



NCN: [2023] UKFTT 00084 (GRC)

Case Reference: PEN/2022/0202

**First-tier Tribunal  
General Regulatory Chamber  
Pensions**

**Heard by: remotely by video conference  
Heard on: 26 January 2023**

**Decision given on: 30 January 2023**

**Before**

**TRIBUNAL JUDGE HAZEL OLIVER**

**Between**

**CAFÉ PIANO RADCLIFFE ON TRENT LIMITED**

Appellant

**and**

**THE PENSIONS REGULATOR**

Respondent

**Representation:**

For the Appellant: Mr Sherkat

For the Respondent: Ms Cranfield

**Decision:** The appeal is Dismissed

**REASONS**

1. By this reference Café Piano Radcliffe on Trent Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 11 August 2022 requiring the Appellant to pay a fixed penalty of £400 for failure to comply with an unpaid contributions notice (“UCN”).

2. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

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, including the requirement to make pension contributions. Under Section 37 of the Act, the Regulator can issue a UCN if it is of the opinion that relevant contributions have not been made on or before the due date. A UCN requires the employer to make payments of relevant contributions by a specified date, and may also require the employer to calculate the amounts of unpaid relevant contributions. A UCN can require an employer to take other steps specified by the Regulator, which may include providing evidence of compliance by a certain date.

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 UCN. 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. 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 provided that 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.

## **Evidence**

7. I had a bundle of documents which I have read, and which contained the Appellant’s notice of appeal document and the Regulator’s response document, and various supporting documents. I heard oral submissions from the representatives for both parties at the hearing.

## **Facts**

8. I find the following material facts.

9. The Appellant is the employer for the purposes of the various employer duties under the Act. The Regulator sent a UCN to the Appellant on 14 June 2022, after

receiving a report from the Appellant's pension scheme provider (NEST) that contributions due to be paid between 1 October 2021 and 31 January 2022 were unpaid. These contributions related to one employee (referred to here as "employee A").

10. The UCN sets out three steps under the heading "what you need to do now". Step 1 is to calculate the unpaid contributions. Step 2 is to contact the pension scheme provider and pay the contributions. Step 3 is to provide evidence of compliance. The notice states, "*When you have met the requirements in steps 1 and 2 above, or even if you are of the opinion that the contributions identified in this notice have already been paid, you must provide evidence of compliance to The Pensions Regulator [by email or by post]... For evidence to be acceptable it must include: (i) the relevant contribution schedules with the amount(s) calculated clearly stated **AND** (ii) proof that these amount(s) have been paid and the date(s) on which they were paid. This might be in the form of a letter, email statement from your provider or screenshots from your pension account... **You must complete steps 1-3 above by: 25 July 2022.***"

11. The notice expressly states, "*If you do not complete the steps required by this notice by 25 July 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*".

12. The Appellant did not contact the Regulator by the deadline, and so the Regulator issued a fixed penalty notice to the Appellant on 11 August 2022. The penalty was due to be paid by 8 September 2022. The Appellant was also required to comply with the UCN by this date.

13. The Appellant requested a review on 4 September 2022. This was on the grounds that employee A had said he wished to take part in the pension scheme, but was not sure whether he wanted to commit to his employment with them. He finally started his pension contributions from February 2022, not October 2021 when he was registered with NEST. The Appellant offered to provide payslips in support.

14. The Regulator confirmed the penalty notice in a review decision issued on 10 September 2022. This was on the grounds that the Appellant had not provided evidence to show when the missing contributions were paid, the Regulator had no record of the Appellant providing confirmation of the payments being up to date, and NEST had not marked the late payment report as being resolved.

15. The Appellant sent the Regulator payslips for employee A on 1 October 2022. It appears that these payslips were not sent to the Regulator's main email address, and the Regulator has no record of having received them. The payslips are for the period between October 2021 and February 2022. They show that the employee A was working for the Appellant during this period and was being paid, but no pension contributions to NEST were made until the final payslip dated 28 February 2022.

16. The Regulator sent a penalty reminder letter on 12 October 2022. The Regulator also issued an escalating penalty notice on 13 October 2022, which has been suspended pending the outcome of this appeal.

## Appeal grounds

17. The Appellant says that all required contributions had been paid and were not overdue. They say they were operating under difficult economic circumstances and are finding it hard to keep going. They also say that they were badly let down by their accountants, and have since discontinued business with them.

18. The Regulator says that the Appellant failed to comply with the requirement in the UCN to bring contributions up to date and provide acceptable evidence of compliance. There is no credible evidence that pension contributions were not due during this period – payslips for employee A simply show that contributions were not paid, it does not show that they were not due. The Appellant is responsible for compliance as the employer, and it is not clear how accountants have let the Appellant down.

## Discussion and conclusions

19. Payment of pension contributions is an essential part of the automatic enrolment system. The whole purpose of the system is to provide workers with a pension fund on retirement, and this requires all contributions to be made correctly and at the right time. The use of UCNs and fixed penalty notices is a central part of the Regulator's compliance and enforcement approach. Employers are responsible for ensuring that the important duties are all complied with, and there needs to be a robust enforcement mechanism to support this system. The Regulator must have evidence of compliance in order to ensure that employers are fulfilling all of their duties, and penalties act as an important deterrent to breach of these duties.

20. 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 a UCN which required missing pension contributions to be made and evidence of compliance to be provided, after having been informed by the pension provider that contributions had not been paid. There had been some unpaid contributions. The Appellant failed to contact the Regulator until after receipt of the fixed penalty notice.

21. There is no dispute that the UCN was legally served at the Appellant's proper address. The Appellant accepts that both the UCN and fixed penalty notice were received.

