THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-001673-GEPN
[2023] UKUT 180 (AAC)
ENVIRONMENT AGENCY V ELIZABETH ARDEN (UK) LTD

Decided without a hearing

Representatives

EA	Paul Collins, solicitor
EAUKL	Harvinder Dhingra, Consultant

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	NV/2022/0005
Decision date:	27 September 2022
Hearing:	Decision 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)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

Abbreviations:

EA	Environment Agency
EAUKL	Elizabeth Arden (UK) Ltd
ESOS	Energy Savings Opportunity Scheme
The Regulations	Energy Savings Opportunity Scheme Regulations 2014 (SI No 1643)

1. This case concerns ESOS. It was introduced by the Energy Savings Opportunity Scheme Regulations 2014 (SI No 1643) in order to comply with Directive 2012/27/EU on energy efficiency. Its purpose is to encourage large organisations to save energy

by requiring them to carry out assessments to identify cost-effective energy saving measures. EA is responsible for monitoring and enforcing compliance.

A. The basic structure of the Regulations

2. This is the basic legal structure. The Regulations impose a duty to carry out an ESOS assessment, including an energy audit (regulations 20 and 26). EA has power to issue notices of compliance, enforcement and civil penalties (regulations 35, 38 and 39). A penalty notice sets the penalty for breaches of the Regulations. In this case, the relevant breach was for failure to carry out and report on an ESOS assessment. The penalty for that breach was fixed under regulation 45.

B. The legislation

3. These are the relevant provisions of the Regulations in this case.

Notices

35 Compliance notices

(1) A compliance body may serve a notice on a responsible undertaking requesting such information as it considers necessary to enable it to monitor compliance with these Regulations (a 'compliance notice').

(2) A compliance notice must—

(a) be in writing,

(b) be served on the person to whom it is addressed,

(c) specify the date by which compliance with it is required.

(3) A compliance notice may be varied or revoked in writing at any time by the compliance body that issued it.

(4) Where a responsible undertaking—

(a) fails to comply with a compliance notice, or

(b) in the opinion of the compliance body, supplies incomplete or inaccurate information,

the compliance body may instead determine the information requested.

(5) A determination under paragraph (4) must be made in writing and include information about appeals under Part 9 of these Regulations and, within 10 days of making the determination, be served on the responsible undertaking.

38 Enforcement notices

(1) In any case where the relevant compliance body reasonably believes that a responsible undertaking has failed to comply with a requirement of these Regulations, that compliance body may serve a notice on that responsible undertaking in accordance with this regulation (an 'enforcement notice').

(2) An enforcement notice must—

(a) be in writing,

(b) be served on the person to whom it is addressed,

(c) specify—

(i) the provision of these Regulations which the compliance body believes has been breached,

(ii) the matters constituting the breach,

(iii) the steps that must be taken to remedy the breach,

(iv) the date by which those steps must be taken, and

(d) include information about appeals under Part 9.

(3) An enforcement notice may be varied or revoked in writing at any time by the compliance body that issued it.

39 Penalty notices

(1) In any case where the relevant compliance body is satisfied that a responsible undertaking is liable to a civil penalty under this Part, it may serve a notice on that responsible undertaking (a 'penalty notice') imposing the penalties and other requirements set out in this Part.

(2) A penalty notice must—

(a) be in writing,

(b) be served on the person to whom it is addressed,

(c) specify—

(i) the breach of these Regulations in respect of which the penalty is imposed,

(ii) the steps that must be taken to remedy the breach,

(iii) the nature of the penalty, and

(d) include information about appeals under Part 9.

(3) A penalty notice imposing a financial penalty must specify—

(a) where no daily penalty applies or the total amount of the daily penalty can be determined at the date of service of the notice—

(i) the total amount due,

(ii) where applicable, how it has been calculated, and

(iii) to whom, and the date by which, it must be paid,

(b) where a daily penalty applies and the total amount of the daily penalty cannot be determined at the date of service of the notice—

(i) the amount of the initial penalty,

(ii) details of the applicable daily penalty, and

(iii) to whom the penalty must be paid.

(4) Where a notice has been served under paragraph (3)(b) and the total amount of the daily penalty can be determined after the date of service of the notice, the compliance body must serve a further notice on the responsible undertaking which complies with paragraph (3)(a).

(5) The daily penalty rate must be calculated by reference to working days.

(6) The compliance body must remit to the Secretary of State any financial penalty received.

Breaches of Regulations

45 Failure to undertake an energy audit

(1) The penalties in paragraph (2) apply where a responsible undertaking fails to carry out an audit, contrary to Chapter 3 of Part 4, where the alternative routes to compliance in Part 6 do not apply.

