



[2023] UKFTT 465 (GRC).

Appeal number: PEN/2023/0003P

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

G T S SERVICES (UK) LTD

Appellant

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL:

**ALEXANDRA MARKS CBE
(SITTING AS A FIRST TIER
TRIBUNAL JUDGE)**

**Sitting in Chambers (and therefore decided without a hearing) on
11 MAY 2023**

DECISION

1. The reference is dismissed and the matter is remitted to the Respondent. The Fixed Penalty Notice is confirmed.

REASONS

Background

2. G T S Services Limited ('the Employer') challenges a Fixed Penalty Notice ('FPN') issued by the Respondent ('the Regulator') on 25 October 2022 (Notice number 181744734946).

3. The FPN was issued under section 40 of the Pensions Act 2008 ('the 2008 Act'). It required the Employer to pay a penalty of £400 for failing to comply by 10 October 2022 with one or more requirements of an Unpaid Contributions Notice ('UCN') dated 30 August 2022.

4. The Regulator completed two reviews of the decision to impose the FPN, and informed the Employer for the first time on 12 November 2022 and then again on 2 December 2022 that the decision was confirmed.

5. The Employer referred to the Tribunal the Regulator's decision to issue the FPN. Although the Employer's Notice of Appeal was dated 11 November 2022, it was apparently not submitted to the Tribunal until January 2023.

6. The parties and the Tribunal agree that this matter is 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

7. The Regulator is responsible for the regulation of work-based pension schemes. Established by s.1 of the Pensions Act 2004 ('the 2004 Act'), its objectives are set out in section 5 of the 2004 Act.

8. These objectives include maximising compliance with automatic enrolment duties under the 2008 Act and safeguards in ss.50 and 54 of the 2008 Act.

9. This reference to the Tribunal is concerned with the duty to pay relevant contributions to an occupational pension scheme.

10. Where the Regulator is of the opinion that relevant contributions have not been paid by an employer, it has the power under ss.37 and 38 of the 2008 Act to issue a UCN requiring an employer to calculate and then pay unpaid contributions into a pension scheme and to provide evidence to the Regulator that it has done so.

11. If an employer contravenes its duties or certain safeguards, the Regulator has the power under the 2008 Act to issue:

- a. a UCN specifying steps requiring an employer to pay into a pension scheme by a specified date an amount in respect of relevant contributions that have not been paid; (s.37), and then
- b. if the employer fails to comply with the preceding notice, a FPN in the sum of £400 (s.40).

12. Under section 44 of the 2008 Act, a person who has been issued with a FPN may make a reference to the Tribunal provided an application for review has first been made to the Regulator.

13. If a reference is made to the Tribunal, the burden of proof rests with the person who makes the reference. The standard of proof to be applied is the balance of probabilities.

14. The role of the Tribunal is to make its own decision, on the basis of the evidence before it, about the appropriate action for the Regulator to take. The Tribunal may confirm, vary or revoke a FPN and when it reaches a decision, it must remit the matter to the Regulator with such directions (if any) required to give effect to its decision.

The facts

15. In this case, the Employer is the employer for the purposes of the 'Employer Duties' under the 2008 Act.

16. The Regulator issued a UCN on 30 August 2022 directing the Employer to take three steps:

- first, to calculate the unpaid pension contributions;
- secondly, to contact the pension scheme provider and pay the contributions; and
- thirdly, to provide evidence of compliance to the Regulator.

17. The period of unpaid pension contributions to which the UCN referred was 1 April 2022 to 30 June 2022. Guidance as to acceptable evidence of compliance was given in the UCN itself. The deadline for compliance with all three steps set out in the UCN was 10 October 2022. The UCN also stated that failure to comply before the deadline could lead to the issue of a £400 FPN.

18. By the deadline of 10 October 2022, no evidence had been provided by the Employer to the Regulator to show its compliance with steps one and two.
19. The Regulator therefore decided to issue FPN and did so on 25 October 2022. The amount of the financial penalty is fixed by law at £400.
20. The FPN made it clear that:
 - a. the Employer must comply with the requirements of the UCN by the extended deadline of 22 November 2022; and
 - b. any objection to the FPN must be submitted within 28 days of issue.
21. On 2 November 2022, the Employer telephoned the Regulator to complain about the FPN being issued.
22. The Employer sent a review request to the Regulator on 3 November 2022 enclosing emails relating to the submission of pension contribution schedules.
23. On 12 November 2022, the Regulator emailed its review decision to the Employer confirming the FPN.
24. On 22 November 2022, the Employer sent a further review request to the Regulator, again enclosing emails relating to the submission of pension contribution schedules.
25. On 2 December 2022, the Regulator emailed its second review decision to the Employer again confirming the FPN.
26. The Tribunal emailed the Regulator indicating that the Employer's Notice of Appeal (dated 11 November 2022) was received on 10 January 2023. The Regulator received the Notice of Appeal on 16 January 2023.
27. The Regulator is unclear as to whether the Tribunal has accepted the Employer's Notice of Appeal as in-time as the decision against which this Notice of Appeal relates to is the second review decision dated 2 December 2022.

