



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PENSIONS**

Tribunal Reference: PEN/2021/0219

Date of Hearing: 14th December 2021

Decision Date: 31st January 2022

Judge David Hunter QC

Between

EASE & CO (BANQUETTE SEATING) LIMITED

Appellant (by Reference)

And

THE PENSIONS REGULATOR

Respondent

DECISION

The Reference is dismissed, and the matter is remitted to the Regulator. The Penalty Notice is confirmed.

REASONS

Preliminary

1. By this Reference Ease & Co (Banquette Seating) Limited (“the Appellant”) challenges a fixed penalty notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 8th October 2020 and bears the Notice Number: E151963819.

2. The Penalty Notice was issued under Regulation 28(2) of the Occupational Pension Schemes (Charges and Governance) Regulations 2015. It required the Employer to pay a penalty of £500.30 for failing to prepare an annual statement regarding governance.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 11th August 2021. The effect of the Penalty Notice is accordingly suspended until the Reference has been determined, the Tribunal has remitted the matter to the Regulator, and any directions given by the Tribunal have been complied with.

4. The Tribunal sat to hear the Appeal on 14th December 2021. The hearing was held remotely, via the Cloud Video Platform. I presided, Mr Bill Johnson represented the Regulator, and Mr Gary Lonie, the sole Director of the Appellant Company, represented the Appellant. The papers for the hearing comprised the Employer's application form for the Reference (described in the papers as the Notice of Appeal, and containing "Grounds of Appeal", with supporting documents), the Employer's request for a review, and the Regulator's Response (with supporting documentary evidence), all of which documentation I have considered, together with the evidence given, and submissions made, at the hearing, and together also with some further documents provided after the hearing to the Tribunal, and copied to the Appellant, by Mr Johnson at my request.

Statutory framework

5. The Regulator is the UK Regulator of workplace pension schemes under the Pensions Act 2004. The Regulator's objectives include protecting the benefits of scheme members and promoting and improving the understanding of good scheme administration.

6. Trustees of occupational pension schemes perform a responsible and important role, and they must comply with various regulations in relation to scheme administration. This includes the requirement to prepare an annual governance statement (also known as a chair's statement) under Regulation 23 of the Occupational Pension Schemes (Administration) Regulations 1996 ("the Administration Regulations"). This statement must give specified information about the scheme's investment strategy, financial processes and charges. It must also give information about the trustees' compliance with the requirement to have sufficient knowledge to be able to exercise the function of trustee. This statement must be prepared within seven months of the end of each scheme year. It is an important document, within the Regulator's regulatory regime, provided in the interests of transparency, for the benefit of members of the scheme.

7. This requirement to prepare an annual governance statement was introduced with effect from 6th April 2015, by Regulation 17 of the Occupational Pension Scheme (Charges and Governance) Regulations 2015 (the "Governance Regulations").

8. The Regulator has statutory responsibility for ensuring compliance with these requirements. Under Regulation 28(2) of the Governance Regulations, the Regulator "must" issue a penalty notice if the information provided by trustees for inclusion in the register indicates that they have failed to prepare a governance statement, or if the Regulator is of the opinion that the trustees have failed to prepare the required governance statement. Under Regulation 28(4)(b), the penalty notice "must be at least

£500 and must not exceed £2000.” This provision for a penalty for non-compliance underlines the importance of the preparation and provision of this statement.

9. Under Regulation 32 of the Governance Regulations, a person may make a reference to the Tribunal in respect of the issue of a penalty notice and/or the amount of the penalty. A person may make such a reference provided that an application for a review, pursuant to Regulation 31 of the Governance Regulations, has first been made to the Regulator. Under Section 103 of the Pensions Act 2004, 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. On determining the reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate.

Facts

10. The facts can be distilled from the Notice of Appeal and the Regulator’s Response, and the associated documents which are contained in the Appeal Bundle. They are not in dispute.

