Neutral Citation: [2022] UKFTT 150 (GRC)

Case Reference: NV/2021/0031

First-tier Tribunal
General Regulatory Chamber
Climate change (Administration) Regulations 2012 (as amended) "the Regulations"

Listed on the papers

Decision given on: 9 May 2022

Before

TRIBUNAL JUDGE FORD

Between

AMPHENOL INVOTEC

Appellant

and

ENVIRONMENT AGENCY

Respondent

On the papers

Decision: The appeal is Allowed

Substituted Decision Notice: A fine of £750 is substituted. Time for payment is extended to 30.06.2022

REASONS

1. The Appellant appeals under Regulation 20 against the imposition of a financial penalty by the Respondent under Regulations 15 and 16 of the Regulations. A penalty of £3,058.30 was imposed applying the formula set out in the Regulations. The Appellant does not argue that the calculation was incorrect.

2. The grounds on which an appeal may be brought are that the decision involved an error of fact or was wrong in law, that the decision was unreasonable or any other reason.

3. On appeal the Tribunal may confirm, quash or reduce a penalty and may extend the time for payment. In an appeal against termination the Tribunal may confirm the termination, permit an extension of time for the breach that led to the termination, or quash the termination.

4. The relevant Regulations are as follows;-

" Financial penalties

15.—(1) The administrator may impose a financial penalty on an operator if the operator—

(a)fails to provide information in accordance with regulation 14(2)(a) or (b);

(b)provides inaccurate information under regulation 14(2)(a);

(c)provides inaccurate information under regulation 14(2)(b); or

(d)fails to make any other notification required under the terms of an underlying agreement.

(2) The amount of the financial penalty that may be imposed under paragraph (1)(a), (c) or (d) is the greater of—

(a)£250; or

(b)0.1 × (X – Y)

where X represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were not reduced rate supplies, and where Y represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were reduced rate supplies.

(3) The amount of the financial penalty that may be imposed under paragraph (1)(b) is the greater of—

(a)£250; or

(b)£12 per tCO_2 of the difference between the actual emissions and the reported emissions for the target period.

(4) A financial penalty under this regulation is recoverable by the administrator as a civil debt if unpaid after the date for payment set out in the notice of financial penalty.

Notice of a financial penalty

16. If the administrator decides to impose a financial penalty on an operator under regulation 15, the administrator must serve a notice on the operator stating—

(a)the contravention that has led to the imposition of a penalty;

(b)the steps that must be taken to remedy the contravention and the date by which they must be taken;

(c)the amount of penalty due;

(d)the date by which the penalty must be paid;

(e)to whom the penalty must be paid; and

(f)that failure to pay the penalty in accordance with the notice by the date specified in the notice, or to take the steps specified in the notice by the date so specified, may result in the termination of the underlying agreement.

Right of appeal

20.—(1) Where a financial penalty is imposed under regulation 15, the operator may appeal to the First-tier Tribunal(**4**) ("the Tribunal") against the decision to impose the penalty.

(2) Subject to paragraph (4), where the administrator terminates an agreement under regulation 17(3), 17(4), or 18, a sector association or operator which has received a notice of termination may appeal to the Tribunal against the decision to terminate the agreement.

(3) Where an agreement provides for a right of appeal in respect of any other decision of the administrator, that appeal is an appeal to the Tribunal.

(4) There is no right of appeal for a sector association or an operator where the administrator terminates an agreement after receiving a notification under regulation 17(2).

Grounds of appeal

21. The grounds on which a person may appeal a decision under regulation 20 are—

(a)that the decision was based on an error of fact;

(b)that the decision was wrong in law;

(c)that the decision was unreasonable;

(d)any other reason.

Effect of an appeal

22. The bringing of an appeal suspends the effect of the decision pending the final determination by the Tribunal of the appeal or its withdrawal.

Determination of an appeal

23.—(1) On determining an appeal under regulation 20(1) against the imposition of a financial penalty the Tribunal must either—

(a)confirm the penalty;

(b)reduce the penalty; or

(c)quash the penalty.

(2) On determining such an appeal, the Tribunal may allow an extension of time for payment of the penalty.

(3) On determining an appeal under regulation 20(2) against the termination of the agreement the Tribunal must either—

(a)confirm the termination;

(b)permit an extension of time to remedy the failure that led to the termination; or

(c)quash the termination.

(4) On determining an appeal under regulation 20(3) against a decision of the administrator the Tribunal must either—

(a)affirm the decision;

(b)quash the decision; or

(c)vary the decision."

5. The Appellant failed to submit its report of performance data demonstrating progress towards meeting its Climate change target for target period 4("TP4") covering the period 01/01/2019 contrary to Regulation 14(2)(a).

6. The report was due on or before 01/05/2021 and was finally submitted on 02/08/2021, three months late.

7. The Appellant states that the first time it became aware of the requirement to file the report was when the Respondent sent an email to the Appellant on 20 July 2020 alerting it to a variation in certification being issued due to the failure to file the TP4 report.

