



Neutral Citation: [2024] UKFTT 112 (GRC)

Case Reference: NV/2022/0005/ESOS

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

Decided without a hearing

Decision given on: 7 February 2024

Before

TRIBUNAL JUDGE L. ORD

Between

ELIZABETH ARDEN (UK) LTD

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

Decision: The appeal is Allowed and the penalty notice (reference ESOS-ENF-2-0561 dated 9 December 2023) is cancelled.

REASONS

Introduction

1. The appeal was remitted for redetermination from the Upper Tribunal by Upper Tribunal Judge Jacobs on 25 July 2023.

Issues

2. The parties agree that the issues are those identified by Upper Tribunal Judge Jacobs at paragraphs 9 to 19 of his decision. In brief, the issues are:

2.1 Whether the Civil Penalty Notice of 9 December 2021 was effectively served on the Appellant.

2.2 If so, whether the Appellant had knowledge of the Notice.

Evidence

3. I had before me a bundle of 154 pages.

Law

4. Of primary relevance are **The Energy Savings Opportunity Scheme Regulations 2014** (the Regulations). Whilst the Regulations have been amended by The Energy Savings Opportunity Scheme (Amendment) Regulations 2023/1182 (29 November 2023), in accordance with the presumption against retrospectivity, the amendments have no impact on this case.
5. The purpose of the Regulations is to promote energy efficiency in organizations over a certain size, and requires them to undertake assessments to identify energy saving measures.
6. The following provisions are of particular relevance.

Part 1 – Introduction

7. **Regulation 2 - Interpretation**

The Environment Agency (EA) is the compliance body (as per the meaning in regulation 6(1));

The EA is the scheme administrator (as per the meaning in Regulation 5).

Part 2 – The Energy Savings Opportunity Scheme

Chapter 2 Scheme administration

8. **Regulation 8 - Notification System**

(1) The scheme administrator must establish a system (the “Notification System”) which enables responsible undertakings to –

- (a) Notify information as required by these Regulations, and
- (b) Voluntarily notify such additional information as the scheme administrator considers appropriate

(2) The scheme administrator must take reasonable steps to ensure that the Notification System is available for use by responsible undertakings at such times as the scheme administrator considers reasonable.

(3) The scheme administrator may establish administrative arrangements in relation to the operation of the Notification System.

Part 3 – Undertakings

Chapter 1 – Relevant undertakings

9. Regulation 15 – Relevant undertakings

(1) Subject to regulation 16, an undertaking is a “relevant undertaking” in relation to a compliance period if, on the qualification date for that 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).

.....

10. Regulation 17 – Participants

(1) In these Regulations “participant” means –

- (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, the group of undertakings.

(2) Where, on the qualification date for a compliance period –

- (a) Two or more relevant undertakings are group undertakings in respect of each other, and
- (b) One of those group undertakings is a highest parent in respect of all the other group undertakings
those undertakings constitute s “highest parent group” for the purposes of these Regulations and must comply with the Scheme as one participant unless paragraph 1, 3, 7 or 10 of Schedule 2 apply.

.....

11. Regulation 18 – Role of the responsible undertaking

The “responsible undertaking” in relation to a participant means the relevant undertaking which is responsible for a participant’s compliance with the Scheme, determined in accordance with regulation 19 or Schedule 2.

12. Regulation 19 – Determination of the responsible undertaking

- (1) Where a relevant undertaking falls within regulation 17(1)(a), it is the responsible undertaking in relation to its own compliance with the Scheme.
- (2) Subject to paragraph (3), where a highest parent group complies with the Scheme as one participant in accordance with regulation 17(2), the highest parent is the responsible undertaking in relation to that participant’s compliance with the Scheme.

.....

Part 4 – ESOS Assessments

Chapter 1 - General

13. Regulation 20 - Duty to carry out ESOS assessment

A responsible undertaking must carry out an ESOS assessment, which includes an energy audit, in accordance with this Part.

