



NCN [2024] UKFTT 00370 (GRC).

Appeal number: PEN/2023/0245P/AE

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

I-CREATION 2020 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
2 APRIL 2024**

DECISION

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

REASONS

Background

2. i-Creation Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 6 September 2023 (Notice number 117192266460).
3. The Fixed Penalty Notice was issued under section 40 of the Pensions Act 2008 ('the Act'). It requires the Employer to pay a penalty of £400 for failing to comply with a Compliance Notice dated 10 July 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 on 21 September 2023 that its decision was confirmed.
5. On the same day, 21 September 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 of its 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 (i.e. an appeal) 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 made previous declarations of compliance in March 2017 and February 2020.

15. At that time, the same individual (AJ) who submitted the Notice of Appeal in this case was a Director of the Employer (then called Ooh-AR Limited) and it was he who completed the declaration of compliance in 2017.

16. Each of the Regulator's acknowledgements of declaration of compliance in 2017 and 2020 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.*'

17. The Employer's deadline for its re-declaration of compliance was 30 June 2023.

18. As the Employer did not file a re-declaration of compliance by 30 June 2023, the Regulator issued a Compliance Notice dated 10 July 2023 to the Employer's registered office address at c/o D P C Stone House, 55 Stone Road Business Park, Stoke-on-Trent, Staffordshire ST4 6SR).

19. The Compliance Notice was marked '***DO NOT IGNORE THIS COMMUNICATION***' and headed '***I-CREATION 2020 LIMITED must comply with the directions in this notice by 21 August 2023. You may be issued a £400 penalty if you fail to comply by this deadline***'.

20. The Employer did not file a re-declaration of compliance as required by the Compliance Notice. As a result, on 6 September 2023 (two weeks after the extended deadline given by the Compliance Notice) the Regulator issued a Fixed Penalty Notice – again addressed to the Employer's registered office. This Penalty Notice

required payment of the fixed penalty sum of £400 by 4 October 2023, and compliance with the Compliance Notice by the same date.

21. On 18 September 2023, the Employer completed the re-declaration of compliance – and on the same date emailed the Regulator asking for a review of the Penalty Notice. The email explained that:

- (1) The Employer had completed its reassessment/re-enrolment earlier in the year.
- (2) The only action that the Employer did not complete was the declaration of compliance.
- (3) The Employer did not receive the reminder (Compliance Notice) dated 10 July 2023.
- (4) The Employer's pension provider said that the Employer was totally compliant and did not need to take any further action.
- (5) When the Employer received the letter (Penalty Notice), he acted immediately to investigate and had since completed the declaration.
- (6) The Employer was seeking a review and cancellation of the £400 penalty notice.

22. On 21 September 2023, the Regulator notified the Employer that it had noted the Employer's reasons for requesting a review, and the fact that it had since submitted the re-declaration of compliance. However, the Regulator had completed a review of its decision to issue the Fixed Penalty Notice and confirmed that decision meaning the penalty is still to be paid.

Submissions

23. The Employer's Notice of Appeal dated 16 October 2023 says that:

- (1) The Employer is a small business and does not have any in-house pensions advice. Its company pension scheme relates to six people.
- (2) The Employer has found communication from its pension provider and pensions adviser to be 'non-existent' in relation to any actions needing completion which are additional to the usual day-to-day operation of the pension scheme.
- (3) The Employer has learnt from this experience and spoken to both the provider and adviser to arrange better communication to help the Employer meet deadlines and complete processes in future. Actions for the next pensions scheme re-enrolment in 2026 have already been diarised.

(4) In early 2023, the Employer found out during a routine check of their pensions portal that they needed to re-enrol and re-assess their team. They spoke to their pension provider to discuss their responsibilities, and completed the process as instructed.

(5) The Employer genuinely thought that was the end of the matter and that re-enrolment was complete. Pension contributions have been made seamlessly as expected so the Employer did not check the portal and could not have known that they needed to complete the process with a declaration of compliance.

(6) The first the Employer heard that all was not well was when they received a £400 penalty.

(7) The Employer did not receive the letter (Compliance Notice) claimed by the Regulator, otherwise the Employer would have acted on it immediately as they did in September.

(8) The Employer checked their online portal and saw they needed to submit a declaration of compliance. They checked with their provider who confirmed that a declaration was required and immediately actioned it. This demonstrates the Employer's commitment to compliance.

(9) The Employer appealed against the £400 penalty but this was rejected.

(10) The Employer believes their actions show that as soon as they received the Penalty Notice in September, they immediately complied with the requirement of which they were previously unaware.

(11) The Employer had already complied with the re-enrolment and re-assessment requirements. The declaration of compliance was the only outstanding requirement, and that was done within half-an-hour of discovering it was required.

