



Neutral citation number: [2024] UKFTT 148 (GRC)

Appeal reference: NV/2023/0022/CCA

**First-tier Tribunal
General Regulatory Chamber**

**Heard Remotely
On 30th November 2023**

Decision given on 12 February 2024

Before

FIRST-TIER TRIBUNAL JUDGE MATHEWS

Between

PLASTIC OMNIUM AUTOMOTIVE LIMITED

and

THE ENVIRONMENT AGENCY

Appellant

Respondent

Representation:

For the Appellant: Mr B O'Sullivan (company secretary and accountant).
For the Respondent: Mr Paul Collins, (Senior lawyer, Environment agency).

Decision – The appeal is dismissed.

The decision dated 5th May 2023 is affirmed.

Background

1. The appellant company develops and produces intelligent exterior systems and in particular automotive tailgate and bumper systems for vehicles. It manufactures and designs the majority of such units for Jaguar Land Rover vehicles. Within that range of vehicles there are many thousands of configurations for the tailgate and bumper

systems, the company receives specific configurations for a vehicle four hours before the items are required at the construction plant assembly point.

2. The appellant has participated in a climate change agreement scheme. In short such schemes allow operators to receive discounts on their energy bills provided they meet targets for the reduction of carbon emissions by their business. The appellant's scheme took baseline energy consumption levels from 2018. The appellant company was adversely impacted by a number of issues from 2020 onwards :-
 - (a) A lack of chips for the automotive industry following reduced production levels from their overseas supplier, Renesas Electronics. This coincided with a global shortage of semiconductor supplies.
 - (b) Further supply chain issues following the Russian invasion of Ukraine.
 - (c) Covid – though this was a minor factor
3. The company continued to make energy savings throughout the period in question however because of a significantly reduced turnover, the company could not achieve the reductions in CO2 emission volumes that were required to avoid buy out fees under the agreement.
4. The respondent has served notice dated 5th May 2023 requiring the appellant to pay a buy out fee of £92,592.00 in order continue to receive the benefit of energy bill reductions under the climate change agreement scheme.
5. When a business taking part in the climate change scheme fails to meet its targets, the Environment Agency is obliged by the relevant regulations to pay a fee to offset the carbon savings that have not been achieved as anticipated. The buy out fee in this case is calculated to meet that sum required to be paid by the environment agency. It is calculated by an agreed and prescribed formula set out in the body of the climate change agreement, it is not a sum in which the environment agency has any discretion when calculating it.

The Law

6. The appeal is made under the Climate Change Agreements (Administration) Regulations 2021 and is also impacted by Rule 13.1.2 of the underlying climate change agreement for the Surface Engineering Sector, made between the parties.
7. The Regulations and Agreement work together to provide for a right of appeal against the Buy-Out Fee as follows:

The Regulations Climate Change
Agreements (Administration) Regulations 2021

Right of appeal

8. Reg 20 (1) Where a financial penalty is imposed under regulation 15, the operator may appeal to the First-tier Tribunal (“the Tribunal”) against the decision to impose the penalty.
 - (2) Subject to paragraph (4), where the administrator terminates an agreement under regulation 17(3), 17(4), or 18, a sector association or operator which has received a notice of termination may appeal to the Tribunal against the decision to terminate the agreement.
 - (3) Where an agreement provides for a right of appeal in respect of any other decision of the administrator, that appeal is an appeal to the Tribunal.
 - (4) There is no right of appeal for a sector association or an operator where the administrator terminates an agreement after receiving a notification under regulation 17(2).

Grounds of appeal

Reg 21. The grounds on which a person may appeal a decision under regulation 20 are -

- (a) that the decision was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the decision was unreasonable;

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(d)any other reason.

Effect of an appeal

Reg 22. The bringing of an appeal suspends the effect of the decision pending the final determination by the Tribunal of the appeal or its withdrawal.

Determination of an appeal

Reg 23.(1) On determining an appeal under regulation 20(1) against the imposition of a financial penalty the Tribunal must either—

- (a) confirm the penalty;
- (b) reduce the penalty; or
- (c) quash the penalty.

