



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Pensions Regulation**

Tribunal Reference: PEN/2015/0004
Appellant: Mosaic Community Care Ltd
Respondent: Pensions Regulator

Judge: Peter Lane

DECISION NOTICE

1. The Pensions Act 2008 imposes a number of requirements on employers, in relation to the automatic enrolment of certain “job holders” in occupational or workplace personal pensions schemes. The Pensions Regulator has statutory responsibility for securing compliance with those requirements. Section 35 of the Act empowers the Regulator to issue a compliance notice, if satisfied that a person has contravened one or more of the employer duty provisions. Section 36 empowers the Regulator to issue third party compliance notices. Section 37 enables the Regulator to issue an unpaid contributions notice to an employer, if of the opinion that the relevant contributions have not been paid on or before the due date.

2. By section 40 of the Act, the Regulator may issue a fixed penalty notice to a person, if it is of the opinion that the person has failed to comply with:-

- (a) a compliance notice under section 35,
- (b) a third party compliance notice under section 36, or
- (c) an unpaid contributions notice under section 37.

3. Section 40(2) enables the Regulator to issue a fixed penalty notice to a person if it is of the opinion that the person has contravened the provisions of regulations made under sections 3, 5, 7 or 60 of the Act or where the person has contravened sections 8 or 10 (or regulations made there under).

4. Section 40(3) to (5) provides as follows:-

“(3) A fixed penalty notice is a notice requiring the person to whom it is issued to pay a penalty within the period specified in the notice.

(4) The penalty –

- (a) is to be determined in accordance with regulations, and
- (b) must not exceed £50,000.

(5) A fixed penalty notice must –

- (a) state the amount of the penalty;
- (b) state the date, which must be at least 4 weeks after the date on which the notice is issued, by which the penalty must be paid;
- (c) state the period to which the penalty relates;
- (d) if the notice is issued under subsection (1), specify the failure to which the notice relates;
- (e) if the notice is issued under subsection (2), specify the provision or provisions that have been contravened;
- (f) if the notice is issued under subsection (1), state that, if the failure to comply continues, the Regulator may issue an escalating penalty notice under section 41;
- (g) notify the person to whom the notice is issued of the review process under section 43 and the right of referral to the Pensions Regulator Tribunal under section 44.”

5. Section 43 deals with review of notices:-

“43 Review of notices

(1) The Regulator may review a notice to which this section applies –

- (a) on the written application of the person to whom the notice was issued, or
- (b) if the Regulator otherwise considers it appropriate.

(2) This section applies to –

- (a) a compliance notice issued under section 35;
- (b) a third party compliance notice issued under section 36;
- (c) an unpaid contributions notice issued under section 37;
- (d) a fixed penalty notice issued under section 40;
- (e) an escalating penalty notice issued under section 41.

(3) Regulations may prescribe the period within which –

- (a) an application to review a notice may be made under subsection (1)(a);
- (b) a notice may be reviewed under subsection (1)(b).

(4) On a review of a notice, the effect of the notice is suspended for the period beginning when the Regulator determines to carry out the review and ending when the review is completed.

(5) In carrying out a review, the Regulator must consider any representations made by the person to whom the notice was issued.

(6) The Regulator's powers on a review include power to –

- (a) confirm, vary or revoke the notice;

(b) substitute a different notice.”

6. Section 44 deals with references to the First Tier Tribunal or Upper Tribunal:-

“44 References to the Pensions Regulator Tribunal

(1) A person to whom a notice is issued under section 40 or 41 may, if one of the conditions in subsection (2) is satisfied, make a reference to the Pensions Regulator Tribunal in respect of—

- (a) the issue of the notice;
- (b) the amount of the penalty payable under the notice.

(2) The conditions are—

- (a) that the Regulator has completed a review of the notice under section 43;
- (b) that 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.

(3) On a reference to the Pensions Regulator Tribunal in respect of a notice, the effect of the notice is suspended for the period beginning when the Tribunal receives notice of the reference and ending—

- (a) when the reference is withdrawn or completed, or
- (b) if the reference is made out of time, on the Tribunal determining not to allow the reference to proceed.

