



Neutral citation number: [2023] UKFTT 00262 (GRC).

Case Reference: PEN/2022/0228

**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

LONDON CITY HOUSING LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeal is Dismissed

REASONS

1. By this reference London City Housing Ltd (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 9 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 13 July 2022, after receiving a report from the Appellant's pension scheme provider that contributions

due to be paid between 28 February 2022 and 5 June 2022 were unpaid. The UCN was sent to the Appellant's registered office address - Unit 12 City Business Centre, Lower Road, London, SE16 2XB.

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: 23 August 2022.*"

10. The notice expressly states, "*If you do not complete the steps required by this notice by 23 August 2022, The Pensions Regulator may issue you with a £400 Fixed penalty notice*".

11. The appellant did not contact the Regulator by 23 August 2022, and so the Regulator issued a fixed penalty notice to the appellant on 9 September 2022.

12. The Regulator confirmed the penalty notice in a review decision issued on 13 October 2022.

Appeal grounds

13. The Appellant says that they did not receive the UCN, and they provided evidence of compliance on 7 October 2022. They say that the Regulator has previously contacted them by email, including in April 2022 with a reminder about another UCN which they did not receive by post. The Appellant says they were severely affected by the pandemic, and if they didn't pay on time it was not due to negligence but due to genuine difficulties due to shortage in their income stream.

14. The Regulator says that the presumption of service applies, and late compliance is not a sufficient basis on which to revoke the fixed penalty notice.

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.** The Appellant says that they did not receive the UCN. The Appellant refers to a previous UCN which they also say they did not receive by post, where a reminder was also sent by email and so they were able to comply.

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 UCN was sent by post to an address that was both the registered office and the principal office address, and was the address given by the Appellant on their last re-declaration of compliance.

21. I find that the statutory presumption applies, and the UCN was received by the Appellant. I note that they have referred to a previous problem with another UCN. However, the Appellant did receive the fixed penalty notice, which was sent by post to exactly the same address. This appears to be the correct address. The Appellant has not provided any explanation of why they would have received the fixed 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 at the registered office address.

22. The Appellant has also questioned why the Regulator did not communicate with them by email instead. Email reminders can be helpful. However, the Regulator has no legal obligation to issue email reminders before sending a fixed penalty notice.

23. **Evidence of compliance was provided on 7 October 2022.** The Regulator has confirmed that missing contributions were paid on 4 October 2022, but says this was some 42 days after the UCN deadline. It appears that the Appellant did bring the missing contributions up to date after receiving the fixed penalty notice. However, they did not meet the deadline in the UCN. In addition, 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.

24. 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.

25. *The Appellant was severely affected by the pandemic, and if they didn't pay on time due to genuine difficulties due to shortage in their income stream.* I appreciate that the Covid-19 pandemic was a difficult time for many small employers. Cashflow difficulties may have caused the Appellant to miss pension contributions. However, employers should prioritise these important duties. It is not acceptable to manage cashflow by delaying pension contributions and only paying them when contacted by the Regulator. It also does not provide a reasonable excuse for failure to comply with the UCN. The fixed penalty notice was not issued simply for failure to make the contributions. It was issued for failure to make the contributions due between February and June 2022 by the extended deadline in the UCN of 23 August 2022.

26. 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

Dated: 3 March 2023