



Neutral citation: [2023] UKFTT 948 (GRC)

Case Reference: NV/2023/0018/ESOS

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

Heard by: Written Representations

**Heard on: 16 October 2023
Decision given on: 6 November 2023**

Before

TRIBUNAL JUDGE SIMON BIRD KC

Between

MARSHELL OIL LLP

Appellant

and

ENVIRONMENT AGENCY

Respondent

Decision: The appeal is Part Allowed

REASONS

1. By notice of appeal dated 23 May 2023 the Appellant seeks to appeal 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 £67,500 by Notice of Civil Penalty dated 14 February 2023 (“the Notice”). The Notice was issued in respect of the Appellant’s failure to comply with an Enforcement Notice dated 4 May 2022 requiring it carry out an ESOS assessment and report that assessment to the Respondent in accordance with Part 4 and 5 of the Regulations.

2. The Tribunal's relevant powers in relation to an appeal to the Tribunal against a Notice of Civil Penalty Notice are contained in regulation 48(1). An appeal may be made on the grounds that the relevant notice was:
 - (a) Based on an error of fact;
 - (b) Wrong in law; or
 - (c) Unreasonable.

3. Rule 22(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory) Rules 2009 ("the Rules") requires that an appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received within 28 days of the date on which the notice to which the proceedings relate was sent to the Appellant. The Tribunal has power under Rule 5(3)(a) of the Rules to extend or shorten the time for complying with any rule unless such extension or shortening would conflict with the provision of another enactment containing a time limit. In the exercise of that power, as with the exercise of any power under the Rules, the Tribunal must give effect to the overriding objective set out in Rule 2.

Appeal Made out of Time

4. The date the Notice in this case was sent to the Appellant was 14 February 2014 and the Appellant's notice of appeal should therefore have been received by the Tribunal no later than 14 March 2014. In fact, the appeal was not made until 23 May 2023, well outside the 28 day period set by Rule 22(1). The Appellant's explanation for this delay is that it has neither staff or premises in the UK, albeit being an English Limited Liability partnership, and its corporate administration is undertaken by a third party, More Group (Accounting) Limited ("MG") and its registered office is shared with 370 other limited liability partnerships and limited liability companies.

5. Neither the Compliance Notice served by the Respondent in March 2022 nor the Enforcement Notice dated 4 May 2022 were forwarded to the Appellant by MG and MG deny receiving either notice. The Notice of Intent to Impose a Civil Penalty dated 24 August 2022 was forwarded to the Appellant on 26 August 2022 and it believed that it had responded to the Respondent, explaining that it was not caught by the Regulations. No response was received to this email which the Appellant assumed indicated that its content had been accepted. In fact, the Appellant states, it had been sent to the wrong e-mail address and not been received by the Respondent.

6. The Notice was served on 14 February 2023 but not forwarded by MG to the Appellant until 4 April 2023. The Appellant then instructed an environmental consultancy to undertake any corrective action to remedy the breach of the ESO

Regulations and an ESOS assessment and a Notification of Compliance for ESOS Compliance Period 2 was submitted on 3 May 2023. This confirmed that the Appellant had no energy responsibility. In making its application to be permitted to make an appeal out of time, the Appellant relies upon an email dated 12 May 2023 from an employee within the Respondent's Enforcement Team who had been asked to confirm that the Respondent would not object to the filing of an appeal on the grounds that the deadline had expired. The response of the Respondent's employee was:

"I can confirm that the Environment Agency has no objection to Marshall Oil LLP filing an appeal on the grounds the deadline has expired"

7. By e-mail dated 20 July 2023 the Parties were informed that Judge Aleksander had directed that the appeal be accepted out of time, directing that:

"The length of delay is 61 days; the reason for the delay is persuasive: it is fair and just to accept the application because of the issues relating to the processing of post at the registered office and the Environment Agency not objecting to the delay"

8. By email dated 20 July 2023, the Respondent expressed its concern at the decision to accept the appeal out of time, stating that at no stage had it agreed that a 61 day delay to the appeal being made was acceptable and indicating that it would be submitting, in response to the appeal, that it was made out of time. It pointed out that the notices it had served, had all been served in accordance with the notice provisions of the Regulations.
9. In its response to the appeal, the Respondent states that the deadline for appealing the Notice was 14 March 2023 and the appeal was submitted 70 days late rather than 61 days. It points out that the service of the notices on the registered office of the Appellant accorded with regulation 51 of the Regulations which, it argues, Judge Aleksander apparently did not have regard to in making his direction.
10. The Respondent points out that the time for processing of post at the Appellant's registered office appears to fluctuate hugely and it casts doubt on the Appellant's contention that it sought to respond to the Notice of Intention to impose a Civil Penalty in September 2022 but sent its email to the wrong address. It also contends that Judge Aleksander misunderstood the response of its employee in the email of 12 May 2023 which should not have been read as expressing that the Respondent would agree that any subsequent appeal would be acceptable to the Respondent. Further, it argues, the Respondent's position should not be prejudiced by a response from an employee to an agent of the Appellant, both acting outside of the appeal process.

