



NCN: [2023] UKFTT 515 (GRC)

Case Reference: NV/2022/0053

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard by CVP Manchester

Heard on: 14/03/2023
Decision given on: 24/03/2023

Before

TRIBUNAL JUDGE FORD

Between

LORD DEMOLITION

and

THE ENVIRONMENT AGENCY

Appellant

Respondent

Representation:

For the Appellant: R Vardon

For the Respondent: J Hart

Decision: The appeal is Allowed

Substituted Decision Notice: The variable monetary penalty is varied to £625. The enforcement costs are varied to £2,441.23

REASONS

1. The appellant appeals against variable monetary penalty final notice reference CMS 78684 VMP requiring the Appellant company to pay the sum of £1,000 and against the associated Enforcement costs recovery notice in the sum of £3,119.85.

The incident

2. I have taken the summary of events that led to the imposition of the penalty from the witness statement of Phil Good environmental officer dated 25 June 2019 in which he states the following in relation to his actions and observations whilst responding to a reported incident at Portland Basin Marina Limited, lower Alma Street, Dunkinfield SK16 4SQ :-

“on 21/11/2018, I received information from the Environment agency’s national information recording system about a suspected illegal activity at Portland Basin Marina... Following this information, on 21/11/2018, I checked the environment agency’s information systems, there were no environmental permits or exemptions registered for the site.

At 11.15 hours on the 21/11/2018 I attended Portland Basin Marina together with my colleagues Tony Everson and James Grosscurth. The site is accessed from a side road which leads to a railway bridge, the marina is situated on the other side of the bridge and was secured by a gate. When I arrived I noticed a dry dock which was fed by a canal, the water was very shallow....

A main river which I know to be the Tame was located directly to the right of the site and ran parallel to the canal.

There were contractors operating a JCB and Tipper truck on the bank of the canal and also a smaller mini digger which was situated in the canal. As I walked along the canal to the rear end of the marina I noticed up to 100 fish swimming in the shallow water of the canal which was at best 4-5 inches deep, my colleague Tony Everson confirmed to me that these were a mixture of coarse fish. I proceeded to walk down the canal and noticed that the flow of water had been dammed near the site boundary which was defined by a rear fence and gate which separated the site from the land beyond it. The ground just beyond the site boundary was incredibly muddy and covered in vehicle tracks, a couple of meters further on to the right, at the top of the bank of the river Tame I could see that the fence had been removed in several places and piles of a strong smelling dark and oily looking material had been deposited.

The river was crossed by an aqueduct which consisted of 3 arches. Upon closer inspection I could see that this material had fallen down the side of the bank and was now covering the 7-8 meter stretch of bank, forming a large pile at the bottom of the hill, in the river. The largest of the piles located directly adjacent to the aqueduct had blocked the first arch of the river. The material was very thick and did not appear to be diluting into the water course at a noticeable rate. The second pile which was still a substantial amount was located on the same side of the river but further upstream of the aqueduct arches”.

3. The Respondent was concerned that an offence may have been committed under s4 of the Salmon and Freshwater Fisheries Act 1975. That section reads;-

“4.— Poisonous matter and polluting effluent.

(1) [Any] 1 person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing fish or into any tributaries of waters containing fish, any liquid or solid matter to such an extent as to cause the waters to be poisonous or injurious to fish or the spawning grounds, spawn or food of fish, shall be guilty of an offence”

4. Following investigation, the Respondent was satisfied beyond reasonable doubt that the Appellant company had committed an offence under s4 (above) and decided to impose a variable monetary penalty of £1,000. The Agency issued an enforcement cost recovery notice in the amount of £3,119.85. The sum was stated to include £1,190 for investigation costs, £54.95 for Administration costs and £1,875 for the costs of obtaining expert advice including legal advice. The Appellant appeals to the Tribunal against those two decisions. The Respondent sought additional legal costs of £550 for legal advice at the hearing.
5. I refer to the Respondent’s calculation of the fine and the costs further below.

