**First-tier Tribunal**
**(General Regulatory Chamber)**
**Professional Regulation**

**Appeal Reference: PR/2016/0018**

**Heard at Leeds Employment Tribunal**
**on 15 December 2016**

**Before**

**JUDGE CLAIRE TAYLOR**

**Between**

**LETS GO (LEEDS) LTD**

Appellant

**and**

**LEEDS CITY COUNCIL**

Respondent

**Representation**
For the Appellant: Mr Anthony Warwick
For the Respondent: Ms Kate Feltham

**Decision**
This appeal is allowed such that I find in favour of the Appellant to the extent set out below.

## DECISION AND REASONS

1. This is an appeal by Lets Go (Leeds) Ltd ('Lets Go') against a penalty charge of £5,000 issued by Leeds City Council ('the Council') related to failure to belong to a redress scheme.

### *Legislation*

2. Section 83(1) of the Enterprise and Regulatory Reform Act 2013 (the 'Act') provides:

> '(1) The Secretary of State may by order require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work which is either—
>
> (a) a redress scheme approved by the Secretary of State, or
>
> (b) a government administered redress scheme.'

3. Section 83(2) provides:-

> '(2) A 'redress scheme' is a scheme which provides for complaints against members of the scheme to be investigated and determined by an independent person.'

4. Subject to specified exceptions in subsections (8) and (9) of section 83, lettings agency work is defined as follows:

> '(7) In this section, 'lettings agency work' means things done by any person in the course of a business in response to instructions received from-
>
> (a) a person seeking to find another person wishing to rent a dwelling-house in England under a domestic tenancy and, having found such a person, to grant such a tenancy ('a prospective landlord');
>
> (b) a person seeking to find a dwelling-house in England to rent under a domestic tenancy and, having found such a dwelling-house, to obtain such a tenancy of it ('a prospective tenant').'

5. Section 84(1) enables the Secretary of State by order to impose a requirement to belong to a redress scheme on those engaging in property management work. Subject to certain exceptions, 'property management work':

> 'means things done by any person ('A') in the course of a business in response to instructions received from another person ('C') where-
>
> (a) C wishes A to arrange services, repairs, maintenance, improvements or insurance or to deal with any other aspect of the management of premises in England on C's behalf, and
>
> (b) the premises consist of or include a dwelling-house let under a relevant tenancy' (section 84(6)).

6. Pursuant to the 2013 Act, the Secretary of State has made the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong

to a Scheme etc) England Order 2014 (SI 2014/2359). The Order came into force on 1 October 2014.

7. Article 3 provides:

> 'Requirement to belong to a redress scheme: lettings agency work
> 3.—(1) A person who engages in lettings agency work must be a member of a redress scheme for dealing with complaints in connection with that work.
> (2) The redress scheme must be one that is—
> (a) approved by the Secretary of State; or
> (b) designated by the Secretary of State as a government administered redress scheme.
> (3) For the purposes of this article a 'complaint' is a complaint made by a person who is or has been a prospective landlord or a prospective tenant.'

8. Article 5 imposes a corresponding requirement on a person who engages in property management work.

> 'Requirement to belong to a redress scheme: property management work
> 5-(1) A person who engages in property management work must be a member of a redress scheme for dealing with complaints in connection with that work.
> (2) The redress scheme must be one that is--
> (a) approved by the Secretary of State; or
> (b) designated by the Secretary of State as a government administered redress scheme.'

9. Article 7 of the Order provides that it shall be the duty of every enforcement authority to enforce the Order. It is common ground that, for the purposes of the present appeal, the relevant enforcement authority is the Council.

