Construction Newsletter November 2014

Website: www.constructionss.co.uk
E-mail: info@constructionss.co.uk
Tel: 01869 220649

Construction Safety Solutions Ltd

Challenging a Prohibition Notice

The service of a prohibition notice is a serious matter, and there has always been a right of appeal, albeit to an Employment Tribunal rather than direct to a court. A recent High Court ruling suggests that the prospect of a successful challenge to a prohibition notice may be better than anyone had previously thought.

An Employment Tribunal has powers to cancel, affirm or vary a prohibition notice. The legislation states that an inspector's power to serve a prohibition notice arises when he or she is "of the opinion" that activities present "a risk of serious personal injury". At the appeal stage a tribunal must take that opinion into account but is free to make its own findings about the risk in question.

Now it has emerged from a case decided in July called Rotary Yorkshire Ltd v Hague (HM's Health & Safety Inspectors) that the evidence for a prohibition notice needs to be substantial and not merely that of possibility of danger. In particular, if in retrospect the risk can be shown to be insubstantial a notice might be overturned.

The company had been served with a prohibition notice concerning a high voltage room containing transformers. The inspectors found some exposed conductors which they believed, if the system had been live, could present risks of serious burns or death from electric shock. The company maintained that the system was not live, that the equipment settings showed this to be the case, and the switches were securely locked off.

What the company apparently lacked however – on the day of the inspection – was documentary proof by an HV Senior Authorised Person that the conductors were dead.

This was a problem for the company when it appealed against the notice because the tribunal made a finding that the proper approach is to assume that such a system is live unless there is documented and auditable evidence that it is dead. The tribunal considered there was a remote risk the system could be energised and made live. It upheld the notice, but made a modification to its wording so that it reflected the lack of documentary evidence as the being reason for its being issued.

The company challenged these rulings in High Court. It succeeded in this further appeal on the basis that the tribunal not given sufficient weight to the facts that (a) there was technical evidence available to the inspectors after the notice was served to show that the equipment signals were reliable in showing the conductors were dead (something they could not have known at the time) and (b) an SAP test the following day confirmed that the conductors were indeed dead. The court's view was that this evidence showed that the inspectors had been wrong in their belief about the risk at the time the notice was served. It quashed the notice.

A number of significant points arise from this ruling:

- A tribunal can apply the benefit of hindsight to overturn a prohibition notice, based on evidence which was not available to inspectors at the time a notice is served.
- When the issue at an inspection is simply the absence of evidence proving there is no risk inspectors can be expected to wait a short time for the evidence to be produced. The judge's view was that safety could be ensured in the meantime by the use a direction to leave an area or equipment undisturbed (under section 20(2)(e) of the Health and Safety at Work Act).
- There might not be a justification for even a temporary measure like a direction: Intriguingly the judge said "in the case of a respectable business undertaking, advice may be all that is in a given case needed and the issue of a notice may properly be regarded as unnecessary."

The case does not mean it is now open season for appeals, but it will certainly make inspectors think very carefully how they frame their written reasons for serving prohibition notices, and the judgement offers encouragement to aggrieved organisations to challenge notices which affect them adversely. Many practitioners will be interested to see if in future the 'responsible business' argument persuades inspectors to refrain from formal action in these situations.

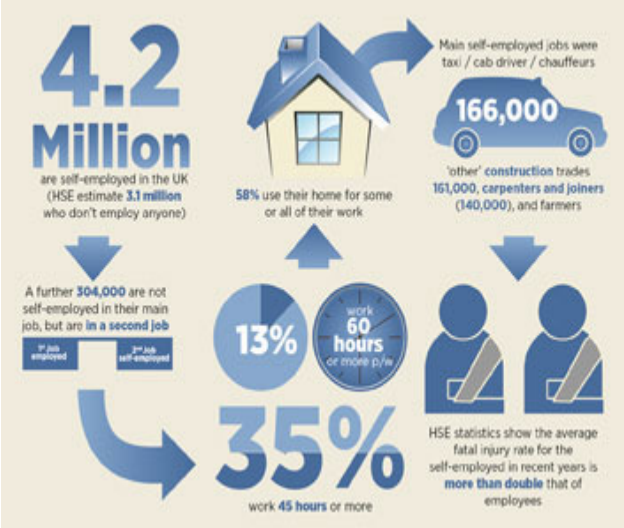
Deregulation Bill: Safety Exemptions Voted Through

The House of Lords has voted in favour of government plans to deregulate areas of health and safety.