Burden and standard of proof

6. The Environment Agency’s approach to civil sanctions under Annex 1 of the Environment Agency’s Enforcement and Sanctions Policy is similar to the Sentencing council’s definitive guidelines for sentencing of environmental offences and I have considered those guidelines in my decision. The standard of proof applicable to the Environment Agency’s decision to pursue civil sanction in relation to the s4 offence is the criminal standard of beyond reasonable doubt.
7. The Tribunal must be satisfied to the criminal standard of proof that the alleged discharge has been proven and can then withdraw the Notice, confirm or vary the notice or take such steps as the regulator could take in relation to that act or omission or remit the matter for further consideration by the Environment Agency.
8. The Environment Agency has pursued recovery of the fine and enforcement costs under Annex 1 of the Environmental Civil Sanctions (England) Order 2010 Article 3 and Schedule 2 paragraph 6.
9. Article 10 sets out the Tribunal’s jurisdiction on appeal. The Tribunal has broad powers of review if satisfied on the balance of probability that the decision to impose the sanctions was wrong in law or in fact, was unreasonable or for any other reason.
10. The costs recoverable by the Environment Agency include the costs of the investigation, the costs of administration and the costs of obtaining expert advice including legal advice.

The background

11. The Portland basin Marina site is run by Guy Holdings Limited. Maintenance works conducted by the Canal and waterways trust had temporarily left the level of water low in the marina basin. Mr Holding took the opportunity to remove silt from the canal basin and spread it on adjoining land over which he had control.

12. In order to achieve this aim Guy Holding entered into an agreement with the Appellant for the provision of plant hire vehicles and drivers to carry out the necessary work. One of the drivers was Jamie Lord, director of the appellant company.
13. It is not in dispute in this case that heaps of silt removed from the marina basin and lodged on the embankment between the canal basin and the river Tame slipped into the river and that the sediment entered the water course.
14. On realizing what had happened, the Appellant arranged for further heavy equipment to be delivered to the site to remove the silt the following day and then undertook the further works to remove the unwanted sediment from the river and spread on nearby land. Guy Holding paid for this remedial work to be carried out.
15. Without going into unnecessary detail, the outcome of the investigative action that was taken by the Environment Agency against Guy Holding was that it resulted in him giving an Enforcement undertaking to the Agency and paying a fine of £2,000 and investigation costs of £2,700.63. The Respondent seeks investigation costs from the Appellant of £1,190.
16. The possibility of an enforcement undertaking from the Appellant was broached in an email from Neil Finch, the chief investigating officer to Jamie Lord on behalf of the Appellant. But when the Appellant learned that an enforcement undertaking would not be accepted from his Company if it denied liability, he decided not to offer such an undertaking. This was because he did not accept responsibility for causing the pollution incident, his position being that he was at all relevant times operating, as agreed in advance, under the instruction of Guy Holding. He had not received legal advice at this time from any legal advisor experienced in Environmental law.
17. Both Jamie Lord and Mr Holding were invited to interview by the Respondent. The Appellant did not attend. Mr Holding was interviewed about the pollution incident in early 2019.
18. There was then a long period of delay before a Notice of intent to impose a variable monetary penalty was served on the Appellant. The Notice of intent was dated 31 May 2022, some 3 ½ years after the pollution incident.
19. The notice informed the appellant that having conducted an investigation into the circumstances of the incident on 21 November 2018 when dredging spoils were deposited on the banks of the River Tame and slipped into the river, causing pollution and partial blockage, the Agency was satisfied beyond reasonable doubt that the Company had committed a relevant offence under section 4 of the Salmon and Freshwater fisheries Act 1975.
20. The Respondent stated its intention to impose a Variable monetary penalty on the Appellant company in the amount of £1,000. In the same Notice the appellant was advised that he had the right to make written representations and objections to the agency within 28 calendar days of receipt. He was informed that in the alternative he could offer a third party undertaking to take action to benefit any third-party affected by the offence, for example, the payment of a sum of money to compensate any person adversely impacted. The notice states the Environment agency “may reduce the amount of a VMP if compensation is paid”.

