EMPLOYMENT TRIBUNALS

BETWEEN

Appellant		**Respondent**
Mr Saad Faraj	AND	HM Inspector of Health & Safety Nicole Buchanon

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 8 July 2022
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Appellant: In person
For the Respondent: Ms H Wood, Solicitor, HSE

JUDGMENT

The judgment of the tribunal is that the Appellant's appeals against Improvement Notices INB28102021/01 and NB08122021/01 were both presented out of time and are hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the appellant's appeals against Improvement Notices INB28102021/01 and NB08122021/01 were presented in time.
2. I have heard from the appellant, and I have heard from the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The appellant is Mr Saad Faraj who was developing premises on the first floor of number 66 Mutley Plain in Plymouth ("the Site"). In February 2021 Her Majesty's Inspector of Health and Safety Ashen had visited the Site and served a Prohibition Notice because of what she perceived to be intrusive work being carried out in the absence of an asbestos survey. That Prohibition Notice is not the subject of these proceedings.

4. Her Majesty's Inspector of Health and Safety Nicole Buchanon is the respondent to this appeal. She attended the Site on 28 October 2021, and she was accompanied by a trainee Inspector Aimee Baker. While she was present at the Site on 28 October 2021, the respondent wrote out and issued the first Improvement Notice under reference INB28102021/01 dated 28 October 2021 ("the First Improvement Notice"). This First Improvement Notice alleges a breach of the Control of Substances Hazardous to Health Regulations 2002 and in particular Regulation 7(1) for failure to prevent or adequately control employees' exposure to silica dust. The respondent handed the claimant the First Improvement Notice personally on 28 October 2021 and informed him that information as to how to appeal against the Notice was on the back of the Notice, and that she would visit again in about three weeks to assess compliance.
5. The respondent then attended the Site again as indicated on a follow-up visit on 8 December 2021, and she was accompanied by Her Majesty's Specialist Inspector Justina Sebag-Montefiore. The respondent subsequently issued the second Improvement Notice under reference INB08122021/01 dated 8 December 2021 ("the Second Improvement Notice"). This Second Improvement Notice alleges a breach of section 3(1) of the Health and Safety at Work etc Act 1974, and a breach of Regulations 8(1) and 13(1) of the Construction Design and Management Regulations 2015. The respondent asserts that this Second Improvement Notice was written on 8 December 2021 following this visit, and it was posted to the appellant on the following day by second class post. The appellant disputes that it was completed on 8 December 2021. In any event the appellant asserts that he did not receive this until 20 December 2021, which is not disputed by the respondent. I therefore find that this Second Improvement Notice, which was dated 8 December 2021, was only received by the appellant on 20 December 2021.
6. The appellant asserts that he had a number of conversations with the respondent and made it clear that he wished to challenge their assumptions and to appeal the Notices. I have seen an exchange of emails between the appellant and the respondent between 8 November 2021 and 9 December 2021, in which the appellant explains what adaptations he has made, and the respondent continues to explain what she to perceives to be the appellant's legal obligations. During this exchange the appellant effectively explained what further steps he was taking to seek to comply with the First Improvement Notice, and he did not mention that he intended to appeal.
7. On 21 December 2021 the appellant raised concerns with the HSE concerns and advice team, and he confirmed that he wished to appeal against both the First Improvement Notice, and a Fee For Intervention Notice which had been raised (which is explained further below). On 22 December 2021 the respondent's line manager emailed the appellant and provided information on how to appeal; confirmation that there was a 21 day time limit; that form ET1 is to be used for the appeal to be presented to the Employment Tribunal; and referred to the Guidance T420 which contains a link to the HMCTS website.
8. On that day 22 December 2021 the appellant went abroad, but clearly had access to the Internet because on 26 December 2021 he responded to that email and confirmed that he wished to appeal "all three notices", and that although he was hoping to meet in advance "as stated at the back of the notices it looks like this is going to be possible and I'm forced to take the more formal route".
9. On 29 December 2021 another member of HSE responded to the claimant to the effect that the appeal must be presented directly to the Employment Tribunal and provided electronic links to Guidance T420 and form ET1, and the HSE reminded the appellant that the time limit was 21 days from the date of service of the relevant notice.
10. The claimant was due to return to this country on 1 January 2022, but this was delayed until 9 January 2022 because his children had Covid 19.
11. On 13 January 2022 the appellant emailed the HSE to complain that the forms appeared mainly geared for the Employment Tribunal and requested a meeting instead. The HSE responded to the effect that all appeals must be made to the Employment Tribunal. On 19 January 2022 the appellant emailed the HSE again explaining why he disagreed with the notices. The HSE responded on 26 January 2022 to the effect that the relevant information had already been contained in all previous emails and that although the 21 day time limit

had now expired the appellant might wish to contact the Employment Tribunal to seek advice on whether he could still proceed with an appeal. On 11 February 2022 the appellant responded in detail and suggested he wished to raise a formal complaint against HSE. On 14 February 2022 the respondent's line manager responded with another copy of form ET1 and Guidance T420 and again sent the appellant a link to the Employment Tribunal website for submission of an online appeal.

