EMPLOYMENT TRIBUNALS

Claimant: Dacorum Sports Trust Limited (A company limited by guarantee)

Respondent: Ms Rebecca Connolly (Environmental Health Officer, Dacorum Borough Council)

RECORD OF A PRELIMINARY HEARING

Heard by: Cloud Video Platform **On:** 11 December 2020

Before: Employment Judge Bedeau (sitting alone)

Appearances
For the claimant: Mr I Wright, Counsel
For the respondent: Mr G Menzies, Counsel

JUDGMENT

The claimant's application for proceedings before this Employment Tribunal to be stayed pending the outcome of criminal proceedings, is refused.

REASONS

1. The appellant, Dacorum Sports Trust Limited, is a charity and a company limited by guarantee. It operates sports facilities, including a climbing wall and a sports development service, from premises referred to as the XC, Jarman Park, Hemel Hempstead.

2. This case is about climbing activities carried out by the respondent.

3. In its claim forms presented to the tribunal on 22 January 2020 and on 21 February 2020, it appeals against the issue of a Prohibition Notice and an Improvement Notice issued on 6 January 2020 and 8 January 2020, respectively, by Ms Rebecca Connolly, Environmental Health Officer, employed by Dacorum Borough Council. She is the respondent in these proceedings.

4. In the response presented to the tribunal on 18 March 2020, the respondent maintains that both the Prohibition Notice and Improvement Notice were correctly issued.

5. At the preliminary hearing, in private, held on 9 April 2020, before Employment Judge R Lewis, the case was listed for a final hearing over four days from 5-8 July 2021 before a full tribunal. In addition, the case was listed for a second preliminary hearing, in public, for three hours, which is now before me. The issues for me to hear and determine are set out as follows:

    5.1 any application to stay in the event that criminal proceedings are then live;

    5.2 the respondent's application to strike out paragraph 13 of the Details of Claim, on grounds of being misconceived having no reasonable prospects of success;

    5.3 to set the case management timetable required to bring the matter to hearing, and

    5.4 to deal with any preliminary or case management issues.

6. Orders were issued to ensure an effective preliminary hearing today.

7. The parties stated that they did not wish to call any oral evidence at this preliminary hearing.

8. Fortunately, I have the benefit of the same counsel who were present at that hearing. In accordance with the Employment Judge's order, they served their written submissions.

Background

9. The Prohibition Notice was issued under section 22 Health and Safety at Work Act 1974, "1974 Act" prohibiting certain activities carried on under the control of the appellant which involves the risk of personal injury.

10. The Improvement Notice was issued under section 21, in respect of the unreasonable and inadequate risk assessments having been carried out by the respondent.

11. The appellant appeals under section 24, 1974 Act.

12. It is not disputed that on 9 July 2017, a climber fell 8 metres from the climbing wall onto the ground suffering skin burns and a fracture. Over one year later, on 5 October 2018, another climber fell 13 metres while climbing the wall sustaining a broken pelvis, broken leg, broken lumber vertebrae, broken ribs, and sternum.

13. I understand that the wall is fitted with eight, of what is described as, auto-belay lines. These lines allow climbing to take place on the higher parts of the wall without the need for a climbing partner. By means of a magnetic braking system, the belay lowers the climber when they let go of the wall and automatically controls the descent to the ground.

14. To use the belay the climber has to clip onto it. To climb without being clipped on is called "free climbing".

15. In response to the Prohibition Notice, the appellant contends that it no longer allows for free climbing. Its case is that both incidents in question, occurred when experienced rope competent climbers fell from the climbing wall sustaining injuries. They fell because they did not clip themselves onto an auto-belay device which would have provided a line controlled automatic descent to the ground. No other incidents have occurred on the climbing wall at the XC.

