THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-000882-GEPN
[2022] UKUT 317 (AAC)
ENVIRONMENT AGENCY V TAYLOR ENGINEERING AND PLASTICS LTD

Decided without a hearing

Representatives

Appellant	Paul Collins, Senior Lawyer
Respondent	Not legally represented

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	NV/2021/0030
Decision date:	9 May 2022 and amended on 5 July 2022
Hearing:	Decided on the papers

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the appeal to the First-tier Tribunal against the Notice of a Financial Penalty issued on 20 October 2021 is dismissed. The suspension on the effect of the First-tier Tribunal's decision no longer applies.

REASONS FOR DECISION

Abbreviations

EA the Environment Agency

TEPL Taylor Engineering and Plastics Ltd

A. What the appeal is about

1. This is one of two cases that raise the same issues; the other case is *Environment Agency v Amphenol Invotec Ltd* UA-2022-000887-GEPN [2022] UKUT 318 (AAC). The same judge decided both cases. The principal issue is whether the First-tier Tribunal

has power to reduce as disproportionate the amount of a financial penalty imposed by EA for breach of the reporting requirements under a climate change agreement. I have decided that it does not. The other issue relates to the changes the judge made to the decision after it was promulgated.

B. Climate change agreements

2. Climate change agreements are described on the www.gov.uk website:

> Climate change agreements are voluntary agreements made between UK industry and the Environment Agency to reduce energy use and carbon dioxide (CO_2) emissions. In return, operators receive a discount on the Climate Change Levy (CCL), a tax added to electricity and fuel bills. The Environment Agency administers the CCA scheme on behalf of the whole of the UK.
>
> …
>
> There are 2 types of CCA – umbrella agreements and underlying agreements.
>
> The Department of Energy and Climate Change and industry sectors negotiated energy efficiency targets for each sector – the sector commitment. The targets were then included in umbrella agreements held between sector associations and the Environment Agency. Umbrella agreements also list the processes that are eligible for a CCA. In 2020 BEIS negotiated new targets for 2021 and 2022.
>
> An underlying agreement is held by an operator for a site, or group of sites, within a particular sector. It contains energy or carbon efficiency targets appropriate for their type of operation derived from the umbrella agreement.

3. Reporting is an important feature of a climate change agreement, because it is a condition for the reduction in the climate change levy. As www.gov.uk explains:

> An operator that has a CCA must measure and report its energy use and carbon emissions against agreed targets over 2-year target periods up to the end of 2022.
>
> If an operator has more than one eligible facility in the same sector it can hold an individual CCA for each facility, or choose to group them together under one CCA. Where facilities are grouped under one CCA the target is then shared across the grouped facilities.
>
> Once a facility, or group of facilities, is included in a CCA, it is referred to as a target unit.
>
> If the operator's target unit meets its targets at the end of each reporting period, the facilities continue to be eligible for the discount on the CCL.

C. The legislation

4. The Climate Change Agreements (Administration) Regulations 2012 (SI No 1976) apply in this case. The relevant provisions are made under the authority of paragraphs 52D to 52F and 146 of Schedule 6 to the Finance Act 2000.

Relevant enabling power

5. I need only quote paragraph 52F, which deals with appeals:

(1) Regulations may confer power on the Administrator—

(a) to impose a financial penalty of a specified amount on a person who, as a representative of a facility to which a climate change agreement applies, contravenes a term of the agreement,

…

(4) If regulations falling within sub-paragraph (1) or (2) are made, the regulations must also—

(a) confer rights of appeal against a decision taken by the Administrator to impose a financial penalty or to terminate a climate change agreement (as the case may be), …

Relevant Regulations:

6. Regulation 14 provides for the duty to report to be a term of the agreement:

14 Terms to be included in an underlying agreement relating to the provision of information

(1) An underlying agreement must contain the terms set out in paragraph (2).

(2) The terms referred to in paragraph (1) are that the operator must—

(a) provide to the administrator on or before 1st May following the end of a target period such information as has been requested by the administrator in order to determine whether progress towards meeting the target is, or is likely to be, taken to be satisfactory; and

(b) provide any other information requested at any time by the administrator by the date specified in the request to enable the administrator to determine that—

(i) the target has been met; or

(ii) the operator is complying with the terms of the underlying agreement.