22. The key issue is whether the Appellant had a reasonable excuse for failing to comply with the UCN. The Appellant relies on three main arguments.

23. **Employee A did not want to make pension contributions.** The Appellant says that employee A was unsure about whether to commit to employment. The Appellant did set up employee A on NEST. However, employee A initially said that he had heard about pensions but did not want to make contributions. He did start work, but was unclear about whether he wanted to stay. Pension contributions were made for employee A as soon as he decided that he wanted them. The Appellant argues that the missing pension contributions were not due because employee A did not want to take part in the pension scheme at that point.

24. The Regulator says that enrolment into a pension scheme is automatic, and there are limits on how and when a job holder can opt out. It is possible to postpone the start of pension payments, or for the job holder to opt out. Both exceptions require certain formal steps which did not happen in this case.

25. The start of pension payments can be postponed for up to three months by using a postponement period, under section 4 of the Act. This requires the employer to provide specific information to the employee within six weeks of the start of the postponement period – including the fact of postponement, when this will end, and the employee's rights to opt-in in the meantime. There is no evidence that this information was given to employee A by the Appellant.

26. A job holder can opt out of automatic enrolment under section 8 of the Act. The rules for doing this are set out in sections 9 and 10 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010. The employee must obtain an opt out notice from the pension scheme provider. The opt out notice containing specific information must be then be given to the employer by the employee. There is no evidence that employee A followed these steps in this case.

27. I therefore find that employee A should have received pension contributions under automatic enrolment from the start of his employment. Even if he initially said he did not want pension contributions, there was no valid postponement period or opt out. Enrolment is automatic to prevent employers from pressurising employees into giving up their pension rights. The rules about postponement and opt out are strict and detailed for this reason. I am not suggesting that the Appellant pressurised employee A in this case. However, enrolment was automatic and pension contributions should have started immediately.

28. ***The Appellant was let down by their accountants.*** The Appellant says that they lacked support from their accountants, who were supposed to be dealing with pensions issues. The Appellant sent the UCN on to the accountants, but they failed to deal with it. The accountants had also failed to deal correctly with PAYE and national insurance contributions, which was eventually sorted out through HMRC (who did not impose any fines). Mr Sherkat confirmed at the hearing that the Appellant was aware of problems with the accountants before receiving the UCN. He said that the accountants were not responding to the Appellant.

29. The Regulator says that compliance is the responsibility of the employer. They can delegate, but remain responsible for ensuring that they comply with all their duties. Delegation to a third party who then fails to act does not provide a reasonable excuse. In this case, the Appellant passed the UCN to their accountants when they were already on notice about issues with HMRC. A reasonable position would have been to contact the Regulator at that point. Instead, the Appellant only contacted the Regulator after receiving the fixed penalty notice.

30. I accept the Appellant's evidence that they were let down by their accountants. However, I agree with the Regulator that delegation to a third party generally does not provide a reasonable excuse if that third party fails to take action. These important duties are the responsibility of the employer. A reasonable employer can delegate to accountants or others, but remains responsible for making sure they delegate to

someone competent and that the duties are complied with. In this case, the Appellant was aware that there were problems with their accountants. The Appellant still chose to send the UCN to the accountants rather than contacting the Regulator themselves. This was despite the fact that the accountants were not responding to the Appellant at this point. I find it was not reasonable for the Appellant to think the accountants would deal properly with the UCN. The failure of the accountants does not provide a reasonable excuse for the Appellant's failure to comply with the UCN.

31. **Business pressures and the size of the penalty.** The Appellant says that the failure needs to be considered in context. The Appellant was struggling to keep the business going and keep people in employment. The £400 penalty represents around eight times the monthly pension contributions. HMRC did not impose any fines for the mistakes with national insurance.

32. The Regulator says that the size of the penalty is fixed by law, it is designed to be penal, and it is fair in the circumstances because the Appellant had chances to comply and avoid the penalty.

33. I have taken account of the fact the Appellant is a small business which may well have been facing various pressures at the time. I am aware that the automatic enrolment rules can seem complex and confusing to those running a small business. I also accept that the Appellant appears to have made a genuine mistake about the rules, and thought there was no need to make contributions for employee A. However, the UCN gave the Appellant clear information about what needed to be done to avoid a penalty. The Appellant did not contact the Regulator at all until after receipt of the fixed penalty notice. If the Appellant was not sure what to do, they could have contacted the Regulator for advice and taken action to avoid the penalty. Instead, the Appellant delegated to accountants who were not acting competently.

34. There is a significant public interest in upholding fixed penalty notices. This is particularly important where the underlying issue is late contributions, because timely compliance by the employer with the Regulator's requirements is crucial to ensuring that individuals are not missing out on pension contributions over an extended period of time. The £400 penalty is fixed by law and cannot be reduced. I accept that the sum may be significant for the Appellant, but it is designed to be a genuine deterrent to breach of the rules, and it is not disproportionate in this case.

35. **Conclusion.** For the above reasons, I find that the Appellant did not have a reasonable excuse for failing to comply with the UCN. I determine that issuing the fixed penalty notice was the appropriate action to take in this case.

36. I note that this is not a case where the Appellant was deliberately trying to avoid their obligations. There appears to have been a genuine mistake about employee A and a failure by the accountants. I hope that this decision helps the Appellant to understand where they went wrong. I am aware that an escalating penalty notice has been put on hold until the outcome of this appeal. The Regulator said at the hearing that the Appellant should get in touch if the fixed penalty notice was upheld. In the circumstances, I would hope that there can be a discussion between the Appellant and the Regulator to help them to understand what they need to do now and how to ensure compliance before any escalating penalty notice is revived.

37. 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**

**Dated: 27 January 2023**