Neutral Citation: [2023] UKFTT 561 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Environment

Tribunal Reference: NV/2022/0071

Decision given on: 22 June 2023

Before

TRIBUNAL JUDGE SIMON BIRD KC

Between

LEARNDIRECT LIMITED

Appellant

v

ENVIRONMENT AGENCY

Respondent

DECISION

Introduction

1. By notice of appeal dated 22 December 2022, the Appellant originally appealed 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 £22,950 by Notice of Civil Penalty dated 2 November 2022 ("NCP1"). The Notice was issued in respect of the Appellant's alleged failure to comply with an Enforcement Notice issued 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. By email dated 28 March 2023 the Respondent notified the Appellant of its intention to withdraw NCP1 and to issue a new Notice of Civil Penalty because NCP1 had incorrectly alleged a failure to comply with an Enforcement Notice, when the allegation should have been a failure to undertake an energy audit. NCP1 had referred to Regulation 45 of the Regulations which is concerned with the failure to undertake an energy audit. The Respondent expressed the view to the Appellant that the proposed new Notice would raise no significant new issues and that in order to receive a timely decision on the appeal, the existing appeal should continue, but be treated as an appeal against the new notice.

3. No response was received to the e-mail of 28 March 2023, but in its Statement submitted in response to the appeal, the Respondent states that, in the interests of bringing the appeal to a timely conclusion, it had on 30 March 2023 withdrawn NCP1 and issued a "*Revised Civil Penalty Notice".* This new Notice ("NCP2") alleges that the Appellant failed to carry out an energy audit contrary to Chapter 3 of Part 4 of the ESOS Regulations. NCP2 identifies that the compliance deadline for undertaking that energy audit was 5 December 2019.

4. The Respondent further argued that, as the Enforcement Notice served on 20 November 2020 had required the Appellant to carry out an ESOS assessment in accordance with Part 4 of the Regulations, it was "*probably reasonable to conclude that any mitigation/statement submitted in their appeal applies equally in relation to the Civil Penalty Notice and the Revised Civil Penalty Notice".* On that basis, the Respondent submitted that the current appeal ought to continue despite the withdrawal of the Civil Penalty Notice.

5. In its Reply to the Respondent's Response the Appellant objected to the Respondent's withdrawal of NCP1 and contended that it was entirely

unreasonable for the Respondent to be allowed to withdraw that Notice part way through the appeal and at a time at which the Appellant is now known not to have been the parent company of the relevant Company at the date of the service of the Enforcement Notice. In consequence, it was not a party to which an Enforcement Notice could or should have been issued. The Appellant further submitted that, with the withdrawal of NCP1, the appeal proceedings should be regarded as concluded or that the Respondent should not be allowed to issue a revised Notice of Civil Penalty with the appeal proceeding only against NCP1. In the event that the Tribunal was minded to allow the Respondent to withdraw NCP1, the Appellant appealed against NCP2.

6. The Tribunal's relevant powers in relation to an appeal to the Tribunal against a Penalty Notice are contained in regulation 48(1). An appeal may be made on the grounds that the relevant notice was:

   (a) Based on an error of fact;
   (b) Wrong in law; or
   (c) Unreasonable.

7. The jurisdiction of the Tribunal is therefore limited to the content of the relevant notice which has been served by the Respondent and whether it has a correct factual or legal basis or is otherwise unreasonable. The Tribunal has no supervisory role in relation to how the Respondent exercises its other powers under the Regulations such as the power to withdraw a Notice of Civil Penalty under regulation 42(2) and it has no power to prevent the Respondent issuing a new Notice of Civil Penalty following the withdrawal of an earlier Notice.

8. The Tribunal's role is limited to considering appeals against issued notices and determining whether, in relation to such issued notices, any of the grounds of appeal is made out. Whilst it is therefore open to the Tribunal to conclude that an issued notice is unreasonable and that it should be cancelled under regulation 50 following consideration of an appeal, it has no power to prevent the Respondent issuing a new Notice of Civil Penalty having identified an error in an earlier issued notice.

9. Further, because an appeal under regulation 48 is an appeal against a specific notice, in this case the appeal was made against NCP1 issued on 2 December 2022, upon the withdrawal of that notice by the Respondent; the appeal also came to an end. In relation to NCP1 there is now no notice against which any powers of the Tribunal under regulation 50 can be exercised. It is not open to the parties to an appeal to confer a jurisdiction on

a Tribunal which it does not possess under the relevant statute and therefore, for any appeal to proceed, it must be an appeal against NCP2.