7. Regulation 15 provides for financial penalties:

15 Financial penalties

(1) The administrator may impose a financial penalty on an operator if the operator—

(a) fails to provide information in accordance with regulation 14(2)(a) or (b);

(b) provides inaccurate information under regulation 14(2)(a);

(c) provides inaccurate information under regulation 14(2)(b); or

(d) fails to make any other notification required under the terms of an underlying agreement.

(1A) This paragraph applies in respect of a penalty that may be imposed under paragraph (1)(a) … on—

(a) the operator of a target unit which does not include a greenfield facility; or

(b) the operator of a target unit which includes a greenfield facility, if the penalty notice is served at any time after the expiry of the 12 month period starting on the date of an underlying agreement.

(2) If paragraph (1A) applies, the amount of the financial penalty that may be imposed under paragraph (1)(a) … is the greater of—

(a) £250; or

(b) 0.1 x (X-Y)

where X represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year for the relevant target period if the supplies were not reduced rate supplies, and where Y represents the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year for the relevant target period if the supplies were reduced rate supplies.

(2A) This paragraph applies in respect of a penalty which may be imposed under paragraph (1)(a), (c) or (d) on the operator of a target unit which includes a greenfield facility, if the penalty notice is served at any time during the 12 month period starting on the date of an underlying agreement.

(2B) If paragraph (2A) applies, the amount of the financial penalty that may be imposed under paragraph (1)(a), (c) or (d) is the greater of—

(a) £250; or

(b) 0.1 x (A-B).

(2C) In paragraph (2B)—

(a) A represents the administrator's reasonable estimation of the amount of levy that would be payable on supplies of taxable commodities to the target unit during a 12 month period starting on the date of the underlying agreement if the supplies were not reduced rate supplies; and

(b) B represents the administrator's reasonable estimation of the amount of levy that would be payable on supplies of taxable commodities to the target unit during a 12 month period starting on the date of the underlying agreement if the supplies were reduced rate supplies.

(3) The amount of the financial penalty that may be imposed under paragraph (1)(b) is the greater of—

(a) £250; or

(b) whichever of the following applies—

(i) £12 per tCO2 equivalent of the difference between the actual emissions and the reported emissions for target period 1, target period 2, target period 3 or target period 4;

(ii) £18 per tCO2 equivalent of the difference between the actual emissions and the reported emissions for target period 5.

8. Regulations 20 to 23 provide for appeals:

20 Right of appeal

(1) Where a financial penalty is imposed under regulation 15, the operator may appeal to the First-tier Tribunal ('the Tribunal') against the decision to impose the penalty.

…

21 Grounds of appeal

The grounds on which a person may appeal a decision under regulation 20 are—

(a) that the decision was based on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unreasonable;

(d) any other reason.

22. Effect of an appeal

The bringing of an appeal suspends the effect of the decision pending the final determination by the Tribunal of the appeal or its withdrawal.

23 Determination of an appeal

(1) On determining an appeal under regulation 20(1) against the imposition of a financial penalty the Tribunal must either—

(a) confirm the penalty;

(b) reduce the penalty; or

(c) quash the penalty.

(2) On determining such an appeal, the Tribunal may allow an extension of time for payment of the penalty.

D. What led to the appeal to the First-tier Tribunal?

9. On 4 May 2021, EA sent a Notice of Contravention and Intent to Impose a Financial Penalty to TEPL. The contravention was the failure to report data showing progress towards meeting TEPL's climate change agreement target for 2019 and 2020. On 20 October 2021, EA sent a Notice of a Financial Penalty to TEPL in the amount of £2,636.64. That amount was fixed under regulation 15(2)(b).

10. The Notice explained why EA had decided to impose the penalty. It referred to this as exercising its discretion. EA considered that TEPL had been negligent in failing to report on time as it did not have appropriate systems in place to ensure that it complied with its duty under its climate change agreement. It accepted that there was no financial gain to the company. The notice is contradictory on previous non-compliance. It stated that there was no previous history of non-compliance, but also that a waive notice for the previous period had been issued when the report was late.

