FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT

Appeal Reference: NV/2016/0005

Decided at Fleetbank House with a Hearing

On 4th November 2016

Before

HER HONOUR JUDGE ANGELA MORRIS

And

MR. CHRISTOPHER PERRETT

(Tribunal Member)

Between

CITY WEST HOMES LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

Determination

Basis of the Appeal

1. I, together with Mr. Christopher Perrett, sat as the Tribunal to determine this appeal which is brought by City West Homes (the Appellant) against the imposition of a civil penalty of £18, 049.80 by the Environment Agency (EA) in accordance with Regulation 50 of the Greenhouse Gas Emissions Trading Scheme 2012 (the Regulations).
2. In summary, the Appellant's case is that in making the calculation, in respect of their emissions target for 2013 the EA unfairly and erroneously set the target at an artificially low level by reason of its failure to take into account the unused free allocation of CO2 emissions from an associated boiler house which would have substantially increased the Appellant's target capacity and, therefore, put it beyond reach of any civil penalty.
3. In the alternative, the Appellant submits that it was wrong or unreasonable for the EA not to exercise the discretion provided to it under Regulation 51 of the Regulations given that the majority of the Appellant's business is run on a cost-neutral basis for the benefit of residents of Social Housing who would be affected by the imposition of such penalty.
4. In accordance with regulation 77 of the Regulations the Tribunal was asked to consider:
   (a) quashing the civil penalty;
   (b) varying of the civil penalty by an exercise of the discretion under Regulation 51 of the Regulations;
   (c) reducing the civil penalty imposed;
   (d) directing the EA to withdraw or reduce the civil penalty imposed.
5. In advance of the hearing we were provided with a bundle of documents which we had an opportunity to consider. This will be referred to as the Appeal Bundle and all page references relate to the same.

Chronology of Events

6. The chronology of events is as follows: -
   (i) 26th September 2016 – a Notice of Intent to impose a civil penalty was served on the Appellant
   (ii) 17th February 2016 – a Civil Penalty Notice was served on the Appellant
   (iii) 15th March 2016 – an appeal by the Appellant was lodged;
   (iv) 3rd May 2016 – A Response to the Appellant's Grounds of Appeal was served by the EA;
   (v) 6th June 2016 – A further response by the EA was served
   (vi) 4th November 2016 – the appeal was heard. Both parties attended.
   (vii) 24th January 2017 – Determination

Background to the Scheme

7. Westminster City Council owns and is ultimately responsible for the PDHU Pump House under the London County Council (General Powers) Act 1949 by which it is designated a Heat Authority.
8. The Appellant is its wholly owned company which manages and operators the PHDU Pump House Site by a Section 27 Agreement under the Housing Act 1985.

The Scheme

9. The EU ETS[1] came into force on 1st January 2005. It is based on directive 2003/87/EC and central to the EU meeting its 20% emissions reduction target by 2020. The targets for the Scheme aim to reduce emissions by 35% below 1990 levels by 2020 and 80% by 2050. Phase III of the EU ETS began on 1st January 2013.
10. The system operates by allocating and trading greenhouse gas emissions allowances through the EU – one allowance is equivalent to one tonne of carbon dioxide equivalent. As part of Phase III there is a centralised EU cap on the total number of allowances issued to installations, reducing each year. Each installation gets a number of free allowances and the rest are auctions. The point being that at the end of each year, installations have to ensure that they have enough allowances to cover their actual emissions. They are able to do this through a combination of the free allocations and purchasing extra where necessary or selling unneeded allocations to other installations. A permit is needed to operate regulated activities such as district heating schemes.

The Small Emitter and Hospital Opt-Out Scheme (SEHOOS)

11. The SEHOOS scheme allows small emitters and hospitals to be excluded from the Eu ETS scheme. However, excluded installations are subject to a domestic scheme that will deliver an equivalent contribution to emission reductions under EU ETS. In other words, a degree of parity is envisaged as between those installations operating within and without the EU ETS scheme.
12. The Appellant is one such excluded installation operator. There was no statutory requirement for Appellant to opt out; that was the Appellant's choice to do so.

