Neutral Citation Number: [2022] UKFTT 00276 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Environment

Tribunal Reference: NV/2022/0004

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

CHEF EXPRESS UK LIMITED

Appellant

v

ENVIRONMENT AGENCY

Respondent

DECISION

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1. By notice of appeal dated 26 January 2022, 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 £27,000 by Notice of Civil Penalty dated 9 December 2021. The Notice was issued in respect of the Appellant's failure to comply with an Enforcement Notice issued on 4 December 2020 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.

2. The Appellant has requested an extension of time for the making of the appeal given that the appeal form was lodged outside the 28 day period for appealing against the Notice. The Appellant has explained that the delay was due to their belief that its appointed consultant was making the appeal on its behalf, that it only appreciated that this had not occurred on 14 January 2022 and that it made the appeal as quickly as it could thereafter. The Respondent has not raised any objection to the grant of an extension of time and, given the short period of extension required and the reason for the delay in making the appeal, I am satisfied that it is just to allow an extension of time in this case. I therefore exercise my power under rule 5(3) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 to extend the period of time for appealing to 26 January 2022.

3. In determining this appeal I have had regard to the appeal bundle of 39 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

4. By its notice of appeal, the Appellant argues that the amount of the civil penalty should be reduced. In support of its appeal it argues in summary that:

   (i) It had not acted negligently as alleged by the Respondent;
   (ii) The Agency had not acted correctly in its setting of the level of financial penalty in that it had not factored in the challenges faced by companies during the COVID pandemic and post-pandemic periods;
   (iii) It had complied with ESOS Phase 1 and when it received the Notice of Intention to apply a Penalty Notice it had engaged consultants to prepare the ESO Energy Assessment which was produced as quickly as the circumstances allowed; and
   (iv) COVID pandemic factors should have been considered as mitigation and, in consequence the penalty of £27,000 should be reduced.

5. The Appellant points out that it submitted its ESOS Phase 2 compliance notice just five days after the Respondent issued the Civil Penalty Notice, having instructed consultants to undertake the ESOS Energy Assessment on its behalf on 6 October 2021. The Appellant argues that this shows that it was not its intention not to comply with the requirements of the Regulations. Although the compliance notice was initially defective, the Appellant states that this was attributable to an error on the part of the consultants which was rectified on 10 January 2022, when compliance was achieved.

6. The Appellant argues that its failure to comply with the requirements of the enforcement notice was attributable to:

   (a) A management failure on its part, in that a single manager failed to act upon a matter which the manager did not understand and had failed to forward the matter on to the Directors responsible;
   (b) The problems caused by lockdowns, "No Travel" orders, the furloughing of staff, staff both of the Appellant and partner organisations working from home, coupled with the closure of premises, which made it challenging to comply with the Regulations. In particular, the effect of the COVID restrictions on the Appellant's retail premises, many of which were leased, meant that securing access and taking meter readings or obtaining readings from Landlords meant that audits were not completed as quickly as they might have been;
   (c) Reminders from the Respondent having been sent to the Appellant's previous Head Office at 90A Tooley Street which were either missed or delivered when the building was closed due to the first COVID lockdown (90A Tooley Street remained the Appellant's registered office until 4 June 2021, when it became 60 Gray's Inn Road). The Tooley Street office remained closed throughout the pandemic. Other attempts made by the Respondent to contact the Appellant through its subsidiary company Momentum Services Limited or that company's finance director were ineffective because staff were working from home as a result of the pandemic; and
   (d) Finding consultants to undertake the ESOS Assessment that were still in business and willing to take on the work took considerably longer that it would have done in a "normal" business environment;

7. The Appellant argues that the COVID related factors made it more problematic to comply with the Enforcement Notice once it was aware that it had been issued. It further argues that the Respondent has sought to rely on an approach to enforcement and the setting of penalties which it does not believe was appropriate during the COVID and immediate post-COVID restriction periods.

The Response to the Appeal

8. 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).

9. 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.

10. The Respondent notes that there is no dispute in the appeal that the Appellant qualifies for ESOS.

11. In response to the grounds of appeal, the Respondent contends that it has applied its "Environment Agency enforcement and sanctions policy" ("ESP) published in April 2018. The Respondent's position is that where a participant fails to undertake an energy audit it normally issues an enforcement notice allowing up to three months to comply and, in the event of a failure to comply with the enforcement notice, it will normally impose a penalty for a failure to comply with the enforcement notice as opposed to a failure to undertake an energy audit. The maximum penalty in respect of a failure to undertake an energy audit is much higher and the Respondent states that this approach ensures that the penalty is proportionate to the breach involved.

12. In responding to the Appellant's reliance in support of its appeal on its submission of a compliance notice five days after the receipt of the Notice of Civil Penalty and delays in obtaining meter readings from premises which were closed due to COVID and the related difficulty in obtaining meter readings from landlords, the Respondent relies on the chronology of events.

