



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PENSIONS**

Tribunal Reference: PEN/2021/0306

Date of Hearing: 22nd February 2022

Decision Date: 23rd March 2022

Judge David Hunter QC

Between

WESTDEANE CONSTRUCTION LTD

Appellant (by Reference)

And

THE PENSIONS REGULATOR

Respondent

DECISION

The Reference is dismissed, and the matter is remitted to the Regulator. The Penalty Notice is confirmed, with the direction to the Regulator set out in paragraph 28 below.

REASONS

Preliminary

1. By this Reference Westdeane Construction Ltd (“the Employer”) challenges a fixed penalty Notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 17th September 2021 and bears the Notice Number: 116563940067.

2. The Penalty Notice was issued under section 40 (1) of the Pensions Act 2008 (“the 2008 Act”). It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Unpaid Contributions Notice (“the UCN”) dated 19th August 2021.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 18th October 2021. The effect of the Penalty Notice is accordingly suspended until the Reference has been determined, the Tribunal has remitted the matter to the Regulator, and any directions given by the Tribunal have been complied with.

4. The Tribunal sat to hear the Appeal on 22nd February 2022. The hearing was fixed for hearing, and held remotely, via the Cloud Video Platform. I successfully connected with the hearing platform, as did Mr Mageeb Gharib, who represented the Respondent. The Employer, in the person of Mr Simon Millward, its sole director, had not connected, either by video or telephone, and was not present. No request for an adjournment had been made, nor had the Employer contacted the Tribunal staff to explain his absence. The staff made efforts to contact the Employer, firstly to no avail, and ultimately to be told that he was away working, and was not available, and had forgotten about the hearing. I was satisfied that the Employer had been given due and ample notice of the hearing and of the mode of hearing. Accordingly, I decided to proceed with the hearing in the absence of the Employer. Later that day the Tribunal received an email from Mr Millward, in which he acknowledged that he had forgotten about the hearing, and that, because he worked “on site” all the time he would find it hard to be present at a hearing, and offered to “just pay the fine”.

Statutory framework

5. The 2008 Act imposes a number of requirements on employers in relation to the automatic enrolment of certain ‘jobholders’ in occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with those requirements and has certain enforcement powers for this purpose.

6. In this case the matter at issue is the duty of the Employer to pay contributions to a qualifying pension scheme (“relevant contributions”) under Section 3 of the 2008 Act (and accompanying Regulations). The Employer is required to regularly and periodically pay across its contributions and those of the employees to the managers or trustees of the relevant pension scheme.

7. Under section 37 of the 2008 Act the Regulator can issue an unpaid contributions notice (UCN) to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date. Under section 40(1) 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 the UCN. The prescribed fixed penalty is £400. Under section 41 the Regulator can issue an escalating penalty notice (EPN) if it is of the opinion that the employer has continued to fail to comply with the requirements of the UCN.

Function of the Tribunal

8. Section 44 of the 2008 Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal. They may do so provided that an application for a review has first been made to the Regulator.

9. Section 103(3) 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 Tribunal must make its own decision on this issue following an assessment of the evidence presented to it (which may differ from the evidence which was available to the Regulator). The Tribunal does not sit as an appellate body from a decision of the Regulator; it is not necessary to show that the Regulator was in error, and the Tribunal can reach a different decision to that of the Regulator even if it thinks that the Regulator's decision fell within a range of reasonable decisions.

10. On determining the Reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination. Those directions may include directions confirming, varying or revoking a notice issued by the Regulator.

Factual background

11. The material facts from which this reference arises are set out in the Regulator's Response document and may be summarised as follows:

12. Prior to issuing the UCN the Regulator had received information from the Employer's pension scheme provider that the Employer had failed to pay relevant contributions to the material occupational pension scheme on or before the due date for payment. It indicated that contributions due between 19th April and 18th July 2021 remained outstanding.

