IN THE UPPER TRIBUNAL **UT ref: UA-2020-001241**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (General Regulatory Chamber)

Between:

Philip Freeman Mobile Welders Limited

Appellant

- v –

The Pensions Regulator

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 3 March 2022

Decided after an oral hearing on 5 November 2021

Representation: Denise Freeman, director of Philip Freeman Mobile Welders Limited, for the appellant
Sam Thomas of counsel for the respondent

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 2 October 2019 under case numbers PEN/2019/0283 and PEN/2019/0284 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal.

REASONS FOR DECISION

1. I apologise to the parties for the time it has taken me to make my decision on this appeal. This was caused, albeit only in part, by a period of ill-health on my part.

2. The appeal is made by Philip Freeman Welders Limited against a decision of the First-tier Tribunal dated 2 October 2019 ("the tribunal") in which it upheld the Registrar's decision of 2 August 2019 to strike out the appellant's reference to the First-tier Tribunal on the basis that the First-tier Tribunal did not have jurisdiction to

consider the reference. In so doing, the tribunal, and its Registrar beforehand, acceded to the Pension Regulator's application to strike out the reference.

3. The essential background to the tribunal's decision concerns two challenges the appellant is seeking to make. The first is against an Escalating Penalty Notice, which the respondent says was issued to the appellant on 8 September 2017. This notice imposed an escalating penalty of £500 per day on the appellant from 6 October 2017. The second challenge concerns a fixed penalty notice of £400 which the respondent says was imposed by a notice issued to the appellant on 10 August 2017.

4. The basis of the appellant's attempt to challenge both of these notices is its claim that it never received them, or indeed any correspondence from the respondent between 18 December 2015 and 5 June 2019. The appellant asked for proof that the notices were in fact sent to it by the respondent.

5. The appellant sent a "Declaration of Compliance" to the respondent on 28 May 2019. The effect of this was to cease any additional sums becoming due under the escalating penalty notice. The total penalty sum due to be paid by the appellant to the respondent under the notices amounts to £14,481.16.

6. On 30 May 2019 the appellant asked the respondent to review the penalty notices. The tribunal found that this review request was made later than the 28 day time limit laid down in section 43(1)(a) of the Pensions Act 2008. The tribunal therefore concluded that it could not be a valid review application. The tribunal further held that the respondent had informed the appellant, on 5 June 2019, that it had decided not to review the penalty notices of its own initiative under section 43(1)(b) of the Pensions Act 2008.

7. On the basis of the above, the tribunal decided that it did not have jurisdiction to consider the reference the appellant was seeking to make to it in respect of the two penalty notices because no request for review was made within the time limit and no section 43 review had in fact taken place. The tribunal stated that it only had power to consider a reference following a request for review under section 43 of the Pensions Act 2008 which was made within the time limit or, if the request was made outside the time limit, when the Pensions Regulator has reviewed the penalty notices of its own volition. Neither circumstance applied in this case. Accordingly, the reference was struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules").

8. Section 1 of the Pensions Act 2008 ("the Act") establishes the Pensions Regulator as a body corporate. The objectives of the Pensions Regulator are set out in section 5 of the Act and are, broadly speaking, to protect the benefits under occupational and personal pensions schemes, to maximise compliance with duties under the Act and to promote and improve understanding of the good administration of 'work-based pension schemes'. Those duties include the automatic enrolment of employees by employers in a work-place pension scheme: per section 3 of the Act.

9. Section 11 of the Act enables the Secretary of State to make regulations requiring employers to provide the Pensions Regulator with information about action they have taken or intend to take for the purposes of, inter alia, the setting up or maintenance of a work-place pension scheme. A necessary first stage of this can be the employer providing its name and address to the Pensions Regulator.