13. The chronology shows that an awareness raising letter was sent to the Appellant at its then registered office, 90a Tooley Street on 18 November 2019. The deadline for submission of the ESOS Phase 2 notification of compliance was 5 December 2019. A compliance notice was issued on 6 November 2020 (again sent to the Appellant's registered office), but the compliance period passed on 20 November 2020 with no response having been received or notification submitted. On 4 December 2020 the Enforcement Notice was sent to the Appellant's registered office with a compliance deadline of 4 March 2021. Again, no response was received or notification submitted.

14. The Respondent then sought to make telephone contact with the Appellant's subsidiary, Momentum Services Limited, on 29 March, 8 April and 9 April 2021. There was no answer but messages were left.

15. The Notice of Intent was sent by recorded delivery on 6 September 2021 to the Appellant's new registered office, 60 Gray's Inn Road, London, and this was signed for at the premises. Further attempts to establish contact with the Appellant made through the Appellant's subsidiary companies resulted in the Respondent being provided with the name of the Finance Director of Momentum. He was then written to by e-mail with the Respondent advising him that any mitigation for the breach should be provided by 1 October 2021 and pointing out that there had been no response to the Notice of Intent to impose a Civil Penalty. Confirmation that this e-mail had been delivered and read was provided.

16. The Notice of Civil Penalty was e-mailed to the Finance Director on 9 December 2021 and sent to the Appellant's registered office on 14 December 2021. On that same date, the Appellant submitted a notification of compliance which, following a correction to it, was accepted by the Respondent on 10 January 2022.

17. Having regard to this chronology, the respondent contends that the Appellant failed to act promptly and failed to take care and put in place and enforce proper systems for avoiding non-compliance with the Enforcement Notice. That satisfies the ESP description of 'negligent' which is means a "*failure by the organisation to take reasonable care to put in place and enforce proper systems for avoiding the commission of the offence".*

18. The Respondent identifies the Appellant as a medium sized organisation which, with negligent culpability gives rise to a penalty factor of 0.12 applying the ESP with a penalty range of 0.055 to 0.3. The penalty starting point is £10,800 and the range is £4,950 to £27,000.

19. In setting the £27,000 penalty, which the Respondent points out represents a £63,000 reduction on the statutory maximum applicable to the breach, it considered all the aggravating and mitigating factors of the case, including all representations made by the Appellant (including the Appellant's eventual compliance).

20. 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

21. 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.

22. 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.

23. 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.

24. The breach in this case is the failure to comply with the enforcement notice served on 4 December 2020 and which required compliance by 4 March 2021.

25. 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 the 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.

26. Further, whilst the COVID pandemic resulted in huge business and other disruption and its effects continue to be felt, the ESP allows for this to be taken into account at Steps 3 and 4 of the methodology which involve the consideration of culpability, aggravating and mitigating factors. Where there is evidence that the pandemic and the consequent restrictions has affected the ability of the recipient of an enforcement notice to comply with the requirements of that notice, that would be a highly material mitigating factor which the Respondent would be obliged under the ESP methodology to take into account in determining the level of a penalty if any. I therefore do not accept the Appellant's contention that the ESP should be set aside as having been designed for operation in a more normal business environment.

27. Turning to the specific circumstances of this case, the difficulty for the Appellant is that there is no evidence that it took any steps to comply with the enforcement notice until September 2021, some 6 months after it should have been complied with and it has provided no evidence that it was not practical or feasible for it to comply with the requirements of the notice until that point. Whilst it provides general commentary on the effects of the pandemic and its ability to comply with the enforcement notice, there is no evidence that it ever tried to comply before September 2021.

28. That omission appears to be the consequence of the absence of any effective procedures, including temporary procedures during the lockdowns, for ensuring that statutory notices such as the Enforcement Notice with which this appeal is concerned, were responded to. What is telling in this case is that not only was the Enforcement Notice not complied with, there was also no engagement of any kind with the Respondent until after the Notice of Civil Penalty had been served.

29. Whilst therefore, I appreciate all that is said by the Appellant about the difficulties which it and many other companies were experiencing as a result of the pandemic, the lockdowns and Government guidance on working from home, I do not accept that this justified apparently having no effective procedures in place for ensuring that statutory notices served on its registered office were forwarded to those able to take decisions and/or issue instructions on behalf of the Appellant to ensure compliance with them.

30. Whilst an interruption in such procedures would have been understandable and justifiable during the first national lockdown and its immediate aftermath, given the disruption to established business practices which resulted from it, by late 2020/early 2021 there had been time to put in place the necessary

alternative procedures to address statutory and regulatory compliance matters.

31. In these circumstances, I do not consider that the apparent absence of *any* effective procedures to ensure that the Enforcement Notice was complied, could be described as anything other than a failure to take reasonable care to put in place and enforce proper systems for avoiding non-compliance with it. That falls within the descriptor of "negligent" as provided within the ESP and in my view that is an appropriate categorisation. The Appellant's claim that its breach was due to the matter being in the hands of a manager without the competence to deal with it and who failed to pass it on to those who could, simply reinforces that conclusion.