8. As is standard practice in the sector the Appellant's reporting is handled by the Surface Engineering association (the "SEA"). The Appellant states that when it received the email of 20 July 2021 it immediately contacted the SEA to see what additional information was required to enable the SEA to file the report and supplied the information requested. I accept that at this point the Appellant moved with reasonable speed to address the issue.

9. The Appellant had not ensured that the responsible person in the Company (SK was named on the CCA register as the responsible person) was aware of his obligations.

The matter was further complicated by the Company asking another individual in the health and safety in the company to deal with the compliance for TP3 in 2020, which she did.

10. The Company is not entirely to blame for this because what happened was that when the previous responsible person was retiring in 2018, he nominated SK to deal with the reporting but told neither SK nor the Company he had done so. SK did not then deal with the compliance, but a health and safety officer did. She left the Company in the summer of 2021 but did not take steps to ensure that SK was aware that compliance now reverted to him.

11. The Appellant states that the emails used by the Respondent go into the junk mailbox in his emails because the email addresses used include either "do not reply" or "cca help". I accept this and it is something that the Respondent may care to look at.

12. But several emails were also sent to SK by SEA in the early part of 2021 about the need to address the reporting requirement and these yielded no response from the Appellant.

13. The Appellant argues in mitigation that SK was quite ill with Covid in early 2021 and when he came back to work several of his team were off work and he was overworked as a result. I accept this given the prevalence of Covid 19 at that time.

14. I find that on 30 April 2021 the Respondent contacted SK by email at the request of SEA who were getting no response. That was one day before the deadline for filing. He was warned that the Company was facing a potential fine.

15. On 04/05/2021 the Respondent sent a Notice of contravention and Intention to impose a financial penalty. On 10/05/2021 the Respondent left a voice message for SK. On 02/06/2022 the Respondent sent SK an email with a reminder of the date of 04/07/2022 as the deadline for mitigation. No response was received. On 20/07/2021 a de-certification notice was issued and on 02/08/2021 the Appellant finally submitted its TP4 report.

16. The Appellant argues that the non-compliance was not deliberate due to burden of work, Environment agency emails going into the junk email due to the nature of the email addresses used, SK not being informed by the relevant officer in 2018 that he was being nominated as the responsible person for the Register, the person who handled the compliance for TP3 leaving the company in June/July 2021 (there is no explanation as to why she did not handle the TP4 compliance), Covid, SK being off ill as were many of his team in the early part of 2021 and the Appellant's good history of compliance.

17. The Respondent accepts that the non-compliance was negligent and not deliberate. The Respondent states that once a decision is made to impose a penalty that the Respondent has no discretion to alter the amount fixed under the Regulations. It is correct that under the Regulations while the Respondent has a discretion as to whether a penalty is imposed, if it decides that it should be then it has no discretion

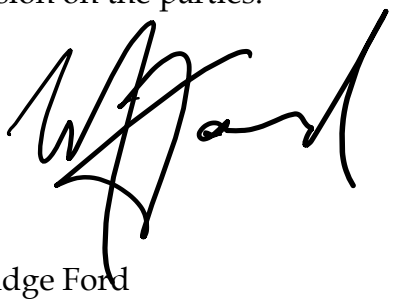
as to the amount of the penalty. This on the face of it seems inconsistent with the Environment Agency enforcement and sanctions policy that sets out the principles that should be considered by the Agency in deciding on penalties. I see no reason why these principles should not be equally considered in deciding the amount of any penalty as well as whether to impose one or not. Otherwise, there is no point to the mitigation provisions.

18. The principles are that the Respondent should act proportionately, have regard to the growth duty (impact on the environment and preventing competitive advantage through non-compliance), consistency, transparency, targeting for enforcement action and accountability.

19. The aims stated are to change the offender's behaviour, remove any financial gain from any breach, be responsive and consider what is appropriate, be proportionate, take steps to ensure that any harm is minimised, and any damage restored and deter future breaches.

20. While the Environment Agency has no discretion to reduce the penalty from the statutory formula calculation, the Tribunal does. In considering this issue, I have considered the factors set out above. I find that inadequate consideration was given to the proportionality of the full fine being payable without taking into account the Covid situation and the impact on the Appellant's operations, the failure of SEA to inform the Appellant or SK that he was now responsible for the reporting, the fact that this was the first noncompliance and the Company having a good history of compliance in the past. I find that the Company did take steps to rectify the situation and did file the report in August 2021, which is three months late, but it was done. The Appellant is now well aware of the need to keep a close eye on its reporting obligations, monitor emails from the SEA and the Environment Agency and respond without delay.

21. I find that the amount of the fine was disproportionate for a first breach and substitute a fine of £750 with time for payment being 28 days from the service of this decision on the parties.

Signed  Date: 05/05/2022

Tribunal Judge Ford