



NCN: [2023] UKFTT 772 (GRC).

Case Reference: PEN/2023/0026 & 0027

**First-tier Tribunal
General Regulatory Chamber
Pensions**

Decided without a hearing

**On: 14 September 2023
Decision given on: 20 September 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

A & P TRADING SOLUTIONS LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision: The appeals are Allowed

REASONS

1. A & P Trading Solutions Limited (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 25 October 2022 requiring the Appellant to pay a fixed penalty of £400 for failure to comply with an unpaid contributions notice (“UCN”). The Appellant has also appealed against an escalating penalty notice issued on 25 November 2022.

2. The parties have agreed to a paper determination of the appeals. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. 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.

4. 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.

5. 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. An escalating penalty notice can be issued if there is continued failure to comply with a UCN.

6. 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. A mere assertion that a notice was not received is not sufficient to overturn the statutory presumption of service (***London Borough of Southwark v (1) Runa Akhter & (2) Stel LLC*** [2017] UKUT 0150).

7. 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

8. 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.

9. 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 30 August 2022, after receiving a report from the Appellant's pension scheme provider that contributions due to be paid between 29 March and 28 June 2022 were unpaid.

10. The UCN was sent to the Appellant's registered office address – 1 Beaton House, High Street, Gillingham, Dorset, SP8 4QT – with the addition of "Little Poland" in the first line of the address.

11. The Appellant did not comply by the deadline of 10 October 2022, and so the Regulator issued a fixed penalty notice to the Appellant on 25 October 2022. The Appellant did not comply with the UCN, and the Regulator issued an escalating penalty notice on 24 November 2022. Failure to comply would result in an escalating penalty of £500 per day as of 22 December 2022.

12. The Appellant first contacted the Regulator on 29 December 2022. The Appellant says they first received the escalating penalty notice on 27 December 2022 as it was posted to an unoccupied flat.

13. The Regulator determined not to carry out a review of the escalating penalty notice because the request was sent on 29 December 2022, outside the 28 day limit. The same thing happened with a second request for a review made on 24 January 2023. The late payment report was resolved by the pension scheme provider on 10 January 2023.

Appeal grounds

14. The Appellant says that they did not receive any of the correspondence, including the escalating penalty notice, until 27 December 2022. The Appellant says this is due to confusion with the address.

Conclusions

Jurisdiction

15. The Regulator says that the Tribunal does not have jurisdiction because the conditions in section 44(2) of the Pensions Act 2008 are not met. Under section 44, a person can make a reference to the Tribunal in respect of the issue or amount of a penalty notice. The conditions are that the Regulator has completed a review under section 43, or "*the person to whom the notice was issued has made an application for the review of the notice under section 43(1)(a) and the Regulator has determined not to carry out such a review*" (section 44(2)(b)).

16. I considered this point in my decision of 22 June 2023, which refused the Regulator's application to strike out the appeals without a hearing. The Upper Tribunal authority in **Philip Freeman Mobile Welders Ltd v The Pensions Regulator** [2022] UKUT 62 (AAC) confirms that the presumption of service is not irrebuttable (overruling **Mosaic** on this point). The decision also confirms that the rebuttable presumption of service applies to the question of whether a notice has been received for the purposes of the time limits for a review – *"I cannot see any logical or rational basis for it being contended that the addressee ought nonetheless to be treated as having received those notices for the purposes of time limits for challenging the notices they have otherwise proven they did not receive. That would be a statutory nonsense."* (UT Judge Wright, paragraph 42).

17. The Appellant explains the address confusion as follows – *"I also explained the reason I not received the notice as there is a confusion in the address as the letters were probably sent to the flat with the same first line of the address. My address is 1 Beaton House which is also the residential flat 1 address. The tenants from time to time forward all letters to me but at that time the flat was unoccupied. They gave me a letter dated 24 November 2022 on 27 December 2022 when I contacted The Pension Regulator asking for details they failed to provide"*. I note that the Appellant's correspondence with the Regulator in December 2022 and January 2023 is consistent with this explanation, and the Appellant repeatedly said they did not have the original letters.

18. The Regulator seeks to rely on the presumption of service. The Regulator says that all notices were issued to the registered office address. I note that they were, with the addition of "Little Poland". This is the full address given by the Appellant to the Regulator. The bundle of documents includes a photograph of the Appellant's shop at this address, which is named "Little Poland".