10. The Appellant's position, in the event that the Tribunal concluded that the Respondent had the power to and was entitled to issue a new Notice, was that its Reply dated 13 April 2023 taken with its notice of appeal against NCP1 should be treated as an appeal against NCP2. In the Directions I issued on 4 May 2023, I set out that the Tribunal had no power to prevent the withdrawal of NCP1 and the issue of NCP2 but that, subject to giving the Appellant the opportunity to provide any further information it wished to relating to its compliance or otherwise with the Regulations in the now relevant period of 31 December 2018 and 5 December 2019, I was prepared to accept the parties' invitation that this appeal now be converted to an appeal against NCP2.

11. That approach was, in my view, in accordance with the overriding objective and I am satisfied that, with the opportunity accorded to the Appellant to make any further representations it wished to by 26 May 2023, it is an approach which is a proportionate one and involves no prejudice to either party. The Appellant availed itself of the opportunity to make further representations dated 24 May 2023 pursuant to my direction which I have had regard to in determining this appeal.

Appellant's Submissions

12. The Appellant submits that, given that Stonebridge Colleges Publishing Limited (now Learndirect Limited) sold its qualifying subsidiary in August 2020, it was impossible for it to have complied with the Enforcement Notice served by the Respondent on 20 November 2020 and it is not in the interests of justice to allow NCP2 to stand. The qualifying subsidiary had ceased trading and been sold when the Enforcement Notice was served. Having had its error pointed out to it, it was wrong in law and unreasonable for the Respondent to seek to rectify its error by withdrawing NCP1 and issuing NCP2.

13. In NCP1 the Respondent had expressly stated that it would not require the Appellant to undertake an energy audit due to due the changes that has taken place in the organisation which made it unreasonable and factually and legally erroneous to serve NCP2. Service of NCP2 should not be allowed to mitigate the fact that NCP1 had not been served on the Appellant.

14. It may or may not be factually correct that the qualifying subsidiary had not carried out an ESO assessment; however the Appellant was unable to confirm that because the subsidiary was not at the date of the service of either NCP1

or 2 part of the Appellant's group of companies. The Appellant was not the parent or ultimate or highest UK parent of the subsidiary company at the date of the service of either NCP1 or 2. An error of fact and arguably law has therefore been made in issuing the Appellant with NCP1 and NCP2.

15. It is damaging to the reputation of the Appellant, unreasonable and contrary to the interests of justice to categorise the Appellant's culpability as "negligent" when the Appellant had no control or ownership of the subsidiary company at the date of the Enforcement Notice. It was entirely unreasonable for the Respondent to issue NCP2 when it was fully aware that the Appellant was not the parent company of the Company and not the appropriate party on which such a notice could or should have been served.

16. It was unreasonable, an error of fact and wrong in law for the Respondent to be allowed to issue NCP2 in relation to a failure when, at the time of its issue, the Company no longer existed and given that the Respondent accepts that it was impossible for the Appellant to carry out an ESOS assessment. The position now was no different (in terms of organisational changes) to the position as it existed at the date of the service of the Enforcement Notice. The Company had already ceased trading and been sold out of the Appellant's group of companies as at 20 November 2020.

17. The Respondent's conduct had placed the Appellant at huge and unjust disadvantage as it is now unable to investigate and confirm whether or not it ought to have carried out an ESOS assessment, whether it had or had not done so or whether the relevant date was 5 December 2019. It was unjust and unfair to impose a civil penalty when the Appellant had no means of checking, given that in March 2023 when NCP2 was served, it was no longer the parent of ultimate or highest parent of the Company. It was accepted that between June 2018 and 7 August 2020 it had been.

18. In these circumstances, it was wrong to conclude that the Appellant had been negligent. Further, given the decline of the Company at the relevant time, it would have been a low energy user, non-compliance would have given rise to no serious risk to the environment and it was disproportionate to impose a civil penalty on a business contributing to the economy when the Company had been part of the Group for only a short period of time and it had not been trading. Given the absence of any effect on the environment, NCP2 imposed a disproportionate penalty on the Appellant.

19. Further, in issuing NCP2 the Respondent had not complied with its Enforcement and Sanctions Policy 2022 in that it had not made it clear to the Appellant what was required of it, contrary to section 3 of that policy, and the Appellant had not received a Notice of Intent to impose a Civil Penalty.

Further, having regard to sections 4 and 5 of the Policy, the Appellant had obtained no financial gain from the alleged breach, a sanction could not have any effect on the Company's future behaviour and the Respondent had failed to take into account the Appellant's circumstances. The Respondent's policy at section 6 also stated that it would serve a Notice of Intent before issuing an Enforcement Notice and no notice of intent had been served here and at the date of the Enforcement Notice, the Appellant was not the ultimate parent company. Applying the Respondent's policy, the alleged breach was a minor one which should have resulted in guidance being offered rather than the imposition of a sanction.

