



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

**Tribunal Reference: PEN/2021/0271**

**Date of Hearing: 18<sup>th</sup> January 2022**

**Decision Date: 10<sup>th</sup> February 2022**

**Judge David Hunter QC**

**Between**

**DAVEY WEST LTD**

**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, with the direction to the Regulator set out in paragraph 28 below.**

**REASONS**

**Preliminary**

1. By this Reference Davey West Ltd (“the Employer”) challenge an Escalating Penalty Notice (“the Penalty Notice”) issued by The Pensions Regulator (“the Regulator”). The Penalty Notice was issued on 6<sup>th</sup> August 2021 and bears the Notice Number: 263215086301.

2. The Penalty Notice was issued under section 41 of the Pensions Act 2008 (“the 2008 Act”). It required the Employer to pay an escalating penalty for failing to comply with the requirements of a Unpaid Contributions Notice (“the UCN”) dated 10<sup>th</sup> March 2021.

3. Following a review of the Penalty Notice by the Regulator, the Employer referred it to the Tribunal on 20<sup>th</sup> September 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 Tribunal sat to hear the Appeal on 18<sup>th</sup> January 2022. The hearing was fixed for hearing, and held, remotely, via the Cloud Video Platform. I successfully connected with the hearing platform, as did Mr Mageeb Gharib, who represented the Respondent. The Employer, in the person of Mr Daniel Davey, a director, had not connected, either by video or telephone, and was not present. No request for an adjournment had been made, nor had the Employer contacted the Tribunal staff to explain his absence. The staff made efforts to contact the Employer, to no avail. Accordingly, I decided to proceed with the hearing in the absence of the Employer. Following the conclusion of the hearing, the Employer sought an adjournment, by telephone. Having considered all the relevant circumstances, I decided to refuse his application. My reasons for doing so are set out fully in my Direction issued on 19<sup>th</sup> January 2021. In that Direction I afforded the Employer the opportunity of furnishing written submissions to the Tribunal on or before 26<sup>th</sup> January 2021. No submissions were received.

### **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. Under section 41 the Regulator can issue an escalating penalty notice (EPN) if it is of the opinion that the employer has continued to fail to comply with the requirements of the UCN.

### **Function of the Tribunal**

8. Section 44 of the 2008 Act permits a person to whom an escalating 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 1<sup>st</sup> July 2020 and 31<sup>st</sup> January 2021 remained outstanding.

13. The Regulator therefore served a UCN on 10<sup>th</sup> March 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 6<sup>th</sup> April 2021.

14. The Employer failed to provide the aforesaid evidence of compliance before the deadline for doing so and, on 9<sup>th</sup> April 2021, the Regulator issued a Fixed Penalty Notice, which imposed the prescribed penalty of £400, to be paid by 7<sup>th</sup> May 2021, and, additionally to the penalty, required the Employer to comply with the UCN by that date also.

15. The Employer failed to respond to the FPN, or to pay the penalty, or to comply with the UCN, by that deadline date, and the Regulator issued an EPN on 11<sup>th</sup> May 2021. The Employer made a request for a review of that EPN on 28<sup>th</sup> July 2021. The Regulator, despite the fact that the request was out of time, did review and revoke that EPN, on 5<sup>th</sup> August 2021.

16. The Regulator issued a new EPN (the Penalty Notice which is the subject of this Appeal) on 6<sup>th</sup> August 2021, thus affording further time for the Employer to comply with the UCN. This EPN required compliance with the UCN by 16<sup>th</sup> September 2021 and warned of an escalating penalty accruing, in the event of non-compliance, from 17<sup>th</sup> September 2021.

17. The Employer made a request for a review of this EPN on 10<sup>th</sup> August 2021. The Regulator conducted a review, and, on 23<sup>rd</sup> August 2021, it wrote to the Employer to confirm the EPN, but varied it by extending the deadline date for compliance with the EPN to 28<sup>th</sup> October 2021.

18. As stated aforesaid, the Employer referred this matter to the Tribunal by its Notice of Appeal dated 20<sup>th</sup> September 2021.

