EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103144/2019

Held in Glasgow by Cloud Video Platform on 8 October 2021

Employment Judge M Kearns
Members: Mrs P McColl
Ms N Bakshi

Stevenson Bros (Avonbridge) Limited	**Appellant** **Represented by:** **Mr A Bergin -** **Advocate**
Kim Munro **HM Inspector of Health and Safety**	**Respondent** **Represented by:** **Mrs J Dickson -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal in respect of the appellant's application for expenses dated 17 February 2021 is that:

(1) With consent of the parties, the respondent is ordered to pay to the appellant expenses in the sum of **£3,000 (Three Thousand Pounds)**;

(2) Quoad ultra, the application is refused.

REASONS

1. The appellant is Stevenson Bros (Avonbridge) Limited, a family business engaged in road haulage. On 16 January 2019 an accident took place involving one of the appellant's drivers. The driver was re-sheeting his trailer by pulling the easy sheet back across the top of the trailer from the ground using a rope. The rope snapped and the driver fell backwards and broke his leg. The respondent conducted an investigation culminating in the issue of an

Improvement Notice to the appellant on 1 March 2019. By application to the Employment Tribunal dated 21 March 2019 the appellant appealed against the Notice. In a Judgment sent to the parties on 25 January 2021 the Improvement Notice was cancelled by the Tribunal.

Application for expenses

2. The appellant makes an application for expenses under rule 76 of the Employment Tribunal Rules of Procedure on two grounds:

   (1) that the respondent's solicitor acted unreasonably in the way in which part of the proceedings were conducted, namely by speaking to the respondent during her evidence resulting in inquiry requiring to take place and submissions to be made to the Tribunal; and

   (2) that the respondent had no reasonable prospect of success in resisting the appeal against the Improvement Notice.

3. With regard to Ground (1), the parties are in agreement that an order for expenses should be made of consent in the sum of £3,000 and we so order.

4. Turning to Ground (2), the appellant's submission was that the respondent had no reasonable prospect of success in resisting the appeal against the Improvement Notice and that the Tribunal should accordingly find that threshold ground established and exercise its discretion to order the respondent to pay the appellant their whole expenses of the appeal as taxed by the Auditor of the Sheriff Court under Rule 78(1)(b). In support of this, it was submitted that the issuing of the Notice proceeded on a lack of understanding of the appellant's processes by the respondent and Mrs Jack as noted in the Judgment of the Tribunal sent to the parties on 25 January 2021 at paragraphs 29 and 31. Specific reference was made to paragraph 33 of the Judgment where the Tribunal found that:

   "*the Inspector's opinion that the appellant was in breach of section 2(1) and 3(1) of the Health and Safety at Work Act 1974 and regulation 6(2) of the Provision and Use of Work Equipment Regulations 1998 was partly*

based on a misunderstanding of the facts and of the appellant's processes..." and that: *"at the time the Notice was served on the appellant on 1 March 2019 the appellant was not in breach of sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and regulation 6(2) of the Provision and Use of Work Equipment Regulations 1998".*

5. The application for expenses referred to paragraph 61 of the Tribunal's Judgment where it found that the respondent's understanding that some drivers supplied their own ropes and that Mrs Hunter did not know who had their own ropes and who had company ropes was erroneous. Furthermore, it was said that the respondent had also accepted Mrs Jack's erroneous assumption that the knot in the rope seen in the photograph (J27) was from an earlier repair. This then raised an issue about the maintenance of ropes, which did not, in fact arise, because ropes were replaced and not maintained. The Tribunal had also concluded that the appellant's method statement and aspects of the process had not been accurately or fairly summarized in the respondent's and Mrs Jack's notes. The Tribunal had concluded that these serious misunderstandings meant that "*at the point when she reached her opinion that the appellant was contravening the statutory provisions, the respondent did not have an accurate picture of the facts about the duty holder's activities, the hazards and the control measures in place to manage them.*"

6. The application for expenses stated that the Improvement Notice had been issued on the basis of a lack of experience of the road haulage industry and a lack of understanding of the appellant's processes and that had the respondent had knowledge and experience of the industry and properly understood the processes, she would not have issued the Notice. Accordingly, the application sought an order for the legal expenses incurred by the appellant in appealing the Notice and attached a Schedule detailing expenses in excess of £47,000.