Submissions

28. The Employer's Notice of Appeal says that:
 - a. The Employer did not receive the UCN dated 30 August 2022
 - b. The Regulator refused the Employer's request for a review due to inadequate evidence. The reasoning in the Regulator's review decision dated 12 November 2022 was "harsh". Guidance was not issued by the Regulator as to what evidence should have been included when making a review request.

- c. All unpaid contributions were paid upon receiving the FPN; and
- d. The cost-of-living crisis has impacted the Employer's business and cash flow so the Employer requested that the FPN be revoked.

29. In its response dated 13 February 2023, the Regulator opposed the Employer's reference of this matter to the Tribunal for the following reasons:

Non-receipt of the UCN

- a. The Regulator relies on the strong statutory presumptions about the service and receipt of documents sent to the proper address, in this case the Employer's registered office address.
- b. The Employer's registered address at Companies House is: 64 Cropley Road Cropley Street, London, England, N1 7GX. According to Companies House, this address has been in force since 10 May 2022. The Regulator submits that the UCN and FPN were both served on the Employer at its registered office address.
- c. The Upper Tribunal in *Southwark LBC v. Runa Akhtar (1) and Stel LLC (2) UKUT 150* states that '*mere assertion [of non-receipt] is insufficient*': proof is required. In this case there is no evidence, let alone proof, provided by the Employer to explain why it did not receive the UCN but did receive the FPN which was sent to the same address.
- d. Failure to appreciate the importance of a notice, and therefore failing to act on it, does not constitute a 'reasonable excuse' for such failure.
- e. There is no record of any correspondence sent to the Employer's registered office address having been returned undelivered. It is reasonable to expect that any official correspondence, sent to the proper business address, would be properly handled, and assistance sought if required.

Inadequate guidance on evidence required for a review

- f. When the Employer called the Regulator on 2 November 2022, the Regulator explained the review process and the evidence needed.
- g. The Employer submitted a review request the following day, on 3 November 2022. The evidence it provided was unsatisfactory because it showed that the pension schedules were *ready for* payment but not that they had been paid and, if so, when. The screenshots also did not contain the necessary references to show that the information related to the pension scheme referred to in the UCN.
- h. The Regulator submits that the UCN contained sufficient information about the breach and how it could be rectified. It also provided a link to guidance on the review process and contact details for the Regulator in case of any queries.

- i. However, the Employer maintains it did not receive the UCN, so it only contacted the Regulator on 2 November 2022, namely after receiving the FPN. The Employer was given advice and guidance at that time on how to make a review request.
- j. The review decision dated 12 November 2022 confirmed the FPN and provided further guidance as to the evidence that was required to comply with the requirements of the UCN.
- k. The Employer submitted a further review request on 22 November 2022 enclosing further evidence. This evidence showed that the relevant contributions had been paid, but only on 2 November 2022, namely after the deadline of 10 October 2022 stated in the UCN, and only after the FPN had been issued on 25 October 2022.

Compliance on receipt of the FPN

- l. As mentioned above, the Employer contacted the Regulator only after issue of the FPN. Employers are required to comply with their duties under the 2008 Act within the timescales provided by law. The Employer failed to do so and incurred a penalty as a result. No reasonable excuse has been provided for the Employer's failure to comply in time.
- m. Automatic pensions enrolment was implemented in the UK in 2012. There is plenty of information and guidance available to alert employers of their duties. There is also advice and guidance on the Regulator's website and available from numerous other sources such as pension providers, payroll companies and financial advisers.
- n. Late or eventual compliance with duties does not excuse the failure to comply on time, nor comprise exceptional grounds to revoke a penalty served following expiry of the deadline in a UCN.

Other considerations

- o. The Employer claims that it has always complied with its duties. In this instance, the Employer failed to comply in time with due payment of pension contributions.
- p. The Employer seeks revocation of the FPN due to '*the cost of living crisis, reduction in business and rising costs*' and the resulting impact on the Employer's cashflow. These issues do not provide a basis for revoking the FPN.
- q. The Regulator accepts that the penalty is burdensome for small businesses like the Employer's. However, the amount of the penalty is fixed by law and neither the Regulator nor the Tribunal has the power to vary it.

- r. The Regulator submits that the penalty is not disproportionate to the breach bearing in mind the importance of ensuring pension contributions are paid on time so as not to prejudice the workers entitled to those contributions.

