FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference:	**MAN/00FA/HNA/2022/0047**
HMCTS code (audio,video,paper):	**V:FVHREMOTE**
Property:	**2 Clifton Gardens, St George's Road, Hull HU3 3QB**
Applicant:	**J.H.Coventry**
Respondent:	**Hull City Council**
Type of Application:	**Appeal against financial penalty- Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020**
Tribunal Members:	**Judge J.M.Going** **P.Mountain**
Date of Video Hearing :	**22 March 2023**
Date of Decision :	**25 March 2023**

DECISION

The Decision and Order

The Final notice is to be varied by amending the financial penalty to £750 to be paid within the period of 28 days beginning with the day after that on which this Decision is posted to the parties.

Preliminary

1. By an Application dated 23 June 2022 the Applicant ("Mr Coventry") appealed to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under regulation 11 of the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 ("the Regulations") against the Respondent's ("the Council")'s issue on 30 May 2022 of a final notice ("the Final notice") requiring the payment of a financial penalty of £2,500, after it had been satisfied that he, as the landlord of the property, had failed to comply with regulation 3 of the Regulations by reason of "failing to ensure the first inspection and testing was carried out by 1 April 2021 in relation to an existing specified tenancy".

2. The Tribunal issued directions on 6 October 2022 setting out a timetable for documents to be supplied, and both parties subsequently provided a bundle of relevant documents including written submissions which were copied to the other.

The Facts and Chronology

3. The following facts and timeline of events are confirmed from an analysis of the papers. None have been disputed, except where specifically referred to.

On 7 November 2008	The property was transferred to Mr Coventry's sole name. (His address on copies of the title obtained from the Land Registry was referred to as being in Torpoint).
1 June 2020	The Regulations, made on 18 March 2020, came into force, applying to all new specified tenancies from 1 July 2020.
1 April 2021	The Regulations also became applicable to all existing specified tenancies.
10 January 2022	Ms Wainman, an environmental health officer with the Council, visited the property following a complaint relating to problems with an outside toilet and rats. During her inspection she noticed "two defective sockets. One in particular was exposing metal parts with a section of plastic completely missing". She thereafter spoke to Mr Coventry's managing agents Humber Estates ("Humber") asking them to attend to the necessary remedial works as well as the lack of smoke alarms, as a matter of urgency.
11 January 2022	Ms Wainman emailed Humber, referring to their conversation of the day before, asking for confirmation that the sockets had been repaired and the smoke alarms

	installed, and for a copy of the most recent Electrical Installation Condition Report ("EICR").
11 January 2022	Humber emailed a reply later that day confirming that "the electrician had completed the socket faceplate replacement and the fitting of smoke alarms as requested".
26 January 2022	The Council sent a letter and formal notice to Mr Coventry, at the Torpoint address noted in his registered title, referring to regulation 3 of the Regulations and requesting a copy of the EICR. Further copies were also sent to Humber and Mr Coventry's address in Chiswick (as referred to in his subsequent Application).
7 February 2022	Humber emailed Ms Wainman apologising for overlooking a response stating "the EICR are hasn't been completed yet, there is a history of the tenant refusing access due to covid, however in the light of the works you've outlined they've been completed and will be certified by tomorrow".
9 February 2022	A copy of an EICR dated 9 February 2022 was emailed to the Council. That estimated the age of the wiring system as being 30 years old and stated that the date of the previous inspection was unknown. The overall assessment was "satisfactory". 4 detailed observations were made, each coded C3, indicating "improvement recommended". The date of the inspection was noted as 9 February 2022 and the recommended date of the next inspection as 9 February 2027.
4 April 2022	The Council served a Notice of intent to impose a financial penalty of £2,500 on Mr Coventry in respect of alleged breaches of regulation 3 with copies sent to the Torpoint and Chiswick addresses as well as to Humber.
5 April 2022	Humber sent an email to Ms Wainman stating "we've received a letter regarding the above property and the failure to comply with the electrical legislation? I believe this issue was sorted out after our conversation back in February, can you confirm please as I hope this latest letter was sent in error?".
5 April 2022	Mrs Wainman replied referring to the need under the Regulations for the property to have had an electrical test and inspection report by April 2021 and explaining what the Notice of Intent gave details of how written representations could be made.
3 May 2022	Humber emailed the council referring to "the insurmountable challenge that the Covid 19 pandemic had played in arranging this check… There was a serious backlog with all contractors – firstly due to the lockdowns, then due to materials, jobs being cancelled and delayed due to sickness and isolation …. We first sent the job across to our main electrician back in March last year when things were still within the timescale set out by the law, however I wish to bring attention to section 7.5 of the… Regulations… landlords will be given reasonable time to carry out

