Neutral Citation: [2024] UKFTT 293 (GRC)

Case Reference: NV/2023/0015/GGE

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard by: CVP Video Hearing

Heard on: 19 October 2023

Decision given on: 11 April 2024

Before

TRIBUNAL JUDGE L. ORD
TRIBUNAL JUDGE NEVILLE

Between

TOOL-TEMP LIMITED

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

Representation:
For the Appellant: James Bailey (Director of the Appellant)
For the Respondent: Paul Collins (Senior Lawyer with the Respondent)

Decision: The appeal is allowed and the Respondent is directed to withdraw the Notice of a Civil Penalty dated 4 April 2023.

REASONS

The Appeal

1. By notice of appeal dated 28 April 2023, the Appellant appeals pursuant to Schedule 5, paragraphs 4(2)(a)(iv) and 4(2)(b) of The Fluorinated Greenhouse Gas Regulations 2015 against the Respondent's imposition of a civil penalty of £4,200 by Notice of a Civil Penalty ("the Notice") dated 4 April 2023.

2. The Notice was issued in respect of the Appellant's failure to obtain sufficient HFC quota authorisations before placing HFCs on the market within Great Britain (GB) as required by Article 14(1) of EU Regulation 517/2014 on fluorinated greenhouse gases. Article 14(1) requires that refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons shall not be placed on the market unless hydrofluorocarbons charged into the equipment are accounted for within the GB quota system.

Evidence

3. In determining this appeal we have had regard to the appeal bundle of 94 pages, the Appellant's and the Respondent's skeleton arguments, the Appellant's response to the Respondent's Notice of Intent, and two email chains between Appellant and Respondent (29 June 2021 14.15 to 30 June 2021 17.26) and (30 June 2021 17.04 to 1 July 2021 2.19pm). We have also considered oral evidence given by James Bailey (for the Appellant) and Paul Collins (for the Respondent).

Law and Policy

4. **The Fluorinated Greenhouse Gas Regulations 2015** (F-gases Regulations) implement EU Regulation No 517/2014 on fluorinated greenhouse gases of 16 April 2014. They prescribe offences and lay down rules on penalties applicable to infringements of the EU Regulation, providing enforcement powers to the enforcing authority, which is the Environment Agency (EA). Relevant provisions are as follows:

   Reg. 31A Civil penalties
   (1) A relevant enforcing authority may impose a requirement to pay a civil penalty in accordance with Schedule 4.
   (2) The requirement to pay a civil penalty may be imposed on any person who—
   (a) fails to comply with—
   (i) a provision of the 2014 Regulation specified in Schedule 2;

   Schedule 2 of the 2014 Regulation includes:
   Article 14(1) (pre-charging of equipment with hydrofluorocarbons) which

provides:

"From 1st January 2017, refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons shall not be placed on the market unless the hydrofluorocarbons charged into the equipment are accounted for within the quota system referred to in Chapter IV".

Schedule 4 - Civil penalties
para. 1 - Imposition of a civil penalty
(1) A relevant enforcing authority may by notice impose on any person, in relation to a failure to comply with any provision referred to in regulation 31A, a requirement to pay a civil penalty to the relevant enforcing authority of such an amount as the notice may specify or determine, subject to sub-paragraph (4).
(2) The standard of proof to be applied by a relevant enforcing authority imposing a civil penalty under these Regulations is on a balance of probabilities.
(4) The maximum civil penalty is £200,000 ……

Schedule 5 - Appeals
para. 1 - Appeals against notices served by the Environment Agency or the Secretary of State
(1) A person on whom an enforcement notice, a civil penalty notice or an enforcement cost recovery notice is served by the Environment Agency or the Secretary of State may appeal against it to the First-tier Tribunal.
(4) Where an appeal is made under sub-paragraph (1), the notice is suspended until the appeal is withdrawn or determined by the First-tier Tribunal in accordance with sub-paragraph (5).
(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.

para. 4 - Grounds for appeal
(2) The grounds for an appeal against a civil penalty notice under paragraph 1(1), 2(1), 3(1) or 3(13) of this Schedule are—
(a) that the relevant enforcing authority's decision to serve the civil penalty notice was—
(iv) unreasonable;
(b) that the amount specified in, or determined by, the notice is unreasonable.

5. In deciding the question of reasonableness, regard is to be had to the EA's **Enforcement and Sanctions Policy (ESP)** updated 17 March 2022.

Whilst the policy has been updated since the time of the Notice, we have considered the documented changes provided to us by the Respondent and none are of relevance to this appeal.