The Respondent's Submissions

20. The Respondent had noticed an error in NCP1 which alleged a failure to comply with the Enforcement Notice but referred to regulation 45 of the Regulations which relates to a failure to undertake an energy audit. NCP1 should have been issued in respect of the failure to undertake an energy audit and not a failure to comply with the Enforcement Notice in accordance with the Respondent's "Environment Agency enforcement and sanctions policy".

21. NCP1 was withdrawn and NCP2 issued in order to regularise the position, there being no provision in the Regulations allowing the Respondent to vary a Notice in order to correct it.

22. A Compliance Notice was posted to Stonebridge Colleges (Publishing) Limited ("Stonebridge") c/o Dearing House, 1 Young Street, Sheffield S1 4UP on 30 October 2020 and the Enforcement Notice was posted to the same company at the same address on 20 November 2020. At that time, the Respondent had identified Stonebridge as being the highest UK parent undertaking of the large undertaking Learndirect Limited. The Compliance Notice and Enforcement Notices, whilst directed at the correct legal entity had not been served as they should have been, as Stonebridge's address was at that time 42 Ocean View Road, Bude, Cornwall EX23 8ST.

23. The Respondent was not aware at this time that Stonebridge had sold Learndirect Limited in August 2020. However, at both the ESOS Phase 2 qualification date (31 December 2018) and the compliance date (5 December 2019) Learndirect was still part of Stonebridge. No written agreement was in place under regulation 19(3) of the Regulations and therefore Stonebridge as the highest parent was the responsible undertaking for the purposes of Regulation 19(2).

24. The Appellant has not undertaken an energy assessment and remains non-compliant.

25. Applying the Enforcement and Sanctions policy, the Respondent categorised the Appellant's conduct as "negligent" i.e.:

> *"a failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding non-compliance"*

26. The Respondent categorises the Appellant as having acted negligently due to its failure to act promptly and its failure to take care and put in place and enforce proper systems for avoiding non-compliance.

27. Applying the stepped approach to civil sanctions set out in its enforcement and sanctions policy, this led to a penalty range of between £4,950 and £27,000 with a penalty starting point of £10,800 to be adjusted having regard to aggravating and mitigating factors.

28. The Respondent submits that in setting the final penalty of £22,950 which represents a £67,050 reduction in the statutory maximum penalty applicable to the breach under the Regulations it considered all the aggravating and mitigating factors of the case including all representations made by the Appellant. NCP2 states that the Appellant was compliant with the requirements of compliance period one, but that there was no response to the Compliance Notice or the subsequent Notice of Intent served on 22 November 2021. Only in December 2021 did the Appellant make contact to explain that there had been several changes in the company structure. The Respondent invites the Tribunal to dismiss the appeal.

FINDINGS

29. 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.

30. As I have set out above, 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.

31. This appeal is proceeding as an appeal against NCP2 which identifies as the relevant breach the failure to carry out an energy audit. That audit should have been carried out in the period 31 December 2018 and 5 December 2019.

32. Whilst it is very regrettable that the Respondent should have issued NCP1 containing a significant error in its misdescription of the breach alleged, I see nothing unlawful or unreasonable, once it had identified an error, in its decision to withdraw NCP1 and to issue NCP2. It would not have been reasonable for it to persist in defence of a Notice which it knew to be erroneous and there is nothing within the Regulations which prevents the Respondent from issuing a new Notice in circumstances in which an earlier Notice has had to be withdrawn by reason of its containing an error which is regarded as being incapable of correction.

33. Nor do I see that a new notice served in such circumstances can be said to be unlawful, unreasonable or contrary to the interests of justice. The objective of the enforcement regime under the Regulations is to maintain the integrity of the ESOS auditing regime and to ensure that it is complied with. It would not be consistent with those objectives for the Respondent effectively to be debarred from correcting errors made in drafting and serving Notices under the Regulations. Whilst I accept that there might be exceptional cases in which the withdrawal of one Notice and the issue of a new Notice might be regarded as unreasonable, I am not satisfied that the circumstances here are such as to render the NCP “unreasonable”. Any element of unfairness is limited and not such as to amount to unreasonableness under Regulation 48. Rather, this context bears on the issue of the appropriate sanction, if any, and not on the lawfulness or reasonableness of the notice itself.

