2018/04860/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2019] EWCA Crim 1422

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 31st July 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MR JUSTICE EDIS

and

HIS HONOUR JUDGE MARSON QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

R (THE PENSIONS REGULATOR)
Respondent

- v -

WORKCHAIN LIMITED
Appellant

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Mr K J Hegarty QC appeared on behalf of the Appellant
The Respondent neither appeared nor was represented

J U D G M E N T
(As Approved)

LORD JUSTICE HICKINBOTTOM:

1. The Pensions Act 2008 ("the Act") requires employers to enrol into a pension scheme eligible "jobholders" or workers who are not already in a qualifying scheme. For most workers (i.e. those over 22 years old who earn more than £10,000 per year), section 3 of the Act requires "automatic enrolment": from the first day a worker becomes eligible, his employer is required to enrol him into a pension scheme without consulting or obtaining his approval. Automatic enrolment was rolled out to existing workers in stages from 2012, with each employer being notified as to when the legislation applied to it. Having been notified, an employer could delay implementation of automatic enrolment by up to three months to enable it to fit enrolment in more conveniently with its business processes.

2. The employer is required to pay pension contributions into the scheme, as well as to deduct employee pension contributions from workers' earnings and also pay those into the scheme, the employer and employee contributions each being one per cent in the first year, rising to three per cent in and from the third year. It is open to the employee to terminate membership of the scheme by "opting out"; and, if he opts out within the first month after enrolment, there is no liability to make any contributions on the part of either employee or employer (section 8).

3. The whole purpose of the Act is to ensure that workers who do not have a pension have the opportunity to build up a pension fund, partly funded by themselves and partly by their employers. Often such employees will be lower paid, and may be economically vulnerable. Therefore, as well as the compliance provisions in Chapter 2 of the Act, Chapter 3 provides for various safeguards, e.g. an employer is prohibited from inducing a worker to give up membership of a relevant scheme (section 54), although such inducement is not in itself a criminal offence.

4. Under section 67 of the Act, the Secretary of State is under a duty to establish a workplace pension scheme which employers who are under a duty to enrol workers into a such a scheme are able to use as a vehicle if they wish. The National Employment Savings Trust ("NEST") was established by article 3 of the National Employment Savings Trust Order 2010 (SI 2010 No 917). Data held by NEST can be accessed on-line, but access is controlled by NEST itself in furtherance of the purposes of the Act. Therefore, employers can access the on-line system to enrol workers into their workplace pension and thereafter it allows each worker to access his own data via his own individual on-line account; but it does not allow access to those data by the employer. NEST does not authorise or allow an employer to have access to an employee's data.

5. Workers can opt out of the scheme on-line, over the telephone or by letter. To opt out, the worker has to identify himself using a unique member identification number (his "NEST ID"), supplied to him by NEST on enrolment. With that information, an employee can gain access to his own data; but, as we have described, his employer cannot. If a worker wishes to opt out of his pension, whether on-line by telephone or by letter, as is made clear to both him and his employer, he must do that personally. NEST does not allow an employer to opt out its workers from their pensions. Again, that is a design feature to ensure, so far as possible, that workers only opt out if, by their own free and informed choice, they wish to do so; and to avoid employers putting pressure on workers to opt out. If an employee opts out, in addition to depriving the worker the opportunity to build up a pension fund at the part-expense of his employer, that of course saves the employer from having to pay the employer contributions into the scheme for that worker. The employer thus makes a direct saving from any opt out.

6. The Appellant, Workchain Limited known as Smart Recruitment UK Limited until February 2018 (“Workchain”), is a recruitment agency which provides temporary workers (“temps”) to business clients, particularly for the haulage and building trades. Workchain employs and pays the workers, charging their clients a fee for the services its workers provide to them.
7. Philip Tong and Adam Hinkley were the owners (i.e. the sole shareholders) and the directors of Workchain. They worked at the company’s head office with Hannah Armson (the Financial Controller) and Lisa Neal (the HR Officer and Armson’s assistant). Martin West, Robert Tomlinson and Andrew Thorpe were the company’s branch managers at Derby, Nottingham and Walsall respectively.

