



NCN: [2022] UKFTT 282 (GRC)

Case Reference: NV/2022/0018

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

Heard by: Written Representations

Reviewed Decision given on: 31 October 2022

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

MARK BRERETON

Appellant

and

LEICESTER CITY COUNCIL

Respondent

Decision: The appeal is Dismissed

REASONS

The Appeal

1. The Appellant appeals against the imposition of a fixed penalty by the Respondent in relation to an alleged failure to comply with a notice served under section 46 of the Environmental Protection Act 1990 (“a Section 46 Notice”) which required that the household waste bins for emptying relating to 32 Luther Street, Leicester LE3 0QG (“the Property”), were to be placed on the kerb no earlier than 7.00 pm on each Thursday and moved off the kerb by no later than 7.00 am on each Saturday.
2. The Appellant argues he was unable to comply with the terms of the section 46 Notice because the alleyway which serves as the bin storage area for his property had been blocked for over a year with other people’s possessions and/or waste and continued to be so at the date of the claimed breach.
3. I am satisfied that this appeal is suitable for determination on the papers.
4. This decision is a reviewed decision. The initial decision was made on 17 August 2022. Following an application for permission to appeal made by the Appellant by notice dated 12 September 2022, I concluded that in not referring Appellant’s arguments that the COVID pandemic and associated restrictions justified his not complying with the Section 46 Notice given inter alia his health condition amounted to an error of law requiring me to review my decision under Rule 44 of the Tribunal Procedure (First-Tier Tribunal)(General Regulatory Chamber) Rules 2009.

The Law

5. Section 46(1) and (4) of the Environmental Protection Act 1990 (“the Act”) provide that where a waste collection authority has a duty to arrange for the collection of household waste from any premises, it may serve a notice (“a Section 46 Notice”) requiring the occupier to place waste for collection in receptacles of a kind and number specified and may also impose requirements as to the placing of receptacles and the steps to be taken by the occupier to facilitate waste collection.
6. Where an authorised officer of the waste collection authority is satisfied that a person has failed without reasonable excuse to comply with a requirement imposed under section 46(1) and (4) and the person’s failure either (i) has caused, or is or is or was likely to cause, a nuisance or (ii) has been, or is or was likely to be detrimental to the amenities of the locality (“a relevant effect”), then a written warning may be given to the occupier of the relevant premises setting out the requirement which has not been complied with and how that failure has had, or is having or was likely to have a relevant effect (section 46A(2)). The warning must also set out the consequences of not complying with the Section 46 Notice.
7. Where a written warning has been given, section 46A(7) empowers a waste collection authority to require a person on whom the written warning has been served, to pay a fixed penalty to the authority if it is satisfied that within one year of the written warning being given, the person has again failed without reasonable excuse to comply with the requirements of a section 46 Notice and the failure has had or is having or was likely to have a relevant effect. The amount of the fixed penalty is such sum as is specified by the waste collection authority (section 46B).

8. There are strict requirements to be met before a person may be required to pay a fixed penalty. A notice of intent to impose a fixed penalty must first be served on the relevant person which sets out the grounds for requiring the payment of a fixed penalty, the amount which would be required to be paid and the notice must set out the right to make representations that a fixed penalty should not be required (section 46C(1)). There is then an additional requirement for a further notice (“the final notice”) to be served. This must not be served before the expiry of 28 days beginning with the service of the notice of intent. The final notice must contain the grounds for requiring payment of the fixed penalty, the amount of the fixed penalty, details of how payment should be made and must also set out the right of appeal to the First-tier Tribunal and the consequences of not paying the fixed penalty.
9. Under section 46D of the Act, a person on whom a final notice is served under section 46C may appeal to the First-tier Tribunal against the decision to require the payment of a fixed penalty and on appeal the First-tier tribunal may withdraw or confirm the requirement to pay the fixed penalty. Pending the determination of such an appeal, the requirement to pay is suspended pending determination of the appeal.

The Facts

10. On Monday 20th August 2021, the Respondent’s City Warden found 47 properties on Luther Street had bins still on the public footpath after collection day which is Friday. These were adjudged to be having a relevant effect. Number 32 was one of these properties. A blue sticker was put on each of the bins to make residents aware and to remove their bins. Occupiers at each of the properties who had a bin on the street were served on 20 August 2021 by post with Section 46 Notices requiring that bins to be emptied must be placed on the kerb no earlier than 7.00 pm on each Thursday and moved off the kerb by no later than 7.00 am on each Saturday.
11. The Appellant was the occupier of 32 Luther Street at the date of the service of the section 46 Notice and at the date of the alleged breach, 16 November 2021.
12. On Monday 11th October 2021 the bin and household waste for Number 32 were again found to be on the footpath and, on 2 November 2011 a Notice of Contravention was served on the Appellant. He responded by e-mail on 5 November 2021, stating that he was being told to do something he was unable to do.
13. On Tuesday 16th November 2021 the bin for Number 32 was again found to be on the footpath and on 17 December 2021 a Notice of Intent to impose a Fixed Penalty was served on the Appellant. The Appellant responded by e-mail on 24 December 2021 pointing out that the Council had failed to respond to his earlier e-mail of 5 November (and others sent earlier in 2021 relating to a previous section 46 Notice) and repeating that the Council were telling him to do something he was unable to do.
14. The Respondent responded by e-mail on 29 December 2021 stating that alleyways were private land and not the responsibility of the Respondent to keep clear, pointing out that it offers a free bulky item collection service for household items. The e-mail stated that the Notice of Intent stood and pointing out that the Appellant had a right of appeal to the Tribunal. Subsequent to this e-mail the Appellant spoke to the Respondent’s City Warden department who informed him that the action would be suspended whilst they investigated his claims.

