



**NCN: [2024] UKFTT 00507 (GRC)**

Case Reference: **PEN/2024/0035/AE**

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

**Considered on the papers:  
Decision given on: 17 June 2024**

**Before**

**TRIBUNAL JUDGE HUGHES**

**Between**

**GIANNI'S GLASGOW LTD**

Appellant

**and**

**THE PENSIONS REGULATOR**

Respondent

**Decision: The reference is accepted and the matter is remitted to the Regulator. The fixed penalty notice is confirmed, the variable penalty notice is revoked.**

## **REASONS**

1. Mr Simeone, the Director of Gianni's Glasgow Ltd. probably had a difficult Christmas. He received a notification to his personal email account on 19 December 2023. This informed him that the business had incurred penalties of £14,400 for its failure to discharge its responsibilities under the Pensions Act 2008. This missive must have been as welcome as the visit of Jacob Marley to Ebenezer Scrooge on Christmas Eve.
2. The background and the approach of the Pensions Regulator is usefully set out in a Response from the Pensions Regulator filed with the tribunal dated 12 March 2024:

### **Background and chronology**

6. The Appellant, Gianni's Glasgow Ltd, is the employer for the purposes of the

‘Employer Duties’ under the PA 08. The Respondent issued an Unpaid Contributions Notice on 17 July 2023 (Annex B) directing the Appellant to take three steps: firstly, to calculate the unpaid contributions, secondly, to contact the pension scheme provider and pay the contributions and thirdly to provide evidence of compliance to the Respondent. The period to which the Unpaid Contribution Notice related was contributions owed between 06 March 2023 and 04 June 2023, and guidance as to what would be acceptable evidence of compliance was given in the Unpaid Contribution Notice. The deadline for compliance with the notice was expressly stated to be 29 August 2023, and it was stated that failure to comply before the deadline could lead to the issue of a Fixed Penalty Notice.

7. No evidence in response to step 3 of the Unpaid Contributions Notice was received by the Respondent before the deadline of 29 August 2023, so the Respondent issued a £400 Fixed Penalty Notice on 13 September 2023 (Annex A), after the deadline in the Unpaid Contribution Notice expired. The Fixed Penalty Notice stated that any objection to the Notice must be submitted within 28 days of issue. The Respondent did not receive any response to this notice.

8. Following continued non-compliance from the Appellant, an Escalating Penalty Notice (Annex C) was issued on 13 October 2023 as the Appellant failed to comply with the requirements in the Unpaid Contributions Notice by the deadline in the Fixed Penalty Notice (11 October 2023). This Escalating Penalty Notice (Annex C) explained that if the requirements in the Unpaid Contributions Notice were not met by the 09 November 2023, then a daily penalty of £500 would start to accrue from the 10 November 2023. The Escalating Penalty Notice contained the same reference to the 28 day period for objection as the Fixed Penalty Notice had.

9. No response was received to the Escalating Penalty Notice and on the 10 November 2023 the penalty started accruing. The penalty accrued for 28 days to £14,000.

10. On the 19 December 2023, the Respondent received a request (Annex D) for a review of the Escalating Penalty Notice. The Respondent replied to the review request on 29 December 2023, declining to conduct a review and this is produced at Annex E.

11. On the 29 December 2023, the Respondent received a second request (Annex L) for a review of the Escalating Penalty Notice. The Respondent replied to the review request on 04 January 2024 confirming the penalty and this is produced at Annex M. On the 05 February 2024 the Respondent was notified of the Appellant’s reference (appeal) to the Tribunal.

12. In response to the Appellant’s reference, the Respondent originally issued a strike out application. For the avoidance of doubt, the Appellant’s reference ought not to be struck out and the strike out application was issued in error. This is because, as outlined above, the Respondent did review the Escalating Penalty Notice on 04 January 2024 (Annex M). For the avoidance of doubt, this review decision was also included with the initial strike out application at Annex M so any assertions of dishonesty are refuted.”

...

## **Annex M**

Dear Mr Simeone

### Review Decision

Your initial request for a review was not received within 28 days of the notice issue date and is therefore deemed out of time. However, the Regulator has decided to initiate a review of the notice under section 43(1)(b) Pensions Act 2008.

We have decided to confirm the notice, which means we have upheld our original decision to issue the notice.

We have made this decision for the following reason(s): You have requested a review of the Penalty notice on the grounds that you have had NO contact or awareness of this situation until I received an email from the Pensions Regulator on the 19th of December. This was the first and only email I received from the Pensions Regulator (or Nest) to the above date. This email was sent to my personal email address [redacted].

