Neutral citation number: [2024] UKFTT 281 (GRC)

Case References: GGE/2022/0033; GGE/2022/0035; GGE/2022/0036; GGE/2022/0037; GGE/2022/0038; GGE/2022/0039; GGE/2022/0040; GGE/2022/0041; GGE/2022/0042; GGE/2022/0043; GGE/2022/0044; GGE/2022/0045

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard by Cloud Video Platform and on subsequent written submissions
Heard on: 14 September 2023
Decision given on: 3 April 2024

Before

JUDGE NEVILLE
MEMBER N MATTHEWS

Between

JOHN BRETT

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr P Collins, solicitor

Decision:

(i) Appeal number GGE/2022/0044 is allowed. The Tribunal directs the Environment Agency to withdraw the civil penalty notice issued under reference 2019_NC0009_John Brett_11_1.
(ii) All the other appeals are dismissed. The Tribunal affirms the corresponding civil penalty notices.
(iii) The total amount of the affirmed penalty notices is £1,045,750.

REASONS

1. Mr Brett appeals against 12 penalty notices served upon him by the Environment Agency, together totalling £1,064,750, pursuant to regulation 15A of the Fluorinated Greenhouse Gases Regulations 2015.

The F-Gas regime

2. EU Regulation 517/2014 aims to control emissions of fluorinated greenhouse gases ("F-gases"), including hydrofluorocarbons ("HFCs"), by (among other measures) imposing a stepped reduction of the total that can be placed on the market in the European Union. F-gases are a major contributor to climate change and, weight for weight, some have a global warming effect many thousands of times higher than carbon dioxide. These appeals concern the regulatory regime that existed before the United Kingdom's departure from the European Union, but it is worth noting that the same strict requirements apply under its domestic successor. The relevant requirements include prohibitions on the importation, production and sale of F-gases without having obtained the relevant quota, and associated reporting and record-keeping requirements.

3. As to how different products are treated, from 1 January 2015, the EU Regulation prohibited the bulk importation or production of HFCs by an organisation unless it held sufficient quota. From 1 January 2017, pursuant to Article 14(1), organisations were prohibited from placing refrigeration, air conditioning and heat pump equipment pre-charged with HFCs on the market unless a sufficient number of quota authorisations had been obtained. Quota cannot be used directly for pre-charged equipment; the importer must instead obtain sufficient quota authorisations from a quota holder.

4. The 2015 regulations implemented the EU Regulation and now implement the GB Regulation. The regulations provide for the Environment Agency to impose a civil penalty in response to a breach of their provisions. In deciding whether to impose a civil penalty, and in what sum, the Environment Agency applies its *Enforcement and Sanctions Policy* ("ESP").

5. The introduction to the ESP is as follows:

> *This document sets out the Environment Agency's enforcement and sanctions policy. It applies to England only.*
>
> *The Environment Agency is responsible for enforcing laws that protect the environment. We aim to use our enforcement powers efficiently and effectively to secure compliance. This contributes to our work to create better places for people and wildlife, and support sustainable development.*
>
> *This document explains:*
>
> - *the results we want to achieve*
> - *the regulatory and penalty principles we uphold*
> - *the enforcement and sanction options available to us how we make enforcement decisions*
> - *the enforcement framework for the climate change schemes and the control of mercury regime*

6. At Section 2 the ESP sets out an outcome focused approach to enforcement, and at Section 3 that the Environment Agency will follow the regulators' code (save where necessary), act proportionately, have regard to economic growth, be consistent, transparent and accountable, and target its regulatory effort in a number of specified ways. At Section 4, it records that enforcement activity will aim to:

    - *change the behaviour of the offender*
    - *remove any financial gain or benefit arising from the breach*
    - *be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction*
    - *be proportionate to the nature of the breach and the harm caused*
    - *take steps to ensure any harm or damage is restored*
    - *deter future breaches by the offender and others*

7. Annex 2 to the ESP provides a specific civil penalties framework for climate change schemes. As it explains:

    Section A explains the steps we will take to decide whether to impose a civil penalty or to work out the final penalty amount. Within the steps we will assess:

    - *the nature of the breach*
    - *culpability (blame)*
    - *the size of the organisation*
    - *financial gain*
    - *any history of non-compliance*
    - *the attitude of the non-compliant person*
    - *personal circumstances*

8. The stepped approach taken to setting a penalty level is as follows:

    How the Environment Agency sets the penalty level

    When we can apply our discretion we carry out the following steps to make our decisions:

    Step 1 - check or determine the statutory maximum penalty for the breach.

