

NCN: [2023] UKFTT 00840 (GRC) Appeal number: PEN/2023/0130

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

MAC4SALE LTD

- and -

THE PENSIONS REGULATOR

**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

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DECISION

1.

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

REASONS

Background

2.

Mac4Sale Limited ('the Employer') challenges a Fixed Penalty Notice issued by the Respondent ('the Regulator') on 13 April 2023 (Notice number 142372508382).

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 13 February 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 17 May 2023 that its decision was confirmed.

5.

On 1 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 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 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 declaration of compliance deadline was 6 January 2020, which the Employer met. The Regulator's acknowledgement of receipt dated 7 January 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.'

15.

In May 2022 the Regulator wrote the Employer a reminder letter about their re-enrolment duties, including a reminder of their re-declaration of compliance deadline of 6 January 2023.

16.

The Regulator sent a second reminder letter to the Employer in October 2022. This again stated the deadline to re-declare compliance was 6 January 2023. The letter also stated in bold text that if the Employer did not complete their legal duties on time, including their re-declaration of compliance, they may be subject to fines and/or prosecution.

17.

As the Employer did not file a re-declaration of compliance by 6 January 2023, the Regulator sent yet another reminder dated 27 January 2023. The letter was marked 'DO NOT IGNORE THIS COMMUNICATION' and headed 'Urgent action is required – your re-declaration deadline was 6 January 2023'. An extended deadline of a further 14 days of the issue date of the letter was given. 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.

The Employer did not file a re-declaration of compliance within 14 days of the final reminder letter so the Regulator issued a Compliance Notice dated 13 February 2023, requiring the re-declaration of compliance to be filed by a further extended deadline of 27 March 2023. The Compliance Notice specified that a £400 penalty might be imposed if the Employer failed to comply.

19.

The further extended deadline was not met so, on 13 April 2023, the Regulator issued a Fixed Penalty Notice requiring payment of the fixed penalty sum of £400 by 11 May 2023 and compliance with the Compliance Notice by the same date.

20.

On 5 May 2023, the Employer filed the re-declaration of compliance. On 6 May 2023 the Regulator acknowledged the re-declaration of compliance.

21.

On 10 May 2023, the Employer asked the Regulator to carry out a review of its decision to impose a penalty.

22.

On 17 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

23.

The Employer's Notice of Appeal dated 1 June 2023 says that:

(1)

The Employer understands their responsibility to submit the necessary declarations in a timely manner.

(2)

They sincerely apologise for any oversight.

(3)

Due to the large volume of letters they receive, it is possible that the reminder letter was misplaced or inadvertently overlooked.

(4)

An internal accountant has been hired but the oversight may have occurred because she is new and works remotely.

(5)

The Employer genuinely regrets the oversight and has taken measures to ensure it does not happen again.

(6)

The required declaration has now been submitted.

(7)

Financially, the Employer is facing significant challenges and paying this penalty would impose a significant burden.

23.

In its response dated 4 August 2023, the Regulator gave the following reasons for opposing the Employer's reference of this matter to the Tribunal:

(1)

As a responsible employer, it is for the employer to be aware of their legal duties and comply with them in full and on time. This Employer complied with their duty to declare previously (in 2020) so is aware of this duty.

(2)

The Regulator directly reminded the Employer of their duty to re-enrol employees and then file a re-declaration of compliance in May 2022, and then again in October 2022. These reminder letters advised of the deadline of 6 January 2023 for making the re-declaration of compliance. The Regulator sent a further reminder letter dated 27 January 2023 giving the Employer a further 14 days in which to comply.

(3)

All the letters and statutory notices were issued to the Employer's registered office address which appears to be their principal office address. There is no evidence that any of the Regulator's correspondence to the Employer was not delivered or was returned to the Regulator.

(4)

The Regulator relies on the strong statutory presumptions that the notices were properly served and received. In any event, the Employer does not dispute receipt and appears to acknowledge receiving both the Compliance Notice and the Fixed Penalty Notice.

(5)

The Employer says that the Regulator's communications were misplaced or inadvertently overlooked, perhaps because the individual tasked with compliance was new and working remotely.

(6)

Employers are entitled to delegate the completion of their duties to someone else, including an internal accountant if they so wish. However, it remains the employer's responsibility to ensure that the duties are complied with. Hence a mistake by an employee does not amount to a reasonable excuse for the employer's failure to send a re-declaration of compliance to the Regulator on time.

