



**Neutral Citation Number: [2022] UKFTT 502 (GRC)**

**Case Reference: NV/2022/0005**

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

**The Energy Savings opportunity scheme Regulations 2014 (as amended)  
“the Regulations”**

**Listed on the papers**

**Decision given on: 27 September 2022**

**Before**

**TRIBUNAL JUDGE FORD**

**Between**

**ELIZABETH ARDEN (UK) LIMITED**

Appellant

**and**

**ENVIRONMENT AGENCY**

Respondent

**On the papers**

**Decision:** The appeal is allowed

**Substituted Decision Notice:** The Penalty notice is cancelled and a revised Penalty notice is to be issued by the Respondent re-assessing the level of the fine on the formula applicable to Low or No Culpability

**REASONS**

1. The Appellant appeals against the Notice of Civil penalty reference ESOS-ENF-2-05161 dated 09/12/2021. The Notice was issued for failure to comply with the Enforcement notice issued by the Environment Agency dated 16/10/2021 ('the Notice'). That notice required the Appellant to carry out an Energy savings Opportunity scheme assessment and to report the outcome to the Respondent by 18/01/2021. No notification of compliance had been received by the due date.
2. The Respondent stated in the Notice of Civil penalty that it had applied its published **Enforcement and sanctions policy ("the enforcement policy")** in considering whether to impose a penalty and in deciding how much that penalty should be. Annexes A and D to that policy are relevant in the Respondent's consideration of whether to impose a penalty for non-compliance with the obligations under the Energy Savings Opportunity Scheme.
3. The Appellant's culpability was assessed as Negligent, just one step up from the lowest level of culpability which is Low or no culpability. The enforcement policy states;-

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

4. The Notice states;-

"We have considered our penalty setting approach in Annex 2 to our Enforcement and Sanctions Policy and your response to the Notice of Intent.

A summary of the steps that we have carried out to make our decision under our policy are as follows:

**Step 1** Check or determine statutory maximum for the breach

Statutory maximum = £90,000

A notification of compliance has not been submitted. The maximum penalty that the organisation is liable to is £90,000 (£50,000 + (£500 x the maximum 80 working days)

**Step 2** Set initial penalty amount by assessing the nature of the breach and other enforcement positions in line with Sections B, C and D

Initial penalty amount = £90,000

**Step 3** Work out penalty starting point and penalty range

Culpability category = Negligent

Size of organisation = Medium

Penalty starting point = £10,800

Penalty range – £4,950 = £27,000

**Step 4** Set final penalty amount by assessing the aggravating and mitigating factors

Final penalty amount = £14,850

The most relevant factors in reaching this decision are as follows:

In assessing the ‘nature of the breach’ in line with Section D2.3 of the Enforcement and Sanctions Policy, failure to undertake an energy audit, we do not consider you to be a new entrant to the scheme.

In assessing the size of your organisation, we consider that you are a medium organisation based on a turnover of £43,767,141 taken from the 2019 accounts.

In assessing the culpability category, we consider that your culpability category is negligent, due to the 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. The compliance deadline was 05 December 2019.

In assessing the aggravating and mitigating factors, we have considered that although there is no previous history of non-compliance, it can be reasonably assumed that you should have the systems in place to avoid the commission of this non-compliance, having qualified for compliance period one. Prior to the issue of the Notice of Intent (NoI) attempts were made to contact you via email and no response was received. In mitigation provided you advised that staff managing the consumer-centric mailbox are trained to only monitor and respond to enquiries related to consumers reaching you through the eCommerce site and that 80% of staff were placed on furlough during the pandemic. As a result the notice was never passed to the appropriate person. We have considered the mitigation however, we also consider that only after the issue of the NoI (sent to the same email address) were steps taken to remediate the non-compliance. You have stated that you intend to comply as soon as possible and have begun to take the steps to remedy the breach.

However, you do remain non-compliant with the requirements of the scheme.

**Payment of £14,850 is due on 09 March 2022.** Payment details are given in the notes section overleaf.

In addition, we require you to take the following action to remedy the breach as stated in the Enforcement Notice issued to you dated 16 October 2020:

Carry out an ESOS assessment in accordance with Part 4 of the ESOS Regulations and report the ESOS assessment in accordance with Part 5 of the ESOS Regulations.

OR

Provide evidence in writing to [ESOS-Enforcement@environment-agency.gov.uk](mailto:ESOS-Enforcement@environment-agency.gov.uk) to demonstrate to the satisfaction of the Environment Agency that Elizabeth Arden (UK) Ltd or any of your corporate group activities in the United Kingdom did not meet the definition of a large undertaking as specified in Schedule 1 of the ESOS Regulations on 31 December 2018. This action must be completed by 09 February 2022”.

