



Neutral citation number: **[2023] UKFTT 00439 (GRC)**.

Case Reference: PEN/2022/0249

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

Decided without a hearing

**On: 17 May 2023
Decision given on: 17 May 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

GEORGE BURNS

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference George Burns (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 18 October 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")).

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 22 August 2022, after receiving a report from the Appellant's pension scheme provider that contributions due to be paid between 20 January 2021 and 29 March 2022 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 amount(s) 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: 3 October 2022.***”

10. The notice expressly states, “*If you do not complete the steps required by this notice by 3 October 2022, the Pensions Regulator may issue you with a £400 Fixed penalty notice*”.

11. The Appellant did not contact the Regulator by 3 October 2022, and so the Regulator issued a fixed penalty notice to the Appellant on 18 October 2022.

12. The Regulator confirmed the penalty notice in a review decision issued on 22 November 2022. This was on the grounds that 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 the pension provider had not marked the late payment report as being resolved.

Appeal grounds

13. The Appellant says that the penalty is harsh because it related to contributions for the only remaining member of the pension scheme. The earnings were only 16 hours at minimum wage, and so contributions were approximately £1.50 per week. The employee wanted to opt out, but this was not done due to a misunderstanding of the process and miscommunication. The appeal says that there was a clerical oversight by the payroll administrators and the unpaid balance has now been paid. The appeal asks for a reconsideration, as it is a first time offence.

14. The Regulator says there is no reasonable excuse for the failure for which the penalty notice was issued, the UCN was never complied with, and some contributions remain outstanding.

Conclusions

15. 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.

16. 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 provide evidence of compliance until after the deadline had expired and after receipt of the fixed penalty notice.

17. I have considered whether the UCN was legally served at the Appellant's proper address and find that it was. The UCN was sent to the address provided by the Appellant in his re-declaration of compliance, which also appears to be the principal office. The Appellant has not disputed that he received the UCN.

18. The key issue is whether the Appellant had a reasonable excuse for failing to comply with the UCN. I have seen an email from the Appellant's pension provider to the Regulator dated 6 January 2023 which says that payment for the periods 26/1/2021 and 2/2/2021 remain outstanding (page 48 in the bundle). The failure to comply is also the Appellant's failure to provide suitable evidence to the Regulator by the relevant deadline. I have considered the points made in the appeal and response.

19. ***The penalty is harsh because it related to contributions for the only remaining member of the pension scheme, with contributions of approximately £1.50 per week.*** It may be that the individual had wanted to opt out. However, they had actually not done so. This means that the employer's duties remained in force. The amount of money involved makes no difference to the employer's obligations (and I note that even a small amount of pension contributions may be significant for a part-time employee).

20. ***The employee wanted to opt out, but this was not done due to a misunderstanding of the process and miscommunication - there was a clerical oversight by the payroll administrators.*** The Appellant has not provided any information about this misunderstanding/oversight. The Appellant is able to delegate these duties to a third party such as a payroll administrator but should delegate to a competent person and remains responsible for ensuring that the duties are complied with. In any case, the UCN gave the Appellant an opportunity to correct any oversight and avoid the penalty. He could also have contacted the Regulator to explain the problems and ask for more time to comply. Instead, the Appellant did not reply to the UCN or contact the Regulator before the deadline. The Appellant has not explained why he failed to take any action after receiving the UCN.

21. ***The unpaid balance has now been paid.*** It appears from information provided by the pension provider that this is not correct, and some contributions are still missing. It is also not disputed that missing contributions were not made until after the deadline in the UCN.

22. It is important to note that the fixed penalty was not issued just because the contributions were late. It was also issued for not complying with the other requirements in the UCN, including providing evidence of compliance. The Appellant did not contact the Regulator at all after receiving the UCN. The Appellant was

required to do this irrespective of whether the contributions had been made. Providing evidence of compliance is not just an administrative detail – it is the only way in which the Regulator can monitor employers and ensure that all proper contributions have been made. The UCN clearly asked for evidence of compliance by a specific deadline and warned of the possibility of a £400 penalty if all the requirements of the notice were not complied with.

23. *The appeal asks for a reconsideration as it is a first time offence.* This is not a reasonable excuse for the failure. The UCN gave the Appellant ample time to sort out the situation and avoid the penalty. 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.

24. The Regulator has referred in their response to the Appellant's intention to wind up the business. This point was not made in the appeal document and so I have not taken it into account.

25. 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. I remit the matter to the Regulator and confirm the fixed penalty notice. No directions are necessary.

26. I note that the Regulator has also issued an escalating penalty notice for continued failure to comply, which is on hold pending the outcome of this appeal. I would urge the Appellant to contact the Regulator as soon as he receives this decision in order to ensure all contributions are up to date and avoid any further penalties.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 17 May 2022