NCN: [2022] UKFTT 507 (GRC)

Case Reference: NV/2022/0028

First-tier Tribunal
General Regulatory Chamber
(Environment)

The Energy Savings opportunity scheme Regulations 2014 (as amended) "the Regulations"

Listed on the papers

Decision given on: 30 September 2022

Before

TRIBUNAL JUDGE FORD

Between

KASPERSKY LABS LIMITED

Appellant

And

ENVIRONMENT AGENCY

Respondent

On the papers

Decision: The appeal is allowed

Substituted Decision Notice: The Penalty notice is cancelled and a substituted Penalty notice is to be issued against the Appellant in the amount of £28,688.00 payable within 6 weeks of the date of the revised penalty notice being served

REASONS

1. The Appellant appeals against the Notice of Civil penalty reference ESOS-ENF- 2-0899 dated 25/03/2022. The Notice was issued for failure to comply with the Enforcement notice issued by the Environment Agency dated 20/11/2020 ('the Notice'). That notice required the Appellant to carry out an Energy savings Opportunity scheme assessment and to report the outcome to the Respondent by 22/02/2021. No notification of compliance had been received by the due date.

2. The Respondent stated in the Notice of Civil penalty that it had applied its published **Enforcement and sanctions policy ("the enforcement policy")** in considering whether to impose a penalty and in deciding how much that penalty should be. Annexes A and D to that policy are relevant in the Respondent's consideration of whether to impose a penalty for non-compliance with the obligations under the Energy Savings Opportunity Scheme.

3. The Appellant's culpability was assessed as Negligent. The enforcement policy states;-

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

4. The Notice states;-

> "We have considered our penalty setting approach in Annex 2 to our Enforcement and Sanctions Policy and your response to the Notice of Intent. A summary of the steps that we have carried out to make our decision under our policy are as follows:
>
> **Step 1** Check or determine statutory maximum for the breach
>
> Statutory maximum = £90,000
>
> A notification of compliance has not been submitted. The maximum penalty that the organisation is liable to is £90,000 (£50,000 + (£500 x the maximum 80 working days)
>
> **Step 2** Set initial penalty amount by assessing the nature of the breach and other enforcement positions in line with Sections B, C and D
>
> Initial penalty amount = £90,000
>
> **Step 3** Work out penalty starting point and penalty range
>
> Culpability category = Negligent .This means failure by the organization as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence

Size of organisation = Large

Qualifying accounts show a turnover in excess of £50 m

Penalty starting point = £27,000

Penalty range – £12,600 to £67,000

Step 4 Set final penalty amount by assessing the aggravating and mitigating factors

Final penalty amount = £57,375

The most relevant factors in reaching this decision are as follows:

In assessing the 'nature of the breach' in line with Section D2.3 of the Enforcement and Sanctions Policy, failure to undertake an energy audit, we do not consider you to be a new entrant to the scheme.

In assessing the size of your organisation, we consider that you are a large organisation based on a turnover in excess of £50 million in the annual report and financial statements for the year ended 2020.

5. The culpability category was assessed as negligent "due to the failure by the organization as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence. The compliance deadline was 05 December 2019. The Appellant was not considered as a new entrant to the scheme having already undertaken one assessment. It was noted that that first assessment was submitted, late which the Agency viewed as a history of non compliance.

6. The Notice states that the Compliance notice and the Enforcement Notice were sent to "the old registered office address on 30 October 2020 and 20 November 2020. Attempts were made to contact the Appellant via phone and email prior to the Notice of intent which was issued on 25 November 2021. "The email was successfully delivered and provided an opportunity for you to give an update on the status of the assessment and to provide justification as to why you were unable to meet the deadline of the Enforcement Notice. We did not receive a Response".

7. It is stated that "The Notice of Intent was emailed to you and although you responded to this there was no substantial mitigation. Advice was offered at that time and prior on how to comply with the requirements of the scheme. It is noted that although the Appellant had stated that it was taking steps to comply, compliance had yet to take place. A penalty of £57,375 was imposed payable by 24 June 2022.

8. It is not in dispute that the Appellant failed to comply with its obligation to complete an assessment of its energy usage by 05 December 2019. Such an assessment has to be completed and reported every 4 years under the Energy Savings Opportunity scheme. The Appellant failed to report the outcome of such assessment to the Respondent.