10. Article 8 provides that where an enforcement authority is satisfied on the balance of probabilities that a person has failed to comply with the requirement to belong to a redress scheme, the authority made by notice require the person to pay the authority a monetary penalty of such amount as the authority may determine. Article 8(2) states that the amount of the penalty must not exceed £5000. It provides:

> '*Penalty for breach of the requirement to belong to a redress scheme*
> *8- (1) Where an enforcement authority is satisfied on the balance of probabilities that a person has failed to comply with the requirement to belong to a redress scheme under article 3 (requirement to belong to a redress scheme: lettings agency work) or article 5 (requirement to belong to a redress scheme: property management work), the authority may by notice require the person to pay the authority a monetary penalty (a "monetary penalty") of such amount as the authority may determine.*
> *(2) The amount of the monetary penalty must not exceed £5,000.*
> *(3) The Schedule provides for the procedure relating to the imposition of a monetary penalty.*'

11. The procedure for the imposition of such penalty is set out in the Schedule to the Order. This requires a 'Notice of Intent' to be sent to the person concerned,

stating the reasons for imposing the penalty, its amount and information as to the right to make representations and objections. After the end of that period, the enforcement authority must decide whether to impose the monetary penalty, with or without modification. If it decides to do so, the authority must serve a Final Notice imposing the penalty, which must include specified information, including about rights of appeal (Article 3).

12. Article 9 of the Order provides as follows:-

> 'Appeals
> 9.—(1) A person who is served with a notice imposing a monetary penalty under paragraph 3 of the Schedule (a 'final notice') may appeal to the First-tier Tribunal against that notice.
> (2) The grounds for appeal are that—
> (a) the decision to impose a monetary penalty was based on an error of fact;
> (b) the decision was wrong in law;
> (c) the amount of the monetary penalty is unreasonable;
> (d) the decision was unreasonable for any other reason.
> (3) Where a person has appealed to the First-tier Tribunal under paragraph (1), the final notice is suspended until the appeal is finally determined or withdrawn.
> (4) The Tribunal may —
> (a) quash the final notice;
> (b) confirm the final notice;
> (c) vary the final notice.

***Final Notice***

13. In the present case, the Final Notice dated 15 July 2016, addressed to Lets Go, stated that the Appellant failed to comply with the Order requiring it to be a member of a redress scheme, pursuant to the relevant legislation. The amount of the penalty was stated to be £5000. This had been specified by the Council in its earlier Notice of Intent of 28 April 2016, and it had received no representations from the Appellant, for instance, explaining its position or petitioning to reduce it. It did become a member of a redress scheme on 12 August 2016. After the Final Notice was issued, the Appellant's councillor, Councillor Ron Grahame had contacted Mr Dixon of the Council to discuss the matter.

***The appeal***

14. The hearing of the appeal took place on 15 December 2016. I heard from both parties and am grateful for their elucidation of the issues. I also heard from Mr Yousaf and Councillor Grahame on behalf of the Appellant and briefly from Mr Dixon of the Council. In reaching a decision in this case, I have had regard to those oral submissions, the written submissions, evidence and the documents contained in the hearing bundle and sent subsequent to this. Mr Warwick had not produced accounts in time for the hearing and I gave directions enabling him to do so within certain deadline. The Appellant provided no accounts at the hearing to substantiate his case. He was given an opportunity afterwards to

provide these. He provided accounts for the year ended 31 March 2015 and after the Council made the point that these were not apposite to his case, he provided the accounts for the year ended 31 March 2016, without any accompanying submissions.

15. Mr Warwick is as director of Lets Go. His case included the following. *(The headings and categorised have been added for ease of reference)*.

    a. **Ground A: Not a lettings business**
        i. The penalty is unfair as it does not take into account the status. The Appellant has advertised as a letting agent but has not acted as one. It does not have any premises for letting or sale any properties. The business plan or website was drafted to attract both landlords and buy to let investors and nothing else.
        ii. As regards the 'to let' sign the Council had said an officer had seen on Conference Road, he was not aware of any signs put up in that road and the company had not put up any signs for lettings, although signs for management were temporarily displayed from time to time.
        iii. It has only done third party management/maintenance for general repairs. The business was established in 2013 to refurbish and maintain property and is a web-based business. The website started in 2015 and was bought as a business package such that the wording was that which had been bought from another company. The aim was to develop a lettings business. However, the company had had no lettings to date.
        iv. Mr Yousaf appeared on behalf of the Appellant and confirmed that he was a client of the company, who only performed management work for him. Emails were additionally presented from satisfied clients showing the work done for them. None of it was lettings work.
    b. **Ground B: Not aware of requirements**
        i. Mr Warwick stated that he accepts that he may have overlooked the fine and wishes to work with the Council and keep a good reputation. He would have joined the scheme had he been aware he needed to. He recognised that he should have made representations to the Council at the right time (after receiving the Notice of Intent) and apologised for not doing so.
        ii. Councillor Grahame gave testimony that when he had been contacted by Mr Warwick about the fine, he had not been aware of the redress scheme. He found that other councillors had also not been aware as well as the Council's own scrutiny board. He had concerns
    c. **Ground C: Fine disproportionate to size of business**
        i. The Appellant does not have the funds available to pay the fine.