Response to the application

7. The respondent opposed the application for expenses under Ground (2). They reminded the Tribunal that expenses are the exception and not the rule in the Employment Tribunal. They referred to the case of Lothian Health Board v Johnstone [1981] IRLR 321 and stated that the test was whether the respondent knew or ought to have known, had she gone about the matter sensibly, that her case had no reasonable prospect of succeeding. It was submitted that the threshold of no reasonable prospect had not been met in this case. They relied upon the respondent's submissions at the original hearing as demonstrating the basis upon which the respondent thought their response to the appeal had a reasonable prospect. The respondent had been legally represented throughout and this was the view of its legal advisers. The appellant was making its submissions with the benefit of hindsight now the judgment had been issued. In support of this they cited ET Marler Ltd v Robertson [1974] ICR 77 in which Sir Hugh Griffths observed: "*Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms*."

8. The respondent's solicitors pointed out that the application for expenses had been the first time the respondent had been put on notice that the appellant thought they had no reasonable prospect of resisting the appeal. No costs warning letter had been issued. They stated that the appellant had made a strike out application on 12 December 2019. It had been open to them to request strike out on the ground of no reasonable prospect of success as an additional ground had they considered this to be the case at that stage but they had not done so, despite the fact that the respondent's evidence was all but concluded at that point.

9. With regard to the paragraphs of the Judgment founded upon, it was submitted that the appellant had sought to cherry pick, taking some paragraphs out of their wider context. Furthermore, the finding that the respondent had very little experience of haulage was the respondent's own evidence and not a criticism of her given the other findings about the breadth of her duties and experience. The Tribunal had referred to the respondent as

"frank" and had, in any event found that the respondent's opinion was "partly", not wholly based on a misunderstanding of the facts and the respondent's processes.

Oral submissions for the appellant

10. In his oral submission on behalf of the appellant, Mr Bergin reminded the Tribunal that under Rule 76(1)(b), it may make an expenses order where it considers that the response had no reasonable prospect of success at the time it was lodged. It is a two-stage test. The first stage is to assess whether the threshold test has been met that there was no reasonable prospect of success. That is an objective test based on the facts at the time. The issue is not whether the respondent thought they had a good case, but whether they actually did. Mr Bergin referred the Tribunal to the case of Opalkova v Acquire Care Limited, [2021] 8 WLUK 265 at paragraphs 24 and 25:

> "*24 Accordingly, there are three key questions. First, objectively analyzed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?*
>
> *25 "The question of whether a response had reasonable prospects of success is objective and is the threshold for making a preparation time order under Rule 76(1)(b) ET Rules, even if the respondent was not aware, and should not reasonably have been aware, that the response had no reasonable prospect of success. However, the lack of understanding of the merits of the response would be relevant, along with other matters, to the discretionary question of whether a preparation time order should be made."*

11. Mr Bergin submitted that at the first stage it was first necessary to objectively analyze whether, at the time of lodging, the response had no reasonable prospect of success. If the answer to that question is yes, then the issue of whether the respondent knew or ought to have known that would be relevant to the exercise of the discretion. Mr Bergin submitted that the Tribunal would be entitled to conclude the response had no reasonable prospect of success even though there were factual disputes requiring evidence that it had to resolve. He referred to the following paragraphs of the Judgment sent to the parties on 25 January 2021 in support of his submission: 12, 13, 25, 26, 27, 29, 31,33 and 61. Mr Bergin submitted that when one considered those findings in fact in the Judgment, it is clear that the Improvement Notice was issued on the basis of a serious misunderstanding of the facts. He stated that on a proper analysis of those facts, any attempt to resist an appeal was bound to fail. There was no other possible outcome. Mr Bergin said that it was also not possible to hold that the respondent was not aware of the lack of prospect in circumstances where the appeal was opposed on the basis of the entirely misconceived opinion of the Inspectors. The respondent misunderstood the facts and that misunderstanding led her to issue the Improvement Notice. Any attempt to resist was bound to fail. When viewed objectively there had been no other possible conclusion. Mr Bergin submitted that the respondent's misunderstanding of the facts had infected the whole process. That was or ought to have been known at the time the response to the appeal was lodged.

