



NCN: [2022] UKFTT 504 (GRC)

Case Reference: NV/2022/0011 ESOS

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(ENVIRONMENT)**

Heard at: Determination on the papers, in Chambers

Heard on: 22 August 2022

Before: Judge Alison McKenna

KEELHAM FARM SHOP LIMITED

Appellant

- and -

THE ENVIRONMENT AGENCY

Respondent

DECISION

1. The appeal is dismissed. The Enforcement Notice dated 20 November 2020 is affirmed.

REASONS

Background

2. The Appellant appeals against the Enforcement Notice dated 20 November 2020, served by the Respondent pursuant to regulation 39 of the Energy Savings Opportunity Scheme Regulations 2014¹ (“ESOS Regulations”). The Respondent opposes the appeal.

¹ [The Energy Savings Opportunity Scheme Regulations 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

3. The Enforcement Notice required the Appellant to carry out an ESOS assessment in accordance with Part 4 of the ESOS Regulations and report the ESOS assessment to the Environment Agency in accordance with Part 5 of the ESOS regulations by 22 February 2021. Alternatively, it offered the Appellant the opportunity to provide evidence in writing that Keelham Farm Shop Ltd was not subject to the requirements of ESOS by the same date. By virtue of regulation 49 ESOS, the requirements of the Enforcement Notice have been suspended pending determination of this appeal.

4. The Appellant was given permission to file its Notice of Appeal out of time. The Respondent was given an extension of time in which to file its Response. The Appellant has not filed a Reply.

5. 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 amended². The Tribunal has considered all the evidence and submissions made by both parties in a bundle numbered 1 to 24.

The Law

6. ESOS is a mandatory energy assessment and energy saving scheme which applies to certain undertakings in the United Kingdom. The ESOS Regulations implement Article 8(4), (5) and (6) of Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency and came into force on 17 July 2014³.

7. The ESOS Regulations provide the definitions of ‘responsible undertakings’ which are required to comply with ESOS by undertaking an energy audit. Paragraph 1 of Schedule 1 to the ESOS Regulations provides that a ‘large undertaking’ is one which either (i) employs at least 250 persons, or (ii) has an annual turnover in excess of 50 million euro and an annual balance sheet total in excess of 43 million euro. Paragraph 11 of Schedule 1 provides that a large undertaking remains defined as such until it has met the definition of a medium or small undertaking for two consecutive accounting periods.

8. The ESOS Regulations provide a rolling formula for calculating the ‘qualification date’ by reference to which an undertaking is defined as a ‘large undertaking’. In this appeal there is no dispute that the relevant date was 31 December 2018.

9. The Enforcement Notice which is the subject of this appeal was issued under regulation 38 of the ESOS Regulations. Undertakings which fail to comply with an Enforcement Notice may be subject to penalties pursuant to regulation 45 of the ESOS Regulations. Regulation 38 provides that:

² [General Regulatory Chamber tribunal procedure rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404222/General_Regulatory_Chamber_tribunal_procedure_rules_-_GOV.UK_(www.gov.uk).pdf)

³ [Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC \(Text with EEA relevance\) \(legislation.gov.uk\)](https://eur-lex.europa.eu/eli/dir/2012/27/oj/contents)

38.—(1) In any case where the relevant compliance body reasonably believes that a responsible undertaking has failed to comply with a requirement of these Regulations, that compliance body may serve a notice on that responsible undertaking in accordance with this regulation (an “enforcement notice”).

10. Regulation 51 of the ESOS Regulations provides for the service of Notices as follows:

51. Any determination or notice required to be served on a responsible undertaking, may be served by—

(a) delivering or sending it to, or leaving it at—

(i) the responsible undertaking’s registered office (where applicable),

(ii) the responsible undertaking’s principal place of activity, or

(iii) another address in the United Kingdom specified by the responsible undertaking as its address for service, or

(b) sending it by electronic means to the email address provided by the responsible undertaking pursuant to paragraph 1(b) of Schedule 3.

11. This appeal is made under regulation 48 of ESOS, which provides that:

48. (1) A responsible undertaking served 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.

12. Under regulation 50 of the ESOS Regulations, the Tribunal has power when determining an appeal to:

(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, any thing which is within the power of the scheme administrator or compliance body.

Submissions and Evidence

13. The Appellant’s Notice of Appeal dated 24 February 2022 relies on grounds of appeal set out in a letter dated 11 December 2020. These are (i) that the Enforcement

Notice is 'defective' by reason of being addressed to the Appellant's former registered address; (ii) that the requirements of the Notice are onerous and unnecessary because, whilst it is accepted that the Appellant was a 'large undertaking' on the qualification date of 31 December 2018, it has since then been subject to a de-merger and currently employs fewer than the requisite 250 employees.

14. The Employer has not provided the Tribunal with any evidence in support of its grounds of appeal. In particular, it has not provided accounting information directed to paragraph 11 of Schedule 1 to the ESOS Regulations. It asks the Tribunal to cancel the Notice and direct that it has no obligation to carry out an ESOS assessment.

15. The Respondent provided a Response to the appeal dated 3 May 2022. The Respondent notes that the Appellant's grounds of appeal do not address the matters specified in regulation 48 of the ESOS Regulations. The Appellant's grounds of appeal are opposed on the basis that (i) notwithstanding the accepted use of an out-of-date postal address, good service of the Notice was effected electronically in accordance with regulation 51(b) of the ESOS Regulations to an email address at which the Appellant had previously corresponded with the Respondent; and (ii) the Appellant has explicitly accepted that at the qualification date it was a 'large undertaking' and so required to comply with its ESOS obligations, although it states that its situation changed thereafter. The Regulator submits that, in all the circumstances, the appeal should be dismissed, and the Notice affirmed.

16. The Appellant has not filed a Reply challenging the Respondent's Response, and so I understand it to accept that the Notice was served electronically as stated.

Conclusion

17. Although the Appellant has not directly addressed regulation 48 of the ESOS Regulations, I consider that its ground of appeal (i) amounts to an error of law challenge and that its ground of appeal (ii) amounts to an unreasonableness challenge.

18. Having considered all the evidence and submissions, I find that the Enforcement Notice was in an appropriate form, and I accept the Respondent's unchallenged submission that it was validly served on the Appellant by email on 20 November 2020. For that reason, I find that ground of appeal (i) does not succeed.

19. I also find that, on the qualification date, the Appellant was a 'large undertaking' under paragraph 1 of Schedule 1 to the ESOS Regulations and so required to undertake the steps specified in the Enforcement Notice. As this is explicitly accepted by the Appellant, I find that ground of appeal (ii) also does not succeed. I do not find it to be unreasonable for the Respondent to serve an Enforcement Notice on an undertaking which accepts it has not complied with its legal obligations.

20. I note the Appellant's comments about its subsequent change of circumstances and would suggest that it considers providing accounting information to the Environment Agency in order to address its claimed change of status under paragraph 11 of Schedule 1 to the ESOS Regulations. This may affect its obligations going forward but does not assist it retrospectively.

21. In all the circumstances I find that the Appellant's grounds of appeal do not succeed and so I now dismiss this appeal and affirm the Enforcement Notice dated 20 November 2020.

(Signed)

JUDGE ALISON MCKENNA

DATE: 22 August 2022

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