	essential works to ensure health and safety hazards associated with electrical safety installations are remedied in a safe and timely manner. An appeal may be made against remedial action by a local authority on the grounds that reasonable progress is being made….We attempted to sort other contractors during this time to assist in reducing the electricians backlog however they were facing the same issue. We specifically balanced the tenant's health alongside this as we had been informed….that she had been ill during the end of 2020 potentially being long term which was affecting her ability to pay the rent, and communicate. Further then to this the tenant underwent a serious surgical procedure which would mean she would arguably be "at risk" also isolation periods were required before and after naturally while recovery took place… We would also reiterate that once access was granted by yourselves liaising with the tenant, the required EIRC and remedial works were carried out with in a very short timescale, the most urgent issues brought to our attention by the agent were some cracked faceplates on some sockets, these were not reported to us by the tenant, however due to the urgent nature stressed by the agent at the time we had an electrical engineer there within a few hours that same day. The other works highlighted were completed as well without delay whilst access was being given…".
4 May 2022	The Council emailed a reply stating that Humber had "not provided adequate evidence in relation to any attempts… made to comply with the… Regulations. You have… demonstrated that you were aware of the landlord's obligations to have regular electrical checks completed and that your electricians had an existing backlog" It was pointed out that Humber had been able to engage an electrician the day after Ms Wainman's inspection… following her report on the defects and lack of smoke detection. It was stated that for these reasons the Council would not accede to the request to vary or quash the penalty.
30 May 2022	The Council served its Final notice confirming the imposition of a financial penalty of £2,500 together with notes on the rights of appeal.
23 June 2022	Mr Coventry's appeal Application was dated and submitted to the Tribunal.

Submissions and the Hearing

4. Mr Coventry in his written statement of case said :-
"I have acted in good faith and within reasonable timescales.
Despite the electrical inspection and test report being supplied within two weeks of the request Hull CC have deemed it appropriate to impose a financial penalty.

My agents appealed this decision and explained in detail that, given the problems faced by many people and organisations caused by the pandemic. there had been a number of problems in finding qualified tradesmen to carry out the necessary work. In addition, the tenant at the property consistently refused access to the property to allow the necessary works to be done.
My agent referred specifically to section 7.5 of the Electrical Safety Standards in the ... Regulations .... which says that "landlords should be given reasonable time to carry essential works" as long as "reasonable progress is being made"
At all times we communicated with Hull CC and acted reasonably and progressed matters as quickly as possible given the restrictions of the time.
Despite this, Hull CC served a financial penalty of £2,500.
I would therefore appeal both the fact that the penalty was imposed at all and also the magnitude of the penalty".

5. The Council in its written submissions referred (inter alia) to those matters set out in the timeline, explaining its justification for and calculation of the financial penalty. Ms Wainman referred in her witness statement to having been told by the tenant that she had been living in the property for six years. Ms Towse, Council's Principal Environmental Health Officer, also made a witness statement confirming her involvement in replying to the representations following the notice of intent, noting that she had requested additional information regarding attempts to gain access to the property said to be due to covid and the tenant's health which had not been supplied.

6. Included with Mr Coventry's papers was an email to him from Ms Spencer, an administrator with Humber, dated 19 December 2022, confirming that she had spoken to the tenant "on many occasions with regards to access for inspections (who) informed me on numerous occasions that she was shielding was attending many hospital appointments due to a serious throat condition, and she was concerned it may be cancer. The tenant was extremely distressed and said she was unable to allow access at the time and could not commit to a date for inspections due to ongoing hospital treatments. We agreed that the tenant would contact us when she felt well enough, this began October 2020. I had left a few voicemails for the tenant to call me back....."

