



EMPLOYMENT TRIBUNALS

Appellant

Junction 4 Pallets Limited

Respondent

v **Andrew Delaney,**
Health Officer **Environmental**

PRELIMINARY HEARING

Heard at Sheffield

On: 5 and 6 October 2023

Before: Employment Judge O'Neill

Appearance:

For the Appellant: **Mr H Vann, Counsel**

For the Respondent: **Mr S Hilton, Counsel**

Judgment on a Preliminary Matter

I find for the respondent in this preliminary matter. I find the main activity at the Durham Lane site falls under Schedule 1 (1) of The Health and Safety at Work (Enforcing Authority) Regulations 1998 and to lie within the jurisdiction of the local authority namely City of Doncaster Council and that its officer Andrew Delaney was empowered to issue the notice pursuant to section 19 of the Health and Safety at Work Act 1974 reference WK / 222022891.

Reasons

Background

1. The appellant appeals against the prohibition notice dated the 20th of December 2022 number WK / 222022891 issued by the respondent.
2. Following a preliminary hearing on the 30th of June the matter was listed before me on the 5th and 6th of October 2023 to determine a preliminary issue as to jurisdiction namely whether the respondent had authority to issue the above notice under the Health and Safety (Enforcing Authority) Regulations 1998 (the regulations).

Law

3. The relevant legislation is as follows

Section 18 Health and Safety at Work Act 1974

Health and Safety (enforcing authority) regulations 1998 and in particular regulation 3(1) and Schedule 1 (1).

HSE operational guidance OG 00073 and 00075

4. I have not set out in full the above material as both parties were represented by council and a bundle containing this was before the tribunal .
5. The key question to be determined is what is the main activity carried out at the appellant site at Durham Lane Amthorpe Doncaster (the Durham Lane site) and does it fall under Schedule 1 of the regulations.
6. Where the main activity carried on... is specified in Schedule 1 the local authority for the area in which those premises are situated should be the enforcing authority.
7. It is accepted that the City of Doncaster is the appropriate local authority responsible for the site if Schedule 1 applies. It is also accepted that no transfer or assignment of powers has been made between the respondent local authority and the health and safety executive (HSE) under regulations 5 or 6.
8. The HSE is the enforcing authority by default unless Schedule 1 applies
9. Schedule 1(1) provides that where the main activity is the sale of goods or the storage of goods for retail or wholesale distribution then the local authority will be the enforcing authority
10. The guidance OG00073 considers further the sale and storage of goods for retail or wholesale distribution, the guidance OG 00075 give guidance on the concept of main activity.

Evidence

11. The Tribunal had before it and agreed bundle of documents paginated and indexed comprising 97 documents together with a separate bundle containing key legislation and guidance documents
12. The Tribunal has heard from the following witnesses who each gave evidence and were cross examined having produced witness statements which were taken as read.
13. The witnesses were
 - Mr Michael Kelly Managing Director of the appellant
 - Mr Andrew Dana Delaney the respondent
 - Daniel Wheatman formerly a senior environmental health practitioner with Doncaster City Council
14. I found each written as to be credible and reliable although I gave little weight to the evidence of Mr Weetman as he has had no dealings with the Appellant since 2015 and had no part in the enforcement notice.

In respect of the activities on the site I found Mr Kelly to be the most reliable of the witnesses having everyday knowledge of the business
15. We also viewed video footage of the site taken by a drone