11. In response to these points, the Appellant agrees that the time taken for the administration of its registered office appears to “fluctuate hugely” but submits that this is not evidence of its negligence. Rather it is evidence of the failure of MG. Once the Appellant received the Notice, it acted promptly and instructed environmental consultants. It also relies on the statement of the Respondent’s employee, pointing out that he made the statement in the capacity of an employee of the Respondent and the Appellant was entitled to rely on it as a statement made to its agent.

Appeal out of time - decision

12. Whilst not formally made as an application to set aside Judge Aleksander’s direction in reliance on Rule 6(5) of the Rules, I treat the Respondent’s response to the appeal as making such an application.
13. Having regard to the overriding objective to deal with cases fairly and justly and having regard to the Rule 2(2) factors, I decline to set aside the Judge’s direction to allow the appeal to proceed out of time. Whilst I accept that the Respondent complied with the service requirements of the Regulations, it would be wrong to ignore the poor operation of the administration of the Appellant’s registered office in exercising my power.
14. Whilst it could be argued that the Appellant would have recourse against MG for its apparently poor performance in the administration of the Appellant’s affairs and that this would justify setting aside the Judge’s earlier direction, in my view that would not be dealing with the case in a way which is proportionate to the importance of the case. The civil penalty in this case is a significant one and the appeal has potential reputational issues for the Appellant.
15. Whilst the delay was a significant one, the delay from the Appellant’s receipt of the Notice extended only a short period beyond the 28 days and there is a reasonable explanation for that additional delay in that the Appellant was awaiting the report from its environmental consultant. Whilst delay should be avoided, I am satisfied that the delay has caused no prejudice to the Respondent and has no bearing on the proper consideration of the issues. Balancing the need to allow the Appellant to contest the appeal and the need to avoid delay, I consider it fair and just to allow the appeal to proceed. I therefore decline to exercise my power to set aside Judge Aleksander’s direction.
16. I have not found it necessary to rely on the Respondent’s employee’s e-mail of 12 May 2023, but reading it fairly and in context it does indicate that the Respondent would have no objection to the appeal being considered by the Tribunal. To that extent it simply confirms my view that no material prejudice would be caused to the Respondent in allowing the appeal to proceed.

THE MERITS

The Appellant's Submissions

17. The Appellant appeals against the Notice on the ground that the amount of the penalty as specified in the Notice was unreasonable. It contends that in assessing the aggravating and mitigating factors, the respondent failed to take account of the actual or potential harm caused by the Appellant's breach. The Appellant neither owns nor occupies any premises in the UK, it employs no staff in the UK and consumes no energy. Annex 2 to Section D3 of the Respondent's Enforcement and Sanctions Policy ("ESP") states that if a satisfactory declaration is received that an organisation which qualifies for ESOS has zero energy consumption, the Respondent will not normally enforce other elements of the scheme. In those circumstances a penalty of £67,500 was too high and disproportionate.
18. The Appellant further submits that in imposing this level of penalty, the Respondent failed to follow its own published guidance as set out in Section A of Annex 2 to its Enforcement and Sanctions Policy ("ESP"). In particular, the Appellant obtained very limited financial gain from the breach, with no profit obtained and the only costs avoided were the costs of instructing an ESOS Lead Assessor. The fee of its appointed consultant was £4,000 plus VAT.
19. The Appellant had also accepted responsibility for the breach and taken steps to ensure that it would not occur again in future phases of ESOS. It also took appropriate steps to remedy the breach on becoming aware of it, by instructing environmental consultants to undertake the ESOS assessment and to submit the relevant notification.
20. The Appellant disputes the assessment of its culpability as "negligent". Its culpability should properly have been categorised as "low or no culpability" given that the breach was caused by the fact that it had never received the Compliance Notice or the Enforcement Notice in May 2022. The Appellant does not know whether they were delivered or were not forwarded by MG.
21. Finally, the Appellant submits that the Appellant has been assessed to be a "large" organisation within the Civil Penalty Notice. That was based on the Appellant having a turnover of greater than £50 million on its accounts for the year ended 31 January 2021. That was correct as at the date of the Notice of Intent to impose a Civil Penalty, but not at the date of the Notice (14 February 2023) which is the relevant date for the purpose of setting a penalty. The Respondent is in a comparable position to a court imposing a criminal sanction, when the size of the

offending organisation will typically be assessed as at the date of the sentence. To use any other date than that of the Notice would mean that a change in the offenders circumstances would not be taken into account. For the year ended 31 January 2022 the Appellant's turnover was less than £50 million and the Appellant should have been assessed as a "medium" organisation. Using the Respondent's approach to the setting of penalties, a "medium" organisation with "negligent" culpability would have given rise to a penalty starting point of £10,800 and the penalty range would have been £4,950 to £27,000. If its culpability is assessed as "low or no" culpability, the starting point would have been £1,800 and the penalty range would have been £900 to £4,500.