5. I have highlighted a section of the text above because it makes it clear that the Respondent had considered the Reply sent to the Respondent to the Notice of Intent to impose a penalty in the Respondent’s exercise of its discretion to impose the penalty that it did impose.
6. It is not in dispute that the Appellant failed to comply with its obligation to complete an assessment of its energy usage by 05 December 2019. Such an assessment has to be completed and reported every 4 years under the Energy Savings Opportunity scheme. The Appellant failed to report the outcome of such assessment to the Respondent. The Appellant failed to comply with the Enforcement Notice served on the Appellant dated 16/10/2020. The Appellant does not dispute that the Appellant was not a new entrant to the scheme or that it is a medium size enterprise.
7. What is in dispute is whether the Respondent served the enforcement and penalty notices correctly, applied its Enforcement policy correctly and proportionately and in particular correctly assessed the level of culpability on the part of the Appellant as Negligent rather than Low or No culpability.
8. On appeal to the first Tier Tribunal (General Regulatory Chamber) the Tribunal may, under Regulation 50 of the Regulations
  - “(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,
  - (c)instruct the scheme administrator or the relevant compliance body to do, or not to do, anything which is within the power of the scheme administrator or compliance body.
9. In the Notice of appeal dated 28/02/2022 the Appellant explained what had happened within the company during the Covid pandemic. The offices were closed between March

2020 and October 2021. Staff members were working from home and the consumer email was being monitored. Emails regarding this penalty were sent to and received by the Company at the email address [ConsumerEU@revlon.com](mailto:ConsumerEU@revlon.com) . Service was not effected by post and neither of the two Directors was personally served.

10. An employee first picked up the Notice of intention to issue a penalty sent by ESOS to the Consumer email address on 10 August 2021. It was referred on to the Consultant, Mr H Dingra who was employed by the Appellant to advise on IT and related issues. He wrote to Margaret at ESOS enforcement on 17 August seeking further details of what was required of the Company.

11. Margaret at ESOS then responded by email stating the following

“The deadline to comply with the Enforcement Notice was 18/01/2021. Please can you provide the following information:

■ Explanation as to why you were unable to meet the date specified in the Enforcement Notice

■ Details of the actions you have taken to date and the current status of your ESOS assessment completion as a percentage

■ Expected date that the key members of personnel will return to work and sites operational

As stated in the Notice of Intent dated 10/08/2021 if you consider that there is information that is relevant for us to take into account when applying the penalty setting approach, please submit this in writing by 08/09/2021.

Please find some further information below, on ESOS requirements in order to be compliant with the scheme: This includes:

■ Calculate the Total Energy Consumption (TEC), unless you are fully covered by ISO 50001. Please see Section 3 of the [full ESOS guidance](#) for further information on how to do this.

■ Identify the Significant Energy Consumption (SEC) - assets and activities that amount to at least 90% of your TEC (see section 4 of the ESOS guidance)

■ Once you have calculated your SEC, you will need to choose one or more routes to compliance that cover all areas of the SEC. You can demonstrate that you have made a compliant ESOS assessment using:

■ ISO 50001 certification

■ Display Energy Certificates (DECs)

■ Green Deal Assessments (GDAs)

■ ESOS compliant energy audits.

You should keep a record of how your areas of significant energy consumption are covered by your compliance routes, in your ESOS Evidence Pack. See Section 8.4 (‘Keeping Records’) for further information about what to include in your Evidence Pack.

■ ESOS Energy Audit: audit the areas of your SEC, and identify energy savings opportunities (see sections 5.4 and 5.5 for more information on how to do this)

■ Appoint a Lead Assessor, to check that your assessment meets ESOS requirements, unless 100% of your energy use is covered by ISO 50001

certification or you have zero energy responsibility under the ESOS rules (see section 6)  
(a list of approved registers of ESOS lead assessors can be found on <https://www.gov.uk/guidance/energy-savings-opportunity-scheme-esos>. This includes details of the organisation and the name of the register.  
Contact details for approved lead assessors are listed on the websites of the approved professional bodies.)

