EMPLOYMENT TRIBUNALS

BETWEEN

Appellant		Respondent
MELVILLE HALL HOTEL LTD	**AND**	**ISLE OF WIGHT COUNCIL (ENVIRONMENTAL HEALTH SERVICE)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 6TH / 7TH APRIL 2021
EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)
APPEARANCES:-
FOR THE CLAIMANT:- **MR S VENTOM (COUNSEL)**
FOR THE RESPONDENT:- **MR A HUMPHREYS (THE APPELLANT'S MANAGER)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. Pursuant to s 24(2) Health and Safety at Work Act 1974 the Prohibition Notice P20-00004 is hereby affirmed on withdrawal of the appeal by the appellant.

2. Pursuant to s 24(2) Health and Safety at Work Act 1974 the Prohibition Notice P20-00004 is hereby affirmed.

3. Pursuant to s 24(2) Health and Safety at Work Act 1974 the Prohibition Notice P20-00004 is hereby affirmed.

Reasons

1. In this case the appellant brings three appeals against three prohibition notices PN 20 -00004 dated 24th January 2020 ; PN – 20- 00007 dated 4th February 2020; and PN 20- 00008 5th February 2020. Those were notices prohibiting the use of respectively the indoor spa pool/hot tub; the indoor swimming pool; and the outdoor hot tub. During the course of the hearing the appellant accepted that the appeal against 004 is not being pursued.

2. The tribunal has heard evidence from Mr Humphreys for the appellant; and from Nina Clough (Senior Environmental Health Practitioner), Rachel Briscoe (Team Manager for the Business Regulation and Public Protection Team) and David Fentum (Regulatory Officer) for the respondent.

Facts

3. The respondent is a spa hotel on the Isle of Wight which has as part of its facilities an indoor hot tub/spa pool; an indoor swimming pool; and an outdoor hot tub. These appeals concern Prohibition Notices issued in late January and early February 2020 in respect of them. In this section I will set out the broad factual outline. The disputes of fact will be dealt with in considering the appellant's challenges to the notices as set out below.

4. The background to these appeals is that on 22nd January 2020 Ms Clough was contacted by Public Health England who informed her that a man who, together with his wife, had recently stayed at the appellant hotel had been admitted to the ICU at Southampton Hospital on 18th January 2020 and had been confirmed as having contracted Legionnaires disease. She informed Ms Briscoe and on 22nd January Ms Clough and Mr Fentum visited the hotel. They spoke with Mr Humphreys. The indoor spa pool/hot tub was inspected and water samples taken. There was a very significant difference between the Palentest recordings taken by Mr Fentum and Mr Humphreys. Mr Humphreys agreed to voluntarily prohibit the use of the showers, indoor spa pool/hot tub and indoor pool until the receipt of water sample results.

5. Mr Fentum returned on 24th January 2020. There is a dispute as to the correct parameters for residual free chorine levels. Mr Fentum contends the indoor spa should have been operating at 3-5mg/l (as is set out in the HSE guidance). Mr Humphreys was operating within parameters of 0.5 -1.6mg/l which he contends was correct. Whilst Mr Fentum was at the hotel he was contacted by Ms Clough to say that the shower water samples were negative but that the indoor spa pool/hot tub samples had tested positive for Legionella serogroup 1. Mr Humphreys agreed to close the indoor spa pool/hot tub and indoor swimming pool voluntarily and on 24th January 2020 Mr Fentum drafted the first prohibition notice (004) in relation to the operation of the indoor spa pool/hot tub. As set out above the appeal against that notice is no longer pursued. However the Schedule to the notice required the appellant to arrange for "a suitably qualified and competent person" to examine the spa pool and associated equipment in order to assess the risks associated with its use. Following this the appellant was required to provide a report supplying information regarding the operation of the spa pool, the method of removal of infectious agents, and measures to control hazards; and to ensure those responsible for implementing the measures have the necessary training and resources.

6. On 27th January 2020 Ms Clough and Mr Fentum returned to the hotel and found what appeared to be wet footprints between the indoor pool steps and the sauna, which appeared to indicate that the indoor swimming pool which was subject to the

voluntary prohibition had in fact been used. Mr Humphreys assured them that this was not the case.