12. Mr Bergin referred the Tribunal to the speech of Lady Black (paragraph 18) in the case of HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) in which she said this in relation to the issue of a prohibition notice: "*18. When the inspector serves the notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the notice comes into existence. However, as it seems to me, when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. Here, as the*

inspector spelled out in the notice, the risk that he perceived arose by virtue of corrosion of stairways and gratings giving access to the helideck, and the focus was therefore on the state of that metalwork at the time when the notice was served. The tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to a risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must, in my view, be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, the evidence shows that there was no risk at the material time, then, notwithstanding that the inspector was fully justified in serving the notice, it will be modified or cancelled as the situation requires."

13. Mr Bergin submitted that in the present case, the facts upon which the Notice was based were wrong. As the Tribunal held, the respondent had issued the Notice on the basis of misunderstandings and wrong assumptions. Therefore, the appeal was bound to fail and the threshold test had been met. Mr Bergin submitted that given what the tribunal had held and what had been known to the respondent at the time, not only had the threshold test been met but the Tribunal should also exercise its discretion and make an order in the terms suggested.

14. Mr Bergin then addressed the written response to the application. With regard to Lothian Health Board v Johnstone, that case predated the current rules, although he did not take particular issue with it. Furthermore, the respondent's reliance on the submissions made at the conclusion of the evidence was misconceived because the Tribunal had rejected those submissions. It was clear from the case of Radia v Jefferies International Limited, [2020] IRLR 431 that the test is an objective one. It is not a question of whether the respondent thought she had a good case, but of whether she actually did. The fact that she was legally represented was neither here nor there.

15. With regard to legal advice, Mr Bergin pointed to paragraph 36 of Brooks v Nottingham University Hospitals NHS Trust, [2019] 10 WLUK 271, in which the EAT said this: *"Reliance upon advice is a factor that may be taken into account by the Tribunal but positive professional advice will not necessarily insulate a Claimant against an award for costs. There may be many reasons for the advisers reaching a different view as to the prospects of success from the Tribunal: these may include the fact that the advice was based on more limited material than that which is considered by the Tribunal, the advice being based on the Claimant coming up to proof, or the advice being negligent. In the absence of any evidence to the contrary, the Tribunal is entitled to proceed on the assumption that a represented party has been properly and appropriately advised as to the merits."* He submitted that it did not matter what the legal advisers thought. That would not prevent the Tribunal from making an award of expenses in the terms sought. This was not a case in which advice had been given on limited material. There had been no new facts between the issue of the Improvement Notice and the hearing. There had been no failings on the part of the respondent's advisers in this case of the sort that had occurred in Brooks. Any advice given to her would be based on her account which included misunderstanding of the facts, so the advice would be tainted by the misunderstanding. The critical issue was what the respondent knew or ought to have known at the time. All roads lead back to this misunderstanding, which persisted throughout the case and led the respondent to resist the appeal. It should have been clear and apparent to them at this stage that there was no reasonable prospect of resisting the appeal.

16. Mr Bergin submitted that whilst the suggestion that the respondent was benefitting from hindsight had a superficial attraction, this was a trap. On a proper analysis, it was clear, he said, that hindsight was not a feature of this application. No evidence had been led at the tribunal hearing that had not been known at the time. We are dealing purely with what was known by the respondent at the time she lodged her response to the appeal. Mr Bergin referred to paragraph 65 of Radia v Jefferies International Limited, [2020]

IRLR 431 in which Auerbach J in the EAT said this: *"I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim 'had no reasonable prospects of success' from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation."* Mr Bergin submitted that the respondent was conflating these two issues. On a proper analysis of the case, there was no hindsight here.