7. Additional directions were issued after the submission of papers asking for copies those documents setting out how the Council determined financial penalty levels relating to the Regulations. In response the Council provided a full copy of its internal procedural guidance which includes in appendix 1 details of financial penalties for different breaches. It also supplied copies of its enforcement policy, and fees and charges policy but which it was explained predated and did not refer to the Regulations.

8. The Hearing on 23 March 2023 was conducted remotely by means of HMCTS' Video Hearings Service. Mr Coventry represented himself and the Council was represented by Mr Luxford who is a Barrister. Also in attendance, via a telephone rather than a video link, were Ms Wainman and Ms Towse, as well as Ms Mills, a listener.

9. The nature of the offence was explained and after opening submissions, the Tribunal asked various questions to clarify different matters from within the papers.

10. Mr Coventry confirmed that he had been the owner or joint owner of the property since approximately 2003 when it was first purchased. He confirmed that he presently owned or had an interest in a portfolio of approximately 30 properties, a number of which were in Hull. He had been a landlord for several years, employed Humber and its predecessors before them as his managing agents in Hull and had usually found them to be thorough. He spoke to them on a regular basis and understood as part of their full management service they visited the property regularly. He had been aware of the advent of the Regulations and instructed the commissioning of an EICR before the deadline date. He had understood from Humber that there were problems in the tenant allowing access because covid and her ill-health.

11. Ms Wainman confirmed that it was principally because she had identified a lack of smoke detectors both on the ground and first floor at her inspection that she had immediately, and accordance with the Council's standard practice, contacted Humber, identified by the tenant as the managing agents, in order to rectify the omission. She confirmed that whilst she was not a qualified electrician, she considered the loose or defective faceplates on 2 of sockets, seen at the same time, to be categorised as C1, which in the language of an EICR means "Danger present. Risk of injury. Immediate remedial action required" and therefore also in need of urgent remediation.

12. Mr Luxford conceded that the internal procedural guidance was not a policy and readily accepted, when it was pointed out, that there was an error in the time-limits stated for an appeal in the Final notice, albeit one that he did not consider invalidated that notice.

13. It was also confirmed that the internal procedural guidance was not available or published on the Council's website and agreed that the references to the availability on that website of information relating to the Regulations and the Council's policy for determining the amount of the penalty in the letters sent with the Notice of intent and the Final notice were both wrong and misleading.

14. Ms Towse gave useful insights as to how the internal procedural guidance had been drafted, principally by herself working in conjunction with Ms Wainman and thereafter approved by a senior officer in the Council. She confirmed that they had not sought to refer to what other councils might be doing, and that the Council's internal procedural guidance was one of the first to be produced. She also confirmed how it was applied in practice and that for a breach of regulation 3(1)(c)(ii) there was no leeway between a penalty of £2,500 or no penalty.

15. Mr Luxford in his final submissions emphasised that a breach of regulation 3 was a strict liability offence, that the reason behind the Regulations is that tenants need to be protected, that a local housing authority can impose a financial penalty up to £30,000, in which context £2,500 was a very small percentage, and possibly too low, that financial penalties are punitive in nature and intended to deter landlords generally from a non-compliance. He said that Humber were Mr Coventry's appointed agent, authorised by him, and for these purposes they should be seen as one. He submitted that the shortcomings that had been identified as regards the lack of publication of a policy, and the errors in the Council's letters and Final notice were not fatal to its imposition of a penalty.

16. Mr Coventry in his closing comments said that, notwithstanding all the legal detail, his contention was that the important questions were had he acted reasonably and was the fine reasonable? He submitted that he had acted reasonably, that there were valid reasons for the initial delay, that he hadn't ignored the need for an EICR and when he had been directly alerted as to the Council's involvement the matter had been dealt with in a few weeks. He said that he had not ignored or tried to evade his responsibility. He had owned rented properties in Hull and elsewhere for 20 years and have never been previously fined. He regarded a fixed fine of £2,500, not widely publicised, as a blunt instrument, and as being unreasonable in this particular case.