8. Workchain was notified that the staging date from which the Act applied to it was 1 February 2014; but it also took advantage of the full three month postponement, so that the implementation date for it was 1 May 2014. In practice, a crucial date was 8 May 2014, which was the cut-off for the first post-1 May payroll date.

9. From July 2012 to February 2014, the Pensions Regulator sent Workchain several standard letters, warning it of its automatic enrolment duty and giving guidance as to how to comply. There is no doubt that, at all relevant times, Tong, Hinkley and Armson knew of the statutory obligations of Workchain so far as the Act is concerned. On 20 January 2014, Workchain registered with NEST to make use of the pension scheme for the automatic enrolment of its permanent recruiting staff and employed temps.

10. There can also be no doubt that, from an early date, Tong, Hinkley and Armson were determined to opt out Workchain’s then-current employees; and there are emails in January 2014 indicating a strategy to obtain workers’ NEST welcome packs so that they would have the necessary information – notably, NEST IDs – to opt out on behalf of workers.

11. On 28 April 2014, just a few days before automatic enrolment of Workchain’s workers, Armson emailed Tomlinson and Thorpe with a list of temps in their respective branches who were due to be automatically enrolled, with a telephone number for NEST. Tomlinson had no doubt as to what was required. Within minutes, he emailed his recruiting staff in Nottingham with the list and the following instructions:

> “I need for your respective desks, phone NEST and opt out on behalf of the temp by pretending to be that temp…. If you don’t it will affect your margins, as they Smart contribute to this and this will come off your margins.”

12. Over the next few days, Armson kept the pressure up on the branch managers to ensure opt-outs; but it seems that NEST were slow at sending out the welcome packs with the NEST IDs to the relevant workers, and attempts to persuade workers to opt out were largely unsuccessful. None had opted out by 30 April. Only two out of 103 workers enrolled had opted out by 6 May 2014. The pressure to ensure opt-outs was increased, as the first payday after 1 May approached; but it seems that there were continuing issues about receipt of NEST welcome packs.

13. On the afternoon of 6 May 2014, five calls were made to NEST from Tomlinson and a recruitment consultant employed by Workchain at the Nottingham branch at Tomlinson’s request, purporting to be from temps asking for their NEST IDs. Later that afternoon or the following day, the NEST on-line service was accessed and the IDs used to opt out of the pension scheme. That access to the NEST on-line data was unauthorised.

14. During the next couple of days further steps were taken. An email was sent through the branches to all temps asking them to call NEST to obtain their NEST IDs and send them to the company so that they could opt them out of the pension. That in itself would have been unlawful because, as we have described, even with their consent the company could not opt out workers. But both the Derby and Nottingham branches continued to telephone NEST themselves pretending to be temps to obtain NEST IDs which were used to opt out on-line.

15. The first payroll date was not the end date, because, as we have indicated, if a worker opts out within a month of enrolment, the company would have no obligation to make any contribution to the pension fund for that worker. The implementation of the strategy to opt out workers was taken over by Workchain's head office. At least a small number of workers were opted out in early June 2014.

16. By 11 June 2014, Workchain had automatically enrolled 155 workers in NEST, of whom 102 (i.e. 66 per cent) had opted out. That can be compared with an average opt out rate of eight per cent. Of the 102 opt-outs, 90 were carried out on-line; and 67 of those originated from the Workchain IP address. The Pensions Regulator had specific evidence of 24 temps whose on-line opt outs originated from the Workchain IP address and used NEST IDs which were obtained in the telephone calls from a Workchain branch. In each of those cases, there was therefore deception in the form of a member of Workchain's senior staff pretending to be a worker to obtain his NEST ID. However, whether or not in an individual case there was such deception, the Pensions Regulator considered that it could be assumed that all 67 opt outs originating from the Workchain IP address were carried out not by the temps themselves, but by Workchain staff.

