FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PENSIONS

Tribunal Reference: PEN/2021/0272

Decided without a hearing

Decision Date: 11th March 2022

Judge David Hunter QC

Between

KILTED FUDGE COMPANY LTD

Appellant (by Reference)

And

THE PENSIONS REGULATOR

Respondent

DECISION

The Reference is dismissed, and the matter is remitted to the Regulator. The Penalty Notice is confirmed.

REASONS

Preliminary

1. By this Reference Kilted Fudge Company Ltd ("the Employer") challenges a fixed penalty notice ("the Penalty Notice") issued by The Pensions Regulator ("the Regulator"). The Penalty Notice was issued on 25th August 2021 and bears the Notice Number: 112023605968.

2. The Penalty Notice was issued under section 40 (1) of the Pensions Act 2008 ("the 2008 Act"). It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Compliance Notice dated 13th July 2021.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 16th September 2021. The effect of the Penalty Notice is accordingly suspended until the Reference has been determined, the Tribunal has remitted the matter to the Regulator, and any directions given by the Tribunal have been complied with.

4. The parties have agreed to the Reference being determined upon consideration of the papers they provided, without an oral hearing being held. I have therefore considered the Employer's application form for the Reference (described in the papers as the Notice of Appeal, and containing "Grounds of Appeal"), the Employer's request for a review, and the Regulator's Response with supporting documentary evidence.

Statutory framework

5. The 2008 Act imposes a number of requirements on employers in relation to the automatic enrolment of certain 'jobholders' in occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with those requirements and has certain enforcement powers for this purpose.

6. Each employer is assigned a 'staging date' (which depends on the size of their workforce and their PAYE reference number) by reference to which the timetable for the performance of their duties is fixed.

7. Under Regulation 3 of the Employers' Duties (Registration and Compliance) Regulations 2010 ("the Regulations"), an employer must provide specified information (in respect of enrolment) to the Regulator within five months of their staging date. That information includes details of the employer and any agent supplying the information, the numbers of jobholders of various categories enrolled in various types of pension scheme and a declaration that the information provided is correct and complete. Regulation 3(4) provides that all information provided must be accompanied by a declaration that the information is correct and complete, and such a declaration is referred to by the Regulator as a 'Declaration of Compliance'.

8. Regulation 4 of the Regulations provides for re-registration, and the provision again by employers of specified information (in respect of re-enrolment) to the Regulator at the end of 3 years starting from the last provision of information to the Regulator. Again, Regulation 4(4) provides that this re-provision of information must be accompanied by a declaration that the information is correct and complete, and this second declaration is referred to by the Regulator as a "Re-declaration of Compliance".

9. Under section 35 of the 2008 Act the Regulator can issue a 'Compliance Notice' against an employer who has contravened any of the 'employer duty provisions' (which include the duty to provide the Re-declaration of Compliance pursuant to Regulation 4(4)). Under section 40(1) the Regulator can issue a fixed penalty notice ("FPN") if it is of the opinion that the employer has failed to comply with the requirements of a Compliance Notice. The prescribed fixed penalty is £400.

Function of the Tribunal

10.. Section 44 of the 2008 Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal. They may do so provided that an application for a review has first been made to the Regulator.

11. Section 103(3) of the Pensions Act 2004 provides that on a reference like this one the Tribunal "… must 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 on this issue following an assessment of the evidence presented to it (which may differ from the evidence which was available to the Regulator). The Tribunal does not sit as an appellate body from a decision of the Regulator; it is not necessary to show that the Regulator was in error, and the Tribunal can reach a different decision to that of the Regulator even if it thinks that the Regulator's decision fell within a range of reasonable decisions.

12. On determining the Reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination. Those directions may include directions confirming, varying or revoking a notice issued by the Regulator.

Factual background

13. The material facts from which this reference arises are not in dispute. They are set out in the Regulator's Response document and may be summarised as follows:

14. The date by which the Employer was obliged to provide the Regulator with a Re-declaration of Compliance (referred to hereafter as "the re-declaration) was 30th June 2021.

