



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

NCN [2024] UKFTT 00358 (GRC).

Appeal Reference: PEN/2023/0176

Decided without a hearing on 21 March 2024

Before

JUDGE ANTHONY SNELSON

Between

DISS DISCOUNT LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

DECISION

The decision of the Tribunal is that the reference is dismissed and the matter remitted to the Pensions Regulator.

REASONS

1. The Appellant runs a small business in Norfolk. By this reference, it challenges a Fixed Penalty Notice ('FPN') issued by The Pensions Regulator ('TPR'), requiring it to pay a penalty of £400 for failing to comply with a Compliance Notice ('CN') issued on 20 April 2023 by the deadline of 31 May 2023.

2. The matter came before me for determination on the papers, both parties having expressed themselves content for no hearing to be held. I was satisfied that it was just and in keeping with the overriding objective to adopt that procedure.

The statutory framework

3. The Pensions Act 2008 ('the Act') imposes a number of requirements on employers in relation to the automatic enrolment ('AE') of certain 'job holders' in occupational or workplace personal pension schemes. These include delivering written notification every three years of how the AE duties have been met, known as a 'declaration of compliance'. TPR has statutory responsibility for securing compliance with AE requirements. If it is of the opinion that a declaration of compliance has not been delivered by the due date, it may issue a CN pursuant to section 35 of the Act¹, requiring the employer to deliver a notice of compliance by a specified date.

4. By s40 of the Act, TPR may issue a FPN in the sum of £400² to a person if it is of the opinion that he or she has failed to comply with (among other things) a CN. In the event of any further breach TPR may issue an Escalating Penalty Notice ('EPN') under s41 of the Act, imposing heavier financial sanctions.

5. TPR may review a FPN or EPN on the application of the person affected (s43(1)(a)). The effect is to suspend the relevant Notice pending the outcome of the review (s43(4)). The possible outcomes are confirmation, variation and revocation of the Notice; in the event of revocation, TPR may substitute a different Notice (s 43(6)).

6. By s44 of the Act, provision is made for references to the First-tier Tribunal ('FTT') or (in circumstances which do not apply here) Upper Tribunal ('UT') in (so far as material) the following terms:

- (1) A person to whom a notice is issued under section 40 or 41 may, if one of the conditions in subsection (2) is satisfied, make a reference to the Pensions Regulator Tribunal in respect of—**
 - (a) the issue of the notice;**
 - ...
- (2) The conditions are—**
 - (a) that the Regulator has completed a review of the notice under section 43;**
 - (b) that the person to whom the notice was issued has made an application for the review of the notice under section 43(1)(a) and the Regulator has determined not to carry out such a review.**
- (3) On a reference to the Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning when the Tribunal receives notice of the reference and ending—**
 - (a) when the reference is withdrawn or completed, or**
 - (b) if the reference is made out of time, on the Tribunal determining not to allow the reference to proceed.**

¹ Hereafter, section numbers will be given as, say, s1, s35 etc.

² The figure is prescribed by the Employers' Duties (Registration and Compliance) Regulations 2010, reg 12.

- (4) For the purposes of subsection (3), a reference is completed when—**
(a) the reference has been determined,
(b) the Tribunal has remitted the matter to the Regulator, and
(c) any directions of the Tribunal for giving effect to its determination have been complied with.

7. In dealing with a reference the powers of the FTT are very wide. The Pensions Act 2004, s103 includes:

- (3) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.**

In *In the matter of the Bonas Group Pension Scheme* [2011] UKUT B 33 (TCC) Warren J, sitting in the UT, held that there was nothing in s103 or elsewhere to constrain the tribunal's approach to a reference. Its function is not that of an appellate court considering an appeal.³ It must simply make its own decision on the evidence before it (which may differ from that before the Regulator).

The key facts

8. The material facts are not in dispute. Besides those given in para 1 above, they can be summarised shortly as follows (I borrow from TPR's 'Response' document).

- 8.1 The Appellant's Staging Date (*ie* the date on which the AE duties first applied to them) was 1 November 2016.
- 8.2 Between 5 June 2022 and 30 March 2023 TPR sent monthly email reminders about the need to complete the 'declaration of compliance' (for the current cycle) by the deadline of 30 March 2023, to the Appellant's contact email address supplied in its 2020 declaration of compliance.
- 8.3 In July 2022 and December 2022, TPR wrote letters to the Appellant at its registered office, drawing attention to its AE duties and in particular its obligation to complete the 'declaration of compliance' (for the current cycle) by the deadline of 30 March 2023. The postal address used was that given by the Appellant in its 2020 declaration of compliance.
- 8.4 The letters and emails referred to above were correctly addressed.
- 8.5 On 20 April 2023 the CN (already mentioned) was issued. It was correctly addressed to the Appellant at its registered office address and allowed it until 31 May 2023 to deliver the declaration of compliance and warned that it would be liable to a fixed penalty of £400 if it failed to meet the (extended) deadline.
- 8.6 The Appellant did not complete the declaration of compliance by the due date (as extended), 31 May 2023. The FPN was issued over two weeks later, on 15 June 2023.
- 8.7 On 27 June 2023 the Appellant submitted its declaration of compliance.
- 8.8 On 28 June 2023 the Appellant applied for a review of the FPN but TPR refused that application on 5 July 2023.

The appeal

³ Although the terminology of 'appeal', 'appellant' etc is used

9. The notice of appeal raises three points. (1) Previous reminders from TPR had been sent to the Appellant's payroll manager's home address and personal email address, neither of which was used in the communications referred to in paras 7.2 and 7.3 above. (2) The postal address used was that of a shop and mail received there was not picked up until after the deadline had passed. (3) The penalty was unfair in the circumstances and particularly harsh for a small employer.

Discussion and conclusions

10. I start by reminding myself of the terms of the applicable legislation (summarised above) and in particular (a) the salutary purposes which the AE regime is designed to achieve, including ensuring that qualifying workers have the chance through occupational pensions to enjoy dignity and comfort in retirement; (b) the need for the mandatory requirements of the scheme to be backed up by an effective and robust enforcement mechanism; and (c) the need for other employers to understand that those requirements will be enforced. In my view, the correct approach is to look to the Appellant to show a good reason why TPR should not have followed its usual practice of meeting a breach of a CN with a FPN.

11. There is nothing in the Appellant's first two points. TPR was under no legal obligation to issue reminders at all. Moreover, they were sent to the addresses (both postal and email) which the Appellant had supplied in its last declaration of compliance.

12. The third point also goes nowhere. The FPN was lawfully issued. As to its level, I acknowledge that for a small business the penalty is likely to be painful, but the sum is fixed by law at £400, and I have no power to reduce it. Arrangements can sometimes be agreed with TPR for payment to be made by instalments.

Outcome

13. For the reasons stated, I am clear that the Appellant has not demonstrated a good excuse for its failure to meet the requirements of the CN and accordingly I must dismiss the reference and remit the matter to the Regulator. No further direction is required.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Date: 30 April 2024