THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-000887-GEPN
[2022] UKUT 318 (AAC)
ENVIRONMENT AGENCY V AMPHENOL INVOTEC 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/2021/0031
Decision date:	5 May 2022 and amended on 6 June 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 Environment Agency's Notice of a Financial Penalty 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

AIL Amphenol Invotec 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 Taylor Engineering and Plastics Ltd* UA-2022-000882-GEPN [2022] UKUT

317 (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. Inevitably, there is a lot of repetition between the two decisions.

2. The other issue relates to the changes the judge made to the decision after it was promulgated. I dealt with that in detail in *Taylor Engineering* and there would be no value in repeating what I said there.

B. Climate change agreements

3. 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.

4. 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

5. 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

6. 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:

7. 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.

8. 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.

9. 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. EA's enforcement and sanctions policy

10. This policy is available online. The tribunal referred in its written reasons. These are the relevant parts:

2. Outcome focused enforcement

The 4 outcomes we want to achieve are to:

- stop illegal activity from occurring or continuing
- put right environmental harm or damage, also known as restoration or remediation
- bring illegal activity under regulatory control, and so in compliance with the law
- punish an offender and deter future offending by the offender and others

To get the best outcome for the environment and for people, we will use the full range of enforcement and sanctioning options available to us.

3. Enforcement and sanction regulatory principles

We must follow the requirements of the Regulators' Code. It is a framework for how regulators should engage with those they regulate.

…

The requirements of the code do not apply where:

- we can demonstrate that immediate enforcement action is required to prevent or respond to a serious breach of the law
- following it would defeat the purpose of the proposed enforcement action

We believe in firm but fair regulation. To meet this commitment we apply the following principles when we carry out enforcement activities.

3.1 Act proportionately

We will act proportionately when we apply the law. We will take account of and balance the:

- risk posed to people and the environment
- seriousness of the breach of the law
- impact on the environment, people and legitimate business
- cost of taking enforcement action against the benefit of taking it
- impact on economic growth

3.2 Have regard to the growth duty

We will have regard to the growth duty and guidance. This means we will only take enforcement action or impose a sanction when we need to and in a proportionate way.

We must protect people and the environment. We will make sure our enforcement action supports rather than hinders legitimate business.

We will not allow operators to pursue economic growth at the expense of protecting people and the environment.

We will deal with non-compliant activity and behaviour appropriately because it harms:

- people and the environment
- businesses that are compliant – it can disrupt competition and act as a disincentive to invest in compliance

Our approach to making decisions on the RES Act, climate change and mercury civil penalties (as set out in annexes 1 to 3) takes account of the growth duty.

The decision to start a prosecution and any decisions we make during proceedings are not subject to the growth duty.

3.3 Be consistent

Consistency means taking a similar approach in similar circumstances to achieve similar ends. We aim to be consistent in:

- the advice we give
- our response to breaches of the law

- the use of our powers and decisions on whether to prosecute
- how we choose what sanction is appropriate in similar factual circumstances

This does not mean every enforcement decision on what action to take will be exactly the same, as each set of circumstances may differ. Our staff will use their professional judgement and discretion, taking account of many factors, such as the:

- scale of environmental impact
- attitude and actions of individuals and managers of businesses
- history of previous breaches and/or offences

3.4 Be transparent

We will make clear to people and businesses we regulate:

- what they have to do to comply with the law
- what they can expect from us
- what breach or offence we think has been or is being committed
- why we intend to take or have taken enforcement action
- their right to make representations or to appeal

This document sets out our policy for dealing with breaches and offences. It shows how we have made sure our actions are understood by those we regulate.

11. Paragraph 3 of that policy refers to the Regulators' Code. This operates under the Legislative and Regulatory Reform Act 2006. Section 21 provides:

21 Principles

(1) Any person exercising a regulatory function to which this section applies must have regard to the principles in subsection (2) in the exercise of the function.

(2) Those principles are that—

(a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;

(b) regulatory activities should be targeted only at cases in which action is needed.

(3) The duty in subsection (1) is subject to any other requirement affecting the exercise of the regulatory function.

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

12. On 4 May 2021, EA sent a Notice of Contravention and Intent to Impose a Financial Penalty to AIL for failure to report data showing progress towards meeting the company's climate change agreement target for target period 4, 2019. This was followed by a Notice of a Financial Penalty in the amount of £3,058.30.

13. AIL's failure arose from a combination of circumstances. In summary: (a) the company's reporting was handled by the Surface Engineering Association [SEA]; (b) SK, the responsible person in AIL, was not aware of the obligation to report and was ill; (c) another person had dealt with the report for Target Period 3; and (d) emails went into junk.