You were originally issued with the Unpaid contributions notice on 17 July 2023 for missed contribution payments between 6 March 2023 and 4 June 2023. In order to comply with that notice you were required to bring your outstanding payments up to date, and to provide confirmation from your pension provider that all payments were paid up to date by 29 August 2023.

The Regulator has no record of Gianni's Glasgow Ltd providing confirmation of the payments being up to date prior to the deadline of the Unpaid contributions notice. Furthermore, NEST has not marked the late payment report as being resolved and is therefore showing as outstanding.

The Regulator has conducted its enquiries and can confirm that the correspondence for Gianni's Glasgow Ltd was issued to their registered address 15 Townhead Kirkintilloch Glasgow G66 1NG.

The email address you refer to [redacted] was provided on the re-declaration of compliance on 14 February 2022. Based on the information and evidence obtained, it is evident that the Penalty notice was issued correctly. You failed to comply with the requirements of the original Compliance notice by 29 August 2023 and therefore, the Penalty notice has been confirmed.

If you do not agree with this decision, you can appeal to the General Regulatory Chamber (GRC) of the First Tier Tribunal. If you wish to appeal, you must submit an application in writing to the General Regulatory Chamber within 28 days of the date of this letter. You can obtain an appeal form from the tribunal website at <https://www.gov.uk/appeal-against-a-pensions-regulator-fine> or by requesting a copy of the form from:

3. Mr Simeone's response to this unwelcome visitation before the Eve of Christmas was a rapid response providing an explanation

I am emailing to request a review into two penalty charge notices issued to Gianni's

Glasgow Ltd by the Pensions Regulator.

Penalty Notice Numbers: 202572495580 and 107251765981

Employer Name: GIANNI'S GLASGOW LTD

On the 19th of December (Today) I received an email from the Pensions Regulator with two penalty notices.

I'm [sic] the first instance I was confused as to whether the email was genuine or an elaborate scam and instantly phoned your debt recovery department to discuss the issue.

After a brief discussion with then I realised that there had been an issue and all correspondence had been sent to my previous accountant.

After finishing the call with the Pension Regulator, I called Nest to discuss the issue whereby it became apparent that all correspondence with Nest had also been getting sent to my previous accountant. This includes all mail correspondence, all email correspondence and that all access to my Nest accountant is under my previous accountants email address. I received nothing from my previous accountant and this could be verified if necessary by discussion with him.

[redacted]

In addition to this I contacted my current accountant, and it became apparent very quickly that a miscommunication has occurred with regards to my staffs auto enrolment. My current accountant was under the impression that I had no auto enrolment set up from a conversation we had, had. However, it seems that I failed to communicate the situation correctly.

Moving forward, I am in the process of retrieving my Nest account from my previous accountant and full control will be given to my current accountant to resolve the issue as soon as this is retrieved. I am in full communication with Nest and the pension regulator and hope to have this resolved asap.

In return I would hope that the penalty notices be could be written off in full. As explained, this is the first I have been made aware of the issue and have made taken immediate action to revoked the issue. This matter will be resolved fully with Nest as promptly as possible.

Kind regards

Vito Simone

4. In a subsequent email (which from its context in the bundle appears to have been sent on 31 January 2024) he stated:

I must request again that you reconsider the rejection decision in reference to penalty notices 202572495580 and 107251765981.

As you will be aware from my previous emails, the moment I was made aware of issues with my Pension Provide (Nest) and the Pensions Regulator, I have acted promptly and communicated consistently with both services.

I have brought the company pension affairs up to date and paid what is due. I have never had any defalcations in the company and pay all of my duties as they fall due and I am aware of them. See attached Screenshot for confirmation.

This was the first and only email I received from the Pensions Regulator (or Nest) to the above date. This email was sent to my personal email address [redacted].

To be absolutely clear, up until this point all correspondence from email to letter had not been received by myself or anyone attached to my business.

I moved accountants in March of this year and from that point due to a combination of miscommunication and a very poor previous accountant I have been unable to receive any correspondence from NEST or yourselves.

I am keen to resolve this matter amicably for the benefit of all the parties involved.

However I will have no option but to approach the tribunal should you fail to consider and reverse the penalty.

The issue affected a very few employees and the amount due is significantly less than the fine which has been given. This will ruin the business, putting the very people you are trying to protect at risk of losing their jobs. This is a situation I am keen to avoid.

