



Neutral Citation: [2023] UKFTT 681 (GRC)

Case Reference: NV/2023/0005/ESO

**First-tier Tribunal  
(General Regulatory Chamber)  
Environment**

**Heard : Written Representations**

**Heard on: 11 August 2023**

**Decision given on: 17 August 2023**

**Before**

**TRIBUNAL JUDGE SIMON BIRD KC**

**Between**

**MARLBOROUGH STERLING INVESTMENT GROUP LIMITED**

Appellant

**and**

**ENVIRONMENT AGENCY**

Respondent

**Decision:** The appeal is allowed and the Notice of Civil Penalty is affirmed with modification.

## **REASONS**

1. By notice of appeal dated 10 March 2023, 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

£1,375 by Notice of Civil Penalty (“the Notice”) dated 10 February 2023. The Notice was issued in respect of the Appellant’s failure to comply with an Enforcement Notice issued on 23 July 2021 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 or to provide evidence that it did not meet the definition of a large undertaking of the purposes of the Regulations as at 31 December 2018.

2. In determining this appeal I have had regard to the appeal bundle of 74 pages which includes the Notice of Appeal and grounds of appeal, the Respondent’s Response to the appeal and the Appellant’s reply to that Response.

### **The Appeal**

3. By its notice of appeal, the Appellant argues that the Notice should be cancelled. In its reply to the Respondent’s response, the grounds upon which it argues the Tribunal should cancel the Notice are that it is based on an error of fact and/or is unreasonable.
4. In support of its appeal the Appellant argues in summary that:
  - (i) It had continuously engaged with the Respondent since July 2022 on being made aware of the requirements of the Regulations in an attempt to comply with them;
  - (ii) It had originally believed that it did not meet the definition of a large undertaking for the purposes of the Regulations, given its primary activity was the provision of specialist labour to a variety of sectors and it only had small premises with 17 in-house employees;
  - (iii) When it had understood that the requirements of the Regulations did apply to it by reason of the group structure of the business, it was provided with guidance on disaggregation by the Respondent. None of the businesses within the group consumed more than 40,000 kWh and therefore, individually, were not large undertakings for the purposes of the Regulations. The Respondent had advised that disaggregation for the purposes of ESOS compliance was permissible;
  - (iv) It was pursuing disaggregation and had supplied the Respondent with the energy consumption data of the four group companies by e-mail on 20 January 2023 and had asked the Respondent to “*confirm that no further action is required*”. The Appellant was advised by a Lead Assessor he

thought this should suffice to ensure compliance with the Regulations. The Appellant was new entrant to the scheme and the energy consumption data was only submitted once it had been confirmed by the Lead Assessor. No response was received from the Respondent to the request for confirmation it had made.

(v) On 10 March 2023 the Appellant submitted a compliance notification, again with advice of a Lead Assessor, but as the parent company of the group. Having appreciated that a separate notification was required for each of the group companies in May 2023, the Appellant had sought advice from the Respondent on how this should be effected as all it wished to do was to ensure that it was compliant with the Regulations.

5. I also note that the Notice records as a mitigating factor that, until 30 September 2021, the majority of the Appellant's staff were furloughed due to COVID, with and it was operating only with a skeleton staff who were concentrating on processing the worker's pay.
6. The Appellant argues that the Notice is founded on an error of fact because it had sought confirmation in its email of 20 January 2023 that no further action was required and no response had been received from the Respondent. It had therefore assumed that it had done all it needed to in order to comply with the Regulations. It had not been able to submit a compliance statement until March 2023 as the relevant page of the Respondent's website was not functioning.

### **The Response to the Appeal**

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. Schedule 1 to the Regulations sets out how it is to be determined whether an undertaking is a "large undertaking" or a "small undertaking". Schedule 1

paragraph 1 provides that a large undertaking means an undertaking which either:

- (a) Employs at least 250 persons, or
- (b) Has an annual turnover in excess of 50 million euro and an annual balance sheet in excess of 43 million euro.

