



[2023] UKFTT 00086 (GRC).

Case Reference: PEN/2022/0174

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

Decided without a hearing

**On: 26 January 2023 in chambers
Decision given on 30 January 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

SWEET TIME (3) LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Sweet Time (3) Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 3 August 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 6 June 2022, after

receiving a report from the Appellant's pension scheme provider that contributions due to be paid between 1 January and 30 April 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 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 18 July 2022.***"

10. The notice expressly states, "*If you do not complete the steps required by this notice by 18 July 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*".

11. The Appellant did not contact the Regulator by 18 July 2022, and so the Regulator issued a fixed penalty notice to the Appellant on 3 August 2022. The penalty was due to be paid by 31 August 2022.

12. The Appellant requested a review on 10 August on the grounds that they had not received the UCN and had made a number of payments a few days after 9 June. The Regulator confirmed the penalty notice in a review decision issued on 17 August 2022. This was on the grounds that the Appellant had not provided evidence of when the missing contributions were paid, there was no contact from the Appellant before the UCN deadline, and the pension provider had not marked the late payment report as being resolved.

Appeal grounds

13. The Appellant says that they did not receive the UCN, but they made payments on 9 June. The Appellant asks for the fine to be cancelled because the business has been severely hit by Covid lockdowns and cannot afford extra costs. The appeal attaches a document showing a series of payments.

14. The Regulator relies on the presumption of service, and says there is no reasonable excuse for the failure to comply with the UCN.

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. 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. The UCN was sent to "14 Court Drive, Stanmore, HA7 4QH". This is not the Appellant's registered office address. The Regulator says that it is the principal office address. It is the employer contact address provided in the Appellant's re-declaration of compliance, and in the Notice of Appeal. I accept that this is the principal office address.

18. The key issue is whether the Appellant had a reasonable excuse for failing to comply with the UCN. I take the points made by the Appellant in their appeal in turn.

19. **The Appellant did not receive the UCN.** The UCN was sent to the Appellant's principal office address. There is a presumption under the 2010 Regulations that a notice is received by the person to whom it is addressed. This presumption can be rebutted by evidence. However, the Appellant has not provided any evidence or explanation as to why the UCN was not received when it was correctly addressed. A simple assertion that a notice was not received is not sufficient to rebut this presumption (see the decision of the Upper Tribunal in **London Borough of Southwark v Akhter** 2017 UKUT 150). I also note that the fixed penalty notice was received at the same address. This provides further evidence that the address is correct and post for the Appellant is delivered to this address. I therefore find that the presumption of receipt applies, and the Appellant did receive the UCN.

20. **The Appellant made the payments on 9 June 2022.** The Appellant has provided a schedule of payments. However, it is not clear what these payments relate to, and when they were paid. In addition, the Regulator says that they have contacted NEST, and the full period of missed contributions was not paid until 30 August 2022. It appears that the Appellant had not made all of the missing payments before the deadline in the UCN.

21. It is also important to consider whether the Appellant complied with all of the requirements of the UCN. The UCN clearly states three steps under "what you need to do now", which expressly includes providing evidence of compliance. The Appellant made no attempt to provide evidence of compliance until after receipt of the fixed penalty notice. The Appellant was required to do this irrespective of whether they thought they had made the payments. Providing evidence of compliance is not 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.

22. *The business has been severely hit by Covid lockdowns and cannot afford extra costs.* I do appreciate that recent times have proved particularly difficult for small businesses. However, it is now a considerable period of time since there were any lockdowns caused by the Covid-19 pandemic, and the Appellant has not explained why this is still affecting its business. The penalty of £400 is fixed by law and is designed to be a genuine deterrent to breach of the rules. It appears that the Appellant did not make pension contributions on time as required by the law. 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.

23. I do not find that this excuse provides a reason to cancel the penalty. I do note that the Regulator has said it is willing to consider repayment plan, which may assist the Appellant to afford the penalty.

24. 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.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 26 January 2023