

First-tier Tribunal
General Regulatory Chamber
Pensions

Heard: Paper Consideration

Heard on: 5 February 2024 in Chambers

Decision given on: 20 February 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

SURE SERVICES GROUP LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1.

By this reference Sure Services Group Limited (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 25 April 2023, requiring the Appellant to pay a fixed penalty of £400 for failure to comply with a compliance notice.

2.

The parties have agreed to a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3.

The Pensions Act 2008 (the “Act”) imposes a number of requirements on employers in relation to the automatic enrolment of certain “job holders” in occupational or workplace personal pension schemes.

4.

The Regulator has statutory responsibility for ensuring compliance with these requirements. Under Section 35 of the Act, the Regulator can issue a compliance notice if an employer has contravened one or more of its employer duties. A compliance notice requires the person to whom it is issued to take (or refrain from taking) certain steps in order to remedy the contravention, and will usually specify a date by which these steps should be taken.

5.

Under Section 40 of the Act, the Regulator can issue a fixed penalty notice if it is of the opinion that an employer has failed to comply with a compliance notice. This requires the person to whom it is

issued to pay a penalty within the period specified in the notice. The amount is to be determined in accordance with regulations. Under the Employers' Duties (Registration and Compliance) Regulations 2010 (the "2010 Regulations"), the amount of a fixed penalty is £400.

6.

Notification may be given to a person by the Regulator by sending it by post to that person's "proper address" (section 303(2)(c) of the Pensions Act 2004 (the "2004 Act")). The registered office or principal office address is the proper address on which to serve notices on a body corporate, as set out in section 303(6)(a) of the 2004 Act (applied by section 144A of the Act). Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. This includes compliance notices issued under the Act.

7.

Section 44 of the Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal in respect of the issue of the notice and/or the amount of the penalty payable under the notice. A person may make a reference to the Tribunal if an application for a review has first been made to the Regulator under Section 43 of the Act. Under Section 103(3) of the 2004 Act, the Tribunal must then "determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it." The Tribunal must make its own decision following an assessment of the evidence presented to it (which may differ from the evidence presented to the Regulator), and can reach a different decision to that of the Regulator even if the original decision fell within the range of reasonable decisions (**In the Matter of the Bonas Group Pension Scheme** [2011] UKUT B 33 (TCC)). In considering a penalty notice, it is proper to take "reasonable excuse" for compliance failures into account (**Pensions Regulator v Strathmore Medical Practice** [2018] UKUT 104 (AAC)). On determining the reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate.

8.

Under section 11 of the Act, an employer who is subject to automatic enrolment duties must give prescribed information to the Regulator - known as a declaration of compliance. This information is prescribed in Regulation 3 of the 2010 Regulations. The declaration of compliance must be provided within five months of the staging date or duties start date (Regulation 3(1)).

Facts

9.

The facts are set out in the Appellant's notice of appeal document, the Regulator's response document and the Appellant's reply, including the annexes attached to those documents. I find the following material facts.

10.

The Appellant is the employer for the purposes of the various employer duties under the Act. The Appellant's declaration of compliance was due to be provided by 30 January 2023. The Appellant did not complete a declaration of compliance by the required date.

11.

The Regulator issued a compliance notice to the Appellant on 24 February 2023, to the registered office address. This stated, "You must tell us how you have met your employer duties by completing your declaration of compliance. This needs to be completed by 6 April 2023". The Regulator had

previously sent reminder letters to the same address, including one on 9 February 2023 which extended the deadline by two weeks.

12.

The Appellant did not comply with the compliance notice, and the Regulator issued a fixed penalty notice to the Appellant on 25 April 2023.

13.

The Appellant applied for a review to the Regulator. The Regulator initially refused to review the penalty as the request was outside the 28 day time limit, and on reconsideration confirmed the penalty notice.

14.

The Appellant did complete the declaration of compliance on 28 June 2023.

Appeal grounds

15.

The Appellant's appeal grounds are:

a.

They did not receive the compliance notice. If they had, the Appellant's accountants would have dealt with this as a matter of urgency.

b.

The person overseeing the Appellant's work at the accountants was in hospital with a flare up of an ongoing disease, meaning work progressed at a slower rate than normal and the deadline was missed.

