



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Pensions Regulation**

Tribunal reference: PEN/2021/0242

Appellant: Phasor Electrical Limited (appellant previously incorrectly named as Chris Beard)

Respondent: The Pensions Regulator

Judge: Hazel Oliver

DECISION NOTICE

1. By this reference Phasor Electrical Limited (the “appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 1 June 2021 requiring the appellant to pay a fixed penalty of £400 for failure to comply with an unpaid contributions notice (“UCN”).
2. The appellant has previously been incorrectly named in these proceedings as Chris Beard, who is a director of the appellant. The fixed penalty notice was clearly issued to Phasor Electrical, and they are the employer. I have therefore corrected the name of the appellant to Phasor Electrical Limited.
3. 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.
4. 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.

5. 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.

6. 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.

7. 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

8. 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.

9. 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 30 April 2021, relating to contributions due to be paid between 6 December 2020 and 5 April 2021 that were unpaid.

10. 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 27 May 2021.**" The notice also states, "*If you do not complete the steps required by this notice by 27 My 2021, the Pensions Regulator may issue you with a £400 Fixed penalty notice*".

11. The appellant did not contact the Regulator by the deadline of 27 May 2021, and the Regulator issued a fixed penalty notice to the appellant on 1 June 2021. The penalty was due to be paid by 29 June 2021.

12. The appellant requested a review of the fixed penalty notice on 9 June 2021 and the Regulator confirmed the penalty notice in a review decision issued on 7 July 2021.

Appeal grounds

13. The appellant says that Christopher Beard (a director of the appellant) was away in Thailand and was unable to return for 6 months due to Covid restrictions. The missed contribution dates between December and April were during this period. The appeal says that Mr Beard was unaware of the issue as he was out of the UK, with no flights available. The appeal also says that the address the notices were sent to was closed "for some of the time frame in question" due to Covid restrictions, and the post was not dealt with. As soon as Mr Beard was back in the UK and aware of the issue, he made the payments.

14. The Regulator says there is no reasonable excuse for failure to comply. The appellant has two directors, it is not clear why the task could not be completed remotely or delegated, and the appellant did not contact the Regulator to explain its difficulties after issue of the UCN. The appellant does not specify when the office was closed, and employers had been coping with Covid restrictions for over a year. It is reasonable to expect that employers deal properly with official correspondence and have mail handling and dealing procedures in place to ensure important regulatory correspondence is dealt with. The appellant did not provide evidence of compliance or make all payments by the UCN deadline.

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 them to pay missing contributions and provide evidence of compliance. There had been some unpaid contributions. The appellant failed to pay all of the missing contributions or provide evidence of compliance until after the deadline had expired.

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 the principal office address as shown on the appellant's website, and this is not disputed by the appellant.

18. 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. It is not clear from the appeal when the appellant says it actually opened and read the UCN.

19. The appellant says that the relevant director was out of the country at the time, the office was closed for part of the period, and the payments were made once he returned. The question is whether this provides a reasonable excuse for failing to make all of the missing contributions in time and provide evidence to the Regulator.

20. I acknowledge that the Covid-19 pandemic caused considerable disruption to both businesses and everyone's daily lives. I accept that Mr Beard was out of the country at the time of the missing contributions. If he was responsible for making the payments, I can also understand how this error may have occurred. It appears from the documents relating to his request for a review that he thought he had made the contributions by logging in remotely from Thailand, but this had not worked.

21. However, this is not a reasonable explanation for the failure to comply with the UCN. Contributions may have been missed by mistake. But, the UCN clearly notified the appellant about the missing contributions and gave the appellant four weeks to comply.

22. The appellant says that their principal office was closed for "some" of this period due to Covid restrictions. I accept that the Covid-19 pandemic has been a difficult time for businesses and many offices have been closed during lockdowns and/or due to instructions to work from home. However, this occurred in 2021 – more than a year after the first lockdown. The appellant should have had arrangements in place to deal with their post by this time in the pandemic, particularly official correspondence such as letters from the Regulator. The appellant has also not explained whether the office was closed at the time the UCN was sent, or why nobody else was dealing with this important correspondence in Mr Beard's absence. A reasonably diligent employer should have made arrangements to ensure they were complying with their employer duties throughout this time, and in particular that they were able to read and deal with correspondence from the Regulator notifying them that they were in breach of those duties.

23. I also note from the Regulator's response to the appeal that the first missing contributions were paid on 28 April 2021 (paragraph 32 of the response, page 55 of the bundle), which was before the UCN was sent and well before the deadline of 27 May. It therefore appears that the appellant was aware of missing contributions and had started to make some payments, but still failed to comply with the UCN as not all payments were made by the deadline and no evidence of compliance was provided to the Regulator.

24. Although the missing contributions have now been paid, 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.

25. 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: 16 February 2022

Date Promulgated: 17 February 2022