



Appeal number: NV/2019/0016P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**B TAYLOR & SONS TRANSPORT
LIMITED**

Appellant

- and -

ENVIRONMENT AGENCY

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA (CP)

Determined on the papers, the Tribunal sitting in Chambers on 7 May 2020

DECISION

1. The appeal is dismissed. The Penalty Notice dated 1 October 2019 is affirmed.

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REASONS

Background to Appeal

2. This appeal concerns a Penalty Notice dated 1 October 2019, served by the Respondent pursuant to regulation 46 of the Energy Savings Opportunity Scheme Regulations 2014 (“The Regulations”).¹ The Regulations came into force on 17 July 2014.

3. The Regulations require large undertakings (as defined) to carry out an ESOS Assessment to audit their energy use in four-year cycles. The audit is then used to analyse the undertaking’s energy consumption and identify ways of improving its energy efficiency. The Regulations give domestic effect to the EU Energy Efficiency Directive 2012/27.

4. The Regulations include an enforcement mechanism whereby the scheme administrator, the Environment Agency, may serve an Enforcement Notice on a relevant undertaking (regulation 38) if it has not either conducted the assessment or satisfied the Environment Agency that it does not meet the requirements of the scheme. The Environment Agency may subsequently impose a Penalty Notice in respect of a failure to comply with that Enforcement Notice (regulation 46). There is a right of appeal to this Tribunal against a Penalty Notice (regulation 48).

5. In this case, the Respondent served an Enforcement Notice on the Appellant dated 9 October 2017. It required compliance by 9 January 2018. As the Enforcement Notice was not complied with, an initial notice of civil penalty dated 26 September 2018 was served. The Appellant complied on 12 February 2019. The Respondent served a Notice of Intent on 15 April 2019. The Respondent considered representations made by the Appellant in response to the Notice of Intent but decided to impose a Penalty Notice on 1 October 2019. The Penalty was £5,400, calculated in accordance with the Respondent’s published Enforcement and Sanctions Policy. It also imposed a publication sanction in accordance with regulation 41. The Appellant appealed to this Tribunal. The lodgement of the appeal had the effect of suspending the Penalty Notice under regulation 49.

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¹ <http://www.legislation.gov.uk/ukxi/2014/1643/contents>

Appeal to the Tribunal

6. 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. The
5 Tribunal considered an agreed open bundle of evidence comprising 92 pages.

7. The Notice of Appeal dated 23 October 2019 relies on grounds previously put forward to the Respondent in correspondence relating to the Notice of Intent on 22 May 2019 and also a letter dated 16 October 2019 in response to the Penalty Notice. In summary, the Appellant's case is that it did not initially consider that it was
10 required to comply because it did not agree that it met the definition of a 'large undertaking' in the Regulations. It was submitted that the published guidance on this was unclear. The Appellant asks the Tribunal to cancel the Penalty Notice and the publication penalty.

8. The Respondent's Response dated 29 November 2019 resists the appeal on
15 grounds that the Appellant clearly met the threshold for participation due to its number of employees. It submits that the Appellant was given clear advice over a lengthy period but has offered no reasonable explanation for its failure to take prompt action to comply with the Enforcement Notice. The Respondent asks the Tribunal to affirm the Penalty Notice.

20 *The Law*

9. The requirement for certain undertakings to participate in the scheme is set out at regulation 15 and Schedule 1 to the Regulations. Large undertakings are defined by reference to the number of employees and the annual turnover.

10. A Penalty Notice may be imposed as follows:

25 39.—(1) *In any case where the relevant compliance body is satisfied that a responsible undertaking is liable to a civil penalty under this Part, it may serve a notice on that responsible undertaking (a "penalty notice") imposing the penalties and other requirements set out in this Part.*

(2) *A penalty notice must—*

30 (a) *be in writing,*

(b) *be served on the person to whom it is addressed,*

(c) *specify—*

(i) *the breach of these Regulations in respect of which the penalty is imposed,*

(ii) *the steps that must be taken to remedy the breach,*

35 (iii) *the nature of the penalty, and*

(d) *include information about appeals under Part 9.*

(3) *A penalty notice imposing a financial penalty must specify—*

(a) *where no daily penalty applies or the total amount of the daily penalty can be determined at the date of service of the notice—*

40 (i) *the total amount due,*

(ii) where applicable, how it has been calculated, and

(iii) to whom, and the date by which, it must be paid,

(b) where a daily penalty applies and the total amount of the daily penalty cannot be determined at the date of service of the notice—

5 *(i) the amount of the initial penalty,*

(ii) details of the applicable daily penalty, and

(iii) to whom the penalty must be paid.

10 *(4) Where a notice has been served under paragraph (3)(b) and the total amount of the daily penalty can be determined after the date of service of the notice, the compliance body must serve a further notice on the responsible undertaking which complies with paragraph (3)(a).*

(5) The daily penalty rate must be calculated by reference to working days.

(6) The compliance body must remit to the Secretary of State any financial penalty received.

