

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under sections 10, 49 and 88 of the Pensions Act 1995 EC2 Master Ltd (the Trustee) in relation to Autoenrolment.co.uk</p>	<p>The Pensions Regulator case ref: AE/17/04056</p>
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1. The Determinations Panel (the “**Panel**”) of the Pensions Regulator (the “**Regulator**”) met on 13 April 2018 to consider the issues in a Warning Notice dated 3 January 2018 addressed to EC2 Master Ltd (the “**Trustee**”), the trustee of Autoenrolment.co.uk (the “**Scheme**”). The Warning Notice was referred to the Panel on 14 March 2018, following a period for representations.

Matters to be determined

2. The Warning Notice asked the Panel to determine whether to issue a penalty under section 10 of the Pensions Act 1995 (“**PA 95**”) for the Trustee’s failure to comply with its duty to report material payment failures both to the Regulator and to Scheme members within the required periods.
3. The power to issue a penalty under section 10 is a reserved regulatory function and is, therefore, only exercisable by the Panel.

The Decision

4. The Panel determined to issue a penalty notice in the amount of £15,000 to the Trustee. The Panel concluded that a penalty was appropriate as the Trustee had failed to take all reasonable steps to secure compliance with one or both of its statutory duties under sections 49(9) and 88(1) PA 95. The Panel determined that a penalty in the amount of £15,000 was appropriate in the circumstances, given the seriousness of the breaches and the need to deter further breaches of this sort by the Trustee and others.

Next Steps

5. The penalty notice will not be issued until at least 28 days after the date of this determination in case a reference (or challenge) is made to the Upper Tribunal.
6. The penalty is payable 28 days from the date of the penalty notice (in accordance with Regulation 21 of SI 1997/794).
7. This Notice gives the Panel’s reasons for its determination.

Directly Affected Parties

8. The Panel considered the Trustee and Smart Pension Limited (“**Smart**”) to be the only parties directly affected by its determination.

The Scheme

9. The Scheme is a defined contribution master trust, established on 15 January 2015. As at 8 September 2017, the membership of the Scheme was 261,677, comprising employees from 54,453 employers.
10. The Trustee is the sole trustee of the Scheme.

The statutory requirements

11. The relevant legal background is as follows.
12. Section 49 PA 95 provides:

“(8) Where on making a payment of any earnings in respect of any employment there is deducted any amount corresponding to any contribution payable on behalf of an active member of an occupational pension scheme, the amount deducted is to be paid, within a prescribed period, to the trustees or managers of the scheme.

...

(9) If in any case there is a failure to comply with subsection (8)—

(a) section 10 applies to the employer; and

(b) if the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority of any of their functions, they must, except in prescribed circumstances, give notice of the failure to the Authority and the member within a reasonable period after the end of the prescribed period under subsection (8).

(10) If in any case subsection (9)(b) is not complied with—

(b) section 10 applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.”

13. Section 88 PA 95 provides:

“(1) Where, in the case of an occupational pension scheme to which section 87 applies—

(a) there is a failure to pay on or before the due date any amounts payable in accordance with the payment schedule, and

(b) the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority of any of their functions, they must, except in prescribed circumstances, give notice of the failure to the Authority and to the members of the scheme within a reasonable period after the due date.

...

*(4) If, in the case of an occupational pension scheme to which section 87 applies, subsection (1) is not complied with—
(b) section 10 applies to any trustee or manager who has failed to take all such steps.”*

14. The Panel found that, although the tests are similar, the wording is slightly different so there could be circumstances in which there was a breach of section 88 but not section 49. In particular, the Panel noted that under section 88 there is a requirement to take “*all such steps*”, whereas in section 49 the requirement is to take “*all reasonable steps*”.

15. However, the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (the “**1996 Regulations**”) provide at regulation 21 that:

“(4) Where, under section 49(9)(b) of the 1995 Act (other responsibilities of trustees, employers, etc), there is a requirement on the trustees or managers to give notice within a reasonable time of a failure to pay within a reasonable period an amount corresponding to any contribution payable on behalf of an active member which has been deducted from the member's earnings, the trustees or managers shall not be required to give notice of a failure to pay such amount by the due date for the purposes of subsection (1) of section 88 of that Act, in a case to which that subsection would otherwise apply.”