ii. It would hinder any kind of growth for the company and may even cause the company to have to cease trading due to the cost and 2 month deadline. It offers £500 to pay administrative costs.

16. The essence of the Council's case is as follows:

a. **Ground A:** All senior officers had been tasked to look out for 'to let' signs to ensure enforcement of the Act. A Council operative from the Environmental Action Service undertaking 'proactive licensing work' had seen a 'to let' sign on 72 Conference Rd in the name of Lets Go. This was detailed in a note handed to the Tribunal. On 19 April 2016, a land registry check was undertaken which confirmed the property was not owned by the Appellant. *(This was produced at pages 31 to 32 of the Bundle.)*

b. **Ground B:**

i. It is the Appellant's responsibility to ensure compliance with legislative requirements.

ii. When the rules came into force, (in 1 October 2014), the Council consulted on how to operate the scheme. Briefing notes were issued to all councillors. Following Councillor Grahame's conversation with Mr Dixon, councillors were briefed again about the scheme.

iii. The Council had informed all property agents that it was aware of about the requirements of the redress scheme. It had not been aware of Lets Go at the time. Nevertheless the onus was on the business to inform itself of the law appertaining to its business.

iv. The Council additionally stated that had Lets Go joined the scheme after the Notice of Intent but before the Final Notice, they would have halved the fine to £2,500. This was their policy, and stated that this had been recognised at other hearings as a generous policy.

c. **Ground C:**

i. The Council stated that it had received no representations from the Appellant prior to the appeal and at the time of the hearing the Appellant had produced nothing to substantiate its claim in regard to this ground.

ii. As regards the Accounts for the Accounts ending in 2016, the Council noted that it would treat these records with a degree of caution considering:

1. They had not been independently audited and were created after the Tribunal date.
2. They do not reveal other sources of income which Mr Warwick may be in receipt of such as benefit payments. The Council is aware that Mr Warwick may have other income streams available to him, which came to the attention of the Council during the original investigation. Therefore the accounts provided do not represent a complete picture of Mr Warwick's financial affairs.

iii. They also noted that the accounts were provided some time after the deadline originally given by the Tribunal for those to be produced.

## Findings

17. As set out in paragraph 12 above, Article 9 provides that the grounds for a successful appeal can only be where (a) the decision to impose a monetary penalty was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the monetary penalty is unreasonable; (d) the decision was unreasonable for any other reason. On making a finding, I may quash, confirm or vary the Final Notice.

18. When considering what is reasonable, I have taken into account that the Department for Communities and Local Government has published '*Improving the Private Rented Sector and Tackling Bad Practice – A Guide for Local Authorities (2012)*' ('the Guide'). This Guide is not statutory, but is important. It states:

> *'The expectation is that a £5000 fine should be considered the norm and that a lower fine should only be charged if the enforcement authority is satisfied that there are extenuating circumstances. It will be up to the enforcement authority to decide what such circumstances might be, taking into account any representations the lettings agent or property manager makes during the 28 day period following the authority's notice of intention to issue a fine. In the early days of the requirement coming into force, lack of awareness could be considered; nevertheless an authority could raise awareness of the requirement and include the advice that non-compliance will be dealt with by an immediate sanction. Another issue which could be considered is whether a £5,000 fine would be disproportionate to the turnover/scale of the business or would lead to an organisation going out of business. It is open to the authority to give a lettings agent or property manager a grace period in which to join one of the redress schemes rather than impose a fine.*' (See page 53 of the Guide.)