17. NEST was soon suspicious of Workchain's operation of the pension scheme, and alerted the Pensions Regulator on 28 May 2014.

18. In the meantime, once the workers who were employed at the inception of the scheme had been opted out, Workchain then proceeded to comply with the scheme and automatically enrolled all new employees except where a rare employee, without pressure, decided himself to opt out. As we understand it, that was done without any prompting from the Pension Regulator, and without the company or anyone associated with it knowing that an investigation was underway – no warrant was issued by the Pension Regulator until December 2015. Once workers who were employed in May/June 2015 had had their pension entitlement dealt with in the way we have described, Workchain was ready, willing and able to comply with the requirements of the 1990 Act which it did. Further, because of the nature of the employment, the turnover of temps is high. Again as we understand it, by the end of 2015, only two of the workers who had been opted out in May and early June 2014 were still employed by the company. Those two factors limited the financial loss in practice suffered by Workchain's workers.

19. Following the notification to the Pensions Regulator in late May 2014, a lengthy and complex investigation ensued, initially on the basis that the evidence suggested an offence of fraud had been committed. Tong and Hinkley firmly and consistently denied that they had been fraudulent or that they had encouraged staff to telephone NEST pretending to be workers. They accepted that, contrary to section 54 of the Act, they had attempted to persuade workers to telephone NEST and opt out of their pension; but, as we have said, that did not in itself amount to a criminal offence.

20. Although the investigation was initially one of fraud, it was clear that some (although certainly not all) of the workers opted out had purported to consent. Furthermore, as we have

indicated, it was in the nature of such employment that many of the workers had quickly moved on. As a result, the Pensions Regulator as prosecutor did not proceed with fraud, but rather brought charges against the directors/shareholders (Tong and Hinkley), the head office financial controllers (Armson and Neal), the branch managers (West, Tomlinson and Thorpe), and Workchain itself, for unauthorised access to computer material contrary to section 1 of the Computer Misuse Act 1990 ("the 1990 Act").

21. Section 1(1) of the 1990 Act provides:

> "A person is guilty of an offence if –
>
> (a) he causes a computer to perform any function with intent to secure access to a programme or data held in any computer, or to enable any such access to be secured;
>
> (b) the access he intends to secure or to enable to be secured is unauthorised; and
>
> (c) he knows at the time when he causes the computer to perform the function that that is the case."

By section 1(3), the maximum sentence upon conviction on indictment is two years' imprisonment or an unlimited fine. Sections 2-3ZA create more serious offences, involving unauthorised access to computers or computer data with specific intent or serious consequential damage.

22. The eight defendants were, however, charged under section 1 only. All eight pleaded guilty at the plea before venue hearing at the Derby Magistrates' Court on 7 June 2018, following which they were committed to the Crown Court at Derby for sentence.

23. A written basis of plea was submitted by Tong and Hinkley on the footing that (i) they did not instruct or encourage their staff to take unlawful steps to opt out workers, but rather had merely failed properly to manage and supervise their staff who acted without their knowledge, consent or connivance, and the offence was therefore one of low culpability; and (ii) the financial gain was only £3,615 (later revised downwards to £2,994) based on financial records which suggested that the saving for the company was around £147 per worker for the first year a worker was not in the scheme. Tong and Hinkley accepted that they were the controlling minds of Workchain, which therefore did not submit any separate basis of plea.

24. The Pensions Regulator did not accept that basis of plea, and responded with an addendum to his sentencing note which maintained that the offence was one of high culpability because Workchain's directors/shareholders instructed or encouraged staff to telephone NEST pretending to be workers to obtain NEST IDs which would then be used by staff to opt out workers from the pension. It also submitted that the harm was not restricted to £3,000, because (i) the intended financial gain would have accrued to an estimated £50,000 over the first five years; and (ii) in any event, the real seriousness of the offending lay not in the financial gain for the offenders or loss for the victims, but in the damage caused to public confidence in the integrity of workplace pensions and the systems used to provide and manage such pensions.

