



Appeal number: PEN/2021/0346

[2022] UKFTT 00251 (GRC)

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

LAGOON POOLS LTD

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

**TRIBUNAL: HER HONOUR JUDGE ANGELA MORRIS
THE RECORDER OF WINCHESTER**

Sitting in Chambers on 11th May 2022

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DECISION

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

REASONS

Background

2. By this reference Lagoon Pools Ltd (“the Employer”) challenges a Fixed Penalty Notice issued by the Regulator on 15th November 2021 (Notice number: 167312397026).

3. The Penalty Notice was issued under s. 40(1) of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of an Unpaid Contributions Notice dated 15th October 2021 which required the Employer to provide the Regulator with information in respect of pension contributions in accordance with its employer obligations under the Pensions Act 2008 and provide evidence of the same to the Regulator by 11th November 2021¹.

4. A Fixed Penalty Notice was issued on 15th November 2021. A request by the appellant for a review of the decision was served on 26th November 2021. The Regulator completed a review of the decision to impose the Penalty Notice and informed the Appellant on 1st December 2021 that the decision was confirmed. The Appellant referred the matter to the Tribunal on 13th December 2021.

5. The parties and the Tribunal agreed that this matter was 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

6. The Pensions Act 2008 imposed a number of legal obligations on employers in relation to the automatic enrolment of certain “jobholders” into occupational or workplace personal pension schemes. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.

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¹ Paragraph 1 of the Respondents Response gives a deadline date of 11th October 2021 but that is clearly incorrect as the Unpaid Contributions Notice itself states the deadline is 11th November 2021. This error is repeated at various points throughout the Response.

responsibility for securing compliance with these obligations and may exercise certain enforcement powers.

8. Once a jobholder has been enrolled in a pension scheme, the employer must deduct pension contributions from his or her earnings and pay them, together with the employers' own contributions, into the scheme (see Section 111A of the Pension Schemes Act 1993).

9. Under Section 37 of the 2008 Act, the Regulator can issue an "Unpaid Contributions Notice" to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date. Such a notice will require the employer to pay the relevant unpaid contributions into the scheme by a specified date and may, among other things, require the employer to take such other steps in relation to remedying the failure to pay the contributions as the Regulator considers appropriate.

10. Under Section 40(1) of the 2008 Act, 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 an Unpaid Contribution Notice (UCN). The prescribed Fixed Penalty is £400.

Function of the Tribunal

11. Under s. 44 of the 2008 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.

12. Section 103(4) 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 role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, taking into account the evidence before it. 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.

Factual Background

13. The Appellant is the Employer for all purposes of the Employer Duties under the Pension Act 2008. There is no dispute that the Appellant has paid some contributions as they fell due and subject to their automatic enrolment duties. The pension scheme used by the Appellant is Nest, Pension Scheme Reference 12004537.

14. The Respondent received information that the Appellant had failed to make pension contributions between 1st June and 31st August 2021. Consequently, the Regulator issued an Unpaid Contributions Notice (UCN) on 15th October 2021. This document was sent to the Appellant's company address at 229 Chertsey Road, Addlestone KT15 2EW.

15. The UCN sets out three steps which the Appellant is required to comply with; first to calculate unpaid contributions, second to contact the pension scheme provider

and pay the unpaid pension contributions and third to provide evidence to the Regulator of such compliance. In this case the deadline for compliance was 11th November 2021.

16. The Respondent did not receive a response from the Appellant by the appointed deadline. The Respondent, therefore, issued a FPN on 15th November 2021 indicating that the appellant could request a review of the penalty within 28 days together with supporting evidence.

17. The Appellant requested a review on 26th November 2021 via the Respondent's online platform stating that the Appellant's payroll manager temporarily stopped the pension contributions because NEST pensions had incorrect details for the account including incorrect NI number. The payroll manager took the view it was best to stop the contributions until they could sort the matter out and make sure the payments were going into the correct account.

18. On 1st December 2021, the Respondent informed the Appellant that the evidence they provided did not demonstrate the missing contributions had been paid and were up to date and the Appellant had failed to make any contact with them before the 1st December 2021 deadline. The Respondent reviewed the matter and determined to uphold the issuing of the FPN.

19. On 13th December 2021, the Appellant appealed against the decision to issue the FPN. The grounds on which Appellant contests the issuing of the FPN are first that the Unpaid Contributions Notice was not passed onto the managing director until the end of November 2021 and he was not aware it had been issued. The pension payments were stopped because of issues regarding the account details and there was a concern that further contributions may find their way into the wrong account. The Appellant informed HMRC of their action in stopping the pension contributions and they will recommence as soon as the pension account details are sorted out. Finally, the Appellant submitted that he has been busy running the business and, therefore, in the circumstances, the issuing of the FPN was unfair.

20. The Respondent opposes this appeal and submits that all employers (large or small) have a legal obligation to comply with their duties to ensure full and timely compliance with the payment of pension contributions in accordance with their section 33 PA obligations and, therefore, it was reasonable and appropriate for them to issue the UCN. The Appellant failed to provide any information showing payment had been made and failed to make any contact with the Respondent whatsoever prior to the deadline date. In the circumstances, the Respondent had no basis to do other than issue the FPN.

