



Appeal number: PEN/2021/0360

[2022] UKFTT 00253 (GRC)

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(PENSIONS REGULATION)**

R & S TONKS LTD

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

**TRIBUNAL: HER HONOUR JUDGE ANGELA MORRIS
THE RECORDER OF WINCHESTER**

Sitting in Chambers on 11th May 2022

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DECISION

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

REASONS

Background

2. By this reference R & S Tonks Ltd (“the Employer”) challenges a fixed penalty notice issued by the Regulator on 6th December 2021 (Notice number: 12651747744).

3. The Penalty Notice was issued under s. 40(1) of the Pensions Act 2008. It required the Employer to pay a penalty of £400 for failing to comply with the requirements of an Unpaid Contributions Notice dated 4th November 2021 which required the Employer to provide the Regulator with information in respect of pension contributions in accordance with its employer obligations under the Pensions Act 2008 and provide evidence of the same to the Regulator by 1st December 2021.

4. A Fixed Penalty Notice was issued on 6th December 2021. A request by the appellant for a review of the decision was served on 7th December 2021. The Regulator has completed a review of the decision to impose the Penalty Notice and informed the Appellant on 9th December 2021 that the decision was confirmed. The Appellant referred the matter to the Tribunal on 14th December 2021.

5. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered all the evidence and submissions made by both parties.

The Law

6. The Pensions Act 2008 imposed a number of legal obligations on employers in relation to the automatic enrolment of certain “jobholders” into occupational or workplace personal pension schemes. The Pensions Regulator has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers.

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8. Once a jobholder has been enrolled in a pension scheme, the employer must deduct pension contributions from his or her earnings and pay them, together with the

employers' own contributions, into the scheme (see Section 111A of the Pension Schemes Act 1993).

9. Under Section 37 of the 2008 Act, the Regulator can issue an "Unpaid Contributions Notice" to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date. Such a notice will require the employer to pay the relevant unpaid contributions into the scheme by a specified date and may, among other things, require the employer to take such other steps in relation to remedying the failure to pay the contributions as the Regulator considers appropriate.

10. Under Section 40(1) of the 2008 Act, the Regulator can issue a Fixed Penalty Notice (FPN) if it is of the opinion that the Employer has failed to comply with the requirements of an Unpaid Contribution Notice (UCN). The prescribed Fixed Penalty is £400.

Function of the Tribunal

11. Under s. 44 of the 2008 Act, a person who has been issued with a Fixed Penalty Notice may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

12. Section 103(4) of the Pensions Act 2004 provides that on a reference like this one the Tribunal "must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it". The role of the Tribunal is to make its own decision on the appropriate action for the Regulator to take, taking into account the evidence before it. The Tribunal may confirm, vary or revoke a Fixed Penalty Notice and when it reaches a decision, must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

Factual Background

13. The appellant is the Employer for all purposes of the Employer Duties under the Pension Act 2008. There is no dispute that the Appellant has paid contributions as they fell due for the majority of the time as an employer subject to automatic enrolment duties. The pension scheme used by the Appellant is The People's Pension, Pension Scheme Reference 12005993.

14. The Respondent received information from the Appellant's pension provider that the Appellant had failed to make pension contribution between 22nd July and 22nd October 2021. Consequently, the Regulator issued an Unpaid Contributions Notice (UCN) on 4th November 2021.

15. The UCN sets out three steps which the Appellant is required to comply with; first to calculate unpaid contributions, second to contact the pension scheme provider and pay the unpaid pension contributions and third to provide evidence to the Regulator of such compliance. In this case the deadline for compliance was 1st December 2021.

16. The Respondent did not receive a response from the Appellant by the appointed deadline. The Respondent, therefore, issued a FPN on 6th December 2021 indicating

that the appellant could request a review of the penalty within 28 days together with supporting evidence.

17. The Appellant requested a review on 7th December 2021 via the Respondents online platform asserting that payments had been made to the pension scheme since the UCN had been issued.

18. On 9th December 2021, the Respondent informed the Appellant that the evidence they provided did not demonstrate the missing contributions had been paid and were up to date and the Appellant had failed to make any contact with them before the 1st December 2021 deadline. The Respondent reviewed the matter and determined to uphold the issuing of the FPN.

19. On Appellant appealed against the decision to issue the FPN on 14th December 2021. The grounds on which Appellant contests the issuing of the FPN are first that they were temporarily closed due to the pandemic but throughout the past 20 months has increased the payments to reduce the amount of the unpaid pension contributions, second that cashflow was drastically reduce after they reopened but they continued to make increased payments, third the imposition of the penalty will cause difficulties to bring the balance down and fourth the Appellant hopes they can agree a timeframe to settle the unpaid contributions.