9 . In its own Enforcement Policy and Guidance, the Environment agency sets out the principles to be applied in taking enforcement action.

10. On the 28 April 2020 the Environment agency published its Response to the coronavirus pandemic which stated;-

> "The Environment Agency's priority is to protect people and the environment and to support those we regulate.
>
> We recognise the difficulties you are facing as a result of coronavirus (COVID-19). We expect you to take all reasonable steps to comply with regulatory requirements, using contingency plans to help you comply. If it is not possible to comply due to these exceptional circumstances, we expect you
>
> i. to:
>
> - notify your usual regulatory contact
> - minimise any unavoidable non-compliance
> - minimise the effects of any unavoidable non-compliance
> - prioritise complying with regulatory requirements that directly protect the environment and human health
> - keep records showing why a non-compliance occurred, for example
> - records of staff absences, contractors being unavailable or supply chain failures
>
> ii. We recognise that because of the coronavirus outbreak, you may be unable to comply fully with your regulatory requirements for reasons beyond your control. We will consider the appropriate enforcement response to any non- compliance during this time in line with our Enforcement and sanctions policy and take into account:
>
> 1. the extent to which you have followed our expectations as set out above
>
> 2. the impact of coronavirus on your activities, which should be supported by your records showing why the non-compliance occurred
>
> 3. the effect of any relevant COVID-19 regulatory position statement
>
> iii. We will keep this approach under review in line with all of the following:
>
> - government guidance
> - the changing circumstances of the coronavirus outbreak
> - any other relevant factor

iv. We will vary or withdraw this statement as appropriate.COVID-19 regulatory position statements

v. We have also published some time-limited COVID-19 regulatory position statements (RPSs) in relation to certain regulatory requirements. They will help minimise risks to the environment and human health where, for reasons beyond your control, compliance with certain regulatory requirements may not be possible due to coronavirus. They also cover specific circumstances where we are relaxing normal regulatory requirements. This is to avoid increasing risks to the environment or human health during the particular circumstances of the coronavirus outbreak.

vi. Each COVID-19 RPS sets out when it applies and the conditions you must comply with. You must still comply with all your other regulatory requirements.

vii. If you wish to use a COVID-19 RPS you must comply with both its:

- specific conditions – including any requirements to notify us or get our approval to use it
- requirements concerning pollution and harm to human health

viii. If you do this, we will not normally take enforcement action against you"

11. In the Respondent's enforcement Policy, there is a section that expressly deals

i. with how the Agency sets the final penalty amount. It reads,

ii. "step 4

iii. We may adjust the penalty from the starting point within the penalty range by assessing the following aggravating and mitigating factors:

iv. financial gain - whether or not a profit has been made or costs avoided as a result of the breach

1. history of non-compliance - includes the number, nature and time elapsed since the previous non-compliance(s)
2. attitude of the non-compliant person - the person's reaction, including co- operation, self-reporting, acceptance of responsibility, exemplary conduct and steps taken to remedy the problem
3. personal circumstances - including financial circumstances (such as profit relative to turnover), economic impact and ability to pay (only if sufficient evidence is provided). Also for a public or charitable body whether the proposed penalty would have a significant impact on the provision of its service (only if sufficient evidence is provided)

v. These factors differ to those listed in the Guideline. We have selected applicable factors from the list. We have also taken factors from other steps in the Guideline. We have then adjusted and simplified them so they are relevant to the climate change schemes.

vi. We will normally adjust a penalty within the range but, in some circumstances, we may move outside the range, including waiving the penalty.

vii. If a public or charitable body provides sufficient evidence to show that the proposed penalty would have a significant impact on the provision of its services, we will normally substantially reduce the penalty from the starting point.

viii. At the end of step 4 we will have calculated the final penalty amount.

12. I find that the Respondent has been unreasonable in its decision to impose a Penalty of £57,375 on this undertaking for the following reasons.