15. In October 2020 and March 2021 two letters were sent by the Regulator to the Employer reminding it about its responsibilities in relation to re-enrolment and re-declaration. The first of those letters summarised the Employer's duties with regard to re-enrolment and re-declaration and set out the re-declaration deadline of 30th June 2021. The second letter was headlined: "Act now – re-enrolment and re-declaration", again stressed the re-declaration deadline, and reminded the Employer, in highlighted typescript, that if it did not complete its legal duties in time, including the re-declaration of compliance, it may be subject to fines and/or prosecution.

16. The Employer failed to provide the Regulator with a re-declaration of compliance before the extended deadline for doing so and, on 13th July 2021, the Regulator issued a Compliance Notice requiring the Employer to provide a re-declaration of compliance by 23rd August 2021.

17. That new deadline passed without a re-declaration of compliance being provided and, on 25th August 2021, the Regulator issued the Penalty Notice.

18. The Employer did complete its re-declaration of compliance, but not until 26th August 2021.

19. The Employer made a request for a review of the Fixed Penalty Notice. The Regulator conducted a review, and, on 8th September 2021, it wrote to the Employer informing it that the outcome of the review was that the Penalty Notice was confirmed. Written reasons for the decision were provided.

20. As stated aforesaid, the Employer referred this matter to the Tribunal by its Notice of Appeal dated 16th September 2021.

Grounds of Appeal

21. The grounds are contained in the request for a review, submitted by the Employer, and in the Grounds of Appeal attached to the Notice of Appeal, submitted by the Employer's bookkeeper. Both documents assert that the only material correspondence received by the Employer was the Fixed Penalty Notice, and that previous correspondence (the two letters of October 2020 and March 2021 and the Compliance Notice) were not received by the Employer. It is said that the Employer "operated irregularly" throughout the pandemic. It is said also that as soon as the FPN was received by the Employer it was passed to the bookkeeper for action, and that the re-declaration was then made.

22. It is said also that: "if the Regulator's "second letter" was dated 12th July 2021 then it would have been issued after the compliance date." I reject this "ground of appeal" immediately – there is clear confusion on the part of the Employer – this can only be a reference to the Compliance Notice, which was of course issued after the original deadline date, and afforded an extended deadline date for compliance – it is the failure to meet that extended deadline date which is the issue in the Appeal.

The Submissions of the Regulator

23. These are contained in the Response of the Regulator to the Reference.

24. Essentially, the Regulator relies upon the aforesaid correspondence with the Employer, by the aforesaid letters and the Compliance Notice, and asserts that by that correspondence reasonable and ample notice was given to the Employer of the statutory and separate duty to make the re-declaration of compliance with the automatic enrolment process.

25. So far as the letter correspondence and the Compliance Notice, and their service and receipt, are concerned, the Regulator relies upon the statutory presumptions of service and receipt contained in Section 303(6)(a) of the Pensions Act 2004 and Regulation 15(4) of the Regulations. In that regard the Regulator draws to the attention of the Tribunal certain dicta in decided cases by the Upper Tribunal and the Chamber President of this Tribunal.

Discussion

26. In the absence of any evidence to the contrary, I find that the Regulator had valid grounds to issue this Penalty Notice under Section 40 (1) of the Act. The question for determination is whether that was the appropriate action for the Regulator to take in this case.

27. The timely provision of information to the Regulator, so that it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that the provision of a re-declaration of compliance within a specified timeframe is a mandatory requirement, as a specific and separate statutory duty.

28. Bearing these factors I mind, it seems to me that issuing this Penalty Notice was an entirely appropriate step for the Regulator to take, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice. All the Employer needed to do, in the context of this Reference, was to provide the re-declaration of compliance by the extended deadline of 23rd August 2021 (almost two months after the original deadline date). I accept the submissions of the Registrar, and consider, provided that the relevant correspondence and Notices were received, that the Employer was given reasonable and indeed ample notice of his obligations and of the deadline for compliance, and ample information about the material process.