11. **A Publication Penalty may be imposed as follows:**

15 *41.—(1) The “publication penalty” means publication on the scheme administrator’s webpage, or another compliance body’s website, of the following information in relation to a penalty notice—*

(a) the name of the responsible undertaking and, where different, of the participant,

(b) details of the breach of these Regulations in respect of which the penalty notice has been issued, and

20 *(c) details of any financial penalty imposed.*

(2) The information in paragraph (1) must be published for a minimum period of one year, and may be published for such longer period as the scheme administrator or the compliance body (as the case may be) determines.

25 *(3) A publication penalty may not take effect until the period specified for any appeal against the penalty has expired.*

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(2) The information in paragraph (1) must be published for a minimum period of one year, and may be published for such longer period as the scheme administrator or the compliance body (as the case may be) determines.

35 *(3) A publication penalty may not take effect until the period specified for any appeal against the penalty has expired.*

12. **Regulation 48 provides for a right of appeal against a Penalty Notice as follows:**

40 *48.—(1) A responsible undertaking served with a determination under regulation 35(5) or paragraph 13(2) of Schedule 2, or 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.

(2) The relevant appeal body—

5 (a) in the case of an appeal against a determination made, or an enforcement notice or a penalty notice issued, by the scheme administrator, the Natural Resources Body for Wales, or the Secretary of State for Business, Energy and Industrial Strategy, is the First-tier Tribunal,

...

10 13. The powers of the Tribunal in determining such an appeal are set out in regulation 50 as follows:

50. An appeal body may—

(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,

15 (c) instruct the scheme administrator or the relevant compliance body to do, or not to do, any thing which is within the power of the scheme administrator or compliance body.

14. The burden of proof in satisfying the Tribunal that the Respondent's Notice should be cancelled rests with the Appellant.

20 15. It is increasingly common for the General Regulatory Chamber to determine appeals against financial penalties imposed by civil regulators. In analogous appeals against Fixed Penalty Notices issued by the Pensions Regulator, tribunal judges have adopted the approach of asking whether a defaulting Appellant has a "reasonable excuse" for their default, notwithstanding the fact that this concept is not expressly referred to in the legislation. This approach was approved by the *Upper Tribunal in*
25 *The Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 104 (AAC).² There is much case law concerning what is and is not a "reasonable excuse" and it is inevitably fact-specific. An oft-cited definition is the one used by the VAT Tribunal (as it then was) in *The Clean Car Company v HMRC* (LON/90/1381X) as follows:

30 *"...the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying*
35 *with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse...."*

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² https://assets.publishing.service.gov.uk/media/5acf131ee5274a76be66c11a/MISC_3112_2017-00.pdf

The Facts

16. Neither party has filed witness evidence in this appeal.

17. There appears to be no dispute between the parties as to the key facts in this case. The Appellant now accepts that it was, at the relevant time, a large undertaking. It implicitly accepts that it received the relevant correspondence and Notices, as it has not raised any matters concerning service.

18. The Appellant accepts that it was in breach of the Enforcement Notice on the relevant date for compliance as it confirms that it did not submit the required ESOS Assessment until 12 February 2019. This is thirteen months after the date for compliance with the Enforcement Notice.

19. I have in my bundle copies of the extensive correspondence between the parties and all of the Notices.

Conclusion

20. Firstly, it does not seem to me that the right of appeal against a Penalty Notice in Regulation 48 includes a right of appeal against a publication penalty under regulation 41. 'Penalty Notice' is defined in regulation 2 as having the meaning given in regulation 39 (1), which does not mention publication penalties. It may be that, if I were to allow the appeal against the Penalty Notice, then the publication penalty would become irrelevant.

21. Secondly, I have considered whether the Appellant's grounds of appeal engage any matter within the scope of regulation 48 (1). They do not raise any alleged error of fact or law, and so I have treated the appeal as one being based on the permissible ground (c), that the Penalty Notice is unreasonable.

22. The Appellant has pointed to some initial difficulty in understanding whether it fell within the ESOS scheme or not. I have reviewed the correspondence and find that the Respondent repeatedly explained the position and gave the Appellant every opportunity to comply with the Enforcement Notice over an extended period of time. Confusion about its legal obligations does not seem to me to justify a failure to comply with them.

23. I have considered whether the Appellant has advanced a reasonable excuse for its failure to comply with the Enforcement Notice. I conclude that it has not. It seems to me that a responsible undertaking, acting reasonably, would have put systems in place to comply with all of its obligations under the Regulations in a timely manner. The Appellant has not relied on any factors which explain its departure from the expected standards of a reasonable responsible undertaking.

24. In all these circumstances, I am not persuaded that it was unreasonable for the Respondent to serve the Penalty Notice.

25. I have no discretion to reduce the amount of the penalty, payment of which will become due on promulgation of this Decision.

26. For all these reasons, the appeal is now dismissed, and the Penalty Notice dated 1 October 2019 is affirmed.

5 **(Signed)**

JUDGE ALISON MCKENNA

DATE: 7 May 2020

CHAMBER PRESIDENT

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