16. Therefore, the Panel’s view was that, where the obligation on the Trustee arose under section 49(9)(b), there would not be a requirement for the Trustee to take steps under section 88(1).

17. As to what the prescribed time is for the purposes of these sections, regulation 16 of the 1996 Regulations provides that the amount to be paid to the trustee must be paid within 22 days where paid by electronic communication, or otherwise it must be paid within 19 days, commencing on the day following the last day of the month in which the amount is deducted from the earnings in question.

18. By sections 90(2)(g) and (i) of the Pensions Act 2004 (“**PA 04**”), the Regulator is required to produce a Code of Practice relating to the discharge of the duties of trustees under section 49(9)(b) and section 88(1) PA 95. The relevant code is Code of Practice No.5, “*Reporting late payment of contributions to occupational pension schemes*” (the “**Code**”). By section 90(5) PA 04, a code of practice issued under section 90 is admissible in evidence in any legal proceedings and, if any provision of such a code appears to the court or tribunal concerned to be relevant to any question arising in the proceedings, it must be taken into account in determining that question. The Panel considered it appropriate to have regard to the Code in making its determination.

19. By way of summary, the Code states as follows:

- (a) Trustees of defined contribution occupational pension schemes have a duty to check that the contributions are paid (paragraph 29).
- (b) Trustees should have processes in place to check the contributions that fall to be paid and to reconcile those with the contributions in fact paid (paragraph 30).
- (c) Trustees must report a material payment failure to the Regulator and members within a reasonable period. As to this:
 - i. A material payment failure occurs where there is a failure to pay a contribution and other amounts due by the due date and there is reasonable cause to believe that it is likely to be of material significance to the Regulator in the exercise of its functions (paragraph 42).
 - ii. Late payments should be reported to the Regulator, in any event, where contributions have been outstanding for 90 days (paragraph 47).
 - iii. A reasonable period for reporting late payments to members is within 30 days of the report to the Regulator (paragraph 50).

Background to the determination

Reporting to the Regulator

20. The position of the Case Team of the Regulator (“the Case Team”) was that the Trustee failed to report to the Regulator late contributions that had been outstanding for more than 90 days, on a number of occasions. These included contributions outstanding for the period 1 August 2015 to 31 August 2016, which were not reported until 26 September 2016; contributions outstanding for the period 1 May 2016 to 25 April 2017, which were not reported until 5 May 2017; contributions outstanding for the period 1 October 2015 to 30 April 2017, which were not reported until 8 May 2017; and contributions outstanding for the period 1 April 2016 to 30 April 2016, which were not reported until 31 October 2017.
21. The Regulator held various discussions with Smart, which appears to have been appointed to undertake Scheme administration on behalf of the Trustee, concerning the need to comply with the rules on reporting materially late contributions:
- (a) In a meeting of 6 October 2015, shortly after the establishment of the Scheme, Smart was reminded of the duty to comply with the maintaining contributions requirements. It was given a link to the relevant page of the Regulator’s website.