(4) For the purposes of subsection (3), a reference is completed when—

- (a) the reference has been determined,
- (b) the Tribunal has remitted the matter to the Regulator, and
- (c) any directions of the Tribunal for giving effect to its determination have been complied with.

(4A) In this section “the Tribunal”, in relation to a reference under this section, means—

- (a) the Upper Tribunal, in any case where it is determined by or under Tribunal Procedure Rules that the Upper Tribunal is to hear the reference;
- (b) the First-tier Tribunal, in any other case.””

7. On 14 January 2015 the Regulator issued a fixed penalty notice in the sum of £400 to Mosaic Community Care Ltd. The stated reason for the issue of the notice was that the Regulator was of the opinion that the appellant had failed to comply by the deadline of 8 January 2015 with one or more requirements of the compliance notice issued on 12 December 2014. The relevant requirement of the compliance notice was to complete the declaration of compliance confirming that the appellant had complied with its automatic enrolment duties under the 2008 Act. The process of making a declaration of compliance is also referred to as registration.

8. The appellant’s grounds of appeal contended that the fixed penalty notice was not received and that was why the application to the Regulator for a review of

the notice was made out of time. The appellant contends that it made every effort to comply with the registration requirement but was unable to do so online, eventually completing it by telephone, having contacted the Regulator's customer support staff.

9. The Regulator's response to the appeal, dated 5 May 2015, can be summarised as follows. Even if the appellant did not receive the fixed penalty notice, its application for a review of that notice was still out-of-time. In those circumstances, the Regulator could not initiate a review under section 43(1); although it could do so under section 43(1)(b). In this case, the Regulator decided not to act under section 43(1)(b). In the light of this, the Regulator contends that the conditions in section 44(2) for the appellant to be able make a reference to the First-tier Tribunal are not satisfied and that, as a consequence, the Tribunal has no jurisdiction to entertain the appeal.

10. Alternatively, the Regulator submits that its decision not to act under section 43(1)(b) was fair, reasonable and proportionate in all the circumstances. As a further alternative, the Regulator submits that if the application for a review of the fixed penalty notice was in time, the Regulator's failure to carry out a review has not caused any injustice to the appellant, since a review would have inevitably resulted in the notice being confirmed.

11. No reply to the Regulator's response has been received from the appellant.

12. Both parties are content for the appeal to be determined without a hearing. In all the circumstances, I consider that I can properly determine the issues without a hearing.

13. The question of whether the Tribunal has jurisdiction to entertain the appeal involves a consideration of regulation 15 of the Employer's Duties (Registration and Compliance) Regulations 2010 (SI 2010/5). This provides:-

"15.- Review and Issue of Notices

(1) The period within which an application to review a notice may be made under section 43(1)(a) of the Act (written application of a person) is 28 days, starting from the day a notice is issued to a person.

(2) The period within which a notice may be reviewed under section 43(1)(b) of the Act (review by the Regulator) is 18 months, starting from the day a notice is issued to a person.

(3) The presumptions in paragraph (4) apply where notices to which section 43 applies are issued (including compliance notices issued under section 51 of the Act and penalty notices issued under section 52 of the Act).

(4) For the purposes of this regulation, it is presumed that –

(a) where a notice is given a date by the Regulator, it was posted or otherwise sent on that day;

- (b) if a notice is posted or otherwise sent to a person's last known or notified address, it was issued on the day on which that notice was posted or otherwise sent; and
- (c) a notice was received by the person to whom it was addressed."

14. I am satisfied from the witness statements of Catherine Doherty and Mark Meller, attached to the response, that the fixed penalty notice in the present case was given a date of 14 January 2014 and that by reason of the Regulations it is deemed to have been posted on that day. I accept in any event that, from those statements, it is the case that the notice was indeed posted on 14 January.

15. The Regulator has, quite properly, drawn attention to the fact that the notice was posted to the appellant at Mosaic Community Care Ltd, Cottam Lane Business Centre, Cottam Lane, Ashton on Ribble, Preston PR2 1JR. This is slightly different to the address given in the notice of appeal: Mosaic Community Care Ltd, Unit 2, Cottam Business Centre, Cottam Lane, Ashton, Preston PR2 1JR. However, the address used by the Regulator was the address notified to the respondent by the appellant on 20 February 2013 and was thus the last address known to the Regulator at the time the fixed penalty was posted. I take that from the witness statement of Rosalind Stow, attached to the response. In any event, the appellant has not shown that anything material turns on the difference in address. Since both addresses have been put forward at various times by the appellant as addresses at which the appellant can be contacted, it is frankly difficult to see how the appellant could contend there is any material difference.