7. On 30th January 2020 Mr Fentum visited again to deliver an Improvement Notice which is not the subject of these proceedings. It is however related to them in that the reasons given by Mr Fentum for issuing the IN are disputed. The IN recorded Mr Fentum's opinion that consideration had not been to the risks for the potential growth of legionella; and that the control of legionella was not currently addressed as there were not specific risk assessments. He expressed concerns including the lack of a schematic diagram of the water system. These are disputed and handwritten comments on the notice include "*Complete nonsense. Opinion based on ignorance on the part of Mr Fentum."*

8. On 3rd February 2020 Public Health England contacted Mr Fentum to inform him that the indoor swimming pool samples taken on 27th January 2021 had high readings for legionella type1. In the absence of any schematic diagrams having been provided by the appellant Mr Fentum took the view that he could not be sure if there was or was not any link between the indoor spa pool and indoor swimming pool (which in any event were physically in close proximity to each other) and on 4th February 2020 he drafted PN 007 in respect of the indoor pool.

9. He visited again on 4th February 2020 and at about 3.30p.m. observed from the outside that someone was in the indoor swimming pool and other people were in the poolside area. Although Mr Humphreys denied that anyone had used the indoor swimming pool, it was accepted that he was preparing the outdoor hot tub for use. Mr Humphreys indicated that an outdoor hose was used to fill the hot tub and water samples were taken.

10. As a consequence of his perception and belief that Mr Humphreys had breached the voluntary prohibition on the use of the indoor swimming pool; his denial that it had in fact been used; concerns about the entire water management system and the competency of Mr Humphreys Mr Fentum decided to issue PN008 in respect of the outdoor hot tub.

11. On 7th February 20020 PHE confirmed that it had matched an isolate ST27 from the patient to the indoor spa pool/hot tub at the hotel thereby confirming the source of the infection. That same day Mr Fentum was contacted by a member of the public who confirmed that they had used the indoor swimming pool and outdoor hot tub, but not the indoor spa pool on 27th January 2020, the date of Mr Fentum's visit and the day on which the appellant denied that there had been any use of the indoor swimming pool.

12. The appellant complied with the requirements of the notices. Following the events set out above there was considerable correspondence between the appellant and Mr Fentum in February/March 2020 as to whether sufficient steps had been taken to allow for the lifting of the notices. These events have no bearing on the questions I have to resolve and it is not necessary to deal with them in this judgment.

Legislative Framework

13. Whilst the legal principles are not in dispute there are a number of concepts in the legislative framework which I have applied and are set out here for completeness sake.

14. The power to serve a Prohibition notice is contained s22 HSWA 1974 and can be exercised by the Inspector if s/he forms the opinion that the activities carried on by or under the control of the person in question involve or will involve the risk of serious personal injury (NHSWAs 22(2)).

15. An appeal against a Prohibition Notice is made to the Employment Tribunal (s24(2) HSWA. The ET may cancel or affirm the notice, and if it chooses to affirm it can modify its terms. Neither party submits that I should affirm but modify any of the notices. The appellant's case is that 007 and 008 should be cancelled, the respondent's that they should be affirmed without modification.

"Chevron"

16. Prior to the case of *HMIHS v Chevron North Sea Ltd [2018] UKSC7* the task for the tribunal was to determine whether it would have served the notice on the basis of the information which was known or ought reasonably to have been known following such investigation as ought reasonably to have been undertaken by the Inspector at the time. Following *Chevron* the correct test is now *".. on an appeal against a Prohibition Notice… the employment tribunal had to decide whether, at the time when the notice had been served, a risk of serious personal injury existed; that the inspectors opinion about the risk and the reasons why he had formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but there was no good reason for confining the tribunal's consideration to the material that had been, or should have been available to the inspector; that the tribunal was entitled to have regard to what the risk in fact was, and, if the evidence showed that there was no risk at the material time, then notwithstanding that the inspector had been fully justified in serving the notice, it would be modified or cancelled as the situation required…*" (Headnote – My underlining)

17. Whilst the primary burden of proof rests on the Inspector to show that the breach alleged has occurred; for completeness sake there is no requirement that the risk has eventuated *R v Board of Trustees of the Science Museum [1993] I WLR 1171*).

