[2022] UKFTT ** (TC)**

TC *****V

Income tax – automatic enrolment in pension scheme – fixed protection 2016 – notice of enrolment sent by email not read by Appellant – also contained arguably inaccurate enrolment information – whether valid notice of enrolment "given" to Appellant – whether failure to opt out of pension scheme within one month of date of email meant Appellant had suffered a protection cessation event and accordingly HMRC entitled to revoke fixed protection 2016 – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2021/00076

BETWEEN

IAN MOAN **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE KEVIN POOLE

The hearing took place on 25 January 2022. With the consent of the parties, the hearing was conducted by video link, using the Tribunal's Video Hearing System. A face to face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which I was referred comprised a bundle consisting of 221 pages and a separate bundle of authorities.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Michael Firth of counsel (direct access) for the Appellant

Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against HMRC's decision to revoke the Appellant's Fixed Protection 2016 as a result of the Appellant's auto-enrolment in a registered occupational pension scheme established by his new employer. The Appellant was aware he was already close to his lifetime allowance limit and did not wish to become a member of his new employer's scheme, informing them of that fact from his first job interview with them. Some months after starting employment, he was sent details of how to opt out of auto-enrolment by email but did not recall seeing it. When he subsequently received a copy of the email, initially his employer accepted his enrolment should be cancelled and he claimed (and was given) Fixed Protection 2016. When the pension scheme subsequently refused to cancel his enrolment, HMRC revoked his Fixed Protection 2016 on the basis that the Appellant had become a member of the scheme and had accrued benefits under it.

2. The key issue between the parties was whether the Appellant was actually given the required auto-enrolment information. There were two aspects to this issue. First, the method of notification to the Appellant was such that he denied he had been "given" the information; and second the Appellant argued that the enrolment information that had been sent to him was in any event incorrect, so that the time limit for opting out had not started to run and therefore his much later notice to opt out of the scheme was valid.

THE FACTS

3. I received a bundle of documents in electronic form running to 221 pages. This included a witness statement of the Appellant, who also gave evidence orally. I find the following facts.

Commencement of the Appellant's employment

4. The Appellant worked in the financial services industry as a financial adviser. From 2011 to 2014, the Appellant worked for Newcastle Financial Advisers Limited ("NFAL"), a member of the Newcastle Building Society ("NBS") group of companies. On 28 July 2016 he had a job interview to rejoin NFAL as a divisional manager, having worked for Co-op Insurance in the meantime.

5. The Appellant's interview to rejoin NFAL was with a Mr Stuart Dodson, the managing director and the Appellant's prospective line manager. The Appellant informed Mr Dodson that he was awaiting a pension valuation from his previous employer but expected to have exceeded the standard lifetime allowance (which had just been reduced from £1,250,000 to £1 million) and would not therefore wish to participate in NFAL's registered pension scheme, in order to benefit from fixed protection 2016 (which would keep his personal lifetime allowance at the higher figure as long as he did not become a member of or accrue any further benefits under a registered pension scheme).

6. The Appellant was sent a letter of offer of employment by NAFL, with a pack of associated documents, on 5 September 2016. He went through the pack in detail, with a particular eye on the pension position because of his concern about keeping his higher lifetime allowance. The offer letter stated that "The Society operates an auto enrolment pension scheme. Upon commencement of your employment with the Society you will be assessed for eligibility and will receive further information from Aegon our pension provider at this time."

7. Included in the pack was a statement of terms and conditions of employment and a "payroll deduction form", which would constitute the Appellant's authority to make deductions from his salary in respect of pension contributions.

8. The terms of employment document were very similar to the Appellant's previous document when he had worked for NFAL before. Under the heading "Pension and Assurance Schemes", it said this (which was exactly the same wording as in his 2011 statement of terms, entered into before auto-enrolment):

> With effect from 1 December 2010, employees are entitled to membership of the Newcastle Building Society Group Personal Pension Scheme (the "GPP Scheme") only. With effect on 30 November 2010, staff who were active members of the Newcastle Building Society Pension and Assurance Scheme (the "NBS Scheme") immediately before that date will be specifically precluded from active membership of, and as a result future pension accrual under, the NBS Scheme.
>
> The terms and conditions of the GPP Scheme are published separately.
>
> Any changes to the GPP Scheme will be notified to you from time to time in accordance with the rules of the GPP Scheme. The society is entitled at any time to terminate the GPP Scheme or your membership of it.
>
> By entering into this Agreement, you consent to the payment of any contributions due under the GPP Scheme and to the deduction from your wages of such sum.
>
> The Society does not hold a current contracting out certificate in respect of your employment.