    Step 2 - decide whether to waive the penalty or set the initial penalty amount by assessing the nature of the breach and other enforcement positions in line with sections B, C, D and E.

Step 3 - if we decide to impose a penalty, work out the penalty starting point and penalty range based on culpability (blame) and size of the organisation.

Step 4 - set the final penalty amount by assessing the aggravating and mitigating factors and adjust the starting point as appropriate.

9. For F-gases, Step 2 is governed by Section E:

E2.1 Our nature of the breach assessment

We will normally impose a civil penalty for all breaches referred to in Regulation 31A of the F Gas Regulations subject to the additional enforcement position (see E2.2).

We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the F Gas Regulations have been set based on the seriousness of the breach taking into account the:

- *impact the breach has on the integrity of the scheme*
- *environmental effect of the breach, where relevant*

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- *a breach is serious because of its potential for environmental harm but the actual harm caused is much less*
- *we impose a civil penalty for failure to comply with an enforcement notice and we don't think the statutory maximum of £200,000 is justified*

E2.2 Additional enforcement position

We may not impose a civil penalty where:

- *we consider giving advice and guidance will be sufficient to rectify the breach*
- *punishment or future deterrent is not necessary*

If after we have given advice and guidance the breach is not rectified, we may then impose a civil penalty.

10. For Step 3, the ESP operates in a similar way to a sentencing guideline in the criminal courts, setting a penalty range and a starting point. The starting point is a multiplier of the maximum statutory penalty as follows:

Table 1: Size of organisation (based on turnover or equivalent)

Breach category	Large	Medium	Small	Micro
Deliberate	1	0.4	0.1	0.05
Reckless	0.55	0.22	0.055	0.03

Negligent	0.3	0.12	0.03	0.015
Low or no culpability	0.05	0.02	0.005	0.0025

11. After setting the starting point, the next table is used to calculate the penalty range:

Table 2: Size of organisation (based on turnover or equivalent)

Breach category	**Large**	**Medium**	**Small**	**Micro**
Deliberate	0.45 to statutory maximum	0.17 to statutory maximum	0.045 to 0.4	0.009 to 0.095
Reckless	0.25 to statutory maximum	0.1 to 0.5	0.024 to 0.22	0.003 to 0.055
Negligent	0.14 to 0.75	0.055 to 0.3	0.013 to 0.12	0.0015 to 0.03
Low or no culpability	0.025 to 0.13	0.01 to 0.05	0.0025 to 0.02	0.0005 to 0.005

12. Once the starting point and range is identified:

Set the final penalty amount: step 4

We may adjust the penalty from the starting point within the penalty range by assessing the following aggravating and mitigating factors:

- *financial gain - whether or not a profit has been made or costs avoided as a result of the breach*
- *history of non-compliance - includes the number, nature and time elapsed since the previous non-compliance(s)*

- *attitude of the non-compliant person - the person's reaction, including co-operation, self-reporting, acceptance of responsibility, exemplary conduct and steps taken to remedy the problem*

- *personal circumstances - including financial circumstances (such as profit relative to turnover), economic impact and ability to pay (only if sufficient evidence is provided).*

Also for a public or charitable body whether the proposed penalty would have a significant impact on the provision of its service (only if sufficient evidence is provided)

The penalty notices

13. The individual penalty notices are as follows. Each was served on 11 April 2022.

Article 15(1) of EU Regulation 517/2014, placing HFCs on the market without obtaining quota

