



[2023] UKFTT 00261 (GRC).

Case Reference: PEN/2022/0219

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

Decided without a hearing

**On: 1 March 2023
Decision given on: 3 March 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

SACHA LEJUNE HAIR LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference Sacha Lejune Hair Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 28 September 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 2 August 2022, after

receiving a report from the Appellant's pension scheme provider NEST that contributions due to be paid between 1 June 2021 and 31 May 2022 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, "*When you have met the requirements in steps 1 and 2 above, or even if you are of the opinion that the contributions identified in this notice have already been paid, you must provide evidence of compliance to The Pensions Regulator [by email or by post]... For evidence to be acceptable it must include: (i) the relevant contribution schedules with the amount(s) calculated clearly stated AND (ii) proof that those amount(s) have been paid and the date(s) on which they were paid. This might be in the form of a letter, email statement from your provider or screenshots from your pension account... **You must complete steps 1-3 above by: 12 September 2022.***"

10. The notice expressly states, "*If you do not complete the steps required by this notice by 12 September 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*".

11. The appellant did not contact the Regulator by 12 September 2022, and so the Regulator issued a fixed penalty notice to the appellant on 28 September 2022.

12. The Regulator confirmed the penalty notice in a review decision issued on 14 October 2022. The Appellant had said it did not have any employees who contributed into a pension scheme – although I note this is not one of the grounds of appeal.

Appeal grounds

13. The Appellant says that:

- a. The person dealing with NEST was unable to notify the NEST contribution and the client "due to Covid related issues and individuals ill health", which was further affected by breakdown of his computer system and IT failure.
- b. They did not receive reminders because of "problems with the post and computer problems".
- c. It is unfair to be penalised for something that was beyond the control of the persons helping with payroll, pension and regulations.
- d. The issue has now been addressed and all contributions brought up to date.

14. The Regulator says that late compliance is not a sufficient basis on which to revoke the fixed penalty notice. The Appellant failed to comply with the requirement in the UCN to provide acceptable evidence of compliance by the deadline, and some contributions are still missing. The Regulator's position on each of the grounds of appeal is set out in the discussion below.

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 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 provide evidence of compliance until after the deadline had expired and after receipt of the fixed penalty notice.

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 registered office.

18. The key issue is whether the appellant had a reasonable excuse for failing to comply with the UCN.

19. **Receipt of the UCN.** There is potentially a dispute that the Appellant received the UCN. One of the grounds of appeal is that they did not receive reminders because of "problems with the post and computer problems". I have assumed that this means the Appellant says they did not receive the UCN.

20. The Regulator says that the statutory presumption of service applies. A mere assertion of non-receipt does not overturn this presumption (with reference to **London Borough of Southwark v (1) Runa Akhter v (2) Stel LLC** 2017 UKUT). The Appellant has not explained why the fixed penalty notice was received but not the UCN.

21. I find that the statutory presumption applies, and the UCN was received by the Appellant. They have referred to problems with the post and computer problems, but not explained what these problems were or why they would have applied around the time the UCN was sent. It appears that the Appellant did receive the fixed penalty notice, which was sent by post to the same address. They must have done so because they applied for a review of the penalty. The Appellant has not provided any explanation of why they would have received the penalty notice but not the UCN. I follow the guidance in **Runa Akhter** that simply asserting a notice was not received is insufficient, and the Appellant needs to provide evidence to show why a notice was not received. They have not done so here. It may be that the UCN was overlooked, but I find that it was received.

22. **The person dealing with NEST was unable to notify the NEST contribution and the client "due to Covid related issues and individuals ill health", which was further affected by breakdown of his computer system and IT failure.** The

Regulator says it is not clear how this impacted the Appellant's ability to comply with the UCN, and points to the extended deadline that has been implemented to help employers during the COVID pandemic. The Appellant could also have contacted the Regulator if it was struggling to comply. Employers can delegate their duties but must still take appropriate steps to ensure they are complied with.

23. It is unclear how issues with the health of the person dealing with NEST would have affected the Appellant's ability to comply with the UCN. This issue may relate more to the missing contributions. I note that the UCN was sent in August 2022, which is well past the peak of the Covid-19 pandemic. I would not have expected the Appellant to be affected by major "Covid related issues" at this time. If the Appellant had delegated compliance to a third party who was ill at this time, this could provide an explanation for why the UCN was not complied with. However, the Appellant has not provided clear information about the timing and nature of the Covid related issues and ill health. The Appellant has also not explained when the computer and/or IT problems arose and for how long they lasted, why they would have prevented compliance with the UCN, and why no alternative arrangements were made if this was a known problem. As pointed out by the Regulator, other devices (such as a smartphone) or public systems (such as in a public library) could have been used, or the Appellant could have contacted the Regulator to explain the problem.

24. As noted by the Regulator, an employer remains responsible for compliance with these important duties even if they choose to delegate to a third party. A reasonably diligent employer should have been aware that the person who should have been dealing with this matter was unwell and experiencing IT problems, and made alternative arrangements. I note that the UCN provided six weeks for compliance, and the fixed penalty notice was not sent for a further two weeks. There was ample time during this eight week period to make alternative arrangements if the person who normally dealt with pension contributions was unable to do so. I find that this does not provide a reasonable excuse for failure to comply with the UCN.

25. It is unfair to be penalised for something that was beyond the control of the persons helping with payroll, pension and regulations. It is not clear to me that the failure was beyond the control of the persons helping the Appellant to comply with their duties. As already noted, the Appellant has not provided clear information about the timing and nature of the Covid related issues and ill health. It is also unclear why problems with computer and IT would have prevented the Appellant from failing to deal with the UCN for eight weeks. Again, the Appellant remained responsible for compliance even if they chose to delegate to a third party. This does not provide a reasonable excuse for failure to comply with the UCN.

26. The issue has now been addressed and all contributions brought up to date. The Regulator says that some of the missing contributions were not made until after the issue of the fixed penalty notice, and contributions for the period from 1 April to 31 May 2022 remain outstanding. This is confirmed by an email from NEST to the Regulator dated 24 November 2022.

27. In any event, the failure to comply is not simply the failure to pay missing contributions on time. The Appellant also failed to provide suitable evidence to the Regulator by the relevant deadline. The UCN clearly states three steps under "what

you need to do now”, which expressly includes providing evidence of compliance. The Appellant made no attempt to provide evidence of compliance until after receipt of the fixed penalty notice. Providing evidence of compliance is not an administrative detail – it is the only way in which the Regulator can monitor employers and ensure that all proper contributions have been made. The UCN clearly asked for evidence of compliance by a specific deadline, and warned of the possibility of a £400 penalty if all the requirements of the notice were not complied with.

28. 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. Late or eventual compliance does not provide a reasonable excuse for failure to comply with all the requirements of a UCN. In this case, it also appears that some contributions were still missing as of 24 November 2022.

29. For the above reasons, I find that the Appellant did not have a reasonable excuse for failing to provide the evidence of compliance required by 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

Date: 3 March 2023