



Neutral Citation Number: [2022] UKFTT 275 (GRC)

Case Reference: NV/2021/0033

**First-tier Tribunal
General Regulatory Chamber**

Climate change (Administration) Regulations 2012 (as amended) “the Regulations”

Listed on the papers

AMENDED Decision given on: 07/06/2022

Before

TRIBUNAL JUDGE FORD

Between

BRAKE BROTHERS LIMITED

and

ENVIRONMENT AGENCY

Appellant

Respondent

On the papers

Decision: The appeal is allowed

Substituted Decision Notice: The Notice of Secondary buy out is quashed

REASONS

1. The Appellant seeks the withdrawal of the Notice of Secondary buy out fee issued against it by the Environment Agency under Regulation 12(2)(b) of the Climate change (Administration) Regulations 2012. The Notice is dated 08/11/2021. The Appellant was informed that if it wished to continue to be eligible to claim the Climate change levy then it must pay the buyout fee calculated in accordance with Regulation 12(2) at £16,338.
2. Under Regulation 12, where the target unit (the Appellant) fails to meet the obligation to make progress towards meeting its target, it may instead be satisfied by the payment of a buy out fee.

Regulation 12 states:-

12.— Terms to be included in an underlying agreement relating to the buy-out fee

- (1) An underlying agreement must contain the terms set out in paragraph (2).
- (2) The terms referred to in paragraph (1) are—
 - (a) if the administrator finds that the target unit has failed to meet its targets—
 - (i) at any time in the period beginning with 1st May in the year following the end of a target period and ending immediately before the first day of the next certification period; or
 - (ii) at any other time,the obligation to make progress towards meeting targets may instead be satisfied by the payment to the administrator of a fee in accordance with sub-paragraph (b);
 - (b) if sub-paragraph (a) applies, the administrator must serve a notice on the operator containing the following information—
 - (i) that the target unit has failed to meet its target;
 - (ii) the fee to be paid, calculated in accordance with sub-paragraph (c) or (d);
 - (iii) the date by which the fee must be paid, determined in accordance with sub-paragraph (e) or (f);
 - (iv) to whom the fee must be paid;
 - (v) how the fee is to be paid; and
 - (vi) that failure to pay the fee in accordance with the notice will result in the issue of a variation certificate in accordance with [paragraph 45 of Schedule 6](#);
 - (c) if sub-paragraph (a)(i) applies, the amount of the fee is

$A \times (W - S)$
where—

- (i) A is £12 where the finding is of a failure to meet a target for target period 1 or target period 2, [£14]² where the finding is of a failure to meet a target for target period 3 or target period 4 [, or £18 where the finding is of a failure to meet a target for target period 5]³ ;
- (ii) W in units of tCO₂ equivalent represents the amount by which the emissions for the target period exceed the target; [...]⁴
- (iii) S, for target periods 1 to 4, in units of tCO₂ equivalent represents any surplus; and
- (iv) S, for target period 5, is zero;

(d) if sub-paragraph (a)(ii) applies, the amount of the fee is—

$A \times W$
where—

- (i) A is £12 where the finding is of a failure to meet a target for target period 1 or target period 2, [£14]⁷ where the finding is of a failure to meet a target for target period 3 or target period 4 [, or £18 where the finding is of a failure to meet a target for target period 5]⁸ ; and
 - (ii) W in units of tCO₂ equivalent represents the amount by which the emissions for the target period exceed the target;
- (e) if sub-paragraph (a)(i) applies, the fee must be paid on or before 1st July in the year in which the target unit is found to have failed to meet its targets;
- (f) if sub-paragraph (a)(ii) applies, the fee must be paid within 30 working days beginning with the date of the notice; and
- (g) payment of the fee is deemed to have been made when the person to whom the fee must be paid as specified in the notice receives full cleared funds.

3. In the period Target Period 4(TP4), the sector Administrator had sought confirmation from the Appellant that the data submitted for the 2018 period (TP 3) was correct and that it was happy for it to be used for reporting in target period 5 (TP5). Under new Regulations the base year is now amended to 2018.

4. The Appellant responded on 23.12.2020 by saying that it had been informed that the energy data for one of its sites required updating for the TP3 period because the supplier had, only recently, marginally altered the data for its electricity figure and it needed to be amended.

5. The Appellant argues that it was most unfair of the Environment Agency to then delay the processing of the reported error until October 2021. The error was treated as an error in the TP5 reporting period and this had the effect of denying

the Appellant the opportunity to have its amended figure treated as included in the TP1 to TP4 periods. The fact that it was included in in TP5 meant that the Appellant could get no benefit from any banked surplus in the TP1 to TP4 periods.