Purposive Approach

18. The underlying purpose of the HSW 1974 is preventive both in respect of employees and members of the public and a purposive approach to interpretation "..*which renders.. the act effective in its role in protecting public safety should be adopted" (Railtrack v Smallwood [2001] EWCH 78 para 90)*

Risk

19. The word risk *"..is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against." (See R v Chargot [2009] 1 WLR1 para 27 and Baker v Quantum Clothing Ltd [2011] 1 WLR 1003 para 66)*

Grounds of Appeal

20. As set out above the appellant no longer challenges or seeks the cancellation of PN004. In relation PN007 and PN008, Mr Humphreys essentially alleges that Mr Fentum either ignored relevant information or was biased against the respondent and that he was the subject of campaign of which Mr Fentum was either a witting, or perhaps unwitting party . He alleges that the background is that the hotel had "a zero tolerance" policy for non-paying guests who were later sued and subjected the hotel to revenge complaints. In addition he was in dispute with the previous owners of the hotel over snagging issues and they had threatened to close the hotel by any means possible. As a consequence of false complaints, at least possibly from those sources, Mr Fentum visited the hotel 14 times between October 2019 and January 2020 prior to the visit in question. He was either a willing participant in a campaign against the hotel or should at the very least have concluded that he was being used as part of a vendetta against it. The appellant's case is that even if the Inspector was entitled to issue the first Prohibition notice (004) that the subsequent notices were unnecessary and were effectively part of a campaign to keep the hotel's spa closed for longer than was necessary and to inflict commercial harm to it: " *I view (his) actions as being harassment as well as interference with my business…. The only conclusion that can be made is that either (he) is also attempting to close our business and/or is attempting to gain a reputation within his department at the expense of the hotel*."

21. In support of the allegation that Mr Fentum was a participant in the campaign and not simply an unwitting dupe the appellant alleges that he was over officious and placed a number of unnecessary requirements of the appellant:
    i) He insisted on staff attending an unnecessary pool responder course;
    ii) Insisted on being shown the schematics of pipework "already known to the appellant"
    iii) Insisted on unnecessary changes to operating procedures beyond that required for schools and commercial pools;
    iv) Insisted that operating procedures be reviewed by a third party;
    v) Insisted on staff attending an unnecessary pool maintenance course.

22. The respondent contends that each of these requirements was justified. It is not necessary to deal with all the factual disputes but one in particular, the free chlorine residual levels will illustrate the point. There is a dispute as to whether the appellant was held to too high a standard by the Inspector. The HSE Guidance "Management of Spa Pools: Controlling the Risk of Infection" recommends (para 169) 3-5mg/l of free chlorine residuals where chlorinating disinfectants are used. The claimant relies

on a number of alternative sources of advice such as that produced by Yeowood Farm, and the HSE's own guidance "Health and Safety in Swimming Pools", and he Calvert Trust's "Pool Operating Procedure" which gives a free chlorine range of 0.5-6.00 ppm, and contends that an acceptable level of residual free chlorine is 0.5 -1.6 mg/l, although the appellant's own Pool Safety Operating Procedures (PSOP) updated in December 2019 refers to the level of 3-5mg/l. The essence of the dispute is that the appellant was testing for free chlorine residual levels to the same standard in both the indoor swimming pool and the indoor spa pool/hot tub whereas the Inspector contends that the guidance indicates testing to different levels are required. On any analysis the Inspector is supported both by the guidance and the appellant's own PSOP and it does not appear to me that he can be criticised for applying that standard nor that it is evidence of any bias or prejudice against the appellant. Despite the clear HSE guidance the appellant continues to maintain that he is right and he Inspector is wrong. However if the inspector is correct, which in my judgment he is, the appellant was not testing the indoor spa pool/hot tub to a safe level. By the time the first PN was issued it was confirmed that the water samples taken from the indoor spa pool /hot tub were grossly contaminated with legionella; and that contamination had occurred whilst under the appellant's control. In the those circumstances I can see no reasonable criticism of the Inspector for requiring those measures to be put in place. I certainly cannot see any basis for drawing any conclusion from them that the Inspector was conducting a campaign to harm the appellant's business.

23. Having heard the Inspector's evidence I find him a wholly truthful and reliable witness and there is in my view no evidential support for the allegations made against him.

Conclusions

24. As set out above the task for the tribunal is to "..*to decide whether, at the time when the notice had been served, a risk of serious personal injury existed; that the inspectors opinion about the risk and the reasons why he had formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but there was no good reason for confining the tribunal's consideration to the material that had been, or should have been available to the inspector;* that the tribunal was entitled to have regard to what the risk in fact was, and, if the evidence showed that there was no risk at the material time, then notwithstanding that the inspector had been fully justified in serving the notice, it would be modified or cancelled as the situation required…" (Chevron) .