19. As regards Ground A, I can find no error of fact or law, or reason why the decision or penalty was unreasonable. The Appellant has stated that it does not provide a letting service and that his company had never erected a 'to let' sign. Regardless of whether the sign existed on Conference Road and was accurately described by the Council's office, the company purports to carry out a lettings business as it states this on the website. However, the point is not material to this decision. This is because the Appellant needed to belong to a redress scheme in relation to its management work, which Mr Warwick has accepted his business undertakes. It did not belong to the scheme until August 2016. Under Article 8, the provisions for the penalty apply equally in both cases, (whether for a breach under Article 3 or 5), such that it is not material whether Lets Go operates a lettings business when it operates a management business.

20. It is noted that Lets Go needing to belong to a redress scheme if it either does lettings or does management is reflected in the word 'or' contained in the Final Notice. As such, I see no error in the Final Notice. The notice states:

> "*Reason for imposing monetary penalty is that you failed to comply with Part 2 Article 3 (Requirement to Belong to a Redress Scheme: Lettings Agency Work)* ***(or)*** *Part 3 Article 5 (Requirement to Belong to a Redress Scheme: Property Management Work) of the Redress Schemes for Letting Agency Work and Property Management*

*Work (Requirement to Belong to a Scheme etc.) (England) Order 2014." (Emphasis Added).*

21. Grounds B and C do not allege any error of fact or law. They concern whether in all circumstances (as found by me), the amount of the penalty was unreasonable or the decision to fine Lets Go was unreasonable for any other reason.

22. I find that none of the arguments advanced under Ground B indicate that the penalty or the decision to fine was unreasonable or constitutes 'extenuating circumstances'. The Appellant did not join a scheme until August 2016. My understanding from the hearing and papers is that although he received the Notice of Intent, he did think he needed to join a redress scheme as he did not in fact do any lettings work. Once Councillor Grahame had spoken with the Council, the Appellant joined a scheme. I do not think that this makes the penalty unreasonable. This is because the legal requirements had been in place for some time, and prior to the website being launched. The Council had informed the Appellant of the requirements by sending a Notice of Intent. The Appellant could then have found the relevant guidance online or contacted the Council, and become a member at that point. I accept that many, and perhaps, all councillors were not aware of the requirements (albeit the Council says they had been informed of them). However, professionals are expected to be aware of the law directly impacting upon their business.

23. As regards Ground C, the Appellant has now provided accounts for the year ending 31 March 2016. These show a turnover of £88,762, gross profit of £22,585 and Cost of Sales of £66,177. Administrative expenses are entered as £25,246 such that the accounts show a loss for the year of £2,661. From the Profit and Loss Account, the Cost of Sales where there is an entry of £52,422 for 'purchases' and £14,105 for 'sub-contractor costs'. 'Directors' remuneration' is entered as £9,298.

24. The Council has made the point that the Appellant did not provide these at the time of its decision. The Appellant did not provide an adequate response to the Council, although he did seek for his councilor's help to try to resolve the matter. As a Tribunal, I may consider evidence that was not before the Council in reaching my decision.

25. The Council has also made the point that Mr Warwick may be receiving other sources of income such as benefit payments. I have not taken this into account as it is unsubstantiated and not definitive. The accounts do not indicate a profit for the year ending 31 March 2016. However, I accept that the accounts should be treated with caution. There is no information given of what the sum of £52,422 for purchases refers to in the context of carrying out a management business, and as the accounts have not been not audited or reviewed and were created after the hearing, they have not been independently verified.

26. I have taken into account that the Guide states an expectation of a £5000 fine to be taken as the norm. As regards Ground C, I have taken the various factors into account as set out above. I consider that these indicate that the appropriate penalty should be £3,725 rather than £5,000.

**Judge Claire Taylor**
**24 January 2016**