



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PENSIONS**

Tribunal Reference: PEN/2021/0257

Decided without a hearing

Decision Date: 7th March 2022

Judge David Hunter QC

Between

KINGSWEAR GALLERY LIMITED

Appellant (by Reference)

And

THE PENSIONS REGULATOR

Respondent

DECISION

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

REASONS

Preliminary

1. By this Reference Kingswear Gallery Limited (“the Employer”) challenges a fixed penalty notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 25th June 2021 and bears the Notice Number: 107656286948.

2. The Penalty Notice was issued under section 40 (1) of the Pensions Act 2008 (“the 2008 Act”). It required the Employer to pay a penalty of £400 for failing to comply with the requirements of a Unpaid Contributions Notice dated 27th May 2021.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 28th August 2021. The effect of the Penalty Notice is accordingly suspended until the Reference has been determined, the Tribunal has remitted the matter to the Regulator, and any directions given by the Tribunal have been complied with.

4. The parties have agreed to the Reference being determined upon consideration of the papers they provided, without an oral hearing being held. I have therefore considered the Employer’s application form for the Reference (described in the papers as the Notice of Appeal), and containing “Grounds of Appeal” with associated documents, the Employer’s request for a review, and the Regulator’s Response (with supporting documentary evidence).

Statutory framework

5. The 2008 Act imposes a number of requirements on employers in relation to the automatic enrolment of certain ‘jobholders’ in occupational or workplace personal pension schemes. The Regulator has statutory responsibility for securing compliance with those requirements and has certain enforcement powers for this purpose.

6. In this case the matter at issue is the duty of the Employer to pay contributions to a qualifying pension scheme (“relevant contributions”) under Section 3 of the 2008 Act (and accompanying Regulations). The Employer is required to regularly and periodically pay across its contributions and those of the employees to the managers or trustees of the relevant pension scheme.

7. Under section 37 of the 2008 Act the Regulator can issue an Unpaid Contributions Notice (UCN) to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date. Under section 40(1) 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 the UCN. The prescribed fixed penalty is £400.

Function of the Tribunal

8. Section 44 of the 2008 Act permits a person to whom a fixed penalty notice has been issued to make a reference to the Tribunal. They may do so provided that an application for a review has first been made to the Regulator.

9. Section 103(3) 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 Tribunal must make its own decision on this issue following an assessment of the evidence presented to it (which may differ from the evidence which was available to the Regulator). The Tribunal does not sit as an appellate body from a decision of the Regulator; it is not necessary to show that the Regulator was in error, and the Tribunal can reach a different decision to that of the Regulator even if it thinks that the Regulator’s decision fell within a range of reasonable decisions.

10. On determining the Reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination. Those directions may include directions confirming, varying or revoking a notice issued by the Regulator.

Factual background

11. The material facts from which this reference arises are set out in the Regulator's Response document and may be summarised as follows:

12. Prior to issuing the UCN the Regulator had received information from the Employer's pension scheme provider that the Employer had failed to pay relevant contributions to the material occupational pension scheme on or before the due date for payment. It indicated that contributions due between 6th September 2020 and 5th May 2021 remained outstanding.

13. The Regulator therefore served a UCN on 27th May 2021 which required the Employer to take three steps: firstly, to calculate the unpaid contributions, secondly to contact the pension scheme provider and pay the contributions, and thirdly to provide evidence of compliance to the Regulator. Step 3 in the Notice set out precisely what sort of evidence would be satisfactory, namely, proof of payment to the pension scheme of the contributions calculated and paid, in the form of a letter, email statement from the pension provider or screenshots from the pension account that clearly shows all outstanding contributions as having been paid. The UCN made clear that if it was not complied with by the deadline date then a £400 FPN may be issued, and, additionally, in the event of further non-compliance, the Regulator may issue an escalating penalty notice. The deadline for compliance with the UCN was 23rd June 2021.

14. The Employer failed to provide the aforesaid evidence of compliance before the deadline for doing so and, on 25th June 2021, the Regulator issued the FPN.

15. The Employer made a request for a review of the FPN. The Regulator conducted a review, and on 27th July 2021, it wrote to the Employer informing it that the outcome of the review was that the Penalty Notice was confirmed.

16. As stated aforesaid, the Employer referred this matter to the Tribunal by its Notice of Appeal dated 28th August 2021.