16. Under section 22, 1974 Act, in relation to a Prohibition Notice, this applies to any activities being or likely to be carried on by or under the control of any person. As the appellant has already stated free climbing is expressly prohibited at the XC, its first ground of appeal is that it is not carrying on nor likely to carry on the described activity by itself or under its control and has taken measures to prevent such an activity.

17. The second ground of appeal is with reference to the breach of section 3(1) of the 1974 Act and whether it is relevant and necessary for the appellant to adduce evidence in relation to the "reasonably practicable" requirement? This issue was resolved during the course of the hearing before me to the extent that, without prejudice to the respondent, reference in the Prohibition Notice to breach of section 3(1) will be removed. The respondent will ask the tribunal to affirm the notice without reference to s.3(1). The parties agreed the wording to be used.

18. The above paragraph, for the sake of clarity, is referred to as second ground of appeal in paragraph 13 of the claim form, which is no longer an issue for me to determine in accordance with Employment Judge Lewis' directions.

19. The third ground of appeal is that there is no risk of serious personal injury arising from the activity which is not being permitted to be carried on in any event.

20. The tribunal is required to focus on the circumstances on the ground at the date of service of the notice.

21. In relation to the Improvement Notice, the appellant will rely on the reviewed risk assessments at the full hearing and the expert advice from its consultants. I am told that two risk assessments were carried out and considered to be suitable and sufficient by the appellant and its advisers.

22. The respondent, in considering the first ground of appeal, contends that the free climbing activity is an activity carried on under the control of the appellant as it controls activities on its own wall. The extent of its control is

such that it could have prevented such a dangerous activity but did not do so. It was in a position to control such an activity by locking the auto-belay and deploying staff to ensure that climbers do clip on when unlocking auto-belay or otherwise, by increased supervision. It was able to exercise sufficient control to ensure that children were clipped on before they attempted to climb the wall. Further, it avers that such an activity involves the risk of serious personal injury. The Prohibition Notice, therefore, was properly issued.

23. The approach in relation to the second ground appeal has been resolved as set out above.

24. In relation to the third ground of appeal, the assertion by the appellant that the element of risk of serious personal injury was not present, is denied. Falling from a height off the wall resulted in serious personal injury on two occasions. It was an obvious risk and the fact that an enforcing officer may seek to avoid taking formal enforcement action by attempting to engage with the duty holder, initially, does not change the fact that falling from a height poses a risk of serious personal injury. Therefore, it submits that the condition for the service of a Prohibition Notice, is met.

25. In relation to the Improvement Notice, the grounds of appeal refer to the two risk assessments being suitable and sufficient. The respondent contends that the assessments are required by virtue of Regulation 3(1)(b) of the Management of Health and Safety Regulations 1999, which should be suitable and sufficient for the purpose of identifying the measures which need to be taken to comply with the requirements of relevant statutory provisions, that is, health and safety legislation. The respondent challenges the two risk assessments on the basis that while they do identify the hazard, that is, climbers not clipping on, they do not identify the risk associated with the hazard, namely serious personal injury or death; they do not go and evaluate the likelihood of such serious personal injury or death occurring; further, the risk assessments do not identify that existing control measures have not been effective in bringing the risk down to the lowest, reasonably practicable level, which would be locking the auto-belays and providing more comprehensive supervision by staff; and the assessments further fail to identify how climbers can be safely brought to the ground.

26. I am told that on or around 7 December 2020, a draft summons was prepared by the respondent which will charge the appellant with the offence of breach of section 3(1) of the 1974 Act. The appellant was informed of intended criminal proceedings on or around 8 December 2020. This was anticipated by Employment Judge Lewis at the earlier preliminary hearing.

27. The appellant's legal representatives were informed on 2 September 2020, by Dacorum Borough Council, that following the Council's investigation into alleged breached of health and safety legislation, it intended to pursue criminal charges against the appellant. This led the appellant's legal representatives to write to the Tribunal on 2 October 2020, informing the Tribunal of the Council's intention. In their letter they applied for a stay of these appeal proceedings pending the outcome of the criminal case.