15. On 18 February 2022 a Fixed Penalty Notice was then served on the Appellant. The Appellant appealed against the Fixed Penalty Notice on 18 March 2022 and e-mailed the Respondent on 18 and 19 February 2022 to point out that his understanding was that action on the section 46 Notice had been suspended and that he was still unable to get his bin off the street.
16. The Respondent sent a response on 20th February 2022 stating that the alley way was not its responsibility and the neighbours bin, and a few household items did not block the alley or prevent him being able to take his bin in.

The Appellant's Submissions

17. The Appellant states that the alleyway also serves as an external access for four properties and has been blocked for over a year by regularly changing items left by other households, including at one point a dining room suite. He also contends that it is too physically restricted to use for the purposes of bin storage. He further argues that he is in more than one COVID-vulnerable group and that there was a health risk posed by compliance with the section 46 Notice even if such compliance could lawfully be required having regard to the social distancing and other restrictions in place in 2021. There was therefore a reasonable excuse for not complying with the section 46 Notice.

The Respondent's Submissions

18. The Respondent states that a total of four separate notifications were sent to the Appellant in accordance with sections 46, 46A, 46B, 46C and 46D of the Act and Notice of Opportunity to Pay Fixed Penalty was served. This provided ample time for liaison with the Council regarding any problems with landlords, access to alleyways or any other difficulties in respect of which the Council may have been able to assist.

Decision

19. There is no dispute in this appeal that the statutory pre-conditions for the service of the section 46 Notice were satisfied and I am satisfied that there was a breach of the section 46 Notice on 16 November 2021 which was within one year of the Notice of Contravention served on 2 November 2021. I am also satisfied that all the required notices prior to the issuing of the Fixed Penalty Notice were served by the Respondent on the Appellant as required by the Act.
20. The issue in this appeal is whether the Appellant had a reasonable excuse for not complying with the Section 46 Notice on 16 November 2021. In my view, having regard to the all of the circumstances, he did not. He knew as from the service of the Section 46 Notice on 20 August 2021 what he was required to do in order to comply with the terms of the notice. If there were physical impediments to his taking his bin off the street, he should have been seeking to resolve those from that date in the exercise of his rights over the alleyway. I have seen no evidence that he took any steps to address blockages of the alleyway, whether through approaches to his neighbours or otherwise and, as is clear from the photographic evidence in the appeal bundle, there is room for bin storage to take place in the alleyway without unreasonably impeding its use for other purposes should that be required, if necessary by moving the bins. I have seen no evidence that the Appellant's rights over the alleyway do not include the right to use it for bin storage as required.

21. He was made aware in the Respondent's Notice of Contravention dated 2 November 2021 that the Council's free bulky household waste collection service could be used to clear the blocked alleyway, but there is no evidence that he sought to use it. Rather, as is clear from his correspondence with the Respondent, he regarded the blockages as a problem caused by and to be resolved entirely by others. Given the context here, which involved a prolonged period of blockage, rather than an unpredictable sporadic blockage and where there is no evidence at all that any steps have been taken by the occupier to resolve the issue, I do not consider that the Appellant had a reasonable excuse for not complying with the terms of the section 46 Notice on 16 November 2021. He could and should have done more well before then in order to put himself in a position to be able to comply with the Notice.
22. As to the implications for his health of requiring compliance with the Section 46 Notice given the COVID pandemic and the suggestion that the notice required a breach of COVID restrictions or social distancing guidelines, I have seen no evidence that complying with the requirements of the notice would have been likely to lead to any health implications for the Appellant or any breach of restrictions or guidelines. The requirements of the notice allow a generous period for bins to be put out on the street and brought in from the street which is sufficient to enable this to happen whilst avoiding the need for close physical interaction with any other person. I do not consider therefore that either the Appellant's vulnerability to COVID or restrictions or guidelines related to COVID provide a reasonable excuse for not complying with the requirements of the Section 46 Notice.
23. I therefore find that the appeal should be dismissed and I confirm the Fixed Penalty Notice.
24. Given that I received representations from the Appellant in support of his application for permission to appeal and the Respondent's submissions on the appeal are in the form of a standardised submission, I have not felt it necessary to invite further representations from the Respondent before making this decision following review. The Respondent has the right to apply for this reviewed decision to be set aside pursuant to Rule 44(3) of the Tribunal Rules.
25. The Appellant has the right under Rule 42(1) of the Tribunal Rules to apply for permission to appeal against this reviewed decision by making a written application for permission to appeal within the period of 28 days from the date the Tribunal sends this review decision.

Signed: Judge Simon Bird KC

Date: 31 October 2022