17. In conclusion, Mr Bergin submitted that on a proper analysis of the case, it was clear that the response to the appeal had no reasonable prospect of success. The threshold had been met and the Tribunal ought to exercise its discretion to make an order for expenses under rule 78(1)(b) and remit the matter to the Auditor.

18. Once he had heard Mrs Dickson's oral submission, Mr Bergin stated that a cost warning letter was not a prerequisite for an expenses application. In any event, the appellant had emailed the respondent in December 2020 to say that if they were happy to concede the appeal at that stage, the appellant would not seek costs. So, whilst no formal cost warning letter had been sent, the respondent was on notice that costs may be an issue

Oral submissions for the respondent

19. For the respondent, Mrs Dickson said that whilst she and Mr Bergin were in agreement about the test to be applied, they differed in the application of that test. She emphasized that the test is a very high threshold. It is not that the response had 'poor prospects' or that the prospects were below 50%. The

test is whether there were no reasonable prospects. Mrs Dickson said that she agreed that the three questions posed in Opalkova were relevant here.

20. Mrs Dickson's primary submission was that the appellant had not met the threshold test. In an appeal against an Improvement Notice, the Tribunal has to look at the facts and determine whether the appellant was in breach of the provisions set out in the Improvement Notice at the time the Notice was issued. In this case the provisions were sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and Regulation 6(2) of the PUWER Regulations 1998. She referred to paragraph 45 of the Tribunal's Judgment in which Regulation 6(2) is set out. The prospect of successfully resisting the appeal depended on the prospect of the Tribunal concurring that those sections were being breached by the appellant at the time the Notice was issued. Mrs Dickson emphasized that the inspection by the respondent had taken place because there had been an accident in which someone had been injured. As the Tribunal had recognized in paragraph 1 of its Judgment, the appellant's employee had broken his leg. The accident had been caused by work equipment that had been exposed to conditions causing deterioration as described in Regulation 6(2) of PUWER. Mrs Dickson submitted that the fact of the accident suggested the deterioration had not been identified and that it had appeared to the respondent that there had been a breach of the obligation to ensure the equipment was inspected. Mrs Dickson submitted that the fact of that accident alone established that there were prospects for a breach causing a risk to personal safety. Mrs Dickson submitted that the Tribunal had heard considerable evidence about the systems the appellant had in place for inspecting and identifying risk. Considerable explanation had been required as to how those systems operated, because, in her submission, it was not immediately clear how the appellant's systems worked. They were open to interpretation.

21. Mrs Dickson referred to paragraph 51 of the Tribunal's Judgment. The general obligation in the Health and Safety at Work Act 1974 required an employer to have a system for assessing risk. Mrs Dickson submitted that it was clear that paragraph 51 contained an assessment by the Tribunal of how

the system operated based on the evidence they had heard. She submitted that in respect of this evidence, the Tribunal could have reached the alternative conclusion that the risk assessment was insufficient given that it did not refer specifically to the risk of a rope breaking. It was only on assessment and interpretation of that evidence that the conclusion could be reached and had the Tribunal come to an alternative conclusion on that evidence they may have found a breach of the Act.

22. Mrs Dickson then turned to the evidence regarding the appellant's inspection system which underpinned the Tribunal's consideration of whether the appellant had breached Regulation 6(2) of PUWER. She referred to paragraphs 54 and 56 of the Tribunal's Judgment. She pointed out that the inspection system for ropes is not held in one document. Evidence had to be pulled together from various different sources. There had been considerable questioning in relation to the vehicle defect checking system to identify whether or not it satisfied Regulation 6(2). It had to be looked at alongside the method statement as referred to in paragraph 56. She referred specifically to line 8 on page 26 of the Judgment where the Tribunal said this: "*The instruction at 9e of the appellant's method statement was to ensure the rope was in good condition before using it. We did wonder whether it could be improved by adding something like: "Inspect your rope by feeding it through your hands to feel it and see whether it is worn or damaged" to paragraph 9.e. of the method statement, but that is arguably just stating the obvious and we did not think that the failure to spell this out was a contravention of the relevant provisions*." Mrs Dickson submitted that much like the risk assessment process, in relation to the inspection process, evidence had to be heard, assessed and analyzed by the Tribunal before it could decide there had not been a breach of Regulation 6(2). Mrs Dickson submitted that because there was no specific inspection system in one document and no instructions given on how to inspect the ropes, the Tribunal could have formed the view that there had been a breach of Regulation 6(2). She stated that where there is scope for different interpretations of the evidence, it is incorrect for the appellant to present the position that there was no reasonable prospect

of success. The prospects were dependent upon the Tribunal's interpretation of the evidence. That evidence could have been interpreted in a different way.