9. Paragraph 1 of the statement of terms included the sentence "This Statement supersedes any previous statements and agreements."

10. The Appellant went to a meeting with Karen Armstrong, the NBS HR Recruitment and Administration Manager, on 10 September 2016 to discuss and sign the documents which he had been sent. He did not at that stage have a valuation of his existing pension fund, but was still expecting it to exceed the standard lifetime allowance. He confirmed to her that he did not wish to be enrolled in any pension scheme for this reason. She told him that he could opt into the scheme at any time but, by not signing the payroll deduction form (also called an "opt in form"), he would not be enrolled.

11. The Appellant signed his contract of employment on 10 September 2016 but deliberately did not sign the payroll deduction form, on the understanding this meant he would not become a member of the pension scheme. Accordingly the provision in the terms of employment consenting to deduction of pension contributions from his salary was, in his view, simply irrelevant.

12. The Appellant's employment with NFAL commenced on 17 October 2016. Hearing nothing further from Aegon (see [6] above), he believed his wish not to join the pension scheme had been actioned and, as far as he was concerned, the matter was at an end.

IT issues

13. The Appellant operated largely from home. He was supplied by NFAL with a laptop for use when he was in the office, and a Samsung smart phone for accessing his emails, diary and contacts list when he was working out of the office (approximately 95% of his time).

14. In order to access his emails, diary and contacts list on the smart phone, the Appellant had to download a synchronisation app called Excitor DME onto his smart phone which was supposed to synchronise seamlessly with the Microsoft Exchange server at NFAL for that purpose. Unfortunately, the smart phone was old and the synchronisation was unreliable. It had a habit of simply deleting emails without any intervention from the Appellant, especially larger emails with attachments. This would result in complete deletion from his account, not just

from his phone. Sometimes no synchronisation would take place for days at a time and then as many as 60 emails might be delivered all at once, causing the phone to crash. Some emails were delivered without the attachments they had been sent with. The Appellant gave evidence of various other problems with the phone, which I accept. This included periods when the Appellant was simply unable to access his accounts at all. Eventually, after NFAL's IT department had tried to resolve the issue by simply swapping the Appellant's smart phone for a similar model which had been handed back by a retiring employee, he bought his own iPhone in late July 2017 which solved the problems.

15. In addition, NBS had implemented a group-wide online payslip system in January 2017, which the Appellant was consistently unable to access. After communications over a period of months with the IT department, he was finally able to access his payslips in late June 2017.

Auto enrolment of the Appellant

16. The Appellant was apparently assessed for auto enrolment in November 2016 and a decision was taken by NAFL to postpone his enrolment for three months. No evidence providing an explanation for this decision or the background to it was before me.

17. NAFL notified Aegon (the scheme administrator) of their decision to postpone the Appellant's enrolment when uploading the Appellant's details onto Aegon's online "Smartenrol" hub through which they communicated with Aegon in relation to pension auto-enrolment matters. Those details were only uploaded on 12 December 2016, nearly two months after the Appellant had started work with NFAL.

18. It appears that NAFL did not provide Aegon with a personal email address for the Appellant, as a result of which Aegon's fallback arrangements for communications with members and prospective members took effect. Under those arrangements, Aegon would send an email to an email address at NBS called "pensionqueries@newcastle.co.uk", and the email would then be forwarded on from there by NBS to the Appellant's work email account without any covering email or other alteration (apart from the addition of a warning in red capital letters immediately after the message header details as follows: "PLEASE BE AWARE THAT THIS E-MAIL MESSAGE ORIGINATED VIA THE INTERNET, NOT FROM WITHIN THE SOCIETY". On initial viewing, such emails appeared very similar to the voluminous junk mail that the Appellant received from providers such as Aegon into his work email account on a daily basis. Many of the emails with this wording were automatically routed into his junk email folder. The Appellant was in the habit of deleting emails in his junk email folder without reading them.

