NCN: [2024] UKFTT 91 (GRC)

Case Reference: PEN/2019/0283; PEN/2019/0284

First-tier Tribunal
(General Regulatory Chamber)
Pensions

Heard at: Glasgow Tribunal Centre
Heard on: 20 September 2022
Decision given on: 29 January 2024

Before

JUDGE NEVILLE

Between

PHILIP FREEMAN MOBILE WELDERS LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:
For the Appellant: Ms D Freeman, director of the appellant company
For the Respondent: Mr S Thomas, counsel

Decision: The notices are remitted to the Regulator with a direction that they be set aside.

REASONS

1. The Tribunal's decision on the issues in this reference are as follows:

    a. The Pensions Regulator operates a robust and reliable system for posting formal notices. The notices in question were posted.

    b. Philip Freeman Mobile Welders Limited has rebutted the presumption that the notices were delivered.

2. Philip Freeman Mobile Welders Limited is a small family welding business operating from 7 Bertram Street, Hamilton, in South Lanarkshire. While in formal terms this is a reference to the Tribunal rather than an appeal, for convenience I refer to it as the appellant. The appellant was founded 26 years ago by Mr Philip Freeman, who remains managing director,

and its financial director is his daughter Ms Denise Freeman. It has a modest turnover and around five employees.

3. The Pensions Act 2008 and its associated regulations place a duty on employers to automatically enrol employees into a workplace pension scheme, and to then provide the respondent with various pieces of information as to how it has done so. If the respondent considers that an employer has not fulfilled its duties, the Act enables it to issue a compliance notice specifying a date by which particular steps must be taken. If the employer still fails to comply then the respondent may issue a penalty notice. These come in two types. First, the respondent may issue a fixed penalty notice imposing a one-off financial penalty of up to £50,000. Second, the respondent may impose an escalating penalty notice of up to £10,000 per day until compliance is achieved.

4. In this case, the appellant company's 'staging date' – the date by which it had to enrol its employees in a pension scheme – was 1 January 2017. Having heard nothing as to whether it had done so, the respondent claims to have written to the appellant later that month. There being no reply, it claims to have then sent a formal compliance notice on 28 June 2017. This was followed on 10 August 2017 by a fixed penalty notice of £400. Still having heard nothing from the appellant, on 8 September 2017 the respondent issued an escalating penalty notice of £500 per day running from 6 October 2017. The respondent claims to have followed this up with telephone calls.

5. For its part the appellant claims that none of the correspondence above was ever sent, or at least was never delivered. While there might have been missed calls from the respondent, the messages left did not request a call back or indicate any urgency. The first the appellant claims to have known about either penalty notice was when a Sheriff Officer attended their premises. By that time, the total outstanding to the respondent was £14,481.16. It is agreed that the appellant then sent a 'Declaration of Compliance' to the respondent on 28 May 2019, in accordance with the compliance notice, ending the accumulation of the daily rate.

6. On 30 May 2019 the appellant requested a review of both penalty notices. The right to request a review arises under s.43 of the Act, but regulation 15 of the Employers' Duties (Registration and Compliance) Regulations 2010 imposes a time limit for such requests of 28 days following the issue of the penalty notice. Section 44 of the Act further entitles an employer to refer a fixed penalty to the Tribunal, in respect of both whether it should have been issued and its amount, but that entitlement is contingent on the respondent having first conducted a review. On 5 June 2019 the respondent wrote to the appellant stating that the request for reviews was made out of time, and that the respondent declined to conduct a review of either notice on its own initiative. The letter set out the respondent's position that, as no review had been conducted, there was no right to make a reference to the Tribunal. That was a position with which the Tribunal agreed when, after the appellant had submitted references anyway, it struck them out for lack of jurisdiction. In doing so it applied the reasoning in a previous case, Mosaic Community Care Limited v The Pensions Regulator PEN/2015/0004, that once a notice had been posted there was an irrebuttable presumption that it had been received.

7. Displaying the tenacity with which it has always pursued these proceedings, the appellant then challenged that decision before the Upper Tribunal. In a decision promulgated on 3 March 2022, Philip Freeman Mobile Welders Ltd v The Pensions Regulator [2022] UKUT 62 (AAC), Upper Tribunal Judge Wright held that the Tribunal had been wrong in Mosaic to find that the presumption of service could not be rebutted. In this case, whether there was

jurisdiction to consider the references depended on whether the notices had actually been received as a matter of fact. The references were remitted to this Tribunal to be decided afresh.

