



EMPLOYMENT TRIBUNALS

Appellant:

Ms A Pye

v

Respondent:

East Hampshire District Council

Heard at:

Reading (by CVP)

On: 7 December 2020

Before:

Employment Judge Hawksworth

Mrs J Wood

Ms HT Edwards

Appearances

For the Claimant: In person

For the Respondent: Mr S Aktar (solicitor)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The appeal was presented outside the time limit. It was reasonably practicable for it to have been presented in time and therefore the time limit cannot be extended. The tribunal does not have jurisdiction to hear this appeal.
2. The appeal cannot proceed as it was presented outside the time limit.

REASONS

Introduction

1. The appellant, Ms Pye, runs Orchard Farm Animal Sanctuary ('Orchard Farm') in Surrey. The respondent is the local authority for the area in which Orchard Farm is situated.
2. On 23 May 2019 the respondent served Ms Pye with a prohibition notice under section 22 of the Health and Safety at Work Act 1974, prohibiting access to Orchard Farm by visitors until specified remedial works had been carried out.

3. On 5 December 2019 Ms Pye submitted an appeal to the employment tribunal against the prohibition notice. A response to the appeal was submitted by the respondent on 2 March 2020.
4. A telephone preliminary hearing for case management was held on 31 March 2020 before Employment Judge Vowles.
5. A one day full merits hearing was listed for 7 December 2020. Orders were made for the parties to prepare for that hearing, including for the respondent to provide further particulars of the response to the appeal.
6. The case management orders recorded that the issues to be considered at the full merits hearing were as follows:

Appeal Against Prohibition Notice - section 24 Health and Safety at Work etc Act 1974

- 6.1 Preliminary issues to be considered will be whether the Prohibition Notice is valid and whether the appeal notice was presented after the expiry of the time limit and, if so, whether there are any grounds to extend the time limit.
- 6.2 If the Tribunal finds that it has jurisdiction to consider the appeal, it will proceed to determine whether the Prohibition Notice should be affirmed, modified or cancelled.

The hearing before us

7. The hearing before us on 7 December 2020 took place by video conference (CVP).
8. The parties had agreed a bundle of documents for use at the hearing and both parties had copies with them at the hearing. Hard copies of the bundle were sent by the respondent to Watford employment tribunal but they had not reached the tribunal panel by the start of the hearing. Neither party had facilities to scan the bundle. Mr Aktar, the respondent's solicitor, suggested that the tribunal could deal with the preliminary issues with a reduced bundle made up of documents already on the tribunal file: the prohibition notice, the respondent's further particulars, the witness statements and the respondent's chronology. Ms Pye said that she agreed that the preliminary issues could be determined with these documents, subject to her time line document also being included. Ms Pye emailed her time line through to the tribunal and we added this to the file. We then took some time for reading.
9. During the hearing the respondent referred to a covering letter which was enclosed with the prohibition notice. A copy of the letter and a signed copy of the prohibition notice were emailed to the tribunal and Ms Pye. Ms Pye was given time to look at these documents and comment on them.

10. We heard evidence from Ms Pye and from Mr Jewell, one of the respondent's health and safety inspectors. Both had prepared written witness statements. After the evidence, Mr Aktar and Ms Pye made submissions. Submissions concluded at 4.30pm, and we reserved our judgment.
11. During the hearing we heard evidence and submissions on both issues recorded as preliminary issues in paragraph 6.1 of the case management summary of 31 March 2020, namely:
 - 11.1. whether the prohibition notice is valid; and
 - 11.2. whether the appeal notice was presented after the expiry of the time limit and, if so, whether there are any grounds to extend the time limit.
12. For reasons explained in our conclusions, in our deliberations we decided that we should consider the time limit issue first. As a result of our conclusion on that issue, it was not necessary for us to consider the question of whether the prohibition notice was valid.