Regulator's conclusions

- s. The Regulator relies on the timely provision of information by employers to check that they have met their duties under the legislation. It for the Employer as a responsible employer to be aware of its legal duties and ensure full compliance with them, including timely payment of pension contributions. In this case, the Employer failed to pay the contributions on time.
- t. The Regulator elected to serve a UCN on the Employer when the Employer's pension provider alerted the Regulator that relevant pension contributions had not been paid on time. By then, the Employer was already in breach of its duties.
- u. The Regulator was entitled to serve both the UCN (which the Employer denies receiving) and the FPN. The Employer was advised and given guidance how to submit a review request and supporting evidence. The Regulator duly reviewed its decision, twice, and on both occasions found that as the relevant contributions had been paid late, the FPN should stand. No reasonable excuse has been advanced why the Employer could not pay the contributions on time, nor any exceptional reasons provided which would justify revocation of the FPN.

Discussion and decision

30. The Tribunal is willing to accept the Employer's reference to the Tribunal (Notice of Appeal) even though it was submitted out of time. It should have been submitted within 28 days of notification of the Regulator's second review decision, namely by 30 December 2022.

31. For the reasons set out below - and taking account of all the evidence provided to me - I conclude that the Employer has given no *'reasonable excuse'* for non-compliance in this case.

32. The Employer has not explained how or why he received the FPN - to which he reacted immediately by telephoning the Regulator, and asking for review of the decision to issue the FPN - yet did not receive the UCN from the Regulator sent to the same address two months previously.

33. The Employer has provided no evidence nor even explanation (such as postal disruption) to account for the non-receipt of the UCN which extended the deadline for unpaid contributions until 10 October 2022.

34. I consider that the Regulator does not have to prove that the Employer received the UCN because:

- a. Various statutory provisions say that if a document is sent to a company's registered office by post, which is its proper address, it is *presumed* that it was received by the person to whom it was addressed. This is only a presumption and, if there were strong evidence to the contrary, the presumption can be displaced. The Employer does not have to *prove* that the UCN was not received but, beyond his simple statement to that effect, the Employer has produced nothing in support of his position. His assertion that the UCN was not received does not amount to sufficient evidence to displace the legal presumption that it was delivered to the proper address.
- b. Secondly, even if the Employer did not in fact receive the UCN, that would not relieve the Employer of his duty to comply with his legal obligations relating to unpaid pension contributions.

35. The Employer accepts that he received the FPN, and he did in fact shortly afterwards contact the Regulator. However, that was only *after* the extended deadline for contributions set by the UCN, and *after* issue of the FPN. It was therefore too late to avoid the penalty because late compliance does not excuse a failure to do so by the deadline.

35. The Employer was - or should have been - aware of the obligation to make monthly pension contributions, even without the UCN (the effect of which was to extend the deadline till 10 October 2022). By then, the Employer had missed three monthly contribution payments – for April, May and June 2022 – none of which were paid until 2 November 2022. I am satisfied that the Employer – or advisers on his behalf - had ample opportunity to comply with the obligation to pay the monthly pension contributions in time.

36. Whether or not an employer receives reminders or a UCN, as a responsible employer it is for them to be aware of their legal duties, and to ensure full and timely compliance with them. The Employer in this case failed to do so. That failure entitled the Regulator to issue a Fixed Penalty Notice.

37. Further even if an employer pays for the services of a third party to assist, it is the employer who retains ultimate responsibility for compliance with statutory duties. Although it appears that in this case the Employer engaged advisers to act on his behalf, that does not relieve the Employer of the responsibility to ensure that the duties were met. The duty to comply with pensions obligations - including those set out in the UCN (which also extended the deadline for paying monthly pensions contributions) - rests with the Employer. It was therefore fair, reasonable and appropriate for the Regulator to issue a UCN and, when the Employer still failed to comply, to issue a FPN.

38. In all the circumstances, I determine that the Regulator was entitled to issue the Fixed Penalty Notice dated 25 October 2022.

39. The Employer has provided no reasonable excuse or explanation for failing to pay monthly pension contributions on time, nor has he suggested any exceptional reasons which would warrant revocation of the penalty.

40. The amount of the penalty is fixed by law, so neither the Regulator nor the Tribunal has discretion to reduce the penalty below £400.

41. The Regulator has, however, indicated that it would be willing to consider payment options should the Employer indicate that a single payment of the £400 penalty would cause financial difficulties.

42. I confirm the Fixed Penalty Notice, and I remit the matter to the Regulator.

43. No directions are necessary.

(Signed)
ALEXANDRA MARKS CBE
(SITTING AS A JUDGE OF
THE FIRST TIER TRIBUNAL)

DATE: 6 June 2023