5. In subsequent emails the Appellant provided convincing evidence demonstrating it's lack of actual knowledge, the breakdown in relations with the previous accountant and steps, subsequent to the discovery of the failure to properly transfer all functions to the new accountant, to resolve the problems.
6. In its response of 12 March 2024 The Pensions Regulator acknowledged that its application to strike out was in error and set out its position. It agreed:

Whilst the Appellant is now compliant with their Employer Duties, this was after the issue of the Fixed and Escalating Penalty Notices and no attempt to provide evidence of compliance in accordance with step 3 of the Unpaid Contributions Notice was made at any time before the issue of these notices. Late compliance cannot justify the Appellant's failure to comply with the requirements set out in the Unpaid Contributions Notice; late or eventual compliance does not excuse the failure to comply with all the directions in the Unpaid Contributions Notice or comprise exceptional grounds to revoke a penalty served following the failure to comply within the deadline in the notice. Similarly, whilst it is acknowledged and welcomed that the Appellant acted promptly this does not negate the breach of the Unpaid Contributions Notice.

7. In addressing the issues around the Appellants lack of awareness of these notices and the role of the previous accountants and instructions given to accountants emphasised the responsibility of the Appellants and concluded:

#### **Unintentional breach**

44. The Appellant may not have intentionally breached their duties, but a lack of intent does not amount to a reasonable excuse, in law or in fact. Similarly, the Respondent submits that the Appellant's failure, even if an honest mistake, does not provide a reasonable excuse, in fact or in law, to comply with the Unpaid Contributions Notice by the relevant deadlines.

#### **Penalty**

45. In relation to the penalty that the Appellant is seeking to appeal, sections 40-41 of the Pensions Act 2008, gives the Respondent the power to issue a penalty notice if there has been a failure to comply with an unpaid contributions notice. The underlying regulations, namely Regulations 12 and 13 of the Employers' Duties (Registration and Compliance) Regulations 2010, prescribes the amount for a fixed penalty and an escalating penalty. With Respect to the escalating penalty that the Appellant is appealing against, the Respondent submits that it accrued in accordance with the legislation. In any case, the Appellant does not assert that the penalty has accrued incorrectly.

46. Whilst the Respondent has discretion as to when to issue a penalty notice, the Respondent has no discretion as to the amounts of the penalty when they are engaged or accrue. The amount of the penalty notices are fixed by law and the

**Respondent submits that the penalty is fair, reasonable, and proportionate in all of the circumstances.** *{tribunal's emphasis}* However, the Respondent would be willing to consider repayment options, should the Appellant wish to contact the Respondent and advise that one single payment will cause financial difficulties.

## **Consideration**

8. The position of the Pensions Regulator is that the Appellant had duties, the appropriate notices were served in accordance with the law, the presumption of service is not rebutted and the penalties flowed automatically. In its view the Appellant's lack of knowledge is entirely the Appellant's responsibility. This approach has some merits, especially simplicity. It is however not entirely consistent with the statutory scheme of penalties.
9. The penalty under s40 of the Pensions Act 2008 is a fixed penalty for failure to comply set by regulation 12 of the Employers' Duties (Registration and Compliance) Regulations 2010:

### **Fixed penalty notices**

12. Where the Regulator issues a fixed penalty notice to a person under subsection (1) or (2) of section 40 of the Act, the penalty is £400.
10. However the penalty under s41 Pensions Act 2008 is somewhat more involved.

### **41 Escalating penalty notices**

- (1) The Regulator may issue an escalating penalty notice to a person if it is of the opinion that the person has failed to comply with—  
.....
  - (3) An escalating penalty notice is a notice requiring a person to pay an escalating penalty if the person fails to comply with a notice referred to in subsection (1) before a specified date.
  - (4) An escalating penalty is a penalty which is calculated by reference to a prescribed daily rate.
  - (5) The prescribed daily rate—
    - (a) is to be determined in accordance with regulations, and
    - (b) must not exceed £10,000.
11. Regulation 13 of the Employers' Duties (Registration and Compliance) Regulations 2010:
    - 13.—(1) Where an escalating penalty notice is issued to a person—
      - (2) Paragraph (3) applies where an escalating penalty notice is issued to an employer in respect of a failure to comply with—

- (a) a compliance notice under section 35 of the Act;
  - (b) a notice under section 72 of the Pensions Act 2004 M1 (provision of information); or
  - (c) an unpaid contributions notice under section 37 of the Act.
- (3) Except where paragraph (1) applies, the prescribed daily rate is to be determined in accordance with Table 1 and the following paragraphs.