Findings of fact

13. We have to decide what happened (the facts). We reach our decision about what happened by considering the evidence we have heard and the documents we have been shown, and deciding what we think is most likely to have happened. We set out below our decision about what happened (findings of fact).
14. Ms Pye runs Orchard Farm. Mr Jewell, one of the respondent's health and safety inspectors, visited Orchard Farm on 26 April 2019, 30 April 2019 and 15 May 2019.
15. Mr Jewell decided that he had to take enforcement action to prohibit any further access by the public to Orchard Farm until suitable and sufficient facilities had been made available for visitors to wash their hands, go to the toilet and consume food. He prepared a prohibition notice under section 22 of the Health and Safety at Work Act 1974. The notice had a schedule setting out the remedial work required. It was signed and dated 21 May 2019.
16. Mr Jewell attended Orchard Farm with a colleague to serve the prohibition notice on Ms Pye with a covering letter. We find that although the notice itself was dated 21 May 2019, this visit took place on 23 May 2019. We reach this finding because Mr Jewell had made a written note of this date.
17. At the visit Mr Jewell gave Ms Pye a copy of the prohibition notice and a covering letter which was also dated 21 May 2019. The letter explained the prohibition notice and the work required. It said:

"On our last visit (15th May 2019) we spoke about considering taking further formal action in order to assist you in making the improvements

which you must make to comply with the law and provide a safe environment to visit. Once improvements have been made you will be able to invite friends and volunteers to the premises to assist you in the future ongoing care of the animals on the Farm in an environment which is a lower risk of infection.

...

The enclosed enforcement notice Prohibits, any further access by the public until such time that suitable and sufficient facilities are made available for visitors to wash hands, consume food and go to toilet.

This notice has no time frame and allows you to meet the Health & Safety requirements in your own time but effectively stops you from inviting people to the site and exposing them to further risk. The schedule attached to the notice outlines what you need to do to reduce the risk and comply with the notice.”

18. The covering letter also said:

“You may appeal against any of the Notices and a form of appeal and advisory leaflet are enclosed. In line with the Code of Practice on Access to Government Information.”

19. The prohibition notice itself had notes on the back page which included the following:

“4. You can appeal against this notice to an Employment Tribunal. Details of the method of making an appeal can be found on the GOV.UK website at <https://www.gov.uk/employment-tribunals/make-a-claim>. An appeal can either be submitted online at the above website address, or by downloading form ET1 and posting it to either the Employment Tribunal Central Office (England and Wales), PO Box 10218. Leicester, LE1 8EG; or Employment Tribunal Central Office (Scotland). PO Box 27105. Glasgow. G2 9JR.

If you do not have access to the Internet, contact the person who issued the Notice and ask to be supplied with a hard copy of form ET1 and guidance T420: Making a claim to an Employment Tribunal.

Time limit for appeal

A notice of appeal must be presented to the Employment Tribunal within 21 days from the date of service on the appellant of the notice, or notices, appealed against, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it is not reasonably practicable for the notice of appeal to be presented within the period of 21 days.”

20. At the visit Mr Jewell explained the prohibition notice to Ms Pye. He said that there was no time frame for completion of the remedial works. Ms Pye had no issue with implementing the changes the respondent had suggested and felt that the respondent was working with her to provide the best outcome for Orchard Farm.
21. Mr Jewell also told Ms Pye that she had the option to appeal the notice but that the appeal had to be made within 21 days. Ms Pye said that she understood the appeal time frame and signed a document to confirm receipt of the notice.
22. On 6 June 2019 the respondent was informed by Public Health England that a volunteer at Orchard Farm had contracted an infectious disease. On 10 June 2019 Mr Jewell received an email from a colleague which said that there had been a breach of the prohibition notice as a member of the public had visited Orchard Farm as a volunteer. As a result of this information, Mr Jewell attended Orchard Farm on 11 June 2019 and posted a copy of the prohibition notice at the gate. He explained to Ms Pye that no-one was allowed to enter Orchard Farm other than family.
23. Ms Pye felt that without assistance from volunteers she would struggle to look after the animals let alone do all the work required by the prohibition notice. Her view of the respondent changed. She felt that the respondent did not in fact want to work with her to make the changes required by the prohibition notice.
24. After Mr Jewell's visit on 11 June 2019, Ms Pye wrongly presumed that 21 days had passed since the service of the notice and that her only recourse would be under the council complaints procedure. Ms Pye emailed Mr Jewell on 12, 13, 14 and 19 June 2019. Over the next 4 weeks or so Ms Pye focused on making the changes required in the prohibition notice to obtain the respondent's agreement that volunteers could visit Orchard Farm again.
25. On 15 July 2019 Ms Pye made a formal complaint under the respondent's complaints procedure. The complaint went through a number of stages. Ms Pye was in frequent email communication with the respondent about her complaint during July and August 2019.
26. Ms Pye also complained to the Independent Regulatory Challenge Panel which considers complaints about health and safety advice given by HSE and local authority inspectors. They referred her back to the respondent.
27. Ms Pye also complained to the relevant ombudsman. She received a response on 3 December 2019. The ombudsman was not able to consider her complaint because she had an alternative legal route available, namely a late appeal to the employment tribunal.
28. From the time she raised her internal complaint to the time she received the outcome of her complaint to the ombudsman, Ms Pye was not told about the possibility of a late appeal to the employment tribunal. She