29. The aforesaid correspondence and Notice set out in paragraphs 15 and 16 above manifestly made it absolutely clear that the duty of making the re-declaration rested upon the Employer, provided ample information in respect of the process of making the re-declaration, warned of the consequences of a failure to do so, and highlighted the deadline date for completion of the re-declaration. Further, when that date had lapsed, the issue of the Compliance Notice afforded a further generously extended deadline for making the re-declaration, an opportunity of which the Employer did not successfully avail.

30. The "reasonable excuse" put forward by the Employer and on its behalf is an asserted non-receipt of any correspondence or notice prior to the issue and receipt of the Penalty Notice. I reject this excuse.

31. The Employer's principal office address, which is not in dispute, is in the Spey Valley Business Park, Aviemore, in Inverness-Shire, Scotland This is the address to which the aforesaid letter correspondence and the Compliance Notice and the Penalty Notice were sent by the Regulator.

32. The statutory presumptions, upon which the Regulator relies, in respect of official correspondence sent to a company's registered address, with regard to due service and receipt, are strong. Relevantly to this reference, they are contained in Section 303(6)(a) of the Pensions Act 2004 and Regulation 15(4) of the Employers Duties (Regulation and Compliance) Regulations 2010. The strength of the presumptions, with regard to due service and receipt of official correspondence sent to a principal office address, has been confirmed in many tribunal cases, for example by the Upper Tribunal in **London Borough of Southwark v Akhter 2017 UKUT 150**, and Judge McKenna in **Ahmads 786 Frist v TPR PEN.2019.0228**. It is clearly established that the burden of overturning the presumptions rests on the Employer, and that it must discharge that burden by evidential proof of non-receipt, and that a bare assertion is of insufficient weight to discharge that burden.

33. In this case, I consider that it is clear that the Aviemore address, to which the aforesaid letters and Notices were sent, is the principal office address of the Employer. It follows that I consider that the Regulator is entitled to rely upon the statutory

presumptions. The assertion of non-receipt is in this case a mere paper assertion and is wholly insufficient to overturn the presumptions. No explanation is provided as to why the Penalty Notice was received, as manifestly it was, whereas, as is asserted, the letters and Compliance Notice, sent to the same principal office address, were not received. Further, although "irregular operation" is asserted, no details are given, and the Employer said in the Grounds of Appeal that despite that irregular operation "there seems no reason to believe that the "letters" should not have been received".

34. I find that both Notices were duly sent and received, and find also that the two letters, giving due warning and notice and sent to that same address, were also sent and received. Although prompt action was taken after the admitted receipt of the Penalty Notice, the previous correspondence, by those letters and the Compliance Notice, afforded more than sufficient opportunity for the Employer to alert its bookkeeper to the need to make the re-declaration in a timely fashion prior to the extended deadline.

35. Accordingly, I consider that the Employer has provided no reasonable excuse for the material failure of timely compliance with the statutory duty to make the re-declaration. Although the re-declaration was ultimately made, it was made after the extended deadline for so doing had expired.

36. As to penalty, the requirement to pay a £400 penalty is clearly a more significant burden for a small business than a larger one. However, the fact that the penalty is burdensome is inherent in the fact that it is a "penalty". The amount of the penalty is prescribed by regulations made under the 2008 Act. Its amount reflects both the importance of complying with the employer duty regulations and the seriousness with which a failure to do so should be viewed. The Registrar has no discretion under Section 40 of the Act to issue a Penalty Notice for a lesser amount. Nor does the Tribunal have power to direct substitution of a lesser amount. I am aware that, if payment of the penalty in a single sum will occasion hardship, the Regulator is willing to engage with the Employer, to consider repayment options.

37. For these reasons I determine that the issuing of the Fixed Penalty Notice was the appropriate action to take in this case. Accordingly, I dismiss the Reference and remit the matter to the Regulator under Section 44 (4) (b) of the Act. No directions are given pursuant to Section 44 (4) (c) of the Act.

David Hunter QC

Date of Decision: 11th March 2022

Date Promulgated: 14th March 2022