



Neutral citation number: [2024] UKFTT 242 (GRC)

Case Reference: NV/2023/0014/GGE

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

**Heard by Cloud Video Platform
Heard on: 12 October 2023
Decision given on: 21 March 2024**

Before

JUDGE NEVILLE

Between

AERMEC UK LIMITED

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

Representation:

For the Appellant: Mr S Ahmad, solicitor

For the Respondent: Mr P Collins, solicitor

Decision:

- (i) The appeal is allowed
- (ii) The Tribunal directs the Environment Agency to withdraw the penalty notice

REASONS

1. Aermec UK Limited (“Aermec”) appeals against a civil penalty notice in the sum of £143,975, served on it by the Environment Agency on 4 April 2023.

The F Gas Regulation

2. EU Regulation 517/2014 aims to control emissions of fluorinated greenhouse gases (“F-gases”), including hydrofluorocarbons (“HFCs”), by (among other measures) imposing a stepped reduction of the total that can be placed on the market in the

European Union. F-gases are a major contributor to climate change and, weight for weight, some have a global warming effect many thousands of times higher than carbon dioxide. Following the United Kingdom's departure from the European Union, the EU Regulation was retained in domestic law. It is now the GB F-gas Regulation, and regulates F-gases placed on the market in Great Britain. There is furthermore a separate GB F-gas registry and quota system. This has had consequences for British businesses engaged in the sale of F-gases and goods containing them. Previously, a business in the UK buying F-gases from another EU member state (termed a 'downstream operator') would have faced no obligations under the EU Regulation. Now, they are treated as importers and must comply with the GB Regulation's requirements accordingly.

3. As to how different products are treated, from 1 January 2015, the EU Regulation prohibited the bulk importation or production of HFCs by an organisation unless it held sufficient quota. From 1 January 2017, pursuant to Article 14(1), organisations were prohibited from placing refrigeration, air conditioning and heat pump equipment pre-charged with HFCs on the market unless a sufficient number of quota authorisations had been obtained. It is important to emphasise the difference between quota and quota authorisations. Quota cannot be used directly for pre-charged equipment, the importer must instead obtain sufficient quota authorisations from a quota holder. These features are preserved in the GB Regulation.
4. If the prohibition at Article 14(1) is breached, Regulation 31A of the Fluorinated Greenhouse Gases Regulations 2015 provides that an enforcing authority (here, the Environment Agency) may impose a civil penalty, and Paragraph 1(4) of Schedule 4 sets the maximum civil penalty at £200,000. It is that provision under which the present penalty notice was served.

The appeal

5. The appeal was heard by CVP, all participants connecting remotely. The Tribunal was provided with a 434 page hearing bundle and skeleton arguments from Mr Ahmad and Mr Collins. Evidence was heard from Mr Paul Lawrence, Aermec's managing director, and submissions were made by each representative. I shall set out the relevant evidence and submissions only where necessary to explain my conclusions on the relevant issues.

Aermec's case

The grounds of appeal

6. Aermec's grounds of appeal, and the arguments made in support, can be summarised as follows:

- a. Ground 1 – The decision to serve the penalty notice was wrong in law
- i. The penalty notice should be quashed as having been made *ultra vires*, the Environment Agency failing to apply its *Enforcement and Sanctions Policy*ⁱ (“ESP”).
 - ii. Paragraph E2.2 of Annex 2 of the ESP required the Environment Agency to consider whether a civil penalty should not be imposed in certain circumstances, and the Environment Agency had failed to do so.
- b. Ground 2 – The decision to serve the penalty notice was unreasonable
- i. Seven arguments are made in support of this ground. First, a regulatory impact assessment was not produced in relation to the GB F-gas scheme until December 2022, despite the disproportionate regulatory burden and complexity it caused to many businesses.
 - ii. Second, the UK government (or relevant devolved authority) failed to disseminate sufficient information about that regulatory burden and complexity.
 - iii. Third, HM Revenue & Customs was not effectively managing imports, so “compliance hinged on the good faith of businesses” to “accurately code the equipment and develop an understanding of the Regulations before the end of the first compliance year”. Aermec had reasonably believed that it had adequately complied because the imported goods were not held by customs, as ought otherwise to have been the case.
 - iv. Fourth, the Environment Agency failed to provide reasonable support and guidance for businesses entering the scheme for the first time. Requests for assistance from Aermec and other organisations either went unanswered or the Environment Agency was unable to help.
 - v. Fifth, the guidance published at the time of the breach inadequately explained the scheme’s requirements.
 - vi. Sixth, insufficient attention was paid to the consequences of the Covid-19 pandemic.
 - vii. Seventh, the Environment Agency was wrong to conclude that Aermec financially gained from the breach, and failed to take into account that it caused no environmental damage.
- c. Ground 3 – The amount specified in the notice is unreasonable.
- i. Taking into account all the above, together with other steps taken by Aermec, the Environment Agency was wrong to categorise the breach as ‘negligent’ within the meaning of the ESP.