12. The appellant then presented the appeal against both notices to this Tribunal on 8 March 2022
13. The time limit of 21 days to submit an appeal against the First Improvement Notice expired on 17 November 2021. The time limit of 21 days to submit an appeal against the Second Improvement Notice expired on 9 January 2022. The appellant did not submit this appeal to this Tribunal until 8 March 2022. The appeal against the First Improvement Notice was therefore submitted approximately three months out of time, and the appeal against the Second Improvement Notice was submitted approximately two months out of time.
14. The appellant was ordered to provide further particulars of his assertion that his appeals should be allowed to proceed out of time, and the findings of fact in respect of these are now dealt with an order.
15. In the first place the appellant contends that he had "appealed directly to the HSE". It is true that the parties exchanged emails. The appellant first emailed the HSE on 21 December 2021 in connection with a potential appeal, and on 22 December 2021 the HSE sent the claimant an email providing detailed information on how to pursue an appeal. In his subsequent email dated 26 December 2021 the appellant stated: "As you are already aware, I wish to appeal all three notices … I was hoping to meet with you in advance to explain the situation from my side as stated at the back of the notices, but it looks like this is not going to be possible and I'm forced to take the more formal route …" However, the appellant had earlier been informed that there was no route of appeal to the HSE, and information as to how to appeal was contained in the back of the Improvement Notices.
16. Secondly the appellant contends that he was outside the UK when the HSE was responding to his emails, and his return was delayed as a result of his children contracting Covid-19. The respondent accepts that the appellant was out of the country between 22 December 2021 and 9 January 2022 (and I so find). Nonetheless he delayed a further two months before submitting his appeal. In any event an appeal can be submitted online, and the appellant clearly had access to the Internet during this period because he exchanged emails with the HSE on 26 and 29 December 2021 respectively.
17. Thirdly the appellant contends that he was not told about the Second Improvement Notice during the visit on 8 December 2021 and was surprised to receive it 12 days later. This may well be the case but there is no requirement on the HSE to inform the duty holder that the notice might be served before it is in fact served, and the time limit for the appeal only runs upon receipt of the notice.
18. Fourthly, the appellant contends that the notice was "not issued to me in time" and therefore he had lost 50% of the 21 days' time limit. This appears to refer to the delay in the Second Improvement Notice being received in the post. However, the respondent accepts that the Second Improvement Notice was not received until 20 December 2021 and time for the appeal did not run until then when it was received. The appellant still failed to submit his appeal for over two months after receipt of this Second Improvement Notice.
19. Fifthly, the appellant contends he was confused by the suitability of the Employment Tribunal originating application form ET1 and how it might relate to an HSE appeal. The respondent replied the effect that the guidance information for those appealing against improvement notices clearly states that the prescribed form did not need to be used, and it includes a list of telephone numbers for all regional tribunal offices, and the customer contact centres. There was therefore sufficient guidance before the appellant to explain the process.
20. Sixthly, the appellant complains that invoices raised by HSE were not received at the same time as the notice. This refers to the Fee For Intervention raised by HSE, which does not form part of the Improvement Notices, nor the appeal process against them, and in any

event the Employment Tribunal does not have jurisdiction to hear an appeal on any Fee For Intervention (for which see further below in the summary of the applicable law).

21. Finally, the appellant submits that it is appropriate to proceed with an appeal because it is required to deal with what he refers to as "potential abuse of process and discrimination" and to "deal with technical interpretation of the HSE guidelines which could potentially lead to revisions of these formal documents". However, this preliminary hearing today is to determine whether it was reasonably practicable for the appellant to have issued his appeals within time, and if not whether they were issued within such further time as is reasonable. Today's hearing is not one at which the validity or otherwise of the notices is to be determined.
22. Having established the above facts, I now apply the law.
23. The power to serve an Improvement Notice is contained within section 21 of the Health and Safety at Work etc Act 1974 ("the HSWA").
24. Section 21 HSWA provides: "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 an appeal against the notice can be brought under section 24) as may be specified in the notice.
25. The power to appeal against an Improvement Notice is contained within section 24 HSWA. Section 24 provides: (1) In this section "a notice" means an improvement notice or a prohibition notice. (2) a person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit. (3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection, then – (a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal; (b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction) …
26. The Employment Tribunal Rules of Procedure are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). Rule 105 confirms that the time limit for such an appeal is 21 days, which can be extended by the tribunal where it is satisfied that it was not reasonably practicable for the appeal to be presented within that time. Rule 105 provides: "(1) a person ("the appellant") may appeal against an improvement notice or a prohibition notice by presenting a claim to a tribunal office – (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 (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.
27. Under Rule 5 of the Rules the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.
28. The back page of the standard form of an Improvement Notice provides Notes and Guidance concerning a potential appeal against that Notice. Note 4 provides: "You can appeal against this notice to an Employment Tribunal …" The notes then give both the website address for submitting online appeals or alternatively the relevant postal address. There is a separate section headed "Time Limit for Appeal" which provides that a notice of appeal must be presented to the Employment Tribunal within 21 days from the date of service on the appellant of the Notice, or within such further period as the Tribunal considers reasonable in the case where it is satisfied that it was not reasonably practicable

for the notice of appeal you have been presented within the period of 21 days. The Notes also confirm that the rules for the hearing of an appeal are given in the Employment Tribunal Rules of Procedure.