- (b) In a meeting of 13 January 2016, Smart was reminded of the need to ensure compliance once a payment became a material payment failure.
 - (c) Smart first requested access to the Regulator's Maintaining Contributions Portal in an email of 30 November 2015. In an email of 15 March 2016, Smart was told, "*Please could you report all 90 day late payment reports through the MC provider portal...*".
 - (d) At a meeting of 15 March 2017, concerns were raised by the Regulator about the reporting of late payments, with the note of the meeting concluding that "*no risk based process is present to identify all types of material payment failures*". Smart confirmed that it did not have a recognised dedicated late contributions team in place, and that there was no formal training. However, it was stated by Smart at the meeting that material payment failures of 90 days late were definitely being identified and reported. It appears that no (or no sufficient) remedial action was taken despite the concerns raised by the Regulator.
 - (e) At a meeting of 17 August 2017, it was stated by Smart that there were in fact employers who were 90 days (or more) late in paying contributions who were not being reported to the Regulator; this position was contrary to the stance taken at the 15 March 2017 meeting. It was also admitted that what was to be considered as a "*material payment failure*" had not been defined, with the exception of employers over 90 days late.
22. On 27 September 2017, the Trustee confirmed to the Regulator that it had put in place a new policy and processes the previous day and that:
- (a) A number of material payment failures were to be reported to the Regulator.
 - (b) Smart had failed to understand what constituted a material payment failure and had been inconsistent in its reporting of them.
 - (c) It had been realised that the legal advice received had not been of the required standard.
23. In correspondence that has been provided to the Panel, it is apparent that Smart did not understand the requirements. For example, there were employers that were more than 90 days late in respect of which Smart stated in email correspondence that it needed "*to give them [a] written warning rather than have tPR come at them out of the blue*" (as evidenced in an email of 25 November 2015). Similarly, on 1 August 2016, an internal Smart email described the reporting process as being "*we report them to [the Chief Operating Officer of Smart] if they have gone over [the] 90 day limit and he decides if they are reported to TPR*". It was clear to the Panel that Smart did not understand the requirements, and did not comply with them.

24. It appears that only 32 reports of late payments were made by Smart to the Regulator from the establishment of the Scheme to 31 October 2017, with only 2 reports in the whole of 2016 and most of the 32 reports coming in May 2017. It is clear that insufficient reports were provided.
25. On 31 October 2017, 498 reports of material payment failures were made to the Regulator, all of which should have been reported earlier. The total value of outstanding contributions in this report was £888,651.94.

Reporting to members

26. The Panel accepts that there was also a failure to report to members.
27. The Case Team's position was that this issue was raised by the Regulator at the 15 March 2017 meeting. Smart informed the Regulator that it did not have the processes in place to write to members and that a view had been taken that Smart needed to consider the impact on the relationship with employers. Moreover, it was considered that compliance could be achieved by members having online access to their contribution history and being reminded from time to time to regularly log on and check this history. At the 17 August 2017 meeting, it was also noted that Smart did not have a process in place for reporting late payments to members.
28. Similarly, it appears that the Trustee failed to understand the requirements concerning the need to inform members of late payments. For example, at a meeting of the Trustee's Operations Working Party on 28 April 2017, the minutes record that, "*It was also noted that members had the ability to see their contributions in real time via the portal so members would have sight of whether and when contributions were being received*". Likewise, at a Trustee meeting of 12 May 2017, it was stated that reporting to members within 120 days "*was a preference rather than a strict legal requirement*". It is apparent that the Trustee misunderstood the requirement and failed to comply with it.
29. The Case Team contends that 2,352 members were not contacted within the required time. Given the wholesale failure to report to members, this is, the Panel infers, all (or the vast majority) of the members in respect of whom payments were late by 120 days or more.
30. At the 27 September 2017 meeting, the Trustee confirmed that a new system had been implemented to comply with the requirements for reporting to members.

Representations

31. No representations were received from Smart.

32. The Trustee, by a letter from its solicitors dated 2 March 2018, accepted the breaches as alleged by the Regulator and did not object to the imposition of the recommended penalty of £11,000.
33. The Trustee wished to put forward its explanation for what happened. In summary, this was as follows:
- (a) Shortly after the establishment of the Scheme, it obtained legal advice in relation to the documentation that it needed to put in place, including any necessary policies. The Trustee stated that its legal advice was to the effect that it was not necessary to have a more detailed written policy in relation to the late payment of contributions, and the policy was that Smart's processes required the Regulator to be notified in the event that any contribution was known to be unpaid 90 days after the due date.
 - (b) Smart had a process for checking and reporting in relation to late contributions, run by Smart's Chief Operating Officer and its Head of London Operations, who were responsible for reporting to the Regulator. The Trustee says that these personnel may have misunderstood the position and erroneously believed that the checking of contributions could be a "*risk-based process*".
 - (c) The Trustee sought further legal advice in January 2017 as to the documentation that it ought to have in place and was advised that nothing further was required.
 - (d) The meeting in March 2017 was part of an industry consultation by the Regulator and not arranged because of any specific concerns about the Scheme. The meeting was between the Regulator and Smart, and was reported back to the Trustee by Smart. The Trustee was not given any indication that the Regulator had concerns about the Scheme.
 - (e) The Trustee only became aware of the Regulator's concerns following the meeting in August 2017.
 - (f) There was an "*awareness*" of the need to report to members, but it was considered that members having access to their online accounts would suffice.
 - (g) As to the number of members notified late, the correct number is said to be 2,115 rather than 2,352.
34. The Trustee has stated that it now has put in place processes so as to comply with the statutory requirements. The Case Team's view is that the Trustee has "*been very cooperative in voluntarily providing information and [has] shown progress in quickly fixing the oversights.*"