Clause one of the government's Deregulation Bill includes plans to make certain self-employed workers exempt from health and safety law.

The Institution of Occupational Safety and Health has been lobbying against the clause, raising concerns that the exemption could lead to confusion, a decline in standards and an increase in the risk of injury or illness at work.

The Bill and its contents were debated in the House of Lords yesterday (21 October). Peers voted 253 to 175 in favour of keeping Clause one part of the Bill.



Deregulation and safety: our infographic on the self-employed, some of whom are now exempt from health and safety law.

Richard Jones, head of policy and public affairs at IOSH, said: "IOSH is very disappointed that the Lords do not seem to have understood the serious problems that this misguided and unnecessary exemption would cause and have not voted for its removal. We will need to redouble our efforts in making the case for its removal as the Bill continues its journey through Parliament."

The TUC has also opposed Clause one and lobbied against its inclusion. Hugh Robertson, senior policy officer for health and safety at the TUC, said: "It is incredible that the Lords managed to ignore all the clear evidence that this clause would make the workplace a less safe place, would increase confusion, and was not what had originally been proposed by Professor Lofstedt in his report. The TUC will continue to strongly oppose this measure as it continues its way through the Parliamentary process."

Lord McKenzie of Luton, shadow communities and local government spokesperson, tabled an amendment for the removal of Clause one from the Bill during the debate.

He said: "We have a first-class health and safety system in the UK. We should be alarmed at what is now proposed in Clause one."

Referring to the impact of the Health and Safety at Work Act 1974 during the debate, Lord McKenzie of Luton added: "After 40 years of progress we see the Government trying to unravel part of the health and safety system. We should resist Clause one and strike it from the Bill."

The latest version of the Deregulation Bill as it stands will amend health and safety law to exempt certain self-employed from the general health and safety duty for themselves and non-employees, except if undertaking 'prescribed activities'. These 'prescribed activities' include a list high hazard or high risk sector activities, such as agriculture and construction. But many self-employed who may pose a risk to others will be exempt.

The Löfstedt recommendation proposed exempting those self-employed whose 'work activities pose no potential risk of harm to others'.

Organisations such as Suzy Lamplugh Trust, the LGA and Unite have also expressed concerns about Clause 12, which was also voted through. This will allow Taxi firms to sub-contract jobs to operators licensed in different districts. The organisations argue that it would make it almost impossible for licensing officials to enforce regulations, potentially posing a risk to passengers – particularly women.

"You could be licensed in Liverpool and work in London," said Unite lead national rep Tommy McIntyre. "Local licensing authorities won't be able to enforce their licensing safeguards – they won't be able to control public safety."

Civil Engineering Firm in Court for Unsafe Work at Height

A Covent Garden-based civil engineering contractor has been prosecuted for safety failings after an inspection of a Mayfair construction site identified multiple work-at-height risks.

Peter Lind and Co (Central Region) Limited appeared at Westminster Magistrates' Court yesterday (8 October) following the visit by the Health and Safety Executive (HSE) to a project on Queen Street on 23 January this year.

The court heard that concerns were first raised about safety standards at the site, where two five-storey regency houses were being extensively over-hauled, by an anonymous complainant in December 2013.

When a HSE inspector visited some eight weeks later he uncovered a catalogue of issues, including:

- Missing or inadequate edge protection in several locations – exposing workers to potential falls of between three and eight metres.
- Unsafe temporary ladders in place of a staircase that been removed.
- Missing toe boards and other edge protection on several tower scaffolds.
- Materials and equipment, including a heavy fire extinguisher, were left on edges where it was liable to fall and cause injury.

The work at height risks at the Mayfair site included missing edge protection to prevent falls.

The failings mirrored those raised by the original complainant, meaning nothing had changed in the intervening period to protect workers. They were exposed to unnecessary risk for at least two months.

HSE immediately served a Prohibition Notice requiring urgent improvements in relation to work at height. Two improvement notices were also served that needed action.

The court was told that although nobody was injured at the site, the potential for a serious or potentially fatal fall was very real. HSE concluded that the work at height was poorly assessed, managed and monitored, and fell well short of the required legal standards.

Magistrates heard that HSE inspectors had also identified concerns at three other sites managed by the company in 2012 and 2013, and that in each instance enforcement notices or written warnings had to be served.

Peter Lind and Co (Central Region) Limited was fined a total of £11,500 and ordered to pay £1,369 in costs after pleading guilty to two separate breaches of the Work at Height Regulations 2005.