Annex 2 : Climate change schemes – the Environment Agency's approach to applying civil penalties.

This applies to the F Gas regime.

Section A: General Principles

Explains that the EA will apply discretion, using a stepped approach, when deciding whether to impose a civil penalty or to work out the final penalty amount. Within the steps they will assess:

- The nature of the breach
- Culpability
- The size of the organisation
- Financial gain
- Any history of non-compliance
- The attitude of the non-compliant person
- Personal circumstances

The nature of the breach assessment is the seriousness of the breach based on the impact it has on the integrity of the scheme, and the environmental effect of the breach, where relevant.

Section A: Environment Agency's penalty setting approach for the climate change schemes

Once the EA have determined that a person is liable to a civil penalty…they apply their discretion to decide whether to:

- Waive the civil penalty
- Reduce the civil penalty
- Extend the time for payment

They use a stepped approach to make this decision as follows:

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 they decide to impose a penalty, work out the penalty point and penalty range based on culpability 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.

Culpability in Step 3 is categorized into: deliberate, reckless, negligent, and low or no culpability.

The definitions of the following are relevant in this case:

Negligent: a failure of the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commissions of the offence.

Low or no culpability: an offence committed with little or no fault on the part of the organisation as a whole.

Size of the organisation: small – between £2 million and £10 million annual turnover.

Culpability and size are used to determine a penalty factor (Table 1) which is applied to the statutory maximum to obtain a penalty starting point. An adjustment may then be made within a penalty range (Table 2) to account for the following aggravating and mitigating factors:

- Financial gain
- History of non-compliance
- Attitude of the non-compliant person
- Personal circumstances

Section E covers F Gas penalties and is to be read in conjunction with section A. Paragraph E2 refers to the EA's power to impose civil penalties for breaches of regulation 31A of the F Gas Regulations

E2.1 states:
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 in E2.2.

E2.2 states:
We may not impose a civil penalty where:

- ……..
- Punishment or future deterrent is not necessary.

6. On an appeal against a penalty notice, the role of the Tribunal is not to place itself in the position of the Respondent and to ask itself whether it would have decided to impose a penalty and, if so, how much. Rather, it is to consider whether the imposition and/or level of the penalty was erroneous, either because of a factual or legal error or because it was unreasonable. Unreasonable in this context takes the ordinary meaning of being unfair, unsound or excessive, having regard to the circumstances of the case.

Issues

7. The main issues in this case are:

   1) whether the EA's decision to serve a civil penalty notice was unreasonable; and if not,

   2) whether the amount specified in the notice is unreasonable.

8. In determining these issues the Tribunal will have regard to the EA's ESP.

9. For issue 1) regard will be had to:

   - The general principles in Annex 2, Section A, namely:
     - The nature of the breach
     - Culpability
     - The size of the organisation
     - Financial gain
     - Any history of non-compliance
     - The attitude of the non-compliant person
     - Personal circumstances

   - Whether punishment or future deterrent was necessary in the context of Annex 2, Section E.

10. For issue 2) regard will be had to the stepped approach in Section A (Steps 1 to 4) and particularly culpability in Step 3 and the following aggravating and mitigating factors in Step 4:

    - Financial gain
    - History of non-compliance
    - Attitude of the non-compliant person
    - Personal circumstances

The Appellant's case (as set out in its Grounds of Appeal, Skeleton Argument, James Bailey's response to the Notice of Intent and his statement and oral evidence)

11. The Appellant appeals on the basis it was unreasonable to serve the notice and, in the alternative, that the amount specified in, or determined by, the notice is unreasonable. It originally put forward the further ground that the EA was wrong in law, but this has since been withdrawn.

Unreasonable to serve the Notice

12. The Appellant is a small business with an annual turnover of about £3 million. A small part of the business (5-10%) involved importing from Switzerland pre-charged HFC goods and placing them on the British market. Prior to Brexit,

the quotas that were required for this activity were administered by their Swiss suppliers, who handled the imports under the EU quota scheme.

13. When the system changed in 2021 to the GB quota regime, responsibility for obtaining authorisations was transferred to the Appellant. The threshold for needing authorisations was 100 tonne of carbon dioxide equivalent (tCO_2e) per annum. The company found it difficult estimating the quantities of authorisations required and there was no clear guidance or advice available at that time either from the EA or other official sources. It consulted its Swiss suppliers and estimated a requirement of 200 tCO_2e authorisations, which they acquired.