13. The Regulator therefore served a UCN on 19th August 2021 which required the Employer 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 Regulator. Step 3 in the Notice set out precisely what sort of evidence would be satisfactory, namely, proof of payment to the pension scheme of the contributions calculated and paid, in the form of a letter, email statement from the pension provider or screenshots from the pension account that clearly shows all outstanding contributions as having been paid. The UCN made clear that if it was not complied with by the deadline date then a £400 FPN may be issued, and, additionally, in the event of further non-compliance, the Regulator may issue an escalating penalty notice. The deadline for compliance with the UCN was 15th September 2021.

14. The Employer failed to provide the aforesaid evidence of compliance before the deadline for doing so and, on 17th September 2021, the Regulator issued the FPN.

15. The Employer made requests for a review of the FPN. The Regulator conducted a review, and on 15th October 2021, it wrote to the Employer informing it that the outcome of the review was that the Penalty Notice was confirmed.

16. As stated aforesaid, the Employer referred this matter to the Tribunal by its Notice of Appeal dated 18th October 2021.

Grounds of Appeal

17. The Employer's case is contained in the requests for a review and in the Grounds of Appeal in the Notice of Appeal. There are essentially two grounds. Firstly, with regard to the unpaid contributions, the Employer asserts difficulties with his computer, which had to be sent away to be fixed, and in its absence, he was unable to make contributions. In that regard he contacted his pension provider, and when his computer was returned began to pay the contributions, and "to sort everything out". Secondly, the Employer asserts that he did not receive the Compliance Notice, and that the Penalty Notice was received "out of the blue".

The Submissions of the Regulator

18. These are contained in the Response of the Regulator to the Reference.

19. The Regulator relies upon the statutory duty which rested upon the Employer to comply with the requirements of the UCN. With regard to the service upon, and receipt by the Employer of the UCN and the FPN, the Regulator relies upon the statutory presumptions of service and receipt contained in Section 303 (6) of the Pensions Act 2004 and Regulation 15 (4) of the Employers Duties (Regulation and Compliance Regulations 2010, and says that, through the medium of the UCN, ample notice was given to the Employer, and ample information provided, as to the need for compliance by the deadline date, and as to each of those steps which required to be taken to ensure full and timely compliance.

20. With regard to the asserted computer difficulties, the Employer points to contributions which were successfully made prior to the expiration of the deadline set by the Compliance Notice, and to the lack of any specific evidence as to the timeframe of the asserted difficulties.

Discussion

21. The timely provision of information to the Regulator, so that it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that, when issuing a UCN, the Regulator requires of the Employer, not only the calculation and payment of the relevant contributions, but also the provision to the Regulator of evidence of compliance.

21. Bearing these factors in mind, it seems to me that issuing this Penalty Notice was an entirely appropriate step for the Regulator to take, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice. All the Employer needed to do, in the context of this Reference, was to provide satisfactory evidence of payment of all due contributions by the deadline date of 15th September 2021 (some four weeks after the date of the issue of the UCN). I accept the submissions of the Regulator and consider that the Employer was given reasonable and indeed ample notice of his obligations and of the deadlines for compliance, and ample information about each of the steps required to ensure full compliance.

22. I find that the UCN and the FPN were duly served upon and received by the Employer. Each of these Notices was sent to the Employer's registered office. There is no argument advanced by the Employer, nor any assertion made, that this was not the correct address. This was the address provided by the Employer on its declaration and re-declaration of compliance and Notice of Appeal. The Employer does not dispute that the correct address was used, and indeed acknowledges the receipt of the FPN without any explanation of the fact that the UCN, sent to the same address, was not received.