Liability

35. The Trustee admitted liability. However, the Panel still considered that liability had to be established.
36. The Panel was of the clear view that the requirements are met. In respect of section 49 PA 95:
- (a) The Scheme is an occupational pension scheme.
 - (b) A large number of employers did not pay employee contributions within the prescribed period, and these remained outstanding for 90 days or more.
 - (c) Materially late payments were not reported to the Regulator as required.
 - (d) Materially late payments were not reported to members as required.
 - (e) The Trustee did not take all reasonable steps to secure compliance. Although it did take legal advice and Smart took steps on the Trustee's behalf, these steps fell well short of what was required. The reporting system that was put in place, both in respect of reporting to the Regulator and members, was manifestly insufficient, and there was a fundamental lack of appreciation of what was required by the legislation and the Code. The Panel also considered that the Trustee failed to take sufficient steps to ensure that Smart, when acting on the Trustee's behalf, complied with the statutory requirements.
37. As regards section 88, given that it appeared to the Panel that the requirements under section 49(9)(b) applied, there was no obligation on the Trustee under section 88. However, if it did apply for some reason, the Panel would find there to be breaches of section 88, for broadly the same reasons as with section 49.

Imposition of a penalty

38. In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 PA 04 and to the matters listed in section 100 PA 04. The Panel also had regard to the Code.
39. Given the matters set out above, the Panel considered it appropriate to impose a penalty on the Trustee under s.10 PA 95. The penalty is in respect of all the breaches identified in the Warning Notice.

Amount of the Penalty

40. The Regulator published its Monetary Penalty Policy ("MPP") in August 2017. The Parties accepted that the MPP is applicable to this matter.

The Case Team's recommendation

41. The Case Team recommended a penalty of £11,000 be imposed on the Trustee.
42. The Case Team submitted that the breaches fell within band 2 of the MPP on the basis that:
 - (a) The breaches are secondary breaches, arising from serious underlying breaches on the part of the employers that failed to pay on time. The underlying breaches would sit in band 3. The secondary breaches are not as serious and do not fall in band 3.
 - (b) Failing to report late or missing payments is more than an administrative breach of the type given as examples of band 1 breaches in the MPP. The Regulator was unable to take remedial action that it otherwise would have done, as a result of the breaches here, and so they are too serious for band 1.
 - (c) The failure to report is most closely aligned with "*failing to provide members with a statutory money purchase illustration within the required timeframe*", which is an example of a band 2 breach.
43. The Panel agreed with the Case Team's view and considered that the breaches fell within band 2, for the same reasons.
44. The range of a band 2 fine is nil to £25,000 for a professional trustee. The Case Team's view was that the starting point should be at the mid-way point of the band, i.e. at £12,500. The Case Team's view was that there was nothing exceptional to justify not starting at the mid-point, and taking into account the seriousness of the breach, alongside the steps taken to resolve the issue and the cooperation of the Trustee, the mid-way point was appropriate.
45. The starting point within a band is, by paragraph 9.4 of the MPP, to be chosen having regard to proportionality and the likelihood of the Regulator achieving its underlying objective. The Panel agreed that there was no reason to deviate from the mid-point of the band as the starting point here.
46. The Case Team submitted that there were a number of aggravating factors:
 - (a) The Trustee is a professional trustee.
 - (b) The breaches here were in fact two separate breaches, one to report to the Regulator and one to report to members.
 - (c) It is not certain that the breaches would have come to light had meetings not been held at the Regulator's request.