Appeal number	**EA reference ending**	**Breach date**	**Amount (tCO_2e)**	**Penalty**
GGE/2022/0033	15_1_1	6 June 2018	24,000kg (34,320)	£200,000
GGE/2022/0035	15_1_2	29 January 2019	19,800kg (28,314)	£200,000
GGE/2022/0036	15_1_3	28 May 2019	19,800kg (28,314)	£200,000
GGE/2022/0037	15_1_4	18 September 2019	19,800kg (28,314)	£200,000
GGE/2022/0038	15_1_5	1 October 2019	1,000kg (9,810)	£19,000
GGE/2022/0039	15_1_6	2 January 2020	24,000kg (34,320)	£200,000
GGE/2022/0040	15_1_7	1 March 2021	900kg (8,829)	£19,000

Article 19(1) of EU Regulation 517/2014, failing to report annual activity to the European Commission

Appeal number	**EA reference ending**	**Year**	**Deadline**	**Penalty**
GGE/2022/0041	19_1_1	2018	31 March 2019	£1,000

GGE/2022/0042	19_1_2	2019	31 March 2020	£1,000
GGE/2022/0043	19_1_3	2020	31 March 2021	£1,000

Article 11(1) and paragraph 1 of Annex III of EU Regulation 517/2014, placing non-refillable containers for use to service, maintain or fill refrigeration, air-conditioning or heat-pump equipment, fire protection systems or switchgear, or for use as solvents on the market

Appeal number	**EA reference ending**	**Date**	**Penalty**
GGE/2022/0044	11_1	2019 and 2020	£19,000

Article 6(3) of EU Regulation 517/2014, failing to establish and keep required records on fluorinated greenhouse gases

Appeal number	**EA reference ending**	**Date**	**Penalty**
GGE/2022/0045	6_3	2 March 2020	£4,750

The appeals

14. The 2015 regulations provide a right of appeal at Schedule 5, on the following grounds at paragraph 4(2):

    (a) that the relevant enforcing authority's decision to serve the civil penalty notice was—

        (i) based on an error of fact;

        (ii) wrong in law;

        (iii) wrong for any other reason;

        (iv) unreasonable;

    (b) that the amount specified in, or determined by, the notice is unreasonable.

15. Mr Brett has exercised that right of appeal in relation to each penalty notice. A significant amount of time was afforded to the parties, at their request, in order to resolve various issues raised in Mr Brett's grounds. Judge Neville held a case management hearing on 1 March 2023. Mr Brett was, at that time, represented by solicitors. His representative confirmed that Mr Brett was of limited means, was (at the time) 78 years old, and suffered from numerous health conditions, including problems with memory loss. It had therefore proven difficult to

obtain some of the documentation requested by the Environment Agency. The parties' representatives agreed that the following issues arose in the appeals:

a. Financial gain

The Article 15(1) and Article 11(1) penalty amounts were greatly increased by the financial gains that the Environment Agency determined was enjoyed by Mr Brett as a result of placing the HFCs / container on the market. These gains were based on information obtained from HMRC and are disputed by Mr Brett.

b. Weight

Again in relation to the Article 15(1) and Article 11(1) penalties, Mr Brett contends that the amounts of gas cited wrongly include container weight.

c. Culpability

The penalties were imposed on the basis that the breaches were deliberate. Mr Brett argued that they were inadvertent.

d. Article 11(1) Container

In relation to the article 11(1) penalty, Mr Brett denies unlawfully placing a non-refillable container on the market at all.

16. The recitals to the case management directions following that hearing included the following:

v. On the Environment Agency's application, I previously directed that unless the requested information were provided by 14 November 2022 then the Tribunal would be likely to debar Mr Brett from disputing the financial gain upon which the penalties had been calculated. That information was not fully provided. Instead, the Environment Agency has been provided with a disorganised volume of primary financial documentation such as invoices. It cannot, and should not be expected to, engage in forensic accountancy on Mr Brett's behalf. Nor will the Tribunal at the hearing of the appeal.

vi. A case management hearing was listed for today. Prior to the hearing, Mr Brett's full health difficulties were made clear to the Environment Agency. This resulted in a joint application yesterday to adjourn the case management hearing for 6 months. I refused that application. As confirmed at the hearing, Mr Brett's health is, sadly, more likely to be worse than better in six months' time. Applying the overriding objective, this appeal should be brought to a fair conclusion as soon as possible.

vii. The steps which Mr Brett intends to take include instruction of an accountant to make sense of the documentation surrounding financial gain, and preparing a witness statement concerning culpability and any other factual issues in the appeals. In response to Mr Hamilton's submissions, and with no objection from Mr Collins, I set out the timetable below as a reasonable amount of time in which to prepare this evidence. In relation to the accountancy evidence, it is not anticipated that this will be a formal expert's report. If it is, then I observed that it

will be more likely to carry evidential weight if it complies with the Practice Direction to CPR 35 (with suitable adaptation to this jurisdiction).