The Regulatory Framework and Guidance

17. The Regulations came into force on 1 June 2020, and from 1 April 2021, they have applied to all "specified tenancies" in England, whether granted before or after the commencement date. Most residential tenancies (other than long leases) will count as specified tenancies.

18. They are intended to ensure that electrical safety standards are met in residential properties in the private rented sector; to prescribe how, when and by whom checks of electrical installations are carried out; and to ensure that certificates are provided confirming that standards are met. The Regulations impose various duties on private landlords in this regard and confer enforcement powers on local housing authorities.

19. Regulation 3(1) provides:
A private landlord who grants or intends to grant a specified tenancy must—
(a) ensure that the electrical safety standards are met during any period when the residential premises are occupied under a specified tenancy;
(b) ensure every electrical installation in the residential premises is inspected and tested at regular intervals by a qualified person; and
(c) ensure the first inspection and testing is carried out—
(i) before the tenancy commences in relation to a new specified tenancy; or
(ii) by 1st April 2021 in relation to an existing specified tenancy.

20. For these purposes, "the electrical safety standards" are the standards for electrical installations in the 18th edition of the Wiring Regulations, published by the Institution of Engineering and Technology and the British Standards Institution as BS 7671:2018. The requirement to inspect and test "at regular intervals" means at least every 5 years.

21. Regulation 3 goes on to impose duties on private landlords to obtain a report from the person conducting the inspection and test which gives the results and sets a date for the next inspection and test. A copy of this must be supplied to tenants (including any new tenant before they occupy the premises) and the inspector who carries out the next test. A copy must also be supplied to the local housing authority within 7 days of a request. Where the report shows that remedial or further investigative work is necessary, a landlord must complete this work within 28 days or any shorter period if specified as necessary in the report.

Enforcement, financial penalties and appeals

22. Local housing authorities have power (by issuing "remedial notices" under regulation 4) to require landlords to take remedial action where they have reasonable grounds to believe that the landlord is in breach of one or more of their duties. They may also arrange for remedial action to be taken (under regulation 6) if a landlord fails to comply with such a notice, or (under regulation 10) in cases where urgent remedial action is required.

23. In addition, by virtue of regulation 11, where a local housing authority is satisfied, beyond reasonable doubt, that a private landlord has breached a duty under regulation 3, the authority may impose a financial penalty (or more than one penalty in the event of a continuing failure) in respect of the breach. The penalty may be of such amount as the authority determines but must not exceed £30,000.

24. Schedule 2 to the Regulations sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under regulation 11. Before imposing such a penalty on a private landlord, the local housing authority must give them a notice of intent explaining the action it proposes to take. This must be done within a prescribed period of time and the landlord must be given opportunity to make representations in response. The local housing authority must then decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount. The penalty is imposed by the local housing authority giving the landlord a final notice containing prescribed information.

25. A final notice issued under the Regulations is subject to the right of appeal to this Tribunal (under paragraph 5 of Schedule 2). Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within the period of 28 days beginning with the day after that on which the final notice was served. The final notice is then suspended until the appeal is finally determined or withdrawn.

26. The appeal is by way of a re-hearing of the local housing authority's decision; but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, quash or vary the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than £30,000.

Relevant guidance

27. The Department for Levelling Up, Housing & Communities ("DLUH&C") has issued non-statutory guidance to assist local housing authorities in the exercise of their enforcement functions under the Regulations. Whilst local authorities are not legally obliged to follow this guidance, it is good practice to do so.

28. The guidance states: "Local housing authorities should develop and document their own policy on how they determine appropriate financial penalty levels. Generally, we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending."

29. The guidance also states that, when developing their policy, local housing authorities may wish to consider the policy they previously developed for civil penalties under the Housing and Planning Act 2016 and the related government guidance.