10. To ensure 'maximum compliance' with an employer's duties under the Act, the Pensions Regulator has three types of notice it may issue under the Act. The first of these is a "compliance notice" under section 35 of the Act. Section 35 provides, so far as is material, as follows:

> "35.-(1)The Regulator may issue a compliance notice to a person if the Regulator is of the opinion that the person has contravened one or more of the employer duty provisions.
>
> (2) A compliance notice is a notice directing the person to whom it is issued to take, or refrain from taking, the steps specified in the notice in order to remedy the contravention.
>
> (3) A compliance notice may, in particular-
>
> (a) state the period within which any step must be taken or must cease to be taken;
>
> (b) require the person to whom it is issued to provide within a specified period specified information relating to the contravention;
>
> (c) require the person to inform the Regulator, within a specified period, how the person has complied or is complying with the notice;
>
> (d) state that, if the person fails to comply with the requirements of the notice, the Regulator may issue a fixed penalty notice under section 40."

11. Pausing at this point, the Pensions Regulator's case is that a compliance notice was issued by post (I will return to email correspondence later) to the address it had been given by the appellant - at 7 Bertram Street, Hamilton - on 28 June 2017. A copy of that letter appears in the First-tier Tribunal's file. Prior to this, the Pensions Regulator had sent a letter in January 2017 to the appellant at the same address stating that the company needed to complete its declaration of compliance by 31 May 2017. In the relevant jargon, that date was within five months of the 'staging date' of 1 January 2017. The 28 June 2017 letter stated that the Pensions Regulator was of the opinion that the appellant had "failed to comply with regulations requiring employers to tell us how they have met their automatic enrolment duties". Providing this information is known as the "declaration of compliance". The 28 June letter said that the Pensions Regulator had no record of the appellant having completed its declaration of compliance by 31 May 2017. It gave the appellant until 8 August 2017 to do so. If the appellant did not meet that further deadline, the 28 June letter stated that the Pensions Regulator may issue the appellant with a £400 penalty and it if continued not to comply an escalating penalty, accruing at a daily rate of £50 to

£10,000, may be imposed. The compliance notice of 28 June 2017 concluded by stating that if the appellant objected to the notice it could apply for a review within 28 days of the notice being issued.

12. Section 40 of the Act provides for a fixed penalty notice to be issued if an employer fails to comply with a compliance notice. It provides, insofar as is relevant, as follows:

> "40.-(1) The Regulator may issue a fixed penalty notice to a person if it is of the opinion that the person has failed to comply with—
> (a) a compliance notice under section 35…
> (3) A fixed penalty notice is a notice requiring the person to whom it is issued to pay a penalty within the period specified in the notice.
> (4) The penalty—
> (a) is to be determined in accordance with regulations, and
> (b) must not exceed £50,000.
> (5) A fixed penalty notice must—
> (a) state the amount of the penalty;
> (b) state the date, which must be at least 4 weeks after the date on which the notice is issued, by which the penalty must be paid;
> (c) state the period to which the penalty relates;
> (d) if the notice is issued under subsection (1), specify the failure to which the notice relates…….
> (f) if the notice is issued under subsection (1), state that, if the failure to comply continues, the Regulator may issue an escalating penalty notice under section 41;
> (g) notify the person to whom the notice is issued of the review process under section 43 and the right of referral to a tribunal under section 44."

13. The First-tier Tribunal also had before it a fixed penalty notice which had on it the same (correct) address for the appellant employer. The Pensions Regulator said that it had been issued by it to the appellant at that address. This fixed penalty notice is dated 10 August 2017. It imposed a fixed penalty of £400 on the appellant and gave a further date for compliance of 6 September 2017. This notice stated that if the appellant failed to comply by 6 September 2017, the Pensions Regulator may issue it with an escalating penalty notice under section 41 of the Pensions Act 2008. The escalating penalty would accrue at a daily rate between £50 and £10,000. The notice concluded by stating that if the appellant objected to the fixed penalty it could seek a review within 28 days of the fixed penalty notice being issued, and if the appellant did not agree with the review decision, it could 'appeal' to "the Tribunal".

14. The escalating penalty notice is provided for in section 41 of the Pensions Act 2008. I need not set out the terms of that section here. The Pensions Regulator put before the First-tier Tribunal an escalating penalty notice with the same (correct) address for the appellant, dated 8 September 2017. It was the respondent's case that this notice was issued by it to the appellant at the address shown on it. The escalating penalty notice stated that the appellant had failed by 8 August 2017 to comply with the compliance notice issued to it on 28 June 2017 and the escalating

penalty notice was being issued due to that failure to comply. A further date for compliance was given of 5 October 2017. If that date was not met, a penalty would accrue at a daily rate of £400. Again, this notice set out that a review could be sought within 28 days of the notice being issued and an 'appeal' made against an adverse review decision.