(7)

Although the Employer may not have intentionally breached their duties, a lack of intent does not amount to a reasonable excuse for failure to comply. Even an honest mistake does not amount to a reasonable excuse.

(8)

The failure to appreciate or act on reminder letters or a formal notice, or such correspondence being wrongly handled, ignored or misplaced does not amount to reasonable excuse for failure to comply.

(9)

The reminder letter dated 27 January 2023 and the Compliance Notice should have alerted the Employer that the re-declaration remained outstanding. Both also granted an extension of time to comply, and invited the Employer to contact the Regulator if unsure what was required.

(10)

After receiving the Fixed Penalty Notice, the Employer rapidly complied without further assistance from the Regulator so it is likely that had attention been paid to the reminder letters and Compliance Notice, the penalty could have been avoided.

(11)

The Regulator also tried to telephone the Employer on the only number provided by the Employer: obtaining no reply, the Regulator left a voicemail message. There is no record of this call being returned until 5 May 2023 when the Employer telephoned the Regulator to enquire about their employer duties. The Employer completed their re-declaration of compliance that same day.

(12)

The Regulator acknowledges that the Employer may take their employer duties seriously, and accepts that they have now completed their re-declaration as well as taken steps to ensure similar deadlines are not missed in future.

(13)

However, the re-declaration was completed only after two extended deadlines and only after the Fixed Penalty Notice was issued. Late or eventual compliance does not excuse failure to comply with the Compliance Notice nor comprise exceptional grounds to revoke a penalty.

(14)

The Fixed Penalty Notice was fair, reasonable and proportionate because:

(a)

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

(b)

The Regulator has repeatedly made clear that action will be taken against employers who fail to provide a re-declaration of compliance.

(c)

In this case, the Employer failed to take timely steps to make the re-declaration so the Regulator was entitled to issue the Fixed Penalty Notice.

(d)

The Regulator served a formal reminder via the Compliance Notice which gave the Employer further time to comply and made clear that a £400 fixed penalty might be imposed for failure to comply.

(e)

The five-month period for compliance, starting with the third anniversary of the employer's duties start date, is a generous period within which to complete the re-declaration.

(f)

The amount of the penalty is prescribed and neither the Regulator nor the Tribunal has any discretion to alter that amount.

(g)

No reasonable excuse in fact or law has been provided for the Employer's failure to complete the re-declaration on time.

Conclusions

24.

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.

25.

There is no legal requirement for the Regulator to provide any reminders to employers: they are sent as a courtesy. Ultimately, it is the Employer's duty to comply with all their pensions obligations.

26.

In this case, three reminder letters were sent to the Employer (in May 2022, October 2022 and January 2023) and a Compliance Notice (sent in February 2023). Any one of these should have alerted the Employer to their legal duties of re-enrolment and re-declaration of compliance.

27.

Each letter clearly set out the steps required, including the re-declaration deadline of 6 January 2023 (effectively extended by five weeks by the final reminder letter, and by a further six weeks by the Compliance Notice). This gave the Employer more than adequate time to comply with their obligations of which they were first notified by the Regulator in January 2020.

28.

Whether or not an employer receives reminders, as a responsible employer it is for them to be aware of their legal duties, and to ensure full and timely compliance. In this instance, the Employer failed to do so. That failure entitled the Regulator to issue a Compliance Notice.

29.

The Employer seems to accept that the Compliance Notice was received but that it was overlooked by mistake. While the candour of this admission is acknowledged, unfortunately it does not excuse the failure to comply on time nor remove the Regulator's right to serve a Fixed Penalty Notice as it did in this case.

30.

The Employer has since completed the re-declaration, but only after the extended deadline had passed and after the Fixed Penalty Notice was issued. This late compliance does not excuse the failure to complete it on time, nor provide a reason for revoking the penalty.

31.

In all the circumstances, I determine that the Regulator was entitled to issue a Fixed Penalty Notice on 13 April 2023 for non-compliance with the Compliance Notice dated 13 February 2023.

32.

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.

33.

However, the Regulator has indicated its willingness to accept the payment of penalties in instalments if a single payment will cause particular hardship.

34.

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

35.

No directions are necessary.

(Signed)

ALEXANDRA MARKS CBE DATE: 9th October 2023

(Sitting as a Judge of the First Tier Tribunal)