Reserved judgment

Appellant: **Pricewatch Limited**

Respondent: **Andrew Gausden**

Heard at London South Employment Tribunal on 8 May 2018 and in chambers on 18 May 2018

Before Employment Judge Baron

Lay Members: **Ms J Forecast & Mr E Walker**

Representation:

Appellant: ***Iain Daniels***

Respondent: ***Richard Roberts***

JUDGMENT ON AN APPLICATION FOR COSTS

It is the judgment of the Tribunal that the application for costs fails.

REASONS

1 Again it is necessary to apologise to the parties for the delay in providing this judgment. As the solicitors for the parties are no doubt well aware the Tribunals are at present seriously under-resourced and delays are inevitable.

2 This matter relates to two appeals against Improvement Notices issued under the Health & Safety at Work etc Act 1974. One Notice referred to a site at Horam, and the other to a site at Selmeston, both in Sussex. By a judgment dated 10 January 2017 the Tribunal affirmed the Horam Notice subject to a modification and cancelled the Selmeston Notice.[1] The Respondent is the Lead Officer of the Petroleum Safety Department of East Sussex Fire and Rescue Service ('ESFRS'). The Notices related to the storage of petrol at the two sites.

3 The Appellant then appealed to the High Court in respect of the Horam Notice. The Tribunal has not been provided with a copy of the Notice of Appeal. We know that the appeal was allowed by consent, and that the Respondent also consented to paying the Appellant's costs of an agreed amount. Any issue as to costs in connection with the appeals to this

[1] We refer to the reasons for the judgment as 'the Reasons'.

Tribunal were remitted. The date on the Consent Order provided to us was 6 September 2017 but the copy did not bear the court stamp and so we do not know the date of the Order. Nothing turns on the point as far as we are aware.

4 Costs in the Employment Tribunal do not follow the event. The relevant provisions in the Employment Tribunals Rules of Procedure 2013 as to costs are as follows:

> **When a costs order or a preparation time order may or shall be made**
> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
> (b) any claim or response had no reasonable prospect of success.

5 Thus the Tribunal must first of all be satisfied that one or more of the criteria in paragraphs (a) or (b) have been satisfied, and then the Tribunal must exercise its discretion whether to order costs, and if so on what basis. Mr Daniels submitted that the Respondent had acted unreasonably in his conduct of the proceedings, and/or that the response had no reasonable prospect of success. Mr Daniels sought an order that there be a detailed assessment of costs.

6 Although not mentioned by either counsel there is a technical point in that in such appeals the Respondent does not present a 'response'. We are interpreting rule 76(1)(b) as meaning that the Respondent's case did not have any reasonable prospect of success.

7 When mentioning the history of the proceedings in his introduction to his submissions Mr Daniels referred to the Respondent having disclosed thousands of documents on 5 January 2016 and that not all of the documents which were clearly relevant were in the trial bundle. That may be so, but we cannot make any proper decision on the basis of such a statement. On this point Mr Roberts told us that the documents provided in 2016 covered 10 sites, and not only the two the subject of these proceedings.

8 Mr Daniels referred to a letter of 28 April 2016 from the Appellant's solicitors in which the Appellant's case was set out and which suggested a means of resolving the matter without a hearing. In his submissions Mr Daniels referred to that letter as a 'costs warning'. We do not read it as such. We were not addressed on it in any detail.

Horam

9 A procedural issue arose concerning this aspect of the costs application. The hearing of this costs application took place on 8 May 2018, and we arranged to meet to discuss the matter in chambers on 18 May 2018. At 17:17 on 17 May 2018 the Appellant's solicitors sent an email to the Tribunal with what was said to be a copy of an email sent to ESFRS on 5 August 2015 relating to the pressure testing of storage tanks at Horam, and submissions were made by the Appellant's solicitors as to its relevance. The Respondent's solicitor did not have the time to make her

own submissions before we met on 18 May 2018. We considered whether it would be necessary to adjourn so as to enable her to make submissions, but for reasons set out below decided that that was not necessary. The Respondent's solicitor did provide comments at 2.21 pm on 18 May 2018 saying that the provenance of the email was doubted for reasons there set out.