Grounds of Appeal

17. The review request was made, and the Grounds of Appeal were submitted, by the Employer's accountant. He provided a volume of documents relating to the Employer's contributions to its pension provider, NEST, and asserted an overpayment of contributions, and said that the Employer was in credit in respect of its contributions as at 30th June 2021. Essentially, he refuted the Regulator's assertion of unpaid contributions, but has not dealt with the failure to respond to the UCN.

The Submissions of the Regulator

18. These are contained in the Response of the Regulator to the Reference.

19. The Regulator relies upon the Employer's statutory duty to make all necessary pension contributions to its pension provider, and to due service of the UCN, which is not disputed by the Employer, and upon the Employer's failure to comply with each of the steps set out in the UCN (also set out in paragraph 13 above and paragraph 23 below) which it was required to take, within the timeframe set out therein, in order to comply with that statutory notice.

20. The Regulator informs the Tribunal that, upon further enquiry from the Employer's pension provider (NEST) following the review request and the lodging of the appeal, it appears that pension contribution schedules during for the period of 6th September 2020 and 5th May 2021 - the period specified in the UCN - are still outstanding. Email correspondence between the Regulator and NEST, confirming this position, is contained in the appeal bundle.

Discussion

21. The timely provision of information to the Regulator, so that it can ascertain whether an employer has complied with its duties under the 2008 Act, is crucial to the effective operation of the automatic enrolment scheme: unless the Regulator is provided with this information, it cannot effectively secure the compliance of employers with their duties. It is for this reason that, when issuing a UCN, the Regulator requires of the Employer, not only the calculation and payment of the relevant contributions, but also the provision to the Regulator of evidence of compliance.

22. Bearing these factors I mind, it seems to me that issuing this Penalty Notice was an entirely appropriate step for the Regulator to take, unless there was a reasonable excuse for the Employer's failure to comply with the requirements of the Compliance Notice. All the Employer needed to do, in the context of this Reference, was to provide satisfactory evidence of payment of all due contributions by the deadline date of 23rd 2021 (four weeks after the date of the issue of the UCN). I accept the submissions of the Regulator and consider that the Employer was given reasonable and indeed ample notice of his obligations and of the deadline for compliance, and ample information about each of the steps required to ensure full compliance.

23. There is in this case no dispute as to the receipt of the UCN. The Employer's duties, in order to comply with the UCN, are set out in the clearest possible terms. Three steps are specified, and compliance is clearly required in respect of each of these steps. The first step is to calculate contributions, the second step is to contact the pension scheme provider and pay the contributions, and the third step, highlighted as are the first two, is: Step 3: Provide evidence of compliance. The manner of providing evidence is specified – by email or by post, and the means of providing compliance are specified also – letter, email statement or screenshots. Further, the UCN makes it abundantly clear, in simple terms, that the requirement to provide evidence is a duty of the Employer, and not of the pension provider.

24. In a recently decided case, **PEN/2018/0269**, Judge Holbrook said: "Making payment of the relevant unpaid pension contributions is, of course, the primary step which an employer must take to comply with an unpaid contributions notice. However, it is not the only step which is required: the provision to the Regulator of evidence of payment is also essential so that the Regulator can be satisfied that the unpaid contributions have been made good, or else so that it can decide whether additional enforcement action is warranted."

25. In this case, the position is stark. The Unpaid Contributions Notice has simply been ignored. Step 3, the provision of evidence of compliance, was not taken, and, in any event, in the light of the up-to-date information provided to the Regulator by NEST, it appears that the Employer has still not fully complied with Step 2 of the UCN – the payment of all material outstanding contributions. The UCN concluded with the notification to the Employer of the right to seek a review of that Notice, if there was an objection to it, and informed the Employer of the means of so doing. There was no communication whatever with the Regulator prior to the request for a review of the FPN. The Employer has failed to comply with the UCN, having failed to object to its issue, and has failed to provide any reasonable excuse for its failure of compliance

26. In this case I find that the UCN was properly and validly issued by the Regulator, under Section 37 of the Act, and that the material evidence of compliance with this Employer’s duty with regard to the payment of contributions was not provided by the Employer in a timely manner by the reasonable deadline fixed by the UCN, and that the Employer had no reasonable excuse for failing to comply with the material requirements of the UCN - the necessity of providing, in a timely fashion, satisfactory evidence of full compliance.

27. For these reasons I determine that the issuing of the Fixed Penalty Notice was the appropriate action to take in this case. Accordingly, I dismiss the Reference and remit the matter to the Regulator under Section 44 (4) (b) of the Act. No directions are given pursuant to Section 44 (4) (c) of the Act.

David Hunter QC

Date: 7th March 2022

Date Promulgated: 8th March 2022