[1] European Union Greenhouse Gas Emissions Trading Scheme

The Opt-Out Scheme

13. Amongst other things, the effect of the opt-out scheme is that excluded installations do not receive a free allocation of allowances. As a condition of being free of the regulation imposed on those installations within the EU ETS scheme, the Appellant must comply with its emissions target and, if it does not, must pay the for the excess emissions through a civil penalty.
14. Regulation 10(2) of the Regulations states that the "*operator of an excluded installation may apply to the regulator for an excluded installation emissions permit to carry out a regulated activity at the installation*".
15. As part of this permit there must be an emissions target for each year prior to 2021[2] and an operator must ensure that the annual reportable emissions from an excluded installation does not exceed the emissions target for that year[3]. Furthermore, within a given time frame, during the year in which the increase occurred, an installation may apply to the regulator for an increase in its emissions target where a capacity increase has occurred[4].
16. Regulations 50 and 51 govern the EA's obligation to impose a civil penalty and its discretionary powers in respect of the same. Regulations 73 and 77 govern the appeal process.

Regulation 50

17. Regulation 50 states that:
    "*Where the regulator* (in this case the EA) *is satisfied that a person (P) is liable to a civil penalty under this Part, the regulator must (subject to regulation 51) serve a notice on P*".

Regulation 51

18. Regulation 51 states that:
    "Where the regulator considers it appropriate to do so, the regulator may …
    (a) Refrain from imposing a civil penalty;
    (b) Reduce the amount of the penalty
    (c) Extend the time for payment specified in the penalty notice
    (d) Withdraw a penalty notice
    (e) Modify the notice by substituting a lower penalty.

Regulation 55

19. Regulation 55 states that:
    "*An operator of an excluded installation is liable to the civil penalty … where in any scheme year the operator fails to comply* …"

[2] Schedule 5, paragraph 3(1)(e) of the Regulations
[3] Schedule 5, paragraph 5 of the Regulations
[4] Either 31st December in the year in which the increase occurred or within 3 months of the date of the capacity increase whichever is the later.

The Direction

20. On 1st January 2013, the Secretary of State's Direction to the EA in respect of the calculation of targets for excluded installations came into force. This included 2 different methodologies for the purpose of setting the emissions targets for excluded operators. These methodologies were either by reference to (a) historic emissions or (b) EU ETS preliminary level of free allocations[5]. If the historic emissions methodology is chosen, the EA must set the annual target for 2013 according to the average of that installations historic emissions over the period 2008-2010 reduced by 5.22%[6].
21. Guidelines on the opt-out scheme, including an explanation of how the emissions targets must be calculated, have been in existence since May 2012[7].
22. The EA's Enforcement and Sanctions Guidance[8] sets out how the EA will approach its task of determining the imposition of a civil penalty. In particular, under the "Our Approach" heading it states that "*Rather than a sanction for non-compliance, this penalty is designed to facilitate the payment for excess emissions. It is akin to the CRC requirement to purchase allowances equivalent to the participant's annual emissions and the buy-out fee for operators that under-achieve against their CCA target. In addition, the ..Opt-out Scheme …was agreed .. on the basis that it delivered equivalent emissions reductions as …"* those within the EU ETS Scheme. In other words, the EA is obliged to approach its enforcement task by reference to considerations and delivery of parity as between the Opt-out and EU ETS schemes.

The Facts of this Case

23. The Pimlico District Heating Undertaking (PDHU) was built in 1950 to distribute waste heat from Battersea Power Station to homes in Pimlico, London. The Appellant owns and runs PDHU on a not-for-profit basis and operated as a Combined Heat and Power system. Until 2010, PDHU obtained its heat energy from a boiler house run by Dalkia Utility Services (Dalkia). PDHU was Dalkia's sole client.
24. Between 2006-7 PDHU constructed a new energy generating centre (the Pump house) which was designed to be ready for and expiration of the Dalkia contract in 2010.
25. The Appellant operated within the EU-ETS scheme until 2012 when their application to join the Opt-out Scheme was granted. The effect of this was that until 2012 the Appellant had an initial "free allocation" of CO2 emissions under the EU ETS Scheme and any additional or excess emissions would be covered by the purchase of further allowances to cover them.