22. The Respondent is required to take a principled approach to setting penalties and one grounded in reality. It should not take account only of those factors that it considers support a higher penalty. It was wrong to ignore the Appellant's conduct after it became aware of the breach. The £67,000 figure is unreasonable and the Tribunal is asked to quash the amount and substitute a revised figure which properly reflects the circumstances and mitigation.

The Respondent's Submissions

23. The Respondent submits that ESOS is established by the ESOS Regulations and implements Article 8(4), (5) and (6) of Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency. It came into force on 17 July 2014 and places duties on one "responsible" undertaking in each group (or where an undertaking participates individually, on that undertaking) in relation to the scheme. The relevant undertaking is the one responsible for a participant's compliance with ESOS as determined in accordance with regulation 19 of Schedule 2 of the ESOS Regulations.
24. A "participant" is defined by Regulation 17(1) as meaning:
- (a) a relevant undertaking required to comply with the scheme on its own behalf;
 - (b) where two or more relevant undertakings comply with the scheme as a group in accordance with paragraph (2), or paragraph 1, 3, 7 or 10 of Schedule 2, that group of undertakings.
25. Regulation 15(1) of the ESOS regulations provides that an undertaking is a "relevant undertaking" in relation to a compliance period if, on the qualification date for the compliance period, it is
- (a) a large undertaking; or
 - (b) a small or medium undertaking which is a group undertaking in respect of a relevant undertaking falling within sub-paragraph (a).

26. Regulation 15(2) provides that the determination of which category an undertaking falls is to be determined in accordance with Schedule 1. Paragraph 1 to Schedule 1 provides that a large undertaking means an undertaking which either employs at least 250 people or has an annual turnover in excess of 50 million euro and an annual balance sheet total in excess of 43 million euro.

27. The ESP was published in April 2018 and sets out the Respondent's enforcement and sanctions policy. Section A of Annex 2 explains the steps the Respondent will take 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 in 2014. Within the steps the Respondent assesses:

- that nature of the breach
- culpability
- the size of the organisation
- financial gain
- any history of non-compliance
- the attitude of the non-complaint person
- personal circumstances

28. Under the ESP four steps are carried out within which the Respondent can apply its discretion and decide whether to waive the civil penalty, reduce it or extend the time for payment. Those 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 amount by assessing the nature of the breach and other enforcement positions

Step 3: if the Respondent decides to impose a civil penalty, work out the penalty starting point and penalty range based on culpability 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.

29. Section D of Annex 2 to the ESP explains how the Respondent will initially assess each ESOS breach and its normal "nature of breach" assessment and the other enforcement positions specific to the scheme. The nature of the breach assessment is the seriousness of the breach based on the impact it has on the integrity of the scheme. That means the trust in, transparency, reliability and effectiveness of the scheme. It may include the length of time a person has been required to comply with the law.

30. Applying the four step approach to the circumstances here, the Appellant has failed to carry out an energy audit and to notify the Respondent. The maximum penalty for such a failure under the ESOS Regulations is £90,000 (Step 1). The ESP states that the Respondent will normally impose a penalty for a failure to undertake an energy audit. The Appellant was not a new entrant to the scheme and the initial penalty amount was set at £90,000 (Step 2). The Appellant was concluded to have acted negligently i.e.it failed to take reasonable care to put in place and enforce proper systems for avoiding the commission of the offence. At the time of the breach the Appellant was a large organisation and the date of the breach is the relevant point of assessment for the purpose of Step 3. It would not be correct to determine the size of the Appellant at the date of the Notice of Civil Penalty as the amount of the civil penalty could vary significantly between the date of the breach and the final stages of enforcement action. The correct step in the ESP at which an organisation's current financial position is considered is at Step 4. Applying Step 3 correctly the penalty factor is 0.3 and the penalty range is 0.14 to 0.75 giving a penalty starting point of £27,000 and a penalty range of £12,600 to £67,500 (Step 3). In setting the final penalty amount, which represents a £22,500 reduction in the statutory maximum penalty, the Respondent considered all aggravating and mitigating factors including all representations made by the Appellant.
31. The Appellant acted correctly in considering the provisions of the ESOS regulations and the ESP and the appeal should be dismissed.

Findings

32. 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.
33. 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.
34. 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.

