FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT

Tribunal Reference: **NV/2015/0003**

Appellant: **Hovis Ltd**

Respondent: **Environment Agency**

Judge: **Peter Lane**

Member: **Christopher Perrett**

Decision Date: **11 January 2016**

DECISION NOTICE

Introduction

1. The climate change levy was introduced by the Finance Act 2000. The levy is a carbon tax that adds around 15% to the energy bills of businesses and public sector organisations. It is levied by energy suppliers when they bill energy consumers, with the energy suppliers passing the sums collected to Her Majesty's Revenue and Customs.

2. The respondent administers the system of climate change agreements (CCAs) in the United Kingdom. CCAs are voluntary agreements made between sector associations, their members and the respondent, committing energy intensive installations and facilities to targets for improving their energy efficiency or reducing carbon dioxide emissions, in return for receiving a reduced climate change levy rate.

3. So-called "umbrella agreements" are sector-level agreements between the respondent and the relevant sector or trade association, setting out the targets for the sector; the obligations of the parties; and the procedures for administering the

agreements. There is also a system of underlying agreements, which are individual contracts between the agency and an operator.

4. A "target unit" is the facility or group of facilities to which the climate change agreement applies. Operators that fail to meet their targets continue to receive the climate change levy discount if they pay a buy-out fee to cover the shortfall. An operator that misses the target and does not pay the buy-out fee loses its certification, which means it is no longer eligible for the discount.

The issue

5. The appellant is a major food producer. It participates in the CCA scheme under the aegis of an umbrella agreement between the respondent and the Food and Drink Sector Association and an underlying agreement between the respondent and the appellant.

6. The respondent considers that the appellant failed to meet its target under its underling agreement (FDF1/T00565) in respect of the period 2013/14. The respondent on 6 May 2015 issued the appellant with a notice under rule 7 of Schedule 1 (rules for the operation of climate change agreements) to the underlying agreement of 22 April 2015. The notice said:-

> "We have determined that the target unit identified in the CCA register as FDF1/T00837 operated by Hovis Ltd (you) has failed to meet its target. If you wish to keep the target unit certified within the CCA scheme and wish to continue to be eligible to claim the CCA discount on the climate change levy you must pay a buy-out fee in accordance with regulation 12(2) of the Climate Change Agreements (Administration) Regulations 2012."

7. The calculation of the buy-out fee is as follows:-

> "We calculated the buy-out fee due using the formula in regulation 12(2)(c) of the Climate Change Agreements (Administration) Regulations 2012 (as amended). The amount of the fee is-
>
> £12 x (W-S)
>
> Where W in units of tonners CO_2 (equivalent) represents the amount by which the emissions for the target period exceed the target, and S in units of tonners CO_2 (equivalent) represents any surplus.
>
> For performance in the target period the buy-out fee is calculated using the information you reported to your sector association. Please refer to them for more information."

8. The amount of the buy out fee, as so calculated, was stated in the notice to be £123,648.00.

The appeal

9. The appellant appealed against the notice to the Tribunal. Both parties were content for the appeal to be determined without a hearing. We are satisfied that we can properly determine the issues without a hearing, pursuant to rule 32 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009. The case for the parties has been clearly and helpfully articulated in their respective written submissions.

10. It is common ground that the respondent's decision to impose a buy-out fee arose from the closure of the appellant's Leicester manufacturing facility on 10 November 2014. As a result of the closure of that facility, production was moved to another facility of the appellant, within the target unit in the underlying agreement. The two year "target period" under the agreement ended on 31 December 2014. The respondent's view of the working of the underlying agreement is that throughput data for the closed Leicester facility fell to be taken into account in respect of the 24 month period, only as between 11 November 2014 and 31 December 2014, rather than the full 24 month period. This meant that the appellant's throughput had reduced by more than 10% of 2 x base year throughput, giving rise to a failure on the part of the appellant to meet its target and, hence, the liability to pay the buy-out fee, if the appellant wished to remain eligible to claim its CCA discount on the climate change levy.

11. The appellant's case, having seen the respondent's response, is that the respondent has misinterpreted the scheme documents. Those documents are as follows:-

> **The underlying agreement** applies to facilities (production plants), which together comprise a target unit. The underlying agreement sets a target for energy reduction to be achieved by the target unit, in two year periods, known as target periods. The target is a reduction in energy consumption, compared with a base year, expressed both as a percentage and number of kWh of energy to be saved. As a result of the statutory scheme, the underlying agreement is binding on the parties.
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> **The technical annex** is a publication of the Secretary of State, which supplements the provisions of the underlying agreement and is also binding on the parties.
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> **The eligibility guidance** is also issued by the Secretary of State, under the climate change legislation. The respondent is required to "have regard" to the guidance.
>
> **The operations manual,** produced by the respondent, adopts the form of guidance for Industry as to how the CCA will operate. It is, in other words, a form of policy operated by the respondent.

12. Rule 10.1 of the underlying agreement provides that where the appellant wishes to exclude the facility, it must notify the respondent. It is common ground that this occurred. The respondent may then vary the target to take account of the exclusion, "following the principles, methodologies and calculations set out in the technical annex". According to the technical annex, "if the exclusion of the site is due to it closing and is not part of a change of ownership, then this will be treated as an act of rationalisation and the original target will be retained". Paragraph 43 of the eligibility guidance likewise states that where a facility leaves a target unit as a result of closure and is not part of a change of ownership, this will be regarded as an act of rationalisation "and the original target unit target and base year performance will be retained".