20. The Respondent opposes this appeal and submits that what this appeal amounts to in reality is a request to revoke the FPN and allow more time for the Appellant to settle the unpaid contributions without more. The Respondent further submits the reasons set out by the Appellant do not amount to a reasonable excuse for the failure to comply with the UCN and provide the information by the stated deadline.

21. There is no issue in this case that both the UCN and the FPN were properly served and received by the appellant.

22. I accept that this is not a case where the Appellant has demonstrated an egregious disregard for their duties to make pension contribution in accordance with their employer responsibilities. The issue here is when the Appellant rectified the situation. The evidence shows that as of 19th November 2021 unpaid contributions were still outstanding to the tune of £5,080.40. The evidence further shows that the contributions were not paid to the pension scheme by 1st December deadline. Furthermore, the Appellant's pension provider has confirmed that as of 21st December 2021, the appellant has still not complied with step two of the UCN and arrears for the period 22nd July to 22nd October 2021 remained outstanding. Finally, the Appellant has failed to provide to the Respondent evidence of compliance.

23. The Unpaid Contributions Notice gives guidance as to what would be acceptable evidence of compliance for the Regulators purposes. This included “proof of payment of the contributions calculated and paid .. or a payment plan agreed with the pension provider”. The proof could be in the form of a letter, email statement from the pension provider or screenshots from an account that *clearly* (my emphasis) shows all outstanding contributions as being paid.

24. The Regulator's role in enforcing the timely payment of pension contributions by employers cannot be underestimated. Making payment of the unpaid contributions is the first step but it is by no means the only step which has to be taken as part of compliance. The provision to the Regulator of evidence of payment is also an essential component of that compliance in order that the Regulator can satisfy itself the unpaid contributions have been made or if further enforcement action is needed.

25. It appears from enquires made of the Appellant's pension provider that contrary to what the Appellant has stated, not only has there been a failure to make further payments to the pension scheme after 19th November 2021 but arrears for the period 22nd July to 22nd October remain outstanding. Furthermore, the Appellant had not maintained regular payments of ongoing pension contributions let alone additional sums to reduce the unpaid contributions owed.

Conclusion

26. I am satisfied that on the facts of this case the Appellant has failed to establish that there was a reasonable excuse for non-compliance with its pension contribution duties. I am troubled that matters have been asserted by the Appellant regarding the payment of pension contributions which appear on closer inspection to be at best inaccurate; this is most unfortunate.

27. One of the main aims of the Pension Regulator is to protect the benefits of pension scheme members and to maximise an employer's compliance duties. Pension contributions are deducted from employees' salary at source and in this case, the Appellant has failed to pay them into the pension scheme. The Appellant has failed to make payment of those deducted contributions by up to six months. That is unacceptable. I agree with the Respondent's submission that the continual failure to make good on the unpaid contributions runs the risk of a permanent shortfall to the member's pension. An employee who is a member of a pension scheme is entitled to have faith in their employers' integrity to maintain legitimate pension contributions.

28. Although the Tribunal has sympathy with the Appellant regarding problems caused to them (and many others) by the pandemic, that does not abrogate their legal responsibility to maintain pension contributions in a timely fashion. Furthermore, if the Appellant was aware that they were struggling to maintain the timely payment of these pension contributions, they had every opportunity to approach their pension provider to arrange a proper payment plan which they could then notify the Respondent of accordingly. Had they done this, it may have avoided them being placed in position from which they now seek redress. This is important because the Appellant should have known that the Respondent does not have the power to facilitate a timeframe by which pension contributions are settled – that matter can only be agreed between the Appellant and the pension provider.

29. Furthermore, despite the clear deadline set out in the UCN, which the Appellant failed to respond to in a timely manner, I note that they were quick to respond after the FPN was issued and so I can only conclude that the Appellant is not without the ability to rectify things in a timely fashion if so inclined.

30. I am satisfied that the Respondent has acted in accordance with its legal duties and reconsidered the matter when a review was requested. There are no reasons exceptional or otherwise which have been placed before the Tribunal by the Appellant to persuade me that the FPN should be revoked. For these reasons, the appeal is dismissed.

(Signed)

**HER HONOUR JUDGE ANGELA MORRIS
THE RECORDER OF WINCHESTER**

Date: 11th May 2022

Date promulgated: 30th May 2022