



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

**Appeal Reference: PEN/2022/0091**

[2022] UKFTT 363 (GRC)

**Heard by CVP on 28 September**

**Before**

**JUDGE ANTHONY SNELSON**

**Between**

**DNS RETAIL MANAGEMENT LTD**

Appellant

**and**

**THE PENSIONS REGULATOR**

Respondent

**DECISION**

On hearing Mr S Kodithuwakku, lay representative, on behalf of the Appellant and Ms A Winstanley, legal representative, on behalf of the Respondent the Tribunal determines that -

- (1) The appeal is allowed.
- (2) The Escalating Penalty Notice dated 25 November 2021 is revoked.
- (3) The matter is remitted to the Respondent.
- (4) No further step is required.

## REASONS

1. The Appellant runs a small retail business in Barnsley. By this reference, it challenges an Escalating Penalty Notice ('EPN') issued by The Pensions Regulator ('TPR') on 25 November 2021, requiring it to pay a penalty accruing at a daily rate of £500 for failing to comply with a Compliance Notice ('CN') issued on 21 September 2021 by the deadline of 21 October 2021.

### *The statutory framework*

2. The Pensions Act 2008 ('the Act') imposes a number of requirements on employers in relation to the automatic enrolment ('AE') of certain 'job holders' in occupational or workplace personal pension schemes. These include delivering to TPR information about enrolment and re-enrolment of employees. This step must be completed within five months of the third anniversary of the 'staging date', the date on which the automatic enrolment legislation first applied to the employer.

3. TPR has statutory responsibility for securing compliance with AE requirements. If it is of the opinion that a declaration of compliance has not been delivered by the due date, it may issue a CN pursuant to section 35 of the Act<sup>1</sup>, requiring the employer to deliver a notice of compliance by a specified date. By s40 of the Act, TPR may issue a Fixed Penalty Notice ('FPN') in the sum of £400<sup>2</sup> to a person if it is of the opinion that he or she has failed to comply with (among other things) a CN. In the event of any further breach TPR may issue an EPN under s41 of the Act, imposing much heavier financial sanctions.

4. TPR may review a FPN or EPN on the application of the person affected (s43(1)(a)) or where the TPR otherwise considers it appropriate to hold a review (s43(1)(b)). The time limit for any application under s43(1)(a) is 28 days; under s43(1)(b) allows TRP 18 months in which to initiate a review. There is no power to extend either period. In either case, the effect of holding a review is to suspend the relevant Notice pending the outcome (s43(4)). The possible outcomes of a review are confirmation, variation and revocation of the Notice; in the event of revocation, TPR may substitute a different Notice (s 43(6)).

5. By s44 of the Act, provision is made for references to the First-tier Tribunal ('FTT') or (in circumstances which do not apply here) Upper Tribunal ('UT') in (so far as material) the following terms:

- (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;**
- ...

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<sup>1</sup> Hereafter, section numbers will be given as, say, s1, s35 etc.

<sup>2</sup> The figure is prescribed by the Employers' Duties (Registration and Compliance) Regulations 2010, reg 12.

- (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 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.

6. In dealing with a reference the powers of the FTT are very wide. The Pensions Act 2004, s103 includes:

- (3) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.

In *In the matter of the Bonas Group Pension Scheme* [2011] UKUT B 33 (TCC) Warren J, sitting in the UT, held that there was nothing in s103 or elsewhere to constrain the tribunal's approach to a reference. Its function is not that of an appellate court considering an appeal.<sup>3</sup> It must simply make its own decision on the evidence before it (which may differ from that before the Regulator).

### *The hearing*

7. The guiding hand of the Appellant is Mr Kodithuwakku's wife. She has recently given birth to a child and, in addition to her baby's needs, has certain health problems of her own to contend with. This explains why Mr Kodithuwakku presented the appeal. Ms Winstanley, a senior in-house lawyer, resisted the appeal on behalf of the Respondent.

8. Although the appeal turns almost entirely on fact, no witness evidence was prepared<sup>4</sup>. This accords, as I understand it, with GRC practice generally in such cases.

9. Although no formal evidence was given, I felt it necessary to inquire into aspects of the factual background. This involved putting certain questions to Mr Kodithuwakku, who is familiar with the Appellant's business and was at the material time personally involved in running it. I also directed one or two questions of a factual kind to Ms Winstanley, concerning the Respondent's standard methods and practices. I treated the answers to my questions as informal evidence. They could not be

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<sup>3</sup> Although the terminology of 'appeal', 'appellant' etc is used

<sup>4</sup> Case management directions given on 10 June did make provision for exchange of witness statements.

challenged directly in cross-examination but they could certainly be the subject of comment in the closing arguments.

