Neutral Citation: [2023] UKFTT 808 (GRC)

Case Reference: NV/2022/0067

First-tier Tribunal
General Regulatory Chamber
Environment

Heard by: CVP Video Hearing

Heard on: 17 August 2023
Decision given on: 5 September 2023

Before

TRIBUNAL JUDGE HUGHES

Between

BUY IT DIRECT LTD

Appellant

and

ENVIRONMENT AGENCY

Respondent

Representation:
For the Appellant: Gillespie
For the Respondent: Mr P Collins

Decision: The appeal is Allowed in part

Substituted Decision Notice: The Penalty under the Fluorinated Greenhouse Gases Regulations 2015 is reduced to £37,500

Case considered:
Rv Sellafield, R v Network Rail [2014] EWCA Crim 49

REASONS

1. On 3 November 2022 the Respondent issued a Civil Penalty Notice to the Appellant under regulation 31A of the Fluorinated Greenhouse Gases Regulations 2015 ("the Regulations"). These regulations provide a framework for the enforcement of EU Regulation No 517/2014

of 16 April 2014 which restricts the use of such gases in order to prevent harm to the environment. Regulation 31A of the 2015 Regulations provides:

.—(1) A relevant enforcing authority may impose a requirement to pay a civil penalty in accordance with Schedule 4.

(2) The requirement to pay a civil penalty may be imposed on any person who—

(a)fails to comply with—
(i)a provision of the 2014 Regulation specified in Schedule 2;
(ii)a provision of the Commission Regulations specified in Schedule 3, read in association with Part 3 of these Regulations;
(b)causes or permits another person to do any of the following—
(i)breach any of the prohibitions mentioned in the following provisions of the 2014 Regulation—
(aa)Article 3(1) (prohibition on intentional release of fluorinated greenhouse gas);
(bb)Article 11(1) (read in association with Article 11(2) and (3)) (prohibition on placing specified products and equipment on the market);

2. The 2014 Regulation, provides, so far as is relevant:

Article 11
Restrictions on the placing on the market

1.
The placing on the market of products and equipment listed in Annex III, with an exemption for military equipment, shall be prohibited from the date specified in that Annex, differentiating, where applicable, according to the type or global warming potential of the fluorinated greenhouse gas contained.

….

5.
Non-hermetically sealed equipment charged with fluorinated greenhouse gases shall only be sold to the end user where evidence is provided that the installation is to be carried out by an undertaking certified in accordance with Article 10.

3. The Respondent issued the Penalty Notice following an investigation on the basis that the Appellant had not complied with the evidence requirement contained in Article 11(5). The Appellant disputed this conclusion and also the size of the penalty.

4. Buy It Direct is an online retailer of electrical goods, furniture and bathroom products (including air conditioning units) for homes and businesses.

5. On 15 November 2019 the Respondent served on the Appellant an Information Notice requiring it to provide information about the systems it had in place to ensure compliance with the evidence requirement in Article 11(5) between 1 August and 1 November 2019. The company replied on 31 December 2019 providing certain information about the processes:

(bundle page 224) Prior to August 21st 2019, BID [Buy it Direct] followed the F gas guidelines as published the EA website. These stated that "If you're selling to an end user,

you must get confirmation from them that the equipment will be installed by someone qualified to handle F gas. End-users must provide you with a letter stating that the equipment will be installed by either someone with an F gas handling certificate or someone from a contractor that has a company certificate". BID accepted electronic written confirmation from customers that the equipment would be installed according to these terms.

(bundle page 225) Since we received the notice from the EA, we conducted a survey on those end-user customers who didn't provide us with details of their engineer to understand the reasons why. In the majority of cases this was due to the time gap between purchasing the equipment and installation (i.e. the customer hadn't yet got around to finding an installer when they bought the product). We didn't find a single instance where a customer had or was going to install the system themselves or use a non-qualified person.