19. By this means, on 12 December 2016 an email was forwarded from Aegon via NBS "pensionqueries" to the Appellant at his work email address notifying him of the three month postponement of his automatic enrolment in the pension scheme. No copy of that email was included in the bundle before me and the Appellant does not recall seeing it, but it was specifically referred to in the subsequent investigation by the Pensions Ombudsman. This email apparently stated that NFAL had deferred the Appellant's enrolment until 1 February 2017 and that he would be automatically enrolled from that date unless he opted to join earlier. Clearly if this email ever reached him the Appellant did not read it, otherwise he would have immediately responded to it.

20. There was other communication in December 2016 between the Appellant and his employer about an arrangement they were running for certain senior employees, including the Appellant, providing for the possibility of enhanced contributions to the pension scheme. Again, the Appellant made it clear that he did not wish to participate and was told that if he did not sign the "Pension Option Form" that had been emailed to him, he would not be included. He did not sign the form.

21. Notwithstanding the postponement of the Appellant's auto-enrolment to 1 February 2017, NAFL made a small deduction from his January pay in respect of a pension contribution. Because the Appellant did not have access to his online payslips at that time, he was not aware of this deduction. A further deduction was made from his February pay (and indeed from subsequent months, right up to June).

22. The next event took place on 6 March 2017. Following an assessment of the Appellant's status in February, he was enrolled on 6 March 2017 as a member of the scheme with effect from 1 February 2017. On the same date, Aegon sent an email for the Appellant to the "pensionqueries" email account at NBS which was intended to amount to the formal notice of his enrolment in the scheme. This email included the following text:

> The government has introduced laws aimed at getting more people to save for their retirement. Simply put, employers have to enrol eligible jobholders automatically into a qualifying pension scheme if they're not already in one.
>
> You've been assessed as an eligible jobholder because you:
>
> - earn over £10000.00 a year,
> - are 22 or over, and
> - are under State Pension Age.
>
> **What this means for you**
>
> You don't need to do anything because you'll be automatically enrolled into your employer's pension scheme, which is provided by Aegon, on 01 Feb 2017. You can choose to opt out of the scheme if you want to, but if you stay in you'll have your own pension to provide an income when you retire….
>
> If you have Enhanced Protection or Fixed Protection and you don't want to lose this protection – you should opt out. If you have either of these protections, you'll applied to HM Revenue & Customs for the protection, and will have been sent a protection certificate or a reference number.
>
> …
>
> Your employer will pay an amount equal to 3.00% of your pensionable earnings. You'll contribute 0.00% of your pensionable earnings*. If you're paying contributions they will be deducted from your pay. You may also benefit from tax relief on any personal contributions you make. These contributions will start from 01 Feb 2017…
>
> …
>
> * Where your employer is operating a salary sacrifice arrangement, your salary sacrifice contribution is included in your employer's contribution percentage.
>
> **What you need to do now**
>
> …
>
> You now have access to SmartEnrol … Where you'll find information on pension savings as well as how to opt out. You'll need your National Insurance number and payroll reference (refer to 'Your reference' at the top of this email) to access SmartEnrol.
>
> If you choose to opt out of the scheme, click on the link in SmartEnrol and follow the instructions. You have from the date you receive this communication until 05 April 2017 to opt out. If you opt out, you'll be treated as though you've never joined the scheme at this time and any payments you

already made will be refunded. If you don't do this before 05 April 2017 you will be an active member of the scheme.

….

23. This email (with its three attachments) was forwarded from "pensionqueries" to the Appellant at 15.50 on 6 March 2017. The internal investigation subsequently carried out by NBS concluded that it had reached the Appellant's email account, but could not tell whether it had been opened. Clearly the Appellant did not open it and recognise it for what it was, otherwise he would have immediately responded. The question is whether (a) he did not receive it at all (either because it went astray between the "pensionqueries" mail account and his own, or because it was deleted as a result of the IT problems with his phone before he saw it), (b) he received it (either in his normal inbox or after it had been diverted by his mail software to his junk mail folder) but deleted it without opening it, or (c) he opened it but did not read it carefully enough to realise the significance of its contents before deleting it.

24. On a balance of probabilities, I find that the email was received at his mail account on the mailserver, and did appear on his phone; the Appellant then opened it (I say this because it would have been shown as originating from the "pensionqueries" mail account which did not normally send him emails, rather than direct from Aegon, making it less likely he would have simply deleted it without opening it) but because it was at first sight so similar to the voluminous junk mail that the Appellant received from Aegon (amongst others) and carried a prominent warning about having originated outside NBS, he deleted it without reading it.