11. The Appellant company is a furniture company, of which Mr Lonie is the sole director. The material pension scheme is the Ease & Co Pension Scheme (“the Scheme”), set up in 1978 for the benefit of the company’s employees. The Appellant is the Trustee of that scheme, and it is accepted that Mr Lonie, as sole director, exercises all those functions which are required of the trustee.

12. It is accepted that the Scheme – a defined contribution pension scheme – is a relevant scheme within the meaning of Section 23 of the Administration Regulations, and that, accordingly and relevantly to this Appeal, the trustee of the Scheme had a statutory obligation to prepare an annual governance statement, the chair’s statement, within seven months of the end of each scheme year.

13. The relevant scheme year for the Scheme ended on 31st March 2019. The Trustee was therefore required to prepare a chair’s statement by 31st October 2019.

14. On 21st February 2020 the Trustee submitted a scheme return to the Regulator, in compliance with the requirement to provide, from time to time, information for inclusion in the register of pension schemes. The Regulator requests the provision of scheme returns periodically – the maximum period elapsing between returns is five years, and frequently returns are required at three year intervals. Mr Lonie, exercising the functions of the trustee, had submitted this return.

15. Amongst the details and information required to be provided by the scheme return is an indication as to whether a chair’s statement was “in place”. Mr Lonie’s return indicated that no chair’s statement had been prepared.

16. There ensued a course of correspondence between the Regulator, Mr Lonie and the pension provider, Aviva, between March and September 2020, concerning the status of the Scheme, in particular as to whether or not the Scheme was exempt from the requirement to provide an annual chair’s statement.

17. In September 2020 the Regulator had formed the view that no exemption applied to the Scheme, that it was accordingly a relevant scheme within Section 23 of the Administration Regulations, and that the Trustee had failed to prepare a chair’s statement before the relevant deadline for doing so - 31st October 2019.

18. In those circumstances the Regulator, as it was required to do by Regulation 28(2) of the Governance Regulations, issued the Penalty Notice on 8th October 2020.

19. The Appellant requested a review of the Penalty Notice on 4th November 2020. The Regulator, following a further course of correspondence with the Appellant and the pension provider, did carry out a review and on 15th July 2021 informed the Appellant that the outcome of the review was a confirmation of the penalty notice.

20. The Appellant duly appealed to the Tribunal, by its Notice of Appeal of 11th August 2021.

The Appellant's Case

21. The Appellant's (Mr Lonie's) case is comprised in the request for a review (in particular in a letter from Mr Lonie to the Regulator on 15th March 2021), in the Grounds of Appeal and in his submissions to the Tribunal during the oral hearing.

22. Essentially, he submits that he is a conscientious employer, who has for many years sought to safeguard the interests of his employees by setting up and maintaining the material pension scheme. He said, in his letter of March 2021, "I am a furniture maker with little knowledge of the pension industry except that we need to look after our people by providing pensions." His acknowledged failure to provide a chair's statement for a relevant pension scheme was unintentional and caused by a lack of knowledge on his part as to the material requirement to provide the statement. He points to the period of the correspondence referred to above, between him and the Regulator and the pension provider, during which there appeared to be uncertainty, on the part of both the Regulator and the pension provider, as to the status of the Scheme and as to whether or not it was a relevant, non-exempt, scheme. Again essentially, he asserts that, in the context of his company's position as a small company with a limited individual pension scheme, as opposed to a large corporate pension scheme, it is unfair and disproportionate for the Regulator to impose this penalty for a failure of compliance born out of a lack of knowledge of complex regulatory requirements.

The Regulator's Case

23. The Regulator's case is comprised in its Response to the Appeal and in Mr Johnson's submissions to the Tribunal during the oral hearing.

24. The Regulator relies upon the mandatory statutory duty imposed by Section 28 of the Governance Regulations to impose a penalty in the event of a failure (undisputed in this case) to prepare a chair's statement.