21. The Notice informed the Appellant that if, following consideration, the Respondent decided to impose a Variable monetary penalty on the Appellant, it would also serve an Enforcement cost recovery notice requiring him to pay the costs of investigation, administration and expert/legal costs that the Respondent had necessarily incurred.
22. The Respondent's assessment and calculations summary for the variable monetary penalty under Environmental civil sanctions (England) ordered 2010, Article 3 and Schedule 2, paragraph 6 can be found at page 204 of the bundle.
23. In this summary it is stated that the culpability of the appellant company had been assessed as "negligent, there was a failure to take reasonable care to prevent the contractor from depositing dredging spoil at a location that led to its slipping into the river Tame". The harm was assessed as category 3. The incident led to "minor localized harm to the appearance and immunity of the water course. Half the waterway was blocked with silt and suspended solids were elevated downstream".
24. The starting point in the sentencing guidelines for a Micro organisation for a negligent category 3 offence was stated as £2,500 pounds with a range of £500 to £5,500.
25. The notice stated that the starting point was further reduced by a factor of 4 in accordance with the agency's policy to result in the starting point and range of the variable monetary penalty as £625 and £125-£1,375.
26. Aggravating factors were stated as follows "though the offence relates to water pollution, it was caused by the illegal deposit of waste on land without the benefit of permit or exemption, had it been charged it would have been categorized as negligent".
27. The summary goes on to state "the lack of cooperation in the investigation has also been considered in this approach. During the investigation officers reported aggressive behaviour from employees of the company. The company failed to attend an interview and assist the Environment agency with the investigation".
28. Mitigating factors were stated as "the offence was not commercially motivated and steps were taken to remove the silt from River Tame".
29. The approach adopted was "starting point of £625, increasing to £1,250. This is to account for the seriousness of the offence and the fact that the water offence was committed as a result of a waste offence".
30. The summary states that the financial means and circumstances of the Company have been considered and no adjustment was necessary for proportionality. It further stated that £250 has been deducted from the penalty to reflect the mitigating features, reducing the variable monetary penalty from £1,250 to £1,000.
31. Email exchanges between the Appellant and the Agency show that Jamie Lord felt much aggrieved at being blamed for the incident when he had been acting under the instruction of Guy Holding, he had advised that the lodging of silt removed from the marina basin on the embankment between the canal and the river was unwise and he was the one who procured the heavy equipment necessary for the removal of the silt from the river Tame and undertook the removal work, albeit Guy Holding covered the additional costs.

32. It was clear from the papers that although Jamie Lord took legal advice, he was told by those he instructed that they were not experts in environmental matters. He therefore had a poor understanding of the implications of denying liability. He did not understand that a denial of liability by him meant that an Enforcement undertaking from him would not be accepted by the Environment Agency as an alternative to enforcement action and a fine being imposed. Mr Lord did not feel responsible for the incident, felt he had done everything he could to deal with the slippage of silt into the River Tame and was being blamed for an incident that he had not caused.
33. The possibility of a donation to charity was mooted with Jamie Lord as an alternative way of dealing with the situation and Jamie Lord understood that if he paid £1,000 to a charity of the Agency's choosing (being a party impacted by the incident) that this would bring the matter to an end and there would be no further consequences (email from Neil Finch chief investigating officer to Jamie Lord of 13/09/2021).

The hearing

34. The attendees at the hearing were Counsel and solicitor for both parties, and Jamie Lord for the Appellant.
35. I heard preliminary applications from both parties for the admission of late evidence. The appellant's evidence had been filed late as he had not instructed his solicitors until 9 March 2023 and the Respondent's further evidence was in the form of an additional handwritten witness statement taken from Guy Holding. I admitted the evidence because I considered it in furtherance of the overriding objective to do so. Mr Holding had not attended the appeal hearing to give evidence and I made it clear that this meant the weight I could attach to his witness statement was limited.
36. In the additional witness statement, Guy Holding does not acknowledge responsibility and seeks to attribute the entire blame to a teenage driver of a 6 ton dumper truck that was used in the dredging operation, which is to completely avoid the main issue as to how the silt actually got into the river in the first place. The witness statement was dated 13 March 2023 and it revealed an attitude on the part of Guy Holding of seeking to blame third parties rather than accept any responsibility for the incident. He states that he was not on site when the incident occurred without in any way engaging with the issue of who gave instructions to place the silt removed from the marina basin onto an embankment between the canal and the river from where it slid into the river, and what actions were taken and by whom, to remove the silt from the river when the slip was realized.
37. In discussions with counsel at the start of the hearing, I queried with Counsel for the Appellant what the Appellant's defence was? It was acknowledged that the Appellant and Guy Holdings limited were the two contractors working on site when the incident occurred as a result of a dredging operation in which both were involved. The offence under s4 of the Salmon and Freshwater Fisheries Act is a strict liability offence. Ultimately, given that Lord Demolition was involved in the operation to remove silt from the marina basin and to then place it on the embankment between the canal and the river from where it slipped into the river Tame, it was difficult to see how the appellant could deny any responsibility by blaming Guy Holding. The Appellant was one of two contractors working on site involved in the removal of the silt from the marina basin.