15. Before turning to the review and the reference to the First-tier Tribunal provisions in the Act, the Pensions Regulator drew my attention to section 303 of the Pensions Act 2004. This provides relevantly as follows:

> "303.-(1) This section applies where provision made (in whatever terms) by or under this Act authorises or requires–
>
> (a) a notification to be given to a person, or
>
> (b) a document of any other description (including a copy of a document) to be sent to a person.
>
> (2) The notification or document may be given to the person in question–
>
> (a) by delivering it to him,
>
> (b) by leaving it at his proper address, or
>
> (c) by sending it by post to him at that address.
>
> (3)The notification or document may be given or sent to a body corporate by being given or sent to the secretary or clerk of that body.
>
> (4) The notification or document may be given or sent to a firm by being given or sent to—
>
> (a) a partner in the firm, or
>
> (b) a person having the control or management of the partnership business.
>
> (5) The notification or document may be given or sent to an unincorporated body or association by being given or sent to a member of the governing body of the body or association.
>
> (6) For the purposes of this section and section 7 of the Interpretation Act 1978 (c. 30) (service of documents by post) in its application to this section, the proper address of a person is—
>
> (a) in the case of a body corporate, the address of the registered or principal office of the body,
>
> (b) in the case of a firm, or an unincorporated body or association, the address of the principal office of the firm, body or association,
>
> (c) in the case of any person to whom the notification or other document is given or sent in reliance on any of subsections (3) to (5), the proper address of the body corporate, firm or (as the case may be) other body or association in question, and
>
> (d) in any other case, the last known address of the person in question."

16. This section applies to notices issued under the Pensions Act 2008: see section 144A of the Pensions Act 2008. The effect of this and section 303(1) and (2) of the Pensions Act 2004, counsel for the Pensions Regulator argued before me at the hearing, is that the Pensions Act 2008 does <u>not</u> empower the Pensions Regulator to

issue an employer with any of the above three notices (under sections 35, 40 and 41 of the Act) *by email*, unless consent has been provided by the employer for email notification, but no such consent had been given by the appellant in this case: per 304(5) of the Pensions Act 2004, which likewise would seem to apply to the Pensions Act 2008 under section 144A of Pensions Act 2008. Th notices in this case had to be by hand or by post.

17. Review of notices and references (not appeal) to the First-tier Tribunal are dealt with in sections 43 and 44 of the Act respectively. Section 43 of the Act provides as follows:

> "43.-(1) The Regulator may review a notice to which this section applies—
> (a) on the written application of the person to whom the notice was issued, or
> (b) if the Regulator otherwise considers it appropriate.
> (2) This section applies to—
> (a) a compliance notice issued under section 35;…
> (d) a fixed penalty notice issued under section 40;
> (e) an escalating penalty notice issued under section 41.
> (3) Regulations may prescribe the period within which—
> (a) an application to review a notice may be made under subsection (1)(a);
> (b) a notice may be reviewed under subsection (1)(b).
> (4) On a review of a notice, the effect of the notice is suspended for the period beginning when the Regulator determines to carry out the review and ending when the review is completed.
> (5) In carrying out a review, the Regulator must consider any representations made by the person to whom the notice was issued.
> (6) The Regulator's powers on a review include power to—
> (a) confirm, vary or revoke the notice;
> (b) substitute a different notice."

18. The regulation made under section 43(3) of the Act is regulation 15 of the Employers' Duties (Registration and Compliance) Regulations 2010 ("the Employers' Duties Regs"). This sets out the following time frame for seeking a review.

> "**15.**—(1) The period within which an application to review a notice may be made under section 43(1)(a) of the Act (written application of a person) is 28 days, starting from the day a notice is issued to a person.
>
> (2) The period within which a notice may be reviewed under section 43(1)(b) of the Act (review by the Regulator) is 18 months, starting from the day a notice is issued to a person.
>
> (3) The presumptions in paragraph (4) apply where notices to which section 43 applies are issued (including compliance notices issued under section 51 of the Act and penalty notices issued under section 52 of the Act).
>
> (4) For the purposes of this regulation, it is presumed that—
>
> (a) where a notice is given a date by the Regulator, it was posted or otherwise sent on that day;

> (b) if a notice is posted or otherwise sent to a person's last known or notified address, it was issued on the day on which that notice was posted or otherwise sent; and
>
> (c) a notice was received by the person to whom it was addressed."