submitted her appeal to the employment tribunal on 5 December 2019, after the ombudsman's letter referred to the possibility of a late appeal.

29. After she presented her appeal Ms Pye spoke about the appeal to a friend who is a barrister. Ms Pye decided that she would not be able to afford to instruct a lawyer.
30. Ms Pye has mental health conditions. During the period May to December 2019 her conditions were under control and she was not in hospital. She was always busy with the farm and at this time she also had to deal with what she felt was harassment on social media, but there was no other reason preventing her from presenting her appeal during the initial 21 day period.

The relevant law

31. Prohibition notices are provided for in section 22(2) of the Health and Safety at Work Act 1974:

“If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as “a prohibition notice”).”

32. Appeals against prohibition notices are to the employment tribunal, pursuant to section 24:

“(1) In this section “a notice” means an improvement notice or a prohibition notice.

(2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.”

33. The Employment Tribunal Rules of Procedure are set out in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 105 provides for the application of the rules to appeals against improvement and prohibition notices and prescribes the time limit for making an appeal against a prohibition notice:

“105.—(1) A person (“the appellant”) may appeal an improvement notice or a prohibition notice by presenting a claim to a tribunal office—

(a) before the end of the period of 21 days beginning with the date of the service on the appellant of the notice which is the subject of the appeal; or
(b) within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time.”

34. Rule 105(1)(b) establishes a two stage test. Where the appeal is presented outside the 21 day period, the tribunal first needs to consider whether it was reasonably practicable for an appeal to be presented within that time. If the tribunal concludes that it was reasonably practicable for the appeal to be presented in time, then the appeal cannot proceed. If the tribunal concludes that it was not reasonably practicable, the tribunal must go on to decide whether the further period within which the appeal was presented was reasonable.

35. The wording of rule 105 is the same as the wording used in respect of the time limit for unfair dismissal and other complaints under the Employment Rights Act 1996. In the case of GMB v Hamm (2000) EAT/246/00 the EAT considered the application of the same test in the context of a complaint under the Trade Union and Labour Relations Consolidation Act 1992. It concluded that

“12...the words “not reasonably practicable” are, in principle, to be given the same meaning whenever they appear in an equivalent context in comparable legislation...

13. Since all those statutory provisions occur in the same general context, that is to say the time limits for presenting various kinds of complaint to an employment tribunal, Parliament presumably intended the words “not reasonably practicable” to bear the same meaning in the different sections in question...”

36. The EAT concluded that when applying the ‘reasonably practicable’ test, the tribunal should give weight to previous decisions of the tribunals and courts on the interpretation of the test even where those have been considering the same test under different statutes.

37. We set out below a summary of some relevant decisions and principles on the interpretation of the ‘not reasonably practicable’ test. As these cases were about employment rights (rather than prohibition notices under health and safety legislation, as is the case here), they use the terminology of ‘claimant’ rather than ‘appellant’ (as Ms Pye is in this case).

38. Case law on the test has established that the extension provision should be given a ‘liberal construction’ in favour of the claimant (Dedman v British Building and Engineering Appliances Limited [1974] ICR 53). The burden of showing that presentation in time was not reasonably practicable in time is on the claimant (so here the burden is on Ms Pye). What is reasonably practicable is a question of fact for the tribunal to decide.