[5] Paragraphs 3.2 and 3.3 of the Direction issued by the Secretary of State (pp 36-47 of the Appeal Bundle) – The Direction.
[6] Paragraph 4.1 of the Direction
[7] Produced by DECC; draft first published on 23rd May 2012.
[8] Appeal bundle pp 84-113 @ p96 – paragraph 3.4

26. In 2009 the PDHU Pump house was closed for a period of time between February and April. This decision was taken by the Appellant because at the material time they considered that it was too expensive to run the PDHU compared with obtaining heat from its old Dalkia supply source.
27. In accordance with the EU ETS Scheme, Phase I and II, the Appellant submitted verified reports of its reportable emissions for the period 2008-10 to the EA. Those reported emissions are:
    - 2008 – 14,979
    - 2009 – 9,671
    - 2010 – 15,896
28. The application for Opt-out for Small Emitters and Hospitals began on 23rd May 2012. The deadline for joining the scheme was July 2012. The Appellant did not apply to DECC to be included in the voluntary Opt-out Scheme until 13th September 2012 due to a misunderstanding of its capacity. Despite this delay, the Appellant's request to join the Opt-out Scheme was granted.
29. As part of their application, the Appellant chose the historic methodology as the basis for their emissions target calculation. On the basis of the information provided to the EA the average emissions over the 2008-2010 period was calculated as 13,515 tonnes CO2 and consequently, the Appellant's emissions targets were established for the years 2013 – 2020 accordingly. These calculations were not queried by the Appellant until the Appellant responded to the service of the Notice of Intent on 22nd October 2014.
30. The Appellant became part of the Opt-out Scheme. On 1st January 2013, the Appellant's permit was varied and the 2013 – 2020 emissions target was listed as part of the same. In accordance with the Scheme, the Appellant reported its 2013 reportable emissions on 21st March 2014. Those emissions amounted to 15,504 tonnes CO2; thus, the Appellant had exceeded its emissions target by 2,694 tonnes, making them liable to a civil penalty.
31. The calculated penalty amounted to £18,049.80. There is no dispute about the methodology of this calculation in principle; the complaint is predicated on the basis that the imposition of the penalty and/or the correct figure upon which "A"[9] is based as the starting point for such calculation is erroneously low.
32. On 26th September 2014 the EA sent a Notice of Intent to the Appellant[10] inviting any representations within 28 days to justify the exercise of its discretion.
33. The Appellant responded to the Notice on 22nd October 2014, in which they submitted, amongst those things, that in their opinion the targets had been incorrectly calculated[11]. The Appellant's assertion as to the erroneous calculation was queried by the EA in their response dated 30th July 2015[12]. After further correspondence between the parties, the EA served a Notice of Civil Penalty on the

[9] Within regulation 55 of the Regulations
[10] Appeal Bundle pp
[11] Appeal Bundle p. 141
[12] Appeal Bundle p.

Appellant on 17th February 2016. The Appellant appealed this Notice on 15th March 2016.

The Calculation of the Emissions Target

34. The first complaint the Appellant makes is that the initial calculation of the emissions target was erroneously low for 2 reasons – first that because PDHU were the sole client of Dalkia, the figures for PHDU and those imported from Dalkia should have been agglomerated to form the basis of the average calculation. Had they done so, the Appellant argues, the figure would have been substantially higher than it was. As a statement of fact, that submission is correct.
35. However, this fails to take into account the fact that the EA had no authority or jurisdiction to take the Dalkia boiler house emissions into account in making its calculation on the "historic" emissions basis (which was the method specifically chosen by the Appellant)[13].
36. The Appellant further submits that due to the failure of the EA to take account of the "real" average emissions of the Pump house from 2008 – 2010 they have been unfairly prejudiced. They point to the fact that the emissions figure for 2009 is disproportionately low when compared with 2008 and 2010. On the face of it, that is correct. The assertion that "*for February, March and April 2009 the Pump house was shut down*[14]" and thus the emissions figure for 2009 should (or should have been taken as) 15,326 CO_2[15] is not altogether accurate.
37. On closer questioning of this matter at the hearing it was established that the Pump house was shut down between 11th February and 2nd April 2009 – something less than 2 months. Therefore, it must follow that the closure of the Pump house for 1/6 of the year does not accurately or adequately accounted for the disparity between the 2009 and the 2008 and 2010 emissions figures and despite the Appellant's concession in respect of this, a clear explanation for the 2008 figure remained unexplained.
38. Furthermore, the EA had no scope within the provisions to calculate emissions by the inclusion of other installations. As far as Dalkia is concerned, had they been part of the Opt-out Scheme, any calculation for their target emissions would have been a separate and distinct operation. It must follow, therefore, that the decommissioning of the Dalkia boiler house in March 2010 cannot have any bearing upon the calculation that the EA has to perform in respect of the Appellant's target emissions. Imported heat from other installations is a consideration only applied to the other methodology which the Appellant specifically did not chose.
39. Once the emissions target was calculated the Appellant was informed of it; they did not challenge this figure until the Notice of intent was served upon them on 1st January 2013.