17. Some evidence was provided in response to the corresponding directions. The hearing of the appeal was listed for 14 September 2023. On 17 August 2023, Mr Brett's representatives wrote to inform the Environment Agency and the Tribunal that they were no longer instructed. They were able to disclose that Mr Brett had been medically advised that his health problems would "make it extremely difficult for him to represent himself in person at any forthcoming hearing."

18. Also provided at or around the same time were GP letters confirming a number of diagnoses, which we have fully taken into account and do not need to be set out in detail in these reasons. A letter from Mr Brett's GP dated 21 July 2023 further stated "As his health is certainly not stable, I would advise the Environment Agency Tribunal to not continue their proceedings at this time, only if it is absolutely essential."

19. On 8 September 2023, Mr Brett emailed the Tribunal to state that "it would be very unfair if [the appeals] continue and [I] hope the tribunal will reconsider their decision to pursue this matter". In support, Mr Brett provided a letter from a consultant psychiatrist Professor G C Fox dated 5 September 2023. The whole letter has been taken into account. After describing Mr Brett's health conditions, Professor Fox concludes as follows:

I believe he is unfit to attend a tribunal to give evidence and unfit to give evidence

remotely. This is for the following reasons:

- *He seems muddled about the information*

- *His concentration is poor*

    - *He has poor short-term recall which would affect any cross examination/evidence giving*

- *In my view, the level of his stress is so severe that it is impairing his cognitive*

    functioning and this will only worsen if he has to be cross-examined in a legal

    situation.

20. Judge Neville directed that the hearing on 14 September 2023 would remain listed, excused Mr Brett's attendance, and gave him permission to file any further written evidence or arguments. This was for the following reasons:

    1. Mr Brett is now unrepresented. He has provided medical evidence that I have considered. He has not made any explicit request for the hearing to be adjourned, or proposed how the appeal can now be decided within a reasonable time.

    2. When this appeal was previously case managed, a significant period of time was given for it to be prepared. This took into account Mr Brett's health problems. While Mr Brett is entitled to a fair hearing of his appeal, so too is the Environment Agency. The overriding objective to the Tribunal's Procedure Rules is that cases be dealt with fairly and justly, and this includes avoiding delay so far as compatible with proper

consideration of the issues. Balancing the relevant factors, and considering the evidence and argument already provided, I consider that it would not be unfair to Mr Brett for the hearing to proceed. If it did not then there is no apparent likelihood that Mr Brett's ability to prepare or present his appeal would improve within any reasonable timeframe.

3. *The Tribunal will ensure that everything provided by Mr Brett (or on his behalf) is carefully considered.*

21. At the hearing, the Environment Agency was represented by Mr Collins. It became apparent that proper consideration of the appeals, including points relied upon by Mr Brett when arguing against the service of the penalty notices, required us to have sight of documents that had not been provided to us. As it was unclear whether Mr Brett knew that those documents would be considered when he had decided not to attend, we directed the preparation of a supplementary bundle, that it be served upon Mr Brett, and again gave permission to provide any further relevant documentary evidence and written submissions. A supplementary bundle was duly provided and Mr Brett responded in writing. Our subsequent decision has then been regrettably delayed by each member of the panel having sequential periods of unavailability.