25. Having undertaken a review of the penalty Notice, the Regulator asserts that no procedural fairness attended the issue of the notice, and that the Appellant has not provided a reasonable excuse for the material failure of compliance.

26. In the context of fairness, the Regulator points to all of those efforts made, once the absence of a chair's statement was noted, to establish that the Scheme was a relevant and non-exempt Scheme for the purposes of Section 23 of the Administration Regulations, and to the fact that it was established that the Scheme was a relevant scheme.

27. So far as reasonable excuse is concerned, and with regard to the Appellant's asserted lack of knowledge of the duty to prepare a chair's statement, the Regulator relies on Section 248 of the Pensions Act 2004, which states, relevantly to this Appeal, under the heading "Requirement for knowledge and understanding" at (5) : "A company to which this section applies (the section applies to the Appellant company) must secure that any individual who exercises any function which the company has as trustee of any relevant scheme has knowledge and understanding of the law relating to pensions and trusts", and at (6) : "the degree of knowledge and understanding required by subsection (5) is that appropriate for the purposes of enabling the individual properly to exercise the function in question."

28. The Regulator draws the attention of the Tribunal to its Code of Practice Number 13, issued in July 2016, entitled "Governance and administration of occupational trust-based pension schemes providing money purchase benefits" of which the Scheme in this case was one). The obligation to prepare a chair's statement had come into force in April 2015, and, inter alia, the Code, at paragraphs 154 to 158, gave detailed guidance as to this obligation, and referred to the material legislation, and warned of a penalty for a failure to prepare the statement.

29. So far as proportionality is concerned, the Regulator, essentially, relies upon the importance of statutory compliance by all trustees who are subject to the material regulatory regime.

Discussion

29. At the outset, I wish to record that I found Mr Lonie, who as aforesaid represented the Appellant, to be a wholly genuine and indeed engaging person. Both in writing and orally, he has made his submissions to the Regulator and to the Tribunal in a concise, reasonable and wholly coherent manner. Further, he has generously acknowledged that all the members of the Regulator's staff with whom he has had dealings have been polite, helpful and patient, and acknowledged, also at the close of the oral hearing, that he had had a fair hearing.

30. I find that the penalty notice was validly issued. In light of the undisputed fact that a chair's statement was not prepared by the Appellant within the prescribed period of seven months from the end of the relevant scheme year – that is by 31st October 2019, seven months after the end of this Scheme year on 31st March 2019, then, by reason of the wording of Section 28 of the Governance Regulations, the Regulator "must" issue a penalty notice. The issue of the penalty notice was mandatory, and in the material factual circumstances, cannot be challenged.

31. The Appellant, as was its statutory right, did seek to review the penalty notice, and the Regulator undertook a review, and confirmed the penalty notice. Accordingly, the Appellant, again duly exercising a statutory right, having referred the matter to the Tribunal, I consider that I, following the principle which I found to be appropriate in **EC2 Master Limited v The Pensions Regulator (PEN/2018/0408)**, should then consider two matters: firstly, the fairness of the decision to confirm the notice on review, and secondly, the question of whether or not the Appellant had any reasonable excuse for the material failure of compliance.

32. Having regard to the fact that the issue of the penalty notice was mandatory, as I found in the EC2 case, and so far as fairness is concerned, I do not in this Tribunal exercise any public law function, and am not conducting a judicial review of the Regulator's decision. I am concerned only to examine the question of whether any procedural or regulatory unfairness attended the decision. I am not, nor can I be, concerned, for example, with the question of the Regulator's policy in extending the material regulatory function "across the board", to both large corporate pension schemes and to much smaller individual company schemes. Such a concern would be a public law concern of "Wednesbury" unreasonableness and is without the jurisdiction of this Tribunal.