19. Section 44 of the Act then sets out the reference to the First-tier Tribunal provisions. These are:

> "44.-(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 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 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.
>
> (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 Procedure Rules that the Upper Tribunal is to hear the reference;
>
> (b) the First-tier Tribunal, in any other case."

20. The appellant has permission to appeal against the First-tier Tribunal's decision on three grounds identified by Upper Tribunal Judge Markus QC in a grant of permission to appeal dated 16 March 2020.

21. The **first** ground is that in assuming, or deciding, that the notices were sent to the appellant company at the correct address, the tribunal may have erred in law in not having had regard to relevant evidence in the form of the appellant's expert

evidence that none of the notices had been sent by, or received from, the Pensions Regulator by email. Although, for the reasons indicated in paragraph 16 above, no valid notice could be issued by the Pensions Regulator by email, the appellant's expert evidence that the Pensions Regulator's emails had not been sent or received, had it been considered, may have influenced the tribunal's view about whether the letters containing the notices had in fact been sent. Moreover, no evidence was provided to show the notice letters had been posted and the tribunal may have failed to weigh in this regard the appellant's vehement evidence, through Miss Freeman, that it would not have allowed such a large penalty to accrue if the appellant company had received the notices. If the notices had not been sent to the appellant then it was arguable that time did not begin to run for the review to be conducted.

22. The **second** ground of appeal is that even if the tribunal was correct that each of the three notices had in fact been sent, its conclusion that it had no jurisdiction may have been flawed as it was based on a wrong view that regulation 15 of the Employers' Duties (Registration and Compliance) Regulations 2010 creates an irrebuttable presumption that a notice which is sent is then received. In upholding the Registrar's strike out decision the tribunal did not demur from the Registrar's reliance on the First-tier Tribunal's decision in *Mosaic Community Care Limited v The Pensions Regulator* PEN/2015/0004 and the view of the First-tier Tribunal in that case that regulation 15(4) of the Employers' Duties Regs creates an irrebuttable presumption that a notice properly issued to an employer is received by it. Judge Markus pointed out that the conclusion in *Mosaic* that regulation 15(4) sets out an irrebuttable presumption was not reasoned. She further suggested that the Upper Tribunal should be wary of construing a regulation in a way that might involve substantial injustice. Further, where the effect of such a presumption deprives the employer of an effective opportunity to dispute the penalty, Article 6 of the European Convention on Human Rights might require regulation 15(4) to be read as if it only contained a rebuttable presumption.

23. The **third** ground of appeal is that the tribunal may have erred in law in concluding that the Pensions Regulator had not "completed a review" under section 43(1)(b) of the Act. This ground turns on what Pensions Regulator's letter of 5 June 2019, made on the appellant's review request, evidences it had decided on the request.

24. I take the third ground of appeal first. In my judgment there was no error of law in the tribunal concluding that the Pensions Regulator had not "completed a review" and that therefore section 43(1)(b) of the Act did not apply. In other words, the tribunal did not err in law in concluding that the Pensions Regulator had not 'considered it appropriate' to review any of the two relevant notices referred to above.

25. I leave to one side that by the time the appellant sought a review, on 30 May 2019, more than 18 months had passed since the 10 August 2017 date of the escalating penalty notice, and thus that request could not have been considered by the Pensions Regulator as a review in any event under section 43(1)(b) given the terms of regulation 15(2) of the Employers' Duties Regs, as this point takes one back to grounds one and two and whether the notices were issued/received.