22. We have given renewed and careful consideration to whether it is fair to proceed to decide the appeals. Arising from Article 6 ECHR, the overriding objective to the Procedure Rules, and common law principles of procedural fairness, the Tribunal is under an obligation to take reasonable steps to ensure Mr Brett's access to justice; this includes the opportunity to effectively respond to the case against him. That opportunity is undoubtedly restricted by his inability to give oral evidence or attend the hearing to make oral submissions. Set against that, neither Mr Brett's previous representatives nor Professor Fox have put forward any proposals to facilitate Mr Brett's greater involvement in the hearing. These proceedings were put on hold for a very long period of time while Mr Brett and his representatives attempted to collate evidence to satisfy the Environment Agency and, if that failed, the Tribunal on the issues in the appeal. Mr Brett's ability to participate in the proceedings has only deteriorated during that time and there is no suggestion that it will improve within a reasonable period of time such than an adjournment or a stay would be appropriate.

23. While recognising the importance of oral evidence, and the importance in our legal system of being able to make oral representations at a hearing, the major issues in these appeals were always likely to be heavily dependent on documentary evidence. Credibility, as such, is less likely to contribute to our conclusions. It is therefore surprising that Mr Brett chose not to commission an accountant's report as envisaged six months before the hearing. No explanation has been provided, and nowhere does the medical evidence suggest that Mr Brett lacks capacity to give instructions or to conduct the proceedings overall. It is overwhelmingly likely that Mr Brett's evidential case will not meaningfully improve in the future, nor be enhanced by any reasonable adjustments or special measures. Taking a step back, and considering the proceedings as a whole, we consider that the composite aspects of the overriding objective at rule 2(2) are best met by proceeding to decide these appeals. We have paid very careful consideration to the written arguments and witness statement provided by Mr Brett, and have scrutinised those provided by the Environment Agency.

Consideration of the issues

24. There is no binding authority on how the Tribunal should approach these particular regulations. In contrast with the statutory scheme discussed in R. (Begum) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 at [67]-[68], we consider that Paragraph 4 of the regulations does permit the Tribunal to decide how a discretion conferred upon the Environment Agency ought to have been exercised, subject to the important qualification that the particular ground has made out. This legislative intent is clear from the grounds' expansive wording, particularly the use of the word "wrong" and the phrase "for any other reason". Furthermore, Paragraph 1 clearly confers a power to exercise the discretion at Schedule 1 for itself:

> *(5) The First-tier Tribunal may—*
>
> *(a) affirm the notice;*
>
> *(b) direct the Environment Agency or Secretary of State to vary or withdraw the notice;*
>
> *(c) impose such other enforcement notice, civil penalty notice or enforcement cost recovery notice as the First-tier Tribunal thinks fit.*

25. The qualification above should be reiterated. The Tribunal must find that one or more of the grounds is made out. In making that decision, appropriate weight must be afforded to the view taken by the Environment Agency: the regulator entrusted by Parliament to administer the scheme and maintain its integrity and effectiveness through enforcement action, and having expertise and experience in doing so; see Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at [45].

26. Finally on this topic, we do not consider the word 'unreasonable' at Paragraph 4(2)(a)(iv) to denote unreasonableness in the classic public law sense described in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. This is inconsistent with the powers given to the Tribunal at Paragraph (5), and we instead treat the word as having its everyday meaning of unfair, unsound or excessive.

27. We have been able to reach the necessary findings of fact, according to the standard of the balance of probabilities, without resort to the burden of proof: Verlander v Devon Waste Management [2007] EWCA Civ 835, at [18-19]. We have also taken into account Mr Brett's vulnerability when assessing his evidence, applying the Senior President's Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses. We have concentrated on the documentary evidence available, and recognised Mr Brett's memory problems and other circumstances when deciding what significance to place upon relevant evidence being missing or unclear.

28. We adopt the four issues already set out above, the first two of which can be dealt with together.

Financial gain & weight

29. In each Article 15(1) penalty notice the Environment Agency applied the stepped process and tables set out above to reach a starting point of £10,000, with a penalty range of £1,800 to £19,000. It then set out a calculation of the financial gain it believed had been enjoyed by

Mr Brett as a result of unlawfully placing the HFCs on the market, using information obtained from HMRC and a customer of Mr Brett who purchased some of the HFCs and applying the Environment Agency's own knowledge of the market rate for which HFCs are sold. For the five Article 15(1) penalty notices for which the final penalty amount is £200,000, financial gain was calculated as being in excess of £400,000. The Environment Agency therefore adjusted those penalties outside the range up to the maximum statutory penalty of £200,000 to ensure (so far as lawfully possible) that Mr Brett did not unduly gain.