Discussion

21. There is no issue in this case that both the UCN and the FPN were properly served and received by the Appellant. The address to which both the UCN and FPN were served are the company address and the Appellant has all but admitted this since he acknowledges the UCN was not "*passed onto the managing director until the end of November*". With respect to the Appellant, it is the employers' obligation to be fully

apprised of and ensure compliance with their pension contribution duties. The third party who did not pass on the UCN has not been named in the body of the appeal documents but that has little bearing on where the ultimate responsibility lies. An employer cannot abrogate their legal responsibilities by seeking to place the blame on a subordinate. Even if that assertion is correct, the fact remains, it was the Appellant (as the employer) who took the decision to deliberately stop the pension contributions on or before 1st June 2021 without any notification to the Regulator he was taking this course. A careful and conscientious employer, cognisant of his legal duties in this regard would have appreciated that failing to inform the Regulator of the reasons for stopping the pension contributions would cause them concern. The duty to inform the Regulator lay with on him and not the other way around.

22. Furthermore, if the pension contributions were stopped before 1st June 2021, it must follow the Appellant was aware of problems before that date. It is unclear and unexplained within the submitted appeal documents why the Appellant made no effort to engage with the pension provider to sort matters out expeditiously. The Pension Regulator's email dated 27th October 2019 states in clear terms "***You should make sure that any incorrect details are amended within 14 days***".

23. What also remains unexplained is why the Appellant did not inform the Respondent at the same time he purports to have informed HMRC of the situation. Furthermore, I note that any information to HMRC is unsupported by documentary evidence. The Tribunal would have expected a conscientious employer, cognisant of his pension obligations to have ensured this was put in writing to avoid any future difficulty. It appears the Appellant made no mention to the Respondent of difficulties regarding the pension account until after the imposition of the FPN.

24. Following the submission of the Appeal Notice, the Respondent made enquiries of the Appellant's pension provider. It appears that, contrary to assertions made in the Appeal Notice, the outstanding pension contributions were not paid until 1st December 2021, namely after the FPN had already been issued. This means the Appellant failed to comply with both steps 2 and 3 of the UCN.

25. Even if I were to conclude that this is not a case of egregious disregard in respect of the employer's duty to make timely and full pension contributions, the Appellant failed to inform the Respondent of the matters he latterly asserts caused the problems. In the circumstances, the Respondent had no information upon which to do anything other than issue the FPN. As Judge Holbrook said "*Bearing in mind the self-evident importance of the Regulator's role in enforcing the timely payment of pension contributions by employers,issuing the Penalty Notice was an entirely appropriate step for the Regulator to take*"².]

26. In short, where the duty falls on the employer and they fail to provide any of the information required in accordance with the UCN, it ill-behoves them to throw the blame on another or seek to hide behind a shield of ignorance of a situation. A

² PEN/2018/0269

conscientious employer would have procedures in place to deal with official documentation from those who regulate their activities to ensure swift compliance.

27. The Regulator's role in enforcing the timely payment of pension contributions by employers cannot be underestimated. Making payment of the unpaid contributions is the first step but it is by no means the only step which has to be taken as part of compliance. The provision to the Regulator of evidence of payment is also an essential component of that compliance in order that the Regulator can satisfy itself the unpaid contributions have been made or if further enforcement action is needed.

It appears from enquires made of the Appellant's pension provider that contrary to what the Appellant has stated, not only has there been a failure to make further payments to the pension scheme until long after the FPN was issued. Moreover, the Appellant appears to have resolved the issues with the pension provider in a timely fashion after the imposition of the FPN.

Conclusion

28. I am satisfied that on the facts of this case the Appellant has failed to establish that there was a reasonable excuse for non-compliance with its pension contribution duties. I am troubled that matters have been asserted by the Appellant regarding the payment of pension contributions appear on closer inspection to be at best inaccurate; this is most unfortunate.

29. One of the main aims of the Pension Regulator is to protect the benefits of pension scheme members and to maximise an employer's compliance duties. Pension contributions are deducted from employees' salary at source and in this case, the Appellant has failed to pay them into the pension scheme. The Appellant deliberately decided to withhold payment of those deducted contributions by up to six months. That is unacceptable. Whatever the Appellant's issues were regarding the account, it was his duty to rectify it in a timely fashion in order to ensure full compliance with this pension obligations. That was not done and only rectified after the Respondent had issued the FPN.

30. An employer cannot hide behind their employees or ignorance to abrogate their legal responsibility to maintain pension contributions. The Appellant had every opportunity to approach the pension provider and/or the Regulator to inform them of the problems and failed to do so. Had the Appellant provided information to the Regulator, it would have avoided the imposition of both the UPC and the FPN.

31. Whatever the situation pertaining to the pension account, the Appellant did not act with all due expedition in sorting it out and has not demonstrated any reasonable excuse for his failure to make the requisite pension contributions on time. He has failed to demonstrate any reasonable excuse for failing to comply with the requirements in the UCN. It follows, therefore, that I am satisfied the imposition of the FPN was appropriate in all the circumstances of this case and, therefore, the appeal is dismissed.

(Signed)

**HER HONOUR JUDGE ANGELA MORRIS
THE RECORDER OF WINCHESTER**

Date: 11th May 2022

Date Promulgated: 30th May 2022