14. AIL exercised its right of appeal to the First-tier Tribunal, which decided that the amount of the penalty was disproportionate and reduced it to £750.

F. The First-tier Tribunal's decision

The tribunal's reasons

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

> 17. The Respondent accepts that the non-compliance was negligent and not deliberate. The Respondent states that once a decision is made to impose a penalty that the Respondent has no discretion to alter the amount fixed under the Regulations. It is correct that under the Regulations while the Respondent has a discretion as to whether a penalty is imposed, if it decides that it should be then it has no discretion as to the amount of the penalty. This on the face of it seems inconsistent with the Environment Agency enforcement and sanctions policy that sets out the principles that should be considered by the Agency in deciding on penalties I see no reason why these principles should not be equally considered in deciding the amount of any penalty as well as whether to impose one or not. Otherwise, there is no point to the mitigation provisions.
>
> 18. The principles are that the Respondent should act proportionately, have regard to the growth duty (impact on the environment and preventing competitive advantage through non-compliance), consistency, transparency, targeting for enforcement action and accountability.
>
> 19. The aims stated are to change offender's behaviour, remove any financial gain from any breach, be responsive and consider what is appropriate, be proportionate, take steps to ensure that any harm is minimised, and any damage restored and deter future breaches.
>
> 20. While the Environment Agency has no discretion to reduce the penalty from the statutory formula calculation the Tribunal does. Considering this issue I have considered the factors set out above. I find that inadequate consideration was given to the proportionality of the full fine being payable without taking into account the Covid situation and the impact on the Appellant's operations, the failure of SEA to inform the Appellant or SK that he was now responsible for the reporting, the fact that this was the first non-compliance and the Company having a good history of compliance in the past. I find that the Company did take steps to rectify the situation and did file the report in August 2021, which is three months late but it was done. The Appellant is now well aware of the need to keep a close eye on its reporting obligations, monitor emails from the SEA and the Environment Agency and respond without delay.
>
> 21. I find that the amount of the fine was disproportionate for a first breach and substitute a fine of £750 with time for payment being 28 days from the service of this decision on the parties.

What was wrong with those reasons

16. There are a number of mistakes in those reasons. I will set them out, but do not need to rely on all of them to set the decision aside for error of law. For that purpose,

it is sufficient that the tribunal was wrong to treat itself as having the power to reduce the amount of the penalty on the ground that it was disproportionate.

17. First, the tribunal found that EA had no power to reduce the amount of a penalty from the statutory formula calculation. It commented that this seemed inconsistent with the enforcement and sanctions policy. I see no inconsistency. To the extent that the policy follows the Regulators' Code, section 21(3) of the Legislative and Regulatory Act 2006 provides that the Code is subject to any other requirement affecting the exercise of the regulatory function. If the legislation provides otherwise, there is no inconsistence.

18. Second, the tribunal did not explain how it acquired a power that EA did not have. That required a justification. The same judge, in *Taylor Engineering*, referred to and relied on regulation 23(1)(b). In this case, the judge set out the terms of that provision in paragraph 3 of the written reasons and quoted the whole of the regulation along with other legislation in paragraph 4, but did not otherwise mention it, still less rely on it. I explain later why the tribunal did not have that power.

19. Third, the tribunal did not explain how it acquired the power to apply the criteria from the policy. The policy is EA's policy and the statutory code applies to EA as a regulator. It was not the tribunal's policy and the tribunal was not a regulator. It needed to explain how the criteria could be used by the tribunal when they could not be used by EA. I accept that the tribunal did not say that it was applying the policy or the code, but its reasoning in paragraph 20 applies the criteria from both.

G. The First-tier Tribunal's powers are not wider than those of EA

20. This is the same reasoning that I explained in *Taylor Engineering*.

21. 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.

22. 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'.

23. 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.

24. 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 …'.

25. 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.

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

27. 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).

28. 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.

29. 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.

30. AIL have responded to the appeal, but the response does not address the legal issue of the tribunal's powers, as EA's reply points out.

H. AIL's response to the appeal

31. AIL responded to the appeal, but the response does not address the legal issue of the tribunal's powers, as EA's reply points out.

I. Disposal

32. Having identified an error of law in the tribunal's decision, I set it aside. The First-tier Tribunal's approach accepted that EA was entitled to impose the penalty. That was correct. The circumstances in which the failure occurred were all ones that could have been anticipated and avoided in a company that had effective procedures to comply with its duty to report. The only issue is the amount of the penalty. That was correctly set by EA. A rehearing is not necessary to restore that by setting aside the tribunal's decision, so I have re-made the decision to restore the Penalty Notice as issued by EA.

Authorised for issue
on 28 November 2022

Edward Jacobs
Upper Tribunal Judge