25. In the light of these disputed sentencing issues, on 24 August 2018, Her Honour Judge Shant QC adjourned sentence to 25 October 2018 so that a Newton hearing could be held to determine them. However, at the adjourned hearing, Tong, Hinkley and Workchain accepted the prosecution case that Workchain, through its directors Tong and Hinkley, had instructed managers and staff to do whatever was necessary to get workers to opt out of the pension scheme.

26. A revised basis of plea was thus proffered. It stated that neither Tong nor Hinkley did any positive or direct acts to opt out employees, and that they were not aware of certain staff making telephone calls impersonating employees. That, it was said, was done without their knowledge. However, they accepted responsibility for this on a joint enterprise basis, as well as creating "an atmosphere whereby these activities took place". That basis of plea was acceptable to the prosecutor, and the court. Judge Shant understandably found that, on the basis of plea, so far as Tong, Hinkley and Workchain (which they controlled) were concerned, the offence was one of high culpability. That is a finding which is neither challenged nor challengeable.

27. In sentencing on the revised basis of plea, Judge Shant reminded herself that, in the absence of an applicable guideline, sections 142 and 143 of the Criminal Justice Act 2003 required her to determine and sentence on the basis of culpability and harm. As we have described, she correctly considered culpability to be high. In terms of harm, she took the agreed figure for the immediate loss as about £3,000, and rightly indicated that there had been no agreement as to how the loss would have mounted up over time. The prosecution submitted that it would have been £35,000 to £50,000; whereas the defendants put the figure much lower.

28. The amount of savings for the company as a result of the offending, the judge said, was relatively small. The loss to individual workers was also relatively low although, she said, for them even a small sum might be significant. However, the judge considered that the real harm and gravamen of the offence was not financial, but the harm to public confidence in the system and the credibility of the security in the data held.

29. The judge reminded herself of the approach adopted towards financial penalties imposed on companies in the Sentencing Council's Definitive Guideline for Environmental Offences, as applied in R v Thames Water Utilities Limited [2015] EWCA Crim 960; [2015] 1 WLR 441;[2015] 2 Cr App R (S) 63, namely:

> "The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance".

30. In respect of ability to pay a fine, Workchain did not submit any turnover figures; but there was evidence of considerable shareholder funds in the company of up to £1.5 million in 2016-17, and regular profits before tax of £600,000 to nearly £800,000 per year. She expressly bore in mind that, although the financial position of the company had deteriorated since the offence, it was still in good financial health; and she concluded that it would still be able to bear a substantial financial penalty. That finding is unimpeachable; and Mr Hegarty did not suggest otherwise.

31. The judge also took into account that the company had been previously compliant with its regulatory duties and had been in compliance with all regulatory requirements since the investigation started in 2015.

32. In the event, in respect of Tong and Hinkley, she imposed sentences of four months' imprisonment suspended for two years, together with a direction that they each perform 200 hours community service and pay £11,250 costs. Armson and Neal were each sentenced to two months' imprisonment suspended for two years, and were ordered to pay £1,500 costs. West, Tomlinson and Thorpe were each sentenced to a two year community order, and ordered to pay £500 costs. None of the individual defendants has sought to appeal against those sentences.

33. Judge Shant imposed a fine of £200,000 on Workchain, together with a costs order of £60,930 and the appropriate victim surcharge. With the leave of Sir Alistair MacDuff sitting as a judge of this court, Workchain now appeals against that sentence on the basis that it is manifestly excessive.

34. In support of that overall submission, Kevin Hegarty QC for Workchain relied on five sub-grounds:

(i) In sentencing Workchain, the judge failed to have regard to relevant sentencing guidelines, namely the Sentencing Guideline on Corporate Offenders: Fraud, Bribery and Money Laundering.

(ii) The judge failed to give credit for Workchain's guilty plea at the first appearance at the magistrates' court, albeit subject to a Newton hearing on culpability at which Workchain had accepted the prosecution case that culpability was high. The parties are agreed that an appropriate level of discount in those circumstances would be 20 per cent.