10 It is necessary to set out very briefly some context although the matter was more fully traversed in the Reasons. The legislation covering the storage of petrol was the Petroleum (Consolidation) Act 1928 under which licences were issued until the end of September 2014. From 1 October 2014 there was a new regime contained in The Petroleum (Consolidation) Regulations 2014 under which certificates were issued. There were transitional arrangements so that where there had been a licence, and importantly the keeper of the petrol had complied with the conditions of the licence, then there was a deemed certificate for the balance of the period covered by the previous licence. Otherwise an application had to be made for a certificate.

11 A certificate was issued to the Appellant in respect of tanks 3 and 4 on 1 May 2015 under the transitional provisions. It authorised the storage of petrol in tank 4. The Improvement Notice related to the storage of petrol in tank 1. On 30 May 2017 ESFRS issued a further certificate backdated to 1 May 2015. That certificate referred to each of tanks 1 to 6 inclusive as being registered for the storage of petrol, but only tank 4 was recorded as actually being used for the storage of petrol at the time. Other tanks were being used for the storage of other fuels. A standard form of covering letter was sent with the certificate dated 30 May 2017. A further letter was written by ESFRS on the same day, the relevant parts of which are as follows:

> The documentation provided by your solicitors as part of the tribunal process has been reviewed and we are now satisfied we have the necessary information for a new Petroleum Storage Certificate to be issued.
>
> We also give notice that we are withdrawing the Improvement Notice dated 2 March 2015.

12 Despite a request from the Appellant's solicitors dated 2 June 2017 ESFRS has not provided details of the documentation to which reference was made. The Respondent's solicitor wrote on 28 June 2017 to the Appellant's solicitors and much of that letter concerns the grounds of appeal to the High Court. As we have said we have not seen the Notice of Appeal and the letter is not fully comprehensible to us. It does not however specifically answer the question raised by the Appellant's solicitors. No evidence was given at this hearing as to the reason for the certificate having been issued.

13 Mr Daniels submitted that it was apparent that throughout the appeal the Respondent had had possession of all material documentation to justify the issuing of the certificate and also the withdrawal of the Notice. The Respondent should have undertaken a full review of the documentation. Not to have done so, said Mr Daniels, was unreasonable behaviour. Mr Daniels also submitted that the Respondent had conceded that our decision was wrong, that it should not have contested the High Court

appeal, and that ESFRS had accepted that it was sufficiently culpable as it agreed to pay all of the Appellant's High Court costs.

14 Mr Daniels also drew attention to the admitted error of having included tank 3 at Horam in the Notice, saying that the Appellant would have had to pursue that point in any event.

15 There was a dispute at the original hearing as to whether a licence under the 1928 Act related to a site as a whole, or only to a specific tank or tanks. We dealt with that matter in paragraph 39 of the Reasons and concluded that the latter interpretation was the correct one. Mr Daniels said in his oral submissions that our conclusion was wrong and that it was a fundamental point. As we understand it he based that submission on the fact that the Respondent had agreed that the appeal be allowed. In our view that does not necessarily follow.

16 Mr Daniels also pointed out that on the new certificates it is now stated that the certificate records the tank(s) registered to store petrol and that '[t]he tanks may be used to store other fuels.' Our interpretation of that text is that all that is being said is that a tank shown on the certificate as having been registered for the storage of petrol may be used for the storage of fuels other than petrol, and it does not mean that any other tanks used for the storage of other fuels and not shown on the certificate may be converted to being used for the storage of petrol. In other words the certificate relates only to the tank(s) referred to in it (whether or not actually used for the storage of petrol at the time), and not to all the tanks at the site.