13. Section 7.1.3 of the operations manual contains provision to the same effect. At 8.3.1 it is stated that "a multi-facility target unit where one or more facilities closes – this is a rationalisation…. as production has stopped. The sector association carries out a variation to exclude the facility or facilities. The target and baseline data should not be altered."

14. The appellant's case is that, pursuant to those provisions, the closure of the Leicester facility should not have led to any change in the appellant's target under the underlying agreement. However, it is common ground that the appellant did change it and subsequently calculated the buy-out fee on the basis of the adjusted target.

15. The appellant admits that it made a mistake in reporting what was described as a "reporting variation" in January 2015, relating to the closure of the Leicester facility. The appellant, however, contends that notwithstanding this, the respondent was not entitled to rely upon the notification in order to adjust the appellant's target. Since the closure of Leicester was a rationalisation, production formerly handled at that facility was relocated to other of the appellant's facilities within the target unit. This meant that the same output would be generated by that unit, employing fewer facilities. There would, thus, be no need to adjust the target. The appellant's mistake, which led it initially to think that because the Leicester facility closed before the end of the target period, none of its throughput for that period could be reported, was, according to the appellant, almost immediately realised and sought to be corrected, through correspondence with the respondent.

16. In any event, the respondent had a discretion to adjust the previous target, upon receiving notice from the appellant. It did not have to do so and, in the circumstances, according to the appellant, it should not have done so. It was only the exclusion of the Leicester throughput, which led to the calculation that the appellant's throughput had fallen by more than 10%, thus supposedly necessitating an adjustment in targets.

17. According to the appellant, the respondent's reliance upon section 10.4.7.5 of the operations manual is misconceived, in that the provisions there relied upon relate to a situation where a particular facility leaves the CSA scheme rather than,

as here, closing, with production being rationalised at other sites which remain within the scheme. In any event, even if 10.4.7.5 was relevant, the result would have required the target unit to be "re-baselined", which did not happen.

18. In its submissions of 11 September 2015, the respondent submitted that the appellant could have appealed against the respondent's decision in December 2014 not to change the base year data or targets, following the closure of the Leicester facility. The respondent submitted that it did not make a mistake and that, in the light of the appellant's initial submissions following closure, the respondent was entitled to adjust the previous target using the methodology previously described, which produced the buy-out fee. The respondent further submitted that its decision to request information from operators only in respect of facilities that were part of the CCA scheme at the end of the target period, avoided placing an unreasonable reporting burden on operators. The respondent agreed that 10.4.7.5 of the operations manual was not, in fact, applicable, since the Leicester facility did not continue to operate. The relevant provisions of the manual were 7.1.3 and 8.3.1, dealing with rationalisation.

Discussion

19. Rule 13 of Schedule 1 to the underlying agreement provides that the appellant may appeal a notice imposing a buy-out fee on the grounds that the decision was based on an error of fact; that it was wrong in law; that it was unreasonable; or for "any other reason". In determining the appeal, the Tribunal must either affirm the decision; quash the decision or vary the decision.

20. In reaching a decision in this case we have regard to all the material (including the submissions) filed by the parties. Our decision is unanimous.

21. The Tribunal is not persuaded that anything material turns on the fact that the appellant could have appealed against a decision of the respondent at an earlier point in the process leading to the buy-out notice. The agreement makes specific provision for an appeal to be brought against such a notice, which the appellant duly did.

22. Nor do we find that the failure of the appellant to appeal the respondent's decision to adjust the target of the target unit has any bearing on the appellant's contention that the buy-out notice was wrong in law and/or unreasonable. By the time the buy-out notice was issued, the respondent was in no doubt that the appellant had realised it had made a mistake in notifying a supposed reduction in throughput and that the appellant's case was that the production at the Leicester facility fell to be taken into account throughout the relevant two year period. We agree with the appellant's submissions that the respondent cannot "rely on its original, incorrect adjustment of the target as justification for its subsequent, incorrect issue of the buy-out notice. One error cannot be a defence to another."

23. We also agree with the appellant that the question of what information the respondent requested, and when, is relevant to the issue of whether the respondent, in the present circumstances, could ignore relevant information from the appellant on the basis that the respondent did not ask for it. We agree that, once the information was before the respondent, the latter was required to have regard to it.

24. Standing back, the Tribunal finds it plain that the correct interpretation of the agreement and related materials is the one advanced by the appellant. Having regard to the purpose of the scheme, it would be frankly peculiar if the closure for rationalisation purposes of a facility at any point within the target period led to the disregarding of the part played by that facility up to the point of its closure. In our view, very clear provisions would be required to bring about such a state of affairs; and one looks in vain for them in the relevant instruments. The situation is, of course, different where a facility leaves the scheme but continues operating. We agree with the appellant that it cannot rationally be said that this is what has happened in the present case. The closure of the Leicester facility was a rationalisation.

Decision

25. The Tribunal concludes that the notice appealed was wrong in law and/or was unreasonable. The notice is hereby quashed.

Judge Peter Lane

Chamber President

Dated 11 January 2016