(2) On determining such an appeal, the Tribunal may allow an extension of time for payment of the penalty.

(3) On determining an appeal under regulation 20(2) against the termination of the agreement the Tribunal must either—

- (a) confirm the termination;
- (b) permit an extension of time to remedy the failure that led to the termination; or
- (c) quash the termination.

(4) On determining an appeal under regulation 20(3) against a decision of the administrator the Tribunal must either—

- (a) affirm the decision;
- (b) quash the decision; or
- (c) vary the decision.

The Agreement

9. The agreement provides that :-

13. RIGHT OF APPEAL

13.1 If the Administrator:

13.1.1 decides not to certify a facility or to vary a certificate which has been issued;

13.1.2 serves a notice imposing a buy-out fee under Rule 7 upon determining that a target unit has failed to meet its target; or

13.1.3 decides to vary or not to vary the target for a target unit, the Operator may appeal to the Tribunal against the decision.

13.2 In respect of an Operator which enters into an agreement after 1 April 2013, the Operator may appeal to the Tribunal against the target that has been set for the target unit by the Administrator.

13.3 For the purposes of Rule 13.2, the date on which notice of the decision is deemed to have been sent to the Operator is the later of the date the agreement is entered into or the date the Administrator sends notice to the Operator of the target for the target unit.

13.4 The grounds on which an Operator may appeal under Rule 13.1 and 13.2 are:

13.4.1 that the decision was based on an error of fact;

13.4.2 that the decision was wrong in law;

13.4.3 that the decision was unreasonable;

13.4.4 any other reason.

13.5 The bringing of an appeal suspends the effect of the decision pending final determination by the Tribunal of the appeal or its withdrawal.

13.6 On determining an appeal under these Rules the Tribunal must either:

13.6.1 affirm the decision;

13.6.2 quash the decision; or

13.6.3 vary the decision.

Issue

10. In the present appeal the appellant advanced the appeal on the basis that the decision to impose a buy out penalty was unreasonable because the appellant had only been prevented from meeting the required targets by international events that were beyond the control of the appellant. The appeal was advanced before me pursuant to section 13.4.3.

Evidence

11. Oral evidence was heard on behalf of the appellant. Mr O'Sullivan confirmed his status as company secretary and chief accountant and indicated that the appeal notice signed

by him represents evidence that is true to the best of his knowledge and belief. The notice is full and set out the appellant's position, in the circumstances of this appeal and with the agreement of Mr Collins I treated that notice of appeal as a witness statement from the company secretary.

12. In oral evidence Mr O'Sullivan also brought to my attention the fact that the company had made efficiency improvements in energy efficiency despite reduced turnover. He added that only since May 2023 has the company returned to full production levels with three shifts a day running for five days a week. He was clear that had the company remained at those production levels prior to 2023, they would have substantially exceeded the minimum required emission reductions under the present agreement.
13. Also present at the hearing were Mr Neil Champ, technical manager for the company, and Mr David Bennett, health and safety manager for the company. They were both extended the opportunity to give evidence and did so by confirming the accuracy of the evidence contained within the appeal document and the account of Mr O'Sullivan.
14. There was no cross-examination of any of the witnesses, there being no significant factual dispute in this case.
15. The respondent had served a response to the grounds of appeal and a further skeleton argument. Mr Collins indicated that the respondent sought to address the appeal by means of submissions in the light of those documents addressing the specific assertions of the appellant.

Findings

16. The tribunal was very much assisted by the constructive and helpful approach adopted by all parties. The parties agreed as to the fact of the agreement between them, a copy was provided to me, and that the buy out sum had been properly calculated. At the outset it was confirmed that the appellant did not dispute the method of the buy out sum calculation. It was accepted that this sum had been arrived at by the agreed mechanism under the agreement between the parties.
17. The respondent, in a response to the grounds of appeal, had also addressed the topic of an alternative method of assessing targets, referred to as the Novem approach. The

agreement makes provision for such an alternative method of assessment to be adopted however in order for that to occur an application for such an alternative method must be made. In the present appeal it was agreed between the parties that the appellant had made no such application. Furthermore the appellant indicated that given the hugely variable types of bumper unit that they are required to manufacture, it was not a target that was suitable for their company hence the fact that no such application had been made.