39. A claimant's late discovery of important facts leading to a change of mind as to whether she has a viable claim may be a factor which is relevant to whether it was reasonably practicable to present a claim in time. In Cambridge and Peterborough NHS Foundation Trust v Crouchman 2009 ICR 1306 the EAT held that the core principles to be applied to this type of case were as follows:
- 39.1. ignorance of a fact that is 'crucial' or 'fundamental' to a claim is in principle, a circumstance that makes it impracticable for a claimant to present that claim;
 - 39.2. a fact is 'crucial' or 'fundamental' if, when the claimant learns of it, her state of mind genuinely and reasonably changes from one where she does not believe that she has grounds for the claim to one where she believes that the claim is 'viable';
 - 39.3. ignorance of a fact until after the expiry of the time limit will not render it 'not reasonably practicable' to present a claim unless, first, the ignorance is reasonable and, secondly, the change of belief in light of that new knowledge is also reasonable.
40. The existence of ongoing internal proceedings can be another relevant factor when determining whether it was reasonably practicable to submit a claim/appeal within the time limit. In the unfair dismissal context, an internal appeal is not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit (Palmer v Southend-on-Sea Borough Council 1984 ICR 372, CA). However, it may be reasonable for a claimant to defer investigating the possibility of recourse to litigation until the appeal process is concluded, making it not reasonably practicable to start a claim within the time limit (John Lewis Partnership v Charman EAT 0079/11).
41. Where a claimant says she was prevented by illness from submitting a claim/appeal in time, a tribunal would normally expect this to be supported by medical evidence, particularly if the claimant was aware of the time limit.

Conclusions

The two preliminary issues

42. We first considered the order in which we should approach the two issues which were listed in the case management summary of 31 March 2019 as preliminary issues.
43. As to the validity of the prohibition notice, Ms Pye said that the prohibition notice was not valid because Orchard Farm does not have any employees, and therefore its activities do not fall within the scope of the Health and Safety at Work Act 1974. In the alternative, Ms Pye said that the activity of Orchard Farm constitutes an "agricultural activity" in respect of which, by virtue of the Health and Safety (Enforcing Authority) Regulations 1998, the

enforcing authority is the Health and Safety Executive, not the local authority.

44. Mr Aktar said that Ms Pye is self-employed and the Health and Safety at Work Act 1974 extends to self-employed people as well as employers. Further, he said that Orchard Farm's activity was not "agricultural activity" but came within the activity of "care, treatment, accommodation or exhibition of animals, birds or other creatures", in respect of which the local authority is the enforcing authority.
45. We decided that the question of whether the prohibition notice was valid was properly characterised as a substantive issue in the appeal, rather than a preliminary one. On the other hand, the question of whether the appeal was presented in time is a preliminary issue. If the appeal was not presented in time, we do not have jurisdiction to consider the issues in the appeal, including whether the notice was valid. We decided that for this reason, we should first consider the question of whether the appeal was presented in time.

The initial 21 day time limit

46. In order to decide whether the appeal was presented in time, we first have to decide the date on which the initial 21 day time limit expired.
47. We have found that the prohibition notice, although dated 21 May 2019, was served on Ms Pye on 23 May 2019. (It would have been better if the notice had been signed and dated on the same day it was served, to avoid any misunderstanding about that.)
48. Rule 105(1)(a) provides that the appeal must be presented before the end of the period of 21 days beginning with the date of the service. In Ms Pye's case, the period 21 days beginning with the date of service ended on 13 June 2019. This was the last day for presenting the appeal under rule 105(1)(a).
49. Ms Pye's appeal was not presented within this period. It was not presented until 5 December 2019, almost 6 months later. The tribunal will only have jurisdiction to consider her appeal if rule 105(1)(b) applies.

'Not reasonably practicable'

50. To decide whether time can be extended under rule 105(1)(b), we need to consider whether it was 'not reasonably practicable' for Ms Pye to present her appeal by 13 June 2019. The burden is on Ms Pye to show this.
51. We note first of all that from 23 May 2019 Ms Pye was aware of the possibility of an appeal to an employment tribunal and she was aware of the 21 day time limit. The appeal right was referred to in the covering letter and the prohibition notice. And, as Ms Pye has accepted, Mr Jewell told her about the 21 day time limit for an appeal when he spoke to her on 23 May 2019. She said that she understood. The prohibition notice also set

out the possibility that an appeal could be presented after the 21 day period if it was not reasonably practicable to present it within that period. For this reason, Ms Pye ought reasonably to have been aware of the possibility of making a late appeal. The prohibition notice also gave details of the website where an appeal could be presented online.