*The background facts*

10. The material facts are not in dispute. They can be summarised as follows.
- 10.1 On 5 July 2020 the address of the Appellants' Registered Office was changed on the Companies House website from 11, Laithes Lane, Barnsley, S71 3AD to Unit 11, Laithes Lane Shopping Centre, Barnsley, S71 3AD. Unhelpfully, 'Laithes Lane Shopping Centre' is broken up into two lines, so that the reader can be forgiven for thinking that the address is at Unit 11 on Laithes Lane, which is located within the shopping centre in Barnsley, rather than Unit 11 of the Laithes Lane Shopping Centre, Barnsley. (In fact, it appears that the shopping centre is known locally as 'The Laithes Shopping Centre'.)
- 10.2 The deadline for the Appellants to supply its 're-declaration of compliance' (with its AE obligations) to TPR was 1 June 2021.
- 10.3 On various dates in the summer of 2021 TPR issued a CN, an FPN and an EPN against the Appellants for failing to meet the 1 June deadline, but these were subsequently revoked when it was discovered that they had been sent to the Appellants' former address.
- 10.4 On 21 September 2021 the (second) CN (already mentioned) was issued. It was addressed to the Appellants at the 'Unit 11' address and allowed them until 21 October 2021 to deliver the re-declaration of compliance, adding the warning that they would be liable to a fixed penalty of £400 if they failed to meet the (extended) deadline.
- 10.5 The Appellants did not complete their re-declaration of compliance by the due date (as extended). The (second) FPN was issued on 26 October 2021 (again addressed to the registered office), requiring payment of the penalty by 23 November 2021.
- 10.6 The FPN was not paid by the due date and, on 25 November 2021, TPR issued the (second) EPN (again addressed to the registered office), which specified the daily accrual rate of the penalty as £500.
- 10.7 Also on 25 November 2021 TPR sent a reminder to the Appellants (addressed to the registered office), pointing out that £400 remained payable under the FPN.
- 10.8 On 23 December 2021 TPR sent a reminder to the Appellants (addressed to the registered office), pointing out that daily penalties of £500 had started to accrue under the FPN.
- 10.9 By a letter dated 21 January 2022, again sent to the address of the registered office and received shortly thereafter, TPR wrote to the Appellants pointing out that their liability under the FPN and EPN had risen to £14,400.
- 10.10 On 28 January 2022 the Appellants' accountant wrote to TPR seeking to 'appeal' against the penalties referred to in the letter of 21 January. He explained that the first his client knew of any penalty was when the letter of 21 January was

received. He further stated that his client had reported postal problems in the past and that he (the accountant) had personal experience of such difficulties because his letters to his client had gone astray on occasions.

- 10.11 On 31 January 2022 the Appellants completed and submitted the required re-declaration of compliance.
- 10.12 TPR did not respond to the letter of 28 January 2022. This omission is not explained.
- 10.13 After the accountant chased the matter up, TPR sent a standard-form letter dated 11 April 2022 declining to review the FPN and EPN on the ground that the 'review application' had been presented outside the 28-day review period. The letter stated that the authors (unnamed members of the TRP 'review team') had considered the points raised in the application but it entirely failed to address them.
- 10.14 Following a purported 're-appeal' by the accountant on 26 April 2022, TPR replied on 28 April with a repeat of its letter of 11 April, again ignoring the complaint that the correspondence prior to 21 January had not been delivered.
- 10.15 TPR has not conducted any review of the EPN, under the 2008 Act, s43(1)(a) or (b).

### *The appeal*

11. The notice of appeal is dated 28 April 2022. It rests squarely on the assertion that the EPN and prior notices were not received.

12. The Respondent resists the appeal on the facts, contending that the Appellant fails to displace the presumption of due service of the relevant notices in the ordinary course of post. Very fairly, however, Ms Winstanley did accept that, if I found as a matter of fact that the relevant documents were not duly delivered, the appropriate course would be to revoke the EPN.

13. Ms Winstanley did not rely on a standard-form paragraph in more than one letter from TPR contained in the bundle of documents which appears to question the Tribunal's jurisdiction to engage with the appeal, apparently on the basis that the Appellant's application (or deemed application) for review of the EPN had been rejected as out of time. I will return to that aspect later.