26. My reason for finding no error of law under his ground is that the Pension Regulator's reply letter to the appellant's request for a review makes it clear, in my judgement, that it had not conducted a review. The letter is dated 5 June 2019 and was before the tribunal when it made its strike out decision. The letter appears to proceed on an arguably wrong basis that the 18 month time limit in regulation 15(2) either had not passed or could be extended. However, nothing turns on this as, even if the Pensions Regulator was right about this in this letter, nothing in section 43(1)(b) of the Act compelled it to carry out a review even if the review request was made within the 18 month time period. The letter says, most materially, the following:

> "We have considered all of the matters you have raised in your review application and have determined not to carry out a review for the following reason[.]
>
> Your application reached us 28 day[s] after the deadline set by law. This means we cannot accept your application, but we could carry out a review on our own initiative if we consider it appropriate. We have decided it would not be appropriate to carry out a review because the information available to us does not indicate that the notices need to be revoked, varied or substituted….
>
> We realise you will not welcome our decision not to conduct a review…." (my underlining added for emphasis)

27. Two points arise from this letter which in my view stand against it showing that a review had been conducted. First, the language I have underlined in the letter. It uses the language of section 43(1)(b), 'not appropriate to carry out a review', and it is only if a review has been carried out or conducted that it may be "completed" (per section 44(2)(a) of the Act). Second, nothing in the letter or any of the surrounding circumstances indicates that the Pensions Regulator had taken any of the steps open to it under section 43(6) of the Act on completing a review, nor is there anything showing that the notices had been suspended (per section 43(4) of the Act) whilst a review was being carried out. The tribunal therefore did not err in law under this ground.

28. The first and second grounds of appeal are related to one another, although they are conceptually distinct stages in a notice being made effective. Arguments about whether a notice was in fact issued by post affects whether the presumption about service or receipt applies in the first place, and arguments based on lack of receipt of a notice may also shade into whether it was issued. However, for the purposes of analysis it is important to keep the two stages separate from one another.

29. A general concern I have about the tribunal's approach, which affects both stages in the analysis (and thus both the first and second grounds of appeal), is that it was carried out in a strike out jurisdiction under rule 8 of the GRC Rules where the appellant could not require that the factual case that it may have wished to put forward could be made at an oral hearing: see rule 32(1) and (3) of the GRC Rules. The appellant's case is essentially a factual one: either the notices were not issued to it or, if they were, they were not received. And the jurisdiction of the tribunal under

section 44 of the Ac likewise turned on resolving those issues. The Upper Tribunal has set out its concern in a number of decisions that the strike out jurisdiction is not usually appropriate where facts relevant to the outcome of the dispute are contested: see, for example, *AW v Information Commissioner and Blackpool City Council* [2013] UKUT 30 (AAC). Although the decision in *AW* arose in the context of striking out on the basis that the appeal had "no reasonable prospects of success", for which the equivalent rule in the GRC Rules is rule 8(3)(c), the same considerations apply in my judgement where contested issues of fact go to whether the First-tier Tribunal has jurisdiction.

30. A main part of the Pensions Regulator's opposition to this appeal, and its corresponding defence of the tribunal's strike out decision, is that the appellant's case simply could not have succeeded, and still cannot succeed, on the evidence. To that end it has filed before the Upper Tribunal on this appeal written submissions and a detailed witness statement. The witness statement – of Cathy Doherty from Capita – and its enclosures sets out evidence about how notices generally are issued on behalf of the Pensions Regulator by post and how emails are also issued. However, Ms Doherty's evidence also specifically addresses the evidence showing, she claims, when and how the relevant notices were issued by post to the appellant (see paragraphs 19-21 of her witness statement). Her witness evidence also deals with the emails said to have been issued to the appellant and telephone calls made to the appellant. Moreover, paragraphs 65-67 of the Pensions Regulator's written submission on this appeal to the Upper Tribunal, dated 11 May 2020, set out a reasoned basis for why the appellant's expert evidence that no emails were issued to the appellant by the respondent may have been based on a factual misconception.

31. All of this evidence appears cogent and may be persuasive. However, it was not before the tribunal when it made its strike out decision. Nor am I satisfied that Miss Freeman, who is not a lawyer or legally qualified, really grasped the significance of this evidence at the time of the hearing before me. This may have been, at least in part, because the Pensions Regulator's submission and witness evidence may not have been issued to the appellant in May 2020 (this was near the start of the Covid-19 pandemic and changes in working practices in the UTAAC's office may have meant this submission and evidence was missed at the time). The submission and witness evidence may therefore only have been issued to the appellant on 28 October 2021, just over a week prior to the hearing before me. There has therefore never been a properly argued out contest on these key factual issues before the First-tier Tribunal.