38. The Environment Agency had not brought any witnesses to the hearing as the evidence of the Appellant had been served too late and they were not available. But the Respondent did not seek an adjournment to call those witnesses.
39. After a break to take instructions it was acknowledged by Counsel for the Appellant that it was difficult to argue that the Appellant was not strictly liable as one of two contractors working on site in the dredging operation and in those circumstances the reality of this appeal was that it turned more on the quantum of the fine and the amount of the enforcement costs imposed on the Appellant, rather than arguments about liability.
40. In relation to the fine, I was told that a fine of £2,000 was imposed on Guy Holding Ltd and an Enforcement undertaking was accepted from him.
41. The hearing then focused on submissions as to mitigation and quantum.
42. It was argued in mitigation for the Appellant that Jamie Lord was relatively young when the incident occurred. He had left school at year 11 and worked hard to build up his own company. The fact that he did not go into further education is not an indication of any lack of intelligence on his part. His accounts are up to date, he has an unblemished reputation and he is extremely worried about the impact of the fine on his business. His position was that he had acted on the instructions of Guy Holding who made it clear that he, Guy Holding, was to remain in charge of the operation. He said that it was Guy Holding who wanted to spread the silt on his land and for that purpose he instructed that it be placed on the embankment and that fencing be removed to allow access to the land adjacent to the Marina so that the silt could be spread there. The silt had slipped from there into the river.
43. An invoice was included in the papers from Lord Demolition to Guy Holding that included charges made by Jamie Lord to Guy Holding for procuring a long reach vehicle to remove the silt from the river bank. This was paid by Guy Holding Limited.
44. I had a copy of the interview with Guy Holding in which he stated that he had secured the services of Jamie Lord through a third party with whom he had previous business dealings. But when that third party was contacted by the Environment agency that third party (according to the Agency witnesses) denied ever having any contact with Jamie Lord.
45. It was argued that there was an element of double counting in the enforcement costs calculation as some of those costs were attributable to Guy Holding and they could not all be attributable to Jamie Lord.
46. It was argued that the costs were disproportionate. It was further argued that the email from Neil Finch in which the possibility of an enforcement undertaking was mooted, did not make it sufficiently clear that this option and the option of making a donation would not be possible if the Appellant was denying liability. While the email did mention this, it was not sufficiently explained to the Appellant who is a layman with no understanding of the law in this area. It was argued that the Agency could have done more to explain the legal situation to the Appellant.
47. Finally it was argued that the delay was excessive in this case as the incident occurred in November 2018 and the hearing was taking place some 4 ½ years later. The Covid lockdowns do not explain the delay to any significant extent because there was a significant delay between the incident in November 2018 and the date of the Variable monetary

penalty. The witness statements on which the Agency relies are dated between January and June 2019.