☛ Once the ESOS assessment is completed, this must be signed off by a company director (see section 7)

☛ Notify the Environment Agency (EA) of compliance, via the online portal: <https://www.smartsurvey.co.uk/s/0YNAR/>

Please respond to the three bullet points above by 31/08/2021”

12. On 26 August 2021, the Appellant’s Finance Director wrote to Margaret at the ESOS email address and in his reply (page 21 of 71 in the stitched bundle) he apologised for the delay in compliance and explained that many of the staff had been furloughed, that the remainder were working from home and unable to access data that was in the office and that access would be needed to complete the assessment. It was explained that the company hoped to be back in the office in October but the situation was still uncertain.
13. Nothing further was heard from the Respondent until the Notice of intention to issue a Penalty notice was served on 16 October 2021.
14. The Appellant ultimately instructed outside Consultants to complete the assessment and it was submitted on 17/12/2021.
15. The Appellant submits that the enforcement and Penalty Notices were not properly served as they were not sent by post to either of the 2 Directors.
16. The Respondent states in reply that service was good because the Notices were sent to two generic email addresses, [ukservice@elizabetharden.com](mailto:ukservice@elizabetharden.com) and [ConsumerEU@revlon.com](mailto:ConsumerEU@revlon.com). It is argued that it was the responsibility of the Appellant to ensure that the communications were passed on to the appropriate persons.

### **Consideration of the evidence**

17. I fully accept the point made by the Environment agency that the integrity of the system must be maintained and that it is the responsibility of each enterprise operating within this jurisdiction to ensure compliance with the legal obligation imposed on it including those imposed under the Energy savings opportunity scheme.
18. But it is notable that no allowance was made in the consideration of culpability to the pandemic and the impact of that pandemic on the Appellant’s ability to note that important Notices were served by the Respondent by email to generic email addresses. Nor was any consideration given to the Appellant’s ability to comply with the time limits imposed.
19. The Appellant states that once the Company became aware of its default it did comply and there was full compliance by 17/12/2021. This is not disputed by the Respondent.

The Appellant feels aggrieved that no allowance was made for the exceptional circumstance of Covid and complains that service was not effective.

20. Somewhat surprisingly I could find no reference to specific service requirements for Enforcement notices and neither party has pointed me to any specific requirements, save that the Appellant has stated that the Notices should have been served on the Directors and not on a generic consumer email address.
21. In its own Enforcement Policy and Guidance the Environment agency sets out the principles to be applied in taking enforcement action. On the 28 April 2020 the Environment agency published its Response to the coronavirus pandemic which stated;-  
The Environment Agency's priority is to protect people and the environment and to support those we regulate.

We recognise the difficulties you are facing as a result of coronavirus (COVID-19). We expect you to take all reasonable steps to comply with regulatory requirements, using contingency plans to help you comply. If it is not possible to comply due to these exceptional circumstances, we expect you to:

- notify your usual regulatory contact
- minimise any unavoidable non-compliance
- minimise the effects of any unavoidable non-compliance
- prioritise complying with regulatory requirements that directly protect the environment and human health
- keep records showing why a non-compliance occurred, for example records of staff absences, contractors being unavailable or supply chain failures

We recognise that because of the coronavirus outbreak, you may be unable to comply fully with your regulatory requirements for reasons beyond your control. We will consider the appropriate enforcement response to any non-compliance during this time in line with our [Enforcement and sanctions policy](#) and take into account:

1. the extent to which you have followed our expectations as set out above
2. the impact of coronavirus on your activities, which should be supported by your records showing why the non-compliance occurred
3. the effect of any relevant [COVID-19 regulatory position statement](#)

We will keep this approach under review in line with all of the following:

- government guidance
- the changing circumstances of the coronavirus outbreak
- any other relevant factor

We will vary or withdraw this statement as appropriate.COVID-19 regulatory position statements

We have also published some time-limited [COVID-19 regulatory position statements \(RPSs\)](#) in relation to certain regulatory requirements. They will help minimise risks to the environment and human health where, for reasons beyond your control, compliance with certain regulatory requirements may not be possible due to coronavirus. They also cover specific circumstances where we are relaxing normal regulatory requirements. This is to avoid increasing risks to the environment or human health during the particular circumstances of the coronavirus outbreak.

Each COVID-19 RPS sets out when it applies and the conditions you must comply with. You must still comply with all your other regulatory requirements.

If you wish to use a COVID-19 RPS you must comply with both its:

- specific conditions – including any requirements to notify us or get our approval to use it
- requirements concerning pollution and harm to human health

If you do this, we will not normally take enforcement action against you”.

22. In the Respondent’s enforcement Policy, there is a section that expressly deals with how the Agency sets the final penalty amount. It reads,

“ 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)

These factors differ to those listed in the Guideline. We have selected applicable factors from the list. We have also taken factors from other steps in the Guideline. We have then adjusted and simplified them so they are relevant to the climate change schemes.

We will normally adjust a penalty within the range but, in some circumstances, we may move outside the range, including waiving the penalty.



If a public or charitable body provides sufficient evidence to show that the proposed penalty would have a significant impact on the provision of its services, we will normally substantially reduce the penalty from the starting point.

At the end of step 4 we will have calculated the final penalty amount.