32. It is in this context that I turn to the first ground of appeal. Whilst I appreciate the force of the Pensions Regulator's evidential case that it now makes showing, it argues, that the relevant notices were issued to the appellant at the correct address for the appellant, I consider the tribunal did err in law in failing to address the evidence the appellant had put before it which the appellant argued, and still argues, went to whether the notices were in fact <u>issued</u> to it. I would accept that, for the reasons given in paragraph 16 above, the appellant may have become somewhat side-tracked in concentrating on whether the emails had been issued to it (or received by it). The key issue, at least under this first ground of appeal, is whether

the notices were issued to the appellant by post. However, the appellant's expert evidence about the emails not having been received, in circumstances where the Pensions Regulator's case was that they had been issued, remained relevant, in my judgement, to whether the notices had been issued by post as well: that is, whether the Pensions Regulator could properly establish on the evidence that the notices had been issued by post. Allied to this is Miss Freeman's consistent and forceful evidence that she would not have allowed such a large debt to build up had the notices been received and, therefore, had they been issued. The force and coherence of Miss Freeman's evidence in this regard was also relevant to whether the notices had in fact been issued to the appellant by post. Miss Freeman may have been mistaken in her evidence and in her recollection, and the evidence now provided from the Pensions Regulator *may* be persuasive on this, but her evidence needed to be taken into account, weighed and evaluated by the tribunal, which is the key fact-finding tribunal.

33. The appellant's evidence, both in terms of the emails and Miss Freeman's evidence, needed to be addressed by the tribunal in order for it to properly and fairly decide whether it had jurisdiction, and its failure to do so amounted to an error of law. That evidence still needs to be addressed, weighed and evaluated by the First-tier Tribunal, against the evidence now put forward by the Pensions Regulator. It may be that the result of that exercise will be that the new First-tier Tribunal is satisfied that the relevant notices were issued but that will depend on its evaluation of the competing evidential cases of the parties. Such a result is not necessarily inevitable and does not provide an answer to the fact that the appellant evidential case was not properly considered by the tribunal when it struck out the reference.

34. I should add under this first ground of appeal that the question of whether the relevant notices were issued by post to the appellant does not depend on any legal presumption about receipt. Such a presumption (or presumptions) is relevant only to the second ground of appeal. Sections 35(1), 40(1), 41(1), 43(1)(a) and 44(1) of the Act all expressly depend on the notice having been issued as a matter of fact. If the First-tier Tribunal was to be satisfied on the evidence that the relevant notices were not in fact issued on the dates contended by the Pensions Regulator, or until a later date, that would affect whether the review request was made in-time under section 43(1)(a) and (b) of the Act. That in turn would affect whether the First-tier Tribunal would have jurisdiction under section 44(2)(b) of the Act or whether the completion of an in-time view request may need to be awaited before section 44(2)(a) of the Act could apply.

35. Turing then to the second ground of appeal, I am satisfied that the tribunal also erred materially in law by following *Mosaic* and considering that regulation 15(4) of the Employers' Duties Regs imposed an irrebuttable presumption that the notices had been received by the appellant. Mr Thomas, as I understood his argument, in the end did not contend for such a presumption on behalf of the Pensions Regulator. Nor, save for *Mosaic*, have I been able to identify any First-tier Tribunal decision that proceeds on the basis that regulation 15(4) creates an irrebuttable presumption. First-tier Tribunal decisions do not, of course, create any precedent as to the law. However, it is instructive that in *Ahmads 786 First Ltd v The Pensions Regulator*

PEN/2019/0218P and *Foggo v The Pensions Regulator* PEN/2021/0282 Judges McKenna and Oliver separately decided the references before them on the basis that the presumption(s) in regulation 15(4) are capable of being rebutted (see paragraph 28 of *Ahmads* and paragraph 22 of *Foggo*). It is further instructive to note that in both of these cases the Pensions Regulator accepted this reading of regulation 15(4) (see, for example, paragraph 16 of *Foggo*).

