



HSE wrong to issue a Prohibition Notice without first giving the recipient an opportunity to prove that safety was not at risk

HSE inspectors are given powerful and potentially highly invasive powers to enter premises, demand information and shut down business operations. These powers are in the discretion of the inspector and are rightly used to achieve the highly desirable objective of improving safety. However, an inspector's decision about whether a situation is unsafe can expose businesses to serious restrictions on their operations as well as substantial losses. There is also a stigma of prohibition and improvement notices; often they must be disclosed in procurement processes and are recorded on a public register. Therefore, an unreasonable decision by an inspector to issue a notice can have real commercial impact upon a business unnecessarily.

Policing the boundaries of an inspector's appropriate exercise of powers is ultimately the role of the employment tribunal and the courts. Businesses which consider that an inspector has gone beyond what he or she should have done are left to apply to an employment tribunal and, if needed, the Administrative Court ("the Court") to challenge unreasonable decisions.

In the recent case of *Rotary Yorkshire Ltd v Hague*, on appeal from an employment tribunal, the Court quashed a prohibition notice which had been issued by the HSE against a construction site sub-contractor. The Court held that the company had not been given sufficient opportunity to prove that there was no risk of serious personal injury and that there was an alternative and less draconian measure which was available to the inspector.

This is a comparatively rare example of a business defending itself against the exercise of powers by the HSE and succeeding.

Commentary

The outcome of the case makes clear the requirement for the HSE to allow organisations sufficient opportunity to prove that safety is not placed at risk by a potential breach.

The case also highlights that the use of prohibition notices should be reserved for cases where there is a clear need for prohibitive restrictions and no other alternative sanction is available.

Organisations which find themselves in receipt of prohibition notices should therefore carefully consider the reasons specified in the prohibition notice and whether there are any alternatives

open to the HSE. If so, it is worth seeking specialist legal advice to see if a challenge is possible which may help to protect the organisation's reputation.

Facts

Rotary Yorkshire Ltd (the "Company") was a sub-contractor on a major construction site in Leeds, responsible for the installation of mechanical and electrical plant. Three health and safety inspectors visited the site and discovered a transformer with exposed conductors. Contact with any exposed conductor would, if it were live, create a risk of death or serious injury.

Whilst it was the inspectors' belief that the conductors were dead, they could not be sure even though the switch for the conductors was in the off position. The Company was unable to provide documentary proof that when the switch was in the off position, the conductors were dead. There was no authorised person available on site that day to test the conductors to prove the situation either way.

In order to prevent further activity whilst steps were taken to ensure safety, the inspectors issued a Prohibition Notice (the "Notice") under powers granted by s.22 of the Health and Safety at Work Act 1974 (the "Act"). The Notice stated that it was issued because *"you have not prevented access to conducting parts of the electrical system that can be energised and made live"*.

The following day, an authorised person established that the conductors were indeed dead (and had been the previous day during the inspection). The Company therefore appealed to the Employment Tribunal (the "Tribunal") against the Notice. Although the Tribunal modified the wording of the Notice to *"you have not prevented access to conducting parts of the electrical system which are exposed and cannot be proved dead"*, the inspectors' decision to issue the Notice was upheld.

The Company therefore made a further appeal to the Court. The Company argued that it should have been given an opportunity until the following day when an authorised person was available to prove the conductor was dead and that safety could have been protected by a Direction (under s.20(2)(e) of the Act) that the room and its contents should be left undisturbed until testing could be carried out.

The Court overturned the decision of the Employment Tribunal and quashed the Notice. In coming to its decision, the Court made the following observations:

- Much depended on the precise basis upon which the inspectors decided that the Notice should be issued. During this case, the inspectors had expressed concern that there was not an adequate system in place which could, at all times, prove the status of the conductors through documentary evidence. The Notice itself however, relied solely upon the possibility that the conducting parts could be energised as the reason for its issuance.
- It therefore followed that if the Company had been able to prove on the day of the inspection that the conductors were dead, the Notice would not have been issued (despite the lack of documentary proof that it was dead). It therefore would have been possible to extend the investigation to await the results of testing the following day when an authorised person was available.
- Notices served under s.22 of the Act must be recorded (and remain for 3-5 years) in a register which is open to public inspection. Therefore the service of a Notice could have a detrimental effect on the receiving party's business. They should therefore only be issued if it is clearly needed.

- In this case, action (such as issuing a Direction that the room and its contents be left undisturbed until the authorised person could test the conductors), would have been sufficient protection as breach of both a Direction and a Notice is a criminal offence and both are policed in the same way.

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