- ii. The approach to calculating the claimed financial gain from the breach was unreasonable.
 - iii. There was no reasonable consideration of mitigating factors, including Aermec's history of non-compliance and other actions surrounding the breach.
 - iv. The amount is unreasonably set significantly higher than the penalty range specified by the ESP.
7. These grounds accord with those available to Aermec under Paragraph 4(2) of Schedule 5 to the 2015 regulations:
- (a) *that the relevant enforcing authority's decision to serve the civil penalty notice was –*
 - (i) *based on an error of fact;*
 - (ii) *wrong in law;*
 - (iii) *wrong for any other reason;*
 - (iv) *unreasonable;*
 - (b) *that the amount specified in, or determined by, the notice is unreasonable.*

How the Tribunal approaches the appeal

8. There is no authority on how the Tribunal should approach these particular regulations. In contrast with the statutory scheme discussed in R. (Begum) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 at [67]-[68], I consider that Paragraph 4 of the regulations does permit the Tribunal to decide how a discretion conferred upon the Environment Agency ought to have been exercised, subject to the important qualification that the particular ground has made out. This legislative intent is clear from the grounds' expansive wording, particularly the use of the word "wrong" and the phrase "for any other reason". Furthermore, Paragraph 1 clearly confers a power to exercise the discretion at Schedule 1 for itself:
- (5) *The First-tier Tribunal may –*
 - (a) *affirm the notice;*
 - (b) *direct the Environment Agency or Secretary of State to vary or withdraw the notice;*
 - (c) *impose such other enforcement notice, civil penalty notice or enforcement cost recovery notice as the First-tier Tribunal thinks fit.*
9. The qualification above should be reiterated. The Tribunal must find that one or more of the grounds is made out. In making that decision, appropriate weight must be

afforded to the view taken by the Environment Agency: the regulator entrusted by Parliament to administer the scheme and maintain its integrity and effectiveness through enforcement action, and having expertise and experience in doing so; see Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at [45].

10. Finally on the Tribunal's legal approach, I do not consider the word 'unreasonable' at Paragraph 4(2)(a)(iv) to denote unreasonableness in the classic public law sense described in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. This is inconsistent with the powers given to the Tribunal at Paragraph (5), and I instead treat the word as having its everyday meaning of unfair, unsound or excessive.

Findings of fact

11. A comprehensive chronology has been provided on behalf of Aermec. Mr Lawrence spoke to its accuracy at the hearing and Mr. Collins was able to ask questions. I find Mr. Lawrence's evidence to have been honest and reliable, being consistent with the contemporaneous documentation and Mr. Collins making no submission to the contrary. I was also assisted by Mr Collins as to other aspects of the dealings between the parties and the chronology of the introduction of the GB F-gas system, and referred to the various guidance documents provided in the bundle and available online. I can therefore find the following facts on the balance of probabilities, and without having to resort to any burden of proof.
12. Aermec first appreciated in mid-2020 that it would need to "apply for quota" in relation to F-gases. It was a member of a trade association and had received communications alerting it to forthcoming changes. Mr Lawrence also stated, and I accept, that various companies seeking to sell quota to Aermec wrote to the company. On 3 December 2020 it registered with the GB F-gas scheme and on 22 December 2021 applied for new entrant quota. The deadline to, as the published guidance put it at the time, "apply for GB quota" closed on 15 January 2021. On both 31 December 2020 and 14 January 2021 the guidance was significantly updated with clearer explanations as to the applicable requirements. At the deadline however, Aermec thought that it had made the necessary application. Notwithstanding that its application came only a month before what it understood to be the deadline, it had already been submitted when the guidance was updated. There was no reason for Aermec to reconsider it.
13. On 3 February 2021 the Environment Agency's F-gas team wrote to Aermec informing it that some imported air conditioning parts were being held by customs while further checks were carried out. The e-mail required the following action:

The importer (AERMEC UK LTD) must obtain GB quota authorisations and write a declaration of conformity using the template.

We have been unable to determine from the documentation available the quantity of HFC in this import. We will not be able to authorise the release of this import until we have sufficient evidence. Please provide further evidence in relation to the identified items.

Evidence should be in the form of a product specification comment manufacturer's declaration or similar and must demonstrate:

1. *The equipment function*
2. *The type of refrigerant in the equipment*
3. *The quantity of refrigerant in the equipment (and CO2 equivalent)*

14. The next day, Aermec provided what it considered to be the requested information and, without any further correspondence from the Environment Agency, the imported goods were released. Mr Collins did raise that the certificate of conformity refers to quota authorisations in a way that ought to have revealed the problem, but against the wider evidence I nonetheless find that this was an understandable oversight when faced with a large amount of legalistic text.
15. On 5 February 2021, pursuant to its application, Aermec was allocated 2,436 tCO₂e of new entrant quota for 2021. Later that year, having made the necessary application and having queried a couple of points that arose, it was allocated 2,228 tCO₂e of new entrant quota for 2022. On 2 November 2021, additional 2021 quota was granted taking Aermec's quota to 2,490 tCO₂e.
16. I recognise Mr Collins' observation that the correspondence does disclose occasional delay by Aermec in dealing with its obligations during the rest year 2021. This is nonetheless minor and I am prepared to accept that it arose from a misunderstanding as to who was responsible for the relevant filings. It does not, in my assessment, materially alter the approach that should be taken to this appeal.
17. On 7 February 2022, Aermec sent its completed return for 2021. This is the return which shows the imports made in the relevant year so that compliance can be checked by the Environment Agency. Following some further correspondence, the Environment Agency wrote on 2 March 2022 to state that Aermec had failed to hold sufficient "quota/authorisations" for the amount of F-gases placed on the market.
18. Mr Lawrence was very surprised to receive this email, as he entirely believed that Aermec had complied with its obligations. It held the required amount of quota at the required time. He queried the situation, and the Environment Agency responded on 3 March 2022 to state

Whilst AERMEC UK LIMITED did hold 2490 quota in 2021, this is not the same as quota authorisations. Quota is used for importing bulk HFC's, rather than HFC pre-charged equipment.

19. This was the point, I find, when Mr Lawrence first appreciated that Aermec had mistakenly bought quota instead of quota authorisations. Attempting to address that mistake, on 22 March 2022 Aermec purchased 11,200 tCO₂e delegations of quota authorisations at a price of £4.50 per tCO₂e for a total price of £50,400. This did not

address the mistake, as it was too late for those quota authorisations to be used for the previous year. The authorisations went unused.

20. On 13 October 2022 the Environment Agency served a notice of intent to issue a civil penalty. Aermec provided representations pointing out the lack of clear guidance, that it had immediately tried to take action, and had tried to resolve customs issues correctly and in good faith. It had also bought the correct amount of quota, albeit that quota was not what was needed, which had not been used.
21. Finally, Aermec has argued that no published guidance was available at the relevant time explaining that quota authorisations were required for pre-charged equipment rather than quota. It points to the guidance “Import, export or manufacture equipment pre-charged with F Gas”, first published by the Environment Agency on 2 August 2022. I agree that this guidance was only published on 2 August 2022. In the email of 3 March 2022, the Environment Agency points to its published guidance “Transfer and authorise F-gas quota to another business” but the introduction to that guidance is clearly aimed at quota holders who wish to transfer quota or grant authorisations to others, and there is no indication anywhere that it might provide any assistance to importers of pre-charged equipment.
22. The guidance available at the deadline of 15 January 2021 was “Applying for quota to produce or import F gas”. When Aermec submitted its application and tried to comply with the legislation, the guidanceⁱⁱ said nothing about importing pre-charged equipment. It was only on 14 January 2021, the day before the deadline Aermec understood applied to it, that the guidance was amended to include the following:

You cannot apply for quota if you are an equipment importer or authorisation manager. You'll need to get quota authorisations from a quota holder.