30. The Upper Tribunal has, in various cases concerning civil penalties imposed under the Housing and Planning Act 2016, confirmed that: –

- the Tribunal's task is not simply to review whether a penalty imposed by a council was reasonable, it must make its own determination having regard to all the available evidence,
- in so doing, it should have regard to the factors specified in the relevant guidance,
- it should also have particular regard to a council's own policy. *Sutton and another v Norwich City Council [2020] UKUT 90 (LC).*
- the Tribunal's starting point in any particular case should normally be to apply that policy as if it were standing in the council's shoes,
- whilst a Tribunal must afford great respect (and thus special weight) to the decision reached by the council in reliance on its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review; the Tribunal must use its own judgement and it can vary the council's decision where it disagrees with it, despite having given it that special weight. If, for example, the Tribunal finds that there are mitigating or aggravating circumstances which a council was unaware of, or of which it took insufficient account, the Tribunal can substitute its own decision on that basis. *London Borough of Waltham Forest v Marshall and another [2020] UKUT 0035 (LC).*

The Tribunal's Reasons and Conclusions

31. There are three substantive issues for the Tribunal to address: –

- whether the Tribunal is satisfied beyond reasonable doubt that Mr Coventry has committed a breach of the regulation 3(1)(c)(ii),
- whether the Council has complied with all the necessary procedural requirements relating to the imposition of the financial penalty, and
- whether a financial penalty is appropriate and, if so, has been set at the appropriate level.

Dealing with each of these issues in turn: –

Was there a breach?

32. Regulation 3(1)(c)(ii) required Mr Coventry to ensure the first inspection and testing of the Premises was carried out by 1 April 2021.

33. It is important to note that the duties set out in regulation 3 are absolute requirements. Whether or not Mr Coventry acted reasonably is immaterial to the question of whether they have been complied with.

34. To his credit, he readily admitted that the property was continuously let from before 1 April 2021 until 9 February 2022 without a current or the requisite EICR.

35. He was under the erroneous impression that, if all reasonable steps had been taken or reasonable progress had been made towards compliance with the original notice served in January 2022, he might have a full defence. That is not correct, although clearly such matters can be put in mitigation when having regard to the level of any penalty.

36. It seems that Mr Coventry was probably misled by Humber's citing of regulation 7 which, as explained at the hearing, relates exclusively to appeals against a decision by a housing authority to take remedial action, rather than those duties under the Regulations (such as those set out in regulation 3) which carry an absolute liability.

37. The Tribunal is satisfied, beyond any reasonable doubt, that there has been a breach of regulation 3(1)(c) which subsisted for over 10 months.

Was there sufficient compliance with the procedural requirements?

38. The Tribunal next carefully reviewed the actions taken by the Council and the timing and information set out in its different letters and notices.

39. The Council admitted various shortcomings: –

- the paragraph in each of the letters with the Notice of intent and the Final notice stating that "I would like to take this opportunity to refer you to the Council's website for information relating to this legislation, including the Council's policy for determining the amount of the financial penalty" was misleading and false. It was confirmed that there is no information publicly available on the Council's website which explicitly references a policy on how it determines appropriate financial penalty levels following the failure to comply with the Regulations.
- the Council does not have a policy as such, but rather internal procedural guidance to assist Council officers with an appendix setting out fixed tariffs for different breaches.
- the information on the rights of appeal accompanying the Final notice wrongly refers to an appeal having to be made within 21 days of the service of the notice, whereas the correct time-limit is 28 days.

40. The first of those failings was not explained and it is difficult to discern any excuse, but nonetheless does not make the notices themselves invalid. The second falls short of what the DLUH&C guidance says a local authority should do, but again does not amount to non-compliance with the procedures set out in Schedule 2 of the Regulations.

41. The Tribunal gave careful thought as to whether the third failing meant that the Final notice was invalid. As was pointed out in the hearing, para 3(4)(e) of Schedule 2 makes it clear that "the final notice *must* set out –… information about rights of appeal…" which must mean correct, not incorrect, information. Nevertheless, after careful consideration, the Tribunal concluded that the error had not in this instance prejudiced Mr Coventry who has still been able to make his appeal. It therefore concluded that in circumstances of this particular case the notice could still be regarded as effective.

42. The Tribunal having found that the necessary procedural requirements had been sufficiently met then considered: –

The appropriateness and amount of a penalty?