Chapter 3 – Energy savings opportunities

14. Regulation 26 - duty to carry out an energy audit

(1) Subject to Part 6, a responsible undertaking must carry out an energy audit in accordance with this Chapter –

.....

Part 5 – Reporting of ESOS Assessments

15. Regulation 29 – Notification of compliance

A responsible undertaking must notify the scheme administrator using the Notification System whether the participant has complied with Part 4, (or, as the case may be, Part 6) in relation to a compliance period by providing –

(a) The basic information set out in Schedule 3, ...

Part 7 – Compliance and Enforcement

Chapter 1 – Monitoring compliance

16. Regulation 35 – Compliance notices

17. (1) A compliance body may serve a notice on a responsible undertaking requesting such information as it considers necessary to enable it to monitor compliance with the Regulations (a “compliance notice”).

(3) A compliance notice must –

(b) be served on the person to whom it is addressed

Chapter 2 - Enforcement

18. Regulation 38 – Enforcement notices

(1) In any case where the relevant compliance body reasonably believes that a responsible undertaking has failed to comply with a requirement of these Regulations, that compliance body may serve a notice on that responsible undertaking in accordance with this regulation (an “enforcement notice”).

- (2) An enforcement notice must –
- (b) be served on the person to whom it is addressed

Part 8 – Civil penalties and breaches

Chapter 1 - Civil penalties

19. Regulation 39 – Penalty notices

(1) In any case where the relevant compliance body is satisfied that a responsible undertaking is liable to a civil penalty under this Part, it may serve a notice on that responsible undertaking (a “penalty notice”)

- (2) A penalty notice must –
- (b) be served on the person to whom it is addressed

Part 9 – Appeals and service of documents

20. Regulation 48 – Appeals

(1) A responsible undertaking servedwith an enforcement notice, or a penalty notice, may appeal to the relevant appeal body on the grounds that theenforcement notice or penalty notice (as the case may be) was –

- (a) based on an error of fact,
- (b) wrong in law, or
- (c) unreasonable.

21. Regulation 50 – Determination of an appeal

An appeal body may –

- (a) Cancel the.....enforcement notice or penalty notice (as the case may be),
- (b) Affirm the.....enforcement notice or penalty notice (as the case may be), whether in its original form or with such modification as it sees fit,
- (c) Instruct the scheme administrator or the relevant compliance body to do, or not to do, any thing which is within the power of the scheme administrator or compliance body.

22. Regulation 51 – Service of documents

Any determination or notice required to be served on a responsible undertaking, may be served by –

- (a) delivering or sending it to, or leaving it at –
 - (i) The responsible undertaking’s registered office (where applicable),
 - (ii) The responsible undertaking’s principal place of activity, or

- (iii) Another address in the United Kingdom specified by the responsible undertaking as its address for service, or
- (b) Sending it by electronic means to the email address provided by the responsible undertaking pursuant to paragraph 1(b) of Schedule 3.

Schedule 3 - Basic information to be notified to the scheme administrator

23. (1) Information to be notified in relation to a responsible undertaking -
- (b) email address.....

24. Also of relevance is **section 7 of the Interpretation Act 1978** which says:

Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “ give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Facts

25. At all relevant times, the Appellant was a wholly-owned subsidiary of the US based Revlon International Corporation.
26. The Appellant had not submitted notification of compliance with the Energy Savings Opportunity Scheme to the Respondent. Therefore, the Respondent sent a Compliance Notice by post to the Appellant’s registered office on 12 March 2020.
27. An Enforcement Notice was subsequently sent to the registered office on 16 October 2020.
28. This office was closed between March 2020 and October 2021 due to the COVID-19 pandemic and the Appellant did not receive the notices. Consequently, the Appellant did not respond.
29. On 8 March 2021 the Respondent sent the Enforcement Notice by email to two email addresses listed on the Appellant’s website (ukservice@elizabetharden.com and Consumer_EU@elizabetharden.com). There was no response.
30. These consumer mailboxes were specifically intended to be used by consumers. The third party personnel who were monitoring them were only trained to respond to enquiries relating to consumers.
31. On 10 August the Respondent sent to the above email addresses a Notice of Intent to serve a penalty notice for failure to undertake an energy audit. An internal employee picked it up and referred it to the Appellant’s consultant, Harvinder Dhingra.

