



NCN [2024] UKFTT 579 (GRC).

Case Reference: PEN/2024/0025/AE

First-tier Tribunal
(General Regulatory Chamber)
Pensions

Decided without a hearing
Decision given on: 04 July 2024

Before

JUDGE HUGHES

Between

COMSERV CONTRACTING & COMMERCIAL LTD

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The reference is dismissed and the matter is remitted to the Regulator. The penalty notices are confirmed.

REASONS

1. The employer in this case is a building company which has been in dispute over payment for two significant contracts for over a year. As a result of this it has had a cashflow crisis and ceased making payments into the pension scheme for its employees Nest in Spring 2023. On 31 August 2023 the Pensions Regulator issued an Unpaid Contributions Notice (UCN) with a date for compliance of 11 October 2023. The Notice required the Employer
 - i. To calculate the unpaid contributions;
 - ii. To contact the pension scheme provider and pay the contributions; and

- iii. To provide evidence of compliance to the Respondent.
2. On 19 September 2023 the Employer contacted the Regulator providing information concerning its difficulties, stating that the pensions contributions were being withheld with the knowledge of the employees and seeking a review of the UCN. The Regulator agreed an extension to 13 November 2023 and warned that a further extension be sought as if there was not compliance by that date a penalty could be issued.
 3. No communication was received and on 28 November 2023 the Pensions Regulator issued a Fixed Penalty Notice (FPN) 113283699420 in the sum of £400. On 29 December 2023 the Regulator issued an Escalating Penalty Notice (EPN) of £500 effective from 24 January number 235946703586.
 4. The Employer requested a review of both penalty notices on 4 January giving details of the sickness of the two persons (husband and wife) who controlled the company. The Regulator on 11 January declined to review the FPN as the request was out of time and changed the start date of the EPN to 7 March.
 5. The Employer appealed to the tribunal on 11 January repeating the explanations of the causes of its financial difficulties, that the staff were aware of the non-payment of pension contributions asking for the penalties to be put on hold and *“We ask that an affordable payment be granted for contribution arrears.”*
 6. In responding to the appeal the Regulator on 1 March noted that there was no dispute that the unpaid contributions remained unpaid and that the position continued to worsen. The amount of the EPN £500 per day was laid down by statute for a company (such as this) with between 5 and 50 employees. The Regulator argued:

In consideration of the comments made by the Appellant as part of their appeal (and in preceding correspondence) the Respondent would urge the Appellant to open and maintain a regular dialogue with the Respondent on resuming payments of pension contributions and on their intention to repay the arrears. The Respondent does have discretion to consider further delaying the accrual period of the EPN, although no guarantee can be provided as to whether further delays will be agreed.

...

The Respondent would urge the Appellant to prioritise the payment of all unpaid contributions and ensure regular, timely, full payments of all future pensions sums that may fall due.

Consideration

7. The tribunal has seen no communication from the Employer since the appeal was filed. At that stage pensions contributions remained unpaid for 9 months. The approach of the Employer has been to make payment of the debts which seem to it to be most pressing and make no payments of pension contributions. Since it is continuing to pay wages this is an approach of “robbing Peter to pay Peter” as well as such other creditors who seem most pressing. While the Employer has indicated

that this has been done with the knowledge of the employees the tribunal has seen no evidence of this.

8. The Regulator's duty is to strive to ensure that pensions contributions are paid. From the information before me it has been doing so for over a year in this case unsuccessfully.
9. I see no proper basis upon which the decision to issue the FPN may be disturbed.
10. The Regulator on 1 March indicated it "does have discretion to consider further delaying the accrual period of the EPN, although no guarantee can be provided as to whether further delays will be agreed", whether it exercises such discretion as it has is likely to be influenced by the extent to which the Employer has prioritised payments of contributions and communication with the Regulator. I am satisfied that the EPN was properly issued and there is no basis to disturb that decision by the Regulator.

Signed: Hughes

Date: 25 June 2024