11. TEPL appealed against the decision to the First-tier Tribunal. Its grounds of appeal were that the failure was a result of unfortunately circumstances. There were that: (a) the previous company secretary had retired without highlighting the need to report; (b) the company's email system had filtered out the reminders it received; and (c) the files relating to the report had been moved into storage and archived.

E. The First-tier Tribunal's decision

12. The tribunal decided to reduce the amount of the penalty. This was its reasoning:

> 13. The appellant was at fault in not filing its TP4 report on time, and that is not in issue. What is in issue is the proportionality of the environment agency response. The factors determining the environment agency's response to the imposition of civil penalties are set out in ~~guidance~~ the Environment Agency Enforcement and Sanctions Policy that is publicly available.
>
> 14. The Environment agency takes into account the nature of the breach, the culpability of the organisation, the size of the organisation, financial gain, any history of non-compliance, the attitude of the non-compliant person and any personal circumstances.
>
> 15. The ~~guidance~~ Environment Agency Enforcement and Sanctions Policy states that the nature of the breach assessment is the seriousness of the breach based on the impact it has on the integrity of the scheme. This means the trust in, transparency, reliability and effectiveness of the scheme. It may include the length of time a person has been required to comply with the law. Maintaining the integrity of the scheme is vital to reduce the U.K.'s contribution to climate change.
>
> 16. The Penalty notice issued by the environment agency gives little indication of the Agency having considered the mitigating factors that were identified by the appellant in the notice of appeal and in correspondence with the Environment agency when explaining why the report was filed late.
>
> 17. The appellant was certainly at fault and acknowledges the fault. I can see no consideration of the good reporting history of the appellant up until the TP4 report. The handover from one company secretary to another was clearly not handled well and the emails went astray and a reporting deadline for TP4 was missed.
>
> 18. But the company history of reporting was good, the report was filed albeit six weeks late and the company showed a clear appreciation of its own failure to comply with the reporting requirements and has identified the steps it has taken to ensure that this does not happen again.
>
> 19. I find that the failures were not deliberate and there was no intention to breach the regulations or obligations under those regulations. The oversight was negligent. The Environment agency does not dispute that the problem arose due to negligence which is a lower level of culpability than reckless or deliberate behaviours. It may have considered the size of the organisation but does not make this clear. No express consideration appears to how late the filing of the report actually was and the fact that it was filed within six weeks of the deadline.

> 20. Whilst I recognise that it is essential to maintain the integrity of the system, I am satisfied that given the level of culpability on the part of the appellant, the acknowledgement of culpability and the taking of immediate steps to rectify the situation once it was realised, combined with the good reporting history of the company, the penalty ultimately imposed by the environment agency was disproportionate.
>
> 21. Under Regulation 23 of the CCA (Administration) Regulations 2012 (as amended), the Tribunal can in this appeal, confirm the penalty, reduce the penalty or quash the penalty.
>
> 22. Having considered all of the evidence in this case, the Tribunal decides that the amount of the penalty should be reduced to £750 representing a more appropriate figure for a first breach of the reporting requirements under the regulations.
>
> 23. I do not accept that the Notice should be quashed because there was clear default in reporting on the part of the Appellant.
>
> 24. The appeal is allowed, to the extent that the decision is varied to substitute a penalty of £750 payable within 8 weeks of the date of notification of this decision.

13. That is the text as amended. The changes in paragraphs 13 and 15 are some of the changes made after the decision was promulgated. The major change was to paragraph 1. As amended, that paragraph consists of just over nine lines, of which only the opening words (‘The appellant seeks the’) survived from the original. The amendments were made because the tribunal had written the decision as if the appeal had been against the decision to issue a Notice of Contravention and Intent. Despite the amendments made, the decision still referred to the penalty being £2,719, which was the amount specified in the Notice of Contravention and Intention, rather than the slightly lower amount specified in the financial penalty. I come back to the changes later.

F. The First-tier Tribunal’s powers are not wider than those of EA

14. Whatever the tribunal’s process of thought at the time when it decided the appeal, its reasons show that it believed it had power to confirm the decision to impose a penalty, but to reduce the amount of that penalty to one that was more proportionate. That was wrong and an error of law.