36. Notwithstanding the stance initially taken to the contrary by the Pensions Regulator on this appeal, where the statutory regulator proceeds on the basis that the scheme can operate effectively and lawfully by the presumption(s) in regulation 15(4) being capable of rebuttal, I consider I should be slow to decide to the contrary save where the statutory language points clearly against such a result. I also bear in mind here Judge Markus', to my mind cogent, observations about the substantial injustice that could arise if, as *Mosaic* and the tribunal in this case held, the presumption of receipt in regulation 15(4) cannot be rebutted.

37. It appears that the First-tier Tribunal in *Mosaic* concluded that regulation 15(4) creates an irrebuttable presumptions simply because, unlike section 7 of the Interpretation Act 1978, it does not contain a phrase such as "unless the contrary is proved". I am not persuaded that this analysis is sound.

38. On the face of section 303(6) of the Pensions Act 2004 (see paragraph 15 above), the Interpretation Act 1978 is intended to apply to the service of notices under section 303 of the Pensions Act 2004 and therefore, per section 144A of the Act, to the notices under sections 35, 40 and 41 of the Act. At first sight that would seem to include the same notices to which section 43 (and section 44) of the Act refers and the regulations made under section 43(3) of the Act. As far as I can see, *Mosaic* and the Pension Regulator's written arguments on this appeal relying on *Mosaic*, failed to take account of the effect of section 303(6) of the Pensions Act 2004. The effect of section 303(6) of the Pensions Act 2004 may be a powerful indicator against regulation 15(4) being construed as creating an irrebuttable presumption that a document which is issued is received. However, to fully work this through and to see if this is the case, consideration needs to be given to section 7 of the Interpretation Act 1978.

39. Section 7 of the Interpretation Act 1978 provides as follows.

> "**References to service by post.**
>
> 7.-Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." (my underlining added for emphasis)

40. It is important to realise that this section contains two 'unless' provisions. The first concerns whether a contrary intention appears that the remaining part of section

7 (which is concerned with deemed service or receipt if a document is properly posted) should apply. If that (first) contrary intention does apply then the rest of section 7 of the Interpretation Act 1978 does not apply, including proving by way of evidence that the deemed service it provides for is not made out.

41. On the face of section 303 of the Pensions Act 2004 and sections 35, 40, 41 of the Act, there is no "contrary intention" to remove the rebuttable deemed service (or receipt) effect of the rest of section 7 of the Interpretation Act 1978 from applying to the notices issued under section 35, 40 and 41 of the Act. Thus, taking those sections on their own, it was open to the appellant to argue by way of evidence that the 'contrary was proven' and that it should not be deemed to have received the compliance, penalty and escalating penalty notices under sections 35, 40 and 41 of the Act. And if that is correct then it would have proven that the notices were not received, notwithstanding the Pensions Regulator having shown under section 7 of the Interpretation Act 1978 that it had properly addressed, pre-paid and posted the notices to the appellant. That is the whole point of the second "unless" in section 7: an addressee can still prove by way of evidence that the notices were not received.

42. However, if this is correct, and I consider it is, it would in my judgement be a very odd disjunction if this proven fact, assuming it to be proven for the sake of this legal analysis, could not then apply to the time limits laid down under the regulation made under section 43(3) of the Act. The disjunction becomes all the more strained, to the point of being legally unsustainable in my judgement, when it is considered that section 43(1) of the Act only applies, see section 43(2) of the Act, to notices issued under sections 35, 40 and 41 of the Act. Even assuming that they were issued, the addressee has proven on the above analysis that they were not received. I cannot see any logical or rational basis for it being contended that the addressee ought nonetheless to be treated as having received those notices for the purposes of times limits for challenging the notices they have otherwise proven they did not receive. That would be a statutory nonsense.

43. Nor do I consider that anything in section 43(3) of the Act provides the necessary "contrary intention" under section 7 of the Interpretation Act 1978 so as to make the presumption of receipt of an issued notice irrebuttable under sections 35, 40 and 41, or even just section 43, of the Act. Section 43(3) is simply about prescribing the period within which a notice that has been issued under other sections of the Act may be reviewed. It is to that extent subservient to, or at least dependent on, a notice having been issued under the Act, and it says nothing ousting the provisions of the section 7 of Interpretation Act for the purposes of section 43 or any other section in the Act.

