



Neutral citation: [2023] UKFTT 1081 (GRC)

Case Reference: EA/2023/0011/ESOS

**First-tier Tribunal
(General Regulatory Chamber)
Environment**

**Heard: by determination on the papers
Heard on: 8 December 2023
Decision given on: 12 December 2023**

Before: Judge Alison McKenna

Between

FARRINGTON CARE HOMES LIMITED

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

DECISION

**The Notice of Appeal is Out of Time.
I refuse to extend time to admit the Notice of Appeal.
This appeal will accordingly proceed no further.**

REASONS

1. This matter concerns an appeal against a Civil Penalty Notice served by the Environment Agency on Farrington Care Homes Limited dated 23 December 2022 in the sum of £18,900.
2. The Notice of Appeal was filed on 25 April 2023, but the time limit for filing an appeal is 28 days, therefore the appeal was lodged three months' out of time.
3. I understand the Grounds of Appeal to be that the civil penalty was erroneous on the facts; that the penalty is unreasonable and that the Environment Agency had indicated to the Appellant's agent that the penalty would be withdrawn.

4. In response to Judge Neville's Case Management Directions, the Environment Agency submitted that it had never stated to the Appellant or its agent that the penalty would be withdrawn. It opposes the grant of an extension of time to allow this appeal to be admitted.
5. It is clear that the Appellant has placed considerable reliance upon representations made to it by its agent Amanda Dunnington. Judge Neville directed Ms Dunnington to file a witness statement with the Tribunal, but she has not done so. The Appellant has informed the Tribunal that Ms Dunnington has been ill and that it is impossible to communicate with her. Judge Neville warned the Appellant that, if Ms. Dunnington did not file a witness statement as directed, this appeal may be struck out.
6. The Civil Penalty Notice which is the subject of this appeal was served under regulation 39 of the ESOS Regulations. This appeal is made under regulation 48 of the ESOS Regulations¹, which provides that:

48. (1) A responsible undertaking served with...an enforcement notice, or a penalty notice, may appeal to the relevant appeal body on the grounds that the determination, enforcement notice or penalty notice (as the case may be) was—

(a) based on an error of fact,

(b) wrong in law, or

(c) unreasonable.

7. Regulation 49 provides that the Civil Penalty Notice is suspended until the determination of an appeal. Under regulation 50 of the ESOS Regulations, the Tribunal has power when determining an appeal to:

(a) cancel the determination, enforcement notice or penalty notice (as the case may be),

(b) affirm the determination, enforcement notice or penalty notice (as the case may be), whether in its original form or with such modification as it sees fit,

(c) instruct the scheme administrator or the relevant compliance body to do, or not to do, anything which is within the power of the scheme administrator or compliance body.

8. I note that I have discretion to extend the time limit pursuant to rule 5 (3) (a) of the Tribunal's Rules². The relevant legal principles which I am bound to consider in exercising my discretion are set out in the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC). I have also considered the Upper Tribunal's decision in *BPP University College of Professional Studies v HMRC* [2014] UKUT 496 (TCC) in which the *Data Select* principles were applied. (*BPP* was considered further in the Court of Appeal and the Supreme Court, but on a different point).
9. The relevant principles are set out as follows in Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or

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

² [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

10. Applying the recommended approach, I find: (i) that the purpose of the time limit is to ensure that proceedings are conducted in an orderly way and that the principle of finality in litigation may be observed; (ii) I find that the period of delay in this case was three months, which is a very significant period; (iii) in considering the explanation given for the delay, I note that the Appellant has relied on representations made to it by its agent which do not seem to be correct. I do not find these reasons to be good ones because the Appellant has a responsibility to attend to its own affairs diligently notwithstanding the appointment of an agent. Furthermore, the Appellant may be advised to take legal proceedings against its agent, who presumably has insurance. Finally, (iv) and (v) I consider the consequences for the parties of extending or not extending time. If I refuse, then these proceedings will be brought to an end today. If I agree, then this matter will proceed to require the Environment Agency to file a Response to the substantive appeal. Strong grounds of appeal might justify admitting an appeal out of time, but in this case the Appellant has not addressed itself directly to prescribed grounds of appeal in any event and seeks to litigate an issue that the Tribunal cannot determine under the Regulations, namely whether the Environment Agency promised to withdraw the Civil Penalty. These issues are likely to require the Tribunal to expend time and the parties money on considering striking out the appeal, causing further delay in arranging a hearing. I also take into account that this matter is unlikely to be suitable for determination on the papers due to an apparent evidential dispute between the parties and so may require an oral hearing.
11. I express my sympathy to the Appellant for the situation it finds itself in. However, in all the circumstances I have concluded that the reasons given are not sufficient to justify the extension of time required to allow this appeal to proceed. I suggest that the Appellant take legal advice about alternative remedies which may be available to it through the courts, as this matter may not now proceed in this Tribunal.

Signed: Judge Alison McKenna

Dated: 8 December 2023

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