14. One difficulty was dealing with the commodity codes for the HFC products, which informed the levels of authorisations required. Selecting the correct codes could be complex, as there were sometimes subtle differences in product codes, for example between pre-chilled equipment and spare parts. Whilst customs declarations were made in good faith using what was believed to be correct codes, on two occasions the carrier, who shipped the goods from Switzerland, put the wrong codes into the system. The Appellant only discovered this when they received their Verification Report in March 2022. The Appellant believes that, had the correct codes been entered, fewer authorisations might have been required.

15. The March Verification Report recorded pre-charged equipment containing 212 tCO_2e being place on the market. This was the first indication the Appellant had of the shortfall in authorisations. Being a responsible business and keen to maintain its good reputation and meet its statutory obligations, it reported the breach voluntarily to the EA. It was not obliged to do so, as the reporting threshold was 500 tCO_2e per annum, which was significantly more than the company placed on the market. If it had kept quiet, it is unlikely that the EA would have found out about the breach.

16. The company also acquired more authorisations in an attempt to meet the shortfall. The excess is still in its account.

17. The breach was unintentional. The Appellant had tried hard to understand and comply with the new requirements, but it made an error and was 12 tCO_2e short. Nonetheless, it had acquired 95% of the required audited authorisations.

18. It is very concerned about the reputational harm resulting from the Notice, and damage to its good compliance record. It had no intention of gaining financially and, even on the EA's figures, its gain is only £300.

19. The Appellant makes the following additional points:

    1) A regulatory impact assessment for the F-gases regime was not produced until December 2022, despite its disproportionate regulatory burden and complexity, which hit small businesses particularly hard.

2) The Government failed to adequately inform new entrants into the system of the implications of the regulations.

3) HM Customs and Excise were not effectively managing the imports before the end of the first compliance year and relied on businesses accurately coding and understanding the regulations. Customs did not tell the Appellant the equipment required quota. The Appellant believed that they had complied because their equipment was not, at any point, held by Customs, who they expected to detain any goods imported in breach of the rules.

4) The EA failed to provide reasonable support in 2020 and 2021 for businesses trying to enter the regime for the first time. The Appellant tried to call the EA to seek clarity relating to the volume of authorisations, but calls were either not returned or the EA was unable to provide substantive responses to questions. It was only possible to communicate via email, which gave rise to unsatisfactory and delayed responses.

5) The global circumstances of the COVID-19 pandemic with lock downs and employee sickness particularly affected small businesses and created disproportionate challenges when trying to meet the new regulatory requirements.

20. Furthermore, the EA failed to consider E2.2 of its Enforcement and Sanctions Policy where it says that they may not impose a civil penalty where punishment or future deterrent is not necessary. The Appellant does not need to be punished for a minor mistaken miscalculation of about 5% of the required quota authorisations, which the EA were only alerted to by voluntary reporting.

The amount specified in the Notice is unreasonable

21. The Appellant was not negligent as it sought to comply and had proper systems in place for compliance. The shortfall was through no fault of the Appellant.

22. The cost applied to 2021 authorisations was unrepresentative and unreasonable. The prices applied to quota authorisations depends on the price of equipment, with £25 per tCO_2e only applying to the most expensive equipment such as trains sold for £1,000,000. The authorisations purchased by the Appellant were, at maximum, in the £10-12 per tCO_2e range, and in 2021 the Appellant paid £8.50 per tCO_2e. The penalty should be reduced to between £100 (approximate cost of 12 tCO_2e) and £500 (the low end of the range for small companies with low culpability).

The Respondent's case (as set out in the Notice, the EA's statement and skeleton argument, and the oral evidence of Paul Collins)

23. The Appellant failed to comply with the requirements of the F-gases Regulations and the Respondent acted correctly in imposing the Notice and setting the amount of penalty.

24. Responding to the Appellant, the Respondent makes the following points on advice:

    1) Guidance and advice on the F-gases regime was easily available and the Appellant acknowledges that it was advised by its supplier. Government Guidance included "Using and trading fluorinated gas and ozone-depleting substances: rules and processes from January 2021" and Refcom's "Implications on the F-gas Regulations of the UK leaving the EU" (the Respondent provided links).

    2) On 29 June 2021 the Respondent emailed the Appellant advising it that, as an importer of more than 100 tCO_2e, it must declare that it held sufficient quota authorisations. It provided a link to Government Guidance "Import or manufacture equipment pre-charged with HFCs", and other information.

    3) On 1 July 2021, the Respondent spoke with James Bailey and provided guidance on obtaining GB quota authorisations, which was followed up with an email. The Respondent provided an email chain (from 30 June 2021 17.04 to 1 July 2021 2.19pm), which recorded the Appellant requesting advice about quotas and the Respondent sending Government web site links and lists of HFC Authorisation Managers and Incumbent Quota Holders to the company.