52. As we understood it, Ms Pye said that it was not reasonably practicable for her to present her appeal within the 21 day time limit for the following reason. When the prohibition notice was first served on her, Ms Pye did not dispute the notice, as she believed the local authority wanted to work with her to get the best outcome for Orchard Farm. When Mr Jewell visited on 11 June 2019 and told her that volunteers could not help her with the remedial works she revised her view but thought that by then she was too late to appeal. She took steps to carry out the required works and then pursued other routes including an internal complaint.
53. We have considered whether the information Ms Pye received from Mr Jewell on 11 June 2019 meant that it was not reasonably practicable for her to present her appeal by 13 June 2019.
54. We accept that Ms Pye's view of the prohibition notice genuinely changed after 11 June 2019. Prior to that date she had no issue with implementing the changes required, but after Mr Jewell's visit of 11 June 2019 she felt that she would struggle to make the changes. However, we have decided that, even taking that into account, it was still reasonably practicable for Ms Pye to have presented an appeal by 13 June 2019. We reach this conclusion for the following reasons:
 - 54.1. It was not reasonable of Ms Pye to be unaware until 11 June 2019 that volunteers could not come to Orchard Farm before the changes were made, because she was already told this in the covering letter which she was given on 23 May 2019. It said that the notice 'stops you from inviting people to the site' and explained that 'once improvements have been made' Ms Pye could 'invite friends and volunteers to the premises';
 - 54.2. In any event, the 21 day time limit for presenting an appeal had not yet expired when Ms Pye became aware on 11 June 2019 that volunteers could not come to Orchard Farm until the changes were made. Ms Pye could have presented an appeal on 11 June 2019, the day she found out this information, or on 12 June 2019 or on 13 June 2019. Ms Pye was able to email Mr Jewell on 12 and 13 June 2019;
 - 54.3. Even though Ms Pye had incorrectly presumed that the 21 day expired on 11 June 2019, she could still have presented an appeal on that day. She had details of the website where she could complete the form to present an online appeal. She should also have been aware from the prohibition notice that appeals were allowed out of time in some circumstances;
 - 54.4. Ms Pye was given information about the right of appeal by the respondent. She was aware that she had a right of appeal and of the time limit. If Ms Pye was unsure about whether the time limit to

- appeal had expired or whether she could present an appeal after the time limit had expired, she could have taken legal advice or spoken to her friend who is a barrister, as she did later;
- 54.5. We do not agree, if this was being suggested, that Mr Jewell deliberately waited until the time limit had expired or nearly expired before visiting Orchard Farm again. We have found that his visit was prompted by information he received about a breach of the prohibition notice.
55. We have also considered whether the internal complaint brought by Ms Pye is relevant to the question of whether it was not reasonably practicable for her to present her appeal within the initial 21 day period. We have decided that it is not, because the complaint was not made until 15 July 2019 and that was after the 21 day period had ended. The existence of the appeal did not mean it was not reasonably practicable to present the appeal by 13 June 2019. Similarly, the question of whether the respondent should at some stage during the internal complaint process have told Ms Pye about the possibility of making an out of time appeal to an employment tribunal is also not relevant to the test of whether it was not reasonably practicable for Ms Pye to present her appeal within the initial 21 day period. The internal complaint and the respondent's conduct of the complaint relate to what happened after that initial period.
56. We have also considered Ms Pye's health conditions. Ms Pye did not suggest that she was unable to present her appeal during the initial 21 day period because of illness or disability. We were not given any medical evidence to this effect. Ms Pye told us that her conditions were under control during this time. There was no other reason preventing her from presenting her appeal during the initial 21 day period.
57. For these reasons, we have concluded that it was reasonably practicable for Ms Pye to have presented her appeal by 13 June 2019, within 21 days of service of the prohibition notice on 23 May 2019. This means that rule 105(1)(b) does not apply and the time limit cannot be extended.
58. The tribunal therefore does not have jurisdiction to hear Ms Pye's appeal.

Employment Judge Hawksworth

Date: 4 January 2021

07/01/2021

Sent to the parties on:

T Henry-Yeo

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For the Tribunals Office

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