EMPLOYMENT TRIBUNALS

Appellant: Total Contractors Ltd

Respondent: Mr Russell A Beckett, HM Inspector of Health and Safety Executive

Heard at: **London South** **On: Wednesday, 20 February 2019**

Before: **Acting Regional Employment Judge P Davies**

Representation (attendance by telephone)

For the Appellant: Mr D Whitaker (counsel)
For the Respondent: Mr R Conway (solicitor)

JUDGMENT

The Judgment of the Employment Tribunal is that both appeals were filed out of time, and so they are dismissed.

REASONS

1. The Appellant seeks to appeal against two prohibition notices and has made an application for an extension of time to present the appeals. The challenge to the Notices which were issued arise out of tragic circumstances where an individual was killed at a construction site in Hove. The fatal accident occurred on 27 July 2018 and on the same date the two notices were served on Mr Wenham. The parties have made oral submissions in support of their

contentions as well as providing written submissions which I am not going to repeat in full.

2. The submissions made on behalf of the Appellant are directed very much to the fact that the whole period of 21 days must be looked at regarding reasonable practicability. According to the Appellant's submissions a careful analysis shows that the Appellant, although a Limited company it is in truth a sole director, Mr Wenham, who operates under the legal frame work of a Limited company. He was not seen as far as any advice was concerned until 2 August of 2018. The facts of what occurred insofar as they set out in the statement of the solicitor for the Appellant, Ms Dhillon, are not challenged as such by the Respondents.

3. On 2 August 2018 there was contact between Ms Dhillon and Mr Wenham which resulted in a site visit on 6 August. Ms Dhillon says in paragraph 5 of her statement in support of the application that background information as to the incident and investigations by the Police and HSE was sought. Ms Dhillon says that advice was given on the basis upon which an appeal could be made. Such advice included the time limits for the appeals. So, it is not a case in which it is said that at least from that date there was any ignorance of time limits on the part of the Appellant company. Ms Dhillon goes on to say that following the attendance on that day, 6 August, the Appellant provided by e-mail information as to the project and the e-mails and accompanying documents were considered. Then Ms Dhillon says she was engaged on other matters but there were further e-mails received from and sent to the Appellant on 9 and 10 August 2018. As Counsel for the Appellant indicated there may well be sound legal professional reasons against the background of the continuing the Police investigation as to why further information is not revealed.

4. The statement by Ms Dhillon goes on then to say that on 13 August Mr Wenham contacted her to say that he had been requested for an interview on 17 August at 9am by the Sussex Police. Ms Dhillon contacted the Police on 14 August seeking clarification of the nature of the offence. During that call the officer raised a possibility that Mr Wenham might be arrested on attendance. Clarification as to the basis of any potential arrest, given that Mr Wenham was willing to co-operate with the investigation and attend for an interview, was raised in an e-mail of Ms Dhillon on 15 August. Ms Dhillon had to undertake other work until on 16 August and she travelled back to her office in London on 16 August. There was a response at 7:10pm on 16 August 2018 by the Police to her e-mail which indicated the offence under the investigation was identified as gross negligence manslaughter and pre-interview disclosure was provided. There was a possibility that Mr Wenham might be arrested. Ms Dhillon says, given the serious nature of the offence under consideration she directed her attention to the drafting of a statement on behalf of Mr Wenham.

5. Ms Dhillon met with Mr Wenham at 8am on 17 August to continue preparations for the interview and on attendance Mr Wenham was arrested. There were discussions about the reason for the arrest but Mr Wenham remained under arrest until 4:45 pm. Ms Dhillon says that the time in custody been spent either advising Mr Wenham as to the interview or the interview itself. Ms Dhillon makes the point given that he was under arrest Mr Wenham was not able to leave. She says that there was no opportunity to consider draft and lodge an appeal on that day.