(iii) The judge failed to have regard to the fact that the offending ceased, and Workchain were thereafter compliant with the automatic pension enrolment scheme from early June 2014, and notably in the period from that date to the date of the Pensions Regulator's warrant in December 2015.

(iv) In terms of harm, the judge failed to calculate and/or state the basis of the loss upon which she had based the sentence.

(v) The judge failed to have regard to the totality of the sentences passed on the company and its sole directors/shareholders.

35. We are not greatly impressed by the first sub-ground. The focus of an offence under section 1 of the 1990 Act is the unauthorised access to computer programmes and/or data. An offence is committed without the need to prove dishonesty or any intent to use the data (e.g.) for further offences or any other particular purpose. The amount of financial loss, if any, is a category of harm which a sentencing judge must properly take into account: but unauthorised access to a computer programme or data will not only lead to potential financial loss for those whose data they are, but also to a loss of confidence in the integrity of the computer system involved in the breach by the unauthorised person. That is likely to be a crucial head of harm for the offence under section 1 of the Act. In this case that was a particularly important factor, given that, for the protection of employees, the statutory scheme expressly prohibited employers having access to the employee pension data. Therefore, the assessment of harm by reference only to a

financial sum taken from the gross gain by the offender and/or loss to the victim(s), and then the assessment of culpability by reference simply to a multiplier of that financial sum as the Sentencing Guideline for Fraud etc provides for corporate offenders, does not appear to us to be of any significant assistance. We accept that financial gain and loss are relevant to the sentencing exercise, but do not consider that the judge erred in not relying upon that sentencing guideline as not being sufficiently analogous to the offence in respect of which she stood to sentence Workchain. Nor are we convinced that a great deal of assistance can be gained from such cases as R v Mangham [2012] EWCA Crim 973; [2013] 1 Cr App R (S) 11, which include convictions under section 1 of the 1990 Act, but also different and more serious charges arising out of different types of computer hacking.

36. In our view, Mr Hegarty was right not to press that particular strand of his appeal. But in relation to the second sub-ground, we consider that he is on very much stronger ground. The judge did not refer to giving credit to Workchain for its plea of guilty, and she does not appear to have given any such credit. Given that the plea was tendered at the first available stage, but on the basis of the prosecution case on culpability which was only accepted by the company at the hearing fixed as a Newton hearing to determine the issue of culpability, in accordance with the Sentencing Guideline on Reduction in Sentence for a Guilty Plea, we agree with the common ground between the parties that credit of 20 per cent was appropriate. In our view, the judge unfortunately erred in not giving such credit. The appeal must be allowed on that basis.

37. However, Mr Hegarty submitted that, even if the fine were reduced by 20 per cent to £160,000, in all of the circumstances that would still be manifestly excessive.

38. We should say that we have some considerable sympathy for the judge in her task of assessing an appropriate fine for this offending, without any guideline or any case in which the appropriate approach to such a task has been considered. She was of course correct to go back to first principles, and correct to identify harm and culpability as matters which must be assessed and which must then form the foundation of the sentence imposed.

39. In a case such as this, as we have already indicated, harm requires some assessment of the actual and potential financial gain for the offender(s) and financial loss for the victim(s) consequential upon the offending. The higher the figures for financial gain and loss, and/or the higher the number of victims, the greater the level of harm. Where the financial loss to the victim(s), although relatively small in absolute terms, represents a substantial amount for them, that, too, is a matter the sentencer will have to take into account. But, over and above harm in money terms, as the judge properly identified, the sentencing judge is required to take into account the harm to the public interest, notably the harm that has been caused to the undermined computer system itself, and in public confidence in it and in similar systems in the financial world upon which reliance is placed by users.

40. In terms of culpability, amongst other things, the reasons for and the circumstances of the unauthorised access and the degree of persistence will be relevant. The fact that employers are in a position of trust (e.g. in the sense that, as here, the scheme relies upon employers to ensure automatic pension enrolment for workers) must also be marked by the sentence. Previous convictions, particularly of like sort, may be an aggravating and possibly a seriously aggravating factor, as may be the general record of poor regulatory compliance of the relevant employer.