[13] The Direction specifically proscribes the EA's jurisdiction in this regard.
[14] Witness statement of David Wickersham, paragraph 15, Appeal Bundle p. 152
[15] Witness statement of David Wickersham, paragraph 17, Appeal Bundle p. 152

40. If the calculation of the emissions targets was a rigid process which failed to allow for increases in emissions after 23rd May 2012, this Tribunal may have found some merit in the Appellant's argument as regards reconsideration of the calculation. But, the Regulations have a level of flexibility which allows an operator to apply to the EA for an increase in their emissions target where there has been a capacity increase after 30th June 2011. The Appellant could have taken advantage of this provision if there had been such a capacity increase; they did not, which leaves the Tribunal concluding that there was no such capacity increase, at the very least, the Appellant had their own reasons for not doing so.

The witness statement of David Wickershaw[16]

41. The Tribunal had the benefit of reading Mr. Wickershaw's statement in advance of the hearing. Mr. Wickershaw attended the hearing but he did not give evidence on oath before us. Furthermore, we were invited to disregard the assertion made at paragraphs 14 of his statement that "*largely because of a previous administrative error on the part of the EA in 2006, the PDHU pump house was closed and did not produce any CO2 emissions for February, March and some of April 2009*". The EA disputed this assertion in its 2nd Response[17]
42. The fact that this assertion was withdrawn for the Tribunal's consideration of this case means that any the fault on the part of the EA in this regard was also withdrawn and the Tribunal has disregarded it in making its decision on the merits of the case.
43. As stated above at paragraph 32 above, it was established at the hearing that the Pump house was in fact shut down between 11th February and 2nd April 2009 – something less than 2 months. Mr. Wickershaw estimates that had the Pump house continued to run throughout 2009 as normal, it would have emitted an additional 5,655 tonnes of CO2 (reflecting seasonal demand) which would have brought the figure up to somewhere close to the 2008 and 2010 figures.
44. The Tribunal was not provided with any supporting or independent evidence by which they could test this assertion. Specifically, there was no evidence which demonstrated a correlation between the closure of the Pump house for 8 weeks between February and April 2009 and the amount of imported heat from the Dalkia boiler house during that time, other than the assertion in the statement.
45. Furthermore, the assertion that the "*Rate of CO2 generation is not consistent throughout the year but reflects seasonal demand*"[18] also remains untested. The Tribunal was provided with no evidence to support this assertion – either by reference to the weather patterns at the time or the imported heat figures from the Dalkia boiler house. Mr. Wickershaw's estimate appears to be based on nothing more than the clear disparity between the 2008/2010 figures as contrasted with 2009, but that disparity is a consequence of the Appellant's own decision making process.

[16] Appeal Bundle p. 149-153
[17] Appeal Bundle pp.155-157
[18] Paragraph 17 of David Wickersham's statement

46. In addition, the decision to shut the Pump house down in 2009 and the decision to join the Opt-out Schemes were financially motivated on the part of the Appellant. In the case of the former - that is clear from paragraph 15 of Mr. Wickersham's statement; in the case of the latter – it was accepted at the hearing as a recognised part of the Opt-out Scheme in order for small emitters to avoid unnecessary and sometimes expensive "red tape".
47. Mr. Wickershaw's statement makes it clear that he was "*under significant pressure*[19]" to make the choice for the purposes of calculating the methodology. In light of the withdrawal of the assertion at paragraph 14, the Tribunal finds that lateness of the application was through no fault on the EA and, therefore, the Appellant must accept responsibility for the methodology chosen.