17 Mr Daniels submitted that the entire case revolved around whether the issue of the certificate was permissible in 2015. He said that the Respondent had all the relevant information by then and that the issuing of the certificate in 2017 had rendered the appeal worthless. It should have been issued in the first place in accordance with the transitional arrangements. He further submitted that by conceding that the appeal be allowed the Respondent had accepted that he had insufficient evidence to justify the issuing of the improvement notice.

18 Mr Daniels said that the Appellant's had carried out pressure tests to the tanks shortly after the service of the Improvement Notices in May 2015 and that the Respondent had been informed of that fact. There was in the original bundle a copy of a Test Certificate issued by The Premier Group dated 4 August 2015 referring to tanks 1, 2, 5 & 6. No date of the testing was stated nor was there any evidence in the bundle of a copy having been supplied to the Respondent.

19 As mentioned, on 17 May 2018 the Appellant's solicitors wrote to the Tribunal with a copy of the email of 5 August 2015 mentioned above concerning the pressure testing of tanks. That appeared to be an email from The Premier Group to Mr Sherman of ESFRS. The identity of the individual who sent the email had been redacted. The email stated as follows:

> Following our recent phone call I attach the tank test certificate for Horam as requested. Please note this test was carried out at our Client's request this year with all tanks passing.

20 The print of the email does not show there having been an attachment to it, but that may be a function of the email software used. The 'header' to the email where one would normally expect to see the name of the individual who printed out the email is 'Danny Sherman – Pricewatch / Local Fuels – Horam Service Station'. The Appellant's solicitors stated in the covering letter that the email had been obtained following the Appellant having made enquiries of The Premier Group.

21 We are not prepared to convene a further hearing to seek to ascertain any further information concerning this document. What we are concerned about is what the position was at the date of the issuing of the Notice. We are therefore disregarding the document.

22 Mr Roberts made submissions on behalf of the Respondent. He pointed out that the Respondent himself became involved with the Horam site following a complaint about the escape of petrol vapour. The Respondent discovered that there had been unauthorised changes. Mr Roberts referred to our finding that the Appellant had been in breach of the 1928 Act licence conditions, with the consequence that the transitional provisions relating to the issuing of a certificate did not apply.

23 On the point as to the extent of a 1928 Act licence Mr Roberts submitted that the Respondent was not alone in being unsure how individual tanks were to be dealt with under the certificate regime, as opposed to the whole site. Mr Roberts submitted that our conclusion in paragraph 39 of the Reasons that a 1928 licence related to individual tanks was in fact correct, and in any event the matter was not an issue in the High Court appeal. He said that the appeal had been made on the basis that we had failed to consider various matters and submitted that the entering into of a consent order by the Respondent did not mean that the Respondent could not rely upon any of our findings or the conclusions to which we came.

24 Mr Roberts submitted that, in summary, the issue before the Tribunal at the original hearing was whether the Respondent believed that there had not been compliance by the Appellant and its predecessors with the conditions attached to the licence under the 1928 Act so as to entitle it to a certificate, and if not whether the issuing of the Notice was a step the Tribunal would have taken. The Respondent was of the opinion that there had not been compliance with the conditions. He submitted that the Appellant was not entirely free of guilt and that the circumstances had not been made easy for the Respondent.

25 In this application the Appellant has to show that the conduct of the appeal by the Respondent was unreasonable, and/or that his case did not have any reasonable prospect of success. In our judgment neither ground has been shown.

26 We will deal with the second limb of the application first. We have reminded ourselves that these proceedings relate to the issuing of the Improvement Notices. Such a Notice is justified where the inspector is of the opinion that there has been a breach of a statutory provision. The circumstances are made somewhat more complex by the change of the authorisation regime from the 1928 Act licences to the 2014 certificates.