25. Before dealing with my conclusions in respect the appellants grounds for asserting that the final two notices should be cancelled I should say firstly that exposure to legionella necessarily involves the risk of serious injury as it is a potentially fatal disease. The question for me is therefore whether at the time each of the notices was served whether the risk of exposure to legionella and hence the risk of serious personal injury existed.

26. The respondent effectively submits that the allegations set out above are a smokescreen to distract from what is essentially a simple case; and that the issuing of each of the PNs was plainly justified (both at the time and with the benefit of hindsight):

i) A report was made of a guest having contracted suspected legionnaires disease whilst a guest at the hotel;
ii) That diagnosis was subsequently confirmed;
iii) Water samples revealed Legionella of the same type as that caught by the guest in the indoor spa pool/hot tub;
iv) Voluntary prohibitions on the use of the indoor pool were plainly broken;
v) Water samples from the indoor pool were also positive;
vi) Given the breach of voluntary prohibitions, the failure to provide schematic drawings, and the fact that legionella had been discovered in both the indoor spa pool /hot tub and the indoor swimming pool it was not possible to conclude that the appellant's management of the risks associated with legionella was sufficiently competent that any of the individual pools or hot tubs would not be contaminated.

27. For completeness sake I should record that in my judgement it was entirely appropriate to issue PN 004 and that if the appeal had been pursued I would certainly have affirmed it.

28. In my judgement in respect of PN007 the Inspector was clearly right to issue it on 4th February 2020. Firstly he had confirmation of the discovery of legionella in the water samples taken on 27th January and evidence that both on 27th January and 4th February that the voluntary prohibition had not succeeded in preventing the pool from being used. There was specific evidence supplied to him on 7th February after the PN was issued but which I am entitled to take in to account (See Chevron above) that the indoor swimming pool was being used on 27th January. In those circumstances in my judgement the conclusion that the use of the indoor swimming pool would present a serious risk of personal injury is incontrovertible. Indeed not to have issued the PN would have required the Inspector to have ignored the water sample results and the continued use of the pool. I cannot see that there is any evidential basis for concluding that he should, or why he should, have done so.

29. The more difficult question relates to the PN 008. There was no evidence of any connection between the water supply to the outdoor tap or the outdoor hot tub being linked to either the indoor spa pool/hot tub or the indoor swimming pool. There was equally no specific evidence of it posing any risk in that water samples had not previously been taken from it (although as set out above there is no requirement for the risk to have eventuated). In effect the basis for issuing PN008 was that the Inspector simply no longer trusted the appellant to competently manage and maintain the outdoor hot tub. By that point water samples from both the indoor spa pool/hot tub and indoor swimming pool had tested positive for legionella despite the appellant's insistence that they were being maintained to standards which should have prevented that in both cases, and the Inspector did not trust, and had every reason not to trust the accuracy and reliability of the information being given to him by the appellant. The Inspector's reasons for issuing the PN are useful in that they

"shed light"(Chevron above) on the question the tribunal has to answer as to whether the risk of serious injury existed at the time the notice was served.

30. The tribunal is in fact in the same position as the Inspector. There is no direct evidence to substantiate the existence of the risk. However the outdoor hot tub is the type of facility that poses a particular risk in respect of legionella. I accept the Inspector's evidence that the appellant had failed to demonstrate that it had a safe system for minimising the risk; and that after 27th January 2020 despite the voluntary prohibition on the use of the indoor pool and despite the fact that positive tests results had been returned in respect of the indoor spa pool /hot tub that the appellant continued to permit the use of the indoor pool. Although the arguments are more finely balanced in respect of PN008 in my judgement those factors were and are sufficient to conclude that the use of the hot tub did present a serious risk of personal injury. Put simply it was the type of facility that the appellant had demonstrated it had not been able to operate safely, which had led to legionella being present in both the indoor spa pool/hot tub and indoor pool. Applying the test set out ".. *where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against*.", in my judgement such a risk existed the issuing of the Prohibition notice was on balance justified. That notice will therefore also be affirmed.

Employment Judge Cadney
Date: 10 July 2021

Judgment and Reasons sent to the Parties: 20 July 2021

FOR THE TRIBUNAL OFFICE