    4) On 3 December 2021 the Respondent emailed the Appellant reminding it that it must have sufficient GB quota by 31 December 2021 to cover goods on the GB market.

25. However, Mr Collins confirmed in evidence that the Respondent's advice had become more tailored and useful over time, as they had progressed through the regime.

26. The Respondent made the following additional points:

    1) There was no need for a Regulatory Impact Assessment.

    2) On 25 June 2021, the Respondent received a referral from HM Customs and Excise Clearance Hub, and the fact there was a referral demonstrated effective management of imports. The Respondent supplied a subsequent email trail between the EA and the Appellant (from 29 June 2021 14.15 to 30 June 2021 17.26) which reflected a query about the amount of HFC in a

shipment of two water chillers, which had been detained at the Hub. The Appellant provided the required information and the Respondent authorised release, as the shipment was below the 100 tCO_2e annual threshold.

3) Mr Collins in evidence accepted that the Appellant did not have to report the breach and that the it was co-operative. Whilst he acknowledged that the company subsequently purchased authorisations in 2022 in an attempt to cover the excess, he made the point that this quota could not be used retrospectively for 2021.

4) The Respondent made reference to its ESP and how it had been applied proportionately, going through the various steps as summarised in the Notice. The Notice stated that the most relevant factors in reaching the decision were that the breach undermined the integrity of the quota system and had a detrimental impact on organisations that complied with the Regulations, putting them at a competitive disadvantage.

5) The Respondent classified the Appellant's organisation as small, and its culpability as negligent in that it failed to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.

6) In assessing aggravating and mitigating factors, the Respondent considered that the Appellant had avoided costs of £300 in not obtaining the necessary quota, using the maximum price of £25 per tCO_2e from a 2021 sample. The maximum was used as anything else might undermine the final civil penalty and give the Appellant an unfair financial advantage.

27. Mr Collins explained in evidence that, in any one year, as the year progressed, the price of authorisations increased. He said there had been cases of authorisation shortages and, hypothetically, if penalties were not set sufficiently high, a business could play the system by paying a penalty rather than a sharp price rise in say December. This must be taken into consideration.

28. The price in 2022 was not valid due to price shifts between years. Taking account of the Appellant's co-operative attitude, the Respondent set the penalty at £4,200.

Discussion and conclusions

Issue 1: Whether the EA's decision to serve a civil penalty notice was unreasonable, taking account of

- **The nature of the breach**
- **Culpability**
- **The size of the organisation**
- **Financial gain**
- **Any history of non-compliance**

- **The attitude of the non-compliant person**
- **Personal circumstances**

And whether punishment or future deterrent was necessary

29. We have considered these matters in reverse order as follows:

The Appellant's circumstances

30. The GB regime did not come into force until post Brexit, and 2021 was the first year businesses were required to comply. The requirements were new and represented a significant change to businesses' obligations. The Appellant had no experience of the regime and how to handle quota authorisations in practice. It found the system to be complicated and difficult to navigate, with limited guidance available, which it often found confusing and unclear.

31. On notice to the parties, we accessed the links to the Government Guidance provided by the Respondent to the Appellant in 2021. The web-page for "Using and trading fluorinated gas and ozone-depleting substances: rules and processes from January 2021" displayed a message saying the guidance was withdrawn on 6 February 2020. The web page for Refcom's "Implications on the F-gas Regulations of the UK leaving the EU" only gave a brief overview of the regime and referred readers to the Government Guidance.

32. The link to "Import or manufacture equipment pre-charged with HFCs" took us to the gov.uk website containing guidance on "Transfer and authorise F-gas quota to another business", which was published on 9 September 2019 and updated on 2 August 2022. Only the August 2022 version was available on the website. However, the site provided another link to "Import or manufacture equipment pre-charged with HFCs", the website of which showed it being published in August 2022 and last updated in September 2022.

33. Consequently, it is unclear exactly what official guidance was available to the Appellant in 2021. Noting that the Respondent confirmed that its guidance became more tailored and useful over time, we conclude that there was an initial period when the advice available from Government and the Respondent was not as clear as it might have been. For a small business with limited resources, this would make it more challenging to fully understand practically what to do.

34. The commodity coding system, which informed the amount of CO_2e recorded for an import, was complex, and the Appellant was having to get to grips with the system for the first time in 2021. The Appellant was under the impression that, had the company not had sufficient authorisations, HM Revenue & Customs, on checking the codes, would detain the goods and inform the EA of any shortfall. No such shortfall was reported. Consequently, the Appellant thought it was in compliance.