Table 1

Number of persons	Prescribed daily rate (£)
1-4	50
5-49	500
50-249	2500
250-499	5000
500 or more	10000

12. The two penalty regimes therefore differ in fundamental ways. Under s40 a single penalty applies, under s41 the gravity or scale of the penalty and consequent breach is calibrated with respect to the number of employees affected, but also it provides an incentive to the employer to resolve issues swiftly by increasing the penalty daily. For incentives to work individuals need to be aware of them. As this case demonstrates, when an individual becomes aware of a penalty that individual acts, however a far larger penalty than this will have no impact if the individual is unaware.
13. The Pensions Act creates an obligation on the Pensions Regulator to review its decisions under certain circumstances:

### **43 Review of notices**

(1) The Regulator may review a notice to which this section applies—

- (a) on the written application of the person to whom the notice was issued, or
- (b) if the Regulator otherwise considers it appropriate.

(2) This section applies to—

...

- (d) a fixed penalty notice issued under section 40;
- (e) an escalating penalty notice issued under section 41.

(3) Regulations may prescribe the period within which—

- (a) an application to review a notice may be made under subsection (1)(a);
- (b) a notice may be reviewed under subsection (1)(b).

(4) On a review of a notice, the effect of the notice is suspended for the period beginning when the Regulator determines to carry out the review and ending when the review is completed.

(5) In carrying out a review, the Regulator must consider any representations made by the person to whom the notice was issued.

(6) The Regulator's powers on a review include power to—

- (a) confirm, vary or revoke the notice;
- (b) substitute a different notice.

14. Fortunately the Pensions Regulator is fully committed to its obligations under the Legislative and Regulatory Reform Act 2006. The Pensions' Regulator in its "Compliance and Enforcement Strategy" June 2016 states:

### **Aims and Objectives**

2.4 In achieving this aim, we strive to be a regulator which advocates an innovative and collaborative approach. We use a range of regulatory options to drive compliance, prioritise our resources on the basis of risk, be outcome focused and work with other regulators to ensure a joined-up approach to employer compliance. We are firm but fair in carrying out our regulatory activities and ensure that we are proportionate, accountable, consistent, transparent and targeted in our approach.

2.5.3 Prevent non-compliance by ensuring effective controls are in place to:

- ▶ stop incorrect declarations in the declaration of compliance system
- ▶ ensure the causes of breaches are fully examined and fed into prevention work to minimise the risk of them occurring again

### **Regulatory Principles**

3.2.1 Proportionality: Proportionality means relating enforcement action to the seriousness of the breach and the risks of harm caused by the breach. Therefore, in deciding whether to use our powers, we will put in place policies and guidance that ensure we consider the circumstances surrounding the breach of the law including the risk of harm to our objectives and the seriousness of any breach, and apply the most appropriate remedy.

15. It is clear from s43 that the Pensions Act 2008 gives some discretion to the Pensions Regulator – it is under a duty to consider the representations it has received and it can confirm, vary, revoke or substitute a new notice. From Annex M (paragraph 2 above) it is clearly that the Pensions Regulator takes a very restricted view of its role in a review. It simply confirms the factual state of affairs in existence at the time it took various steps and treats as of no significance the representations of the Appellant – that he was not aware of these facts and he has taken steps to remedy them. Of particular interest is the statement:

“The Regulator has no record of Gianni's Glasgow Ltd providing confirmation of the payments being up to date prior to the deadline of the Unpaid contributions notice. Furthermore, NEST has not marked the late payment report as being resolved and is therefore showing as outstanding”

16. This was sent on 4 January 2024 and it treats as determinative of all issues that the company had not met “*the deadline of the Unpaid contributions notice.*” The issue is not whether the Pensions Regulator was entitled **at the time it acted** to take the steps it did, but whether, **at the time of the review**, having considered the representations of the Appellant it should confirm vary revoke or substitute. Particularly concerning is the reliance on NEST not having “*marked the late payment report as being resolved*”. This shows an approach fundamentally at odds with what a competent regulator would do. This may seem



paradoxical since the issue is ensuring that the correct sums are paid to the pension scheme and will continue to be paid in future. A competent regulator in these circumstances however would establish the facts, what remedial action was necessary and consider whether remedial action was or would be taken promptly. It would defer decision until it had gathered the relevant facts. It would have taken time, it would have striven to be fair. Instead, 16 days after Mr Simeone had become aware of the issue through notification to him on a personal e-mail address which at all relevant times the Pensions Regulator had possessed but not used, it attempted to close the matter. The Pensions Regulator has sought to limit the application of s43 to a point where it has effectively been deprived of all content. However one indicator of the Regulator's priorities is that in its response to the appeal it offered the Appellant time to pay.