13. In October 2019 the Appellant's registered office changed. In November 2019 the Respondent sent the Phase 2 awareness letter to the Appellant's old address. On 30 October 2020, a year after the Appellant changed address, the Compliance notice was sent to the old registered address. The Enforcement Notice dated 20/11/2020 was sent to the old registered address of the company. I find that this error was realized before the end of March 2021 because at that point the Respondent made an unsuccessful attempt to contact the Appellant by phone. The line was "unavailable". The compliance deadline of 27/03/2021 was not altered despite what must have been obvious concerns about the effectiveness of service of the Compliance notice. Emails were sent by the Respondent on 25/03/2021 to two individuals in the Appellant company and one of those emails bounced back indicating the email address was no longer valid.

14. The Respondent relies on the fact that the second email did not bounce back and argues that the Appellant did become aware at that point of the action being taken against the Appellant for non-compliance with its obligations under the scheme. But on the 17/06/2021 the Enforcement notice was sent again by the Respondent by email to a generic email address in the Appellant company which indicates that the Respondent was aware that the Appellant might not be aware of the enforcement action.

15. Then on 29/06/2021 the Respondent received a first communication from the Appellant company (from LM) asking for verification of the Enforcement notice that had been sent on 17/06/2021 because LM was concerned that it might not be genuine. The verification was sent and from then on LM engaged with the Respondent and sought advice as to the nature of the obligations under ESOS, the details for suitable assessors and what had to be done in order to comply.

16. I find that the Respondent should have considered at that point, whether the Appellant had had a reasonable opportunity to comply with its obligations and if it had undertaken such consideration, it would in my view, more probably than not have concluded that it had not.

17. The Appellant company was then slow in following up the suggested assessors and in getting the assessment completed. The assessment was ultimately completed but filed very late.

18. In deciding on the size of the penalty to impose the Respondent failed to take the following mitigating factors into account,-

    a. That service of the Compliance and Enforcement notices was effected on the Appellant's old registered address

    b. The high level of engagement with LM once the Appellant actually realized at the end of June 2021 the seriousness of the enforcement action being taken under the ESOS scheme. LM was proactive in seeking the assistance of the Respondent in finding a suitable assessor and kept the Agency informed of progress in getting the assessment done

    c. The impact of Covid on the Appellant's operations and on its ability to ensure compliance within the timescales allowed.

    d. The impact on the environment of non-compliance

    e. The low level of energy usage within the company

    f. The fact that the Appellant did not gain financially from its non-compliance

19. The Appellant argues in addition that although it falls within the definition of a large undertaking due to the size of its turnover, its energy usage is low and number of employees are low and this should have been considered. The Respondent does not agree with this.

20. On the evidence I find that the Appellant does fall within the definition of a large undertaking based on its turnover alone. But that should not have been the end of the consideration of the size of the fine. The Respondent has a discretion not only as to whether to impose a fine but also in the size of the penalty imposed.

21. The Respondent failed to consider the impact of the Appellant's breaches on the environment which in this case was negligible, or to consider the attitude of the Appellant once it realized that it was in breach of its obligations and whether steps were taken to ensure that there would be compliance in the future. The evidence shows that the Appellant did not act intentionally to avoid its obligations and that once they were realized, all reasonable steps were taken to comply. I also consider it unreasonable to treat the Appellant as other than a new entrant while simultaneously considering it to be an aggravating factor that there was a delay in its first compliance as a new entrant and concluding that it had a history of noncompliance.

22. I have concluded that it was unreasonable of the Respondent not to extend the time for compliance given the issues with service of the compliance and enforcement notices. Once LM was assigned the task of ensuring compliance, she sought the assistance of the Respondent agency and made serious efforts to ensure compliance. Yet no additional time was given for compliance. This was despite it being very apparent from the communications between LM and the agency that she was on a learning curve and was making her best efforts to get the assessment done under the challenging conditions of

Covid.

23. Compliance has now taken place albeit much later than it should have done. A penalty is appropriate to ensure the integrity of the scheme . In all the circumstances and taking into account the mitigating factors set out above, a halving of the fine would be more reasonable and I substitute a fine of £28,688 or half of the fine originally imposed.

Decision

The appeal is allowed

The Respondent is to issue a revised penalty notice against the Appellant for period 2 in the amount of £28,688 payable within 6 weeks of the date of issue.

Signed

First Tier Tribunal Judge Ford 30/09/2022