First-tier Tribunal
(General Regulatory Chamber)

Tribunal Reference: NV/2018/0018

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

EASTEYE LIMITED

Appellant

v

ENVIRONMENT AGENCY

Respondent

DECISION

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1. By notice of appeal dated 6 November 2018, the Appellant appeals pursuant to regulation 48(1) of the Energy Savings Opportunity Scheme Regulations 2014 ("the Regulations") against the Respondent's imposition of a civil penalty of £8,190 by Notice of Civil Penalty dated 4 October 2018. The Notice was issued in respect of the Appellant's failure to comply with an Enforcement Notice issued under the Regulations and which required the Appellant to carry out an ESOS assessment and report that assessment to the Respondent in accordance with Part 4 and 5 of the Regulations.

2. By its notice of appeal, the Appellant states that it owns and operates a number of bars and restaurants and has no member of staff with the necessary expertise to comply with the requirements of ESOS. To enable it to do so, it appointed an agent, Blogical, to undertake the necessary work. However, Blogical proved to be unreliable which has resulted in numerous problems being caused to the business. The Appellant seeks a reduction in the penalty specified to the minimum possible amount.

3. The evidence submitted with the Appellant's appeal form shows that the company was seeking assistance from Blogical, in terms of understanding the requirements of ESOS, as early as 31 July 2015 and that Blogical was collating the necessary information. However, despite this, in December 2015 the Appellant gave notice that it intended to comply late with ESOS stating that its ESOS assessment would be finalised by 25 January 2016 and compliance notified.

4. This timetable was not met and on a number of occasions during 2016, the Respondent chased for updates. From the evidence before the Tribunal it appears that Blogical were still seeking quotations from other firms to undertake work to inform the ESOS assessment. It was not until 12 June 2017, that an assessment was in fact submitted to the Respondent.

5. Well before this, the Respondent had served an enforcement notice on 13 October 2016, which required the Appellant to carry out an ESOS assessment and to report it to the Respondent by 13 January 2017.

6. There is some inconsistency in the material before the Tribunal as to whether the assessment submitted in July 2017 was sufficient to comply with the enforcement notice, with correspondence between the Respondent and the Appellant continuing into 2018, but the Respondent's appeal statement confirms that the enforcement notice was complied with on 12 June 2017 and I will proceed on that basis. The assessment was therefore reported 6 months after the period provided for compliance by the enforcement notice.

7. In response to the appeal, the Respondent asks that the appeal be dismissed. It states that ESOS is a mandatory energy assessment and energy saving scheme which applies to large undertakings and groups containing large undertakings. For the purposes of the Regulations, an undertaking is a relevant undertaking if in relation to a compliance period and on the qualifying date it is either:

   (a) A large undertaking; or
   (b) A small or medium undertaking which is a group undertaking in respect of a relevant undertaking falling within (a).

8. There is no dispute that that the Appellant is a medium-sized organisation which qualifies for ESOS based on the financial criteria set out in the ESOS Regulations, in that it has an annual turnover of £11,006,591.

9. Applying the Respondent's Enforcement and Sanctions Policy published on 11 April 2018, the Respondent categorised the Appellant's conduct as "negligent" i.e.:

> *"[a] failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence"*

10. The Respondent acknowledges that the Appellant was reliant on Blogical to complete the ESOS assessment, however, it argues that the correspondence submitted by the Appellant shows that, in 2015, Blogical had made the Appellant aware of the need to submit an ESOS assessment, yet it was not until after the service of the enforcement notice that Appellant fully engaged with the commissioning of an ESOS assessment when quotations for the work were obtained. The Appellant failed to contact the Respondent prior to the expiry of the compliance period, and, despite the clear wording of the enforcement notice, the Appellant appears to have been unaware, even in March 2017, of the deadline which should have been met.

11. The Respondent submits that the Appellant failed to act promptly and failed to take care and put in place and enforce proper systems for avoiding non-compliance with the enforcement notice, which resulted in a failure to comply until 12 June 2017.

12. Applying the stepped approach to civil sanctions set out in its Enforcement and Sanctions Policy, led to a penalty starting point of £4,680 and a penalty range of between £2,145 and £11,700 In setting the final penalty of £8,190, which the Respondent points out compares to a maximum penalty of £84,000 for a failure to undertake an energy audit which, but for the Respondent's policy, the Appellant might have been liable to.

13. In determining the level of sanction, the Respondent states that it took the following into account all the aggravating and mitigating factors of the case including all representations made by the Appellant (including the Appellant's eventual cooperation). The factors of financial gain, previous history of non-compliance and personal circumstances were treated as being neutral. The Respondent concluded that the penalty should be set halfway between the penalty starting point and the top of the penalty range; hence a penalty of £8,190 was imposed.