23. With regard to timing, Mrs Dickson referred to paragraph 67 of Radia in which the EAT had emphasized the importance of judging reasonable prospects on the basis of information known or reasonably available at the start. Radia had been a disability discrimination case in which the claimant had lied to experts and an argument had been made that the grounds should never have been advanced. Mrs Dickson said that the facts were quite different in the present case but she agreed with Mr Bergin that the test was relevant. In this case, the appellant had only raised the argument of 'no reasonable prospect of success' once informed by a successful judgment. She submitted that the appellant had had ample opportunity to provide a costs/expenses warning and to set out their position on this in a costs warning letter but no such letter had been sent out at any stage of the proceedings. The appellant's application to strike out the response had been made after the conclusion of the respondent's evidence. Dues to factors outwith anyone's control, there had then been a break of one year before the hearing could continue. Yet during all that time, when the appellant was aware of the respondent's evidence in detail, no costs warning letter had been sent. Mrs Dickson referred to the second and third questions set out in Opalkova: did the respondent know there were no reasonable prospects? If not, should the respondent have known? She turned these around on the appellant and asked: did the appellant know there were no reasonable prospects? If so, why did they not send a costs warning letter if the position on prospects was so apparent? Mrs Dickson said that her position was that it was not apparent to any party at the outset or at any stage that the respondent had no reasonable prospect of success. The respondent's prospects may have been below 50% but that is not enough. There has to be no reasonable prospect for the appellant's submission to be successful.

24. Mrs Dickson then referred to the appellant's written submissions lodged and then expanded upon by Mr Bergin. He had explained that the appellant had taken the view that the Improvement Notice proceeded on a lack of

understanding by the respondent of the appellant's processes and that she had very little knowledge of the haulage industry and that had she had more experience of the industry and properly understood the processes, she would not have issued the Notice. Mrs Dickson submitted that those facts do not amount to nearly enough to establish no reasonable prospect of success. They only speak to one aspect of the knowledge of the inspector who served the notice. Inspectors can and regularly do work across a large number of industries. Their knowledge is of health and safety, assessment of risk and maintaining public safety.

25. It is for the Tribunal to look back at the facts at the time the Notice was served. Mr Bergin had focused entirely on a perceived misunderstanding on the part of Mrs Jack. He was framing that with the benefit of hindsight and looking at it from one perspective. The inspection process is not black and white and fully understood or misunderstood. It is open to considerably more interpretation than that. In part of Mr Bergin's submissions, he had taken the Tribunal to the paragraphs of the Judgment about the process for replacement/ supply of ropes. That factual evidence is irrelevant. The question before the Tribunal was whether there was a breach of the 1974 Act or the Regulations. Inspection of ropes was what was relevant. Mrs Dickson submitted that the three-stage test in Opalkova is failed at the first hurdle. The respondent's case is not one which had no reasonable prospect of success. At the outset of the case and throughout the evidence, at its highest it could be said that the prospects for either party were uncertain. In a case where the Tribunal is considering the systems in place to avoid personal injury in a context where there has been an injury, it cannot be said there was no reasonable prospect of success.

Discussion and Decision

26. It is important to bear in mind that expenses are the exception and not the rule in the Employment Tribunal. Rule 76(1) provides that a tribunal *may* make a costs order but *must* consider whether to do so where it finds that a party has acted as described in the Rule.

