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# **Sample Cases**

## **2013**

## 6. Selected Appeal Cases

### Case 1: Single Payment Scheme and the Organic Farming Scheme, 2012.

An application was lodged under the 2012 Single Payment Scheme. Following an on farm inspection the Department deemed that there had been an over declaration of eligible forage area and a double the difference penalty was applied as specified in the Terms and Conditions of the Scheme.

The decision was appealed to the Agriculture Appeals Office. The appellant explained that he was in REPS and the Organic Farming Schemes and had been advised that in relation to a specific SPA parcel that it was 'an area of natural vegetation and will remain fenced off from livestock'. It was explained that there is an embankment which divides this area from the other land farmed, that it is fenced off, that cattle do not graze this parcel, in fact it is a habitat area, part of which is rocky with some scrub. The appellant stated that he had complied with professional advice in relation to this parcel.

The Appeals Officer found that the Single Payment Scheme specifies that 'eligible area excludes .... areas fenced off from grazing use, ...'. Therefore as this land was fenced off from cattle it did not qualify as eligible forage area for the purposes of this Scheme. In addition, the Terms and Conditions of the Organic Farming Scheme state that forage area is defined as 'the net area entered as grassland or permanent pasture on your most recent EU Single Payment Scheme application'.

As the parcel concerned was deemed ineligible under the Single Payment Scheme, it was also ineligible for payment under the Organic Farming Scheme. The appeal was disallowed.

### Case 2: Agri-Environment Options Scheme (AEOS) 2010.

The appellant applied to join AEOS in May 2010. Their contract commenced in November 2010. AEOS Division of the Department was informed that they wished to withdraw from the Tree Planting Standard action due to health reasons. Medical evidence was provided. AEOS Division received a further letter informing them that the applicant wished to withdraw from AEOS as due to poor health they were unable to continue farming, additional medical information was provided.

The appellant was informed by letter from AEOS Division that their application to withdraw from AEOS under section 18 of the Terms and Conditions – Force Majeure had been refused. The reason given for the decision was that there was insufficient medical evidence to warrant termination under the provisions of force majeure. A return of the payments made was also requested.

The appeal, on medical grounds, was received by this office and an oral hearing was requested. At the oral hearing it was outlined that although it was accepted that some of the health problems pre-dated the AEOS application, if the applicant's health had remained as it was at the time of application they would have continued farming and fulfilled their obligations under the Scheme. The Department identified the relevant category of force majeure in this case as '*long term professional incapacity of the participant.*'

Having examined the medical documentation, it was accepted that the appellant's medical condition had deteriorated resulting in their ceasing to farm. The Appeals Officer accepted that the appellant would have continued farming and fulfilled their obligations under AEOS if their health had remained the same as it was when they applied and were accepted into AEOS. The Appeals Officer's decision was that the AEOS contract should be terminated, under paragraph 18 of AEOS Terms and Conditions, on the grounds that the appellant was unable to continue for reasons beyond their control, due to long term professional incapacity. The amount paid to the appellant under AEOS was not to be recouped. The appeal was allowed.

### Case 3: Organic Farming Scheme, 2011.

The Department approved the appellant's application to join the Organic Farming Scheme (OFS), with the contract commencing in June 2011 and running for a period of 5 years and 7 months. The Department wrote to the appellant in October 2012 stating that the Organic Certification Body had confirmed that the organic operator's licence had lapsed with effect from 31 December 2011 and recoupment of all payments made under the OFS was required. The appellant sought a review of this decision; however, it was upheld by the Department.

The decision was appealed to the Agriculture Appeals Office on the basis that it was necessary to exit the OFS due to an injury; the appellant was still farming but not organically; the farming system was changed to reduce the manual labour requirement. Medical evidence was provided.

