

The Renewable Energy Consumer Code Appeals Panel Hearing

In the matter of

ESE Services Ltd (“the Member)

held on

8 November, 2018

at

1 Wood Street, London

Panel Members:

Amanda McIntyre (Chairperson)

Bryn Aldridge

Alan Wilson

In attendance:

Michael Thompson (panel secretary)

Tom Coates (Legal Advisor)

Renewable Energy Consumer Code (“the Regulator”) representation:

Ms Lorraine Haskell (RECC Head of
Independent Panels)

Ms Rebecca Robbins (RECC Head of
Compliance)

ESE Services Ltd representation:

None present

1. Preliminary matters considered by the Appeals Panel prior to the commencement of the Appeals Hearing.

- 1.1.** The Panel considered whether to adjourn in the light of the previous requests for adjournments, the responses from the RECC Regulator, the three previous decisions made by the Chairperson dated 19 October, 25 October and 7 November and the email of 7 November 2018 from the Code Member all of which were put before the Panel. The latter email sent at 20.45 had confirmed that the Member would not be attending the Hearing, would not be sending a legal representative and would not be sending another Director. It also stated that the Member believed his right to attend in person had been unfairly compromised and he would be submitting a complaint to the relevant authorities. The Panel also requested RECC's views on any adjournment that might take place.
- 1.2.** Ms Haskell for the RECC Regulator stated that they stood by the original submissions that they sent on 7 November and which were summarised in the Chairperson's decision of the same date. In particular, the Member had chosen not to attend and had chosen not to send a representative. She also stated that RECC had concerns that any further delay in the sanctions from the Non-Compliance Panel's ("NCP") Determination of 16 August 2018 coming into play would cause risk of further consumer detriment, that the NCP had found breaches of the Code that were serious and that the Member could carry on their activities until such time as the sanctions did take effect. She stated that they had a concern that any adjournment might lead to the Member requesting further adjournments. She also stated that the reputation of the RECC Regulator as a regulator was at risk of damage.
- 1.3.** Ms Robbins for the RECC Regulator added that they had concerns about the letters that were found to be misleading continuing to be sent out to consumers up until the end of December 2018 and the resulting potential detrimental impact on consumers.
- 1.4.** Ms Haskell confirmed that the Member did not need to be a member of the Code to continue his business model and Ms Robbins advised that the Member had voluntarily withdrawn from the MCS certification scheme.
- 1.5.** Ms Haskell then went on to say that, if the Panel was minded to adjourn, on account of the Member's non-attendance, they would want it rescheduled for 15th November 2018. This would incur significant extra cost, but it would minimise the cost as opposed to choosing an alternative date. If there is a further delay, sanctions would be delayed which could again give rise to consumer detriment.

- 1.6. After consideration of all the above, the Panel has decided to proceed with the Hearing today.
- 1.7. As part of the Panel's decision, it has decided to offer the Member the opportunity to make their submission by telephone conference between 1.30 and 2.30pm.

2. Appeal to be Heard

- 2.1. The Appeals Panel ("the Panel") convened to hear the appeal of ESE Services Ltd ("the Member") against the determination of the NCP following the hearing held on 16 August 2018.
- 2.2. Under Bye-Law 11 of the Renewable Energy Consumer Code ("the Code"), a Member can appeal the decision of the NCP on the grounds that:
 1. The Non-Compliance Panel's determination or part thereof was irrational, and/or based on a fundamental error of fact and/or based on a clear misinterpretation of the Code or these Bye-Laws; and/or
 2. there has been a serious procedural irregularity; and/or
 3. the sanction(s) imposed are not in reasonable proportion to the findings made by the Non-Compliance Panel; and/or
 4. if the appeal is in relation to costs, the order for costs (if any) was based on a fundamental error of fact or law and/or based on a clear misinterpretation of the Code or these Bye-Laws, or was unjust because of a serious procedural irregularity.