6. Those basic facts are accepted by the Respondents but not that sequence of events prevented the lodging of an appeal within the 21 days. The Respondents refer in particular to two reported cases concerning the approach to be taken by Employment Tribunals when issues arise regarding reasonable practicability.

7. There is an issue about the dates upon which the notice should have been filed /received by the Employment Tribunal. The Respondents contend that that date was 17 August because the Tribunal regulations, in particular, Regulation 4 makes it clear that in computing time the day should not be taken into account when an event occurs, in this case the day when notices were received by the Appellant. On behalf of the Respondents it is said that the proper and only source of computation is set out in section 105 of the Schedule to the Employment Tribunal Rules 2013 concerns appeals against improvement and prohibition notices which says:

> "A person ("the appellant") may appeal an improvement notice or a prohibition notice by presenting a claim to a tribunal office—
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> (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
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> (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."

8. The Respondents say that the proper reading of that is that the date begins on these date of the service of the notice, therefore it is 16 August. I accept the submissions of the Respondents because the rules that govern appeals against improvements and prohibition notices provide a comprehensive regime which needs to be considered as a separate schedule and must be read and make sense of in relation to what the schedule says.

9. Both parties however say that issue is not fatal to the arguments on either side. The reason is that on behalf of the Appellants it is said that from the time that the Appellant was informed of the Police involvement on 13 August

through to 17 August there was a real and serious impediment to the attention to be given to the filing of any notice of appeal. The Appellant stressed the point that Mr Wenham was facing personally one of the most serious criminal charges of gross negligence manslaughter, and it was therefore not only necessary but essential that the Appellant should devote time, and solicitors time, to dealing with that Police matter and not in relation to the prohibition notice.

10. The Respondents submit that a careful analysis of the whole period of time shows that the advice given earlier on to the Appellant meant that it was reasonably practicable to file a notice of appeal. They referred to dicta in one of the reported cases indicating that, of course, it is always possible to amend any notice to clarify or to add particulars as may be required to understand the nature of the claims by way of appeal that has been made. Therefore, it was reasonably practicable to fill in the notice, in the form that the two notices were filed in fact ,namely, very concise and very particular as to why there is objection to these prohibition notices, namely, on the basis that all reasonable steps have been taken in relation to one, and that there had been no steps taken in relation to the other and allege that it follows these notices were erroneous.

11. In relation to the application of reasonable practicability both parties agree that there is assistance to be given to an Employment Tribunal by consideration of the application of reasonable practicability in other areas and in particular for unfair dismissal. I have been referred to the two cases. The case of ***Beasley v National Grid [2008] EWCA Civ. 742*** a decision of the Court of Appeal reference was made to paragraph 11 where Lord Justice Tuckey approved the following assessment or application of principles by Mr Justice Silber, namely:

> "Silber J identified the material considerations as being a) the state of the claimant's knowledge, relating to the need to bring his claim within three months, b) the steps taken by the claimant to ensure that he did bring his claim within that period and; c) any impediments which prevented the claimant from bringing his claim within this period. He then concluded that the Tribunal had considered each of these matters and that its conclusion was one which was open to it on the facts and so was not open to challenge for error of law."

Paragraph 12 goes on to say:

> "Now the provisions of section 111(2) are clear. Complaint must be presented within three months unless the complainant can show it was not reasonably practical to do so. If he cannot, the tribunal has no jurisdiction to hear his complaint. Either it is out of time or it is not. There is no grey area for complaints which are only a bit out of time.

> So the fact that this complaint was only 88 seconds out of time does not alter the requirements of the statute, although the reasons for this delay were relevant to the question of reasonable practicability and the length of the delay would have been relevant to the question of the further period which the Tribunal considered reasonable if it had decided it was not reasonably practicable for Mr Beasley to comply were the three month time limit."