28. The application was opposed by the Council in its letter dated 21 October 2020.

The statutory provisions

29. An Improvement Notice is suspended pending the outcome of an appeal, section 24(3) of the 1974 Act.

30. It is useful to cite the relevant provisions:

> "3 – **General duties of employers and self-employed persons other than their employers**
>
> (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected are not thereby exposed to risks to their health or safety.
>
> (2) ……
>
> (2A) A description of undertaking included in regulations under subsection (2) may be framed by reference to -
>
> (a) The type of activities carried out by the undertaking, where those activities are carried out or any other feature of the undertaking;
>
> (b) Whether persons who may be affected by the conduct of the undertaking, other than the self-employed person (or his employees), may thereby be exposed to risks to their health or safety.
>
> (3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety."
>
> **"Section 21 Improvement notices**
>
> If an inspector is of the opinion that a person –
>
> (a) is contravening one or more of the relevant statutory provisions; or
>
> (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated,
>
> he may serve on him a notice (in this Part referred to as "an Improvement Notice") stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the

period within which and appeal against the notice can be brought under s.24) as may be specified in the notice.

22 Prohibition notices

(1) This section applies to any activities which are being or likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.

(2) 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").

(3) A Prohibition Notice shall –

(a) state that the inspector is of the said opinion;

(b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;

(c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and

(d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied.

(4) A direction contained in a Prohibition Notice in pursuance of subsection (3)(d) above shall take effect -

(a) at the end of the period specified in the notice; or

(b) if the notice so declares, immediately."

31. Section 20 deals with the powers of the inspector.

32. Regulation 3, Management of Health and Safety at Work Regulations 1999, sets out the duty and content of a risk assessment. It provides:

"**(3) Risk assessment**

(1) Every employer shall make a suitable and sufficient assessment of-

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

> (b) the risks to the health and safety of persons not in his employment arising out or in connection with the conduct by him of his undertaking,
>
> For the purpose of identifying the measure he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions…"

Relevant cases

33. Should the appeal be stayed pending the outcome of criminal proceedings? Both parties have referred me to the case of Akciné Bendrové Bankas Snoras (In bankruptcy) v Mr Vladimir Antonov , Mr Raimondas Baranauskas [2013] EWHC 131 (Comm). This is a judgment of the Commercial Court of the Queen's Bench Division of the High Court of Justice. Civil proceedings were brought by the bank against Mr Antonov and, at the time, there were extradition proceedings. He applied for a stay of the civil proceedings until after the final determination of the extradition proceedings against him.

34. This came before Mrs Justice Gloster, DBE. In relation to the issue of whether to grant a stay of the civil proceedings, Her Ladyship referred to the relevant legal principles. First, whether to grant a stay involves the exercise of a court or tribunal's discretion which is a power that has to be exercised with "great care and only where there is a real risk of serious prejudice which may lead to injustice." Second, the discretion has to be exercised by reference to the competing considerations between the parties and the court has to balance justice as between the two parties; the claimant has a right to have its civil claim decided; the burden lies on a defendant to show why that right should not be delayed. Third, a defendant must point to a real, and not merely notional, risk of injustice. In this context her Ladyship referred to the judgment in the case of Panton v Financial Institution Services Limited [2003] UKPC 8 at page 11, that is:

> "A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in criminal proceedings. The accuser's right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings."

35. Fourth, the fact that a defendant has a right to remain silent in criminal proceedings and would, by serving a defence in civil proceedings, be giving advance notice of his or her defence, carries little weight in the context of an application for a stay of civil proceedings. There is no right to invoke the privilege against self-incrimination in relation to putting in a defence as compared with the right in civil proceedings to invoke the privilege where a defendant is being interrogated, being compelled to produce documents or cross examined, V v C [2002] C.P. Rep. 8, Waller LJ, at paragraphs 37 and 38.