23. Environment Agency written submissions for this appeal also refer to the guidance ‘Selling F gas or equipment’. Again, the version in place in late December 2019 makes no mention whatsoever of the need to obtain quota allocationsⁱⁱⁱ. Nor does it now, the current version stating that it:

...applies to F gas and equipment that has already been placed on the market in Great Britain (England, Scotland and Wales). ‘Placed on the market’ means the F gas or equipment has cleared customs for free circulation.

24. It is therefore intended for businesses that buy pre-charged equipment in Great Britain, not those who import it. During the hearing it was suggested to Mr Collins that the Environment Agency had not provided any guidance or instructions to businesses such as Aermec on how to meet their obligations, in time for them to realistically do so. He was unable to point to any document refuting this.

Consideration

25. I do not need to address every argument raised by Aermec above. I turn first to the ESP. In the penalty notice, the Environment Agency guided itself by explicit reference to its provisions. The introduction to the ESP is as follows:

This document sets out the Environment Agency's enforcement and sanctions policy. It applies to England only.

The Environment Agency is responsible for enforcing laws that protect the environment. We aim to use our enforcement powers efficiently and effectively to secure compliance. This contributes to our work to create better places for people and wildlife, and support sustainable development.

This document explains:

- *the results we want to achieve*
- *the regulatory and penalty principles we uphold*
- *the enforcement and sanction options available to us how we make enforcement decisions*
- *the enforcement framework for the climate change schemes and the control of mercury regime*

26. At Section 2 the ESP sets out an outcome focused approach to enforcement, and at Section 3 that the Environment Agency will follow the regulators' code save where necessary, act proportionately, have regard to economic growth, be consistent, transparent and accountable, and target its regulatory effort in a number of specified ways. At Section 4, it records that enforcement activity will aim to:

- *change the behaviour of the offender*
- *remove any financial gain or benefit arising from the breach*
- *be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction*
- *be proportionate to the nature of the breach and the harm caused*
- *take steps to ensure any harm or damage is restored*
- *deter future breaches by the offender and others*

27. Annex 2 to the ESP provides a specific civil penalties framework for climate change schemes. As it explains:

Section A explains the steps we will take to decide whether to impose a civil penalty or to work out the final penalty amount. Within the steps we will assess:

- *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*

28. For F-gases, Section E also provides as follows:

E2.1 Our nature of the breach assessment

We will normally impose a civil penalty for all breaches referred to in Regulation 31A of the F Gas Regulations subject to the additional enforcement position (see E2.2).

We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the F Gas Regulations have been set based on the seriousness of the breach taking into account the:

- *impact the breach has on the integrity of the scheme*
- *environmental effect of the breach, where relevant*

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- *a breach is serious because of its potential for environmental harm but the actual harm caused is much less*
- *we impose a civil penalty for failure to comply with an enforcement notice and we don't think the statutory maximum of £200,000 is justified*

E2.2 Additional enforcement position

We may not impose a civil penalty where:

- *we consider giving advice and guidance will be sufficient to rectify the breach*
- *punishment or future deterrent is not necessary*

If after we have given advice and guidance the breach is not rectified, we may then impose a civil penalty.

