FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Professional Regulation

Tribunal Reference:	**PR/2015/0020**
Appellant:	**Noor Rashid (Let Belle Vue)**
Respondent:	**Darlington Borough Council**
Judge:	**Peter Lane**

Appearances:

For the appellant:	**Mr William Byrne, Counsel (Direct Access)**
For the respondent:	**Ms Helen Thomson, Solicitor, Darlington Borough Council**

DECISION

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

> "(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."

2. Section 83(2) provides that:-

> "(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."

3. 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")."

4. 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)).

5. 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. 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."

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

7. 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 Darlington Borough Council ("the Council").

8. 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 £5,000. 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).

9. 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

10. In the present case, the final notice addressed to the appellant, trading as Let Belle Vue, is dated 18 September 2015. It records that the appellant, who acted as a lettings agent and property management agent, did not belong to an approved redress scheme from 1 October 2014, when the requirement to do so began, until 5 August 2015. The notice continues by stating that, having taken into account the appellant's representations, it has been decided that "a reduced fine" should be imposed. Of the "bullet points" set out in the notice, the only one that appears to be relevant to the reduction of the penalty from £5,000 to £3,000 is that "Let Belle Vue is now registered with an approved redress scheme".

The appeal

11. The appellant appealed to the Tribunal against the final notice. A hearing of the appeal took place at Durham Combined Court Centre on 16 February 2016, when the appellant was represented by Mr Byrne of Counsel and the respondent

by Ms Thomson. The appellant chose not to give oral evidence and the hearing, accordingly, proceeded by way of submissions. In reaching my decision in this case, I have had regard to those submissions and to the materials contained in the appeal bundle, which runs to 295 pages.

12. The facts giving rise to the appeal are as follows. In August 2015 the Council received a complaint from the occupier of a property within the relevant portfolio of the appellant. The content of the complaint is immaterial. Its making, however, led the Council to contact the appellant on 5 August. In the course of a telephone conversation between the appellant and Michael Conyard of the Council, the appellant said that he was a member of the Property Ombudsman Scheme. Checks carried out later that day by the Council, however, confirmed that this was untrue. In fact, the appellant joined another redress scheme, the "Property Redress Scheme" at some stage on 5 August. The Council takes the view that the appellant did this only because he had been asked about the matter by Mr Conyard.

13. Mr Byrne told me, on instruction, that the appellant accepts that he falsely told Mr Conyard on 5 August that he was a member of the Property Ombudsman Scheme.

Discussion

14. I do not consider that the nature of the infringement in the present case can be categorised as anything other than substantial. The requirement to be a member of a scheme began in October 2014. Some ten months later, the appellant was still in breach of the law. Whilst I accept that he joined a scheme on 5 August, shortly after becoming aware that he was in breach, the appellant's lack of awareness of legal requirements impacting directly on his business is troubling. There is nothing to suggest that, had he not been contacted by the Council, the appellant would have rectified the position of his own accord.

15. I also note that the Council gave a three month "grace period" within which letting agents and property managers would not be penalised if they were then found not to be members of a scheme. Over seven months had elapsed in the case of the appellant, since the end of that grace period. There was no legal obligation on the Council to inform letting agents and property managers within its area of the legal changes. The relevant information was placed on a government website, as well as being highlighted by professional bodies.

16. In his written documentation, the appellant sought to rely upon section 13 of the Regulatory Enforcement and Sanctions Act 2008 (duty not to impose burdens etc.). However, as Ms Thomson pointed out, that section was repealed in 2012. The appellant has failed to give any explanation as to how any other provision of the 2008 Act might be said materially to assist his case.

17. Mr Byrne sought to rely upon a policy of the Council towards cases of the present kind, embodied in a document entitled "Procedure, Redress Schemes for Letting Agency Work and Property Management Works".

18. Mr Byrne focussed upon a table from this policy, highlighted in paragraph 11 of the Council's response. This sets out the following "fee structure":

£5,000	Businesses that have been served with a notice of intent and failed to join an approved scheme.
£4,000	Business[es] that have joined an approved scheme following the service of the notice of intent.
£3,000	Businesses that joined prior to enforcement action being taken, after 1 October 2014.