18. Accordingly the parties agreed that the appellant was out of time for any alternative method of calculation and did not pursue it in any event.
19. The sole issue was the reasonableness of the buy out sum in principle given that it has been caused and incurred as a result of events that were beyond the appellant's control.
20. I make findings of fact to reflect the assertions of the appellant, set out and summarised in the background and paragraphs 10 and 11 above.
21. The appellant sought to remind me of the fact that pursuant to section 13.6 of the underlying agreement in this case, set out at page 39 of the bundle, on appeal the tribunal has three apparent options, to affirm the decision, quash the decision or vary a decision. The appellant invited me to vary and reduce the decision in view of the fact that intervening events had had such a profound impact upon the appellant.
22. As set out above, in the present appeal the appeal relates to paragraph 13 of the original agreement, and the tribunal, in determining the appeal has the powers set out in Regulation 20 (3) and paragraph 13.6 of the agreement.
23. The respondent took me to the following decisions of the Upper Tribunal, **Environment Agency v Amphenol Invotec Ltd [2022] UKUT 318 (AAC)** and **Environment Agency v Taylor Engineering and Plastics Ltd [2022] UKUT 317 (AAC)**. The decisions concern appeals against penalty notices which, although imposed under a different provision, concern the same statutory powers for the tribunal as are relied upon in the present appeal.

24. Mr Collins submits that in relation to buy out fees such as the one in the present case, neither the respondent in making its initial decision nor the tribunal on appeal has any discretion to reduce the amount of the fee. The respondent simply follows an agreed method of calculation as has happened in the present case.
25. I have noted the appellant's submission in which they seek to distinguish the authorities above on the basis that the financial penalties in question were of a different nature. The submission is correct however the provisions of the regulations relevant to the powers of the tribunal when considering an appeal are common to both this appeal and those considered by the Upper Tribunal.
26. The Upper Tribunal decisions before me establish the principle that a tribunal in circumstances such as the present appeal, does not have powers wider than those of the respondent. I note at this point that as all parties agree the respondent in the present decision had no discretion as to calculation of the buyout fee, it was the product of an agreed method of calculation. Neither did the agreement give the respondent of discretion as to whether or not a buyout fee could be imposed. It follows, as was established in the decisions referred to, that I do not have the discretion that the appellant urged me to exercise in reducing the buyout fee. That poses the rhetorical question as to what can be achieved in an appeal such as the present one and of course the appeal would be important if the calculation of the buyout fee were the subject to dispute or argument or if an error of another type had been made.
27. In my judgement I am required to follow the decisions set out in the Upper Tribunal decisions above, the present case concerns an identical issue as to the scope of an appeal despite the fact that the subject matter is slightly different. As a consequence of that finding, I have no power to reduce the amount of the buy out fee on the basis of the reasons asserted by the appellant. I cannot reduce it because the respondent could not reduce it, and I do not have powers beyond those of the respondent in such circumstances.
28. Whether or not the agreement is reasonable in failing to provide such a discretion is not a matter upon which I have jurisdiction. I note in passing, as Mr Collins pointed out to me, that an annex to the agreement did make alterations to take account of Covid restrictions however it was the supply chain issues rather than Covid that caused acute

difficulty for this appellant for the period of time with which these proceedings are concerned. I also recognise that despite the buyout fee having been imposed in this case, the appellant has still made considerable savings over the full period of the climate change agreement. That is of course to their credit but also supports the suggestion that the current iteration of the agreement is workable despite the difficulties encountered by the appellant in this case.

Summary

29. The powers of the tribunal in this case do not include a discretion of the type urged upon me by the appellant. The tribunal does not have that power because despite the wording of the relevant regulations and agreement, the environment agency did not have any such discretion when settling the original buyout fee.
30. For the reasons set out above the appeal is dismissed and the respondent's notice is affirmed.

Signed:-



Deni Mathews

11th February 2024

Judge of the First-Tier Tribunal