First-tier Tribunal
(General Regulatory Chamber)

Tribunal Reference: NV/2018/0017

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

UNISERVE HOLDINGS LIMITED

Appellant

v

ENVIRONMENT AGENCY

Respondent

DECISION

---

1. By notice of appeal dated 24 September 2018, the Appellant appeals 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 £9,900 by Notice of Civil Penalty dated 24 September 2018. The Notice was issued in respect of the Appellant's 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 its notice of appeal, the Appellant accepts the Respondent's assessment of its failure as negligent, but argues that the level of the sanction should be reduced to £6,300. In support of its appeal, the Appellant argues that its failure to comply with the Enforcement Notice was unintentional and resulted from the lack of knowledge as to the requirements of the Regulations within the Appellant company. It was not until the Appellant's Group Health & Safety Manager was appointed in late 2017, that the company had the benefit of an employee with specific responsibility for and knowledge of its statutory environmental obligations. Compliance with the enforcement notice was achieved as soon as reasonably practicable following the appointment of the Group Health & Safety Manager.

3. The Appellant also argues that it has not benefitted financially from its breach and has committed £23,538 of capital expenditure to comply with its ESOS requirements. The company has no history of repeated non-compliance with statutory obligations and from the first contact with the Respondent it was committed to ensuring compliance and submission within 90 days. It achieved that and compliance would have been quicker had its energy suppliers been more responsive to requests for information. Whilst it was moving to achieve compliance, it kept the Respondent's relevant officers fully informed of progress.

4. In the circumstances, the Appellant states that it does not understand what more it could have done or it could have been expected to have done which could have mitigated the level of civil penalty to the minimum level. The Respondent did not advise it could have done more. In the circumstances, it does not seek a full removal of the civil penalty but rather, its reduction to the lowest level.

5. In response to the appeal, the Respondent asks that the appeal be dismissed. It states that ESOS is a mandatory energy assessment and energy saving scheme which applies to large undertakings and groups containing large undertakings. For the purposes of the Regulations, an undertaking is a

relevant undertaking if in relation to a compliance period and on the qualifying date it is either:

(a) A large undertaking; or
(b) A small or medium undertaking which is a group undertaking in respect of a relevant undertaking falling within (a).

6. Schedule 1 to the Regulations sets out how it is to be determined whether an undertaking is a "large undertaking" or a "small undertaking". Schedule 1 paragraph 1 provides that a large undertaking means an undertaking which either:

(a) Employs at least 250 persons, or
(b) Has an annual turnover in excess of 50 million euro and an annual balance sheet in excess of 43 million euro.

7. Paragraphs 2 to 7 of Schedule 1 describe how the annual turnover and the annual balance sheet totals of an undertaking must be determined and paragraphs 8 to 10 describe how the number of employees must determined.

8. There is no dispute that that the Appellant qualifies as a large undertaking for ESOS, based on the financial criteria set out in the ESOS Regulations in that it has an annual turnover of £206,432,000.

9. Applying the Respondent's Enforcement and Sanctions Policy published on 11 April 2018, 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 commission of the offence"*

10. The Respondent argues that, whilst the Appellant's notice of appeal states that the breach was unintentional and due to lack of knowledge within the business, this demonstrated a failure to put in place and enforce proper systems for avoiding a breach. Five letters had been sent to the Appellant over the period December 2014 to January 2016, as one of the organisations which the Respondent considered could fall within the scope of ESOS requiring them to notify compliance by 5 December 2015. The enforcement notice was sent on 12 June 2017 and no substantive response was received until 14 July 2017 when the Appellant advised the Respondent that it did not qualify for ESOS. The Respondent e-mailed on 18 July 2017 advising that this was incorrect, but no substantive response was received until 1

December 2017 when the Appellant's newly appointed Health & Safety Manager made contact.

11. Applying the stepped approach to civil sanctions set out in its Enforcement and Sanctions Policy, led to a penalty range of between £6,300 and £33,750. In setting the final penalty of £9,900, which the Respondent points out compares to a maximum penalty of £90,000 for a failure to undertake an energy audit which, but for the Respondent's policy, the Appellant might have been liable to. In determining the level of sanction, the Respondent states that it took the following into account all the aggravating and mitigating factors of the case including all representations made by the Appellant (including the Appellant's eventual cooperation). The factors of financial gain, previous history of non-compliance and personal circumstances were treated as being neutral.

FINDINGS

12. 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.

13. 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.

14. 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.

15. The breach in this case is the failure to comply with the enforcement notice dated 7 June 2017 and which required compliance by 7 September 2017. Whilst it would be fair to characterise the Respondent's conduct in response to the Respondent's enforcement action as exemplary from December 2017 onwards, reflecting the appointment of the Group Health & Safety Manager, the Appellant's earlier conduct in response to the service of the enforcement

notice, was anything but. The Appellant fairly accepted that, in receipt, the enforcement notice was passed continually from department to department with no action being taken, due to no one being aware of what was required.

16. Put shortly, the Appellant does not appear to have had in place procedures to ensure that it was aware of and understood all those statutory obligations which it was required to meet or to ensure that those requirements were in fact met.

17. The Respondent has adopted a policy in relation to applying civil penalties which 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.

18. In determining whether there has been a relevant error in the level of penalty imposed by the notice, the issues here are whether (a) the Appellant's culpability was reasonably categorised as negligent as found by the Respondent; and (b) whether the civil penalty of £9,900, is proportionate to the breach, having regard to the circumstances.

19. The Respondent's policy descriptor for negligent is:

> *"[a] 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".*

20. In this context, the Respondent's conclusion that the Appellant's conduct was negligent was an entirely reasonable one and, properly, the Appellant does not seek to argue otherwise. Applying the Respondent's policy, the effect of this conclusion is that the penalty starting point is £13,500 with a range of £6,300 to £33,750. This range sits within a statutory maximum of £45,000.

21. Taking £13,500 as the penalty starting point and allowing for the Appellant's admission of the breach and its exemplary conduct after December 2017, I see nothing wrong or unreasonable in the conclusion that a penalty of £9,900 should be imposed. The figure of £9,900 represents a significant reduction from the penalty starting point to reflect the post-December 2017 conduct. However, where within the range of £6,300 to £33,750 the appropriate level of

sanction falls involves consideration not just of the mitigation advanced by the Appellant, but also the aggravating factors. The prolonged period of time between June and December 2017, when nothing at all of any substance was done to comply with the enforcement notice was a material aggravating factor in this case which reasonably justified not imposing a penalty at the bottom of the range.

22. The Respondent's conclusion that, in terms of seriousness, the Appellant's breach fell within the bottom third of the penalty range and materially below the penalty staring point, was a proportionate one having regard to all of the circumstances and involved no relevant error.

23. As a result of my conclusion, I dismiss the appeal and direct that the civil penalty notice be affirmed.

Signed by the Judge of the First Tier Tribunal
1 March 2019

Promulgation date 5th March 2019