



[2022] UKFTT 00318 (GRC)

Case Reference: PEN/2022/0102

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

Heard: Paper Consideration

**Heard on 2 September 2022 in Chambers
Decision given on 05 September 2022**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

MA HEALTH LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference MA Health Limited (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 21 April 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 21 February 2022, after

receiving a report from the appellant's pension scheme provider (NEST) that contributions due to be paid between 1 October and 31 December 2021 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, "*You must complete steps 1-3 above by 4 April 2022.*"

10. The notice expressly states, "*If you don't complete the steps required by this notice by 4 April 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*". The appellant did not contact the Regulator by 4 April 2022, and so the Regulator issued a fixed penalty notice to the appellant on 21 April 2022. The Regulator confirmed the penalty notice on review.

11. The appellant made the missing payments to NEST on 28 April 2022.

Appeal grounds

12. The appellant says that contributions were delayed because the two people employed by the appellant gave consent to stop paying into their NEST pension scheme in October 2021. Since then, both individuals have opted out. All contributions have now been authorised to be paid up to April 2022. The appellant says they acted honestly, and the employees made the decision themselves which is why the payments were temporarily on hold. Everything is now up to date. The appellant asks not to pay the fine as it seems unfair.

13. The Regulator's position is that there is no ability under the Act to temporarily opt out of a pension scheme. Two employees were enrolled in the pension scheme, as confirmed in the appellant's re-declaration of compliance in September 2020. No request to opt out of the scheme was received by NEST until 24 April 2022, and there is no evidence of an opt-out request before this date. Contributions are required until the date the pension provider processes the opt-out request. The missing contributions were due and were not paid by the deadline. The penalty is not unjust, it is fixed by law and is not disproportionate to the breach.

Conclusions

14. 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.

15. 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 make the missing contributions or provide evidence of compliance until after the deadline had expired and after receipt of the fixed penalty notice.

16. 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 the appellant's principal office, and the appellant does not dispute receiving it.

17. The key issue is whether the appellant had a reasonable excuse for failing to comply with the UCN. There is no dispute that the appellant received the UCN. The unpaid contributions were not made until 28 April 2022. The failure to comply is the appellant's failure to make the payments before the deadline in the UCN of 4 April 2022 and provide suitable evidence to the Regulator.

18. The appeal is based on the fact that the appellant's employees wished to opt out from the pension scheme. The question is whether this provides a reasonable excuse for late compliance.

19. The appellant has said that its two employees gave consent for pension payments to stop in October 2021. The appellant has not provided any evidence of this consent. There is also no evidence that the individuals contacted NEST to opt out from the scheme until 24 April 2022. The appellant has provided correspondence from NEST to both individuals which confirms receipt of the opt-out requests on 24 April. There is no evidence of an earlier request.

20. Under the Act, an employer can only stop pension payments for an employee if that employee has formally opted out of the scheme, and this request to opt out has been processed by the pension provider. It is not sufficient for an employer to obtain consent from its employees and simply stop making the pension payments. It is also not possible for an employer and employee to agree to put contributions on "hold". There is a system of automatic enrolment into pension schemes to ensure that employees receive regular pension contributions. An employer cannot move employees in and out of the scheme based on their agreement.

21. I accept that the appellant may have thought that individual consent from the employees was sufficient to enable them to stop making pension contributions. However, this is clearly not what is permitted by the rules on automatic enrolment. The appellant should have continued making contributions until each individual had opted out of the pension scheme by contacting NEST. I therefore find that the appellant does not have a reasonable excuse for failing to comply with the UCN.

22. The appellant did later make the missing contributions. However, 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. The appellant says that the fine is not fair. I do not agree. The appellant may have made an honest mistake about the requirements, and thought that consent from the employees was sufficient. It also appears that both employees may have been happy to put payments on hold (and I note that one of them is a director of the appellant). Nevertheless, the appellant failed to comply with the UCN. The UCN alerted the appellant in February 2022 to the fact that there was an issue with missing payments. The appellant did not contact the Regulator or make any attempt to pay the missing payments until after receipt of the fixed penalty notice. The appellant had the opportunity to resolve the situation and avoid the fine once it received the UCN, but instead failed to respond to the UCN.

24. For the above reasons, 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 2 September 2022