MISC/3112/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by The Pensions Regulator succeeds**. In accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal (GRC) made on 15th September 2017 under reference PEN/2017/0108. I substitute my own decision. This is to uphold the fixed penalty notice that was set aside by the First-tier Tribunal and to refer the matter to the appellant (The Pensions Regulator) to proceed accordingly.

2. I decided this matter on the basis of consideration of the papers. The respondent, Strathmore Medical Practice, has not replied to any communications from the Upper Tribunal and has therefore taken no part in the proceedings, but I am satisfied that it has been properly notified of each stage of the Upper Tribunal proceedings and has had proper opportunities to participate. The appellant indicated that it did not require there to be an oral hearing in the Upper Tribunal. I note that this is the first appeal in this area of jurisdiction to come before the Upper Tribunal.

The legal framework

3. The Pensions Act 2008 and the Employers' Duties (Registration and Compliance) Regulations 2010 impose a number of legal obligations on employers in relation to the automatic enrolment of certain jobholders into occupational or workplace personal pension schemes. The Pensions Regulator ("the Regulator") has statutory responsibility for securing compliance with these obligations and may exercise certain enforcement powers. Each employer is assigned a staging date from which the timetable for compliance with their obligations is set. An employer must provide certain specified information to the Regulator in a "declaration of compliance" within five months of its staging date. If there is a failure to do this the Regulator can issue a compliance notice (section 35 of the 2008 Act). If the employer fails to comply with this the Regulator may issue a fixed penalty notice (section 40). Section 43 provides for the Regulator to review notices, including a compliance notice and a fixed penalty notice. The prescribed penalty in the present case is £400.

4. The 2008 Act includes the following provisions:

> 44(1) A person to whom a notice is issued under section 40 … may, if one of the conditions in subsection (2) is satisfied, make a reference to the 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 … 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) …
>
> (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 Procedural Rules that the Upper Tribunal is to hear the reference;
> (b) the First-tier Tribunal, in any other case.

5. In other legal provisions there are limited circumstances in which matters may be referred to the Upper Tribunal (other than on appeal) but I am not aware of any provision for a reference under section 4A of the 2008 Act to be made to the Upper Tribunal. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a right of appeal to the Upper Tribunal against a decision of the First-tier Tribunal, and that includes decisions made by the First-tier Tribunal on a referral to it under the 2008 Act.

6. The 2008 Act does not specify grounds for a referral or the powers of the First-tier Tribunal on a referral. In such circumstances the general and well-established rule on appeal to the First-tier Tribunal is that the tribunal stands in the shoes of the decision maker (here, the Regulator) and has the powers that the Regulator has. It seems that the same applies on a referral under the 2008 Act.

Background and procedure

7. There is no dispute over the basic facts in this case. I take the following extract from the decision of the First-tier Tribunal (references are to the paragraph numbers of the decision). In this extract Strathmore Medical Practice is referred to as the Appellant and the Regulator is referred to as the Respondent:

> 3. There is no dispute that all the Appellant's Employees had been duly enrolled by the relevant [date?]. Nor does the Appellant dispute that the relevant Declaration was not filed by the due date which for the particular Appellant was 28 February 2017.

> 4. In the absence of such a Declaration the Respondent sent a Compliance Notice to the appellant on 8th March 2017. This required the declaration of compliance to be completed by 18th April 2017 and stated that if this was not done "we may issue you with a £400 penalty.
>
> 5. Such a penalty was indeed issued on 20 April. The Appellant then completed the necessary declaration the following day.
>
> 6. The Penalty Notice indicated that the Appellant had a right to seek review of the Notice and the Appellant availed [itself] of that right on 21st April 2017. The Appellant's Manager stated that she was the new practice manager and was still learning the process for pensions [automatic enrolment]. She said that she thought she had already filed the Declaration and did not realise until the Penalty Notice was received that she had not done so. In her appeal [*sic*] to the Tribunal but not in her request for review by the Respondent, the practice manager says that the previous letter (ie the Compliance Notice) had been mislaid.
>
> 7. By letter dated 28th April [2017] the Respondent stated that it had decided to confirm the Penalty. Responding to the statement that the Practice manager was newly in post and learning, the Respondent stated that "it was not sufficient to mitigate the failure to comply with the Compliance Requirement [that it?] was due to reliance on one employee". …

8. The First-tier Tribunal did not hold an oral hearing and on 18th September 2017 quashed the decision to confirm the fixed penalty notice and remitted the matter to the Regulator for a further review to be undertaken. The Regulator applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. There was some doubt about whether the First-tier Tribunal's grant of permission was valid, and for the avoidance of doubt and to the extent necessary I gave such permission (and appropriate directions) on 7th November 2017. A copy was sent to Strathmore Medical Practice on the following day, and a copy of procedural directions subsequently given by the Registrar was sent to Strathmore Medical Practice on 30th January 2018. No reply was received to either communication.