Issues come to light

25. It was only when the Appellant obtained online access to his payslips near the end of June 2017 that it became apparent to him that pension contributions were being made on his behalf. He requested his employer to sort things out with Aegon so that his enrolment into the scheme would be cancelled and his contributions refunded. They forwarded this request to Aegon, requesting the refund of contributions from January to May and confirmed they would refund his June contribution in his July salary. On the strength of this, the Appellant then made application to HMRC for a reference number confirming his Fixed Protection 2016, which they issued on 6 July 2017.

26. On 20 July 2017 the Appellant was informed by NBS that Aegon would not refund the contributions because the Appellant had not validly opted out of the scheme. On 25 July 2017 the Appellant obtained a copy of the Aegon email dated 3 March 2017. He subsequently delivered a notice seeking to opt out of the scheme; there was ambiguity in the documents before me as to when this took place, but HMRC have not disputed that such a notice was delivered no later than January 2020; their argument is that any such notice would have been delivered out of time and therefore would be invalid, irrespective of its compliance with all the statutory requirements for such a notice, which I infer were satisfied.

HMRC withdraw Fixed Protection

27. On 26 July 2017 the Appellant wrote to HMRC explaining the position and asking to retain his Fixed Protection 2016. HMRC responded on 15 August 2017 refusing his request and asking him to provide the date on which he lost the protection. After the Appellant replied, HMRC wrote on 29 November 2017 formally withdrawing the Appellant's reference number (and, with it, his Fixed Protection 2016), on the basis that his application had contained the required declaration that he had suffered no protection-cessation event, a declaration that was incorrect. After the Appellant had exhausted his rights through the NBS grievance procedure and the Pensions Ombudsman and renewed his appeal to HMRC, they once again rejected his appeal (including following a statutory review) and he therefore appealed to the Tribunal.

THE LAW

Legislation on automatic enrolment

28. Section 3 of the Pensions Act 2008 ("PA08") provides for automatic enrolment of jobholders as follows:

> **3 Automatic enrolment**
>
> (1) This section applies to a jobholder –
>
> (a) who is aged at least 22,
>
> (b) who has not reached pensionable age, and
>
> (c) to whom earnings of more than £10,000 are payable by the employer in the relevant pay reference period (see section 15).
>
> (2) The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date.
>
> …
>
> (6B) In the case of a pay reference period of less or more than 12 months, subsection (1) applies as if the amount in paragraph (c) were proportionately less or more.[1]
>
> (7) The automatic enrolment date, in relation to any person, is the first day on which this section applies to the person as a jobholder of the employer. This is subject to section 4.

29. Under section 4 PA08, the Appellant's employer was entitled to defer the "automatic enrolment date" by up to three months by giving the Appellant notice of its intention to do so, as long as any "prescribed requirements" in relation to the notice were met:

> **4 Postponement or disapplication of automatic enrolment**
>
> …
>
> (2) Where –
>
> (a) a person ("the worker") begins to be employed by an employer (E) after E's staging date,
>
> (b) E gives the worker notice that E intends to defer automatic enrolment until a date specified in the notice ("the deferral date"), and
>
> (c) any prescribed requirements in relation to the notice are met,
>
> the worker's automatic enrolment date is the deferral date if on that date section 3 applies to the worker as a jobholder of E; if not, subsection (4) applies.
>
> …
>
> (5) A notice under this section may be given on or before the starting day or within a prescribed period after that day.
>
> (6) The deferral date may be any date in the period of three months after the starting day.
>
> …

[1] The Appellant's annual earnings were £55,000 and he had a monthly pay reference period (he was paid monthly on the 25th of each month); his earnings were therefore clearly above the threshold in his first pay reference period, even if he started three quarters of the way through it.

(8) In this section –

…

"starting day" means –

…

(b) the day on which the worker begins to be employed by E, in the case of a notice under subsection (2);

30. In relation to the Appellant (NFAL's "staging date" having already passed), NAFL was therefore entitled, within the "prescribed period" of the Appellant's "starting day" (17 October 2016), to give a notice of its intention to defer the Appellant's automatic enrolment.

31. Under Regulation 24(3) of the Occupational Pension Schemes (Automatic Enrolment) Regulations 2010 [SI 2010/772] ("the Enrolment Regulations"), the "prescribed period" was fixed as "the period of six weeks beginning with the day after the starting day".