17. S 44 of the Pensions Act gives jurisdiction to the tribunal:

#### 44 References to First-tier Tribunal or Upper Tribunal

(1) A person to whom a notice is issued under section 40 or 41 may, if one of the conditions in subsection (2) is satisfied, make a reference to the Tribunal in respect of—

- (a) the issue of the notice;
- (b) the amount of the penalty payable under the notice.

(2) The conditions are—

- (a) that the Regulator has completed a review of the notice under section 43;
- (b) that the person to whom the notice was issued has made an application for the review of the notice under section 43(1)(a) and the Regulator has determined not to carry out such a review.

(3) On a reference to the Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning when the Tribunal receives notice of the reference and ending—

- (a) when the reference is withdrawn or completed, or
- (b) if the reference is made out of time, on the Tribunal determining not to allow the reference to proceed.

(4) For the purposes of subsection (3), a reference is completed when—

- (a) the reference has been determined,
- (b) the Tribunal has remitted the matter to the Regulator, and
- (c) any directions of the Tribunal for giving effect to its determination have been complied with.

18. Under s. 44 of the 2008 Act 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. The burden of proof in an appeal rests with the Appellant. The standard of proof to be applied is the balance of probabilities.

19. The evidence supplied by the Appellant is clear and convincing. It demonstrates that when it changed accountants in March 2023 the company did not ensure that all necessary notifications were sent to the statutory bodies with which it dealt. He has indicated that the penalty is between 6 and 7 X the amount of unpaid pension and this has long since been paid. The Pensions Regulator (31 May) argued that:

- A lack of awareness cannot represent a reasonable excuse

- the Appellant’s oversight with respect to their Employer duties was a breach of the Pensions Act 2008 and the individual workers suffered loss as the pension contributions were not paid into the pension scheme until after the issue and escalation of the Escalating Penalty Notice.
20. The chronology set out in in the Response is helpful. The unpaid contributions notice was sent on 17 July with a deadline of 29 August (43 days later) a fixed penalty notice was issued on 13 September (15 days later), the escalating penalty notice was issued on 13 October (30 days later) requiring compliance by 9 November (27 days later) and the penalty ran from 10 November and 28 days penalty were accrued. A widely fluctuating number of days elapsed between the taking of each step in the enforcement process – there is little rhyme or reason in this – each new step is taken after some time, on a date convenient to the Regulator. The Appellant had actual knowledge 39 days after the penalty started to accrue and moved very quickly to resolve the issues and make the outstanding payments.
  21. In assessing an appropriate response to these events matters of causation, intent and consequence are relevant in assessing the appropriate regulatory response in accordance with the proper regulatory practice. The causative fact is the change of accountant and the breakdown in the arrangements for the regular payment of contributions. The company is responsible for those payments and failed to ensure that the continuation of payments and notification to regulators of the change of accountants was properly secured. However there is no suggestion that this failure had any element of intent; while some responsibility must fall on the director and company it was clearly inadvertent and at worst there may have been a degree of negligence. This is of fundamental significance. The structure of an escalating penalty is that it acts as an incentive, if there is no effective communication there is no incentive. Furthermore the Pensions Regulator had readily to hand the means of communicating with the director but did not use it. The Regulator relied on service, but paid no regard for a period of some months of other means of contact which. When tried, were immediately effective. The consequence or regulatory objective, the transfer of funds to the pension provider, was achieved, there was no loss to the employees – and this objective could have been achieved many months earlier without any sanction at all. Jacob Marley’s reformation of Ebenezer Scrooge’s relations with his employee was effective because it was communicated. It its obsession with its entitlement to serve a penalty notice the Regulator entirely lacked Dickens’ psychological insight.
  22. The failure to ensure continuity of payment clearly merited a sanction. However “a proper consideration of the circumstances of the breach” including the lack of intent, the failure of the regulator to use available means of communication and the absence of harm to employees mean that the impact of the escalating penalty is wholly disproportionate and oppressive. I am also concerned (from the information before me) that the penalty is of the same order of magnitude of the entire contribution to relevant staff pensions for a year – which also indicates disproportionality.
  23. In all the circumstances I am satisfied that it is proper to confirm the first, fixed penalty notice.
  24. I am however not satisfied that the second notice is (despite the Regulator’s protestations) any of fair, proportionate or reasonable. While it would be tempting to substitute a different order, such as one the Regulator had the power to do on review but, by failing to understand its responsibilities, did not do; I am satisfied that, in fairness to the Appellant who has

undergone much entirely unnecessary stress and expense due to the failures of the Pensions Regulator, I should revoke the second (variable penalty) order.

Signed     Hughes

Date: 17 June 2024