



Neutral citation number: **[2023] UKFTT 00004 (GRC)**.

Case Reference: PEN/2022/0142

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

**Heard by: remotely by video conference
Heard on: 3 January 2023**

Decision given on: 3 January 2023

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

TAZ FURNISHING LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Representation:

For the Appellant: Mr Aftab Khan

For the Respondent: Ms Natasha Jones

Decision: The appeal is Dismissed

REASONS

1. By this reference Taz Furnishing Limited (the “Appellant”) has appealed against a fixed penalty notice issued by the Pensions Regulator (the “Regulator”) on 7 June 2022 requiring the Appellant to pay a fixed penalty of £400 for failure to comply with an unpaid contributions notice (“UCN”).

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

Evidence

7. I had a set of documents which I have read and which included the appeal, response and copies of the relevant notices. I also had oral submissions from both parties.

Facts

8. I find the following material facts.

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 8 April 2022, after receiving a report from the Appellant's pension scheme provider (NEST) that contributions due to be paid between 31 July 2021 and 28 February 2022 were unpaid.

10. The UCN sets out three steps under the heading "what you need to do now". Step 1 is to calculate the unpaid contributions. Step 2 is to contact the pension scheme provider and pay the contributions. Step 3 is to provide evidence of compliance. The notice states, "*When you have met the requirements in steps 1 and 2 above, or even if you are of the opinion that the contributions identified in this notice have already been paid, you must provide evidence of compliance to The Pensions Regulator [by email or by post]... For evidence to be acceptable it must include: (i) the relevant contribution schedules with the amount(s) calculated clearly stated AND (ii) proof that these amount(s) have been paid and the date(s) on which they were paid. This might be in the form of a letter, email statement from your provider or screenshots from your pension account... You must complete steps 1-3 above by 19 May 2022.*"

11. The notice expressly states, "*If you do not complete the steps required by this notice by 19 May 2022, the Pensions Regulator may issue you with a £400 Fixed penalty notice*".

12. The Regulator also sent a reminder email to the Appellant on 4 May 2022, which repeats the requirements and warning about the £400 penalty.

13. The Appellant did not contact the Regulator by 19 May 2022, and so the Regulator issued a fixed penalty notice to the Appellant on 7 June 2022. The penalty of £400 was due to be paid by 5 July 2022.

14. The Appellant requested a review of this decision through its accountant on 30 June 2022. The Regulator confirmed the penalty notice in a review decision issued on 4 July 2022. This was on the grounds that the Appellant had not provided any evidence with the review request to show that the missed contributions for the reported period had been paid into the scheme, and NEST had not marked the late payment report as being resolved and it was therefore showing as outstanding.

15. During the hearing, Mr Khan (representing the Appellant) was able to check the records of payment with NEST. He confirmed that these records showed all missing payments had been made in July 2022.

Appeal grounds

16. The Appellant's appeal is based on the following grounds:

- The Appellant says it was not able to maintain a bank account due to the pandemic. A more sympathetic view should be taken when the government says they will help all businesses whatever it takes.
- A new direct debit has been set up to avoid future issues.

- The Appellant now provides a schedule showing all payments status as paid.

17. The Regulator says that the appeal should be dismissed. There were no lockdowns and limited restrictions at the time, and the Appellant has not explained the issues with its bank account. There is no evidence that the payments were made in time, and no information or proof of payment was provided before the deadline in the UCN.

Discussion and conclusions

18. Payment of pension contributions is an essential part of the automatic enrolment system. The whole purpose of the system is to provide workers with a pension fund on retirement, and this requires all contributions to be made correctly and at the right time. The use of UCNs and fixed penalty notices is a central part of the Regulator's compliance and enforcement approach. Employers are responsible for ensuring that the important duties are all complied with, and there needs to be a robust enforcement mechanism to support this system. The Regulator must have evidence of compliance in order to ensure that employers are fulfilling all of their duties, and penalties act as an important deterrent to breach of these duties.

19. I have considered whether issuing the fixed penalty notice was an appropriate action for the Regulator to take in this case, and find that it was. The Regulator had sent the Appellant a UCN which required evidence of compliance to be provided, after having been informed by the pension provider that contributions had not been paid. There had been some unpaid contributions. The Appellant failed to make the payments or provide evidence of compliance until after the deadline had expired and after receipt of the fixed penalty notice.

20. 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. The UCN was sent to the registered office address, and the Appellant does not dispute this. The presumption of service applies, and the Appellant has not produced any evidence to show that the UCN was not delivered.

21. The key issue is whether the Appellant had a reasonable excuse for failing to comply with the UCN. On behalf of the Appellant, Mr Khan put forward a number of points.

22. In relation to the effect of the Covid-19 pandemic, Mr Khan did not say that the Appellant had been unable to maintain a bank account (as was said in the written appeal). Instead, he said that this meant the shop was not open every day and there were delays in dealing with post. I have not been provided with any detail about the dates. I also note that the relevant period of time is April to June 2022, when there were no longer any restrictions in place relating to the pandemic. It is unclear why the pandemic would have caused any problems with obtaining post during these months. The UCN also gave six weeks for compliance, and I have no evidence that the Appellant was unable to receive and deal with post throughout this period. I do not find that this provides a reasonable excuse for non-compliance.

23. Mr Khan also referred to there being some bank account and direct debit issues, which were resolved in June 2022. I do not have any evidence about these issues. This also does not explain why the Appellant failed to contact the Regulator at all in response to the UCN. If the Appellant was experiencing bank account problems, it could and should have contacted the Regulator to explain the position. The Appellant did not contact the Regulator at all after receiving the UCN.

24. Mr Khan says that the missing contributions were then paid in July. I have seen a report showing that payments were made for the missing periods of time. The Regulator confirmed at the hearing there are no further issues with non-compliance. However, the penalty was issued for failure to comply with the UCN within the deadline. There is a significant public interest in upholding fixed penalty notices where there has been late compliance. This is particularly important where the underlying issue is late contributions, because timely compliance by the employer with the Regulator's requirements is crucial to ensuring that individuals are not missing out on pension contributions over an extended period of time.

25. Mr Khan also referred to various issues that caused the Appellant's director problems with compliance – his health, being an immigrant, not being well educated, being an employer for the first time, and not being fully aware of his obligations. I do accept that the automatic enrolment scheme can appear both complex and burdensome for small businesses, and the Appellant's director may not have fully understood his obligations. However, the UCN is very clear as to what needs to be done and by when. Employers have an obligation to pay attention to communications from the Regulator and act on them appropriately. If the Appellant's director did not understand what needed to be done, he could and should have contacted the Regulator. Although it can be difficult running a small business, all employers are expected to act professionally and ensure that they do their best to comply with their legal duties.

26. The Appellant has also asked for a more sympathetic view to be taken in light of the support provided by the government for small businesses. Again, I understand that the Covid-19 pandemic was a difficult time for many such businesses. However, this does not explain why the Appellant was unable to comply with the clear requirements of the UCN at a time when all restrictions related to the pandemic had been lifted.

27. For the above reasons, I find that the Appellant did not have a reasonable excuse for failing to provide the evidence of compliance required by the UCN. I determine that issuing the fixed penalty notice was the appropriate action to take in this case. I remit the matter to the Regulator and confirm the fixed penalty notice. No directions are necessary.

Hazel Oliver

Judge of the First-tier Tribunal

Dated: 3 January 2023