Findings of Fact

16. Having considered all the evidence both oral and documentary I make the following findings of fact on the balance of probability. Some of my findings are set out in my conclusions in an attempt to avoid unnecessary repetition and conversely some of my conclusions are set out in the findings.
17. The appellant operates a pallet business from a number of sites including that at Durham Lane.
18. The appellant has a website which describes the Doncaster Used Yard (i.e., the Durham Lane site) as the first of our used yards located just up the road from our production facility, 180,000 square feet of space for inspecting, grading repairing and storing our large **stock** of pallets. (emphasis mine).
19. The website also states 'every day we recover excess used pallets from major retailers and SMEs alike which are taken to one of our 3 strategically located service centres for inspection, repair and grading. At all three sites we keep substantial **stocks** of popular use pallet types including euros and the UK standards - we also keep a smaller **stock** of less popular palette types so contact us regarding your specific requirements.
20. Mr Kelly agrees that this is what their website says and explains that the purpose of the website statement is to act as a sales pitch to get the message across to customers and potential customers that the appellant is the place to go to buy pallets.
21. In answer to a question from me, to the effect that of all the activities carried out on the site which was the most important to the business financially, Mr Kelly responded by stating firstly the sale of pallets
22. He went on to tell me that servicing customers own pallets was at this stage a growth area but I have inferred from his explanation that although it is a developing part of the business it is not a major or core business.
23. He also said and I accept that they had to find a way of disposing of the irreparable pallets which they chip and sell on, otherwise they would be drowning in wood chip. I take from this that chipping is an incidental but necessarily evil in the in the business.
24. From this and from the statistics I find that the main activity on the site is the sorting, grading, repair and storage of pallets to sell on wholesale.
25. In his statement Mr Kelly gave a list of the operations carried out by the company. He agreed that pallet design, manufacturer of new pallets, heat treatment, managing customers pallet networks, sale of new pallets were rarely if ever carried out at Durham Lane.
26. Essentially at Durham Lane the operation comprises the manual sorting of every pallet into type and condition, pallets in good order go into stock and are stored for resale; damaged pallets, which are judged to be repairable are repaired and then stored for resale; those judged to be beyond repair are turned into woodchip.
27. In his statement Mr Kelly gives the statistics and has produced a spreadsheet showing a breakdown of the used pallets coming into the site and I set out

below in full paragraph 6.7 of his evidence in chief. During the course of the hearing other statistics were introduced and Mr Vann in his submission sought to persuade me that Mr Kelly's original statistics required some substantial adjustment. However, I rely on Mr Kelly's evidence in chief but note the following;

a that about 3.8% of pallets required alteration to fit customer expectations

b that the pallets belonging to Amazon and some other service clients are not included in these statistics and that their stock equals about 25% of the pallets on site

c that the percentage of pallets chipped in that paragraph is likely to be an underestimate.'

28. Paragraph 6.7 of Mr Kelly's statement reads as follows 'As set out above the spreadsheet at document 22 of the bundle shows that over the course of 2022 32% of the pallets handled by the Doncaster Yard required repairing before they could be distributed to customers, a further minimum of 313731 were chipped. Out of the total of 1369 191 pallets processed, 54% ($433861 + 313731 = 747592$) therefore required repair servicing remanufacture or chipping. Just 46% ($1369\ 19\ 1 - 7\ 47592 = 621599$) of the pallets that came through the Doncaster Yard was serviceable upon receipt and were ready for redistribution without any repair, servicing, remanufacture or chipping. 100 percent of the pallets coming into the yard had to be assessed to determine their condition'.
29. Mr Kelly estimates that about 33% of the pallets arriving into the yard have to be chipped he tells us that 46% are ready for sale in the condition that they arrive that leaves about 30% of the pallets which require repair before being stored as stock for onward distribution i.e., sale. It appears that the overwhelming percentage of pallets are in fact sold on and that is the core business.
30. Mr Kelly explained that some customers have special requirements which necessitate the appellant making adaptations to the pallets. As described by Mr Kelly I find this amounted to minor alterations such as the addition or removal of a 'foot' and do not amount in my view to a manufacture or a transformation of a pallet and in any event, this work amounts to just 3.8% of the pallets which I find constitutes an incidental activity.
31. Another incidental activity, not part of the core business but an irritant to Mr Kelly, requires the appellant to store and then return to rental companies pallets which belong to them and become mixed up with other pallets coming into the yard.
32. Mr Kelly also told us that a growth area but as yet still a relatively small part of the business is the servicing of pallets belonging to others and in particular to their largest client Amazon. This appears to be a new but growing element of the business in which the appellant sorts, repairs and redistributes pallets belonging to Amazon and others back to their own sites as directed.