(2) The penalties are—

(a) the financial penalties of—

(i) an initial penalty of £50,000, or such lesser amount as the compliance body may determine, and

(ii) a daily penalty of up to £500 for each working day the responsible undertaking remains in breach, starting on the day after the service of the compliance notice subject to a maximum of 80 working days, and

(b) the publication penalty.

(3) The penalty notice may specify the steps the compliance body requires the responsible undertaking to take, including conducting or completing an ESOS assessment, to remedy the breach, and the date by which such steps must be taken.

Appeals to the First-tier Tribunal

48 Appeals

(1) A responsible undertaking served with a determination under regulation 35(5) or paragraph 13(2) of Schedule 2, or 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.

50 Determination of an appeal

An appeal body may—

(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, any thing which is within the power of the scheme administrator or compliance body.

Service of documents

51 Service of documents

Any determination or notice required to be served on a responsible undertaking, may be served by—

(a) delivering or sending it to, or leaving it at—

(i) the responsible undertaking's registered office (where applicable),

(ii) the responsible undertaking's principal place of activity, or

(iii) another address in the United Kingdom specified by the responsible undertaking as its address for service, or

(b) sending it by electronic means to the email address provided by the responsible undertaking pursuant to paragraph 1(b) of Schedule 3.

4. Section 7 of the Interpretation Act 1978 is also relevant to this case:

7 References to service by post

Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

C. Timetable

5. EA says that it sent the following notices to EAUKL at its registered office:

On 12 March 2020, a compliance notice under regulation 35 with the date for compliance as 27 March 2020;

On 16 October 2020, an enforcement notice under regulation 38 with the date for compliance as 18 January 2021. The compliance required was to confirm compliance with the audit under regulation 29;

On 9 December 2021, a notice of a civil penalty under regulation 39 in the sum of £14,850 for failure to comply with the enforcement notice. EAUKL appealed to the First-tier Tribunal against this notice under regulation 48.

At least some of those notices were also sent to EAUKL at a general email address.

D. The First-tier Tribunal's decision

The issues and the decision

6. The judge identified the relevant issues on the appeal. Having set out what was not in dispute, she continued:

> 7. What is in dispute is whether [EA] served the enforcement and penalty notices correctly, applied its Enforcement policy correctly and proportionately and in particular correctly assessed the level of culpability on the part of [EAUKL] as Negligent rather than Low or No culpability.

In view of the error that the tribunal made, I do not need to explain the policy that EA applies to fix the amount of a penalty.

7. Having considered those issues, the judge cancelled the penalty notice and substituted a revised notice setting the penalty on the basis of Low or No culpability.

The error of law

8. Having identified service as an issue in the appeal, the judge then misdirected herself in law. She began paragraph 20 of her written reasons with the words: 'Somewhat surprisingly I could find no reference to specific service requirements …' That was a mistake, because regulation 51 makes express provision for service. Having misdirected herself on the law, it is not surprising that the judge failed to apply it. That in turn may have had an effect on the Enforcement Policy issues.

E. What the First-tier Tribunal should have done

9. The grounds of appeal raised two issues: service on EAUKL and EAUKL's knowledge of the notice.

Service

10. This is the first issue that the tribunal should have considered. Had the penalty notice that was the subject of the appeal been served on EAUKL? The notice was a legally significant act, because it was the notice that imposed the penalty. That is what regulation 39(1) expressly provides. Service is the process by which the notice becomes legally effective. That is why regulation 39(2)(b) provides that 'A penalty notice *must* … be *served* on the person to whom it is addressed'. Regulation 51 supports that by providing for the means by which service may be effected.

11. But did regulation 51 apply? It applies only to notices that are 'required to be served'. In contrast, the language of regulations 35, 38 and 39 provides that that EA 'may' serve the appropriate notice. Nevertheless, regulation 51 applies. It has to be interpreted in the context of EA exercising its powers as the ESOS regulator. In that context, when the circumstances justify a notice being issued, it is proper to say that there is a requirement that it be served. Otherwise, regulation 51 would be rendered largely redundant in the legislation and it would not apply in the circumstances where it would most be appropriate.

12. As regulation 51 applies, section 7 of the Interpretation Act 1978 becomes relevant because it provides for: (a) the means by which service may be effected; and (b) a rebuttable presumption of when service is effected.

13. The tribunal should have enquired and found whether service had been effected. There are two ways in which EA may have served EAUKL under regulation 51: (a) by post to the company's registered office (regulation 51(a)(i)); or (b) by email (regulation 51(b)).

14. I will begin with post to the registered office. The starting point was for EA to prove that the penalty notice had been *sent* in accordance with regulation 51 and section 7. The only evidence I can find in the First-tier Tribunal's hearing file is a copy of the notice bearing the address of EAUKL's registered office. That was not sufficient to show that the notice was posted or, if it was, when that was done. EA may have a specific record of posting. If so, that could have been put in evidence. If not, EA might have been able to produce sufficient evidence of its standard procedures as a basis for the tribunal to infer that it was posted on a particular date.