This process initiated by the Notice form the EA has identified a number of areas for improvement but also questions. To strengthen our compliance, we will no longer rely on a customer's honesty to forward us the details of who performed their installation and will instead be enhancing our processes even further so that regulated goods are not released without first obtaining the details of the proposed engineer

We would like to continue to work with the EA around developing the specific processes required for online retailers on this point. We would therefore be grateful if you could advise us as to what would be acceptable evidence – is for example a customer's intention to use a F-gas qualified engineer sufficient and what is our obligation on following up for evidence of the actual installation? We could also do with understanding your view on the standards of evidence required.

6. The Respondent in the light of the information provided by the Appellant, concluded that the Appellant had sold air conditioning units subject to this regulation without holding evidence of that the systems would be installed by a correctly qualified engineer. On 18 August 2020 the Respondent served a Notice of Intent to Serve a Civil Penalty. In that notice the Respondent analysed the information provided by the Appellant and found a substantial mismatch between the numbers of units sold and the information about installers gathered and supplied to the Respondent (bundle page 35): 964 orders, 1164 units 83 installers identified. The Respondent concluded:

   "The Environment Agency considers that during the period BID did not obtain evidence that non-hermetically sealed equipment sale to UK customers would be installed by a certified undertaking before selling the equipment BID obtained evidence of certified installer in probably 8.6% of orders."

7. On 10 September 2020 the Appellant responded to this.

   "the evidence that the equipment has been installed by a certified undertaking is the legally binding sales agreement incorporating the F gas procedure, customer agreement to these terms and the records held by BID the cumulative effect of this information amounts to the evidence required by Article 11(5) of the EU regulation that the installation of the equipment is to be installed by an accredited undertaking"

8. Over two years later the Respondent issued the Penalty Notice and now, four years after the alleged breach the issue has come to the tribunal for consideration.

Consideration of a breach of Article 11

9. The Appellants case was summarised:-

   It is the Appellant's case that at the time of the Respondent's enquiries, and, indeed, even now, they can show that they acquired from their end users, evidence that the installation of the relevant products was to be carried out by an appropriately qualified undertaking under Article 10 of that same EU Regulation.

10. The term "evidence" is undefined in the Regulations. The Respondent published guidance on the issue in 2014:

    "If you're selling to an end user, you must get confirmation from them that the equipment will be installed by someone qualified to handle F gas.
    End users must provide you with a letter stating that the equipment will be installed by either:
    • Someone with an F gas handling certificate
    • Someone from a contractor that has a company certificate
    • […]

11. The Respondent published a consultant's report to assist industry with compliance (the Gluckman guidance)

    "If the equipment is being purchased by an end user […], they must provide a Letter of Assurance' confirming that they will ensure that the installation will be carried out by someone with a suitable F-Gas handling certificate. The letter should state that the buyer is aware that the equipment being purchased must be installed by a qualified technician and give an assurance that the work will be done either by:
    • In-house staff with the relevant F-Gas personnel certificate or
    • By a contractor holding a F-Gas Company Certificate."

12. In August 2019 (shortly after the start of three month period of BID sales which the Respondent reviewed) the Respondent published a revised version of its guidance

    "Get a letter from end users of F gas equipment
    If you sell stationary refrigeration, air conditioning, heat pump and fire protection systems, you must get a letter from the end user to confirm the details of the qualified technicians they are using to:
    • install
    • service
    • repair
    • decommission"

13. In his evidence Mr Glynne (director of the Appellant) explained that the company's sales were performed through a website and a purchaser could not proceed to a purchase until he had agreed contractual terms which included installation by a relevantly qualified engineer. He indicated that the purchase price of a unit (including VAT) was approximately £500 and the installation cost perhaps half as much again.

14. The Appellant is functioning in a competitive marketplace where price, the ease of purchase and delivery will all contribute to achieving a sale. Although it points to a contractual agreement and references to manuals which will be supplied with the product, from the point of view of a purchaser the contractual term is a click which needs to be performed in the process of making a purchase, of no greater weight than the numerous clicks any internet user performs consenting to advertisements in order to get access to a newspaper website. It is a trivial process which lacks the significance to the purchaser of specifying where the delivery is to occur or making the payment. It is sold through a website which sells a wide range of products which do not require installation by individuals with a specific recognised qualification. In evidence Mr Glynne spoke of the difficulty the company had in changing the specification of the pathway a purchaser takes through BID's presence on the website. He explained:-

"We always believed that we were within the guidelines. As soon as we were aware [of the issue] we had to re-engineer all e-commerce…the minimum time to change the website is 3 months.. [we] phased in over six months, we can't operate much quicker."