- (d) The Regulator provided reminders at both face-to-face meetings and in minutes that it subsequently shared.
 - (e) The Trustee asked its legal advisers only if there were sufficient existing policies in place and did not specifically ask about the reporting of material payment failures to the Regulator or to members. These questions were not raised until 18 months and almost two years respectively after the establishment of the Scheme.
 - (f) The risk register of the Scheme referenced reviewing late and missing contributions and reporting to the Regulator when such payments were older than 3 months; the fact that there were failures suggests that the issue was not sufficiently reviewed and suitable controls were not put in place.
 - (g) The issue affected 498 employers and over 2,000 members, so it was not a small or isolated matter.
47. However, the Case Team considered that the following were mitigating factors:
- (a) The failures were linked to Smart's resourcing and its delays in adopting a bulk reporting process. The Case Team said that these were areas over which the Trustee has limited control.
 - (b) The delay in reporting to the Regulator was at least in part due to the actions of senior individuals at Smart. The Case Team considered that these were not decisions of the Trustee and, although it was arguable that stronger controls should have been in place, the Trustee cannot be expected to supervise the individuals directly. The Case Team also took into account that the relevant individuals had subsequently left Smart.
 - (c) The Trustee asked its legal advisers to ensure that there was full compliance, although the Case Team believed that this was offset by issues concerning the risk register.
 - (d) The Trustee has been very cooperative and has improved its governance.
48. The Panel agreed with all of the aggravating factors put forward by the Case Team, save for the issue concerning the risk register. The Trustee submitted in its representations that this was not an aggravating factor and the Panel agreed with this submission. The Panel considered that, in reality, the failure concerning the risk register reflected the failure of the Trustee to comply with the legislative requirements, and so was indicative of the failure itself and did not aggravate it. However, the Panel considered that a further aggravating factor was that there were not merely two separate breaches, but in fact there were two separate categories of breach, meaning that there were, in total, many hundreds of breaches of the statutory requirements.

49. The Panel did not accept the mitigating factors at (a) and (b). In the Panel's view, a Trustee is required to put in place a proper and effective reporting system, with contractual arrangements that ensure that there are the necessary controls in place. It is not sufficient for a trustee merely to blame those to whom it has delegated tasks. Given the nature and extent of the failings, the fact that Smart's actions were deficient did not mitigate the Trustee's own failures. Moreover, the failings in respect of reporting to members appeared to be as much those of the Trustee as of Smart.
50. The Panel also had reservations about mitigating factor (c). While it is correct that legal advice was obtained, the Trustee seems to have failed to ask the correct questions or to have probed sufficiently into the advice. For example, it should have been obvious to the Trustee that the system for information being provided to members through their having access to their online account was not sufficient.
51. The Panel agreed that the Trustee had been cooperative and transparent, albeit only in the more recent period since August 2017. It also considered that the Trustee may have been misled, for example into believing, after the meeting in March 2017 between Smart and the Regulator, that the Regulator had no concerns (with the minutes of the Trustee meeting of 28 April 2017 stating that the Regulator has "*no negative comments*"). The Trustee was entitled to take such statements of fact as being correct, and this was a mitigating factor.

The Panel's Decision on Penalty

52. Overall, the Panel felt that the proposed fine of £11,000 was insufficient. In the Panel's view, the aggravating factors outweighed, by a clear margin, the mitigating factors, and the fine should be above the starting position of the mid-way point of band 2. The Case Team's suggestion of £11,000 took into account mitigating factors that the Panel did not accept, and therefore the figure was too low for this reason as well. Given the matters above, and the guiding principles of the MPP, namely to punish wrongdoing, deter repetition and act as a warning to others, the Panel considered £15,000 to be an appropriate penalty.

Conclusion

53. For these reasons the Panel determined to issue a penalty notice in the amount of £15,000 to the Trustee, EC2 Master Ltd, payable 28 days from the date of the notice.
54. By virtue of section 96(5) PA 04 the penalty will not be issued during the 28-day period within which this determination may be referred to the Upper Tribunal and, if so referred, until the reference and any appeal against the Upper Tribunal's determination has been disposed of. If no referral to the Upper Tribunal is made within 28 days, then a penalty notice will be issued to the Trustee.

