



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

Tribunal reference: PEN/2021/0296

Appellant: Morecambe Bay Wines Limited

Respondent: The Pensions Regulator

Judge: Hazel Oliver

DECISION NOTICE

1. By this reference Morecambe Bay Wines Limited (the “appellant”) has appealed against an escalating penalty notice (“EPN”) issued by the Pensions Regulator (the “Regulator”) on 29 July 2021 requiring the appellant 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 (“FPN”) 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. Under Section 41 of the Act, the Regulator can issue an EPN if an employer continues to fail to comply with a UCN.

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 FPN 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 23 April 2021, relating to contributions due to be paid between 6 December 2020 and 5 April 2021 that 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 20 May 2021.**” The notice also states, “*If you do not complete the steps required by this notice by 20 May 2021, the Pensions Regulator may issue you with a £400 Fixed penalty notice*”.

10. The appellant requested a review of the UCN on 27 April 2021, on the grounds that all staff had been furloughed, it was using the Coronavirus Job Retention Scheme (“CJRS”), and it did not have sufficient income to pay its bills. The Regulator varied the UCN to give a new deadline of 24 June 2021. The appellant did not

provide evidence of compliance by the new date, and the Regulator issued a FPN to the appellant on 28 June 2021. The penalty was due to be paid by 26 July 2021, and compliance with the UCN was also required by that date.

11. The appellant did not respond to the FPN or provide evidence of compliance. The Regulator issued an EPN on 29 July 2021 with a deadline of 25 August 2021. The EPN states that a daily penalty of £500 will begin to accrue from 26 August if evidence of compliance was not provided by that date.

12. The appellant requested a review of the EPN on 6 August 2021 on the grounds that the business was closed during lockdown, it did not have government assistance, and it did not have money to pay the pension contributions. The appellant said they had fully reopened on 21 January and were intending to catch up with all overdue payments over the next few months. The Regulator confirmed the EPN and set a revised compliance date of 22 September 2021. The appellant submitted a second review request on 26 August, saying that he had made an error and the business did not fully reopen until 21 July, the business had been fully and partially closed due to lockdowns, staff were furloughed and the directors had no financial support from the government. The Regulator confirmed the EPN again on the grounds that automatic enrolment duties continue to apply as normal whether staff are working, furloughed, or have placements with government funding.

13. The appellant appealed on 27 September 2021.

Appeal grounds

14. The appellant says that the business was forced to close due the government lockdown of the hospitality and leisure industry. Staff were put on the furlough scheme, and the business did not fully reopen until 19 July 2021. The company had no financial support from the government during this time. They have been pragmatic by arranging payment plans with customers while bouncing back after lockdown and paying all the arrears would damage the business and cause mass redundancies. The company is now trading well and has paid arrears to the end of June 2021 and will bring arrears up to date over the next few months.

15. The Regulator says the grounds of appeal do not give a reasonable excuse for failure to comply with the EPN. The appellant has not provided any evidence of financial hardship or that contributions have been paid. The guidance on the CJRS states that pension contributions must be made, or the money returned to HMRC. It was reasonable and proportionate to issue the EPN, and many businesses have been able to make pension contributions despite the pandemic.

Conclusions

16. 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, FPNs and EPNs 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.

17. I have considered whether issuing the EPN 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 and failed to comply with the further deadline in the FPN.

18. 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 registered office address, and this is not disputed by the appellant.

19. The key issue is whether the appellant had a reasonable excuse for failing to comply with the UCN, including the revised deadline in the FPN. There is no dispute that the appellant received the UCN, FPN and EPN.

20. I acknowledge that the Covid-19 pandemic caused considerable disruption to both businesses and everyone's daily lives. I also accept that it was a financially difficult time for many businesses, particularly those in the leisure and hospitality industry which were hit especially hard by the various lockdowns. However, employer duties continued throughout this period, including the obligations relating to pension automatic enrolment. Financial difficulties do not allow employers to stop making pension contributions or delay making those contributions, in the same way as they do not allow employers to stop or delay paying their employees' wages.

21. I note that the appellant used the CJRS and placed its employees on furlough. For the initial period of furlough, from 1 March 2020, the CJRS covered automatic enrolment pension contributions as well as wages. This changed from 1 August 2020, when employers were required to pay the pension contributions of furloughed employees themselves (and employer National Insurance). The appellant's missing contributions fall during this period.

22. The Regulator's response says that government advice was that pension contributions had to be made or the money returned to HMRC and provides a link to a government website. This website is no longer available, so I have been unable to check the wording of the advice at the time. However, I agree that employers who used the CJRS were expected to make pension contributions when they were receiving a grant under the scheme. When the terms of the grant were changed in August 2020 and it no longer covered pension contributions, the rules and guidance were clear that this became the employer's responsibility. Minimum pension contributions were not suspended during this period. Employers should not have been using the CJRS if they could not afford to pay the pension contributions for furloughed employees.

23. I appreciate that the appellant's business was struggling during the time when the pension contributions were missed. However, an employer is not permitted to miss or delay making compulsory pension contributions in order to prioritise other aspects of its business, even during difficult times. This may mean employers have to make difficult decisions about whether they can afford to retain all of their employees. Nevertheless, pension contributions are not an optional duty that can be ignored during times of financial difficulty.

24. The Regulator did take the appellant's difficulties into account by extending the original UCN deadline to 24 June 2021 and provided a revised compliance date of 22 September 2021 after review of the EPN. The appellant says that its business was fully reopened on 19 July 2021. It was reasonable to expect the appellant to comply with the UCN by this revised date.

25. I am not aware of what has happened since the appeal was issued. I hope that all pension contributions are now up to date, and the appellant has complied with the UCN. For the avoidance of doubt, compliance means both making the missing contributions and providing satisfactory evidence to the Regulator to show that it has done so. Late compliance does not prevent penalties from being enforced. If the appellant has now complied, the Regulator will need to decide whether it is necessary or appropriate to enforce any escalating penalties under the EPN.

26. 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 EPN was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the EPN. No directions are necessary.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 22 February 2022

Date Promulgated: 24 February 2022