### *Discussion and conclusions*

14. I start by reminding myself of the terms of the applicable legislation (summarised above) and in particular (a) the salutary purposes which the AE regime is designed to achieve, including ensuring that qualifying workers have the chance through occupational pensions to enjoy dignity and comfort in retirement; (b) the need for the mandatory requirements of the scheme to be backed up by an effective and robust enforcement mechanism; and (c) the need for other employers to understand that those requirements will be enforced. In my view, the correct approach is to look

to the Appellants to show a good reason for interfering with the penalty under challenge.

15. I can see much force in Ms Winstanley's submissions. The presumption of due delivery is a powerful factor. On the other hand, I am mindful of the difficulty of Mr Kodithuwakku's position. He is asked to prove a negative and faces an obvious disadvantage in seeking to do so.

16. On balance, I am persuaded that this appeal must be upheld. An appeal based on assertion and no more could not succeed, but I am satisfied that there are several material factors which lend extra support to the appeal here. Five factors in particular merit mention. First, the Appellants' address on the Companies House website is confusingly presented (see above) and I find it quite plausible that its use may have led to mail not being delivered correctly. Second, it is noteworthy that the Appellants' accountant referred in the letter of 28 January 2022 to his own experience of post addressed to the Appellants going astray. Third, it is agreed that it is apparent on the face of envelopes containing penal notices that they come from TPR and contain official and potentially important material. In the circumstances, it seems unlikely that Mr Kodithuwakku or his wife would have failed to open (or having opened, discarded or put in a drawer) not one or two but numerous communications from TPR, had they been duly delivered. Fourth, the immediate response to the letter of 21 January 2022 is not easily reconciled with the implicit theory that the Appellants were inclined to fail to open and/or ignore official correspondence. Fifth, it was not suggested that the Appellants have 'form' for breaching their AE obligations. Having regard to all the circumstances, and to these considerations in particular, I have reached the conclusion that there is just enough in the Appellants' case to swing the result in their favour. I am persuaded that the relevant documents were not delivered and that their non-compliance with the EPN is attributable to that fact.

#### *Outcome and postscript*

17. For the reasons stated, I uphold the appeal and revoke the EPN.

18. On the face of it, the logic of the appeal extended to the FPN but the notice of appeal did not identify the FPN as a 'decision or notice' against which the appeal was brought. In those circumstances the FPN technically stands. I hope, however, that TPR, as a fair-minded regulator, will take the view that the FPN should also be revoked, given the Tribunal's finding that the relevant prior notices were not duly delivered and the fact that the Appellants' accountant made it clear from the outset (on 28 January 2022) that he was seeking to challenge the FPN as well as the EPN. If they decide otherwise, they should certainly specify clearly to the Appellants the date by which the £400 must be paid.

19. The Appellants should learn a salutary lesson from their narrow escape in this case. If they find themselves again facing any form of penalty at the hands of TPR, their chances of persuading the Tribunal to revoke it are likely to be very poor. They must

be scrupulously careful from now on to comply fully with every AE duty that applies to them and to take all reasonable measures to ensure that post addressed to them is duly delivered. (They might well start by discussing with the Royal Mail whether re-formulation of their address to show 'Laithes Lane Shopping Centre' on the same line might help to avoid mis-delivery.)

20. Finally, I refer to the TPR standard documentation mentioned in para 13 above. In a submission dated 4 October delivered at my invitation, TPR has drawn my attention to the case of *Mosaic Community Care Ltd v The Pension Regulator*, a decision of the FTT under reference PEN/2015/0004 on 10 August 2015 (CP Peter Lane). The nub of that decision is that the reference on the 2008 Act, s44(2)(b) to an application made under s43(1)(a) is to an application *validly* made. That means, among other things, an application made within the statutory 28-day time limit. Accordingly, if an application is not made in time and TPR does not elect to hold a review under s43(1)(b), there is no jurisdiction in the Tribunal to consider a reference (appeal). The documentation to which I drew attention makes this point.

21. The submission of 4 October makes the further observation that the *Mosaic Community Care* case has been confirmed in other reported decisions. It was not said that it had been affirmed by a court of record in any decision binding on me.

22. As I stated above, Ms Winstanley did not run a jurisdictional defence: she explicitly disavowed such a defence. Nor, so far as I am aware, was any interim application made for the appeal to be struck out for want of jurisdiction. My decision above addresses the appeal pursued before me and the response which TPR presented to it. In the circumstances, I do not think that it would be right to say anything more on the subject of jurisdiction.

(Signed) Anthony Snelson  
Judge of the First-tier Tribunal  
Date: 5 October 2022