55. **Appendix 1** to this Determination Notice contains important information about the rights to refer this decision to the Upper Tribunal.

Signed: 

Chairman: David Latham

Dated: 2 May 2018

Relevant Statutory and Code Provisions

The Pensions Act 1995

Section 10 – Civil penalties

- 1) Where the Authority are satisfied that by reason of any act or omission this section applies to any person, they may by notice in writing require him to pay, within a prescribed period, a penalty in respect of that act or omission not exceeding the maximum amount.
- 2) In this section, "the maximum amount" means:
 - (a) £5,000 in the case of an individual and £50,000 in any other case, or
 - (b) such lower amount as may be prescribed in the case of an individual or in any other case, and
 - (c) the Secretary of State may by order amend paragraph (a) by substituting higher amounts for the amounts for the time being specified in that paragraph.
- 3) Regulations made by virtue of this Part may provide for any person who has contravened any provision of such regulations to pay, within a prescribed period, a penalty under this section not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, others in subsection (2)(a).
- 4) An order made under subsection (2) or regulations made by virtue of subsection (3) do not affect the amount of any penalty recoverable under this section by reason of an act or omission occurring before the order or, as the case may be, regulations are made.
- 5) Where:
 - (a) apart from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership, and
 - (b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6),
 - (c) this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was

attributable.

- 6) The persons referred to in subsection (5)(b):
 - (a) in relation to a body corporate, are:
 - (i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and
 - (ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and
 - (b) in relation to a Scottish partnership, are the partners.
- 7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.
- 8) A penalty under this section is recoverable by the Authority.
- 8A) Any penalty recoverable under this section:
 - (a) shall, if the county court so orders, be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of that court; and
 - (b) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.
- 9) The Authority must pay to the Secretary of State any penalty recovered under this section.

Sections 49(8), 49(9) and 49(10) - Other responsibilities of trustees, employers, etc

- 8) Where on making a payment of any earnings in respect of any employment there is deducted any amount corresponding to any contribution payable on behalf of an active member of an occupational pension scheme, the amount deducted is to be paid, within a prescribed period, to the trustees or managers of the scheme.
- 9) If in any case there is a failure to comply with subsection (8)-
 - (a) . . .
 - (b) if the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority [the Regulator] of any of their functions, they must,

except in prescribed circumstances, give notice of the failure to the Authority and the member within a reasonable period after the end of the prescribed period under subsection (8).

- 10) If in any case subsection (9)(b) is not complied with-
- (b) section 10 applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.

Section 87 - Schedules of payments to money purchase schemes

- 1) This section applies to an occupational pension scheme which is a money purchase scheme, other than one falling within a prescribed class or description.
- 2) The trustees or managers of every occupational pension scheme to which this section applies must secure that there is prepared, maintained and from time to time revised a schedule (referred to in this section and section 88 as a "payment schedule") showing-
 - (a) the rates of contributions payable towards the scheme by or on behalf of the employer and the active members of the scheme ,
 - (b) such other amounts payable towards the scheme as may be prescribed, and
 - (c) the dates on or before which payments of such contributions or other amounts are to be made (referred to in those sections as "due dates").
- 3) The payment schedule for a scheme must satisfy prescribed requirements.
- 4) The matters shown in the payment schedule for a scheme-
 - (a) to the extent that the scheme makes provision for their determination, must be so determined, and
 - (b) otherwise,
 - (i) must be matters previously agreed between the employer and the trustees or managers of the scheme, or
 - (ii) if no such agreement has been made as to all matters shown in the schedule (other than those for whose determination the scheme makes provision), must be matters determined by the trustees or managers of the scheme.
- 5) Where in the case of a scheme this section is not complied with-

- (a) section 10 applies to any trustee or manager who has failed to take all such steps

