



NCN: [2022] UKFTT 509 (GRC)

Case Reference: NV/2022/0032

**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: 3 October 2022

Before

TRIBUNAL JUDGE FORD

Between

DECKERS EUROPE LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

On the papers

Decision: The appeal is allowed

Substituted Decision Notice: The Penalty notice is cancelled and a revised Penalty notice is to be issued by the Respondent stipulating a fine of £5,000

REASONS

1. The Appellant appeals against the Notice of Civil penalty reference dated 21/04/2022, reference ESOS-ENF-2-0494. The Notice was issued for failure to comply with the Enforcement notice issued by the Environment Agency dated 16/10/2020 . That notice required the Appellant to carry out an Energy savings Opportunity scheme ('ESOS') assessment and to report the outcome to the Respondent. The assessment was originally due by 05/12/2019.
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 Respondent having formed the view that the Appellant had failed to take reasonable care to put in place and enforce proper systems for the commission of the offence.
4. 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.

Low or no culpability

This means an offence committed with little or no fault on the part of the organisation as a whole. For example:

- by accident or the act of a rogue employee despite the presence and due enforcement of all reasonably required preventive measures
- where such proper preventive measures were unforeseeably overcome by exceptional circumstances

5. The Notice set out the Respondent Agency's consideration of the appropriate penalty under Annexes A and D and concluded that the Appellant's culpability was negligent. The Respondent considered the Appellant to have a history of non-compliance due to its late filing of its first ESOS assessment which was due by 05/12/2015, but was not filed until 26/01/2016. The Respondent referred to the need to maintain the integrity of the scheme.
6. In its response to the Appellant's grounds of appeal, the Environment agency stated;-

"The Appellant states that they have been unable to confirm receipt of the Compliance Notice or Enforcement Notice and that their offices were closed for much of the period from 12 March 2020 till April 2021. We acknowledge that as a result of

the office closures the Appellant may not have received the notices. However, we did try to contact the Appellant by telephone and email before the issue of the Notice of Intent, in May and June 2021. Further, a Phase 2 awareness raising letter was also sent to the Appellant before the compliance deadline and before Covid restrictions started. The Appellant states that in September 2021 'Deckers' Senior European Counsel and Company Director Alex Henderson took on responsibility for managing our Facilities department. Upon receipt of the ESOS letter dated 3 September 2021 notifying Deckers of the possible imposition of a fine for failure to submit an assessment, he immediately instructed Caroline to comply with the terms of the letter. Deckers was given a deadline to submit the assessment of 12 November 2021, which we complied with.' The Appellant appears to be confused about the chronology of events at this stage. The Notice of Intent was sent to the Appellant by recorded delivery on 6 September (delivery confirmed the following day). On 15 September, we telephoned the Appellant and was provided with another email address. An email was sent to fcailities-emea@deckers.com and ukmarketing@ugg.com on 15 September. There was no response. A further email was sent to the Appellant on 27 September. The Appellant did not respond to the Notice of Intent until 30 September. The deadline of 12 November 2021 was not a deadline imposed by the Agency”.

7. 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 assessment report in question was due by 05/12/2019 but was not ultimately filed until 12/11/2021.

8. On appeal to the first Tier Tribunal (General Regulatory Chamber) the Tribunal may, under Regulation 50 of the Regulations

“(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.

9. The Respondent argues that the Appellant has been unclear as to which ground of appeal is relied on under the Regulations. I find that it is sufficiently clear that the Appellant is arguing that the imposition of the fine was “unreasonable” and seeks a reduction of the fine or a waiver.

Consideration of the evidence

10. The Appellant does not deny that it has been late in complying with its ESOS obligations and the reasons given for it are that:-

- The Company appointed a new Facilities manager (CG) and there was no handover period given the impact of Covid. CG was unaware of the obligation to complete and file an ESOS assessment until she was contacted by senior

management (Alex Henderson/Rob Hannington) who received copies of the notice of intention to impose a civil penalty in early September 2021.