On examination of the Terms and Conditions of the scheme and taking account of all submissions made, the Appeals Officer found no basis for overturning the original decision. Section 5.6 of the OFS terms and conditions states: *'Participants who wish to avail of the Scheme must register with and be approved as an organic operator by one of the OCBs and hold a licence for the full duration of their Scheme contract...'*. Section 10.4 states: *'Non-renewal of an organic licence by the participant within the five-year commitment period shall mean termination from the Scheme and full recoupment of all aid paid, including interest payable under SI No. 13 of 2006, except where a participant has ceased farming and has already completed three years in the Scheme...'*

Section 15 deals with force majeure or exceptional circumstances: *'Where a participant is unable to continue complying with the commitments given for reasons beyond his/her control, a case may be made under force majeure to terminate his/her participation in the Scheme. In such cases the participant or his or her representative should inform the Organic Unit in writing with relevant evidence, within ten working days of being able to do so.'*

The Appeals Officer found that the appellant continued to farm after 31 December 2011, though not organically. Therefore force majeure provisions of long term professional incapacity could not be applied. The appeal was disallowed.

#### **Case 4: Agri- Environment Options Scheme, 2010.**

The appellant applied to join the Agri-Environment Options Scheme (AEOS 1) listing Traditional Hay Meadow as their Mandatory Action, and Tree Planting – Whips, and Coppicing Hedgerows, as their Complementary Actions. The application was successful and they were given a contract start date in September 2010. In a letter dated 30 January 2013, the Department informed the appellant that as they had dropped Traditional Hay Meadow, and Coppicing Hedgerows actions, the Department were seeking a full refund for the actions paid under the Scheme.

The appellant subsequently appealed to the Agriculture Appeals Office. The appeal stated that due to financial constraints the appellant had been forced to sell the majority of their land to pay outstanding debts. Paragraph 5.6 of the AEOS Terms and Conditions states: *All contracts shall run for at least 5 years.*

Paragraph 10 of the AEOS Terms and Conditions titled Reduction of undertaking states: *Where all or part of an undertaking is not continued for a minimum period of 5 years, all or part of the aid paid in respect of that undertaking shall be repaid.* The Appeals officer found that the appellant had failed to complete their AEOS undertakings in accordance with the Scheme Terms and Conditions. The provisions of force majeure do not extend to cover financial constraints. The appeal was disallowed.

#### **Case 5: Single Payment Scheme and Nitrates Regulations, 2010.**

The Department undertook a Statutory Management Requirement 4 Cross Compliance inspection and applied a 1% sanction for exceeding the 2009 phosphates limits. The Department determined that a maximum chemical phosphorous limit of 115 kg applied to the holding and 150 kg of chemical phosphorous was applied.

The amount of chemical fertiliser used was not contested, the grounds of appeal included the fact that 100m<sup>3</sup> of slurry was exported in 2009 and was shown on the Appellant's fertiliser accounts for 2009.

Under Section 3 of the Nitrates Regulations, at that time, farmers must have kept records, finalised by 31 March of the following year and must record livestock manure moved on to or off the holding.

The Appeals Officer noted a phosphorous limit of 19 kg / ha is required for phosphorous index 3 soils but the Appellant's fertiliser records stated a limit of 24kg / ha. The Appeals Officer found 19 kg per ha was correct.

The amount of chemical phosphorous applied during 2009 exceeded the farm limit in the absence of exports. The Appellant sought allowance for 80 kg of organic phosphorous in slurry exported. At the time of the inspection the inspecting officer noted 80 kg of organic phosphorous was exported but as this information was not submitted to Nitrates Section it was not credited in the calculation. This evidence showed that the Record 3 form was provided at the time of the inspection. The Appeals Officer noted that in 2009 a farmer was only required to submit the Record 3 export form if seeking nitrates credit.

The Appeals Officer received confirmation from Nitrates Section that an initial 1% sanction imposed for a 2009 Nitrates breach was waived as a result of the Appellant's submission of a 2009 Record 3 export form. On the basis that Nitrates Section had accepted the export of slurry for 2009 Nitrates - the Appeals Officer found credit must also be given for the phosphorous element of that export. The appeal was allowed.