30. For the other two penalty notices, 15_1_5 and 15_1_7, the financial gain was calculated at £513.43 and £10,622.24 respectively. While the fact of financial gain was therefore one of the aggravating factors leading to a penalty at the top of the range, being £19,000, it did not cause a discrete increase to cancel out a particular figure. Nor does Mr Brett put forward any reasoned challenge to those financial gain figures.

31. In each of the five penalties that therefore remain in issue, Mr Brett disputes the claimed financial gain by reference to his actual profits as follows: (taking the penalties together by tax year)

    Tax Year 18/19

    Estimated financial gain upon which penalty is based: £980, 175.53

    Actual profit made by Appellant during the relevant period: £39,198.00

    Tax Year 19/20

    Estimated financial gain upon which penalty is based: £1,429,426.80

    Actual profit made by Appellant during the relevant period: £19,399.00

    Tax Year 20/21

    Estimated financial gain upon which penalty is based: £10,622.24

    Actual profit made by Appellant during the relevant period: £30,119.00

32. Mr Brett does not dispute that the Environment Agency obtained the figures upon which they rely from HMRC's records of customs declarations, nor does he dispute that those records accurately reproduce what he declared or the way in which the sale costs have been estimated. So far as we can determine, Mr Brett puts forward the following explanations as to why the Environment Agency has miscalculated financial gain:

    a. The Chinese exporter misstated the tonnage of the gas, Mr Brett declared the incorrect amounts, so the HMRC records were wrong.

    b. In support of this he asserts that the maximum port loading weight is 20,000kg, inconsistent with records showing two shipments of 24,000kg. Likewise, the "maximum ISO Tank weight that can be transported by road is 19,000 kilos plus ISO Tank weight".

    c. The weight may include the weight of the tank instead of just its contents.

33. Mr Brett also states that tanks are leased, filled and re-exported at a cost of £9,000 per time. This had been overlooked by his bookkeeper and so even the figures quoted in the above paragraph are £45,000 too high.

34. We have carefully examined the documents placed before us. While the grounds of appeal and Mr Brett's witness statement refer to them as supporting the issues he has raised, the only direct sales documents between him and his Chinese suppliers relate to penalty notice ending 15_1_5 where financial gain is common ground. There are documents suggesting that some of those suppliers have EU quota and that they are compliant with REACH, but these are not specific to the transactions in issue.

35. Other documents include a bill of lading dated 23 April 2022 that cannot relate to these proceedings, a list of companies who have EU F-gas quotas, and some correspondence between the parties. Beyond that, there is only Mr Brett's internal accounting data and submitted returns. These fall well short of casting serious doubt over the figures reported to HMRC. They are self-reported, and Mr Brett himself confesses to being disorganised and muddled in their preparation. It was indicated on 1 March 2023 that Mr Brett would provide an accountant's report to substantiate his claim to have imported less gas than claimed, but without explanation Mr Brett has failed to do so. Without one we, like the Environment Agency, cannot substantiate his assertions from the evidence provided. There is not even a simple list of what tonnage Mr Brett claims *ought* to have been used to calculate financial gain. The closest available is a revised table prepared by Mr Collins to summarise representations with Mr Brett's former solicitor. Even on those figures, which Mr Collins does not accept, financial gain on each of the five penalty notices would still exceed £200,000.

36. We are also struck by the five shipments under discussion having a total reported VAT import cost of just under £185,000. Mr Brett (or a company to whom he was selling the imported goods) would have had to pay the reported VAT value in order to have the goods released, and that release date is also when the Environment Agency take them as having been placed on the EU market. If the Environment Agency's estimated gain figures are much too high then so are the VAT amounts, yet Mr Brett or his customer appears to have paid them without demur. This is highly implausible given what else he says about the size of his business. While we have had to make certain assumptions in that analysis, that is because Mr Brett's case is so poorly explained.

37. No evidence is provided to support Mr Brett's assertion as to the maximum tonnages that can be loaded onto a ship or transported by road. As observed by Mr Collins, one invoice that has been provided is for over 20,000kg in any event, undermining what Mr Brett has said.