3. Evidence before the Panel

- 3.1. The Panel had before it all the evidence provided to the NCP at its hearing of 16 August 2018, together with the NCP's determination, a transcript of the hearing, and the Member's notice of appeal of 11 September 2018 and the Regulator's response dated 5 October 2018.
- 3.2. As the Member was not present and no telephone submission was forthcoming, the Panel relied upon the email of 11 September 2018 setting out the Member's grounds for appeal ("the Notice of Appeal").

- 3.3.** Under Appeals Panel Rule 10, the Chairperson invited the Regulator's representatives to present its case as to why the NCP's determination should be upheld.
- 3.4.** Ms Haskell for the Regulator stated that some of the points in the Member's Notice of Appeal are unclear and hard to respond to without the Code Member present. Throughout her evidence she directed the Panel to the Regulator's response and to various points in the transcript.
- 3.5.** Ms Haskell then moved onto the grounds for appeal outlined in the Member's Notice and took each one in order.
- 3.6.** With regard to point i of the first ground of procedural irregularity, Ms Haskell said that RECC were not clear what the Member was saying. Ms Robbins suggested that it may be to do with Bye-law 4.9 which relates to the dispute resolution process whereby the Member is given an opportunity to resolve any complaint before RECC gets involved. She pointed out that there are many stages of the process but it was unclear which one the Member was referring to.
- 3.7.** Ms Haskell added that Bye-law 11.8.2 allows upholding an appeal in regards to serious procedural irregularity. RECC did not bring any charges regarding dispute resolution or complaint handling to the NCP and so the point has no substance for the purposes of this Appeal.
- 3.8.** At point ii of procedural irregularity the Member says they didn't admit to facts or breaches. Ms Haskell pointed to several instances in the transcript where the Member did admit the facts and breaches and where the Chairman of the NCP referred the Member to this and checked they understood what they had admitted to.
- 3.9.** At point iii the Member refers to undisclosed evidence admitted during the NCP hearing. Ms Haskell advised that the RECC Regulator was only aware of one occasion where that happened and this was in relation to 4 complaints in document 29a which the Member had not been given prior notice of at the NCP. She pointed out that these complaints did not introduce any new charges or allegations that had not already been brought.
- 3.10.** Ms Haskell then turned to the Member's second ground of appeal relating to fundamental error of fact in the NCP determination.

- 3.11.** With regard to point i Ms Haskell considered that there is insufficient information provided for them to respond.
- 3.12.** With regard to point ii, Ms Haskell pointed out that the Regulator is required to keep the complainant's details anonymous unless they have obtained their written permission under Bye-law 5.7 and that in any case, RECC provide supporting evidence to verify that complaints are real.
- 3.13.** In regard to point iii, Ms Haskell referred the Panel to the transcript namely p377, at line 23 where she explained that feedback complaints are supporting evidence, are real complaints with evidence to substantiate them, and are used to demonstrate a pattern of behaviour. The Regulator is able to rely on feedback complaints at the NCP in line with Bye-law 7.1. Ms Haskell reiterated that feedback is defined in the Bye-Laws as information provided by a consumer or other individual or organisation. This includes but is not limited to expressions of dissatisfaction or feedback complaints from consumers or another Code Member in relation to Code Members. She submitted that feedback could be categorised as a complaint.
- 3.14.** Ms Robbins then pointed out that this point should go to procedural irregularity rather than fundamental error of fact as not only are RECC allowed to use these complaints as evidence, they can evidence these complaints as real and anonymous through the use of unique numbers.
- 3.15.** Turning to point i of the third ground for appeal, Ms Haskell stated that the NCP look at current issues of non-compliance. She went on to say that the Member had made some changes in relation to their practices but these were not adequate and do not make the Member compliant and the concerns remain despite RECC raising them on numerous occasions. She also referred the Panel to p405 of the transcript, line 21, where the NCP Chairman said that he was grateful for the Member's explanation about the changes made but that the NCP were here to consider concerns that the regulator has and that the regulator still has concerns about the language remaining in the letters.
- 3.16.** Ms Robbins stated that there is evidence to show that the NCP mitigated somewhat and referred the Panel to the NCP's written warning at Annex A of their determination dated 28th August 2018, p365 of the bundle. At paragraph 2, Ms Haskell highlighted that the NCP expressly state they gave weight to the Member's willingness to engage with the disciplinary procedure when deciding appropriate

sanction. She also mentioned that RECC had sought termination of membership but the NCP had chosen not to pursue this sanction and demonstrated mitigation by virtue of the reduced sanction imposed.

