



NCN: [2022] UKFTT 511 (GRC)

Case Reference: NV/2022/0046

**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: 14 December 2022

Before

TRIBUNAL JUDGE FORD

Between

TERADATA LTD

Appellant

and

ENVIRONMENT AGENCY

Respondent

On the papers

Decision: The appeal is dismissed
The Notice of civil penalty is affirmed

REASONS

1. The Appellant appeals against the Notice of Civil penalty dated 16/06/2022 reference ESOS-ENF-2-1536. The Notice was issued for failure to comply with the Enforcement notice issued by the Environment Agency dated 19 March 2021 (“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 21 June 2021. Compliance did not take place until February 2022.
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 and I accept that they were duly applied.

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”.

The evidence

4. A compliance notice was issued dated 19 February 2021. The Environment Agency states that it issued an enforcement notice on 19 March 2021 and posted it to the registered offices of the Appellant company.
5. The appellant states that the company never received the compliance notice dated 19/02/2021 and did not receive the enforcement notice dated 19 March 2021 until 07 December 2021. Their registered offices were closed between March 2020 and February 2022. Arrangements were made to redirect items of post to the office manager but nevertheless some items of post were delivered to the address of a different company and some simply went astray. The Covid pandemic began in March 2020, and it is surprising that 12 months later, reliable arrangements were not in place for the redirection of mail.
6. On 7 December 2021 the Environment agency made telephone contact with Josy Piccirillo, an employee of the Appellant, and informed her of the compliance issues. A follow up email was then sent to Ms Piccirillo on that same date explaining the enforcement action being taken.
6. In the email of 7 December 2021, the Respondent asked the Appellant to explain why it had been unable to comply with the Enforcement notice deadline and requested that such explanation should be provided by 14 December 2021, a week later. No response was received by the 14 December 2021.
7. Three days later the Respondent emailed the Appellant stating that no response was received, and the Environment Agency would be issuing a Notice of intent to impose a Civil penalty. The Appellant was told that it should provide the ESOS information required by 23 December 2021. It failed to respond to this communication. It was not until 24 February 2022 that notification of compliance was filed by the Appellant.
8. The Respondent acknowledges that due to the office closure the Appellant may not have received the Compliance and Enforcement Notices when they were sent. The Agency did not keep a copy of the Compliance notice it said it served on the Appellant and is only able to provide a template. There is no acknowledgment of receipt of the Compliance notice from the Appellant company and it denies ever receiving the compliance notice. The Appellant states that it did not receive the Enforcement notice until 7/12/2021.
9. The Appellant makes no reference to the November 2019 Phase 2 ESOS awareness letter from the Respondent. This was posted to the Appellant prior to the start of the Covid

pandemic. In this letter the Respondent pointed out that the deadline for sending its ESOS Phase 2 notification of compliance to the Respondent was 5 December 2019.

10. I find that the Appellant failed to act as it should have done on receipt of the Phase 2 ESOS awareness letter, which it does not deny receiving. The Appellant does not explain why it failed to respond to the communications from the Agency on 07 December 2021.
11. The Appellant argues that it should not be subject to any penalty for failure to comply with a Compliance notice that it never received. I find that any defect in service was rectified when the Respondent spoke to Josey Piccirillo and followed up that phone call with an email on 07.12.2021.
12. This was the first incident of non-compliance, and the Respondent has classed the behaviour as negligent due to the 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.
13. It is not in dispute that the Appellant failed to comply with its obligations to complete an assessment of its energy usage and file its report with the Respondent by 05 December 2019. Such an assessment has to be completed and reported every 4 years under the Energy Savings Opportunity scheme.
14. On appeal to the first Tier Tribunal (General Regulatory Chamber) the Tribunal may, under Regulation 50

“(a)cancel the determination, enforcement notice or penalty notice (as the case may be),

(b)affirm the determination, 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, anything which is within the power of the scheme administrator or compliance body.

Conclusion

15. I find that the Respondent has established that the Appellant failed to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence and that the Respondent’s assessment of the Appellant’s culpability as Negligent reflects the reality of its behaviour.
16. I have concluded on the evidence before me that the Appellant was made aware by the Respondent of its assessment and reporting obligations under the ESOS scheme in November 2019 before the Covid pandemic began.
17. The Respondent is not able to prove service of the Compliance or enforcement notices prior to 07 December 2021. But I am satisfied that no later than 07 December 2021 the Appellant was made aware of the enforcement action being taken against it by the Respondent. The Appellant has given no explanation for its failure to send any response to the Respondent’s email by the specified date of 14 December 2021. There was no request for additional time or any offer of a compliance undertaking. The Notice of compliance was not filed for another two months.
18. The Notice of civil penalty dated 16/06/2022 is affirmed without adjustment.

Decision

The appeal is dismissed

Signed

A handwritten signature in black ink, appearing to read 'Ford', written over a horizontal line.

First Tier Tribunal Judge Ford

13/12/2022

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