41. Any sentence must also be proportionate. The assessment of proportionality requires a sentencing judge to take into account the circumstances of the case, including the financial circumstances of the offender including profitability, so far as they are known or appear to the court, which in an appropriate case may have the effect of increasing, as well as decreasing, the

appropriate level of fine (see R v Sellafield Limited [2014] EWCA Crim 49 at [3], approved in Thames Water at [33], particularly in relation to "very large organisations"; but these observations are, in our view, generally applicable to commercial organisations such as the Appellant).

42. Moving from the general to the particular, in this case, we accept Mr Hegarty's broad submission that the financial loss to Workchain's employees was, in the event, relatively small; and the potential loss was not as large as it might have been because of the generally temporary nature of its workforce. Of those 102 workers who were opted out to which we have referred, as we have indicated, within about eighteen months only two remained on the Workchain workforce. Furthermore, although 67 workers were opted out by Workchain in the manner we have described, the criminal activities of Workchain took place over a relatively short period, a matter of a few weeks through to early June 2014. Thereafter, due to the spontaneous compliance which we have described, all new workers who joined the company were automatically enrolled in the pension scheme under the Act, as they should have been. The loss to workers was, therefore, in aggregate, limited: it was in the low thousands of pounds. However, we agree with Judge Shant: for the lower paid workers involved, the amounts would not have been insignificant. Their losses would not have hit home until they had retired with a smaller pension than they would otherwise have had, but losses there would have been. The savings for the company would also have been relatively small, but to an extent would have given the company not only a direct financial saving but also a potential commercial advantage over its competitors.

43. Importantly, as the statement of the Head of Compliance and Enforcement in the Automatic Enrolment Directorate of the Pensions Regulator (Joseph Turner) dated 9 August 2018, makes clear, in additional to direct financial gains/losses for the immediate parties, Workchain's manipulation of the on-line system inevitably damaged or risked damaging trust in these systems, and consequently the scheme introduced by the Pensions Act as a whole. It inevitably risked undermining public confidence in the security of personal data in this context and generally, including confidence in the security of the pension funds involved.

44. Furthermore, Workchain's culpability was clearly high. Its senior employees unlawfully attempted to persuade its workers to opt out and, having failed to do so, pretended to be those workers in order to access unauthorised data for the purposes of defeating the automatic enrolment provisions of the scheme set up by the 1990 Act. The conduct was successful, as shown by the high rate of opt outs achieved, compared with the norm.

45. Therefore, whilst we accept Mr Hegarty's submission that this offending, in all sorts of ways, could have been more aggravated, in our view, this offending was nevertheless clearly serious; and warranted a substantial sentence. That is reflected in the sentences of imprisonment imposed upon Tong, Hinkley, Armson and Neal.

46. However, in considering an appropriate and proportionate sentence for the company, it is important to bear in mind that its sole directors/shareholders were convicted of the same offence, and have been sentenced to prison (albeit those sentences were suspended). In assessing the level of fine, a need to bring home to the directors/shareholders the appropriate message with regard to regulatory compliance is therefore not, in this particular case, a weighty factor; but also the burden of any fine in practice will largely fall upon those same two individuals as shareholders. In assessing the appropriate fine, we also have to take into account not only the company's unblemished record, save for this offence, but also its general compliance with this and indeed other regulatory schemes.

47. Whilst we have sympathy for the difficult task which the judge had, after careful consideration, despite the seriousness of this offence, we are persuaded that the level of fine she imposed was manifestly excessive. Taking into account all of the circumstances, we consider that a fine of £125,000 would have been appropriate after a trial. Consequently, with a discount for the guilty plea of 20 per cent, a fine of £100,000 would have been appropriate in this case. In assessing that level of fine, we have taken into account the costs order imposed, which we leave undisturbed.

48. Consequently, for those reasons, we allow the appeal and substitute a fine of £100,000 for the fine imposed of £200,000. All other orders will remain undisturbed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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