#### **Case 6: Single Payment Scheme and Nitrates Regulations, 2011.**

The Department wrote to the appellant to inform him that the total amount of nitrogen from livestock manure applied on his farm in 2011 exceeded the permitted level of 170 kg N/ ha, resulting in a 3% penalty. The appellant sought an appeal. The appellant stated that he understood that it was a requirement that all Nitrates records must be completed and up to date by 31 March of the following year. An oral hearing was held at which the appellant stated that the problem occurred as he was not aware of the change in Department rules. He stated that he had been over the 170Kg limit since 2007 and each year had the opportunity to submit a record of movement of slurry form. The appellant outlined that he exported cattle slurry to a neighbouring farm and stated that he kept a record of the movement of slurry on his holding.

The basis for the penalty is set out in the European Communities (Good Agricultural Practise for Protection of Waters) Regulations, 2006 as amended. Under the Regulations it is clear that herd owners are obliged to ensure that the total amount of nitrogen from grazing stock does not exceed 170kg of N per ha or 250kg of nitrogen per ha for derogation holders. In this case the amount of nitrogen produced on the holding in 2011 was in excess of 170kg and below 250kg.

In 2011 the Department introduced a deadline of 31 December 2011 for receipt of Record 3 forms. This deadline was notified to all Advisors/Planners/Farm Bodies on 25 May 2011, and advertised in the farming press in November 2011. This deadline was subsequently extended to 31 January 2012. The extension of the deadline was notified to farmers in the farming newspapers. The appellant did not submit a Record 3 form prior to the deadline. The Appeals Officer found that the change in rules was well publicised. The Appeals Officer upheld the Department's decision and the appeal was disallowed.

#### **Case 7: Non-Valuation Aspects of Reactor Scheme.**

The appellant was notified in September 2012 of the requirement to complete a herd test by November 2012. The test was completed in mid- December 2012 and 5 reactors were disclosed. These reactors were valued in mid- December 2012. In late December 2012 the appellant informed the Department that these animals had been administered a treatment in early December 2012 and this medicine had a withdrawal period of 56 days which would expire at end January 2013.

The Department informed the appellant that compensation would not be paid in respect of the 5 TB reactor animals because they were treated after they were informed a test was due.

The appellant's Veterinary Surgeon wrote to the Appeals Office, confirming that the herd had a serious problem in November 2012, which was having a serious impact on animal welfare and could have led to animal fatalities. He stated that he strongly advised that the animals be treated.

Annex A of ER5R document which was sent to the appellant prior to his herd test, ER/20/10 which outlines the criteria for making decisions on eligibility for payment were noted, as was the appellant's Veterinary Surgeon's letter to the Appeals Office.

The question the Appeals Officer had to decide in this case was whether the dosing of the cattle, after being informed of a herd test, could be regarded as routine treatment or as urgent medical treatment given on veterinary advice which has been certified.

The Appeals Officer took into account that both the Department's Veterinary Inspector and Superintending Veterinary Inspector dealing with this case recommended that valuation should be paid and the certified veterinary advice given to the appellant that urgent treatment was required to avoid animal welfare problems and fatalities. Also taken into account were the particularly adverse weather conditions in 2012 which led to the spread of liverfluke, and caused animal welfare problems. The Appeals Officer decided that, on the basis of the veterinary evidence provided by three Veterinary Surgeons, in these particular circumstances, the dosing of the herd could be considered as urgent medical treatment.

The Department's decision to refuse compensatory payments on the TB reactors was overturned and the appeal was allowed.

#### **Case 8: Nitrates and Cross Compliance (2010).**

The appeal concerned the Nitrates Regulations and 2010 Cross Compliance. The Appellant's 2010 on-farm nitrogen production exceeded the limit per hectare in the absence of slurry export. The Department had received a 2010 Record 3 form for the movement of cattle slurry to a farm in Northern Ireland which would have left a balance below the 170 kg per ha statutory limit.