36. Fifth, in criminal proceedings, in England and Wales, a defendant is expected to outline a positive defence at an early stage.

37. The disclosure of a defence in civil proceedings is unlikely to disadvantage a defendant in criminal proceedings.

38. Sixth, it is also legitimate, when balancing the competing considerations between the parties, to take into account that a positive defence is likely to exculpate, rather than incriminate, a defendant, Waller LJ, paragraph 39.

39. Seventh, it is not enough that both the civil and criminal proceedings arise from the same facts, or that the defence in the civil proceedings may involve the defendant taking procedural steps such as exchanging witness statements and providing disclosure of documents which might not be imposed upon them in the criminal proceedings.

40. Eighth, the defendant has a choice between remaining silent in the civil proceedings or risk giving an indication of his defence which may be used by the prosecuting authorities. Harshness of such a choice did not provide a god ground for staying civil proceedings.

41. Ninth, in the event that the court were to be satisfied that there would be a real risk of serious prejudice leading to injustice if the civil proceedings continued, then the proceedings should nevertheless not be stayed if safeguards can be imposed in respect of the civil proceedings which provides sufficient protection against the risk of injustice.

42. In the earlier case before the Employment Appeal Tribunal, His Honour Judge McMullen QC, in the case of Mindimaxnox LLP v Gover and Ho UKEAT/0225/10/DA, a case in which the Employment Judge decided not to stay employment proceedings and to allow them to run concurrently with similar High Court proceedings, the judgment was overturned on appeal.

43. In paragraph 41 HHJ McMullen stated:

> "Generally, Crown Court proceedings will take precedence over other proceedings but the implication is that there would be some sort of concurrent proceedings would go on together."

44. In paragraph 45 he stated the following:

> "45. In my judgment it is not in accordance with the overriding objective to have concurrent proceedings over exactly the same factual territory except for the unique tort of unfair dismissal in the employment tribunal. The factual territory and the legal principles relating to the dismissal, but not the unfairness of it, are the same or at least substantially the same. It cannot be right that there are two sets of proceedings on foot, each requiring teams of lawyers to be respectively in the London Central Employment Tribunal and in the Queen's Bench Division on different days. Take this very case. In the employment tribunal there is to be a case management discussion then a PHR on one of the issues, if not more, and then in the High Court there is a

> PHR on the confidentiality issue and then a trial. It cannot be in accordance with the overriding objective that duplicate proceedings are on foot."

45. The Mindimaxnox LLP case was decided before the Snoras case and it is not referred to in Snoras. Snoras is the more relevant as it concerns extradition proceedings and staying civil proceedings whereas Mindimaxnox LLP was about concurrent civil proceedings.

46. Section 11(1) Civil Evidence Act 1968 allows for a subsisting conviction to be admitted in evidence in civil proceedings "where to do so is relevant to any issue in those proceedings."

47. By virtue of a conviction, a person is taken "to have committed the offence unless the contrary is proved", section 11(2)

Submissions

48. Mr Wright submitted that the tribunal should take into account eight factors which he adumbrated in his written submissions. He submitted, firstly, that the overriding objective of the tribunal rules is to enable the tribunal to deal with cases fairly and justly which includes dealing with cases proportionately and saving expense. It is undesirable to have two sets of closely linked proceedings running concurrently, therefore, one set of proceedings should be stayed. He was referred to paragraph 41 by His Honour Judge McMullen QC in the Mindimaxnox LLP case in support of this submission.

49. Secondly, he submitted, that the criminal courts are more appropriate to consider the complaints first. Any criminal conviction is serious, and it is appropriate that the appellant should have a first opportunity to defend the charges whether at the Magistrates Court what the Crown Court. It is a matter of reputational and commercial damage for the appellant if it is convicted which supports the criminal proceedings being heard first.