19. The Regulator says that the Appellant has failed to provide any proof of the residential flat next door being unoccupied, and has not explained what precautions it took as a reasonable employer to ensure the address given to the Respondent was one at which they could receive their official mail. The Regulator says that for all correspondence related to this matter to have been delivered to the wrong address "raises many questions", especially when "Little Poland" was clearly marked on the door of the shop. The Regulator says that this is a bare assertion of non-receipt, and asserting it was "probable" that mail was sent to an unoccupied flat is not sufficient to rebut the presumption of service.

20. I note the position in **Akhter** that a mere assertion of non-receipt is not sufficient to rebut the presumption of service. The presumption does apply here, as the notices were sent correctly to the Appellant's registered office address. I have therefore considered whether the Appellant has provided sufficient evidence to rebut this presumption.

21. The Appellant has provided an explanation of what they believe happened with the notices. They have explained that the flat with the same address was unoccupied at the time. They have also said that the new tenants of the flat gave them the escalating penalty notice on 27 December 2022. This shows that at least one of the notices was delivered to the flat instead of to the Appellant's business premises.

22. There is no evidence of what happened to the other notices. However, it is difficult to see what evidence the Appellant could provide about this. If they never received the notices, they do not know for sure what happened to them. They have provided an explanation about what probably happened, based on the fact that one of the notices was delivered to the flat and passed on by the new tenants.

23. This is more than simply a bare or paper assertion that the notices were not received. The Appellant has provided an explanation of what they believe happened. This is consistent with the information provided to the Regulator in the requests for a review of the penalties. I have considered whether to accept this explanation. On the balance of probabilities, I find that the Appellant did not receive the UCN or fixed penalty notice, and did not receive the escalating penalty notice until it was handed over by the new tenant on 27 December 2022. Although the evidence from the Appellant is limited, they have given a consistent explanation throughout their dealings with the Regulator and in this appeal, and the fact the escalating penalty notice was redelivered by the tenant indicates the other notices are likely to have been incorrectly delivered as well.

24. I note the Regulator's comments that the Appellant as a reasonable employer should have made arrangements to ensure they received official mail. It is concerning that the Appellant's registered office address is so easily confused with an unoccupied residential flat. However, on the jurisdictional point, it is simply a factual question whether the notices were received for the purposes of the time limits for a review. I find that they were not. The fixed penalty notice was not received at all, and the escalating penalty notice was only received on 27 December 2022. This means that the Regulator was wrong to refuse to carry out a review of the penalty notices because they were submitted out of time.

Merits of the appeals

25. I have gone on to consider the merits of the appeals. This is on the basis that the Tribunal has jurisdiction because the requests for review were not out of time and the Regulator determined not to carry out a review.

26. 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.

27. The key issue is whether the Appellant has a reasonable excuse for failing to comply with the UCN. If they do, the fixed penalty and escalating penalty notices should not have been issued.

28. I have found as a fact that the UCN was not received by the Appellant. The Regulator makes the point that the Appellant should have put arrangements in place to ensure they received official mail. I have considered this issue. As noted above, it is concerning that the addresses are so easily confused. It is arguable that this means the Appellant does not have a reasonable excuse for failure to comply with the

UCN, despite never having received it because it was probably delivered to an unoccupied flat.

29. Having considered this point carefully, on balance I find that the Appellant did have a reasonable excuse for failing to comply with the UCN, because they never received it. I have accepted their explanation about delivery to the unoccupied flat. I note they included their shop name "Little Poland" in the address given to the Regulator, which was a reasonable step that should have helped to ensure the correspondence was delivered to the correct address.

30. I note that the Appellant should now be fully aware that there is a problem with delivery of official mail to their registered office address. They would be well advised to make alternative arrangements. If the same thing happens again, it is less likely that this would be regarded as a reasonable excuse.

31. For the above reasons, I find that the Appellant did have a reasonable excuse for failing to comply with the UCN. I determine that issuing the fixed penalty notice and the escalating penalty notice was not the appropriate action to take in this case. I remit the matter to the Regulator and direct that the fixed penalty notice and escalating penalty notice should be set aside.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 19 September 2023