32. A jobholder's right to opt out of a pension scheme into which he or she has been automatically enrolled is set out in s. 8 PA08:

8 Jobholder's right to opt out

(1) This section applies on any occasion when arrangements under section 3(2)… apply to a jobholder (arrangements for the jobholder to become an active member of an automatic enrolment scheme).

(2) If the jobholder gives notice under this section –

(a) the jobholder is to be treated for all purposes as not having become an active member of the scheme on that occasion.

(b) any contributions paid by the jobholder, or by the employer on behalf or in respect of the jobholder, on the basis that the jobholder has become an active member of the scheme on that occasion must be refunded in accordance with prescribed requirements.

…

(4) The Secretary of State may by regulations make further provisions in relation to notices under this section.

(5) The regulations may in particular make provision –

(a) as to the form and content of a notice;

(b) as to the period within which a notice must be given;

…

33. Regulation 9 of the Enrolment Regulations sets out detailed requirements in relation to the procedure for opting out:

9 Opting out

(1) A jobholder who has become an active member of an occupational pension scheme or a personal pension scheme in accordance with arrangements under section 3(2) of the Act, may opt out by giving their employer a valid opt out notice obtained and given in accordance with this regulation.

(2) Where the jobholder has become an active member of an occupational pension scheme, the jobholder must give their employer a valid opt out notice within a period of one month beginning with the later of –

(a) the date on which the jobholder became an active member of the scheme in accordance with regulation 6(1)(a), or

(b) the date on which the jobholder was given the enrolment information.

…

34. For these purposes, "enrolment information" is defined in regulation 2 of the Enrolment Regulations as meaning "the information described in paragraphs 1-15 and 24 of Schedule 2", which includes (at paragraph 2):

> The jobholder's automatic enrolment date, automatic re-enrolment date or enrolment date, as the case may be….

Tax legislation

35. Paragraph 1 of Schedule 4 to the Finance Act 2016 ("FA16"), which establishes Fixed Protection 2016, provides as follows:

> **1**
>
> (1) Sub-paragraph (2) applies at any particular time on or after 6 April 2016 in the case of an individual if—
>
> (a) each of the conditions specified in paragraph 2[2] is met,
>
> (b) there is no protection-cessation event (see paragraph 3) in the period beginning with 6 April 2016 and ending with the particular time,
>
> (c) paragraph 1(2) of Schedule 6 to FA 2014 ("individual protection 2014") does not apply in the individual's case at the particular time, and
>
> (d) at the particular time or any later time, the individual has a reference number (see Part 3 of this Schedule) for the purposes of subparagraph (2).
>
> (2) Part 4 of FA 2004 has effect in relation to the individual as if the standard lifetime allowance were the greater of the standard lifetime allowance and £1,250,000.

36. The relevant sub-paragraphs in this case are 1(b) and 1(d) because HMRC argue that a protection cessation event did occur when the Appellant was auto-enrolled in his employer's pension scheme in 2017 and that, as a result, they were entitled (as they did) to withdraw the reference number referred to in paragraph 1(d).

37. Paragraph 3 of Schedule 4 FA16 explains that a protection-cessation event includes a benefit accrual or the making of an arrangement relating to the individual:

> **3**. There is a protection-cessation event if—
>
> (a) there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme,
>
> (b) …
>
> (c) …, or
>
> (d) an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances.

38. "Benefit accrual" is defined in Paragraph 4 Schedule 4 FA16:

> **4**
>
> (1) For the purposes of paragraph 3(a) there is benefit accrual in relation to the individual under an arrangement –

[2] Paragraph 2 is not included here, as it is common ground that the conditions in it are met in this case.

(a) in the case of a money purchase arrangement that is not a cash balance arrangement, if a relevant contribution is paid under the arrangement on or after 6 April 2016,

…

(4) Paragraph 14 of Schedule 36 to FA 2004 (where a relevant contribution is paid under an arrangement) applies for the purposes of sub-paragraph (1)(a)…[3]

39. "Permitted circumstances" for the purposes of paragraph 3(d) are defined (via paragraph 7) by reference to Paragraphs 12(2A) to (2C) of Schedule 36 to the Finance Act 2004 ("FA04"), but there was no argument in this case that there were any permitted circumstances surrounding the Appellant's auto-enrolment.