23. Moreover, the statutory presumptions, upon which the Regulator relies, in respect of official correspondence sent to an Employer's last known address, with regard to due service and receipt, are strong. They are contained in those statutory provisions set out in paragraph 19 above. The strength of the presumptions has been confirmed in many Tribunal cases, for example by the Upper Tribunal in **London Borough of Southwark v Akhtar 2017 UKUT 140**, and Judge McKenna in **Admads 786 Frist v TPR PEN.2029.0228**. It is clearly established that the burden of overturning the presumptions rests on the Employer, and that it must discharge that burden by evidential proof of non-receipt, and that a bare (paper) assertion is of wholly insufficient weight to discharge that burden. The material assertion in this case remains a paper assertion, as the Employer did not pursue its Appeal in the oral hearing.

24. In this case therefore I find that the UCN and FPN were properly and validly issued by the Regulator, under Sections 37 and 40 of the Act, and that the material evidence of compliance with this Employer's duty with regard to the payment of contributions was not provided by the Employer in a timely manner by the reasonable deadlines fixed by the UCN and the FPN.

25. With regard to the asserted computer difficulties, again there is a lack of evidence. No information is provided as to the timeframe of any difficulty, and, in this day and age, there must have existed reasonable opportunities to "go online" by the use of a "smart" mobile phone, or of a publicly provided computer or that of a friend or acquaintance. In any event, as the Regulator has noted, online contributions were successfully made by the Employer between 19th August and 14th September 2021, before the deadline date set by the UCN. I observe that, in the context of the issue as to the receipt of the UCN, it cannot be without significance that those payments were made at and immediately after the time of the issue of the UCN.

26. The Employer's duties, in order to comply with the UCN, are set out in the clearest possible terms. Three steps are specified, and compliance is clearly required in respect of each of these steps. The first step is to calculate contributions, the second step is to contact the pension scheme provider and pay the contributions, and the third step, highlighted as are the first two, is: Step 3: Provide evidence of compliance. The manner of providing evidence is specified – by email or by post, and the means of providing compliance are specified also – letter, email statement or screenshots. Further, the UCN makes it abundantly clear, in simple terms, that the requirement to provide evidence is a duty of the Employer, and not of the pension provider.

27. In a recently decided case, **PEN/2018/0269**, Judge Holbrook said: "Making payment of the relevant unpaid pension contributions is, of course, the primary step which an employer must take to comply with an unpaid contributions notice. However, it is not the only step which is required: the (timely) provision to the Regulator of evidence of payment (Step 3) is also essential so that the Regulator can be satisfied that

the unpaid contributions have been made good, or else so that it can be decided whether additional enforcement action is warranted.”

28. In this case, although some outstanding contributions seem to have been paid before the UCN deadline date, the Employer has failed to comply with Step 3 of the UCN. No evidence of any compliance has been provided to the Regulator. Additionally, further enquiry made of the pension provider by the Regulator has provided the information that, as of the UCN deadline date, not all of the outstanding contributions had been paid, so that it would appear that the Employer had failed to comply fully with Step 2 of the UCN.

29. For these reasons, I find that there has been a failure of compliance, by the Employer, with the UCN, and that the Employer has advanced no reasonable excuse for that failure.

30. As to penalty, the requirement to pay financial penalties is clearly a more significant burden for a small business than a larger one. However, the fact that the penalty is burdensome is inherent in the fact that it is a “penalty”. The amounts of material penalties are prescribed by regulations made under the 2008 Act. The amounts reflect both the importance of complying with the employer duty regulations and the seriousness with which a failure to do so should be viewed. The Registrar has no discretion to issue Penalty Notices for lesser amounts, nor does the Tribunal have power to direct substitution of lesser amounts. I am aware also that the Regulator is willing to accept payment of penalties in instalments if a single payment will occasion particular hardship, and the Employer may engage with the Regulator in that regard.

31. For these reasons, as aforesaid I determine that the issuing of the Fixed Penalty Notice was the appropriate action to take in this case. Accordingly, I dismiss the Reference and remit the matter to the Regulator under Section 44 (4) (b) of the Act.

David Hunter QC

Date of Decision: 23rd March 2022

Date Promulgated: 24th March 2022