32. On 17 August 2021 Mr Dhingra responded acknowledging receipt and confirming that the Appellant fully intended to comply. He explained that the consumer mailbox was only intended for consumers.
33. On 25 August 2021 the Responded replied to the effect that the deadline for compliance had passed and asked for an explanation as to why the Appellant had not met the date in the Enforcement Notice.
34. On 26 August 2021, the Appellant's Finance Director, James Taylor responded explaining that many of the staff were furloughed and the remainder were working from home and unable to access data in the offices, which was needed to complete the assessment.
35. On 9 December 2021 the Respondent sent a Penalty Notice by email to Mr Dhingra imposing a penalty on the Appellant for failing to comply with the Enforcement Notice and an additional fixed penalty.
36. Mr Dhingra replied on 13 December 2021 acknowledging receipt of the Penalty Notice and confirming that the Appellant was undertaking the relevant analysis but it was taking time as they had to aggregate data from their multiple entities and data was held in the US.
37. On 17 December 2021 the Appellant sent its compliance notification, receipt of which was acknowledged by the Respondent.
38. The Appellant appealed to this Chamber on 28 February 2022 against the issue of the Penalty Notice. A decision was made, which was appealed to the UT by the Respondent. The UT's decision of 27 September 2023 quashed the this Chamber's decision and remitted it back for redetermination.

The Upper Tribunal's Decision

39. The Upper Tribunal considered the issue of service and at paragraph 14 said this:

“I will begin with post to the registered office. The starting point was for EA to prove that the penalty notice had been sent in accordance with regulation 51 and section 7. The only evidence I can find in the First-tier Tribunal's hearing file is a copy of the notice bearing the address of EAUKL's registered office. That was not sufficient to show that the notice was posted or, if it was, when that was done. EA may have a specific record of posting. If so, that could have been put in evidence. If not, EA might have been able to produce sufficient evidence of its standard procedures as a basis for the tribunal to infer that it was posted on a particular date.”

40. The Upper Tribunal went on to say:

At paragraph 16:

“I now turn to service by email. I can deal with this briefly. The only permissible email address would be one provided in accordance with Schedule 3 to the Regulations. As far as I can tell, EAUKL did not provide an address under that provision.”

At paragraph 17:

“If the tribunal had found that the notice had not been served, it would have had no legal effect. That meant that the notice was wrong in law under regulation 48(1)(b) and should be cancelled under regulation 50(a).

At paragraph 18:

“If and only if the tribunal had found that the notice had been served, it would then have had to consider the second issue: knowledge.”

Submissions

Respondent’s submissions

41. The Respondent confirmed it had no record of posting the Penalty Notice to the Appellant’s registered postal address. It was emailed to Mr Harvey Dhingra of the Appellant on 9 December 2021.
42. A Compliance Notice and the Enforcement Notice were posted to the Appellant’s registered office but there was no response. Therefore, the EA emailed the Appellant on 8 March 2021 and emailed the Notice of Intent on 10 August 2021.
43. As the Appellant had not submitted a notification of compliance under regulation 29, the Respondent could not rely on an email address provided in accordance with Schedule 3.
44. Under the circumstances it was perfectly reasonable for the Respondent to contact the Appellant by email. Mr Dhingra replied to the Respondent’s 10 August email on 17 August. On that basis, the Respondent considered it appropriate to serve the Penalty Notice on the Appellant by email to Mr Dhingra on 9 December 2021.