43. The Tribunal is satisfied that it is appropriate to impose a financial penalty in respect of the breach of duty.

44. The Tribunal readily accepts that Mr Coventry employed Humber to look after the premises, but he was still the person with ultimate control. The Tribunal found that Mr Coventry is an experienced landlord and the owner of, or having an interest in, a portfolio of properties and which, whether being operated as a business or not, need to be managed properly. It was his responsibility to ensure that statutory requirements are met in a timely manner. The Tribunal found that he could and should have acted more rigorously to ensure that the necessary requirements were being properly met.

45. The importance of failure to obtain a current and valid EICR should not be underestimated. Properties which are not properly inspected or tested clearly pose a risk for harm.

46. The Tribunal next began the task of assessing the appropriate amount of the fine by a review of the actions of the parties and an evaluation of all of the evidence.

47. Its starting point was with the Council's internal procedural guidance, which for the breach in question refers to a fixed tariff of £2,500. The only possible moderation which it allows to that figure comes from the reference at the end of the appendix which states that "if the penalty is paid within the 21 days required there will be a reduction of one third …"

48. The difficulty with the Council's procedural guidance is that it lacks any flexibility. It does not allow for any other figure to be substituted in order to reflect the severity of the offence or a landlord's previous record of offending. It is thus not in line with the DLUH&C guidance. It is, in Mr Coventry's words, a "blunt instrument". As such, the Tribunal found it must step outside it, reminding itself that it is conducting a rehearing, not a review and must use its own judgment in circumstances where it finds the policy, such as it is, wanting.

49. The Tribunal next considered the Council's civil penalties policy. The DLUH&C guidance clearly envisaged a synergy between a policy to determine appropriate financial penalties in respect of breaches of the Regulations to those previously developed under the Housing and Planning Act 2016.

50. The Council's civil penalties policy makes no reference to the Regulations, but it does state that "the Government has laid out statutory guidance as to the process and the criteria that needs to be considered when determining civil penalties. These are:

- The culpability and track record of the offender
- The level of harm caused to the tenant
- The severity of the offence
- Aggravating factors
- Mitigating factors
- Penalty to be fair or reasonable should remove any financial benefit the offender may have obtained as a result of committing the offence
- Whether it will deter the offender from repeating the offence."

51. The Tribunal consider that these criteria provide a better means of determining the appropriate amount of the financial penalty in the circumstances of this particular case.

52. In judging the severity of the offence, it again borrowed from the Council's civil penalties policy when assessing and applying its findings on culpability and harm. The Tribunal found Mr Coventry's culpability to be "low", noting that he had employed local managing agents and instructed them to obtain an EICR prior to the April 2021 deadline. It also noted that there was no evidence of any harm to the tenant. As with the Council's civil penalties policy the Tribunal then considered any aggravating or mitigating factors. It found no evidence of any aggravating factors, but did find the following 4 mitigating factors, being that :–

- there is no evidence of any previous housing legislation infringements or anything to suggest that Mr Coventry is other than of good character,
- the breach was made good within a fortnight from receipt of the notice in January 2022,
- the previous delay was exacerbated by the tenant's ill health and personal circumstances, and
- the disruption caused by covid.

53. Reverting to the figure set by the Council's procedural guidance of £2,500 but deducting therefrom £500 for each of the first 3 of the mitigating factors and £250 for the last, being covid, the Tribunal arrived at a figure of £750.

54. It is perfectly logical to use a formula (indeed the government has said there should be a policy), but it is essential that a housing authority, and in this instance the Tribunal, then review the answer given in a holistic way, to see if that answer in any particular case is able to pass the test of being reasonable and proportionate in all the circumstances.

55. The Tribunal, having reviewed all of the evidence is content that a penalty of £750 is just and proportionate in the circumstances of this case, appropriately reflects the seriousness of the regulatory breach, and will have a suitable punitive and deterrent effect.

56. The Tribunal has decided therefore to uphold the Council's decision to impose a financial penalty on Mr Coventry but to vary the amount to £750.

Tribunal Judge J Going
25 March 2023