6. The Environment Agency did not process the error until TP4 had passed, even though the error was reported within the TP4 period. Under new rules banked surplus from TP1 to TP4 cannot be used in TP5.
7. The Appellant states that at the time of the original TP3 reporting, the figures supplied were correct on the information it had received from its supplier at that time. It argues that there was no error at the time of reporting and the amendment should not now be treated as misreporting.
8. The grounds of appeal available to the Appellant under Regulation 21 are that the decision was based on an error of fact, the decision was wrong in law, the decision was unreasonable or any other reason.
9. The Environment Agency Climate change Operations manual sets out the method for identifying the base year at section 3.3.5. It reads;-

“What is the base year? The base year is a continuous 12-month period where the operator measures its initial performance. The data collected during the base year establish the baseline. The baseline energy consumption for the target facility must not include any fuel consumed in plant carrying out Annex 1 activities.

- For target periods 1 to 4, we would normally expect the base year to be the 12- month period from January to December 2008

- for target period 5, we would normally expect the base year to be the 12-month period from January to December 2018

If an operator doesn't have data during either of the above default base year periods, it must use the next available 12-month period closest to the default base year. Operators must explain why they aren't able to use the default base year periods. Changes to energy use and/or products since the base year are not valid reasons for using a later base year. If a structural change occurs, the base year data should be reconstructed where possible (see section 7.5.1).....

10. At 10.4.2.1. the manual states

“Surplus. The surplus mechanism could be applied in target period 1-4, however, in target period 5, the surplus mechanism does not apply, and banked surplus may not be used”

11. Failure to pay the buy out fee will lead to decertification under the scheme.

12. The relevant target period in this case was the period 01.01.2017 to 31 December 2018, target period 3. When the administrator was preparing to submit data for operators for TP5 it asked the Appellant to confirm that the information for TP3 was correct. The Appellant then discovered that it was not correct and the Environment Agency was informed on 23 December 2020 that there was an error in the information originally supplied to the Appellant for the TP3 period and that a correction was necessary. The Environment Agency accepts that the correction was not processed until October 2021 although it was reported on 23 December 2020.

13. 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) $0.1 \times (X - Y)$

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 tCO₂ 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.”

14. 10.4.2 of the Climate change agreement operations manual states,-

A buy-out payment could also be due where a reporting error is discovered after the end of the target period and, as a result of this error, the target unit is found to have failed to meet its target for the previous target period(s). The requirement to pay this fee is known as secondary buy-out.

In target period 5, the calculation of the buy-out fee does not take account of any surplus previously banked by the target unit on the register. If a buy-out fee is due the target unit operator will be sent a Memorandum of Account (MoA) notice with details of:

- the fee to be paid (and its calculation)
- the date by which it must be paid (cleared funds received)
- how to pay the fee and to whom (including bank account details and a unique payment reference code)
- the consequences of not paying the fee Once funds are cleared into the consolidated fund, the register will be updated, and the target unit recertified and included on the next Reduced Rate Certificate list that is published. If the buy-out fee is not paid by the due date, a notice issued informing operator of intent not to re-certify will be issued to the operator. The buy-out fee must be paid (and funds cleared) on or before 1 July following the end of each target period. The clearance of funds is

dependent on the banking system and operators must allow sufficient time. Payment must be provided by BACS/CHAPS. If the revised target data are provided at any time other than the reporting period leading up to the 1 May, for example, where a reporting error is corrected following an audit, the resulting buy-out fee must be paid within 30 calendar days of the date shown on the MoA notice.

15. The Environment Agency has in my view failed to recognize that the Appellant reported the error during the TP4 period and not in TP5 and that the correction actually related to the TP3 period.
16. The Environment Agency has correctly stated that it is not possible to offset surplus for periods 1 to 4 in period 5. While that it correct, it does not explain why the Environment Agency failed to recognise that the error had occurred in relation to TP3 and the error was reported in TP4. It was not reported in TP5 and should not have been treated as if it was.
17. For that reason I quash the decision. The decision was based on an error of fact and was unreasonable. The error occurred in relation to TP3 and was reported in TP4. The error was not reported in TP5. The Respondent will need to recalculate the amount due. The surplus mechanism still applies in the calculation and account must be taken of any banked surplus from TP1 to TP4. The Respondent should not have treated the secondary buy out provisions as having been triggered.

Signed

Date: 07/06/2022

Tribunal Judge Ford