The hearing

8. The case was heard before me in Glasgow on 20 September 2022. The appellant appeared by its financial director Denise Freeman, who also gave evidence together with a Mr Duncan Fox. Each attended in person. The respondent was represented by counsel Mr Thomas. He and the respondent's witnesses Ms Catherine Doherty and Ms Heather Prescott joined the hearing remotely by means of the Cloud Video Platform. I am entirely satisfied that the hearing was as effectively and fairly heard as if all participants had been physically within the courtroom, and no one sought to argue otherwise. The documents before the Tribunal were agreed as being a main hearing bundle of 205 pages, a short supplementary bundle of 2 pages, and a copy of a recent letter from the respondent from August 2022.

9. Ms Freeman delivered a pre-prepared opening statement, which I took as both her opening and her evidence in chief. It was comprehensive and well presented, setting out the chronology of the case as she saw it, and cross-referencing the relevant parts of her witness statement and its exhibits. She next called evidence from Duncan Fox, relating to the appellant's email system. Both of them were capably and comprehensively cross-examined by Mr Thomas. Evidence was then given by Ms Doherty and Ms Prescott, who were asked questions by Ms Freeman in cross-examination and by myself in clarification of their evidence. Each party made closing submissions, following which the Tribunal's decision was reserved. I shall set out the parties' evidence and submissions when necessary to explain my conclusions on the issues in the case.

Issues and legal principles

10. The Tribunal must first decide whether either penalty notice was actually received. As held by the Upper Tribunal, this engages s.7 of the Interpretation Act 1978:

> *7. References to service by post*
>
> *Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

11. In London Borough of Southwark v Akhtar [2017] UKUT 150 (LC), a case concerning notices under a lease, the operation of s.7 was described as follows:

> *82. A legal presumption like the one in s.7 has the effect of reversing the burden of proof. Once the landlord has proved that the notice was properly addressed, pre-paid and posted it has nothing further to do – unless the contrary is proved. If the contrary is proved, then the landlord must, as it were, go the long way round and actually prove service without the help of the presumption and must therefore convince the tribunal on the balance of probabilities that the notice was actually*

received. But it is only required to do that if the contrary is proved, and not if the contrary is merely asserted.

12. This reveals the approach that should be taken in this case. It should also be noted that the Upper Tribunal held that there must be proof of non-service and not simply a denial, and applied that principle to the case before it as follows:

> *84. Ms Akhtar's evidence went no further than a bare denial. The absence of the notice in her filing system adds nothing. The evidence about her lodger was not evidence that the notices had not been delivered, but was merely the ruling out of an explanation for her not having seen them. As a matter of law, what Ms Akhtar said was not sufficient to rebut the presumption in section 7 of the Interpretation Act 1978. That is the case even if the FTT was convinced that Ms Akhtar was not telling lies, because memories can fail, envelopes can be mislaid, items of post can be overlooked.*

Were the notices sent?

The respondent's evidence

13. Evidence was given first by Cathy Doherty, a Compliance & Enforcement Manager at Capita plc, to whom the respondent outsources its bulk correspondence. This includes receiving replies in response. Her witness statement sets out that capital uses a customer relationship management system to facilitate the sending of notices. The CRM tracks and records all written and telephone communications with employers subject to automatic enrolment in order to provide an audit trail. Both the respondent and Capita describe the engagement with these employers as a "journey". That journey begins with reminder letters and emails advising employers of their obligations, including the staging date, and the date when a Declaration of Compliance must be submitted, and where necessary continues right up to the point of enforcement by means of compliance and penalty notices.

14. The CRM automatically decides which employers ought to be sent which notice, working from data provided by the respondent and a system of rules that reflect the respondent's desired approach. For example, if the CRM detects that a particular employer has not complied with its obligations, that a set period of time has passed since a Compliance Notice was sent, there is no special flag or suspension recorded, and no pending review or Tribunal proceedings, then it will issue a Fixed Penalty Notice. This is all done without any human input. The details and template for the notice is sent to another contractor, which I shall call CIC, that runs a mail merge to produce, print and send the notice by first class post. CIC then sends a daily email to Capita containing the numbers of letters and notices issued for each type of communication, so that this this can be reconciled against the expected numbers produced by the CRM. PDF copies of the notices sent are saved together with the date of issue.