Conclusion in respect of the imposition of the civil penalty

48. Having considered the Appeal Bundle and the submissions made by both parties at the hearing, the Tribunal concluded that the Appellant made the following choices:
    (i) To shut down the Pump house for 8 weeks in 2008;
    (j) To apply to join the Opt-out Scheme;
    (k) To use the historic methodology for the calculation of the target emissions;
49. Those choices were the Appellant's prerogative and they knew (or ought to have known) that once the methodology was chosen by them it could not be altered[20].
50. If the free allocation methodology had been chosen by the Appellant the emissions target would have been lower – making the costs implication for the purchase of additional usage greater. No doubt this was a factor in their consideration of the historic emissions method.
51. The Appellant was aware of the emissions target from 1st January 2012; they did not challenge that figure at any stage despite the fact that they must have known that the 2009 figure was lower because they had made the decision to shut the Pump house down for a period of time for the financial reasons outlined in Mr. Wickershaw's statement.
52. The Appellant also had the opportunity to apply to the EA for an increase in the emission target after 30th June 2011. The Appellant failed to take advantage of this measure for reasons which have not been expanded upon. The Tribunal is left to conclude that there has been no such increase.
53. In accordance with the Regulations, the EA is obliged to approach its enforcement task by reference to considerations and delivery of parity as between the Opt-out and EU ETS schemes.
54. In this case, through no fault of the EA, the Appellant chose the method and now seeks to complain about the consequences of its choice of calculation, despite the fact they must have known that once chosen, there was no scope for changing their minds. The figures upon which the emissions targets were based was available to

[19] Paragraph 9
[20] Paragraph 4.5 of the Guidance p. 58 of the Appeal Bundle

them from 1st January 2002; they did nothing to challenge it despite that avenue being available to them. The Tribunal concludes that the EA were correct to impose a civil penalty in accordance with Regulation 55 and refuses to quash its imposition.

Conclusion in respect of the discretion to waive or reduce the civil penalty

55. In exercising its discretion to waive or reduce the civil penalty, the EA takes into account a number of public interest factors[21]. Annex 1 to Enforcement and Sanctions Guidance includes consideration of whether the non-compliance was committed deliberately, recklessly or with gross negligence as opposed to accident or genuine mistake and whether or not the circumstances leading to it could reasonably have been foreseen and no avoiding and/or preventative measure was taken. This was reinforced by the EA to the Appellant by letter dated 26th September 2014[22].
56. The purpose of this civil penalty is not punitive in the sense that it is a punishment for non-compliance. Rather it is an enforcement tool to ensure parity as between those inside or out with the EU ETS schemes.
57. In this case, the Appellant made choices about the scheme and to that extent their actions were deliberate in the sense that they took them rather than having a methodology forced upon them. Given their previous reported outputs, they could reasonably have been expected to foresee the circumstances leading to their non-compliance and, furthermore, had an opportunity to do something about it but failed to do so.
58. The Tribunal takes on board the fact that this is a not-for-profit organisation and that the customers serviced by the Appellant's operation are residents of social housing and of limited means. Whether the costs of this civil penalty ***must*** be passed onto the residents is a moot point; that is a policy decision to be taken by the Appellant as to how and where they find the funds to meet such penalty from. This Tribunal cannot allow itself to make its determination as to whether:

    (a) the EA should have exercised its discretion or

    (b) this Tribunal should exercise the discretion

    By reference to policy decisions which are the prerogative of the Appellant alone. In other words, this Tribunal will not be influenced by how the Appellant seeks to meet a civil penalty. To do so, invites the Tribunal to imposes a subjective (if not emotional) element to the public interest considerations which the Regulations do not allow.
59. In addition, the Tribunal has no jurisdiction to approach its task on a holistic or broad approach as the Appellant invites us to do. That would be tantamount to imposing our own interpretation of what we think the public interest considerations of the Scheme ought to be (as opposed to what they are) and that we decline to do.
60. The Tribunal has taken on broad the Appellant's submissions with respect to its commendable efforts to reduce its carbon emissions to a rate substantially below the

[21] Enforcement and Sanctions Guidance
[22] Appeal Bundle p 146

National Grid average. But it seems to us that although noteworthy for its efforts it does not "cancel out" the Appellant's obligations under the Opt-out Scheme. To do otherwise would lead to a disparity as between those within the EU ETS Scheme and those who have opted out – which the very thing the Regulations and Enforcement Guidance makes clear it is seeking to avoid[23].

61. Having considered all of the submissions, there was nothing additional placed before the Tribunal which persuades us that the EA did not properly and reasonably have regard to its own public interest guidance. Furthermore, the Appellant's submissions for waiver or reduction did not meet those considerations in 2014 and they have failed to persuade this Tribunal that they are met now such that we should exercise our discretion to waive or reduce the civil penalty imposed.
62. For the reasons stated therefore, the appeal is dismissed.

Signed:

Angela Morris

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HHJ Angela Morris

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Mr. Christopher Perrett

Tribunal Member

Dated: 24th January 2017

[23] EAs Enforcement and Sanctions Guidance, B 3.4 – exceeding an emissions target. Appeal Bundle p 96