Section 88 - Schedules of payments to money purchase schemes: supplementary

- 1) Where, in the case of an occupational pension scheme to which section 87 applies-
 - (a) there is a failure to pay on or before the due date any amounts payable in accordance with the payment schedule, and
 - (b) the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority of any of their functions,

they must, except in prescribed circumstances, give notice of the failure to the Authority and to the members of the scheme within a reasonable period after the due date.
- 2) Any such amounts which for the time being remain unpaid after that date (whether payable by the employer or not) shall, if not a debt due from the employer to the trustees or managers apart from this subsection, be treated as such a debt.
- 3) Where any amounts payable in accordance with the payment schedule by or on behalf of the employer on the employer's own account have not been paid on or before the due date, section 10 applies to the employer.
- 4) If, in the case of an occupational pension scheme to which section 87 applies, subsection (1) is not complied with-
 - (b) section 10 applies to any trustee or manager who has failed to take all such steps.

The Pensions Act 2004

Section 5 – Regulator's objectives

- 1) The main objectives of the Regulator in exercising its functions are-
 - (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
 - (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
 - (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2),

- (cza) in relation to the exercise of its functions under Part 3 only, to minimise any adverse impact on the sustainable growth of an employer,
 - (ca) to maximise compliance with the duties under Chapter 1 of Part 1 (and the safeguards in sections 50 and 54) of the Pensions Act 2008, and
 - (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.
- 2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-
- (a) the members who are employees in respect of whom direct payment arrangements exist, and
 - (b) where the scheme is a stakeholder pension scheme, any other members.
- 3) In this section-
- "stakeholder pension scheme" means a personal pension scheme which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c. 30) (register of stakeholder schemes);
- "work-based pension scheme" means-
- (a) an occupational pension scheme,
 - (b) a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
 - (c) a stakeholder pension scheme.

Section 10(1) and 10(4) – Functions exercisable by the Determinations Panel

- 1) The Determinations Panel is to exercise on behalf of the Regulator-
- (a) the power to determine . . . whether to exercise a reserved regulatory function, and
 - (b) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question.
- [. . .]
- 4) For the purposes of this Part, a function of the Regulator is a "reserved regulatory function" if it is a function listed in Schedule 2.

Section 90 - Codes of Practice

- 1) The Regulator may issue codes of practice-
 - (a) containing practical guidance in relation to the exercise of functions under the pensions legislation, and
 - (b) regarding the standards of conduct and practice expected from those who exercise such functions.
- 2) The Regulator must issue one or more such codes of practice relating to the following matters-
 - (a) what constitutes a "reasonable" period for the purposes of any provision of the pensions legislation (other than any enactment contained in or made by virtue of Part 2) which requires any action to be taken within such a period;

[...]
 - (i) the discharge of the duty imposed by section 88(1) of that Act (duties of trustees and managers of certain schemes to report failures to pay employer contributions etc timeously);

[...]
 - (k) such other matters as are prescribed for the purposes of this section.
- 3) The Regulator may from time to time revise the whole or any part of a code of practice issued under this section and issue that revised code.
- 4) A failure on the part of any person to observe any provision of a code of practice issued under this section does not of itself render that person liable to any legal proceedings. This is subject to section 13(3)(a) and (8) (power for improvement notice to direct that person complies with code of practice and civil penalties for failure to comply).
- 5) A code of practice issued under this section is admissible in evidence in any legal proceedings and, if any provision of such a code appears to the court or tribunal concerned to be relevant to any question arising in the proceedings, it must be taken into account in determining that question.
- 6) In this section-

"legal proceedings" includes proceedings of the Pensions Ombudsman, proceedings of the Ombudsman for the Board of the Pension Protection Fund and proceedings of the Board of the Pension Protection Fund under section 207 or 208; and

"the pensions legislation" means any enactment contained in or made by virtue of-

- (a) the Pension Schemes Act 1993 (c. 48),
 - (b) Part 1 of the Pensions Act 1995 (c. 26), other than sections 62 to 66A of that Act (equal treatment),
 - (c) Part 1 or section 33 of the Welfare Reform and Pensions Act 1999 (c. 30),
 - (d) this Act.
 - (e) Schedule 18 to the Pensions Act 2014, or
 - (f) the Pension Schemes Act 2015.
- 7) Sections 91 and 92 make provision about the procedure to be followed when a code of practice is issued or revoked under this section.
- 8) The Regulator may not issue codes of practice under this section in relation to a public service pension scheme (but see section 90A).

