



**NCN: [2023] UKFTT 331 (GRC)**

**Case Reference: NV/2022/0052 ESOS**

**FIRST-TIER TRIBUNAL  
(GENERAL REGULATORY CHAMBER)  
ENVIRONMENT**

**Heard at: Determination on the papers.**

**Heard on: 26 January 2023**

**Decision given on: 27 January 2023**

**Before: Judge Alison McKenna**

**BUCCANEER HOLDCO LIMITED**

**Appellant**

**- and -**

**THE ENVIRONMENT AGENCY**

**Respondent**

**DECISION**

1. The appeal succeeds in part.
2. The Civil Penalty Notice dated 13 September 2022 is affirmed as to the publication penalty.
3. The Civil Penalty Notice dated 13 September 2022 is affirmed as to the financial penalty, but the amount is modified to impose a reduced penalty of £3188.

## REASONS

### *Background*

4. The Appellant appeals against the Civil Penalty Notice dated 13 September 2022, served by the Respondent pursuant to regulation 46 of the Energy Savings Opportunity Scheme Regulations 2014<sup>1</sup> (“the ESOS Regulations”). The Respondent opposes the appeal.
5. The Civil Penalty Notice imposes a financial penalty of £3,750 and a publication penalty for failure to comply with the Enforcement Notice dated 11 June 2021. The deadline for compliance was 13 September 2021. It is not in dispute between the parties that the Appellant complied with its obligations under the ESOS Regulations on 12 September 2022, almost a year after the deadline.
6. By virtue of regulation 49 of the ESOS Regulations, the requirements of the Civil Penalty Notice have been suspended pending determination of this appeal.
7. The Appellant’s Notice of Appeal was filed within time. The Respondent was given an extension of time in which to file its Response. The Appellant has not filed a Reply.
8. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended<sup>2</sup>. The Tribunal has considered all the evidence and submissions made by both parties in a bundle numbered 1 to 43.

### *The Law*

9. ESOS is a mandatory energy assessment and energy saving scheme which applies to certain undertakings in the United Kingdom. The ESOS Regulations implement Article 8(4), (5) and (6) of Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency and came into force on 17 July 2014<sup>3</sup>.
10. This appeal is made under regulation 48 of the ESOS Regulations, which provides that:

*48. (1) A responsible undertaking served with...an enforcement notice, or a penalty notice, may appeal to the relevant appeal body on the grounds that the determination, enforcement notice or penalty notice (as the case may be) was—*

- (a) based on an error of fact,*
- (b) wrong in law, or*
- (c) unreasonable.*

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<sup>1</sup> [The Energy Savings Opportunity Scheme Regulations 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>2</sup> [General Regulatory Chamber tribunal procedure rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>3</sup> [Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC \(Text with EEA relevance\) \(legislation.gov.uk\)](https://www.legislation.gov.uk)

11. Under regulation 50 of the ESOS Regulations, the Tribunal has power when determining an appeal to:

*(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.*

### *Submissions and Evidence*

12. The Appellant's Notice of Appeal dated 21 September 2022 relies on grounds of appeal that it had submitted a notice of compliance on 12 September 2022, before the Civil Penalty was issued. It explained that it takes its obligations under ESOS seriously and has been working with an external adviser to ensure compliance. It submits that it is an new entrant to the scheme so has no history of non-compliance. By way of outcome, it asks for the Tribunal to waive or reduce the financial penalty and to cancel the publication penalty.

13. The Respondent provided a Response to the appeal dated 17 November 2022. The Respondent notes that the Appellant's grounds of appeal do not address the matters specified in regulation 48 of the ESOS Regulations. It is submitted that the original date for compliance was 5 December 2019. Thereafter, that the Appellant did not respond to the Respondent's service of an Enforcement Notice dated 11 June 2021, a Notice of Intent dated 4 May 2022 or the Civil Penalty itself until it filed a notice of compliance on 12 September 2022. In view of this belated compliance, the Respondent now suggests that the financial penalty should be reduced to £3, 188.

14. The Appellant has not filed a Reply challenging the Respondent's Response.

### *Conclusion*

15. Although the Appellant has not directly addressed regulation 48 of the ESOS Regulations, I consider that its grounds of appeal amount to an 'unreasonableness' challenge.

16. I accept that the Appellant has now filed a notice of compliance but note that this was filed almost a year after the second deadline for doing so. The Appellant's status as a new entrant and the lack of any history of non-compliance was expressly taken into account by the Respondent in deciding to issue a penalty. The financial penalty was calculated on the basis that the Appellant is a large undertaking and that its non-compliance was negligent. Having considered all the evidence and submissions, I am satisfied that the Respondent was entitled to issue the Civil Penalty Notice dated 13 September 2022 and that it was reasonable to impose both a financial and a publication penalty in this case.

17. I have considered whether the publication penalty is unreasonable. I find that, even in view of the Appellant's belated compliance, a publication penalty is appropriate given the extended duration of the breach. I conclude that the publication penalty should be affirmed.

18. I have considered whether the amount of the financial penalty was unreasonable. In view of this belated compliance, it does seem appropriate to me to reduce the financial penalty further for this reason: that the Appellant's compliance was apparently not a factor taken into account when determining the appropriate amount of the penalty, as it was only notified a few hours before the Civil Penalty Notice was issued. I agree with the Respondent that a penalty of £3,188 is appropriate in all the circumstances of this case.

19. The Tribunal's powers under regulation 50 of the ESOS Regulations include affirming a penalty notice with such modification as it thinks fit. I conclude that the financial penalty in this case should be affirmed, but modified to a financial penalty of £3,188.

20. The appeal therefore succeeds in part, and I direct accordingly.

**(Signed)**

**JUDGE ALISON MCKENNA**

**DATE: 26 January 2023**

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