The Appellant's attitude

35. The Appellant's witness and director of the company, Mr Bailey, came across as a responsible and credible witness who was very concerned about not damaging the company's good reputation. He had been keen to engage with the regime from the start, and under his leadership the company had taken reasonable steps to comply.

36. The Appellant sought advice and guidance on several occasions, and established compliance systems. It bought what it thought would be sufficient authorisations for 2021. The breach was inadvertent and it had no intention to gain financially.

37. Once the company became aware of the 12 tCO_2e shortfall through its Verification Report of March 2022, it tried to rectify the breach by buying more authorisations. Whilst it was unable to use those authorisations retrospectively for 2021, it was unaware of this restriction at the time.

38. The Appellant voluntarily reported its breach to the Respondent, despite being under no obligation to do so. This was accepted by Mr Collins at the hearing. The company wanted to be transparent and open.

History of non-compliance

39. There is no history of non-compliance.

Financial gain

40. The price the Appellant paid for authorisations in 2021 was £8.50 per tonne. Had it bought sufficient quota at that time, 12 tCO_2e would have cost the company £102.00.

41. Even at the highest 2021 price of £25.00 per tCO_2e, suggested by the Respondent, the gain would only be £300.00.

The Appellant's size

42. The company is small according to the Respondent's ESP.

Culpability

43. The Respondent says that the Appellant was negligent in that it failed to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.

44. We find however that, given the efforts made by the Appellant and the circumstances it was in, including difficulty accessing clear advice, its culpability was low in that there was little fault on its part.

Nature of the breach

45. The nature of the breach assessment reflects the seriousness of the breach based on the impact it had on the integrity of the regime. It may include the length of time a person had been required to comply with the law.

46. Most breaches will have some effect on the regime, which aims to limit HCF use to reduce the UK's impact on climate change. However, in this instance the breach was minor, relating to only 12 tCO_2e, in circumstances where the Appellant had for the most part (200 tCO_2e) complied.

47. Given the minimal financial gain to the Appellant, it is highly unlikely that it would have put the company at any commercial advantage compared to its competitors.

48. It was the first year that the Appellant was required to comply with the regime and the breach was contained within that year.

Whether punishment or future deterrent was necessary

49. We could find no evidence that the Respondent took account of this aspect of its policy. There is no indication in the Notice that this step was considered, and the Respondent made no reference to it in the documents before the Tribunal. We therefore find that it did not have proper regard to this element of policy.

50. The breach, which was minor, occurred in the first year of the regime when the Appellant was inexperienced. Guidance was not always as clear as it could have been but, nonetheless, the company made reasonable efforts to comply under the circumstances. The breach was inadvertent.

51. The company is proud of its good compliance record, which it is keen to retain. It reported the breach voluntarily when it was under no obligation to do so.

52. Accordingly, we find that punishment would serve no useful purpose and would be disproportionate. Consequently, on the facts of this particular case, we conclude that the Appellant did not need punishment or future deterrent.

Conclusion on Issue 1

53. On the basis of our above findings, we conclude that, in this particular case, the decision to serve a civil penalty notice was unreasonable. We reiterate that this decision turns on its particular facts.

Issue 2: whether the amount specified in the notice is unreasonable, having particular regard to culpability and the following aggravating and mitigating factors:

- **Financial gain**
- **History of non-compliance**

- **Attitude of the non-compliant person**
- **Personal circumstances**

54. In case we are wrong in our conclusion on Issue 1, we have proceeded to consider Issue 2. We repeat our findings on Issue 1 with respect to culpability and the aggravating and mitigating factors set out for Issue 2.

55. Taking culpability as low and the size of the organisation as small, we have used Table 1 of the ESP to find the penalty starting point. Applying the multiplying factor of 0.005 to the statutory maximum of £200,000, we obtained a starting point of £1,000. Moving onto Table 2, we applied the multiplying factors of 0.0025 and 0.02 to obtain a penalty range of £500 to £4,000.

56. There are no aggravating factors to take into account in this case. We have had regard to our conclusions on Issue 1, which demonstrate significant mitigating factors. Consequently, we find that the penalty, if it were applied, should be at the bottom of the range.

Conclusion on Issue 2

57. In our judgment, if a penalty were necessary, the appropriate amount would be £500. Therefore, we conclude that the amount specified in the Notice is unreasonable.

Signed: Judge Liz Ord **Date:** 9 April 2024
Signed: Judge Neville **Date:** 9 April 2024