FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Environment Appeal

Appeal Reference: NV/2016/0021

Determined in Birmingham Without a Hearing
On 16 February 2017

Before

JUDGE PETER LANE

Between

NEWLYN PLC

Appellant

and

ENVIRONMENT AGENCY

Respondent

DECISION AND REASONS

The legislation

1. The Energy Savings Opportunity Scheme Regulations 2014 ("the Regulations") implement Article 8(4), (5) and (6) of Directive 2012/27/EU of the European Parliament and of the Council on Energy Efficiency ("the Directive"). Part 2 of the Regulations establishes the Energy Savings Opportunity Scheme ("the Scheme"), which is administered by the Environment Agency. Part 3 requires large undertakings (as defined by the Regulations) and certain small or medium undertakings (again, as so defined) to participate in the Scheme. A participant is required to carry out an assessment of its energy consumption by auditing that consumption in every compliance period. The first such period ended on 5 December 2015, with subsequent four-year compliance periods due to end on 5 December 2019, and so on.

2. The assessment must analyse the participant's energy efficiency and recommend reasonably practicable ways in which that energy efficiency can be improved. Responsible undertakings within the Scheme are required to notify the Environment Agency of their compliance by providing prescribed information and confirmation of

compliance. Civil penalties can be imposed in respect of certain breaches of the Regulations.

3. Regulation 38 provides that where the relevant compliance body (here, the Environment Agency) reasonably believes that a responsible undertaking has failed to comply with the requirements of the Regulations, the compliance body may serve an enforcement notice on the responsible undertaking, specifying the alleged breach and the steps to be taken to remedy it, together with a timescale.

4. By regulation 48, a responsible undertaking which is served with an enforcement notice may appeal on the grounds that the notice was based on an error of fact; wrong in law; or unreasonable. In the present case, the Environment Agency issued an enforcement notice on the appellant on 6 October 2016. In accordance with regulation 48(2)(a), an appeal accordingly lies to the First-tier Tribunal.

The appeal

5. The appellant has appealed against the enforcement notice. It does so on the basis that it contends it should not be treated as a "large undertaking" for the purposes of the Regulations and, accordingly, should not be subject to the Scheme.

6. I do not detect in the grounds of appeal (or elsewhere) any contention by the appellant that the enforcement notice was, in its own terms, unreasonable. It is, in any case, evident that, if the appellant is a member of the Scheme, it failed to comply with the relevant requirements by 5 December 2015. Accordingly, it was appropriate for the Environment Agency to issue the enforcement notice, requiring the appellant to take the steps described in Schedule 1; that is to say, to carry out an assessment and provide a report on that assessment to the Environment Agency.

7. The sole issue in the appeal is, therefore, whether the appellant is a "large undertaking" within the scope of the Scheme.

Discussion

8. Schedule 1 defines what is meant by a "large undertaking". Paragraph 1(a) provides:-

> "1. In these Regulations –
>
> (a) a 'large undertaking' means an undertaking which either –
>
> (i) employs at least 250 persons, or
>
> (ii) has an annual turnover in excess of 50 million euro and an annual balance sheet total of 43 million euro …"

9. It is common ground that the only way in which the appellant can qualify as a "large undertaking" is by reference to the number of its employees.

10. According to the appellant's grounds of appeal, where it sets out its turnover, balance sheet and employees by reference to calendar years, the appellant had 241 employees in 2014, 250 in 2013 and 250 in 2012.

11. Paragraph 11 of Schedule 1 to the Regulations reads as follows:-

> "**Change of status**
>
> **11.** Where, in any accounting period, an undertaking is a large undertaking ... it retains that status until it falls within the definition of a small or medium undertaking ... for two consecutive accounting periods".

12. The significance of paragraph 11 for the present case is, I consider, borne out in the letter to the appellant from the Environment Agency dated 6 September 2016. Having set out the employee criteria, the letter says:-

> "An 'undertaking' must take part in ESOS if it met these criteria on 31 December 2014 [the 'qualification date' as defined by regulation 4(3)(a)] or is part of a corporate group which includes another UK body that met them.
>
> Please also note that if your organisation is very close to the threshold or have (sic) recently grown or shrunk then they may need to look back over several accounting periods to establish if they qualify. This is because the status of an organisation is determined by whether they have maintained their size for at least two consecutive accounting periods".

13. The wording of paragraph 11 is cited. We then find the following:-

> "So for example, an organisation that was over the ESOS qualification threshold every year for the last 10 years and then has shrunk in the accounts ending in April 2014 then they would still qualify for ESOS because they have not maintained the smaller size for 2 consecutive accounting periods so they are still counted as a large undertaking. Equally if for the last 5 years a company did not meet the qualification thresholds and then has grown in their accounts ending in December 2014 (and now meet the thresholds) then they would **not** qualify for ESOS because they have not maintained the large undertaking size for 2 consecutive accounting periods so they are still counted as a small or medium undertaking".

14. The appellant fell within the definition of "relevant undertaking" in respect of the "initial compliance period" which, as defined by regulation 4(1), was the period from 17 July 2014 to 5 December 2015. The appellant was a "large undertaking" on the qualification date for that compliance period, that is to say, 31 December 2014 (regulation 4(3)(a)). This was sufficient to require the appellant to comply with the

provisions of the Regulations and for the Environment Agency to serve the enforcement notice.

15. The appellant appears to think that it is not to be treated as a member of the Scheme because in the years 2014 and 2015 it employed fewer than 250 persons. It is, however, the "initial compliance period" under regulation 4(1) that governs the position at present. Regulation 4(2) defines a "subsequent compliance period" as a period which:-

> "(a) begins on 6th December immediately following the end of the preceding compliance period, and
>
> (b) ends on 5th December four years later".

16. The upshot is that the appellant cannot leave the Scheme, on the basis of a reduced number of employees, merely by reference to the accounting periods of 2014 and 2015. The "subsequent compliance period" which immediately follows the initial compliance period will not end until 5 December 2019. The next "qualification date" by reference to which the appellant will fall to be assessed as a "relevant undertaking" or otherwise will be 31 December 2018.

17. As the Environment Agency observes, it seems this crucial point was grasped by a representative of the appellant in an exchange of e-mails of 20 October 2016. The representative recognised her "error" in not realising that the relevant periods were 2012 and 2013, in each of which the appellant had 250 employees. This led the representative to ask "Can you let me know what we need to do to comply please?".

Decision

18. For the reasons I have given, the enforcement notice was not based on any error of fact or law. As I have already stated, there is no discernible challenge to its reasonableness. Given that the appellant had failed to comply with the obligations imposed on it by the Regulations, it was entirely appropriate for the Environment Agency to serve the enforcement notice. The fact that these obligations may be unwelcome to the appellant is, with respect, beside the point.

19. This appeal is dismissed.

Judge Peter Lane
7 March 2017