32. I therefore see no error in the Respondent's finding that the Appellant's conduct was, in the circumstances, negligent.

33. In determining whether there has been a relevant error in the level of penalty imposed by the notice, having regard to the grounds of appeal the issue therefore narrows to whether the civil penalty of £27,000 is reasonable i.e. proportionate to the breach, having regard to the circumstances.

34. The Respondent's conclusion that the Appellant's non-compliance falls at the top end of the range was not unreasonable given the paucity of any specific mitigation for its conduct. Whilst, as I have said, the Appellant has provided general commentary on the problems for it caused by the pandemic and the COVID restrictions, there is simply no evidence that, until September 2021 it did anything at all to comply with the requirements of the Enforcement Notice. For example, there is no evidence as to when it first sought to obtain the necessary information from its landlords to complete the ESOS Assessment and no evidence as to when it first sought to instruct consultants to undertaken the Audit on its behalf. The Appellant seems either to have been unaware of or to have ignored the fact that the Enforcement Notice should have been complied with by 4 March 2021.

35. Further, if COVID related matters were seriously hampering its ability to comply with the Enforcement Notice, I would have expected to see that being raised with the Respondent at an early stage. However, the first response from the Appellant to the Respondent came *after* the service of the Notice of Civil Penalty served on 9 December 2021. Given that the Appellant had instructed its consultants on 6 October 2021, it had ample time to engage with the Appellant to explain any compliance difficulties which the pandemic had given rise to before the Respondent served the Notice of Civil Penalty. However, there was no such engagement.

36. The only evidenced action in this case is the instruction given to the consultants in October. That shows an intent, albeit very belated and only following the issue of the Notice of intent, to secure compliance with the Enforcement Notice. Whilst I note that in responding to the grounds of appeal the Respondent has argued that regard was had in the determining the level of sanction to the representations made by the Appellant and its ultimate compliance secured on 10 January 2022, that cannot be correct as the Respondent's knowledge of these post-dated the service of the Notice of Civil Penalty.

37. The Tribunal's role under Regulation 48 of the Regulations is to review the decision of the Respondent on the limited grounds provided, rather than to substitute its view on what the appropriate penalty should be. That begs the question as to the extent to which it is open to the Tribunal to take into account circumstances which existed at the date of the Notice of Civil Penalty but which were not known to the Respondent in this case, because the Appellant did not raise the matter before the Notice of Civil Penalty was issued.

38. Whilst ultimate compliance with an Enforcement Notice might be relevant mitigation where the compliance pre-dates the issue of the Notice of Civil Penalty, I do not consider that such compliance, even where it occurs shortly after the issue of the Notice, can be properly be taken into account as mitigation on appeal Regulation 48. The proper focus of an appeal under Regulation 48 is the lawfulness and reasonableness of a Notice of Civil Penalty as at the date it is issued.

39. Here, following the Notice of Intent, the Appellant engaged consultants to undertake the ESOS Energy Audit on 6 October 2021. In determining whether the Civil Penalty was reasonable i.e. proportionate to the breach having regard to all of the circumstances, it seems to me that I should have regard to this action in the consideration of the appeal and the Respondent has not argued otherwise. In this context, I note that whilst the Notice of Civil Penalty was issued to the Appellant's Finance Director on 9 December 2021, it was not served in accordance with Regulation 51 of the Regulations until 14 December 2021 on which date the Appellant also served its notice of purported compliance on the Respondent.

40. However, the Enforcement Notice should have been complied with by 4 March 2021. Therefore, on the evidence, it was only the Notice of Intent issued six months after the expiry of the compliance period which appears to have spurred the Appellant into engaging with the need to remedy its breach. Earlier compliance appears to have been prevented by the absence of effective internal procedures of the Appellant which resulted in the matter

being left in the hands of a manager without the competence to deal with it and with all the opportunities provided by the Respondent to engage with it missed.

41. In this context, I am not satisfied that the instruction given the consultants at such a late stage and the ultimate compliance, even if that had been effective on 14 December 2021, provides any material mitigation for the breach. The Appellant compliance only followed the threat of sanction at the level set out in the Notice of Civil Penalty.

42. In all the circumstances, I do not consider a penalty set at the top end of the ESP range to be unreasonable. In reaching that view I also take into account how the Civil Penalty of £27,000 compares with the statutory maximum for the offence of £90,000 and the fact that the categorisation of the Appellant's culpability as negligent rather than deliberate or reckless has effectively taken into account that the Appellant had no intention not to comply. Overall, I am satisfied that the civil penalty of £27,000 is proportionate to the nature and extent of the breach having regard to all the relevant circumstances and was therefore reasonable.

43. In conclusion I am satisfied that in all the circumstances, the determination of the level of penalty as set out in the Notice of Civil Penalty involved no error of fact or law and was not unreasonable in the sense of being out of proportion to the breach and the causes of it.

44. I therefore dismiss the appeal.

JUDGE SIMON BIRD QC
13 June 2022