Consideration of the evidence

48. In reaching my decision I considered the documentary evidence filed by both parties including the late evidence admitted at the hearing and the submissions made by counsel for both parties.
49. The Environment agency did not accept that there should be any further reduction in the level of penalty imposed on the Appellant beyond the mitigation already set out in the VMP, mainly because the Appellant was perceived to have been confrontational and aggressive towards Council officers and because it is said that he failed to accept advice to use straw bales to reduce the level of contamination in the River. These were viewed as aggravating factors.
50. The level of culpability was Negligent. In this case the Appellant could more accurately be accused of naivety in accepting dredging work in a situation where he did not have full control over the works.
51. The guidelines state that the taking steps to remedy the problem, the absence of any adverse history, the absence of financial gain and being of good character are all factors that should mitigate the level of fine imposed. I am not satisfied that sufficient credit was given to this Appellant for these mitigating factors. I am also satisfied that the excessive delay in pursuing civil sanctions against the Appellant should further reduce the level of fine imposed to the lowest level.
52. The Appellant should be given greater mitigation for his swift and effective actions in promptly securing suitable heavy equipment for the removal of silt from the river when he realised that a slip had occurred. It was this Appellant who secured the long arm excavator and made sure that it got to the site and the silt was removed. Prior to this Guy Holding and his employees were seeking to remove the silt manually which given the quantity of the silt, was a hopeless endeavour.
53. The Appellant is criticised for not using straw bales to stop further pollution. The Environment agency has not established that straw bales would have altered the outcome of this incident. Given the amount of silt involved (over 80 tons), I am not satisfied on the evidence that straw bales would have prevented the silt from entering the watercourse of the River Tame, or retained any oil in the silt. I am not satisfied that oil was present in the silt in any quantity damaging to the watercourse. There is reference to a slick on the surface of the water, but the source of the slick was not clear.
54. I can see from the photographs that two straw bales were placed on top of the silt at some point but the scale of those bales compared with the amount of silt illustrates that they were not going to have any impact on the physical movement of the silt. The Appellant acted in accordance with the advice of Agency officers attending the site to focus on the physical removal of the silt from the river bank and river bed.
55. The Appellant is accused of being uncooperative and abusive towards Agency officers. I do not accept that he was. He found himself being blamed for a situation that he believed he

had not created, and the evidence shows that he was upset and angry with Guy Holding for, as he believed, placing him in that situation. His behaviour falls short of being obstructive.

56. I accept that he misunderstood the interplay between such an undertaking and his denial of liability. The implications of continuing to expressly deny responsibility were not explained to him by Council officers. His own advisor was not experienced in environmental law.

57. The Appellant should not have been viewed as uncooperative for failing to make written representations within the 28 days afforded to him as again I find that he did not understand the implications of this opportunity. The same applies to his non-attendance at the interview.

58. I also find that the delay in the Environment agency proceeding with the Variable monetary penalty process in this case was unreasonable, even taking into account the Covid situation. The final VPN is dated mid-August 2022, almost 3 years after the incident occurred.

59. I have concluded that insufficient weight was given to the mitigating factors in this case including

- The Appellant was operating on a site that was not owned or controlled by the Appellant and under the instructions of the site proprietor Guy Holding
- The Appellant was unaware that Guy Holding did not have a license to spread the silt on land adjoining the marina
- The Appellant was primarily responsible for the clean-up operation after the silt slid down the embankment and into the River Tame. That operation was carried out with all due speed and involved the Appellant hiring extra equipment that had to be delivered by road
- This was the first time the Environment agency had encountered the Appellant as involved in any incident of concern
- The Environment agency failed to enquire as to the Appellant's understanding of the process of investigation and make any attempt to alert him to the implications of adopting a position of denying responsibility for the incident and of not attending for interview

60. I therefore reduce the fine to **£625**.

61. I asked if there was a further breakdown of the enforcement costs calculation and was helpfully provided with a more detailed breakdown of the costs. The investigation costs were estimated at £1,190. I considered there to have been duplication and crossover between the enforcement costs in this case and in the investigation against Guy Holding and therefore halved the investigation costs this Appellant should be required to pay to **£595**.

62. The Administration costs were estimated at £54.95. Again, I considered this to be unreasonable and halved this amount to **£27.48**.

63. The costs of obtaining expert evidence including legal advice was £1,875 plus an additional £550 since September 2021, total £2,425. While I appreciate that the preparation of the VMP notices was a process that will have taken some time, I consider the time charged as excessive. It includes 8 hours for the VMP calculations, 2 hours for the preparation of

documents and one hour for the preparation of Final notice and ECRN. I therefore allow for a 25% reduction for the legal advice reducing the liability further to **£1,818.75**.

64. The total enforcement costs the Appellant must therefore pay is assessed as **£2,441.23**.

Conclusion

65. The amount of the penalty imposed on the Appellant is reduced to **£625** payable within 56 days of date of this decision, as I consider the amount originally imposed to have been unreasonable and excessive in all the circumstances.

66. The Appellant is to pay the investigation costs (including the cost of legal advice) of the Respondent in the total amount of **£2,441.23** payable within 56 days of the date of this decision.

Signed

A handwritten signature in black ink, appearing to be 'A. Hand' or similar, written in a cursive style.

Date: 23/03/2023.