After the hearing, HSE inspector Andrew Verrall-Withers commented:

“We uncovered an almost systematic failing in regards to work at height at the Mayfair site, and the extent of the risk this created was substantial. There were numerous examples where falls could have occurred, and the consequences could have been devastating.

“Peter Lind and Co is guilty of failing to pay enough attention to performance at the site. There were numerous issues that could and should have been identified and immediately addressed.

“Falls from height remain the biggest single cause of death and serious injury in the construction industry, and it is vital that developers and principal contractors work within the law and meet the required standards at all times.”

Further information on working safely at height can be found online at www.hse.gov.uk/falls

Working at Height Guidance Overhauled

It’s estimated that more than a million British businesses and 10 million workers carry out jobs involving some form of work at height every year. Falls are one of the biggest causes of death and serious injury at work.

Guidance for working at height has been overhauled as part of the government’s Red Tape Challenge.

In line with the red tape challenge the HSE has overhauled its guidance for working at height with the aim of setting out what should and should not be done in simple terms.

Health and safety minister, Mike Penning, said: “It’s vital that businesses are not bogged down in complicated red tape and instead have useable advice about protecting their workers.

“As a former fireman, I know that the 10 million people who are working at height in this country face risks in their job. But I’m also clear that managing these risks can be done sensibly, by giving simple and clear advice and tackling myths that confuse employers.”

Key changes to the guidance include:

- providing simple advice about dos and don’ts when working at height to ensure people are clear on what the law requires;
- busting some of the persistent myths about health and safety law, such as the banning of ladders when they can still be used;
- offering targeted advice to helping business in different sectors manage serious risks sensibly and proportionately; and
- helping workers to be clearer about their own responsibilities for working safely.

Chair of the HSE, Judith Hackitt, said: “It’s important to get working at height right. Falls remain one of the biggest causes of serious workplace injury — with more than 40 people killed and 4,000 suffering major injuries every year.

“We have a sensible set of regulations and have been working with business to improve our guidance. “The result is advice that employers can count on to help them manage their businesses sensibly and proportionately.”

The new guidance has been backed by the British Retail Consortium, Small Business Trade Association Forum, trade unions, and the Access Industry Forum. The Work at Height Regulations 2005 (WAH), which set out the law as it applies in Great Britain, have not been changed. The new guidance is available free on the HSE website.

HSE Survey: Shocking Ignorance of Asbestos risk

A new survey commissioned by HSE and based on interviews with 500 tradespeople reveals that many are ignorant of the risks posed by asbestos.

One of the headline findings in the survey, carried out by Censuswide in September 2014, was that 14 per cent of respondents believed that drinking a glass of water would help protect them from the deadly dust.

Twenty seven per cent of those asked thought that opening a window would help keep them safe.

Equally worrying, only 30 per cent of those surveyed were able to identify all the correct measures for safe asbestos working, while 57 per cent made at least one potentially lethal mistake in trying to identify how to stay safe.

The findings raise serious concerns, especially in light of the fact that tradespeople, including construction workers, carpenters and painters and decorators, could come into contact with the deadly asbestos on average more than 100 times a year. HSE figures reveal that 20 tradespeople, on average, die every week from asbestos-related diseases.

Asbestos can be found in walls and ceilings, or the structure of a building, as well as a host of other places like floor tiles, boilers, toilet cisterns, guttering and soffits. Basic maintenance work like drilling holes and sanding can disturb it and the lethal microscopic fibres have been linked to lung disease and cancer.

Censuswide’s research reveals that while 53 per cent of respondents knew that asbestos could be in old buildings built before 1970, only 15 per cent knew that it could still be found in buildings built up to 2000. In a drive to raise awareness of dangers faced by the 1.3 million tradespeople at risk, HSE has launched a new safety campaign to improve preparations for dealing with asbestos.

Launched by Mark Harper, the minister responsible for health and safety, at the TradePoint store in Cricklewood, the campaign features a new web app for phones, tablets and laptops that should help tradespeople easily identify where they could come into contact with the material and advice on how to deal with the risks. TradePoint is supporting the campaign by distributing free asbestos safety kits through its stores.

Mr Harper said: “The number dying every year from asbestos-related diseases is unacceptably high. Despite being banned in the construction industry, asbestos exposure remains a very serious risk to tradespeople.

“This safety campaign is about highlighting the risks and easy measures people can take to protect themselves. We hope the safety kits and the web app will encourage people to be aware of the risks, think twice, and take precautions to be safe.”

To download the app: www.beware-asbestos.info/news