15. Despite all that, the record available to Capita does not produce an explicit date of postage. Instead it shows the 'end date', meaning the date on which the automated process for sending a notice – including electronic record keeping – is complete. In some cases, and indeed in this case, the end date does not precisely match the date the notice was issued in posted. In others, it is not populated at all. Capita is nonetheless confident that whenever its CRM identifies that a notice should be sent, it is received by CIC and then posted within 24 hours. This confidence derives from a series of checks and reconciliations described in Ms

Doherty's evidence. Where there have been errors, these have always been picked up in time to still maintain compliance with that 24 hour period. Ms Doherty concludes:

16. Because the system is automated as described, the chances of a letter or notice not being generated – once the system identifies a letter or notice needs to be sent an triggers it to be created and despatched – are nil. Once a document is created, it is always sent out to an employer as the process does not rely on any manual or human intervention for letters to be printed and despatched. We have never found an error whereby the system shows a letter has been generated but it has not been despatched.

17. Ms Doherty also describes how Capita's performance is subject to Operating Service Levels with the respondent, and should its system fail it would incur a financial penalty. This has never happened.

18. With reference to the appellant, Ms Doherty produces records to show that:

    a. The FPN was created on 10 August 2017 and the EPN created on 8 September 2017. Both were issued on the day of creation and the saved PDFs correspond with that data.

    b. All emails were sent to an email address beginning debbie@ (I need not record the rest of the address in these reasons, the parties agree it is correct). On the same days as they were sent, thousands of emails were sent to other employers. There is no record of any issue with the sending of emails on those days.

    c. All statutory notices were addressed to the appellant's address at 7 Bertram Street. None was returned as undeliverable. On the same day as the FPN was sent to the appellant, a total of 230 FPNs were sent to employers. No concerns have been raised about whether these were sent, and there has been engagement by employers with many of those notices. The same is said about the EPN, 112 being sent out on the same day and no issues were encountered.

    d. Once the EPN had started to accrue, a call had been made to the appellant's contact telephone number provided by the respondent. On 11 October 2018 the caller was told that Ms Freeman was off sick and that Mr Freeman only works part time. An urgent message was left for them to call back.

    e. A further call was made for Ms Freeman with a message to call back on 17 October 2017, and again on 24 October 2017. On 1 November 2017 another call was made but rang out with no facility to leave a message.

19. Heather Prescott is the Automatic Enrolment Data Strategy and Services Lead for the respondent. She gave evidence about the process for when post is returned by Royal Mail. All returned mail is scanned into an electronic queue in the CRM and allocated to the relevant employer's record. Where it is a formal notice, the Respondent then attempts to find an alternative address where possible, via other records on the CRM, Companies House, 'open-source checks' or by simply calling the employer to ask. If appropriate, the returned notice is then revoked by the respondent using a section 43(10)(b) review on its own initiative. If another address cannot be found, then a review is opened on the CRM and further enforcement suspended until the situation is resolved. She had checked the relevant records and no items of post sent to the appellant had been received.

Findings

20. I find that the systems employed by the respondent and its contractors for sending notices by post are reliable and robust. The evidence given by Ms Doherty and Ms Prescott was confirmed by statements of truth, explored and challenged in significant detail during the hearing, and substantiated by extracts from the relevant records. It was credible and straightforward. The respondent has proved that the notices were properly addressed, enveloped and posted by first class mail.

21. I make the above finding subject to three qualifications:

    a. First, it hardly needs saying that computer systems assumed to be infallible can get it wrong, resulting in significant injustice in individual cases, and Ms Freeman's written submissions rightly referred to the sub-postmasters scandal as one example. Key to my finding in the respondent's favour is Ms Doherty's evidence that no adverse issues had ever been encountered that could cause her to doubt the reliability of the information it produces. The operation of deemed service plainly puts a person who denies receiving a notice at a significant disadvantage. The respondent should be ready in appeals such as these to persuade the Tribunal that it retains a similar level of confidence that post was sent. Even isolated and minor examples of the system going wrong may be disclosable in subsequent proceedings if the respondent is to comply with its duty of candour and injustice to be avoided.

