EMPLOYMENT TRIBUNALS

Appellant: Tata Chemicals Europe Ltd

Respondent: Christopher Hatton, HM Inspector of Health & Safety

HELD AT: Liverpool **ON:** 6 December 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr C Kennedy, QC
Respondent: Ms H Wood, solicitor

JUDGMENT

The judgment of the Tribunal is that the respondent's application for a stay is refused. The appeal hearing will be listed before a full Tribunal and the parties will be informed of the hearing date in due course.

REASONS

Preamble

1. Following the adjournment of the preliminary hearing listed on 30 November 2017, in accordance with agreed case management orders, the Tribunal has received and taken into account the following documents relating to the respondent's application to stay the proceedings:

1. Respondent's Outline submissions on stay of the appeal proceedings.
2. Appellant's submissions in relation to the stay sent 30 November 2017.
3. Respondent's response to claimant's written submissions sent 4 December 2017.
4. Rejoinder to respondent's reply sent 5 December 2017.

5. The availably dates.

2. As agreed at the preliminary hearing on 30 November 2017 the Tribunal will consider written submissions and supporting documentation only.

3. In a claim form received 4 July 2017 the appellant sought to appeal Improvement notice IN/HID/CH/08/06/17 (referred to as the "improvement notice") dated 8 June 2017. The Grounds of Appeal alleged the improvement notice was "fundamentally flawed" and the criticisms of that notice ran to 49 paragraphs. In short, the appeal asserts the inspector should have made further inquiries before reaching his decision to issue the improvement notice. The Tribunal does not comment on the validity or otherwise of the improvement notice or the appellant's appeal.

4. In its Response sent to the Tribunal on 21 July 2017 the respondent reserved the right to set out full details of its response later, indicating the appeal will be defended and requested a stay of the proceedings until a criminal investigation into the respondent and resulting prosecution were concluded. The respondent confirmed the improvement notice related to an incident on the appellant's premises which resulted in a man dying having sustained serious injuries.

5. The basis of the respondent's application for the stay is manifold; public interest on the grounds that the respondent is "likely" to disclose all the evidence being gathered which is material to the criminal conviction, any appeal hearing will provide an opportunity for witnesses to rehearse their evidence and this could prejudice the investigation and compromise the HSE regulatory role in conducting a criminal investigation.

6. It is also submitted a stay will ensure the Employment Tribunal has the full picture on the basis that the "full nature and extent of the appellant's systems are also being investigated as part of the criminal investigation" and HSE was obtaining further evidence from witnesses as a result of conflicts in earlier evidence which may be relevant to the Tribunal decision as to what the inspector would have known had he carried out further investigation. Any conviction or acquittal would also inform the Tribunal on the inspector's view when he served the notice was justified.

7. Finally, it was submitted on behalf of the respondent a stay should be ordered until the end of March 2018 and this would be in the public interest on the basis that the respondent would be required to disclose a "huge amount of evidence" that was within his knowledge when the decision was made to serve the notice.

8. In relation to the agreed test to be applied by the Tribunal hearing the appeal reference was made to Hague v Rotary Yorkshire [2015] EWCA Civ 696.

9. The stay is initially being sought to March 2018. As the basis of the application is to postpone the hearing until the outcome of the criminal proceedings, it was submitted on behalf of the appellant by Christopher Kennedy, QC, that the stay is more likely to last until late 2018 or a date in 2019. Such an adjournment was "contrary to the purpose of the statutory powers," ignored the different function of the

Employment Tribunal and the criminal courts, and was not justified on its own terms. The Tribunal accepted the validity of this submission, on the evidence before it HSE was still investigating and criminal proceedings had not started.

10. The Tribunal has differentiated between those matters that are not disputed between the parties, and those that are in issue as follows;

Relevant matters that have been agreed

11. Below are relevant matters not in dispute between the parties:

11.1 The timeline of events from 30 November 2017 when the incident occurred on the appellant's premises, the ongoing investigation that commenced 9 January 2017, and the improvement notice served 8 June 2017 with a compliance date of 8 December 2017 and an agreement by the parties to stay the appeal proceedings to allow without prejudice negotiations. The improvement notice was issued after a 6-month investigation and steps had since been taken by the appellant to up-date its procedures.

