



NCN: [2023] UKFTT 774 (GRC)

Case Reference: PEN/2023/0123 & 0124

**First-tier Tribunal
General Regulatory Chamber
Pensions**

Heard: on the papers in Chambers

**Heard on: 15 September 2023
Decision given on: 20 September 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

RSAA ENTERPRISES LIMITED

Appellant

and

THE PENSIONS REGULATOR

Respondent

Decision:

The proceedings are struck out under Rule 8(2)(a) because the Tribunal does not have jurisdiction to consider them.

REASONS

1. These are appeals against a fixed penalty notice (FPN) (PEN/2023/0123) and an escalating penalty notice (EPN) (PEN/2023/0124) issued by the Pensions Regulator. The Regulator has invited the Tribunal to strike out the appeal under Rule 8(2)(a). This is on the basis that the Tribunal does not have jurisdiction because no review has been undertaken by the Regulator.

2. Under Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal “*must strike out the whole or a part of the proceedings if the Tribunal - (a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them*”.
3. Under section 43(1) of the Pensions Act 2008, the Regulator may review a fixed penalty and escalating penalty notice, “*(a) on the written application of the person to whom the notice was issued, or (b) if the Regulator otherwise considers it appropriate*”. The prescribed period for a written application for a review under section 43(1)(a) is 28 days from the date of the notice.
4. Under section 44 of the Pensions Act 2008, a person can make a reference to the Tribunal in respect of the issue or amount of a penalty notice. The conditions are that the Regulator has completed a review under section 43, or “*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*” (section 44(2)(b)).
5. I have considered the background information provided by both parties.
6. The Regulator issued the Appellant with an Unpaid Contributions Notice (UCN) on 24 October 2022, a FPN on 20 December 2022 and an EPN on 20 January 2023. The Appellant sent written review requests on 20 and 21 April 2023. The Regulator refused to conduct a review because they reached them outside the 28 day deadline.
7. The Appellant does not deny receiving correspondence from the Regulator. The Appellant’s response to the strike out application says that they attempted to resolve issues with Nest following their bank cancelling the direct debit in June 2022. They say that they contacted the Regulator to appeal against the penalty and were told they could not accept an appeal until the June payment was made. They say that the Regulator refused to accept the appeal when they responded within the time, and now they are saying that they cannot accept as it is out of time. In the appeal itself, the Appellant says they spoke to the Regulator on or around 2 March 2023, and it is very disappointing that the Regulator does not recognise their call to them in March 2023.
8. I note that the Regulator has not referred to any calls from the Appellant in March 2023. An application for a review should be made in writing under section 43(1). In addition, even if this call was made and amounted to a request for a review, this would still have been outside the 28 day time limit for both the FPN and the EPN.
9. The Regulator says that the Tribunal does not have jurisdiction because the conditions in section 44(2) of the Pensions Act 2008 are not met. The Regulator refers to the decision in ***Mosaic Community Centre Limited v Pensions Regulator*** (PEN/2015/0004) as showing that the Tribunal only has jurisdiction when a review under section 43 has been undertaken by the Regulator. The Regulator says there was no review in this case. There was also no refusal to carry out a review within the meaning of section 44(2) because no review was requested within the time limit.

10. I considered the Upper Tribunal authority in ***Philip Freeman Mobile Welders Ltd v The Pensions Regulator*** [2022] UKUT 62 (AAC). This confirms that the presumption of service is not irrebuttable, and the rebuttable presumption of service applies to the question of whether a notice has been received for the purposes of the time limits for a review. Where there is a dispute about receipt of notices which may affect the relevant time limits, the evidence should be considered by the Tribunal.
11. The Appellant has not denied receiving any of the notices from the Regulator, and has not put forward any case that would potentially rebut the presumption of service. This means there is no evidence about receipt of the notices in this case that needs to be tested at a hearing before the First-Tier Tribunal.
12. It is clear from the information provided by both parties that no request for a review of either the FPN or the EPN was made within the 28 day time limit. Even on the Appellant's case, they did not contact the Regulator until March 2023. The Regulator refused to conduct any review for this reason. This means that the conditions of Section 44 of the Pensions Act are not met. There is no issue relating to receipt of notices. The Tribunal does not have jurisdiction to consider these appeals and so they are struck out under Rule 8(2)(a).

Signed: *Judge Hazel Oliver*

Date: 19 September 2023