16. As the Regulator points out, the presumption in regulation 15 is different from certain other enactments governing the service of documents, such as section 7 of the Interpretation Act 1978, in that there is no provision in regulation 15 for the person to whom the notice is addressed to rebut the presumption that it was received. It therefore follows that, regardless of whether the appellant actually received the fixed penalty notice, the deadline for making the application to the Regulator for a review of the fixed penalty notice was 11 February 2015 (that is to say, 28 days after the notice was issued (14 January)). The witness statement of Rosalind Stow shows that the application for review was made on 17 February 2015. It was accordingly out of time.

17. There is no mechanism under the relevant legislation, whereby the Regulator can extend time for making a written application under section 43(1)(a) for a review. This is unsurprising, given that, where the Regulator considers it appropriate, it may initiate a review of its own motion under section 43(1)(b). The consequence for an appeal to the First-tier Tribunal, however, is significant. Given the terms of regulation 15(1), I do not consider it can properly be said that an out-of-time application falls to be treated as an application under section 43(1)(a), read with section 44(2)(b). If regulation 15(1) is to have any meaning, the Regulator cannot, in my view, act under section 43(1)(a) by initiating a review by reference to that provision, if there is no valid application

for review. By the same token, the Regulator cannot determine not to carry out a review under section 43(1)(a), in response to of an out-of-time application.

18. The effect is that I find the Tribunal does not have jurisdiction in the present appeal. The refusal of the Regulator to carry out a review was by reference to section 43(1)(b), not section 43(1)(a). Thus the conditions in section 44(2) are not satisfied.

19. That finding disposes of the appeal. I have, nevertheless, gone on to consider the matter on the hypothetical basis that there may be jurisdiction in the Tribunal to determine the appeal substantively. Even on this basis, however, the appellant cannot succeed.

20. I accept the evidence of Rosalind Stow that the Regulator proceeded in accordance with its compliance and enforcement policy and that she therefore considered whether there was information which indicated that the penalty notice should be varied, substituted or revoked. I conclude that Ms Stow was correct to decide that the appellant had not put forward a reasonable excuse for failing to complete the declaration of compliance. Even if the appellant had experienced difficulties in using the online system, it was open to the appellant to complete the declaration of compliance by telephone, which is what the appellant eventually (but belatedly) did on 20 January 2015.

21. The declaration of compliance is, I find, an important source of information for the Regulator and thus central to its functions under the 2008 Act. The importance of the declaration of compliance is underlined by the fact that it is a criminal offence knowingly to provide false or misleading information: section 80(1)(a)(iii) of the 2004 Act. The compliance and enforcement strategy clearly sets out that action will be taken against employers who fail to complete the declaration of compliance. A generous period of five months is allowed to employers, within which to complete the declaration of compliance, calculated from the date when the automatic enrolment duties first apply. I accept the evidence at Annex D to the response that, when an employee of the appellant telephoned the respondent on 14 October 2014, in response to a warning letter, the deadline for the completion of the declaration of compliance was stated and guidance in that regard given. I also accept from Annex D that the Regulator called the appellant on four occasions from 18 November 2014 to 5 January 2015, attempting to remind the appellant that the declaration of compliance was still outstanding.

22. It is also evident from Annex D that, when an employee of the appellant telephoned the Regulator on 9 January 2015, before the fixed penalty notice was actually issued, the Regulator made clear that the declaration of compliance could be completed by telephone. The employee is recorded as having declined to do this, as she did not have the necessary workforce information to hand.

23. In all the circumstances, even if the Tribunal had jurisdiction in respect of the Regulator's refusal to act upon the out of time application for review, it is plain that it was in the circumstances appropriate to issue the fixed penalty notice.

24. I accordingly dismiss the appeal and remit the matter to the Regulator under section 44(4)(b). No directions are given pursuant to section 44(4)(c).

Peter Lane

Chamber President

Dated 10 August 2015