11.2 The purpose of an improvement notice is set out in paragraph 2 of the appellant's submissions, namely, to protect persons at work and the public. The respondent does not consider the persons at work and public to be at risk at this present moment given the appellant has updated its procedures.

11.3 The test which the Tribunal will have to apply in deciding whether or not to uphold the improvement notice is whether the notice was justified based on the facts which were or should have been known to the inspector at the time he issued it following a reasonable investigation. It appeared not to be disputed between the parties that the Tribunal's task is to focus on a narrow point, and does not involve the same consideration as the criminal process.

11.4 The Tribunal took the view that was unclear as to what documents would need to be produced for any criminal proceedings that would prejudice, on public interest grounds, the respondent given the narrow issue to be decided by the Tribunal i.e. the Tribunal must ask whether they would have issued the notice had they been in the position of the inspector. If the answer is they would have asked more questions, the notice fails.

11.5 The forthcoming Inquest will present, to an extent, the opportunity for witnesses to rehearse their evidence.

Relevant matters that have not been agreed

12. The following matters are not agreed between the parties:

12.1 Whether the improvement notice is intended for situations where timely action is required (the appellant's view), or whether they are a tool to ensure compliance is achieved within a defined or reasonable timeframe i.e. 6 months in this case (the respondent's view).

12.2 Improvement notices are not meant to be issued and then shelved (the appellant's view). The parties had agreed a significant stay already and appellant's position altered when the stay was sought on public interest grounds as opposed to negotiations between the parties (the respondent's view).

12.3 Substantial documents were gathered by the respondent during the 6-month period leading up to the service of the improvement notice that was within his knowledge before a decision was made to serve the improvement notice. The documents are all potentially relevant to his decision making and the exercise which the Tribunal will have to undertake. Even if the appellant is right that not all evidence gathered since the service of the notice needs to be disclosed, disclosure in this case will still be significant, and possibly more extensive than that to which the Claimant would be entitled before being expected to submit its defence statement in any prosecution.

Appellant's submissions

13. The Tribunal has considered all the submissions put forward on behalf of the appellant, and proposes to deal with the following:

13.1 The highlighted references to Hague v Rotary Yorkshire. In that case the inspector issued a prohibition notice in relation to electrical equipment which did not in fact pose a threat. However, that was something which the inspector could not reasonably have been sure about. The equipment was safe, as was established on further investigation. The issuing of the notice was upheld. The Tribunal considered paragraphs 4, 10, 12, 28-31& 34. The test by which the it is to determine any appeal is set out, namely, the Tribunal should focus on the point at which the notice was served and determine whether they, if they had been in the position of the inspector, would have served that notice – paragraph 28 and the reference to Charles J's approach in Chilcott v Thermal Transfer Ltd [2009] EWHC Admin 2086.

13.2 Paragraph 35 in the judgment of Laws LJ confirmed Charles J's approach was correct and "the question for the inspector is whether there is a risk of serious personal injury. In reason, such a question must surely be determined by an appraisal of the facts which were known or ought to have been known to the inspector at the time of the decision…the Employment Tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector's action… [Paragraph 35] the primary question for the Employment Tribunal was whether the issue of the notice was justified when it was done. An inspector may rightly apprehend a risk and be justified in acting…even though later unnecessary unknown events may demonstrate that, in fact, there was no danger." The Tribunal took the view that one possible outcome on appeal is for the inspector to have apprehended a risk was found not to be justified in issuing the improvement notice, and the appellant found guilty in any future criminal proceedings. There are a number of possible outcomes, but this does not necessarily point to prejudice or public interest overriding the right to have an appeal litigated without delay.