34. The service of the new Notice alters the time period which is the key focus of the appeal from 20 November 2020 to 21 February 2021 which was the compliance period under the Enforcement Notice to 31 December 2018 to December 2019, which prevents the Appellant relying on the sale of its subsidiary in August 2020 as an explanation for the breach as it is now alleged, but that provides no proper basis for arguing that the initial breach, which was the failure to undertake the energy audit, should as a matter of fact and law go unsanctioned once the Respondent has got its relevant Notice in order. I therefore do not accept that NCP2 should be cancelled for the reasons advanced by the Appellant.

35. Whilst the Appellant states that it does not know whether an ESOS audit was required or was or was not undertaken in the relevant period, I note that there

had been compliance in compliance period one, which shows that the Company was the subject to the requirements of the Regulations and the Respondent's evidence is that no energy assessment has been carried out. There is no evidence to contradict that. I am therefore satisfied that no that no ESOS assessment was undertaken as required by the Regulations during the period to 5 December 2019.

36. It is necessary for me also to consider the amount of the civil penalty which NCP2 imposes. I remind myself that 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.

37. The Respondent's policy in relation to applying civil penalties in relation to climate change schemes is contained in Annex 2 to the its Enforcement and Sanctions Policy. This 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.

38. In determining whether there has been a relevant error in the level of penalty imposed by the notice, the issues therefore narrow to whether (a) the Appellant's culpability is reasonably categorised as negligent as the Respondent argues and (b) whether the civil penalty of £22,950 is proportionate to the breach, having regard to the circumstances.

39. This is not a case in which it would have been reasonable to waive any penalty for the failure to undertake the required assessment. There is no evidence that this was an inadvertent or technical one; there was a reasonably lengthy failure to comply given that, even at the date of the sale of the subsidiary in August 2020, there had not been compliance for some 8 months after the compliance date. There is no explanation before me as to the reasons for this non-compliance, although I accept that at this remove and with the organisational changes in the Appellant's group, the Appellant is placed in some difficulty is responding to the allegation.

40. However, this also has implications for the Respondent's allegation that the breach was a negligent one. Whilst one possible inference from the lengthy

period of non-compliance might be that the Appellant did not have in place procedures to ensure that it was aware of and understood all its relevant statutory obligations which it was required to meet under the Regulations or to ensure that those requirements were in fact met, there are also other possible explanations. In these circumstances, and absent any evidence on such matters either way, I am not prepared to draw the inference that the Appellant's conduct was negligent. In my view, having regard to all of the circumstances, which include the Appellant's awareness of its obligations under the Regulations shown by compliance at compliance period one, the only reasonable conclusion on the available evidence was that the breach was one of low culpability.

41. I have also seen nothing from the Respondent which explains how it is said that aggravating factors in this case justify as proportionate a more than doubling of the starting penalty from £10,800 to £22,950. I do not consider that it is reasonable for the Respondent to have relied upon the absence of responses to the Compliance Notice and the Enforcement Notice in late 2020 given that neither notice was properly served on the Appellant. Further, by this time the subsidiary had been sold and there was nothing which the Appellant was able to do to secure compliance with the Regulations.

42. The penalty imposed should reasonably have reflected both a reasonable conclusion as to culpability, reflecting the failure to comply with the Regulations by 5 December 2019, coupled with the seriousness aggravated by the fact that there was still non-compliance at the point of disposal in August 2020. However, also to be taken into account was the absence of any history of non-compliance and the compliance with the requirements of compliance period one.

43. In my view, the Respondent's penalty of £22,950 is manifestly excessive reflective of an unjustified judgment as to the level of culpability and given the starting point of £10,800. Applying its policy correctly to the facts, the Respondent could only have concluded on the evidence that this was a case involving low culpability with mitigating and aggravating factors outweighing each other. This would have led to a penalty range of £900 to £4500 applying Table 2 to Part D of Annex 2 to the Respondent's policy.

44. I am satisfied that the only reasonable conclusion available to the Respondent on the facts here is that this was a case involving low culpability by a medium sized company. A civil penalty at the top end of the range i.e. £4500 would not have been disproportionate or unreasonable having regard to delay involved in compliance with the requirements of the Regulations and the need to ensure that the Appellant understands the importance of ensuring that it and any companies of which it might now or in the future be the parent of,

comply with their Regulations. It is also would also be consistent with safeguarding the integrity of the ESOS regime, whilst reflecting the particular facts of this case.

45. As a result of my conclusion I allow the appeal in part and direct that the civil penalty notice be affirmed but as modified by setting the Final Penalty amount at £4,500.

JUDGE SIMON BIRD KC
19 June 2023