40. Paragraph 14 of Schedule 4 FA16 provides for the issue of reference numbers:

14

(1) An individual has a reference number for the purposes of paragraph 1(2)… if a reference number –

(a) has been issued by on behalf of the Commissioners in respect of the individual for the purposes concerned, and

(b) has not been withdrawn.

(2) Such a reference number –

(a) may include, or consist of, characters other than figures, and

(b) may be issued only if a valid application for its issue is received by or on behalf of the Commissioners.

(3) A valid application is an application –

(a) made by or on behalf of the individual concerned,

(b) made on or after 6 April 2016,

…

(e) containing also in the case of an application for a reference number for the purposes of paragraph 1(2) –

(i) a declaration that the conditions specified in paragraph 2 are met in the individual's case, and

(ii) a declaration that there has been no protection-cessation event (see paragraph 3) in the individual's case in the period beginning with 6 April 2016 and ending with the making of the application…

41. Paragraph 15 of Schedule 4 FA16 provides the basis for withdrawing a reference number:

15

(1) This paragraph applies where a reference number for the purposes of paragraph 1(2) … has been issued by or on behalf of the Commissioners in respect of an individual.

(2) The number may be withdrawn by an officer of Revenue and Customs.

[3] That paragraph provides that a relevant contribution is paid if either "a relievable contribution is paid by or on behalf of the individual under the arrangement", or "a contribution is paid in respect of the individual under the arrangement by an employer of the individual". The Appellant did not argue that the payments made in this case were not "relevant contributions".

(3) The number may be withdrawn only if—

(a) something contained in the application for the number was incorrect, or

(b) where the number was for the purposes of paragraph 1(2)—

(i) there has been a protection-cessation event (see paragraph 3) in the individual's case since the making of the application…

…

(4) Where the number is withdrawn –

(a) notice of the withdrawal, and

(b) reasons for the withdrawal,

are to be given by an officer of Revenue and Customs to the individual.

(5) Where the number is withdrawn, the effect of the withdrawal is as follows –

(a) in the case of withdrawal in reliance on sub-paragraph (3)(a), the number is treated as never having been issued,

(b) in the case of withdrawal in reliance on paragraph (b) or (c) of subparagraph (3), the number is treated as having been withdrawn at the time of the event mentioned in sub-paragraph (i) or (ii) of that paragraph …

42. Paragraph 16 of Schedule 4 FA16 makes provision for appeals against the withdrawal of reference numbers:

16

(1) …

(2) Where a reference number issued in respect of an individual for the purposes of paragraph 1(2) … is withdrawn, the individual may appeal against the withdrawal.

…

(5) Where an appeal under sub-paragraph (2) is notified to the tribunal, the tribunal –

(a) must allow the appeal if satisfied that the withdrawal was not authorised by paragraph 15(3), and

(b) must otherwise dismiss the appeal.

ARGUMENTS

For the Appellant

43. In outline, Mr Firth submitted that the enrolment information was not "given" to the Appellant within the meaning of paragraph 9(2)(b) of the Enrolment Regulations, meaning that time had not started to run on his time limit to opt out of automatic enrolment. He advanced two arguments why this was the case.

44. First, for the information to have been "given" to the Appellant, he must have been given a real opportunity to opt out; and he invited the Tribunal to find that either the relevant information had never reached the Appellant's email account or, if it had, it had either been deleted before he read it as a result of the technical problems with his phone or it had been automatically diverted into his "junk" folder, as a result of which he might have deleted it without paying it serious attention as it was very similar to the large volume of other similar junk mail he received and he had no reason to be expecting it, given the course of discussions

with NFAL in which it been fully understood that he did not wish to participate in any pension arrangements. In either case, he submitted (against the background of the assurances the Appellant had been given about not joining the pension scheme if he did not sign the form authorising deductions from his salary for it) that the Appellant had not been given a real opportunity to opt out by the email that had been sent to him.