15. First, a reminder of regulation 23, which the tribunal relied on in paragraph 21 of its written reasons:

> **23 Determination of an appeal**
>
> (1) On determining an appeal under regulation 20(1) against the imposition of a financial penalty the Tribunal must either—
>
> (a) confirm the penalty;
>
> (b) reduce the penalty; or
>
> (c) quash the penalty.

(2) On determining such an appeal, the Tribunal may allow an extension of time for payment of the penalty.

It is easy to read regulation 23(1)(c) as authorising the tribunal to reduce the penalty from the amount that would be otherwise payable under regulation 15. But it has to be read in the context of the Regulations as a whole.

16. Regulation 20(1) provides for an appeal 'against the decision to impose the penalty.' That reflects the language of the enabling power in paragraph 52F(4)(a) of Schedule 6 to the Finance Act 2000: 'rights of appeal against a decision taken by the Administrator to impose a financial penalty'. That power sets the limit to the scope of the appeal. An appeal is authorised against and only against 'a decision … to impose a financial penalty'.

17. Regulation 20(1) expressly refers back to regulation 15. Regulation 15(1) provides that EA 'may impose a financial penalty'. That language does not create a duty to impose a penalty, only power to do so. Elsewhere the Regulations provide that things 'must' be done; regulation 14 is an example. The choice of 'may' is significant. It confers a power; that is the language of the enabling provision in paragraph 52F(1)(a) of Schedule 6. EA calls it a discretion, but I do not need to consider whether that is a proper classification.

18. Having conferred the power to impose a penalty, regulation 15(1A) to (3) provide for the amount of the penalty. Those paragraphs set out three calculations and the circumstances in which each applies. It is the phraseology that matters rather than the actual terms. I take paragraphs (1A) and (2) as an example. Paragraph (1A) provides that it 'applies in respect of a penalty that may be imposed'; paragraph (2) provides that 'the amount of the financial penalty that may be imposed … is the greater of …'.

19. Just looking at paragraphs (1A) and (2), EA has to select the appropriate amount of the penalty from those available. There is no scope for EA to impose a different amount. Paragraph (2) uses the word 'may' but then provides that the amount of the penalty 'is' the greater of the sums specified. That is prescriptive. If the paragraph applies, it dictates the amount and that is the amount that EA must use as the financial penalty. The only choice is whether or not to impose a penalty, not the amount.

20. So much for EA, but what about the First-tier Tribunal? Why does it not have wider powers than EA?

21. The only argument in favour of the tribunal having such a power is regulation 23(1)(b). However, that only appears possible when that provision is read in isolation. It only applies on the determination of an appeal. Before it can apply, there has to be an appeal. And there can only be an appeal against a decision to impose a penalty. That is what regulation 20(1) provides and that is all that paragraph 52F(4)(a) of Schedule 6 authorises. The decision to impose a penalty is made under regulation 15, which must be read as a whole. Read as a whole, it does not make separate provisions for (a) the imposition of a penalty and (b) its calculation. What it does is to make a composite provision for the imposition of a penalty of a particular amount. That is why paragraphs (1A) and (2) use the word 'may'. They pick up the language of paragraph (1). They do so because they are giving substance to that paragraph by specifying how the amount of the penalty is calculated. That amount is an integral part of the penalty

imposed. As such, it is part of the decision to impose a penalty which is the only subject of an appeal under regulation 20(1).

22. This does not render regulation 23(1)(b) redundant. The tribunal could still reduce the penalty if EA had used the wrong calculation or made a mistake in making the calculation. But the tribunal can do so only because that is part of 'the decision to impose the penalty'. Within that appeal, it can check that EA imposed the correct penalty in the circumstances of the case and change it if it didn't. But there is no scope within regulation 15 to impose a penalty for an amount that is different from the amount derived from the appropriate calculation.