### **Grounds of Appeal**

19. The Employer's case is contained in the requests for a review and in the Grounds of Appeal in the Notice of Appeal. The Employer initially asserted non-receipt of Notices from the Regulator – presumably the UCN and the FPN, in that it is said that the Employer was unaware of the “fine” of £400, and it is said that the business premises had been shut for long periods and the premises did not have a letter box. Further, the Employer asserts long-standing and substantive difficulties with regard to communication with its pension provider. It is said that efforts have been made on many occasions to communicate with regard to pension contributions, that letters have been written to the provider to no avail, and that on every occasion of verbal communication there were insuperable difficulties by reason of a lack of fluency in English on the part of the provider's representative and poor phone lines. In the second request for a review, in August 2021, the Employer said: “I would like to request further time to resolve this matter with NEST and pay any outstanding fines in its full entirety and would ask you also that any further impending charges be halted in this process to prevent us accruing charges because of this problem.” The Employer also makes reference to financial difficulties experienced by its business.

### **The Submissions of the Regulator**

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

21. The Regulator relies upon the statutory duty which rested upon the Employer to comply with the requirements of the UCN. With regard to the service upon, and receipt by the Employer of the UCN and the FPN, the Regulator relies upon the statutory presumptions of service and receipt contained in Section 303 (6) of the Pensions Act 2004 and Regulation 15 (4) of the Employers Duties (Regulation and Compliance Regulations 2010).

22. With regard to such difficulties which the Employer may have had with the pension provider, the Regulator points to the substantive period of time which elapsed between the service of the UCN on 10<sup>th</sup> March 2021 and the service of the second EPN on 6<sup>th</sup> August 2021 – a period of time which should have been more than sufficient to enable the Employer to resolve any difficulty with the pension provider, and points also to the fact that, as of the end of September 2021, by reason of communication between the Regulator and the pension provider, the position with regard to unpaid contributions had not been resolved. The Regulator asks the Tribunal to note that papers in the Appeal

bundle indicate that the Employer, with regard to pension matters, appears to have had access to professional advice.

## **Discussion**

23. It is important to record that this is not, nor could it have been, an appeal against the Fixed Penalty Notice. By reason of Section 44 of the 2008 Act, an appeal against (in term of the material legislation, a reference in respect of) a Notice (in this case the FPN) may only be brought if the Regulator has completed a review of the material notice, upon a request to do so by the material Employer. A request for a review of a notice must be made within 28 days of the date of issue of the notice. No request for a review of the FPN was made by this Employer, nor was any review of the FPN completed by the Regulator. Whatever the outcome of this appeal, the Fixed Penalty Notice must stand, and the Employer is bound to pay that penalty.

24. The subject of this appeal is the Escalating Penalty Notice, issued as a result of the continuing non-compliance by the Employer with the requirements of the Unpaid Contributions Notice. 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.

21. Bearing these factors in 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 6th 2021 (some four weeks after the date of the issue of the UCN). Further, the issue of the Fixed Penalty Notice afforded the Employer a further opportunity to comply with the UCN, by 7<sup>th</sup> May 2021. 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 deadlines for compliance, and ample information about each of the steps required to ensure full compliance.

22. I find that the UCN and the FPN were duly served upon and received by the Employer. Each of these Notices was sent to the Employer's registered, and principal office. There is no argument advanced by the Employer, nor any assertion made, that this was not the correct address. This was the address provided by the Employer on its re-declaration of compliance in December 2020, and that address appears on the Employer's Notice of Appeal. The Regulator received no notification that any of the material correspondence had not been delivered, nor is there any record of the return of any of that correspondence. Further, no explanation is advanced as to how each of the two EPNs was received by the Employer, but not the UCN and FPN, each sent to the same address. Further, with regard to the receipt of post, any responsible employer should ensure that effective arrangements are in place for effective and timely receipt, particularly with regard to important official government communications.

23. Moreover, the statutory presumptions, upon which the Regulator relies, in respect of official correspondence sent to an Employer's last known address, with regard to due service and receipt, are strong. They are contained in those statutory provisions set out in paragraph 21 above. The strength of the presumptions has been confirmed in many Tribunal cases, for example by the Upper Tribunal in **London Borough of Southwark v Akhtar 2017 UKUT 140**, and Judge McKenna in **Admads 786 Frist v TPR PEN.2029.0228**. It is clearly established that the burden of overturning the presumptions rests on the Employer, and that it must discharge that burden by evidential proof of non-receipt, and that a bare (paper) assertion is of wholly insufficient weight to discharge that burden. The material assertion in this case remains a paper assertion, as the Employer did not pursue its Appeal in the oral hearing.