13.3 On behalf of the appellant it was submitted the respondent has conflated the task of the Tribunal and the criminal courts, and the Tribunal will not be considering the full nature and extent of the appellant's systems. The Respondent has offered no particulars to explain why it asks the Tribunal to accept that it will have to disclose all the evidence gathered which is material to the criminal investigation. Given the narrow scope of the appeal that should not be necessary. Either the inspector was reasonable in his assumption or he was not. The Tribunal on balance preferred the sense of this submission and recognised that both sets of proceedings dealt with different issues, even if some of the documents were common.

13.4 It is submitted further that HSE seeks a stay on the determination of its improvement notice for (unspecified) forensic advantage. The notice was issued in the exercise of its public function. That should not take second place to tactical considerations, particularly when they are set out in such a vague manner. The Tribunal took the view that tactics within this litigation of either party is irrelevant to the decision as to whether it is on the interests of justice of both parties to stay; which is a balancing exercise having the overriding objective in mind.

13.5 On behalf of the appellant is was submitted describing the inquest as an entirely different and non-adversarial process ignores, first the fact that witnesses will be asked the same material questions in that Tribunal as at any criminal trial thus making it a 'rehearsal' and second that the task of the Tribunal is different from that of criminal proceedings. If the danger is rehearsal that will happen as a result of the inquest. The Respondent has not established evidence of a risk – asserting that there might be such a risk is insufficient; The Respondent has not engaged with the matters which will be relevant to the Employment Tribunal on Appeal and those which will not; even if there were a risk of the sort advanced, that should be balanced against the interest in proceeding to deal with the appeal in a timely fashion and against the extent of the delay sought;

13.6 The appellant has not changed its position in that a stay for the purpose of negotiation is different to an undefined stay, a submission accepted by the Tribunal as self-evident.

13.7 Reference was made to the possible requirement of expert evidence on the part of the appellant with reference to the inadequacy of the respondent's inquiries and basis for issuing the notice. The Tribunal fails to see the relevance of this to a stay.

Respondent's submissions

14. The Tribunal has considered all of the submissions put forward on behalf of the respondent, and proposes to deal with the following:

14.1 The appeal is based on what the inspector should have known as opposed to what he knew, and the Tribunal will need to give due consideration to what those further enquiries may have revealed, and may not be provided with a complete picture until the respondent has completed its investigation. Given the agreement between the parties as to the relevant issue to be decided by the Tribunal at the

appeal hearing as set out above, and the fact the respondent investigated for a 6-month period prior to issuing the improvement notice, it is far from clear why the Tribunal will need to consider evidence arising from an investigation that took place after the improvement notice was served. This is a matter that will need to be considered by the respondent during the process of discovery of documents relevant only to the issues, which the parties will provisionally agree before disclosure and exchange of documents.

14.2 The appellant and respondent will require the Tribunal to consider the appellant's systems and their adequacy. The Respondent is not attempting to "cure its notice" by providing evidence gathered following the appeal being submitted – it is ensuring the Tribunal has an accurate picture.

14.3 No forensic advantage is being sought, and the application for a stay was not a matter of tactics.

14.4 The application of the public interest test is a balancing exercise for the Tribunal. The Respondent contends that, whilst the resolution of the appeal is undoubtedly important to the parties, the appellant has failed to point to any public interest which attaches to it and no public interest has been advanced for the Tribunal hearing taking place first. In those circumstances, the Respondent contends that the criminal investigation and potential prosecution must take precedence and that nothing should be done which runs a potential risk of prejudice. The Tribunal took the view that given the lack of clarity as to what specific prejudice the respondent will be caused if the appeal is heard first, there is a public interest consideration in an appeal against an improvement notice being heard without delay.

14.5 It is agreed practice with the Coroner's Society that health and safety prosecutions will ordinarily await the outcome of an Inquest. This position has been reached after balancing the public interest factors and is to avoid any situation arising in which a manslaughter prosecution cannot be pursued as a result of matters coming to light at Inquest. It is a wholly different situation from that which the Tribunal finds itself in. It serves a very important public interest (the enquiry into the death and the potential for lessons to be learnt / reports to be issued to prevent future deaths) and thus the balancing exercise in terms of which should go first is more complex. Witnesses are also able to rely on Rule 22 of the Coroners Rules 2103 to avoid answering questions which may incriminate them, and juries are specifically excluded from reaching findings which lay blame – thus, whilst some of the same factual topics may be explored, the exploration of criminality is excluded. It is the Tribunal's view that at the appeal hearing witnesses can avoid self-incrimination, although the Tribunal has not been provided with any concrete examples of the prejudice that could possibly be caused to the respondent in this respect; one would expect it to be an argument used by the appellant's witnesses and not the respondent.