Section 100 – Duty to have regard to the interests of members etc

- 1) The Regulator must have regard to the matters mentioned in subsection (2)-
- (a) when determining whether to exercise a regulatory function-
 - (i) in a case where the requirements of the standard or special procedure apply, or
 - (ii) on a review under section 99, and
 - (b) when exercising the regulatory function in question.
- 2) Those matters are-
- (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
 - (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Schedule 2 – The Reserved Regulatory Functions Part 2 – Functions under the Pensions Act 1995

[. . .]

- 11) The power to require a person to pay a penalty under section 10 (including under regulations made by virtue of subsection (3) of that section).

The Occupational Pension Schemes (Scheme Administration) Regulations 1996

Regulation 16 - Prescribed time in which an employer must make payments to trustees or managers

- 1) Save as provided in paragraph (2), the prescribed period for the purposes of section 49(8) of the 1995 Act (amount deducted from earnings to be paid to the trustees or managers of the scheme within a prescribed period) is-
 - (a) where the contribution payable on behalf of an active member is paid to the trustees or managers of the scheme by means of an electronic communication, 22 days; or
 - (b) in any other case, 19 days,commencing on the day following the last day of the month in which the amount is deducted from the earnings in question.
- 2) Where a person becomes an active member of a relevant scheme, in relation to contributions deducted in the relevant period, the prescribed period for the purposes of section 49(8) of the 1995 Act is the period commencing on the day on which the first deduction in the relevant period is made and ending-
 - (a) where the contribution is paid to the trustees or managers of the scheme by means of electronic communication, on the 22nd day of the month following the last day of the relevant period; or
 - (b) in any other case, on the 19th day of the month following the last day of the relevant period.
- 3) For the purposes of this regulation-

"the 2008 Act" means the Pensions Act 2008;

"electronic communication" has the meaning given in section 15 of the Electronic Communications Act 2000;

"relevant period" means a period of three months commencing on the date from which active membership is effective; and

"relevant scheme" means-

 - (a) a scheme which is a qualifying scheme in relation to the person under section 16 of the 2008 Act; or

- (b) where the person is enrolled in the scheme pursuant to section 9 of the 2008 Act, a scheme which is registered under chapter 2 of part 4 of the Finance Act 2004.

Regulation 21(4) - Circumstances where notice of non-payment of any amount payable to a scheme need not be given

[. . .]

- (4) Where, under section 49(9)(b) of the 1995 Act (other responsibilities of trustees, employers, etc), there is a requirement on the trustees or managers to give notice within a reasonable time of a failure to pay within a prescribed time an amount corresponding to any contribution payable on behalf of an active member which has been deducted from the member's earnings, the trustees or managers shall not be required to give notice of a failure to pay such amount by the due date for the purposes of subsection (1) of section 88 of that Act, in a case to which that subsection would otherwise apply.

The Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997

Regulation 21 – Time limits for payment of civil penalties under section 10(1) of the 1995 Act

- 1) For the purposes of section 10(1) of the 1995 Act (civil penalties) the period prescribed for the payment of a penalty to the Authority shall be 28 days from the date of the notice in writing sent by the Authority requiring payment of that penalty.

The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

Regulation 8

An employer must, on or after the automatic enrolment date, deduct any contributions payable by the jobholder to the scheme, from qualifying earnings or pensionable pay due to the jobholder.

Referral to the Tax and Chancery Chamber of the Upper Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”). You have 28 days from the date this Determination Notice is sent to you to refer the matter to the Tribunal or such other period as specified in the Tribunal procedure rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice.

The Tribunal’s address is:

Upper Tribunal
(Tax and Chancery Chamber)
Fifth Floor
Rolls Building
Fetter Lane
London
EC4A 1NL

Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of PA 04 and the Tribunal procedure rules.

You should note that the Tribunal procedure rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to the Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support
The Pensions Regulator
Napier House
Trafalgar Place
Brighton
BN1 4DW.

Tel: 01273 811852

A copy of the form for making a reference, FTC3 ‘Reference Notice (Financial Services)’, can be found at:

http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043