35. 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 four 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 Regulations.
36. I am satisfied that this stepped approach, provided that it is correctly followed, provides a sound and therefore reasonable basis for determining the appropriate civil penalty in a given case. I do not understand the Appellant to contend otherwise.
37. The Appellant contends that the penalty of £67,000 was unreasonable because (a) the Appellant's culpability should have been assessed as "no or low" culpability, as opposed to "negligent", having regard to the Respondent's ESP; (b) at the date of the service of the Notice, the Appellant was a medium size firm rather than a large firm; and (c) the level of penalty was disproportionate to the breach and did not take account of the mitigating circumstances. I will deal with each of these in turn.

Negligent

38. I do not accept that the Appellant's culpability should reasonably have been categorised as "no or low" culpability. Under the ESP, the descriptor for this level of culpability is:

"....an offence committed with little or no fault on the part of the organisation as a whole. For example:

- by accident or the act of a rogue employee despite the presence and due to enforcement of all reasonably required preventative measures*
- where such proper preventative measures were unforeseeably overcome by exceptional circumstances"*

39. Here, the Appellant should have complied with the requirements of the ESOS Regulations by 5 December 2019 without any prompting by way of enforcement action from the Respondent. It should have had in place procedures to ensure that it complied with all relevant environmental legislation timeously. In fact, the Appellant points to no internal procedures or safeguards which were in place to ensure compliance with the ESOS Regulations. The Appellant's approach appears to have been to proceed on the basis of an assumption that, because of it had no operating premises within the UK, the Regulations placed no obligations on it. Indeed, its response to receipt of the Notice of Intent appears to have been to attempt to make this point to the Respondent, albeit that use of the wrong e-mail address thwarted that attempt.

40. It was in fact not until April 2023, after it had been sent the Notice, that it finally took the steps to comply with the requirements of the ESOS Regulations which it should have taken in 2019.
41. Given this context, I see nothing unreasonable in the Respondent's characterisation of the Appellant's culpability as "negligent". The ESP defines this as the:

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

That is an accurate description of the Appellant's culpability. Whilst the poor service apparently provided by its registered office will have contributed to the length of the period of non-compliance, it cannot excuse the negligence of the Appellant itself in not taking steps to acquaint itself with its domestic law responsibilities.

Size

42. I do however, agree with the Appellant that the Respondent was wrong to use the size of the Appellant at the date of the Notice as being material for Step 3 of the ESP. The purpose of Step 3 of the ESP is to establish a proportionate starting point and a proportionate range for the purposes of imposing a financial sanction. The Step 4 adjustment of the starting point is, as the ESP states, "normally" within the range. This ensures that the overall stepped approach properly reflects the circumstances of the offender at the point of the imposition of the penalty. There would be no logic in an approach which sets a starting point and a range which, at the point of imposition of the sanction, are no longer appropriate to the circumstances of the organisation in breach. Whilst Step 4 does allow for the financial circumstances of the organisation in breach to be taken into account, this is to enable adjustment normally within the range, rather than the supplanting of the Step 3 range by an unstated and different range at Step 4.
43. The Respondent does not dispute that the correct categorisation of the Appellant at the date of the Notice was "medium" and that, as the Appellant points out, the penalty starting point should have been £10,800 and the penalty range should have been £4,950 to £27,000.

Mitigation and Penalty

44. The Respondent imposed a penalty at the top end of the range and, whilst in its submissions it states that it had regard to the mitigation advanced by the Appellant in setting the level of the penalty, that cannot be correct as the Appellant had advanced no mitigation as at the date of the Notice. That is not the fault of the

Respondent. It is the result of the failure of the Appellant to respond effectively to the Notice of Intent.

45. As the Appellant points out, there are mitigating circumstances in this case. The ESOS assessment confirmed that it had no energy responsibility and therefore there have been no adverse environmental consequences as a result of the breach. The Appellant accepted responsibility for the breach and has remedied it and the financial gain from the breach was modest. Steps have been taken to ensure that no further breaches occur.
46. However, there has therefore been very prolonged non-compliance to the potential detriment of the integrity of the scheme. The Respondent was reasonably entitled to treat this as a significant aggravating factor. Allowing for this and a modest financial gain (taking account also of the fact that the Appellant has ultimately borne the costs of compliance), I have concluded that the reasonable penalty for the breach in this case would have been £20,000.
47. As a result of my conclusion I allow the appeal in part and direct that the civil penalty notice be affirmed but modified by deleting reference to a failure to comply with an enforcement notice and substituting a failure to undertake an assessment and replacing the penalty starting point and penalty range figures with those set out at paragraph 43 above and requiring the payment of £20,000 in accordance with the payment details contained in the notice by no later than 20 December 2023.

Signed Judge Simon Bird KC

Date: 4 November 2023