29. Aermec argues that the Environment Agency failed to give any consideration to E2.2 by considering whether giving advice and guidance would be sufficient to rectify the breach, and whether punishment was necessary. I agree. There is no reference anywhere in the notice of intent or the penalty notice to any consideration this issue. As set out above, when the penalty notice was issued it was apparent to the Environment Agency that:
- a. This was the first year many businesses had obligations under the scheme, because responsibility for compliance with the relevant schemes had previously been undertaken by their suppliers in the EEA;
 - b. That while the relevant law was in force, the distinction between quota and quota authorisations, and who needed each, was not clearly explained in any of the guidance published for business;
 - c. Aermec had bought the wrong thing, by mistake;
 - d. They had tried to remedy that mistake when alerted to it by buying the right thing, not realising that it was too late.
30. These are all relevant matters to E2.2 that were not considered. Insofar as the Environment Agency considered when issuing the penalty notice that Aermec had benefited financially from its non-compliance, this was misconceived. The way in which it has calculated financial gain to determine the penalty amount is the subject of great controversy between the parties, and indeed causes me some concern, but even on the Environment Agency's approach it is intended to avoid any risk that the penalty amount is less than any financial gain from non-compliance. In this case it ignores that quota (distinct from authorisations) *had* been bought at market value at the relevant time that would have broadly approximated to the price that would have been charged for authorisations. Certainly, once the price of the extra unused authorisations that were subsequently purchased are taken into account there is no realistic possibility that Aermec will materially gain from its mistake in the absence of a penalty. Even on the correspondence available at the time the penalty was issued, it is plain that Aermec was trying to understand the scheme and to comply. It has now done so without any significant issues since the discovery of its quota vs quota allocations mistake.
31. I accept the points made by Mr Collins in response to the above, being that compliance with published legislation is still the responsibility of Aermec even in the absence of guidance to business on how to do so, and that the public interest in compliance goes beyond the precise number of tCO₂e accounted for and also includes maintaining the integrity of scheme through its correct operation, compliance by businesses, and accurate reporting year on year. Yet the questions posed by E2.2 are whether advice and guidance will be sufficient to rectify the breach,

and whether punishment or future deterrence are necessary. The Environment Agency having failed to ask itself those questions, I address them myself.

32. On the first question, Aermec has complied with its obligations since the time when it actually understood them. There is no indication that the ‘advice and guidance’ contained in just the two sentences of the email of 2 March 2022 set out above has not been enough. Future compliance by Aermec itself does not require a penalty to be imposed.
33. Second, I accept that there might often be times when punishment might still be appropriate in these circumstances. Imposition of a penalty may deter other businesses from failing to comply, or to address a gain from non-compliance. If a business had not taken reasonable steps to try to comply, stood to benefit financially if no penalty were imposed, or if F-gases were placed on the market without *any* corresponding unused quota of a different type or from a different year to mitigate environment damage, then the great importance of reducing climate change gas emissions and maintaining the integrity of the F-gas scheme might still justify a penalty even where the business is entirely rehabilitated. These factors are not present here. The circumstances of this case clearly permit the discretion at paragraph E2.2 to be exercised. No cogent explanation has been provided by the Environment Agency at any point as to why it should not. Wider deterrence is not in issue, as my reasons include that the GB scheme was in its infancy, and the guidance to businesses unclear and unhelpful. I exercise the discretion under E2.2, for the reasons I have given. I am entirely satisfied that it would be unreasonable to impose a penalty, and that the corresponding statutory ground at Paragraph 4(2)(a)(iv) of Schedule 5 has therefore been made out.
34. The above conclusion should not be misunderstood as finding that inadvertent errors, or ignorance of legal responsibilities, will commonly amount to justification for imposing no penalty. On the contrary, this will usually be very rare. In environmental regulation, given the importance of combating climate change businesses do have a positive responsibility to understand their obligations and strictly comply with them. Rather, I have reached a fact specific conclusion applying a section of the Environment Agency's own ESP that was not considered in the penalty notice, and the plain language of which justifies issuing no penalty in the present circumstances. There is no need to address the other grounds put forward by Aermec.

Signed

Date:

Judge Neville

21 March 2024

ⁱ The version applicable at the time of the penalty notice can be accessed here:

<https://webarchive.nationalarchives.gov.uk/ukgwa/20230316085621/https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy>

ⁱⁱ <https://webarchive.nationalarchives.gov.uk/ukgwa/20201230023046/https://www.gov.uk/guidance/applying-for-quota-to-produce-or-import-f-gas>

iii <https://webarchive.nationalarchives.gov.uk/ukgwa/20191204164116/https://www.gov.uk/guidance/selling-f-gas-or-equipment>