50. Thirdly, it is common ground that there is a significant overlap between the issues to be decided in the two sets of proceedings. He submitted that the investigation of the facts and matters which give rise to the service of the notices are the same as that which give rise to the issue of any summons. Further, that the breaches of statutory duty included in the two enforcement notices are very likely to be the breaches of duty alleged in the criminal proceedings. The criminal court and the tribunal must both decide whether the appellant was in breach of regulation 3 and section 3(1).

51. Fourthly, any finding by the criminal court of breach of statutory duty by the appellant will determine that issue because of the differences in the standard of proof between the criminal court and the tribunal. It is not the case the other way round. A finding of breach by the tribunal may influence the decision on that issue but it will not be decisive.

52. Fifthly, the doctrine of res judicata will apply to proceedings regarding the issue of breach and any facts found relating to the activities carried on, or not carried on by the appellant. Even if the doctrine does not strictly apply,

the earlier findings will impinge on the tribunal hearing the case second which will find it difficult not to be bound by the findings. He submitted that the criminal court with stricter rules of evidence, is the more appropriate forum to find facts and decide mixed questions of fact and law than the tribunal. This is not the case where the tribunal has particular expertise to decide proceedings, such as a discrimination claim first.

53. Sixthly, there is no particular urgency to hear the appeals at this stage. The Prohibition Notice remains in force until it is cancelled by the tribunal at the full appeal hearing.

54. Mr Wright further submitted that, in relation to the degree of complexity of the issues arising between the two sets of proceedings, there is a substantial overlap. Both the tribunal and the criminal court will have to consider the nature and extent of the activities carried on by the appellant. They will have to consider breach of statutory duty. It is to be preferred that the criminal case would go first as there are strict rules concerning evidence in the court and the respondent would serve its documents and evidence first. The appellant would, therefore, be informed of the case it has to meet. If the tribunal proceeds first, it would be usual for documents and evidence to be exchanged thereby giving the respondent a "dry run" at the case before criminal proceedings commence.

55. Mr Wright went on to submit that it is more appropriate that the criminal courts consider the matters complained about first. A criminal conviction is a serious matter, and it is appropriate that the appellant should have a first opportunity to defend the charges in the criminal court. It is a matter of reputational and commercial damage for the appellant if it is convicted. He referred to the Mindimaxnox case and cited paragraph 41 of HHJ McMullen who stated that Crown Court proceedings will take precedence over other proceedings.

56. In addition, Mr Wright submitted, that if the summons is shortly to be issued, then it is to be expected that a first hearing will be listed by the Magistrates Court before July 2021. This should be contrasted with the possibility that the case, already listed for hearing on 4 July 2021, may not take place due to the frequency at which tribunal hearings are postponed.

57. He submitted that there is a strong case for staying the appeals until after the determination of criminal proceedings. Accordingly, the appellant's application should be granted.

58. I have taken into account the submissions by Mr Menzies, counsel on behalf of the respondent, and after considering all relevant matters, I accepted his submissions in my judgment.

Conclusion

59. Neither the Prohibition Notice nor the Improvement Notice was included in the joint bundle of documents. I gave instructions to the clerk that the parties be asked to send to the tribunal, for my benefit, the notices but as at

the date this judgment has been signed by me, I have not had sight of the notices. I have, however, been given sufficient information from counsel to determine their content.

60. The appellant's position has changed slightly, in that, the section 3, 1974 Act provision has been removed from the Prohibition Notice. The tribunal will, therefore, not be concerned about whether the appellant did all that was reasonably practicable? This will be considered during the criminal proceedings.

61. The issues the tribunal will be considering in relation to the Prohibition Notice, section 22(2), are whether the activities were under the control of the appellant, and was there a serious risk of personal injury? The respondent does not have to show a breach of the law.

62. In relation to the Improvement Notice, section 21, the issue is whether there is a contravention of relevant statutory provisions?