45. Mr Firth argued, broadly, that the requirement for the enrolment information to have been "given" to the Appellant needed to be interpreted in context – there was no competing interest to be balanced against the Appellant's right to opt out. The taxpayer was being given a unilateral choice which presented no disadvantage to his employer. Parliament should be presumed to have intended that a notice should only be regarded as "given" when it was knowingly received, so that the taxpayer had a real opportunity to exercise his rights to opt out. He relied on *Rust-Andrews v First-tier Tribunal (Social Entitlement Chamber)* [2011] EWCA Civ 1548, where the Court of Appeal said this about when a decision of the Tribunal should be regarded as "given":

> As we have not heard argument on the point, I can do no more than express my provisional view. …. It seems to me that as a matter of fairness and principle, one would expect an appeal time limit to run from the date when the appellant knows or can be taken to know of the decision he wishes to appeal and the reasons for it. It therefore requires clear wording to provide that an appeal time limit runs from a time earlier than when the appellant received or can be taken to have received the decision in question and the reasons for it (cf *R(Anufrijeva) v SSHD* [2004] 1 AC 604 para 26). "Given" is insufficiently clear so to provide. I do not think, for instance, that a decision is "given" on the date it is posted to the parties, if they are unaware of it. It is given (to them) when it is received or can be taken to have been received by them. The giving of a decision requires the transmission of the decision to the party in question, and it is given to him when in he receives it or would in the ordinary course receive it.

46. Second, Mr Firth submitted that the enrolment information was deficient (and therefore invalid) because it had, he submitted, identified an incorrect enrolment date. The required enrolment information had therefore not been "given" at all.

For HMRC

47. Mr Marks argued that the notice of enrolment had clearly been "given" to the Appellant. Whether he had read it or not, it had been sent to his email account and Mr Marks invited me to find it had been received there and not accidentally lost *en route* or deleted on arrival before the Appellant saw it. If the Appellant had simply failed to see it because it had been automatically diverted to his junk mail folder, he relied on *R (oao Munim) v Secretary of State for the Home Department* [2020] EWCA Civ 49, where the Court of Appeal had held that failure by an appellant to monitor his junk email folder amounted to "unreasonable conduct" on his part, in the context of a provision in the Immigration Rules which said that "failure, without providing a reasonable explanation, to comply with a request made on behalf of the Secretary of State to attend for interview" constituted valid grounds for refusal of leave to remain in the UK. In that case, a request to attend for interview had been emailed to the appellant and received at his email account but automatically diverted to his junk email folder, where he had not seen it until much later.

48. As to any inaccuracy in the enrolment date set out in the notice delivered to the Appellant, Mr Marks said that HMRC's position was that there is no statutory requirement as to what information should be provided to the Appellant when informing him of his right to opt out. All that was required was that the jobholder was given notice that he had been enrolled into a

scheme. Such notice was given here on 6 March 2017. The enrolment date is only required in order to work out the time limit under Regulation 9 of the Enrolment Regulations. In his submission, even though the enrolment date given in the enrolment notice may have been incorrect in law (he put it no higher than that), this did not affect the Appellant's obligation to give a valid opt-out notice within the statutory time limit.

49. Mr Marks also initially submitted that even if the notice of enrolment did not reach the Appellant until 27 July 2017 (when he admits to first seeing it), he was still out of time for opting out, as the time limit would have expired on 27 August 2017; however on reflection he withdrew this submission, on the basis that the notice would, on its face, have imposed a time limit for exercise that had already passed and could not therefore be valid.

DISCUSSION

Was the enrolment information given accurate, and if not, what is the result?

50. As can be seen from [22] above, the date stated in the notice given to the Appellant as his automatic enrolment date was 1 February 2017. It is clear that for the Appellant, his pay reference period was a month, that being the period by reference to which his regular salary was paid[4]. The fact that NFAL had decided to enrol the Appellant in the scheme with effect from the first of the month indicates that his monthly pay reference period ran from the first day of the month. In the pay reference period commencing 1 October 2016 (even though he only started work on 17 October 2016), the earnings payable to him were far in excess of the £833 required to bring him immediately within the scope of auto enrolment (his annual salary of £55,000 equating to over £1,000 per week, so he would only have needed to be paid for less than one week's work on 25 October 2016, the contractual payment date, to pass that figure). As such, the Appellant's "automatic enrolment date" for the purposes of section 3 PA08 was therefore his start date of 17 October 2016, subject to NFAL's ability to defer that date in accordance with s. 4 PA08.

51. As can be seen from [19] above, the purported notice of deferment was issued on 12 December 2016. Section 4(5) PA08 requires any notice of deferment to be issued not later than 6 weeks after the day after the Appellant's "starting day" (17 October 2016) (see [29] to [31] above). The purported notice of deferment was issued well after that period had expired, and cannot therefore have been valid. The Appellant's automatic enrolment date therefore remained at 17 October 2016.