FINDINGS

14. The parties have agreed that the appeal should be dealt with by way of written representations and, having considered all the submitted documentary evidence, I am satisfied that it is appropriate for the appeal to proceed on this basis.

15. Regulation 48(1) of the Regulations provides that an appeal to the Tribunal against a Penalty Notice may be made on the grounds that it was:

(a) Based on an error of fact;
(b) Wrong in law, or
(c) Unreasonable.

16. On an appeal against a penalty notice, the role of the Tribunal is not to place itself in the position of the Respondent and to ask itself what penalty it would have decided to impose, but rather to consider whether the penalty was erroneous either because of a factual or legal error or because it was unreasonable. Unreasonable in this context bears its ordinary meaning i.e. one which having regard to the circumstances is unfair, unsound or excessive.

17. The breach in this case is the failure to comply with the enforcement notice dated 13 October 2016 and which required compliance by 13 January 2017.

18. The evidence shows that in July 2015, the Appellant had, to an extent, engaged with the requirements of the ESOS regime and had appointed Blogical to assist with compliance. However, there was little actual progress towards achieving compliance. There is no indication that work of any substance towards compliance was undertaken in 2016, notwithstanding the service of the notice of intention to comply late with ESOS in December 2015 which had promised a compliance notification by 25 January 2016. The e-mails before the Tribunal show that the Respondent chased the Appellant for updates, with Blogical being copied in.

19. In this context, the Appellant cannot have failed to have been aware of its continuing non-compliance and that awareness would have been reinforced by the service on it of the enforcement notice in October 2016. This action appears to have prompted more concerted attempts at compliance, but the compliance period of the enforcement notice was not met and not met by some margin.

20. Whilst it is entirely understandable that the Appellant should need to engage consultants and an external lead assessor to undertake its ESOS assessment, the responsibility for compliance with ESOS remained with it. It should have had in place procedures to monitor the performance of Blogical and for the taking of remedial action to ensure either that Blogical performed its contractual obligations in sufficient time to allow for compliance with ESOS, or to ensure that an alternative appointment was made to secure that objective. None of this seems to have been in place and, instead, compliance with the enforcement notice appears to have been allowed to drift, without any real control being exercised and with no adequate, concerted action being taken to secure compliance. The result is that compliance was not secured until 12 July 2017; some six months after it was due.

21. The Respondent has adopted a policy in relation to applying civil penalties which sets out a stepped approach to the decision on the civil penalty to be applied in any given case. The steps are based on the Definitive Guideline for the Sentencing of Environmental Offences but adjusted so that they are appropriate for the climate change civil penalties, including those under ESOS. I am satisfied that this stepped approach provides a sound and therefore reasonable basis, for determining the appropriate civil penalty in a given case.

22. In determining whether there has been a relevant error in the level of penalty imposed by the notice in this case, the issues are whether (a) the Appellant's culpability was reasonably categorised as negligent, as found by the

Respondent; and (b) whether the civil penalty of £8,190, is proportionate to the breach, having regard to all the circumstances.

23. The Respondent's policy descriptor for negligent is:

> *"[a] a failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence".*

24. In this context, and given the facts which I have outlined above, the Respondent's conclusion that the Appellant's conduct was negligent was an entirely reasonable one and one which involved no error. There was no proper system in place to avoid the commission of the offcence. Applying the Respondent's policy, the effect of this conclusion is that the penalty starting point is £4,680 with a range of £2,145 to £11,700. This range sits within a statutory maximum of £39,000.

25. I am not, however, satisfied that the Respondent's conclusion that that the penalty should be set at the halfway point between the starting point and the top of the penalty range was reasonable. The breach here was the failure to comply with the enforcement notice. The evidence shows that the Appellant was attempting to comply, albeit haphazardly, with its obligations and with the enforcement notice. This is not a case in which a blind eye was turned to the ESOS requirements. Whilst the Appellant could and should have done more to ensure that compliance was achieved within the compliance period, there were clearly failings on the part of its appointed consultant and some allowance needs to be made for this. Further, compliance was ultimately secured, albeit late.

26. In this context, a penalty of £8,190 imposed is disproportionate to the breach and therefore unreasonable. In my view, a penalty at the midpoint of the penalty range should have been imposed, better reflecting the circumstances as a whole. The appropriate penalty which should have been imposed was one of £6322.

27. As a result of my conclusion I allow the appeal in part and direct that the civil penalty notice be affirmed but as modified by requiring the payment of £6322 in accordance with the payment details contained in the notice by no later than 4 April 2019.

Signed by the Judge of the First Tier Tribunal
4 March 2019

Promulgation date 5th March 2019