29. Notification of Contravention Letters are issued under Regulation 23 of the Health, Safety and Nuclear (Fees) Regulations 2021. They are required before the Health and Safety Executive can recover the costs of its interventions (known as a Fee For Intervention, or FFI for short) from a duty holder who is in breach of Health and Safety Law. They are not enforcement notices issued under the Health and Safety at Work etc Act 1974 and there is no right of appeal against them to an employment tribunal. Any challenge to them must be brought under the FFI Queries and Disputes Process which is outlined on HSE's website, as required by Regulation 25 of the Health, Safety and Nuclear (Fees) Regulations 2021.
30. I have been referred to and have considered the following cases, namely: London Borough of Wandsworth v Convent Garden Market Authority [2011] EWHC 1245 (QB); and Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372.
31. The grounds relied upon by the appellant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are set out numbered paragraphs 8 to 14 above.
32. The question of whether or not it was reasonably practicable for the appellant to have presented his claim in time is to be considered having regard to the following authorities. In London Borough of Wandsworth v Convent Garden Market Authority the High Court accepted at paragraph 31 that the meaning of reasonable practicability had been set out in the Court of Appeal in Palmer and Saunders v Southend-on-Sea BC. The headnote to that case suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit ...
33. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
34. The First Improvement Notice:
35. This First Improvement Notice was dated 28 October 2021, and the time limit for appealing against this expired on 17 November 2021. Information and guidance on how to present an appeal were included on the reverse of the form. Although the appellant entered discussions with the respondent about potential compliance, the appellant did not express any intention to the respondent or anyone else on HSE to appeal this Notice until 21 December 2021, nearly five weeks after the time limit had already expired. There was subsequently an exchange of emails between the parties and on 22 December 2021, 29 December 2021, 26 January 2022, and 14 February 2022 the HSE emailed the appellant

giving him clear information on the appeal process and how to pursue a potential appeal. Notwithstanding this no appeal was presented until 8 March 2022.

36. I find it was reasonably practicable (in the words of the statute) and in addition "reasonably feasible" (as explained in Palmer and Saunders v Southend-on-Sea BC) for the appellant to have presented his appeal within the relevant time limit. Even if this were not the case, it is clear that he did not present the appeal within such further time as was reasonable, given that he was clearly aware of the process following information provided to him, and still failed to present the appeal until 8 March 2022.
37. Accordingly, I dismiss the claimant's appeal against the First Improvement Notice because it was presented out of time.
38. The Second Improvement Notice:
39. I accept the respondent's evidence that the Second Improvement Notice was correctly dated 8 December 2021, but this is not particularly relevant because the parties agreed that this Notice was not received by the appellant until 20 December 2021. This meant that the time limit for appealing against it expired on 9 January 2022.
40. I have some sympathy with the appellant's concern that he was unable to return to the UK until 9 January 2022 because his children had contacted Covid 19, when he had earlier planned to return on 1 January 2022. However, this does not affect the remaining evidence. In the first place this Second Improvement Notice includes on the form clear advice on how to appeal against it. There were discussions between the parties, and in particular on 29 December 2021 the appellant received an email from HSE confirming that any appeal had to be presented to the Employment Tribunal, and the email provided electronic links to guidance T420 form ET1, and it reminded the appellant that the time limit was 21 days from the service of the notice. Even though the claimant was abroad, he was exchanging emails and had access to the Internet. No reason has been proposed by the appellant as to why he was unable to complete an present an appeal whilst abroad. The claimant did not raise any concern about using the ET1 originating application form until 13 January 2022 which was after the time limit had already expired.
41. In my judgment it was reasonably practicable (in the words of the statute) and in addition "reasonably feasible" (as explained in Palmer and Saunders v Southend-on-Sea BC) for the appellant to have presented his appeal within the relevant time limit. Even if this were not the case, it is clear that he did not present the appeal within such further time as was reasonable, given that he was clearly aware of the process following information provided to him between 29 December 2021 and 14 February 2022, and still failed to present the appeal until 8 March 2022.
42. Accordingly, I also dismiss the claimant's appeal against the Second Improvement Notice because it was presented out of time.

Employment Judge N J Roper
Date: 8 July 2022

Judgment sent to Parties: 13 July 2022

For the Tribunal Office