The Department's Nitrates Section notified the Appellant that a 20% Cross-Compliance sanction applied with no credit for exports - on the basis certification procedures that exist for the export of organic manures to Northern Ireland were not followed.

In the appeal the Appellant stated the Northern Ireland documentation required the importer to obtain a veterinary certificate and the exporter is not mentioned and he could not locate information on the Department's web-site on the export of slurry outside of the State and had never received any information on the subject. At the hearing the Appellant's Teagasc Advisor stated Record 3 export forms had been accepted by the Department for exports from this farm to the same Northern Ireland farm.

The Department stated there was a procedure in place in 2010 for the export of organic manure to Northern Ireland, dealt with by the Department's By-Products Section where the exporter must get permission for each consignment. By-Products Section notifies DARD in Northern Ireland, and the cattle manure must be accompanied by a health certificate from the District Veterinary Office, and the Animal By-Products Regulation – EU Council Regulation 1774/2002 applied.

The Appeals Officer noted the Nitrates Regulation - Statutory Instrument No. 101 of 2009 (The Nitrates Regulation) states at Part 3 regulation 15(5)(a); *In the case of a holding on which grazing livestock are held, the amount of available nitrogen and available phosphorus supplied to the holding by manure from such livestock shall (save insofar as such manure is exported from the holding) be deemed to be the relevant proportion of the amount of available nitrogen and available phosphorus contained in the total manure produced by such livestock.* The Appeals Officer was satisfied from the Department's response to the appeal that there were procedures in place for slurry exports in 2010 from the State that involved the obtaining of health certification and licensing and these procedures were not followed in the case at appeal. However, the Department could not show these procedures were published within Nitrates information or within SMR4 information. The Appeals Officer noted that the Record 3 form is the only export form referred to in the Nitrates publications.

The Department had accepted the Record 3 movement forms for 2008 and 2009 for the exports of slurry to the same Northern Ireland holding, maps and address were provided to the Department at those times. The Appeals Officer found the 2008 Record 3 notice was provided to the Department in 2009 prior to the reported slurry movement in 2010 and the Appellant was not made aware of any issue in the intervening period.

In the matter of notification of the requirements the Department directed the Appeals Officer to a newspaper advert from 2008 in respect of Statutory Instrument No. 252 of 2008. The Appeals Officer noted that the advert was to notify the public of the introduction of S.I. No. 252 of 2008 which referred to and listed the EU animal by-product regulations introduced from 3 October 2002 to 11 June 2008.

The Department identified EU Council Regulation No. 1774/2002 as relevant legislation, The Appeals Officer noted 1774/2002 was repealed by EU Council Regulation No. 1069/2009 from 21 Oct 2009 and the export at appeal was a 2010 export. In response to this the Department replied that S.I. No. 150 of 2011 provided the legal basis for animal by-product licensing. The Appeals Officer noted S.I. No. 150 of 2011 was not in place during 2010. The Appeals Officer considered the Department had not shown the legislation giving effect to EU Council Regulation No. 1069/2009 during 2010.

The Appeals Officer was of the view that the movement of cattle slurry to Northern Ireland should have raised a query to the authorities by the Appellant but found it relevant that the 2008 slurry export when notified to the Nitrates Section of the Department was accepted as valid and did not give rise to any notice that certain procedures existed for such exports.

The regulatory basis for the Cross Compliance penalty is through Articles 71 and 72 of Commission Regulation (EC) No. 1122/2009, and the only basis for a 20% penalty was the application of reductions and exclusions in cases of intentional non-compliance. The Appeals Officer found it was not established from the evidence provided that there was an intentional breach by the Appellant, having relied on the Record 3 form to notify the 2010 slurry export and the Record 3 form was the only export form referred to in the Nitrates publications. The appeal was allowed.