27 We concluded as a fact that the Appellant had been in breach of the 1928 Act licence conditions. Consequently the transitional provisions relating to the issuing of a certificate did not apply. We also concluded that the Respondent had reasonable grounds for believing that tank 1 was being used for the storage of petrol. We do not accept the submission by Mr Daniels that our conclusion that a 1928 Act licence covered only the tank(s) referred to in it was demonstrably wrong. We set out our reasons for concluding that such licence related only to the specific tank(s) referred to in it in our Reasons and we do not repeat them here. Thus we conclude that the Respondent was justified in deciding that there had been a breach of the licence conditions so that the transitional provisions did not apply. Therefore the issuing of a Notice became possible.

28 We do not accept that the Respondent's case concerning Horam did not have any reasonable prospect of success, save in respect of tank 3. The reference to tank 3 in the Notice was an error by the Respondent or someone in the ESFRS office. While Mr Daniels did refer to it in his submissions he did not pursue the matter as itself justifying any award, and in our view he was quite right not to do so.

29 The other head in rule 72 is that the conduct of the proceedings was unreasonable. It is here that the issuing of the certificate on 30 May 2017 and the consent to the appeal being allowed become relevant. We repeat that we have not been provided with a copy of the Notice of Appeal. We do not know therefore the basis of the appeal. We accept the point made by Mr Roberts that the fact that the Respondent consented to the appeal being allowed does not mean that no reliance can be placed on our original judgment or the reasons for it.

30 We recognise the apparent *volte face* by the Respondent in deciding to issue a certificate and consent to the revocation of the Notice, and the force of the submissions made by Mr Daniels on the point. We are not prepared to accept that the conduct of the Respondent in defending this appeal was unreasonable behaviour simply on the basis of the letter of 30 May 2017 and the entering into of the consent order in the High Court.

31 We made our findings and came to our conclusions on the basis of the documents in the trial bundle, also taking into account of course the oral evidence and the submissions of counsel. We simply do not know what the documents in question referred to in the letter of 30 May 2017 are and whether or not they were in the bundle. The Appellant did not provide us with a list of its disclosed documents. If the documents were not in the bundle then that raises the question as to why the Appellant's solicitors did not require them to be there. If they were there and our attention was not drawn to them then the point arises that our decision may have been different if we had read them. If we did take them into account then it is the necessary corollary that the Respondent now accepts that our decision on any point arising in the proceedings to which those documents may have been relevant was wrong. We do not understand that to be the case. Without that information we find ourselves unable safely to conclude that the conduct of the proceedings was unreasonable.

32 Even if we had been satisfied that there had been unreasonable behaviour by the Respondent we would have exercised our discretion so as not to make an order for costs. We note the history of the Appellant in respect of both sites. We have found that the Respondent had been in breach of the licence conditions. We also recorded in our Reasons that the Appellant had been less than straightforward and clear in its dealings with the Respondent in respect of Horam. Further it had made changes to the storage arrangements at Selmeston without prior authorisation. This is not a case where the Appellant is entirely innocent.

Selmeston

33 This matter is more straightforward than Horam. The history of the information as supplied to ESFRS is set out in our Reasons. What we found was that the Appellant had been in breach of the conditions attached to its licence and therefore the transitional arrangements did not apply in 2014. The storage of petrol in tank 3 was not authorised under the 1928 Act and therefore not under the 2014 Regulations.

34 Our decision was only that we would not have issued an improvement notice at the time that it was issued, not that one would not have been justified later. We did not decide that the circumstances were such that it was absolutely obvious that the Respondent should not have issued the Notice. We cannot say that the Respondent was unreasonable in the conduct of the proceedings, nor that there was no reasonable prospect of success in defending the appeal.

35 Our conclusion in summary was that we found against the Respondent in that he was too hasty in issuing the Notice without having made more detailed enquiries. Such finding does not in our judgement justify the making of a costs order. This was not a clear-cut matter about which there could only have been one outcome.

Employment Judge Baron
Dated 30 October 2018