9. The Respondent points out that the deadline for the submission of the ESOS Phase 2 notification under the Regulations was 5 December 2019 and, in the light of the Appellant's non-compliance, a Compliance Notice was served on it at its registered office on 18 June 2021. The deadline for a response to the Compliance Notice passed on 2 July 2021 with no response received from the Appellant. On 23 July 2021 the Enforcement Notice had been served requiring compliance by 25 October 2021. The Notice of Intent to Impose a Civil Penalty was served on 20 July 2022 which led to engagement with the Appellant between July and September 2022 as to whether the regulations applied to it and on the potential for disaggregation of the group's companies for the purposes of ESOS compliance.
10. The Respondent argues that it was clear from its e-mail of 12 September 2022 that, in order to comply with the Regulations, the Appellant needed to calculate its total energy consumption, to identify energy savings opportunities where these exist and then submit a compliance notification. The Respondent had sought confirmation of the Appellant's low energy status on 21 October 2022 but this was not supplied until 20 January 2023. The compliance notification submitted on 10 March 2023 was for the group of companies with a total energy consumption nearly double the 40,000 kWh threshold. The Appellant therefore remained non-compliant.
11. The Respondent states that it has applied its "Environment Agency enforcement and sanctions policy" ("ESP) published in April 2018. Section A of Annex 2 to the ESP explains the steps the Respondent takes to decide whether to impose a civil penalty or to work out the final penalty amount in relation to climate change schemes (including ESOS). The steps are based on those in the Definitive Guide for the Sentencing of Environmental Offences, published by the Sentencing Council on 1 July 2014. Within the steps the Respondent assesses:
  - the nature of the breach
  - culpability (blame)

- the size of the organisation
- financial gain
- any history of non-compliance
- the attitude of the non-compliant person
- personal circumstances.

12. Section A of the ESP headed “How the Environment Agency sets the penalty level” sets out the four steps that are carried out when the Respondent can apply its discretion and decide whether to: (i) waive (not apply) the civil penalty; (ii) reduce the civil penalty; or (iii) extend the time for payment. The four steps are:

Step 1 Check or determine the statutory maximum penalty for the breach.

Step 2 Decide whether to waive the penalty or set the initial penalty amount by assessing the nature of the breach and other enforcement positions in line with Section D.

Step 3 If the Agency decides to impose a penalty, work out the penalty starting point and penalty range based on culpability (blame) and the size of the organisation.

Step 4 Set the final penalty amount by assessing aggravating and mitigating factors and adjust the starting point as appropriate.

13. Applying the ESP guidance, the Respondent identifies the Appellant as a medium sized organisation which, with negligent culpability, gives rise to a penalty starting point of £1,000 and a penalty range of £1,000 - £1,500.
14. In setting the £1,375 penalty, which the Respondent points out represents a £43,625 reduction on the statutory maximum applicable to the breach of failing to carry out an energy audit, it considered all the aggravating and mitigating factors of the case, including all representations made by the Appellant.
15. The Respondent therefore found that the Appellant had acted negligently, the ESP guidance was correctly applied in determining the penalty to be imposed and the appeal should be dismissed.

## **FINDINGS**

16. 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.

17. 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.
18. 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.
19. Under Regulation 50, the relevant powers of the Tribunal on this appeal are to cancel or affirm the Notice (with or without modification).
20. In this case the Notice was served in relation to the failure to comply with the enforcement notice served on 23 July 2021 and which required compliance by 25 October 2021. There is no dispute that the Appellant was required to comply with the Regulations or as to the date by which that compliance should have occurred. The issues are firstly, whether the Respondent's categorisation of the Appellant's breach as "negligent" was based on an error of fact or law and/or was unreasonable and secondly, whether the penalty imposed by the Notice was unreasonable.
21. Under the Respondent's ESP, the term "*negligent*" is defined as meaning "*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*". The next and lowest level of culpability is "*low or no culpability*" which is defined as "*an offence committed with little or no fault on the part of the organisation as a whole*".
22. In this context, I note that the Appellant was apparently unaware of the existence of the Compliance Notice served on 18 June 2021 or the Enforcement Notice served on 23 July 2021. That indicates that it did not have in place reasonable procedures to ensure that statutory notices were brought to the attention of those who needed to be made aware of them for the purposes of

corporate decision making. Whilst I appreciate that in the summer of 2021 the effects of COVID were still having significant implications for the operation of businesses, including that of the Appellant, and that it was a new entrant to the ESOS, the fact that its first knowledge of the enforcement notice was apparently with the service of the Notice of the Intent to impose a Civil Penalty, supports a finding that the Appellant had at least some culpability in the failure to comply with the Enforcement Notice. Properly effective procedures would have alerted the Appellant to the existence of the earlier notices at a much earlier point of time, even allowing for the COVID restrictions and their implications.