<u>The law and legal submissions</u>

15. The parties are not in agreement in respect of HSE practice.

16. On behalf of the appellant the Tribunal was referred to Tolley's Handbook of Health & Safety at Work at paragraph E15018. The Tribunal has considered the reference at paragraph 6 of the appellant's submissions, which it does not intend to repeat. It notes the respondent does not accept Tolley represents HSE practice, and the appellant's view that "perhaps it should." Whether the respondent's practice in relation to appeals and stay is that set out by Tolley or the reference set out below is not a matter for the Tribunal to resolve.

17. On the respondent's part, it disputes Tolley reflects actual HSE practice, maintaining it deals with an unusual hypothetical situation in which an inspector serves a notice and at the same time decides to prosecute for the substantive offence, which is not the situation in this case as the notice was served 6 months ago when no prosecution decision had been made. Further, the respondent disputes that HSE would not only wait for the appeal period of 21 days to pass before instigating criminal proceedings, but, if any such appeal was pursued, would also wait until the Tribunal had heard the appeal and affirmed the notice. The respondent would not delay commencing a prosecution because of a possible or pending appeal, and is unaware of anything within its extensive published material on how it conducts business / reaches prosecution decisions to support this position.

18. The respondent does not accept the point made in Tolley about consistency. The parties agree it is open to a Tribunal to conclude that the inspector was right but still allow the appeal if it the notice was not justified on the facts known to the inspector at the time it was served. The respondent submitted the same would apply if a conviction was secured. A conviction may be a relevant fact which the Tribunal may want to take into account, it does not tie its hands, and there would be similar (or even greater) risk of inconsistency if a Tribunal cancelled a notice on the basis that it was not justified and then the respondent went on to be convicted for the same breaches which the notice had been served to rectify.

19. The respondent the Tribunal to the "true position" that was common practice for HSE to seek a stay in appeal proceedings where there is an ongoing investigation:http://www.hse.gov.uk/enforce/enforcementguide/notices/tribunals-appeal.htm

"8. You (or in certain circumstances the CPS) should inform the Tribunal if you have made a decision to prosecute the individual/company (or a prosecution is almost certain), as a result of the circumstances that led to the service of the notice. You can also ask the tribunal to put the appeal of the notice on hold pending the outcome of the prosecution. Since a Prohibition Notice remains in force until the outcome of the appeal, no difficulty arises. However, an Improvement Notice is suspended where an appeal against it has been brought. This means that the circumstances giving rise to the issue of the notice will persist, possibly beyond the compliance date (depending on when the prosecution is taken).

9. There is no simple rule as to when it is appropriate to ask the Tribunal to put the appeal of an Improvement Notice on hold pending the outcome of the prosecution".

20. The Tribunal was referred to Health and Safety Enforcement – Law & Practice – 4th Edition by Richard Matthews QC and James Ageros QC which states at para

4.80: "Whilst as the HSE Enforcement Guide acknowledges, there is no simple rule about when a Tribunal should put an appeal on hold pending a prosecution; if the circumstances giving rise to the notice do create a risk to health and safety, it is likely to be appropriate to hear the appeal against the notice before the trial, which may well take years to be concluded".

21. In the present case, the respondent was satisfied steps had been taken voluntarily by the appellant to update its procedures, even though the notice has been suspended since July 2017. The Tribunal accepts there is no suggestion on the part of the appellant that this appeal needs to be resolved urgently in order to remove a risk that their employees are exposed to. The Tribunal need not concern itself on this issue when considering whether to grant a stay.

