

DECISION

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

REASONS

Background

2. Clearchoice Windows Doors and Glazing Limited ('the Employer') challenges a Fixed Penalty Notice ('FPN') issued by the Respondent ('the Regulator') on 29 November 2022 (Notice number 119600059107)

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 14 November 2022 with one or more requirements of an Unpaid Contributions Notice ('UCN') dated 3 October 2022.

4. The Regulator reviewed its decision to impose the FPN, and informed the Employer on 10 January 2023 that it had decided to confirm the FPN.

5. On 1 February 2023, the Employer referred to the Tribunal the Regulator's decision to issue the FPN.

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 employers' 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 UCN:

- a. 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. stating that if the employer fails to comply with the steps required by the UCN notice by the stated date, the Regulator can issue 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 3 October 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 May 2022 to 31 July 2022. Guidance as to acceptable evidence of compliance was given in the UCN itself.

18. The deadline for compliance with all three steps set out in the UCN was stated as 14 November 2022. The UCN also stated that failure to comply before the deadline could lead to the issue of a £400 FPN.

19. By the deadline of 14 November 2022, no evidence had been provided by the Employer to the Regulator to show its compliance with steps one and two.
20. The Regulator therefore decided to issue FPN and did so on 29 November 2022. The amount of the financial penalty is fixed by law at £400.
21. The FPN made it clear that:
 - a. the Employer must comply with the requirements of the UCN by the extended deadline of 28 December 2022; and
 - b. any objection to the FPN and request for a review must be submitted within 28 days of the date of the FPN.
22. The Employer sent the Regulator an email requesting review of the FPN on 28 December 2022.
23. On 10 January 2023, the Regulator emailed its review decision to the Employer confirming the FPN.
26. On the same date (10 January 2023), the Regulator issued an Escalating Penalty Notice ('EPN') requiring compliance with the UCN by 6 February 2023, and stating that if the Employer failed to comply, a penalty would accrue at a daily rate of £50 from 7 February 2023. The EPN is not the subject of this reference to the Tribunal: indeed, because the Employer complied with the UCN before 6 February 2023, I assume that the EPN effectively fell away.
27. On 1 February 2023, the Employer appealed to this Tribunal against the FPN which imposed a financial penalty of £400.

Submissions

28. The Employer's Notice of Appeal says that:
 - a. Due to a change of accountants and payroll provider, the Employer was blocked/locked out of its NEST account.
 - b. As the professional relationship had broken down, the accountants/payroll providers who held the login details, removed their own access but did not add the Employer who was therefore unable to gain access to pay the contributions.
 - c. Despite numerous attempts to get the old accountants to cooperate, they refused, effectively sabotaging the Employer's attempts to comply and making things difficult once the Employer moved their business away from them.

- d. Calling NEST and offering to pay did not work because the Employer did not have the necessary access to the NEST account.
- e. Until this time, the Employer had kept up-to-date with payments.
- f. Once access was restored, the Employer paid in full.
- g. The penalty imposed is unfair as the Employer did all it could as a new small business to operate within the law. The £400 is a big deal as the Employer does not believe they are at fault.
- h. Once the issue arose, they did what they could to fix it.

29. In its response dated 6 March 2023, the Regulator opposed the Employer's reference of this matter to the Tribunal for the following reasons:

- a. The grounds of appeal do not amount to a reasonable excuse for failure to comply with the UCN.
- b. The Employer bears statutory responsibility to assess and pay the requisite contributions, and to provide the required evidence to the Regulator by the prescribed deadline.
- b. All Employers, whatever their size, have to comply with their duties – and these duties include maintaining pension contributions for their employees. The Employer failed to do so.
- c. The UCN and FPN were sent to the Employer's registered office address. The Employer does not dispute receiving them.
- d. The Employer says that they were unable to comply with the UCN due to mitigating circumstances beyond their control. However, the Regulator submits that problems an employer may have with their third-party pension provider or accountant do not excuse non-compliance with statutory requirements.
- e. If the Employer was having difficulties complying with their statutory obligations, they could have contacted the Regulator but there is no evidence they did so at any time before issue of the FPN.
- f. The UCN provided 6 weeks within which to comply, and a further 2 weeks grace period then elapsed before the FPN was issued. This should have provided the Employer with ample time to comply. If they were struggling to do so, they could have contacted the Regulator before the deadline set out in the UCN to seek an extension of time.
- g. The Employer has provided no evidence of the difficulties they describe.
- h. The outstanding pension contributions from May-July 2022 remained unpaid until January 2023. It was therefore fair, reasonable and appropriate for the Regulator to issue and then confirm issue of the FPN.

- i. The Employer may want to take up the issue with their former accountants, and pursue any legal remedy. However, the actions of the accountants cannot excuse the Employer's failure to comply with their own statutory duties.
- j. The Regulator would expect a responsible employer to have realised that contributions had not been paid and either comply with the UCN and/or contacted the Regulator before the UCN deadline.
- k. Even if the Employer did not intentionally breach their duties, lack of intent does not amount to a reasonable excuse for failure to comply with the UCN. Late compliance also does not excuse the failure to comply in time, nor comprise exceptional grounds to revoke a penalty.
- l. The Regulator is willing to accept payment of penalties in instalments if a single payment would cause particular hardship. The amount of the penalty is fixed by law so there is no discretion as to its amount.

Discussion and decision

30. 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.

31. The Employer was - or should have been - aware of its obligation to make monthly pension contributions, even without the UCN (the effect of which was to extend the deadline till 14 November 2022). By then, the Employer had missed three monthly contribution payments – for May, June and July 2022 – none of which were paid until 12 January 2023.

32. The Employer states that they became aware of the problem with their former accountants/payroll providers in around April 2022 (I assume in the Employer's favour that reference in the Notice of Appeal to April 2021 is a typographical error). Yet there is no evidence that the Employer did anything to alert the Regulator to this issue until after receiving the FPN in late November 2022, seven months later.

33. Whether or not an employer receives 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.

34. Even if an employer pays for the services of a third party to assist in the performance of its statutory duties, the employer retains ultimate responsibility for compliance. Although it appears in this case that the Employer engaged advisers to act on their behalf, and that they felt let down by those advisers, that does not relieve the Employer of the responsibility to ensure that their statutory duties were complied with.

35. 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.

36. In all the circumstances, I determine that the Regulator was entitled to issue the Fixed Penalty Notice dated 29 November 2022.

37. While it is possible to feel some sympathy for the Employer's situation, that situation does not constitute a reasonable excuse for failing to pay monthly pension contributions on time, nor an exceptional reason which would warrant revocation of the penalty. There were steps the Employer could have taken, for example, to notify the Regulator of their difficulties, seek advice and even ask for an extension of time to comply.

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

39. 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 the Employer financial hardship.

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

41. No directions are necessary.

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

DATE: 14 August 2023