- 3.17.** In relation to point ii of the Member's third ground for appeal, Ms Haskell referred to 2.4 of the Code where it is clear that the Code Member will be responsible for any non-compliance with the Code by the third party. This is even more apparent where the third party has directors in common with the Member. She also pointed to places in the transcript where the Member stated that he had control over the content of the letters and frequently referred to the two companies as "us".
- 3.18.** In regards to the second point ii (sic) Ms Haskell said that she was not sure what the Member is saying. She said that the written warning specifically refers to the NCP giving weight to the Member's willingness to comply and engage with the disciplinary procedure.

4. Appeals Panel's Consideration and Decision

- 4.1.** The Panel considered the matters set out in Section 11 of the Appeals Panel Rules. In the absence of the Member at the Appeals Hearing, the Panel had regard to the Member's grounds for appeal dated 11 September 2018. The Panel took account of the written submission provided to it by the Regulator. The Panel also took account of the oral submission given by the representatives from the Regulator.
- 4.2.** In regards to the point i of the first ground of appeal, the Panel considered that there was no evidence submitted to support this.
- 4.3.** In regards to point ii, the transcript clearly showed at several points that the Member had admitted the facts and indeed the breaches apart from that in relation to section 5.1 of the Code.
- 4.4.** In regards to point iii, the Panel noted that the Member did not have notice of 4 complaints before the NCP Hearing. However these complaints did not relate to any new charges or allegations. And the Chairman of the NCP gave the Member an opportunity to read through the complaints and had offered an adjournment if the Member wanted one. The Panel did not regard this to be a serious procedural irregularity.

- 4.5. In relation to point i of the second ground of appeal, the Panel considered that there was no evidence provided to support the Member's submission that evidence had been provided which questioned the authenticity of complaints but which had not been properly taken into consideration.
- 4.6. In relation to point ii, the Bye-Laws are clear that anonymous complaints can be used as evidence.
- 4.7. In relation to point iii, again the Bye-Laws allow for the use of feedback complaints as complaints.
- 4.8. In regard to point i regarding Sanction, the Chairman of the NCP Hearing had referred to the Member having made some changes and the written warning provides evidence that the NCP did mitigate in their decision.
- 4.9. In relation to point ii, the Code is very clear that Members are responsible for any third parties they use.
- 4.10. In relation to the second point ii (sic), any Member does indeed have the right to seek a NCP Hearing as an alternative to a Consent Order under Bye-Law 8.5.7.
- 4.11. Under 11.9.3 of the Bye-Laws, the Panel decided to dismiss the Member's appeal and uphold the determination of the NCP.

5. Costs

- 5.1. The Regulator provided evidence to show that the claim for its costs had been sent to the Member at least 24 hours before the Appeals Hearing as per Appeals Panel Rule 5.8. The Panel notes the Member's email dated 7 November in which the Member states that he disagrees with the schedule of costs and says he will be making representations. The Panel has not received any such representations from the Member as at 16.55 on 8 November 2018.
- 5.2. The Panel considered the reasonableness of both the overall level of the Regulator's costs and the reasonableness of the individual items of costs set out in the schedule by the Regulator.
- 5.3. The Panel's decision is that the Member should pay the Regulator's costs amounting to £21,140.00.

- 5.4.** The Regulator submitted to the Panel that final costs may be reduced given that Counsel for the Regulator had not attended the Hearing. In that event, costs of £21,140.00 are made in favour of the Regulator less any difference in Counsel's fees.

16 November 2018