22. A Tribunal's general case management power under rule 29 of the Employment Tribunal Regulations 2013 allows it to stay the whole or part of any proceedings.

Conclusion: applying the law to the facts

23. The power to stay proceedings is discretionary and taking into account the submissions made on behalf to the parties, having carried out a balancing exercise in respect of their interests, it is not just and equitable to grant the application for a stay, and nor is it in accordance with the overriding objective. A stay would cause an unacceptable delay. The issues to be decided by the Employment Tribunal and the Crown Court are entirely different. Further, the respondent investigated for a 6-month period prior to issuing the improvement notice, and it is this material that is relevant to disclosure given the agreement between the parties as to the test to be applied at the appeal hearing.

24. A Presidential Guidance was issued on 4 December 2013 on the procedure for applying for a postponement, and the Tribunal has taken due regard to it when considering this application. When the stay relates to criminal court proceedings pending, details should be given as to when these proceedings were commenced, what they entail, and how it is said that they will affect the Employment Tribunal case or how the employment tribunal case will be said to affect those other proceedings. This information cannot be provided by the respondent as the HSE is conducting a criminal investigation and there is no evidence that criminal proceedings are due to commence in the near future. The Tribunal accepts on balance, submissions put forward on behalf of the appellant to the effect that the respondent has not put "anything of substance" before the Tribunal in the balance to place against the undesirability of staying this appeal against an improvement notice, which by its very nature, was "not meant to be shelved for an indefinite length of time."

25. The Tribunal has been referred to the right of witnesses from self-incrimination, and it has been suggested the matter should be stayed on this basis. There does not exist an overriding right, based on self-incrimination, to have a civil action stayed pending the conclusion of criminal proceedings. It is for the party seeking a stay to satisfy the Tribunal that he or she will be prejudiced by continuance of the civil action. The appellant, who may be subject to the criminal action, is not claiming it will be prejudiced by the Employment Tribunal hearing its appeal, to the

contrary, it asserts that a lengthy delay will be prejudicial. The respondent has not satisfied the Tribunal, on balance, that it will be prejudiced if case management orders were to be made, and the appeal listed on some date after March 2018, the length of the stay sought by it. It is notable that an inquest into the unfortunate death of the individual is due to take place, and no doubt, due process will result in witnesses for the appellant and respondent being questioned and relevant documents considered. The benefit of surprise may be lost as a result of the inquest, but this is not a matter which out-weighs the prejudice to the appellant if the appeal hearing were further delayed, even taking into account that there has already been some delay as a result of without prejudice negotiations. The issue to be decided at the appeal hearing held in the Employment Tribunal and any criminal proceedings are completely different and the Tribunal is not satisfied the respective lines of cross-examination would be the same.

26. In conclusion, when balancing the interest of the parties and any prejudice caused as a result of the appeal against the improvement notice continuing to trial, the Tribunal was not entirely satisfied the respondent will be caused any substantial prejudice, especially given the fact it requested a stay until March 2018, and the appeal hearing has been listed after this date. The appellant has the right to have its appeal litigated and heard without delay; invariably it is the practice of the Employment Tribunal to expedite health and safety appeals due to their nature and importance to the parties. The onus is on the respondent to show why a stay should be granted, especially given the fact that it carried out investigations before issuing the improvement notice 6-months after the incident on 8 June 2017 with a compliance date of 8 December 2017. On balance, considering the balance of prejudice between the parties, it is just and equitable for the respondent's application for a stay to be refused.

27. Case management orders will be issued separately. The appeal hearing will be listed on the next available date from April 2018. The appeal hearing date provisionally listed for 28 and 29 March 2018 has been adjourned.

28. The case will be listed for hearing for two days commencing 10am on 16 and 17 April 2018 before a full Tribunal at Liverpool Employment Tribunals, 3rd Floor, Civil and Family Court, 35 Vernon Street, Liverpool, L2 2BX.

Employment Judge Shotter

Date 12.12.17

ORDER SENT TO THE PARTIES ON

15 December 2017

FOR THE TRIBUNAL OFFICE