; 26, 27, 30 and 31 August; 8 and 30 September; 1, 13, 20 and 25 October; and several dates in December 2022). None of these dates – with the possible exception of the first reminder letter dated 3 May 2022 – coincide with the dates of national postal strikes.

(3) The Employer has not explained how or why it received the Fixed Penalty Notice yet did not receive any previous correspondence or the Compliance Notice from the Regulator all sent to the same address.

(4) Even if the Employer received neither the Compliance Notice nor any of the reminder letters, that would not relieve the Employer of the duty to comply with their legal obligation to send the Regulator a re-declaration of compliance by the required deadline.

(5) There is no legal requirement for the Regulator to provide reminders: they are sent as a courtesy. Ultimately, it is the Employer's duty to comply with all their pensions obligations, whether or not reminded of them.

33. The Employer was - or should have been - aware of the obligation to send the Regulator a declaration of compliance by 31 January 2023, even **without** the reminder letters and eventually the Compliance Notice (the effect of which, as I have said, was to extend the deadline till 17 April 2023). I am satisfied that the Employer had ample time to comply with their obligation to complete and send to the Regulator a re-declaration of compliance by the extended deadline.

34. The fact that the Employer had no employees opted into the pension scheme and that no contributions were due does not relieve the Employer of their legal obligation to inform the Regulator, by means of a re-declaration of compliance, of their compliance with auto-enrolment pension obligations.

35. The Employer accepts that the Fixed Penalty Notice was received, and shortly afterwards completed and sent the re-declaration of compliance to the Regulator. However, this was several weeks **after** the extended deadline, and **after** issue of the Fixed Penalty Notice. It was therefore too late to avoid the penalty because late compliance does not excuse a failure to do so by the deadline.

36. In all the circumstances, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 3 May 2023 for non-compliance with the Compliance Notice dated 6 March 2023.

37. The amount of the penalty is fixed by law so neither the Regulator nor the Tribunal has any discretion to reduce the penalty below £400.

38. I confirm the Fixed Penalty Notice, and I remit the matter to the Regulator.

39. No directions are necessary.

Signed

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**ALEXANDRA MARKS CBE
(Sitting as a Judge of the First Tier Tribunal)**

DATE: 09 October 2023