16.

The Regulator says that the Appellant has not shown a reasonable excuse for failure to comply, as discussed below. The Appellant has submitted a reply to the Regulator's response, also discussed below.

Conclusions

17.

The declaration of compliance is a central part of the Regulator's compliance and enforcement approach. It is necessary so that the Regulator can ensure that employers are complying with their automatic enrolment duties, and this is why it is a mandatory part of the system. Employers are responsible for ensuring that these important duties are all complied with, and there needs to be a robust enforcement mechanism to support this system.

18.

I have considered whether issuing the fixed penalty notice was an appropriate action for the Regulator to take in this case, and find that it was. The Regulator had sent the Appellant information in February 2023 about the need to complete a declaration of compliance, including extending the relevant deadline. This deadline was further extended in the compliance notice. The Appellant failed to comply with the further deadline set out in the compliance notice.

19.

I have considered whether the compliance notice was legally served at the Appellant's proper address, and find that it was. Under the 2004 Act, the Regulator can serve this notice on a limited

company by sending it to either the company's registered office or to its principal office. According to the documents I have seen, the notice was sent to the Appellant's registered office address.

20.

I do not find that the Appellant had a reasonable excuse for failing to comply with the compliance notice.

21.

The Appellant was sent the compliance notice, which contained clear information about how to complete the declaration of compliance and an extended deadline. Under Regulation 15(4) of the 2010 Regulations, there is a presumption that a notice is received by a person to whom it is addressed. The Appellant has not rebutted this presumption. The fixed penalty notice was received by the Appellant, and this was sent to exactly the same address by the Regulator. The Appellant has provided no explanation as to why the compliance notice may not have been received - in circumstances where it appears to have been sent to the correct registered office address, and the fixed penalty notice was received. A mere assertion that a notice was not received is not sufficient to overturn the statutory presumption of service (**London Borough of Southwark v (1) Runa Akhter & (2) Stel LLC** [2017] UKUT 0150).

22.

I note the Appellant's reply says that the reminder letters were not received. The reply also says that the fixed penalty notice was not received. They say that the only piece of correspondence they received was dated 25 May 2023, and was forwarded to the accountants on 28 June 2023. The reply also says that the registered office is under construction, and has been since March 2023. It may be that the situation with the registered office has led to post being mislaid or overlooked. However, this does not provide a reasonable excuse for non-compliance. A responsible employer must have processes in place to ensure that important post sent to its registered office address is seen and dealt with.

23.

I therefore find on balance of probabilities that the compliance notice was received by the Appellant at its registered office address.

24.

I have also considered the illness of the Appellant's accountant. The Regulator says that this is not a reasonable excuse for the failure to comply. Firstly, regardless of whether duties were delegated, it is the employer's responsibility to ensure compliance. Secondly, there is no explanation for why another member of the firm could not cover the work.

25.

I agree with the Regulator that the employer has the responsibility for ensuring compliance with these duties, and this remains the case even if they choose to delegate to a third party.

26.

In relation to the accountant's illness, some medical evidence has been provided. This appears shows a hospital stay of one day, on 13 April 2023. The medical notes record that the individual had been on holiday in Thailand two weeks previously, and they felt well throughout the holiday. This evidence does not show a lengthy stay in hospital as suggested in the appeal. The Appellant's reply says that although protocols were in place for handling staff illnesses, the company is family-run and this illness was distressing for the whole family.

27.

I accept that the individual who dealt with the Appellant's account was unwell in April 2023, and that this may well have been distressing for her family. However, this does not explain the Appellant's failure to comply. The compliance notice had already been sent to the Appellant in February 2023. The accountants (who completed the appeal and reply for the Appellant) say that they did not have the compliance notice. They also say that they were only sent the fixed penalty notice by the Appellant in June 2023, and they acted on it immediately, meaning that illness in April would not have affected what happened. The Appellant has not explained how the accountant's illness prevented them from complying with the compliance notice.

28.

For the above reasons, I determine that issuing the fixed penalty notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the fixed penalty notice. No directions are necessary.

Hazel Oliver

Judge of the First-tier Tribunal

Date: 19 February 2024