12. In relation to the second case, ***London Borough of Wandsworth v Covent Garden Marker Authority [2011] EWHC 1245 (QB)***, a decision of Mrs Justice Slade, in paragraph 32 Mrs Justice Slade said:

> "It is clear from the judgment of the court in Palmer given by May LJ that whether presentation of a claim is 'reasonably practicable' is pre-eminently an issue of fact for the Employment Tribunal. May LJ held at page 1141 E-F:
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> "In the context in which the words are used in the Employment Protection (Consolidation) Act 1978, however ineptly as we think, they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible' as Sir John Brightman did in Singh 's case [1973] ICR 437 and to ask colloquially and untrammelled by too much legal logic — 'was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?' — is the best approach to the application of the relevant subsection."

Then Mrs Justice Slade goes on to say:

> "Lord Phillips then MR endorsed this established approach in *Marks & Spencer Plc v Williams-Ryan [2005] ICR 1293* at page 1305 paragraph 43. The words 'reasonably practicable' in the unfair dismissal legislation do not mean 'reasonably capable physically of being done' or 'reasonable' to be done. The Employment Tribunal would no doubt investigate what was the substantial cause of the failure to meet the time limit. Amongst the factors which, depending on the circumstances, an Employment Tribunal may take into account were whether the employee was being advised at any material time and, if so, by whom."

The Tribunal was reminded by Counsel for the Appellant that this is a very fact sensitive case and reference was made to the various factual matters set out earlier in the judgment, but it should be noted that paragraph 33 says:

> "The Employment Judge held that it was clear that CGMA were capable of submitting the appeals within the time limit provided by Rule 4. The reason why she found that it was not reasonably practicable for CGMA to issue the Appeal Notices in time was that there was a pending PACE interview. The Employment Judge did not explain why she reached this decision save to say that "the fact that the improvement notices could be used in evidence in criminal proceedings was a reason for CGMA to proceed with some caution."
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> Wisely this reason was not relied upon by Mr Campbell in resisting the appeal. With respect it is hard to see why appealing against the Improvement Notices could adversely affect CGMA in resisting criminal proceedings. Rather, issuing such notices of appeal could be seen as acting consistently with contesting criminal proceedings. In my judgment no Employment Judge properly directing herself could properly have concluded on those grounds that it was not reasonably practicable to present the Notices of Appeal in time. Although CGMA did not serve a Respondent's Notice, CGMA seek to uphold the decision of the Employment Judge on the grounds advanced by Mr Campbell".

13. The Appellant says the facts of this case are very different and, in particular, the time scale between intimation of proceedings. However, the principles as already set out above are sound principles and have application to the facts of this case. The Appellant had received advice about time limits and had discussions in the way that already been referred to and the steps he took. The Appellant emphasises that there is a 21 day period but the impediments in particular arise from the date of the 13 August to 17 August. The facts must be properly looked at. While it is conceded there was a short window when a notice could have been made, that is a very short window of possibly the 8 to 10 August. However, the Appellants say construing reasonable practicability for the whole period of time means clearly that it was not reasonably practicable and that they should be an extension of time.

14. The Respondents submitted that if you look at the whole period of time you should take into account the factors which have already been referred to in the ***Beasley*** case. That you look at what has been done in this case, or rather the failure to do anything, against the background of taking instructions form the Appellant, and the ability at that time to if they had so wished to put in the notice notwithstanding the fact that they were serious matters which needed attention by a way of the Police investigation. They do not excuse/do not explain and are not impediments to the filing of any notice of appeal in this case. For the reasons as set out very clearly in paragraph 33 of the Judgment in the Wandsworth case it would have been entirely consistent with criminal proceedings for notices to be put in along

the basis when in fact they were put in on 20 August.

15. I accept the Respondent's submission. On the facts of this case, I find that it was reasonably practicable for the Appellant to have complied with the 21 day time limit. Therefore, there is not a question of considering any further period. It follows that this appeal is out of time and must be dismissed.

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Acting Regional Employment Judge P Davies

Date 20 March 2019