27. As Mr Bergin submitted in reference to Opalkova, there is a two-stage test. (The first question is stage one and questions two and three are considered at stage two): "*24 Accordingly, there are three key questions. First, objectively analyzed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?*

> *25 "The question of whether a response had reasonable prospects of success is objective and is the threshold for making a preparation time order under Rule 76(1)(b) ET Rules, even if the respondent was not aware, and should not reasonably have been aware, that the response had no reasonable prospect of success. However, the lack of understanding of the merits of the response would be relevant, along with other matters, to the discretionary question of whether a preparation time order should be made."*

28. We first considered whether the threshold of no reasonable prospect of success had been met. As set out in Radia and Opalkova, the test is an objective one and turns on whether, at the point when the response was lodged, there was no reasonable prospect of it succeeding.

29. In the Chevron case, at paragraph 14, Lady Black said this in respect of a prohibition notice:. "*It is common ground between the parties that a section 24 appeal is not limited to a review of the genuineness and/or reasonableness of the inspector's opinion, but requires the tribunal to form its own view of the facts, paying due regard to the inspector's expertise. It is also common ground that the tribunal should be focusing on the risk existing at the time when the notice was served."*

30. As Lady Black made clear at paragraph 18, the Tribunal's task is to ascertain in relation to a prohibition notice, what the risk in fact was: "*18. When the*

inspector serves the notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the notice comes into existence. However, as it seems to me, when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. In doing so, it may well have available to it more evidence than was available to the Inspector at the time when the Notice was served."

31. The Notice in Chevron was a Prohibition Notice. In an appeal against an Improvement Notice, the test for the Tribunal is whether the appellant was in fact in breach of the provisions set out in the Improvement Notice at the time the Notice was issued. In this case the provisions were sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and Regulation 6(2) of the PUWER Regulations 1998. As Mr Bergin pointed out, the Tribunal did indeed conclude in its Judgment that: "*at the point when she reached her opinion that the appellant was contravening the statutory provisions, the respondent did not have an accurate picture of the facts about the duty holder's activities, the hazards and the control measures in place to manage them.*" However, as Mrs Dickson submitted by reference to paragraph 33 of the Judgment, the respondent's opinion was partly, rather than wholly based on a misunderstanding of the facts and processes. We considered that that is a long way from a conclusion that 'any attempt to resist the appeal was bound to fail'.

32. Mrs Dickson submitted that the Tribunal had heard considerable evidence about the systems the appellant had in place for inspecting ropes and identifying risk. She suggested that considerable explanation had been required as to how those systems operated because it was not immediately clear how the appellant's systems worked. They were open to interpretation. We did not accept that submission in its entirety. We found that the appellant's method statement was clear and detailed. However, we agreed with Mrs Dickson that much had turned on the interpretation of the evidence in relation

to inspecting ropes and identifying risk. It is fair to say that the appellant's systems had involved the examination of more than one document and that although instruction was given in the relevant method statement to ensure that the rope was in good condition; and although drivers were also instructed on induction to check the condition of ropes before using them in re-sheeting, no specific instructions had been given on how to inspect ropes, though that might be thought obvious.

33. With regard to the respondent's lack of experience of road haulage, it was mentioned in the context of Railtrack v Smallwood in paragraph 43 of the Judgment to the effect that the respondent's expertise was general rather than specific to haulage. It was not, as Mrs Dickson submits, a criticism.

34. It is also fair to say that more evidence was available to the Tribunal than had been placed before the Inspector or given to her prior to her lodging her response. For example, at the hearing which began on 10 December 2019, the Tribunal had the benefit of an affidavit dated 6 December 2019 from Mr Henderson.

35. In conclusion, we accept Mrs Dickson's submission that establishing the facts required interpretation of the evidence and that the evidence in relation to risk assessment for the purposes of section 2(1) of the 1974 Act and inspection for the purposes of PUWER 6(2) could have been interpreted differently. We agree with Mrs Dickson that it is incorrect to say that the appeal response had no reasonable prospect of success. The prospects were dependent upon the Tribunal's interpretation of the evidence. We conclude that the threshold test of the response having no reasonable prospect of success has not been met and the application is accordingly refused.

Employment Judge: Mary Kearns
Date of Judgment: 22 October 2021
Entered in register: 01 November 2021
and copied to parties