15. It is simply implausible that the vendor would bring proceedings for breach of the contractual term if a purchaser did not use a registered engineer as required, the contractual term has no substantive weight with a purchaser. A purchaser might consider the impact of the cost of installation or might perceive the risk of not being able to enforce repayment of a faulty unit if it has not been installed by a qualified individual, they would give little weight to a click contract term.

16. While the Appellant argues that the guidance can not make the regulation more onerous the guidance has a proper role in ensuring that the regulations are properly obeyed. The 2014 guidance requires a vendor to obtain a letter from a purchaser confirming that a proper installer will be used; the 2018 guidance requires such a person to be identified. These both require a demonstration of a level of commitment and understanding from a purchaser which does not come from a click contract and provides a level of reassurance that the purchaser understands the issues and responsibilities which does not come from the system the Appellant had adopted, which was adopted within a framework intended to ease the sale of the equipment rather than to ensure that the purchaser understood their responsibility.

17. Under the guidance there is some weight to the evidence, within the framework adopted by the Appellant prior to the Information notice, there is no evidence that the installation with be properly carried out. The response to the Information Notice which indicates a change of approach would clearly have been the correct approach to have adopted from the beginning of this regulatory framework (paragraph 5 above):

"To strengthen our compliance, we will no longer rely on a customer's honesty to forward us the details of who performed their installation and will instead be enhancing our processes even further so that regulated goods are not released without first obtaining the details of the proposed engineer"

18. The point of the requirement for evidence is to ensure that the Regulations are given effect by minimising the risk of release of the gas through poor handling and installation. Over the years since the Regulations came into force the Appellant had not ensured that it had received the evidence necessary to give it reasonable assurance that there was compliance. While it has made efforts to gather information to show compliance subsequently the

complexities and uncertainties of the results demonstrate that at the time of sale it did not have the evidence it required. I am satisfied that the breach if established.

Consideration of sanction

19. The second ground of appeal relates to the level of penalty.

20. The Environment Agency's approach to determining a civil penalty is laid down by its **Enforcement and Sanctions Policy Annex 2: Climate change schemes - the Environment Agency's approach to applying civil penalties**.

21. The starting position is to assess:

    the nature of the breach
    culpability (blame)
    the size of the organisation
    financial gain
    any history of non-compliance
    the attitude of the non-compliant person
    personal circumstances

22. The breach of this provision can attract a penalty of £200,000. I have considered the joined cases of Sellafield and Network Rail; the former dealing with environmental protection in a case with a large company where no actual damage was proved but there were failures of system over a period of time. In this case the Environment Agency has determined that the breach was negligent in that there was a 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 and that the organisation responsible was large, producing a penalty of £60,000 and a range of sanction of £28,000 - £`150,000. In the light of the co-operation from the company the sanction imposed was £42,000.

23. The last four criteria are treated as aggravating or mitigating factors. At the time the sanction was imposed the Environment Agency had not received all the information it had sought from BID (which it received in the form of a witness statement from Mr Glynne served on 23 March 2023, a day after BID significantly changed its position on the systems it had in place at the relevant time).

24. BID has disclosed company accounts showing a substantial increase in gross profits from £8,080,000 in 2019/20 to £32,763,00 in 2020/21 with the results for 2021/22 and 2022/23 showing losses in each year comparable to the profits prior to the surge in profits due to Covid. Given the scale of the company and the level of profits in 2019/20 I do not consider that this merits a major revision of the penalty.

25. In his witness statement Mr Glynne discloses the gross profit from sales of this equipment to end users as £29,507.32 of which sales to end-users without F-Gas engineer details was £27,739.44 indicating that 94% of sales to end-users were lacking evidence indicating compliance. However this indicates a desire of BID to fully co-operate in this matter.

26. Taking all these factors into account I consider that the penalty should be reduced to approximately 90% of the original level and I reduce the penalty to £37,500.

Signed Hughes Date: 3 September 2023