    b. Second, Ms Freeman complained that shortly before the hearing the respondent sent the appellant further correspondence that was addressed to its registered office instead of the 7 Bertram Street address. Unlike previous correspondence, this letter claimed that the respondent did not have a contact name or email address for the appellant. This was all very surprising to Ms Freeman, because significant time and effort had been put into establishing the correct contact details with the respondent in response to these proceedings, and no notice of the letter being sent was given by those means. Ms Doherty explained that this would have been manually changed at some point because sending post to the registered address is 'good service' for formal notices. This statement might be correct, but the practice unwise. Where contact has been established with an employer using nominated contact details, including an address, telephone number and email address, to then send the important correspondence to an entirely different address, without notification using the established contact details, is bound to give rise to inadvertent non-compliance and disputes before the Tribunal. Nonetheless, I do not consider that the issue is material to the present case – despite the appellant's understandable concern that this casts doubt on the reliability of the respondent's systems, here the notices were only ever produced using the correct systems.

    c. Third, there was significantly less evidence given about the reliability of email transmission. While formal notices are sent by post, if an employer ignores emails chasing a response then this may indicate failures in its office rather than by Royal Mail. That is part of the respondent's case here. There is no reason to think that emails were not sent as claimed, but unlike physical post there are a range of reasons why emails might be waylaid before reaching the appropriate inbox. The respondent's system logs when emails are "bounced", but no evidence was given on the steps taken by the respondent to avoid emails – sent, of course, in bulk – being misidentified as spam by common email platforms. This can result in emails being

filtered into a spam or junk folder, or never even getting as far as the user's account, without being returned to the sender as undelivered.

Were the notices delivered?

22. The burden therefore moves to the appellant to prove that the notices were not delivered. This brings in the relevance of the unreturned telephone calls and unanswered emails argued by the respondent – if the appellant did not properly deal with those, then it becomes more likely that the notices were delivered but similarly ignored.

23. The appellant has not come to this appeal armed only with a bare denial, and its evidence can be divided first into that which describes how post, telephone and email messages would have been received in its office, and second into that describing regular problems with local Royal Mail delivery.

24. The appellant was founded in 1996 by Philip Freeman, who is now in his eighties. He still works, and attended the hearing, but has left the running of the business in the hands of Ms Freeman. She described the company's financial compliance with evident pride. It always paid its PAYE liabilities and VAT to HMRC early, including during the pandemic when the option was available to defer payment, always paid its suppliers and had never been taken to court. Even the FPN in the sum of £400 would have been promptly paid or challenged on receipt, never mind such a serious piece of correspondence as the EPN, imposing a penalty of £500 per day. The first that anyone had known of the respondents enforcement action was when a Sheriff Officer add attended on 28 May 2019 attempting to recover a total of £14,481.16.

25. Ms Freeman has always candidly accepted that two early letters from the respondent were received, dated 20 April 2015 and 18 December 2015, informing the appellant that auto-enrolment would be required in the future and, she says, stating that the respondent would write to her again with more information. She also accepts that the appellant was under a legal obligation to enrol its employees and submit details to the respondent regardless of whether or not the enforcement notices were received, and that it did not comply with its obligations under the relevant legislation. It had, in fact, enrolled its employees in a pension on 20 April 2018, but failed to submit a declaration of compliance to the respondent. This was done the day after the Sheriff Officer attended.

26. Ms Freeman described the system for receiving post in the office, which I need not describe in detail. As noted in a reply to a telephone call from the respondent, she had taken a month off in around October 2017 for medical reasons. Debbie Shaw ran the office during that time. Ms Shaw has worked for the respondent for 23 years and Ms Freeman has absolute confidence in her abilities. Ms Shaw could deal with most enquiries but anything that needed looking at urgently or saving for Ms Freeman's return was communicated to her, either by email or telephone. In evidence, it was suggested to Ms Freeman by Mr Thomas that the systems for passing on and actioning messages was *ad hoc* and informal, and may have broken down during Ms Freeman's absence. This was certainly a point worth exploring in evidence; courts and tribunals are familiar with small family businesses that fail to cope when a key member of staff is suddenly away. With this business, however, I was impressed at the clear and organised way in which Ms Freeman described how she had instructed Ms Shaw to deal with matters in her absence and why she was confident that she had done so. It is also a familiar feature of a family business that someone in Ms Freeman's position is never truly on leave, she described being updated on an almost daily basis on what was

happening. No one listening to Ms Freeman could fail to be convinced that this small busy office was efficient and well run, even in her temporary absence. Ms Freeman accepted that two messages were taken saying that the respondent had called, but that the caller had not requested that they call back or that the matter was urgent. If they had, then they would have been called. I accept this.