23. Further and in any event, I do not consider that the Respondent's categorisation of the Appellant's conduct after its becoming aware of its non-compliance with the Regulations as "*negligent*", can fairly be said to be erroneous (whether in fact or law) or unreasonable. The Respondent had made it sufficiently clear, even to a new entrant to ESOS, what was required from the Appellant in its e-mail of 21 October 2022, including what evidence was required in relation to the disaggregation of companies within the Appellant's group. It had also stated that individual notification of compliance was required for each of the companies.
24. It was not then until 23 January 2023 that the information in relation to total energy consumption was provided. The Appellant had the data for 2018/2019 by 16 September 2022, and whilst it understandably wished to have any data for submission checked by a Lead Assessor, the very lengthy period it took to provide the data in my view reasonably supports a conclusion that the Appellant did not have in place proper systems for ensuring compliance with the Regulations.
25. That said, given the course of dealings between the Appellant and the Respondent, there is merit in the Appellant's contention that it reasonably assumed from the absence of any response to its e-mail of 20 January 2023 that it had done all that it was required to do in order to comply with the Regulations. I do not therefore consider that the continuing failure to comply with the requirements of the Regulations after 20 January 2023 was reasonably treated by the Respondent as counting against the Appellant as an aggravating factor. Even if I were wrong in relation to that, the continuing non-compliance after this date was simply symptomatic of the underlying failure to have put in place a proper system to ensure compliance.

26. I can therefore find no relevant error in the Respondent's finding that the Appellant's breach was a negligent breach, rather than one of no or low culpability.
27. In determining whether there has been a relevant error in setting the level of penalty imposed by the Notice, having regard to the grounds of appeal the issue narrows to whether the civil penalty of £1,375 is reasonable i.e. proportionate to the breach, having regard to all of the circumstances.
28. As the Respondent has explained, it 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 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.
29. However, I am not satisfied that a penalty which is closer to the top end of the range identified by the ESP rather than to the bottom of that range was a reasonable one having regard to the circumstances of this case.
30. I have found above that there is no error or unreasonableness in the Respondent applying the penalty factor for a "negligent" breach. That reflects the Appellant's failure to have proper systems in place to ensure that it complied with the Regulations. However, the penalty starting point in this case was £1000 reflecting the "negligent" penalty factor and, applying the ESP, the penalty starting point should be varied only to reflect aggravating or mitigating factors.
31. Whether there are such additional factors falls to be judged as at the date of the Notice. I am not satisfied that, on the evidence before it, it was reasonable for the Respondent to conclude that there were aggravating factors in this case which justified departing from the penalty starting point. As soon as the Appellant became aware of the ESOS obligations and established that they applied to it, it was clearly seeking to comply with them, albeit that its failure to have proper systems in place made that difficult. This is not a case in which non-compliance was deliberate or intended to deliver any financial benefit to the Appellant and there was no history of non-compliance. Whilst it may still be the case that compliance has not been achieved, that is not a factor which can reasonably be said to weigh materially in favour of departing from the



penalty starting point in this case given that the Respondent's failure to respond to the Appellant's e-mail of 20 January 2023. Further, as I have already stated, on the facts here, that delayed compliance was merely a symptom of the a new entrant failing to have proper systems in place which is already taken into account in identifying the penalty starting point in this case.

32. In all the circumstances, I do not consider a penalty of £1,375 was a reasonable penalty to impose in this case. There was no reasonable justification for departing from the penalty starting point and therefore the civil penalty imposed should have been £1,000. That would have been proportionate to the breach, reflecting the need to ensure compliance with the Regulations more generally and not unreasonable.
33. I therefore allow the appeal and modify the Notice of Intent to impose a civil penalty by replacing the civil penalty of £1,375 with one of £1000 and I affirm the Notice as modified.

**Signed: Judge Simon Bird KC**

**Date: 15 August 2023**