



**Neutral Citation: [2023] UKFTT 849 (GRC)**

**Case References: NV/2023/0020/CCA & NV/2023/0021/CCA**

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

**Heard by: Paper Consideration**

**Heard on: 13 October 2023**

**Decision given on: 16 October 2023**

**Before**

**TRIBUNAL JUDGE A. MCKENNA**

**Between**

**HARVEY & BROCKLESS LIMITED**

**and**

**THE ENVIRONMENT AGENCY**

Appellant

Respondent

**Decision:**

The appeals are both dismissed.  
The Decisions dated 5 May 2023 are affirmed.

**REASONS**

## *Background*

1. These appeals are made under the Climate Change Agreements (Administration) Regulations 2012 ('The Regulations')<sup>1</sup>, and the underlying Climate Change Agreement for the Food and Drink sector dated 18 March 2022 ('The Agreement'), to which the Appellant and the Respondent are parties.
2. The Appellant seeks to appeal against the Buy-Out Fees notified to it by the Respondent on 5 May 2023 in relation to site F00904, calculated at £12,078 (appeal 0020), and that related to site F01248, calculated at £7,920 (appeal 0021). Buy-Out Fees are imposed under regulation 12 (2) of the Regulations. The Buy-Out Fees in these appeals were calculated in accordance with the formula included at regulation 12 (2)(d) and paragraph 7.3 of the Agreement.
3. Buy-Out Fees are payable where an operator has failed to meet its climate change targets for a specified period. A mitigation scheme operated in relation to period 4 as a result of the Covid 19 pandemic and its impact on the food and drink sector. However, the Buy-Out Fees with which I am concerned in this appeal relate to period 5, in respect of which there was no mitigation scheme.

## *The Law*

4. The Regulations and Agreement work together to provide for a right of appeal against the Buy-Out Fee as follows:
  - (a) The Regulations

### ***Right of appeal***

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

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<sup>1</sup> [The Climate Change Agreements \(Administration\) Regulations 2012 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- (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.*

**(b) The Agreement**

***13. RIGHT OF APPEAL***

***13.1 If the Administrator:***

*13.1.1 decides not to certify a facility or to vary a certificate which has been issued;*

*13.1.2 serves a notice imposing a buy-out fee under Rule 7 upon determining that a target unit has failed to meet its target; or*

*13.1.3 decides to vary or not to vary the target for a target unit, the Operator may appeal to the Tribunal against the decision.*

*13.2 In respect of an Operator which enters into an agreement after 1 April 2013, the Operator may appeal to the Tribunal against the target that has been set for the target unit by the Administrator.*

*13.3 For the purposes of Rule 13.2, the date on which notice of the decision is deemed to have been sent to the Operator is the later of the date the agreement is entered into or the date the Administrator sends notice to the Operator of the target for the target unit.*

*13.4 The grounds on which an Operator may appeal under Rule 13.1 and 13.2 are:*

*13.4.1 that the decision was based on an error of fact;*

*13.4.2 that the decision was wrong in law;*

*13.4.3 that the decision was unreasonable;*

*13.4.4 any other reason.*

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

*13.6 On determining an appeal under these Rules the Tribunal must either:*

*13.6.1 affirm the decision;*

*13.6.2 quash the decision; or*

*13.6.3 vary the decision.*

5. Thus, these appeals fall under regulation 20 (3) because they relate to paragraph 13.1.2 of the Agreement. Such an appeal can be made on one of the grounds in regulation 21 and on determining the appeal the Tribunal has the powers set out at regulation 20 (4) and paragraph 13.6 of the Agreement.

#### *Submissions and Evidence*

6. The Appellant's Notices of Appeal are both dated 1 June 2023 and rely on the same grounds. These are that the material impact of the pandemic which affected the Appellant in period 4 continued into period 5. This led to a failure to meet the targets set, but also contributed to a lower energy output overall. It is submitted that it would be fair to reduce the amount of the Buy-Out Fees in all the circumstances and this is the outcome sought.
7. The Respondent's Response dated 3 August 2023 applies to both appeals. It is submitted that the Appellant has failed to specify which of the regulation 21 grounds is relied upon in bringing the appeals. It is noted that there is no dispute as to the liability to pay a Buy-Out Fee in principle and no dispute over the calculation formula used by the Respondent. It is submitted that the Covid mitigation measures were not continued by the Government into period 5.

8. It is further submitted that neither the Respondent in making its initial decision nor the Tribunal on appeal has any discretion to reduce the amount of the Buy-Out Fee. The Respondent helpfully refers me to two Decisions of the Upper Tribunal concerning appeals against Penalty Notices which, although imposed under a different provision, share the same statutory powers for the Tribunal on determination. These are: *Environment Agency v Amphenol Invotec Ltd* [2022] UKUT 318 (AAC) and *Environment Agency v Taylor Engineering and Plastics Ltd* [2022] UKUT 317 (AAC).
9. The Appellant filed a Reply to the Respondent's Response. It is submitted that the regulation 21 ground relied upon in bringing these appeals is regulation 21 (c) and paragraph 13.4.3 of the Agreement i.e., that the Buy-Out Fees were unreasonable. It is submitted that the Upper Tribunal Decisions relied on by the Respondent may be distinguished on the basis that they relate to penalties rather than to Buy-Out Fees, and suggested that these appeals should be also considered by the Upper Tribunal.
10. The agreed hearing bundle before me included the Appellant's financial statements, the Climate Change Agreements Operational Manual, the Agreement itself and the authorities relied upon by the Respondent.

### *Conclusion*

11. Whilst the Respondent has referred me to authorities which the Appellant submits should be distinguished, I note that the Appellant has referred me to no authorities. I agree with the Appellant that the Upper Tribunal authorities relied on by the Respondent are not precisely on all fours with the situation before me in these appeals. However, although the statutory provisions as to penalties and Buy-Out Fees differ, I note that the provisions are identical when it comes to the powers available to the Tribunal on determining an appeal.
12. In the authorities referred to, the Upper Tribunal decided an important matter of principle about appeals under these Regulations, which is that the Tribunal does not have powers wider than those of the Respondent. This means that the Tribunal's power to vary a penalty (or a Buy-Out Fee) could only be invoked to correct an error of another sort (for example, as to the calculation of the penalty or Buy-Out Fee) and is not intended to enable the Tribunal to substitute its own view of the appropriate amount for that of the Respondent. After due consideration, I consider that I am bound to follow the Upper Tribunal's reasoning on that point in determining these appeals and so I conclude that I have no power to reduce the amount of the Buy-Out Fees on the basis of the reasons relied on by the Appellant. I find that, if it is unreasonable for the Respondent not to have in place a scheme to recognise the continuing difficult trading conditions following the pandemic, then this is a matter to be taken up with Parliament and not with the Tribunal.
13. In all the circumstances, I now dismiss these appeals and confirm the two decisions dated 5 May 2023 to impose the Buy-Out Fees in the amounts stated. If the Appellant wishes these appeals to be considered by the Upper Tribunal, they must first apply for permission to appeal.

**Signed: Judge Alison McKenna**

**Date: 13 October 2023**