



NCN [2024] UKFTT 578 (GRC).

Case Reference: PEN/2024/0033/AE

First-tier Tribunal
(General Regulatory Chamber)
Pensions

Decided without a hearing
Decision given on: 04 July 2024

Before

JUDGE HUGHES

Between

COFAL LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The reference is accepted and the matter is remitted to the Regulator. The penalty notice 180406325985 is disappplied and not payable.

REASONS

1. In this case the Appellant has appealed against the issue of a penalty notice in the sum of £400 dated 29 December 2023 having previously issued a Compliance Notice on 1 November 2023. The Appellant company was formed on 28 March 2023. The Regulator in its case indicates that the Appellant's duties under the Pensions Act started on 6 May 2023 and accordingly there was a duty to make a declaration of compliance by 5 October 2023. In July the Regulator reminded the Employer of its impending obligation to make a declaration. In its communications the Regulator has pointed out that it does not hold any email address for the company and urged the director to provide one.

2. Having received the Penalty Notice the Employer promptly sought a review of the penalty on 8 January and was notified on 13 January that the request had been unsuccessful. In seeking a review the director argued:

I'm writing with an urgent request for a review of a £400 penalty charge I received as a small coffee shop owner navigating both the unfamiliar waters of pensions auto-enrolment and a particularly challenging time for our business. Two months ago, I diligently registered with the regulator, unaware of the additional requirement for a declaration of compliance.

My focus has been on keeping our doors open and serving our community during this difficult period. While I've always maintained a history of timely HMRC payments, I genuinely believed that registering with the Pensions Regulator fulfilled my initial obligations. Unfortunately, my lack of experience with auto-enrolment and the pressures of running a small business led to this oversight.

I'm incredibly relieved to inform you that I've now completed the declaration of compliance, demonstrating my immediate action and commitment to responsible business practices. Given the extenuating circumstances and my immediate rectification, I kindly request a review of the penalty, considering my small business status, lack of awareness, and prompt response as mitigating factors.

I'm eager to fully understand the ongoing requirements of auto-enrolment and ensure my coffee shop remains compliant.

Thank you for your understanding and support for small businesses like mine during these challenging times.

3. In this case the Employer has not suggested that it did not receive the various notices and communications from the Regulator.
4. The Regulator in response pointed out that the Compliance declaration should have been submitted by 12 December and that he had to comply with the notice by 26 January.
5. In the appeal to the tribunal dated 39 January 2024 the Employer repeated the arguments advanced on review.
6. The Regulator resisted the appeal arguing:-

“Employers with workers as defined in the Pensions Act 2008 are required to comply with their statutory duties within the timescales provided by law. The Appellant failed to do so; it was therefore fair, reasonable and appropriate for the Respondent to issue a Compliance Notice and when the Appellant still failed to comply, to issue a penalty, as a result. As stated, the Appellant has complied with other automatic enrolment duties (and those required by HMRC), so it is not plausible they were not aware of the requirement to declare and were unable to do so. It is irrelevant that the underlying duties may have been met in this case, the Declaration of Compliance was not, and this is an important statutory duty.

The amount of the penalty is fixed by law. In all the circumstances, and with particular regard to the multiple warnings and reminders given to the Appellant, the penalty is fair, reasonable and proportionate. If this would pose a financial hardship on the Appellant, it is free to contact the Respondent to discuss payment options.

The Tribunal is therefore invited to dismiss the appeal on the merits."

Consideration

7. The Employer's appeal asserts that the omission was inadvertent, that he did not understand the need to submit the Compliance Declaration, that he was efficient at meeting his obligations to HMRC, that he lacked experience with respect to auto-enrolment, that there was considerable pressure in running a small business and he had complied promptly by completing the declaration as soon as he had understood the position.

8. The Regulator's response (set out above) is intriguing:-

"As stated, the Appellant has complied with other automatic enrolment duties (and those required by HMRC), so it is not plausible they were not aware of the requirement to declare and were unable to do so. It is irrelevant that the underlying duties may have been met in this case, the Declaration of Compliance was not, and this is an important statutory duty."

9. To the untutored eye this appears a gross overstatement. The communications from the Regulator make very clear that there is a duty to file the declaration and the possibility of a penalty is apparent. If the Employer had apprehended that fact it would be bizarre for it to allow a few weeks to pass knowing that as the notice of 1 November made clear:

COFAL LIMITED must comply with the directions in this notice by: 12 December 2023. You may be issued a £400 penalty if you fail to comply by this deadline.

10. Furthermore the tribunal takes considerable issue with the assertion that:

It is irrelevant that the underlying duties may have been met in this case

11. The reason for the existence of the regulatory framework and the Regulator is to ensure that the underlying duties have been met. The duty to file details of compliance is a significant means of enabling the Regulator to be satisfied that there is compliance, but the Regulator should maintain a sense of proportion and not indulge in overblown rhetoric which denigrate the purpose for which it was created.

12. From the material before me I see no reason to doubt that there has been substantial compliance with the "underlying duties." The Employer responded promptly once it had a better understanding of the position.

13. In the light of that prompt response to the notice and its satisfaction that the "underlying duties" had been met it would have been open on review for the Regulator to decide not to impose a penalty.

14. In considering this appeal I have a wider discretion than the Regulator considers that it has on review. However in all the circumstances of the case, in particular the frank approach of the Employer to its error and the arguments advanced by the Regulator I am satisfied that there should be no penalty in this case.
15. The employer should ensure that the various regulatory bodies with which it deals have its correct email address and should take these events as a warning to check the post.

Signed: Hughes

Date: 4 July 2024