23. In this case the Respondent did consider that the Appellant was not a new entrant to the scheme. The size of the enterprise was taken into consideration. Compliance had not taken place by the time the Penalty Notice was issued on 09/12/2021. It took place 8 days later. There was no review of the penalty after compliance had taken place 8 days after the Penalty notice was issued.

### **Findings**

24. I find that the Appellant did not comply with its obligations under the Energy savings opportunity scheme (ESOS) for the second period. The Appellant failed to comply with the Enforcement Notice dated 16/10/2020 requiring it to carry out an ESOS assessment and subsequently failed to file its report on time. I accept that compliance is essential to maintaining the integrity of the scheme.
25. I find that there were mitigating factors in this case that were not duly considered including in particular the impact of the Covid pandemic on the Appellant's business operation and its ability to comply within the time allowed with its obligations under ESOS.
26. I further find that the level of culpability of the Appellant company was not correctly assessed. I find that their behaviour was not negligent but was in the lower category of low or no culpability.
27. The Respondent's consideration of the very real issues surrounding the pandemic was unreasonable and disproportionate given the failure to file the report on time did not present any immediate enhanced risk to the environment or to people or animals.
28. I question the service methods used by the Agency, particularly during the pandemic. Communications were sent and Notices served by email to email addresses that were not used by management of the Appellant's business and the Environment Agency will have known this. The Respondent could have served the Notices on either of the Directors.
29. When the Appellant realised the default, it wrote to the Agency one week later and requested additional time for compliance. It was given very little time to comply, to get an assessment done and to file its report, particularly given that businesses were only just re-opening their offices after the pandemic and the Appellant had informed the Agency that its own offices would not be reopening until October at the earliest.
30. I find that there were factors that should have been taken into account in order to ensure a proportionate response to the Appellant's non-compliance. Service of the enforcement Notice should not have been effected using email addresses only given that the offices were shut. Service could have been effected on either of the two Directors by post given that their addresses were easily discoverable from the Companies house website. The Respondent has merely stated that it was for the Appellant to pass on the Notices to the

Directors. The Agency sent correspondence to the business headquarters knowing that they were not fully functional. The Appellant has stated that the Directors were not aware of the Enforcement proceedings and I accept that this is true given the method of service used by the Respondent. The Respondent did not make any enquiries to ensure that the management or the responsible person in the Appellant's business was aware of the enforcement proceedings.

31. No allowance was made for the Covid situation when looking at the lack of response from the Appellant. The guidance issued by the Environment agency quoted above suggests that there should be some leeway given due to the impact of the pandemic but there is no evidence of any such leeway having been given here.
32. The Environment Agency showed little or no engagement with the points made by the Finance Director in his email response dated 26 August 2021 to the ESOS communication requesting further details as to why there had not been compliance. On 09 December the Penalty notice was issued and there was no review when the relevant ESOS report was filed on 17/12/2021.
33. I have concluded that the level of culpability in this case was not as high as negligent because although there should have been compliance by 05 December 2019, the Enforcement notice was dated January 2021, this was 9 months into the Covid pandemic but no consideration was given to the impact of the pandemic. I find that the service of this Notice by email to two consumer email addresses without making any contact with the Appellant to ensure receipt in the context of the pandemic and empty offices, was not reasonable. Little was done to ensure that the Appellant had been made aware of the default. Nor in my view was any allowance made for the difficulties the Appellant was facing in completing the relevant assessment at a time of global pandemic. The Appellant did ultimately comply but no allowance has been made for this in any review of culpability.
34. I have concluded that the level of culpability falls within the lowest category of "Low or no culpability". The second example given of that level of culpability in the Policy is where such proper preventive measures were unforeseeably overcome by exceptional circumstances". The Covid pandemic amounted to exceptional circumstances that greatly affected the daily operations of the Appellant's business and its ability to comply with its obligations under the Energy savings scheme within the time limits imposed. No understanding was shown of the impact of the pandemic on the Appellant's business operations or its ability to comply.
35. The Respondent will now need to recalculate the level of the fine that it imposed, applying the formula in its enforcement policy applicable to the lowest level of culpability. I do not accept that the Appellant should not be subject to a civil penalty as it was in default before the pandemic started. But the Respondent's assessment of the level of culpability was factually incorrect and should be amended to Low or no culpability and the amount of the fine adjusted accordingly.

### **Decision**

36. The appeal is allowed and the Respondent is instructed to issue a revised Penalty notice to the Appellant re-assessing the level of the fine on the formula applicable to Low or No Culpability

Signed

A handwritten signature in black ink, appearing to read 'Ford', written in a cursive style.

First Tier Tribunal Judge Ford  
27/09/2022