



NCN: [2022] UKFTT 510 (GRC)

Case Reference: NV/2022/0034

**First-tier Tribunal
General Regulatory Chamber
(Environment)**

**The Energy Savings opportunity scheme Regulations 2014 (as amended)
“the Regulations”**

Listed on the papers

Decision given on: 8 December 2022

Before

TRIBUNAL JUDGE FORD

Between

MORGAN PHILIPS UK LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

On the papers

Decision: The appeal is dismissed

REASONS

1. The Appellant appeals against the Respondent’s decision dated 27 May 2022 to serve a Notice of Civil penalty on the appellant company (ESOS-ENF-2-1088). The Notice was issued for failure to comply with the Enforcement notice issued by the Environment Agency dated 04/12/2020 . A notice of civil penalty was issued under regulation 39 of the ESOS Regulations.
2. On 6 November 2020 the respondent had issued a compliance notice requiring the appellant company to carry out its ESOS assessment and file its report on that assessment by 4 March 2021. An enforcement notice was issued on for December 2020. A notice of intention to

issue a penalty was sent on 28 October 2021. This was followed up with an email to the managing director on 15 November 2021. Responses were received on 25 November 2021 and 20 December 2021 from the appellant and notification of compliance was ultimately received on 16 February 2022.

3. The Respondent stated in the Notice of Civil penalty that it had applied its published **Enforcement and sanctions policy (“the enforcement policy”)** in considering whether to impose a penalty and in deciding how much that penalty should be. Annexes A and D to that policy are relevant in the Respondent’s consideration of whether to impose a penalty for non-compliance with the obligations under the Energy Savings Opportunity Scheme.
4. The Appellant’s culpability was assessed as Negligent due to the failure by the appellant organization “to put in place and enforce proper systems for avoiding the commission of an offence under the ESOS scheme”.
5. The size of the organization was assessed as medium given that its turnover in the accounts to 8 December 2020 was shown as €26.5 million. The agency assessed the penalty starting point as €10,800, the penalty range as €4,950-€27,000.
6. Aggravating factors included that the appellant organization was not a new entrant to the scheme and that there was a history of previous noncompliance (the ESOS report due in December 2015 was filed four months late). The appellant pleaded in mitigation that there had been organizational structure changes and these in addition to downsizing and the difficulties caused by Covid led to office closures and postal interruptions meaning that notices were not received and ESOS expertise was lost. The appellant argued that steps had been taken to remedy the situation and systems were in place to ensure there would be no recurrence.

Grounds of appeal

7. In this appeal the appellant raises only one issue, namely the size of the appellant’s organization. The appellant argues that given the number of employees has been below 250 since 2018 (inclusive), the appellant should not be treated as being part of the scheme after 2018.
8. The appellant states that the turnover for the 2020 accounting period was €26.5 million and for the 2021 period was €25 million. The balance sheet showed totals of €.5 million and €.6 million for 2020 and 2021. The number of employees is recorded by the Appellant as 96 for 2020 and 64 for 2021.

Environment Agency response

9. In response to the Environment agency refers to paragraph 11 of schedule 1 to the ESOS Regulations.
10. It is argued that where an organization is very close to the threshold for qualification or has recently grown or shrunk, it may be necessary to look back over several accounting periods

to establish whether they qualify. This is because the status of an organization is determined by whether they have maintained their size for at least two accounting periods.

11. Paragraph 11 of schedule 1 states;-

“11. Where, in any accounting period, an undertaking is a large undertaking (or a small or medium undertaking, as the case may be), it retains that status until it falls within the definition of a small or medium undertaking (or a large undertaking, as the case may be) for two consecutive accounting periods.

Findings

- 23 I find that the Appellant did not comply with its obligations under the Energy savings opportunity scheme (ESOS) for the second period. The Appellant failed to comply with the Enforcement Notice dated 04/12/2020 requiring it to carry out an ESOS assessment and subsequently failed to file its report on time. I accept that compliance is essential to maintaining the integrity of the scheme.
- 24 I find that the appellant has failed to establish that the Environment agency erred in treating the appellant as a medium-sized organization under the ESOS scheme. The appellant has failed to show that the organization has maintained the number of employees at fewer than 250 for two consecutive accounting periods.
- 25 I noted that in its appeal the appellant states that in the 2020 accounting period the number of employees was 96 and in 2021 it was 64. But the 2021 accounting period is outside the relevant period for this enforcement action being the accounting period ending December 2020. I have not been provided by either party with the figures for 2019 and I cannot research those figures independently as it would be inappropriate to do so.
- 26 On the evidence before me, I find that the appellant retained its status of a medium size organization as at the accounting period to December 2020 and the enforcement action taken by the Environment agency and in particular the agency’s treatment of the appellant as a medium-sized organization under the ESOS scheme was appropriate.
- 27 A small to medium undertaking must have fewer than 250 employees and a turnover of less than €50 million or a balance sheet of less than €43 million. The difficulty for the appellant organization is that it has failed to show that the change in the organization taking it below those thresholds was maintained over two accounting periods prior to the date of the compliance notice.
- 28 I therefore dismiss the appeal.

Decision

The appeal is dismissed

Signed



First Tier Tribunal Judge Ford

05/12/2022