33. As I understand it this is a service provided by the appellant for a fee as Mr Kelly said that this would have an adverse financial impact if it were to be lost to the site. The pallets never belonged to the appellant and are not for resale by them. Mr Kelly estimates that 20% of the pallets going through the site belong to Amazon and are processed in this way. As way. I understand it the statistics given by Mr Kelly a paragraph 6.7 of his statement do not include the Amazon pallets. I accept Mr Kelly's evidence that this servicing element is financially important to the business but I find it falls short of the main activity.
34. Mr Delaney has frankly admitted that until the appellants had lodged their appeal, he gave no consideration as to whether his jurisdiction might be in issue. He says his note book, which has not been disclosed, contains nothing of relevance to the preliminary point under consideration today. He also generally accepted Mr Kelly's account of how the Durham Lane yard operated however I share his view that the use of hand tools to repair pallets or breaking down of the damaged pallets was not the main work activity on site but merely an activity that supported the main activity of wholesale distribution of second-hand pallets directly from the site and the repair station serves the activity of onward distribution

Conclusions.

35. I find that the main activity at the Durham Lane site falls under schedule 1 paragraph 1 of the 1998 regulations and is the sale and the storage of pallets for wholesale distribution.
36. Wholesale is set out in the guidance as the resale (sale without transformation) Transformation according to the Oxford English dictionary means a mark changed in form nature or appearance. The kind of minor change described by Mister Kelly as remanufacturing for short of transformation and applies to less than 4% of the panels in any event.
37. Repairing pallets for resale is in my view not a transformation. The pallet arrives as a broken pallet and is sold on as a palette in good repair. The repair may well transform the value of the item as Mr Vann suggests but the goods i.e., the pallets remain the same objects and are not themselves transformed.
38. I do not accept the appellant's argument that broken pallets are equivalent to part finished goods. Some are used and broken goods which the appellant makes ready for sale by repairing but looking at the examples in the guidance I make a distinction between damaged goods and part finished goods. Considering the guidance, I infer that had the pallets come in from the appellant's manufacturing site at 'the farm' to be heat treated at the Durham Lane site or to be stored at Durham Lane pending return to 'the farm' for heat treatment they might constitute part finished goods. Similarly, if they arrived in kit form at the Durham Lane site to be put together there as pallets then they would arrive as part finished goods. However, in my view what arrives on the site are fully formed pallets which may, in some cases, require repair and in some cases disposal, if beyond repair, but these are not part finished goods i.e., goods requiring construction or finishing in some way.

39. As I have already described I find that the chipping operation to be a secondary activity to the main activity of selling pallets. I note that in the website description the pallets are described as being in stock and this would reinforce my view that the pallets stored on site are stored there as stock for the purpose of sale.
40. Chipping the pallets enables the appellant to dispose of the rubbish where the pallets are otherwise irreparable. The appellant may be able to sell the chippings and that contributes to the financial viability of the Durham Lane site but I find that Mr Kelly regards that as a necessary evil rather than a core part of the business and I infer that he would rather be repairing pallets than chipping them. This may well be processing and transformative but I find it to be an incidental activity and not part not a main activity of the site but incidental to the main activity.
41. Servicing pallets for clients such as Amazon is a growing part of the business but is yet to attain the status of main activity on this site and is still a relatively small percentage (20 %) of the pallets passing through.
42. I find the main activity on the site to fall within Schedule 1(1) of the regulations and to lie within the jurisdiction of the local authority that is the City of Doncaster Council and its officer Andrew Delaney was empowered to issue the notice pursuant to section 19 of the Health and Safety at Work Act 1974 reference WK 222022891.

Employment Judge O'Neill

Date: 6 October 2023.

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Sent to the parties on:

18 October 2023