44. Moreover, even if regulation 15(4) of the Employers' Duties Regs construed in isolation from the Act might be suggestive of an irrebuttable presumption as to receipt, as *Mosaic* decided, it has it be construed consistently with Act. It is an axiomatic principle of statutory construction that the starting point for construing Parliament's intention is the primary legislation itself: see paragraph [41] of *R(CJ) and SG v Secretary of State for Work and Pensions* (ESA): [2017] UKUT 324 (AAC) ; [2018] AACR 5 and the cases cited therein. For the reasons given above, the Act

does not evidence any intention that the rebuttable 'deemed receipt' provisions of section 7 of the Interpretation Act 1978 are not to apply to it or the notices issued under the Act. In fact the converse is the case as the effect of section 144A of the Act is to apply the Interpretation Act 1978 to the Act.

45. Accordingly, where regulation 15(3) and (4) of the Employers' Duties Regs refer to "presumptions" and "it is presumed that", these must be read, so as to maintain consistency with the Act, as being presumptions that are capable of being rebutted on the basis of contrary evidence. I should add that, although it does not matter for the purposes of this case, at least at this stage, the terms of regulation 15(4) are not free from difficulty. Regulation 15(4)(a) deems that the date on the notice is to be treated as the date it was sent or posted, but it says nothing about deeming to where it was posted. The deeming of "to where it was posted" is then seemingly dealt with in regulation 15(4)(c) with regulation 15(4)(b) attempting to deal with it only needing to be posted to the person's last known (or notified) address. However, regulation 15(4)(b) only applies "*if*" the notice is posted to the last known or notified address. That conditional language, with its admission of evidence about whether and to where the notice was posted, itself stands contrary to construing the presumptions in regulation 15(4) as being irrebuttable.

46. *Mosaic* was therefore wrongly decided on this point and the tribunal erred in law in following it and therefore closing out from its consideration any arguments or evidence the appellant's put forward about whether the notices had been received.

47. I appreciate that the Pensions Regulator's argument before me did not, in the end, seek to argue for any irrebuttable presumption and founded primarily on an argument that the appellant's case, seeking to rebut any presumption under section 7 of the Interpretation Act 1978 and regulation 15(4) of the Employers' Duties Regs, was based on no more than a 'bare denial'. Although Mr Thomas did not take me to this case, he may have had in mind in this regard paragraphs [82]-[86] of *London Borough of Southwark v Akhtar* [2017] UKUT 150 (LC).

48. However, the difficulty with this argument, in my view, is that the appellant's case was more than a bare denial *and* it was having to be made in a strike out context where it had no right to an oral hearing in which it could set out and explain the basis for its rebuttal. To an extent, the appellant's evidence about whether the emails (and notices) had been issued is also relevant here in that its case was (and may still be) that the Pensions Regulator's systems may not be faultless and so the notices may not have been received because, even if they were correctly addressed, they were not properly posted. However, the appellant had also sought to put forward evidence about alleged postal difficulties at their address. None of this evidence was addressed by the tribunal in its strike out decision because it (wrongly) considered it should not have regard to it given it (wrongly) followed *Mosaic*.

49. I note that the Pensions Regulator argues on this appeal to the Upper Tribunal that the above evidence of the appellant about non-receipt of the notices is thin and not persuasive when placed against the number of notices which were issued to the

appellant. There may well be considerable force in that argument. However, the evidence has not been tested before the First-tier Tribunal and, just as the Pensions Regulator has done on this appeal, the appellant may wish to add to or refine its evidence on this issue.

50. For the reasons given above, the appeal succeeds. The matter is remitted to be re-decided afresh by a differently constituted First-tier Tribunal (General Regulatory Chamber). It will be a matter for the new First-tier Tribunal to determine whether it is fair and appropriate for the matter to be decide without a hearing.

51. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether it will succeed on the evidence before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence. I should emphasise, just in case this is not already obvious, that the Pensions Regulator's case against the appellant, both in terms of the notices being issued and their receipt, is now much more detailed, as set out in the Pensions Regulator's written submission of 11 May 2020 and in Ms Doherty's witness statement of 7 May 2020.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 3 March 2022