(12) The Employer acknowledges that the declaration of compliance was late but feels that the £400 penalty is neither fair nor proportionate for all the above reasons.

24. In its response dated 28 November 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1) The Regulator is of the opinion that the Employer failed to comply with the requirements of a Compliance Notice.

(2) The Compliance Notice and Fixed Penalty Notice were sent to the Employer's registered office address. They were not returned undelivered. The Regulator therefore relies on the statutory presumptions that all notices were properly served and received.

(3) The Employer's claim that the Compliance Notice was not received is a bare assertion and is not supported with any evidence or other information. This

is insufficient to rebut the presumption of service. The Penalty Notice was clearly received at the same address and there is no explanation why the Compliance Notice was not.

(4) The Employer has successfully completed previous declarations of compliance in March 2017 and February 2020 (albeit when the business was trading under a different name). It is therefore implausible that the Employer was not aware of its duty to complete the re-declaration. The person who submitted the review request was also cited on the original declaration of compliance in 2017, and the Notice of Appeal.

(5) The Regulator does not use recorded delivery or other registered mail services as this would allow intended recipients to refuse to sign or accept notices and other important communications and then claim lack of knowledge or receipt.

(6) Each employer is responsible for understanding and complying with their legal duties in running a business and ensuring full and timely compliance with them.

(7) It was fair, reasonable and proportionate for the Regulator to issue a Compliance Notice and then, when the Employer still failed to comply, to issue a penalty.

(8) The Employer completed its original declaration of compliance, and a re-declaration of compliance so it is not plausible that they were not aware of the requirement to re-declare and were unable to do so.

(9) It is irrelevant that the underlying duties (e.g. to pay pension contributions) may have been met in this case because the re-declaration of compliance was not made on time, and this is an important statutory duty.

(10) The amount of the penalty is fixed by law. In all the circumstances, the penalty is fair, reasonable and proportionate.

Conclusions

25. 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.

26. There is no legal requirement for the Regulator to provide any reminders to employers: ultimately, it remains the Employer's duty to comply with all their pensions obligations whether reminded of them or not.

27. In this case, a Compliance Notice was sent in July 2023 which the Employer seems to suggest was not received – though does not deny that the Fixed Penalty Notice was received. Even if the Compliance Notice was not received, the Regulator – having sent it to the correct registered office address (which to this day remains unchanged) – is entitled to rely on the statutory presumptions of proper service and

receipt unless there is strong evidence to the contrary. **No** evidence to the contrary has been provided in this case.

28. Only after the extended deadline granted by the Compliance Notice had passed – and indeed only after the Fixed Penalty Notice was served (meaning the Employer had had over seven months rather than five months to comply) – did the Employer submit a declaration of compliance.

29. The reasons given by the Employer in its review request to the Regulator and Notice of Appeal to the Tribunal (summarised in paragraphs 21 and 23 above) indicate that the Employer was not well aware of its auto-enrolment obligation to submit a declaration of compliance.

30. While I have some sympathy with the Employer’s claim that the Compliance Notice was not received, as a responsible employer he should have been aware of the need to submit a declaration of compliance long before Compliance Notice was issued extending the deadline from 30 June 2023 until 21 August 2023.

31. The Regulator’s acknowledgements of receipt of the declarations of compliance in 2017 and 2020 both explicitly stated the need to re-enrol employees and re-declare compliance in three years’ time.

32. It appears from Employer’s mention of a ‘pensions adviser’ (as well as a pensions provider) that the Employer may have engaged a third party to assist with pensions issues. While the Employer remains responsible for fulfilling the statutory duties of an employer, if a pensions adviser was engaged to assist but did not provide the necessary standard of professional skill and care, thereby resulting in loss to the Employer, it is open to the Employer to take steps against that adviser.

33. The acts and/or omissions of a third party does not, however, provide a reasonable excuse for the Employer’s failure to comply – in full and on time – with all statutory obligations, including the need to submit to the Regulator a re-declaration of compliance.

34. The declaration of compliance is an important tool to enable the Regulator to check that employers are complying with their legal obligations. While the Employer argues that compliance was achieved immediately on becoming aware of the requirement, this cannot in law amount to a reasonable excuse for the previous failure to comply on time. Were it otherwise, employers might adopt a casual approach to compliance deadlines in the hope or even expectation that late compliance would enable a penalty to be overturned.

35. In all the circumstances, I therefore determine that the Regulator was entitled to issue a Fixed Penalty Notice on 6 September 2023 for non-compliance with the Compliance Notice dated 10 July 2023.

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

37. However, the Regulator is able to accept the payment of penalties in instalments if a single payment will cause particular hardship. Should the Employer advise the Regulator that one single payment would cause financial difficulties, the Regulator may be willing to consider repayment options.

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

39. No directions are necessary.

(Signed)

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

DATE: 2nd May 2024