19. Mr Byrne said that it appeared from this that the "default" position of the Council was to impose a penalty of £5,000 and that, moreover, the policy took no account of such matters as the size and profitability of the business in question.

20. A reading of the relevant document, however, reveals the following. First, the starting point of £5,000 is derived directly from guidance from Government:

> **"Department for Communities and Local Government enforcement guidance states an expectation that £5,000 should be considered the normal penalty to be imposed for a breach of the order but does refer to the possibility of a lower sum being accepted only if the local authority is satisfied that extenuating circumstances apply".** (bundle, page 136)

21. It in this context that the table mentioned in the response document is to be read. Importantly, the policy continues as follows:

> "Any representations made about a penalty reduction will be considered on a case-by-case basis. Account may be taken of:
>
> - The size of the business committing the breach may be a factor to consider.
> - Whether the maximum fine of £5,000 fine (sic) may be disproportionate to the turnover/scale of the business.
> - May lead to the organisation going out of business.
>
> A lower fine may be charged if the enforcement authority is satisfied that there are extenuating circumstances." (bundle, page 137)

22. It seems to me, therefore, that the table relied on by Mr Byrne is primarily designed in order to guide the Council as to certain general factors, bearing upon the issue of the appropriate amount of the penalty. The policy specifically recognises that other matters, arising on a case-by-case basis, may also be relevant.

23. There was criticism at the hearing of the alleged failure of the Council to ask the appellant about the scale of his business and the effect that a penalty might have upon it. I do not consider that there is any merit in this criticism. As is plain from the appellant's response to the Notice of Intent (bundle, pages 17 to 20), the appellant was well aware of the potential significance of this matter. At page 20 we find the following:

> "The level of the fine being imposed a disproportionate for the turnover and scale of the business which will go out of business should the penalty be imposed.
>
> ....
>
> The company has limited resources and the monetary penalty will impose undue financial hardship on the company".

24. No further details, whether in the form of accounts, or otherwise, appear to have been supplied by the appellant at this stage.

25. Overall, therefore, I find that there is nothing remotely unlawful about the way in which the Council operated the relevant legislation, Government guidance and internal policy in the present case.

26. That is not, however, the end of the matter. The Tribunal's function includes reviewing all relevant evidence, whether or not existing at the time of the final notice, in order to determine whether the amount of the penalty is reasonable. In so doing, the Tribunal may take its own view of all relevant matters.

27. Mr Byrne emphasised, in oral submissions, that the heart of his client's case is that the appellant is a "very modest operator". Material from the accounts of the appellant's business has been placed before the Tribunal, for the tax years 2013 and 2014. Under the heading "Capital Account", £41,600 is shown for 2013 and £39,483 for 2014. The business showed a net loss in 2013 of £24,445 and, for 2014, a net loss of £20,560. Accounts for 2015 have not been provided.

28. No submission was made that, irrespective of the threat of a financial penalty, the scale of the appellant's losses in 2013 and 2014 is such that the appellant faces going out of business. No explanation was given to the Tribunal as to how the appellant is able to bear these losses. The fact is, however, that he is doing so. Given that the appellant has admitted misleading the Council as to whether he was a member of the Property Ombudsman Scheme, I am, in any event, not satisfied that the Tribunal has been given a complete and accurate picture of the appellant's financial position.

29. In all the circumstances, I find as a fact that it has not been shown on balance that the imposition of a penalty of £3,000 would be likely to put the appellant out of business as a letting agent and/or property manager or that the penalty would otherwise have a disproportionate effect upon the business.

30. As I have earlier indicated, I do not consider that the appellant's breach of the law can be categorised as anything other than substantial and serious. In all the circumstances, the only relevant mitigating factor was that the appellant, having falsely claimed to a member of the Property Ombudsman Scheme on 5 August 2015, joined a redress scheme later that day. I consider that this mitigating factor is properly recognised in the proposed penalty of £3,000, as opposed to £5,000. No further reduction is appropriate, having regard to article 9(2) of the Order

Decision

This appeal is dismissed.

Judge Peter Lane

Chamber President

Date: 1 April 2016