The First-tier Tribunal

9. The Regulator argued to the First-tier Tribunal that Strathmore Medical Practice had no reasonable excuse for the failure to complete the declaration of compliance in time, that the member of staff being new did not absolve it of responsibility, neither did the failure of its internal processes or mislaying correspondence and that thousands of employers had managed to comply with the timetable.

10. The Regulator noted that although the practice manager said that she thought that she had complied, there was no evidence to support that contention. The First-tier Tribunal queried what evidence could be provided. It seems clear (to me, at least) that the evidence would be her own statement (and that of anybody else she mentioned it to) and that it was then up to the Regulator (or, on reference, the First-tier Tribunal) to believe that evidence or not. Here, it seems that the Regulator did not believe that evidence but the First-tier Tribunal did (paragraph 13).

11. However, the First-tier Tribunal's principal reason was that the relevant legislation "makes no mention of the need to establish a reasonable excuse. It does give the [Regulator] power to carry out a Review and to confirm, vary or revoke the notice" (paragraph 12). It observed that the Regulator seemed to think that it had no discretion at the Review stage. However, "it was well within [its] power in reviewing the matter to recognise the omission to comply with the Compliance Notice by the due date had been quickly rectified and to take account of the fact that, other than in making the Declaration [Strathmore Medical Practice] had complied with the provisions of the Act" (paragraph 13).

12. The First-tier Tribunal's conclusion was that because the Regulator had closed its eyes to the possibility of revoking the Fixed Penalty Notice, its decision not to do so should be quashed and the matter remitted for a further review. I observe the irony here that the First-tier Tribunal could have substituted its own decision on Review but closed its eyes to the possibility of doing so.

Grounds of appeal and conclusions

13. The Regulator's first ground relates to whether there was evidence to support the practice manager's statement that she thought that she had complied. I do not really have anything further to say on this matter. The First-tier Tribunal was entitled to find as a matter fact that she was telling the truth about this.

14. The second ground relates to whether the Regulator believed that there was no discretion at the review stage and whether the Regulator had closed its eyes to the possibility of revoking the fixed penalty notice. The Regulator refers to its letter of 28th April 2017 confirming the penalty, which included the following:

> "In your review [application] you have stated that you are the new practice manager … still learning the process regarding how to manage the new pensions [automatic enrolment]. Also that you actually thought you had already done the declaration but did not realise you had not. While the Regulator sympathises with your circumstances … It is not sufficient to mitigate [the fact] that the failure to comply with the requirements of the Compliance notice was due [to] reliance on one employee. Ultimately it is Strathmore Medical Practice responsibility to ensure that they declare in time and to make necessary checks that this has been done. It is irrelevant as to the nature or size of the business".

15. This explanation was amplified in the Regulator's written submissions to the First-tier Tribunal. The Regulator now argues that this shows that it was aware that it had the discretion to revoke the penalty notice and did not close its eyes to that possibility. I agree. The finding made by the First-tier Tribunal on this point did not accord with the undisputed evidence that was before it and was made in error of law.

16. The third ground relates to the use of the concept of reasonable excuse. The Regulator cites several cases within the automatic enrolment jurisdiction in which the First-tier Tribunal has used, or endorsed the use, of this concept in deciding whether to issue or confirm the issue of a penalty notice. I am a little puzzled here because if the First-tier Tribunal in the present case was of the opinion that the concept was of

no relevance, it was taking a harsher line on enforcement than the Regulator which had made the decision that was set aside. The legislation is permissive. The Regulator may issue a compliance notice (section 35(1)); the Regulator may issue a fixed penalty notice (section 40(1)); the Regulator may review a notice (section 43(1)). Although the legislation says nothing about reasonable excuse, it does not prevent the Regulator (or the First-tier Tribunal) from having regard to it. I do not go so far as to say that they must always have regard to it – there might well be a case where that would not be appropriate – but it is certainly proper to take reasonable excuse into account. As the Regulator has argued in this appeal "To do so is entirely consistent with fairness and justice". On this matter the criticisms of the Regulator made by the First-tier Tribunal were entirely misplaced.

17. The Regulator has also argued that there is an important public interest in enforcing compliance with employers' duties under the 2008 Act, in connection with which the penalty notice is an important tool. "The deterrent effect would be greatly diminished if the practice were to revoke [penalty notices] in all cases provided compliance is achieved at some point". I agree that the Regulator is entitled to take that approach as part of its general policy, but it must consider each individual case on its own merits.

18. For the above reasons I consider that the decision of the First-tier Tribunal was made in error of law and it is set aside. There is little point in referring this matter back to the First-tier Tribunal, where the decision would also be made by a judge sitting alone. The facts are not in dispute and there is no need to invite further evidence. I agree with the reasoning of the Regulator in its letter of 28th April 2017 confirming the penalty and I make the order set out in paragraph 1 above.

H. Levenson
Judge of the Upper Tribunal
29th March 2018