15. If EA could show posting, EAUKL would then have the opportunity to prove that the notice did not arrive. The company had said that the notice could not be found. But it would need to produce evidence to that effect. The tribunal would then have had to consider whether: (a) it had not arrived; or (b) it had arrived but had been lost in the confusion of postal deliveries during lockdown.

16. I now turn to service by email. I can deal with this briefly. The only permissible email address would be one provided in accordance with Schedule 3 to the Regulations. As far as I can tell, EAUKL did not provide an address under that provision.

17. If the tribunal had found that the notice had not been served, it would have had no legal effect. That meant that the notice was wrong in law under regulation 48(1)(b) and should be cancelled under regulation 50(a).

18. If and only if the tribunal had found that the notice had been served, it would then have had to consider the second issue: knowledge.

Knowledge

19. This is the second issue raised by the grounds of appeal. Even if the notice was properly served, it is possible that EAUKL was not aware of it. That could then be a relevant factor in deciding whether it was unreasonable to impose a penalty or that the amount was unreasonable. There may be other possibilities, depending on the circumstances. This does not mean that lack of knowledge by EAUKL would have been decisive, only that it would have been a factor to consider. But the issue does not arise unless and until the tribunal is satisfied that the notice under appeal was properly served.

F. The First-tier Tribunal response to the application for permission to appeal to the Upper Tribunal

20. On 13 October 2022, EA applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. On 24 November 2022, an administrative officer of the General Regulatory Chamber sent an email to the parties:

> On 13 October the Environment Agency submitted an application to the Tribunal for permission to appeal the Decision of 27 September 2022.
>
> The Tribunal Judge has seen the application, and has instructed as follows:
>
> 'I note that the Environment Agency is relying on a First Tier Tribunal decision in another similar case that has not to my knowledge been reported, and I question whether any application has been made to the President to adduce this decision in evidence and rely on it in this appeal?
>
> Apart from this I have nothing to add to my decision and await guidance from the Upper Tribunal.'

21. That response raises a number of issues.

22. First, the appeal to the Upper Tribunal lies against the decision made by the First-tier Tribunal on 27 September 2022. There is no appeal against the tribunal's response to an application for permission to appeal against that decision. The Upper Tribunal does not review that response: *CIS/4772/2000* at [2]-[11]. Nor may it be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67]. Nevertheless, the email raises some issues that merit comment.

23. Second, decisions of the First-tier Tribunal or of any other tribunal or court are cited for the propositions they establish. They are not a matter of evidence and do not have to be adduced.

24. Third, it is worth repeating what Upper Tribunal Judge Wright said of letters and emails like the one I have quoted. He was referring to the Social Entitlement Chamber, but the point is relevant generally. In *HMRC v AD* [2020] UKUT 353 (AAC), the clerk of the Chamber had written to the parties saying:

> On 02/09/2019 I received your application for permission to appeal to the Upper Tribunal against the Tribunal's decision made on 02/04/2019.
>
> Your application has been rejected because:
>
> … a statement of reasons has not been prepared.
>
> If you have given reasons for the delay in making your application, these will have been considered when deciding if a statement should be prepared.
>
> I am returning your application as I can take no further action …

This is what Judge Wright said:

> 12. I have proceeded on the basis that behind the First-tier Tribunal's letter of 10 September 2019 lay a decision of a judge of the First-tier Tribunal under rule 38(7)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 refusing to admit (not 'rejecting') the application for

permission to appeal: see *JP v SSWP* (ESA) [2016] UKUT 48 (AAC). However, HMRC, just as any other party to an appeal, were entitled to receive, and ought to have received, a copy of the judicial determination on its application for permission to appeal. (And it should not need saying that a judge ought to have made a ruling on the application for permission to appeal.)

25. Fourth, I am not aware of any system of reporting of decisions made in the General Regulatory Chamber. Some of the decisions may be posted online, but that is not the same as reporting.

26. Fifth, precedent is hierarchical. Tribunals are bound by decisions made by a body higher in the judicial hierarchy. Practices differ about a tribunal's own previous decisions. Generally, the higher the level, the more restricted the freedom to depart from previous decisions. At First-tier Tribunal level, there are two considerations that favour previous decisions not being binding. First, the role of that tribunal is essentially fact-finding. Second, the large number of decisions may make it impossible in practice to ensure that everyone knows the decisions that are being made. If the judge in this case intended to refer to using an earlier decision as a binding precedent, this was not appropriate in the First-tier Tribunal.

Authorised for issue
on 25 July 2023

Edward Jacobs
Upper Tribunal Judge