38. In summary on these issues, we find that the Environment Agency's figures are reliable, being reached by reference to contemporary reports made to HMRC when goods were released at customs. Mr Brett's assertions to the contrary are neither sufficiently cogent nor substantiated by evidence to outweigh them. Mr Collins was careful to clarify that he did not put forward the lack of evidence and explanation as justifying an adverse inference as to Mr Brett's credibility; it is simply the case that there is insufficient evidence to displace the weight carried by the figures available to the Environment Agency. We agree with this analysis, for the reasons already given.

39. The importance of businesses being unable to profit from breach of the F-gas regime is set out in the ESP and arises from the need to combat climate change. We are satisfied that where financial gain exceeds the penalty range by such a large margin it is appropriate to increase it accordingly. There is no challenge to the methodology by which the financial gain has been calculated save for that which we have already rejected. The penalties are proportionate. While the Environment Agency set the starting point and the range by reference to Mr Brett's conduct being deliberate rather than inadvertent, we would have upheld the five penalties of £200,000 on either basis. The actual financial gain is significantly more than the statutory maximum and the penalties would be appropriate and proportionate even in response to inadvertent errors.

Culpability

40. The Environment Agency argues that the breaches are all deliberate. Mr Brett argues that they were unintentional. The ESP defines the different levels of culpability as follows:

> ***Culpability***
>
> *We will determine culpability in line with the following categories as set out in the guideline.*
>
> ***Deliberate***
>
> *This means one of the following:*
>
> - *intentional breach of or flagrant disregard for the law by persons whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation*
>
> - *deliberate failure by the organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence*
>
> ***Reckless***
>
> *This means one of the following:*
>
> - *actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by persons whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation*
>
> - *reckless failure by the organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence*
>
> ***Negligent***
>
> - *This means failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.*
>
> ***Low or no culpability***

This means an offence committed with little or no fault on the part of the organisation as a whole. For example:

- *by accident or the act of a rogue employee despite the presence and due enforcement of all reasonably required preventive measures*
- *where such proper preventive measures were unforeseeably overcome by exceptional circumstances*

41. The Environment Agency points to Mr Brett having previously been a director in Eurochem (SE) Limited, which was incorporated on 28 February 2012. During the time periods covered by this appeal, after that company had been dissolved, Mr Brett continued to trade under the style 'Eurochem (SE)'. The limited company imported HFCs in previous years, and in 2016 submitted an Annual Report showing that it had imported 66,170 tCO_2e of HFCs without quota. No enforcement action was taken because, Mr Collins told us, the company was dissolved. Correspondence has been provided showing that Mr Brett communicated with the Environment Agency on behalf of the company. This shows that by the time of the breaches Mr Brett knew full well that imported HFCs required quota, and that there were reporting and record-keeping obligations.

42. In his witness statement and written submissions, Mr Brett admits that his record-keeping may have been substandard. He blames the lack of quota on being misled by Chinese suppliers. While we accept that documentary evidence has been provided that Chinese suppliers do, in a general sense, offer to sell HFCs with quota, this does not detract from Mr Brett plainly being aware that he bore the legal responsibility to ensure that his imports were compliant. Nowhere does he explain his failure to submit an Annual Report for four years in a row, having known of the obligation for 2016. When the Environment Agency first observed that Mr Brett must have had knowledge of the regime from operating the limited company, Mr Brett's only response was:

It was and remains my understanding that the imports made via Eurochem SE Limited were covered by the suppliers' quota and that no offences were committed

It would appear however that the agency is referring back to early alleged breaches by a different legal entity and, as such, I do not believe they are relevant to the current matter under review.

43. In relation to reporting, we have no difficulty accepting that the breaches were deliberate. Mr Brett knew from his time at the limited company that he was under an obligation to submit annual reports but did not do so. We reach the same view on record keeping. Mr Brett would have known that there were record-keeping requirements and his failure to match them satisfies the second bullet point of the definition of deliberate.