33. I do not consider that any relevant, that is to say, procedural unfairness attended this decision. Once the absence of a chair's statement was noted, considerable effort was expended, in the material correspondence referred to above, by Mr Lonie himself, it should be noted, and by the Regulator and the pension provider, to establish whether this Scheme was a relevant scheme, to which the material requirement to prepare a chair's statement applied, so that the issue of a penalty notice was not only appropriate but also mandatory. Once that fact, of the relevant status of the Scheme, was established, the Regulator had no choice but to issue the penalty notice. The material regulatory regime was correctly followed and applied. There is in my view no evidence of any regulatory failure, or any other procedural unfairness, in this case.

34. So far as the assertion of "lack of knowledge", as a reasonable excuse for the failure of compliance, is concerned, the material statutory provision upon which the Regulator relies – Section 248 of the Pensions Act 2004, which is set out above, is determinative. The relevant wording of the Section is, refreshingly, clear and unequivocal. In terms of this Appeal, as the person exercising a material function of the company, as the corporate trustee of the Scheme, Mr Lonie simply must have the degree of knowledge and understanding of the law relating to pensions and trusts which is appropriate for the purpose of enabling him to exercise the function in question – the statutory requirement (a matter of law) to prepare the chair's statement.

35. I do understand Mr Lonie's frustration, and his human reluctance to comprehend that he, as an individual person running a small company with few relevant employees and a relatively small Scheme, should have the requisite knowledge of all of the requirements of a detailed regulatory regime which govern his function as, effectively, a trustee. But the material legal requirement is absolutely clear and does apply "across the board" to any individual who, relevantly in this case, exercises the prescribed function of the preparation of a chair's statement.

36. I make three observations in this regard. Firstly, the requisite knowledge was in the public domain, and available to all trustees, in the form of the aforesaid Code of Practice. Having regard to Section 248, however burdensome it might be for some individuals, if they take on the role of a trustee exercising statutory functions, they take on also the obligation, imposed on their companies by this Section, to gain an understanding of all of the material functions which they may be required to exercise. Secondly, whilst I quite understand that there are cost implications in obtaining, if required, the appropriate professional advice, in the context of a long standing position as an individual exercising a trustee's functions, the obtaining of what would in all probability be "one-off" advice and guidance, to obviate the possibility of the imposition of penalties, might well be regarded as prudent expenditure. Thirdly, this statutory provision is determinative of any issue of proportionality. In that it applies to

all relevant persons exercising pension trustee functions, there can be no question of the Regulator “using a sledgehammer to crack a nut”, as Mr Lonie vividly asserts. In the context of this Appeal, the Regulator was statutorily bound to apply the material legal requirements to the Appellant, both in terms of issuing the penalty, and in terms of relying on the statutory requirement of the prescribed degree of knowledge.

37. Having regard to my conclusion as to the absence of any material unfairness, the statutory requirement as to relevant knowledge is determinative of the appeal.

38. I make one further observation. There was some discussion during the oral hearing of precedent, in that Mr Lonie observed that an adverse decision in this case might deter others from exercising the same concern for their employees as he has exercised over the years. In that regard, firstly there is of course a statutory obligation on employers to put in place appropriate occupational pension schemes. Secondly, the “other side of the coin”, in respect of Mr Lonie’s concern as to precedent, is that to find that, in circumstances such as pertained in this case, a lack of knowledge constituted a reasonable excuse, might be to establish a precedent for some employers who might cynically seek to excuse material failures of compliance. I cannot stress sufficiently that I do not place Mr Lonie in that category. As I said above, I found that he exhibited a manifestly genuine integrity, and I am grateful to him for the clarity of his submissions.

39. However, for the reasons set out above, I determine that the issue of the penalty notice in the sum of £500.30 was the appropriate action for the Regulator to take in this case. For the sake of completion, the amount of the penalty was not in issue in the reference. The penalty amount was the minimum amount which could be imposed, with the nominal and customary addition of 10 pence for each active scheme member. I remit the matter to the Regulator and confirm the penalty notice. No directions are necessary.

David Hunter QC

Decision Date: 31st January 2022

Date Promulgated: 2nd February 2022