- Compliance and enforcement Notices were sent by the Environment Agency to generic customer service email addresses at the Appellant company prior to the beginning of September 2021. I am not satisfied that in the context of the Covid pandemic, that this can amount to proper service of those notices, particularly when for much of the time the offices of the Appellant company and many other companies were shut and staff were on furlough.
 - the Respondent company only became aware of the compliance issue when the Notice of intention to impose a civil penalty was served on named individuals in the management team, one of who is also a Company director, in early September 2021
 - Once there was awareness of the issue the Appellant company moved swiftly in appointing a lead assessor and completing the ESOS assessment. The assessment was filed by the date specified in the Notice of intention to impose a penalty, 12/11/2021. The approach of the Environment agency was not however to review the penalty at that point but to proceed to issue the penalty originally stated in the Notice of Intention
11. I accept the point made by the Environment agency that the integrity of the system must be maintained and that it is the responsibility of each enterprise operating within this jurisdiction to ensure compliance with the legal obligation imposed on it including those imposed under the Energy savings opportunity scheme.
 12. No allowance was made in the consideration of culpability to the pandemic and the impact of that pandemic on the Appellant's compliance. Nor was any consideration given to the Appellant's ability to comply with the time limits imposed. No additional time for compliance was given and the Respondent did not accept that the points raised in mitigation including the global pandemic, were valid mitigation.
 13. Somewhat surprisingly I could find no reference to specific service requirements for Enforcement notices and neither party has pointed me to any specific requirements, save that the Appellant has stated that the Notices should have been served on the Directors and not on a generic consumer email address.
 14. In its own Enforcement Policy and Guidance the Environment agency sets out the principles to be applied in taking enforcement action. 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 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

15. In its statement covering the Covid pandemic, it is stated that :-

“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:

- the extent to which you have followed our expectations as set out above
- the impact of coronavirus on your activities, which should be supported by your records showing why the non-compliance occurred
- the effect of any relevant [COVID-19 regulatory position statement](#)

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

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

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.

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.

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

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

16. At step 4 of the Respondent’s Enforcement Policy, there is a section that expressly deals with how the Agency sets the final penalty amount. It reads,

“ step 4

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

- financial gain - whether or not a profit has been made or costs avoided as a result of the breach
- history of non-compliance - includes the number, nature and time elapsed since the previous non-compliance(s)
- 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
- 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)

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.

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

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.

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

Findings

17. I find that the Appellant did not comply with its obligations under the Energy savings opportunity scheme (ESOS) for the second period. It did not file its ESOS assessment report that was due on 05/12/2019 until 12/11/2021
18. I find that the Respondent did not take reasonable steps to ensure that the Appellant was aware of the compliance and enforcement action being pursued by the Respondent until 03/09/2021. This was the date when AH , Senior European counsel and a company director, acknowledged that he received a copy of the Notice of intention to issue a civil penalty. I am not satisfied that reasonable steps were taken prior to that to ensure that the Appellant was made aware of the compliance action being taken against it. The Appellant

company could not reasonably be expected to know in the circumstances of a pandemic where enforcement notices were previously sent to the company by email to generic customer service email addresses, that compliance action was being taken.

19. While the Appellant is open to criticism for not ensuring an adequate handover to the new Facilities manager who was not made aware on her appointment of the obligation to file the ESOS assessment for the second period (due by 05/12/2019), the Respondent entirely failed to consider and take into account the Covid pandemic as a mitigation factor. Nor did the Respondent allow further time for compliance without penalty and despite the Appellant meeting the deadline specified in the Notice of intent for compliance, the Respondent still went ahead and imposed the full penalty. That was in my view unreasonable.
20. The Regulators code states that “Regulators should carry out their activities in a way that supports those they regulate to comply and grow”. The Respondent appears to have lost sight of this aspect of the code.
21. I find that the Appellant had a history of non-compliance for the first period and was 6 weeks late in complying with its ESOS obligations in that first period. The Respondent should not have overlooked the date for filing its assessment for the second period. The Appellant failed to comply with the Enforcement Notice dated 16/10/2020 requiring it to carry out an ESOS assessment and subsequently failed to file its report on time. I accept that compliance is essential to maintaining the integrity of the scheme. I also accept that the failure to comply was not deliberate but negligent.
22. The Notice of Civil penalty was issued on 12/04/2022. This was some 5 months after the ESOS assessment was filed. I accept having read the letter from a Company Director that accompanies the appeal, that systems have now been put in place to ensure that compliance by the Appellant will take place on time in the future.
23. I consider the fine imposed to be excessive and unreasonable in the circumstances. I am not satisfied that the Respondent agency duly considered all of the factors it should have considered in deciding the size of the fine it would impose as set out in the Enforcement Policy, the Regulators code and the Covid regulatory position statement. I find that a fine of £5,000 in total to be more appropriate. I do not consider that a daily fine should be imposed because the Appellant did file the ESOS assessment by the 12/11/2021, the date specified in the Notice of intention.

Decision

The appeal is allowed and the Respondent is instructed to issue a revised Penalty notice to the Appellant specifying a fine of £5,000

Signed



First Tier Tribunal Judge Ford
03/10/2022