



[2022] UKFTT 317 (GRC)

Case Reference: PEN/2022/0095

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

Heard: Paper Consideration

**Heard on: 1 September 2022 in Chambers
Decision given on: 05 September 2022**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

GLOBAL WINE MART LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Global Wine Mart Limited (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 21 April 2022 requiring the appellant to pay a fixed penalty of £400 for failure to comply with an unpaid contributions notice (“UCN”).

2. 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.

3. 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.

4. 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.

5. 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 from the Regulator 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 UCNs issued under the Act.

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.

Facts

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

8. 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 21 February 2022, after

receiving a report from the appellant's pension scheme provider (NEST) that contributions due to be paid between 1 February and 31 December 2021 were unpaid.

9. 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 amounts have been paid and the dates 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 4 April 2022.***"

10. The notice expressly states, "*If you don't complete the steps required by this notice by 4 April 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*".

11. The appellant did not contact the Regulator by 4 April 2022, and so the Regulator issued a fixed penalty notice to the appellant on 21 April 2022.

12. The Regulator confirmed the penalty notice in two review decisions issued on 27 April and 6 May 2022. This was on the grounds that: this was a different issue from completion of declarations of compliance (a point raised by the appellant in their first request for a review); the Regulator had no record of the appellant providing confirmation of the payments being up to date prior to the deadline in the UCN; and NEST had not marked the late payment report as being resolved.

13. The appellant's pension provider confirmed to the Regulator on 18 May 2022 that the relevant contributions were not made until 27 April 2022.

Appeal grounds

14. The appellant says that, "*The Pensions Regulator has issued penalty for unpaid contributions for nest but now all the contributions has been settled.*" The appellant asks for the penalty to be waived.

15. The Regulator's position is that late compliance is not a sufficient basis on which to revoke the fixed penalty notice. The appellant failed to comply with the requirement in the UCN to provide acceptable evidence of compliance, and the relevant contributions were not made until after the deadline in the UCN.

Conclusions

16. 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.

17. 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 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 make the missing contributions or provide evidence of compliance until after the deadline had expired and after receipt of the fixed penalty notice.

18. I have considered whether the UCN 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.

19. The key issue is whether the appellant had a reasonable excuse for failing to comply with the UCN. There is no dispute that the appellant received the UCN. The unpaid contributions were not made until 27 April 2022 (as shown by the schedule provided by NEST). The failure to comply is the appellant's failure to make the payments before the deadline in the UCN of 4 April 2022, and also the failure to provide suitable evidence to the Regulator.

20. The appeal is based on the fact that the appellant has now paid the missing contributions. The question is whether they have a reasonable excuse for this late compliance. The appellant did not contact the Regulator at all after receiving the UCN, and did not make the payments until after receipt of the fixed penalty notice. They have given no reason for this.

21. There is a significant public interest in upholding fixed penalty notices where there has been late compliance. 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 appellant simply did not do what was required by the UCN until after the relevant deadline had expired. Late payment is not a reason to revoke the fixed penalty.

22. 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

Dated 1 September 2022