23. That leaves this question: why can regulation 23(1)(b) not authorise the tribunal to substitute a different amount? The answer to that lies in the nature of an appeal. All appeals are statutory. In theory, therefore, they can take any form that Parliament or, in this case, a Minister provides. Appeals generally comply with some basic features, although details differ. As a matter of interpretation, any departure from those basic features would need to be made clear. One feature is that a primary purpose of an appeal is to 'redress error': see Lord Westbury LC in *Attorney-General v Sillem* (1864) 11 ER 1200 at 1209. Another feature that follows from redressing error is that on appeal 'analysis … becomes clarified and refined': see Rix LJ in *Compagnie Noga D'Importation and Exportation SA v Abacha* [2001] 3 All ER 513 at [47]. Or as the Canadian Supreme Court put it in *Housen v Nikolaisen* [2002] 2 SCR 235:

> 14. … appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

It is hardly consistent with those features for the tribunal to have wider powers than EA. That result can only be achieved by reading regulation 23(1)(b) in isolation from the subject matter of the appeal and the nature of that subject matter under regulation 15.

G. The amended reasons

24. I have already mentioned the changes the judge made to the written reasons. The changes were to the subject matter of the appeal and to the legislation, guidance and policy that the tribunal had to apply. Either the judge was confused when the decision was made or muddled when the reasons were written. It is astonishing that a judge could have been so confused or muddled. To make matters worse, the judge made no changes to the substance of the reasons for decision, which suggests that it was not affected by the confusion. I am at a loss to understand how these mistakes were made and how the changes came to be necessary.

25. I am also at a loss as to the legal basis on which the changes were made. The judge's only comment was in the grant of permission to appeal:

> The Environment Agency has sought amendments to the original decision to enhance clarity and some of these have been accepted and an amended decision issued.

I assume that the request for amendments was made as part of the application for permission to appeal. That is how they were dealt with. It may be that there are internal documents that I have not seen that would explain the process that the judge followed.

26. Some judges adopt the practice of issuing a decision in draft for comment before finalising it. That would have allowed the changes in this case to be made. That is not, though, what happened here. I mention it only because it is one way to avoid issuing a decision as defective as this one was.

27. There are two ways that reasons may be altered after a decision has been issued.

The slip rule

28. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976) contain what is commonly called a slip rule:

> **40. Clerical mistakes and accidental slips or omissions**
>
> The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by—
>
> (a) sending notification of the amended decision or direction, or a copy of the amended document, to each party; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document.

29. That rule applies to mistakes that arise from momentary inattention when drafting. It does not apply to the nature of the changes that were made in this case.

Review

30. Section 9 of the Tribunals, Courts and Enforcement Act 2007 provides a review procedure that allows the First-tier Tribunal to correct its own mistakes:

> **9 Review of decision of First-tier Tribunal**
>
> (1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> …
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.

Those powers are subject to the tribunal's rules of procedure:

> **44 Review of a decision**
>
> (1) The Tribunal may only undertake a review of a decision—
>
> (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision.

> (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
>
> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

31. The nature of the changes made would amount to an error of law for the purposes of rule 44(1)(b), but there is nothing before me to show that the tribunal was exercising that power or followed the procedure in rule 44(2) and (3).

Conclusion

32. As far as I can tell, there was no power to make the changes to the original decision. That means that I could decide whether the decision was made in error of law as originally issued. In the event, it does not matter whether I take that approach or not. The tribunal made the same mistake about the scope of its jurisdiction in both versions, so its decision must be set aside.

H. Disposal

33. As I have identified an error of law in the First-tier Tribunal's decision, I have set it aside. I now need to decide whether to re-make the decision or remit the case for a rehearing.

34. TEPL have responded to the appeal saying:

> Having read the ruling, we are happy to accept and comply. We will make payment as soon as advised.

That must refer to the grounds of appeal rather than to my case management directions, as the latter did not contain any analysis of the issues or indication of the likely outcome. as TEPL are not legally represented, I have not taken their response as a formal concession, but have considered for myself whether to re-make the decision or remit the case for rehearing. Having done so, I have re-made the decision. The tribunal decided (paragraph 23 of its written reasons) that it was appropriate to impose a penalty. That left the amount of the penalty. I have found no mistake in the way EA identified the appropriate calculation and then made the calculation. In those circumstances, I can see no value in a rehearing.

Authorised for issue
on 28 November 2022

Edward Jacobs
Upper Tribunal Judge