27. As to delivery of post, the appellant is only one of several with the postal address "[Name], 7 Bertram Street." These businesses are physically separated with separate letterboxes, despite all being (so far as Royal Mail are concerned) at number 7. The buildings are also intermingled with residential properties, other businesses at number 9 Bertram Street, and an automotive engineering company across the street at number 30. This presents a confusing picture to whoever delivers the post and there had been many problems over the years, With businesses receiving each other's post being a common occurrence.

28. To illustrate her point, Mrs Freeman produced a copy of a letter from the respondent itself to an entirely different company. She had resealed that letter and handed it back to the postman, but could not say that other companies would always extend the same courtesy. Complaints had been made to Royal Mail, who had responded that they experience local staffing problems so had to use agency carriers. The respondent had queried this, as the letter in question had never actually in fact been returned to them. As pointed out by Ms Prescott, this might mean that the postman had simply redelivered it. Mr Thomas put this forward as undermining the appellant's case. I reject this, and the incident does provide support for the problems with post experienced by the appellant.

29. It is, again, a common experience for courts and tribunals to hear unsubstantiated assertions of poor local delivery. Ms Freeman's evidence went much further than this, producing several mis-addressed letters and giving me a detailed and plausible description in oral evidence of how far back these concerns went. She also produced a letter signed by three nearby businesses confirming to the Tribunal that the local service is unreliable, that they receive other people's post, and that they experience their own going missing. Mr Thomas took the point, rightly, that this letter was not in the form of a witness statement and that the position of the signatories was not clear. There was also no formal statement of truth. As is no doubt already becoming clear from these reasons, I found Ms Freeman to be a reliable and credible witness. Her evidence as to the problems with delivery and how she came to collect the signatures from the three local businesses emerged from Mr Thomas's cross-examination intact, having remained consistent, detailed and plausible.

30. On the emails, the appellant called evidence from Duncan Fox, of Paragon Ecommerce. He had prepared a report for the appellant on whether the 10 emails that the respondent claims to have sent had ever been received. The main points of his report can be summarised as follows:

    a. The respondent had only provided basic information on the emails, and had not included detailed message headers or even the time of day at which they were sent. This meant that he could not perform any analysis to see the originating server. The respondent claimed that one email, sent on 9 March 2016, had been returned as undelivered. Without the headers in that email, Mr Fox could not consider why that might be. Nor was there any apparent reason why an email might not have been delivered.

b. The appellant has its own domain, but configured to forward (without retaining) all emails to a Gmail account. Mr Fox had been told, and had found this consistent with the way in which emails were accessed from the office, that no one had recently logged into that Gmail account from a web browser at all. It had been set up on the Thunderbird client on a computer in the office. He had found that neither Ms Freeman nor Ms Shaw had much idea about how the system worked.

c. The way in which the emails were set up meant that no emails were deleted from the Gmail account even if they were deleted on the local mail client.

d. He had searched the Gmail account for the 10 emails and they were not there.

31. Mr Thomas challenged Mr Fox's evidence as not properly constituting expert evidence. His report showed no indication that he understood the duties of an expert witness, nor did Mr Fox appear to have set out any qualifications in the relevant field. In cross-examination, Mr Fox happily accepted all these criticisms. He had never been to court before to give evidence about an IT system and had simply offered to prepare the report. Mr Thomas was right to submit that Mr Fox's evidence should not be afforded significant weight as expert evidence. I agree, but in fairness to Mr Fox he has never purported to give conventional expert evidence. The appellant had asked him to search their email system to find if the appellant's emails were there, and he did so according to a methodology that he clearly identified and that is comprehensible without the need for any particular expertise. Recognising that the formal rules of evidence do not apply, and in the particular circumstances of this appeal I am content to simply accept him as a witness of fact. There is no particular feature of his factual evidence put forward by Mr Thomas, or that is otherwise apparent, that undermines its reliability.

32. I take a step back and consider all the evidence to determine, on the balance of probabilities, whether the appellant has rebutted the presumption that the notices were delivered. In what must be a quite exceptional set of facts, I reach the conclusion that the compliance notice and the subsequent penalty notices were not delivered. This conclusion takes into account everything said by the respondent as to the previous receipt of correspondence, and the issues concerning telephone calls and emails. Having not received the notices or becoming aware of them until attendance of the Sheriff Officer, I find that there was a reasonable excuse for not responding to the compliance notice and the ongoing penalty notices should be set aside.

33. Finally, I apologise to the parties for the very significant delay in sending this decision. This due to a combination of errors together with pressure of other work in the Tribunal generally, as well as personally.

Signed | Date:

Judge Neville | 29 January 2024