52. Even if the notice of deferment had been given in time, the maximum permitted deferral under s. 4(6) PA08 would have been "three months after the starting day", i.e. three months after 17 October 2016, namely 17 January 2017 (see [29] above).

53. Thus, whether the notice of deferment was served in time or not, the date of 1 February 2017 given as the Appellant's "automatic enrolment date" in the information sent to him on 6 March 2017 was clearly incorrect.

54. Mr Marks submitted that there was no requirement to include the automatic enrolment date in the auto-enrolment notice, but this is clearly incorrect in the light of paragraph 2 of Schedule 2 to the Enrolment Regulations – see [34] above.

55. Since the time limit for opting out runs from the date on which a jobholder is "given the enrolment information", the question that then arises is whether the time limit starts to run as soon as information is given which purports (albeit incorrectly) to be the "enrolment information", or only when the correct "enrolment information" is given.

[4] See Regulation 4 of the Enrolment Regulations.

56. There can in my view be only one answer to this question. The legislation lays down a highly prescriptive regime setting out the requirements for provision of a great deal of detailed information to an auto-enrolled member, and clearly linking the time limit for opting out to the date of provision of that information. If the information that has been provided is simply incorrect (which was clearly the case here, and in a very important respect) then I consider it to be self-evident that any time limit expressed to run from the time when that information has been provided cannot start to run until the correct information has been provided.

57. It follows that the opting out notice delivered by the Appellant, delivered (as it was) before the correct enrolment information had been given to him, must have been delivered before the statutory deadline (of one month after the giving to him of the enrolment information). As there is no other challenge to the validity of his opt-out notice, I conclude that it was a valid notice. It follows that there was nothing in the Appellant's application for a reference number that was incorrect, nor was there a protection-cessation event in relation to the Appellant. Accordingly, the withdrawal of the reference number by HMRC was not authorised and the appeal must be allowed under Paragraph 16(5)(a) of Schedule 4 FA16.

58. The appeal is therefore ALLOWED.

If the enrolment information had been accurate, what would be the result?

59. If I had not allowed the appeal on this basis, my analysis of the issue of whether the email sent to the Appellant via "pensionqueries" on 6 March 2017 meant that the information it contained was "given" to the Appellant at that time would be as follows.

60. I did not find the cases cited by both sides to be particularly helpful on this point. The *Munim* case was concerned with different wording and whilst the *Rust-Andrews* case at least interpreted the word "given", it did so in an entirely different context.

61. I accept Mr Firth's proposition that a decision as to when information has been "given" is one which must reflect the overall context in which the decision is being made; this is not a situation in which there are detailed provisions governing how the information must be given or specifying what method of delivery will mean that the information can be definitively regarded as having been given, or when. Quite clearly in the modern world, where the recipient of the information is known to use an email address and has not objected to its use to communicate with him/her, any information received at that email address ought, at first sight, to be regarded as "given", but even that cannot necessarily be assumed. For example, email accounts can be hacked, or suspended for non-payment of subscription fees; IT failures can cause deletion of emails without the user's knowledge; the user's computer may have broken and they may be unable to obtain access to a replacement for some reason; a computer virus may have destroyed the email or rendered access to it impossible. One could easily imagine many other situations in which it could not fairly be said that the information in the email had been "given" to the intended recipient; for example, if important information is buried in a single email amongst a snowstorm of other similar-looking but entirely insignificant emails, has that information truly been "given", or would it be more accurate to say it has been "hidden"?

62. In the present case, I have found that the email was in fact received at the Appellant's email account, it was not deleted without his intervention and he deleted it, either without opening it at all (particularly if it had been diverted into his junk folder) or after only briefly scanning it and mistakenly dismissing it (in the light of the header which had been added by the NBS email system) as "just more junk email".

63. It should be remembered that the Appellant believed it had been settled with his employer that he was not to be enrolled in any pension scheme and he was not therefore expecting any

communication about it. On the other hand, the email would have been shown on his phone as originating from "pensionqueries", and the Appellant did not suggest this account was used to send him any other emails.

64. On balance, I consider that the receipt of the 6 March 2017 email which I find to have taken place would (if the information in it had been correct) have resulted in the information contained in it being "given" to the Appellant. For that reason, if that information had been accurate I would have dismissed the appeal.

CONCLUSION

65. On the basis set out at [56] to [57] above, however, the appeal is ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 04 April 2022