44. Mr Brett's claim to have thought that the limited company's quota obligations were met by its suppliers is inconsistent with the document at page 72 of the bundle showing that it did hold some quota. Giving credit, however, for Mr Brett's health preventing him from attending the hearing to answer that point, by the narrowest of margins we are willing to find that this misconception did exist in relation to the present imports of HFCs. We nonetheless consider that his attitude still discloses a deliberate failure to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid the breach. This was not a case of someone deciding not to investigate whether legal obligations

might arise, such as to establish recklessness. It was a person who knew that there were legal obligations but deliberately did not ascertain what they were. It therefore also properly falls within the second bullet point of the definition of deliberate.

Article 11(1) non-refillable cylinder

45. In relation to this penalty, the grounds of appeal and Mr Brett's witness statement are a straightforward denial. The Environment Agency subsequently provided an email from FX Fire & Safety Solutions Ltd dated 9 September 2021 confirming its purchase of 900kg of HFC236fa in a "non-returnable cylinder". In his most recent submissions following the adjourned hearing, Mr Brett provided a letter from FX Fire & Safety Solutions Ltd dated 25 September 2023 clarifying that they had purchased refillable cylinders but that these were 'non-returnable', as in Mr Brett would not accept them back. Given that Article 11(1) and Annex III to EU Regulation 517/2014 does not appear to prohibit that sale, and the Environment Agency has provided no more evidence in support of the cylinder being non-refillable, we accept Mr Brett's case and allow the appeal against this penalty.

Conclusion

46. Save as set out in the above paragraph, we have rejected Mr Brett's case on each of the issues put forward.

47. The Article 15(1) penalties, under references ending 15_1_5 and 15_1_7 and each in the sum of £19,000, were placed at the top of the penalty range. Little reasoning was provided in the penalty notices themselves save that the breaches were deliberate, but that had already been taken into account under Tables 1 and 2 in setting the starting point and range. Mr Collins drew our attention to the importance of maintaining the integrity of the scheme, and that this is a case where a very large amount of HFCs have been put into the atmosphere over and above the stepped quota upon which the F-gas scheme is based. We recognise the force of the second of those submissions as well as the following indicative aggravating circumstances in the ESP:

    - *history of non-compliance - includes the number, nature and time elapsed since the previous non-compliance*

    - *attitude of the non-compliant person - the person's reaction, including co-operation, self-reporting, acceptance of responsibility, exemplary conduct and steps taken to remedy the problem*

48. These breaches form part of a course of conduct spanning three years of non-compliance, which can be properly taken as an aggravating factor. None of the positive attitude indicators at the second bullet point are present, and nowhere in Mr Brett's evidence or submissions can we find any remorse for the environmental damage caused by his conduct. For those reasons we affirm the decision to impose a penalty at the top of the range.

49. In relation to all the penalties, Mr Brett makes other points about his health, family circumstances and finances, and whether it is appropriate to pursue the penalties. We recognise that the ESP contains room for discretion on compassionate grounds.

50. We can imagine a set of circumstances where an otherwise compliant business, especially a sole proprietor with unlimited liability, fails to comply in a minor or moderate way and the

surrounding compassionate circumstances justify waiving or heavily reducing the penalty. In this case, any compassionate circumstances arising from Mr Brett's illness and family circumstances are outweighed by the public interest in ensuring that businesses operate lawfully under the F-gas regime. Mr Brett's circumstances already prevailed when he decided, freely, to continue in business after the dissolution of his limited company. The integrity of the F-gas scheme, including the deterrence of others, would be undermined by relieving him of the consequences of non-compliance. As to being a small business, if the European Parliament had wished to exempt small businesses then it could have done so. It did not, and nor has the UK Parliament following the regime becoming part of domestic law. It is a factor that is sufficiently accounted for within the ESP, which can (and in this case should) yield to redressing financial gain and recognising damage to the environment. While Mr Brett cites his lack of means as the reason why he was unable to retain legal representation, no evidence of those means has been provided such that we can take it into account in accordance with the ESP.

51. In conclusion, we therefore allow appeal GGE/2022/0044 on the basis that the Environment Agency's was based on an error of fact. None of the grounds at Schedule 5, Paragraph 4(2) of the 2015 regulations are made out in relation to the appeals.

Signed	Date:
Judge Neville	3 April 2024