63. I am satisfied that the issues before a criminal court are: whether the appellant adopted a hierarchical approach to prevention; could it have extended its safety provisions to everyone including children and non-competent climbers; was it reasonably practicable to have in place a system whereby all climbers were permanently supervised; the provision of mechanical equipment for ascending and descending; the provision of a facility for users to give comments on safety; the monitoring of closed-circuit television; regular risk assessments; and the removal of risks on the ground, amongst others.

64. The issues in the Prohibition Notice and Improvement Notice will be different from what the criminal court and tribunal will consider.

65. I am satisfied that res judicata will only arise if criminal proceedings took place first, section 11 Civil Evidence Act 1968. Having regard to Tolley's Health and Safety handbook, at page 63, that "The fact that an employment tribunal has upheld a notice is not binding on the Magistrates court hearing a prosecution under the statutory provision of which the notice alleged contravention; it is necessary for the prosecution to prove all the elements in the offence."

66. Even if the tribunal hear the appeal first, the requirements of section 3 would have to be proved by the respondent in criminal proceedings as the standard of proof is different and much higher than before a tribunal where it is on the balance of probabilities. In any event, the tribunal will no longer be concerned about breach of section 3.

67. I accept that the appellant will be calling witnesses who are likely to be the same witnesses to be called criminal proceedings, as well as the same or substantially the same documentary evidence, and will be calling expert evidence in relation to the Improvement Notice and may do so in relation to section 3 in criminal proceedings. I can quite understand its reluctance to disclose its hand in tribunal proceedings some time prior to the criminal case. I bear in mind that in criminal proceedings a defendant is required to

give an outline of a positive case prior to the start of the trial. In Snoras, it was held that the disclosure of a defence in civil proceedings is unlikely to disadvantage a defendant in criminal proceedings. Further, a positive defence is likely to exculpate, rather than incriminate, the appellant.

68. I do not accept that there is a risk of self-incrimination before a tribunal in this case as self-incrimination only arise as if the witnesses are compelled to produce evidence and that the production of that evidence is likely to give rise to the risk of self-incrimination. That had not been demonstrated before me. What the appellant will be doing would be to adduce evidence which would be purely exculpatory and not self- incriminating. In any event, a tactical reason for choosing to disclose evidence at the criminal trial but not before the tribunal, according to Snoras, is not a good reason for a stay. Further, I was not told what questions the appellant's witnesses, which, if answered, may incriminate them.

69. The burden is on the appellant, who is seeking a stay, to show why a party's right to have a claim decided, should be delayed? Granting a stay would be to deny the respondent the opportunity to have the case brought against it dealt with in a suitable timescale.

70. The appeal is listed for hearing over 4 days from 5 to 8 July 2021 before a full tribunal. I am told that the criminal trial is likely to take place in the Crown Court and may either by in late 2021, in 2022 or early 2023. Given the current Covid-19 pandemic, I am aware that the criminal courts are not operating at full capacity due to restrictions preventing the possibility of infection. There is, therefore, a consequent delay in cases being heard.

71. I am satisfied that a criminal trial in this case is likely to take place either in late 2021 or sometime in early 2022.

72. The appellant must show a "real risk, and not merely in notional, risk of injustice". The appellant has not produced evidence of a real risk of injustice. I have come to the conclusion and do apply the judgment of Mrs Justice Closter in Snoras, that there is not a real risk of serious prejudice which may lead to injustice were I to allow the appeal hearing to proceed first.

73. Paragraph 41 of HHJ McMullen judgment in the Mindimaxnox case is, in my judgment, a general rule and is not applicable in every case. The Snoras case is more on point as it requires a tribunal to engage in a balancing exercise.

74. Accordingly, the appellant's application for a stay is refused.

75. Having regard to my judgment, I have, consequently, issued further case management orders for the final hearing, in a separate document.

76. There are no further preliminary issues to hear and determine.

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Employment Judge Bedeau

10 January 2021
Date: ……..

Sent to the parties on: 08 February 2021

For the Tribunal Office