Appellant’s submissions

45. The Appellant said their office was closed due to COVID. After it was re-opened, all mail received was opened and they found nothing from the Respondent. All signed for post was received by security and the Appellant was notified. There was no evidence of the notifications being sent to them. Sending post and assuming it was received and read, knowing the nation was on lockdown with most offices closed, cannot be deemed reasonable.
46. The email was sent in an unreasonable manner to a consumer-facing address, which clearly indicated it was for consumer queries. The Appellant’s third-party vendor was monitoring these emails and was trained to only act upon emails relating to consumers and products. Consequently, they would have been deleted and so the Appellant was not aware that notices had been sent.
47. It was only when an internal employee purged all emails received during the pandemic, that she discovered an email that looked like it could be official, despite it being sent to an inappropriate address. It was then forwarded to the appropriate people and responded to.

48. The Appellant was not trying to evade or delay compliance. They simply needed time to gather the information properly which, for a large organisation, would take time due to the challenges of the pandemic.
49. They appealed on the basis that the notices were not delivered in a reliable format nor to a proper email address, and the delays that followed were based on COVID restrictions.

Discussion and conclusion

50. Regulations 35 (Compliance notice), 38 (Enforcement notice) and 39 (Penalty notice) all state that notices must be served on the person to whom they are addressed.
51. Regulation 51 provides for two ways in which notices may be served, the first being by post to the Appellant's registered office, and the second being by email.
52. I can deal with the first method, postal service, briefly. The Upper Tribunal commented that the only evidence it could find in the First-tier Tribunal's hearing file was a copy of the notice bearing the address of the Appellant's registered office. The Upper Tribunal said that was not sufficient to show that the notice was posted or, if it was, when that was done. It gave suggestions on how the Respondent might prove posting, such as by providing a specific record of posting or producing sufficient evidence of its standard procedures as a basis for the tribunal to infer postage.
53. The Respondent confirmed that it had no record of posting the Penalty Notice to the Appellant's registered postal address. With respect to the Enforcement Notice, the Respondent submitted that it had been posted to the registered office, but provided no evidence of this. Instead, it relied on its email communications.
54. I shall now turn to the second method, being email service. Upon considering this matter, the Upper Tribunal stated that the only permissible email address would be one provided in accordance with Schedule 3 to the Regulations and, as far as it could tell, the Appellant had not provided an address under that provision.
55. I have examined this matter further to establish whether email service of the notices was effective in accordance with Schedule 3. As per Regulation 29, an email address for service would have to be given by the Appellant using the Notification System in Regulation 8.
56. This would be part of a range of other important information sent formally to the Respondent via the Notification System, including the Appellant's size, as the relevant undertaking (Regulation 15), who the participants were (Regulation 17), details of any group of companies (Regulations 18 and 19) and other relevant matters. The legal formality reflects the seriousness of getting the method of communication right.
57. The Respondent purported to serve the Penalty Notice on the Appellant's consultant, Mr Dhingra, by serving it on his email address. They submit that this was "perfectly reasonable" in the absence of any response by the Appellant to the notices posted to their registered office, and without the information required by Schedule 3. Whilst Mr

Dhingra replied to the email, this was not an email address provided in accordance with Schedule 3.

58. Accordingly, service was ineffective and the Penalty Notice is wrong in law. Therefore, the Appeal is allowed on this basis and the Penalty Notice is cancelled. Consequently, I have not gone on to consider knowledge.
59. I have, however, for completeness briefly addressed the original ground of appeal, which is that the Penalty Notice was unreasonable.
60. The Enforcement Notice was not served on the Appellant. Consequently, the Appellant could not be expected to comply with it. Whilst Mr Dhingra was made aware of the Notice of Intent in August 2021, the Appellant needed time to gather a large quantity of information from its various offices in England and the USA. Taking account of office shut downs during the pandemic and the difficulties placed on staff accessing that information, the Respondent did not fairly consider the circumstances the Appellant was in and the reasons for the delay. Consequently, it was unreasonable to proceed with a Penalty Notice in December 2021.

Signed: Judge Liz Ord

Date: 7 February 2024