24. In this case therefore I find that the UCN and FPN were properly and validly issued by the Regulator, under Sections 37 and 40 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 deadlines fixed by the UCN and the FPN. Further in that regard, both the UCN and the FPN expressly informed the Employer that in the event of difficulty with compliance there was an opportunity to communicate with the Regulator – the first communication from the Employer to the Regulator was on 28<sup>th</sup> July 2021, after the deadline for compliance afforded by the first EPN had expired.

25. I find also, therefore, that the Escalating Penalty Notice of 6<sup>th</sup> August 2021, the subject of the Appeal, was also properly and validly issued by the Regulator, under Section 41 of the Act.

26. With regard to the Employer's asserted difficulties in communicating with the pension provider, I find that this assertion does not constitute a reasonable excuse for the material failure of compliance. It appears that in July 2020, when the Employer's declaration of compliance with its automatic enrolment pension duties was completed, that the Employer had the assistance of a firm of accountants in that regard. Further, in the Notice of Appeal, an indication was given of the involvement, in the Employer's pension affairs, of that firm of accountants. I consider, in all the circumstances, including the Employer's access to professional advice, that the period of time ultimately afforded for compliance with the UCN gave the Employer more than sufficient opportunity to resolve any difficult of communication with the pension provider, and to comply. Leaving aside the issue of receipt of the UCN and FPN, which I have resolved above, the receipt of the first EPN, which is not in dispute, should have alerted the Employer fully to the importance of complying with the UCN, and that EPN afforded the Employer some four weeks from receipt to resolve the matter before the EPN began to accrue. The Employer chose not to avail of that opportunity but allowed that period of grace to elapse before contacting the Regulator, through the out-of-time request for a review. Further, following the Regulator's revocation of the first EPN, and issue of the second EPN, the subject of the Appeal, which afforded a further extension of time for compliance, the Employer chose not to avail of that further opportunity, but to appeal to the Tribunal, an appeal which it has not pursued by appearance at the oral hearing or by the provision of further submissions. The Employer's assertions as to difficulties in communication are therefore, effectively as with the assertion as to non-receipt of postal communications, paper assertions only, unsupported by any evidence other than one, un-dated, letter to the pension provider attached to the Grounds of Appeal.

27. Looking at the broader picture, from the date of the first unpaid contribution set out in the UCN, July 2020, to the date of issue of the EPN which is the subject of the Appeal, 6<sup>th</sup> August 2021, the Employer had over one year to establish effective communication with the pension provider, and put its pension scheme affairs in order, but failed to do so.

28. For the sake of completion, I note the Employer's reference to financial difficulties. The requirement to pay financial penalties is clearly a more significant burden for a small business than a larger one. However, the fact that the penalty is burdensome is inherent in the fact that it is a "penalty". The amounts of material penalties are prescribed by regulations made under the 2008 Act. The amounts reflect both the importance of complying with the employer duty regulations and the seriousness with which a failure to do so should be viewed. The Registrar has no discretion to issue Penalty Notices for lesser amounts, nor does the Tribunal have power to direct substitution of lesser amounts. I note also that the Regulator is willing to accept payment of penalties in instalments if a single payment will occasion particular hardship, and the Employer may engage with the Regulator in that regard.

29. For these reasons, as aforesaid I determine that the issuing of the Escalating 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. Pursuant to Section 44 (4) (c) of the Act, in all the circumstances, I direct that the Regulator should vary the Notice, to give the Employer 28 days from the date of issue of the determination of this Appeal to comply with the directions in the Notice (effectively, to comply with the Unpaid Contributions Notice).

30. For the sake of clarity, for the benefit of the Employer, the outcome of the Appeal is that the Fixed Penalty stands, and that penalty of £400 must be paid. The Escalating Penalty Notice is confirmed, but that penalty will not begin to accrue until that date which is 28 days after the issue of this decision, so that the Employer will have that period of 28 days to put its pension scheme affairs in order, before any further penalty becomes due.

**David Hunter QC**

**Date of Decision: 10<sup>th</sup> February 2022**

**Date Promulgated: 16<sup>th</sup> February 2022**