



SHEPHERD+ WEDDERBURN

Health and Safety Legal Update IOSH North East of Scotland



Presented by Kevin Clancy

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Speaker



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Summary

- Health and Safety over the last 12 months
- Current developments
 - Legislative Changes
 - ISO 45001
 - Legal Privilege
 - GDPR
- Enforcement
 - Challenging Enforcement Notices
 - Fee For Intervention
 - Recent Prosecutions



Health and Safety over the last 12 months

Where are we now?

- The health and safety landscape in the UK
 - An improving culture of safety
 - Mature system of regulation
 - Compares favourably to other European countries
 - HSE Statistics for 2016/17
 - 137 fatalities (down from 144)
 - c.70,100 other injuries to employees reported under RIDDOR
 - 554 prosecutions resulting in a conviction (down from 660)
 - 11,913 notices issued by enforcing bodies (compared to 11,403)
 - c.£70 million in fines resulted from prosecutions (up from £38m)
 - 516,000 workers suffering from a new case of work related ill health

Current Developments

Legislative Changes

- The Personal Protective Equipment (Enforcement) Regulations 2018
 - A new EU Regulation (2016/425)
 - Replaces a 25-year old PPE Directive
 - Full enforcement from April 2018 onwards
 - All PPE after 21 April 2018 will need to be certified in line with the new Regulation
 - Directly affects PPE importers, distributors and retailers
 - Shift in focus: the Regulation now associates PPE with risks rather than pieces of equipment

ISO 45001

- New international standard for occupational health and safety
- Replaces OHSAS 18001
- Aims: providing a framework to build an effective management system
- Focus on:
 - Leadership and culture
 - Participation and consultation
 - Risks and opportunities
 - Documentation and procedures
 - Compliance

Legal Privilege

- **Legal advice privilege**
 - Protects advice given by lawyers to their clients

- **Litigation privilege**
 - Protects communications between a client and a lawyer and third parties if litigation is anticipated or has been commenced
 - Well established test:
 - Litigation is in process or is reasonably contemplated
 - Litigation is adversarial in nature
 - The communication / document made or created for sole or dominant purpose of conducting litigation

 - What is “anticipated litigation” when responding to a H+S incident?

Legal Privilege – developing law

- Three important cases over the last 12 months
 - *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation*
 - *Bilta & Ors v Royal Bank of Scotland*
 - *R (HSE) v Paul Jukes*
 - Introducing uncertainty?
 - ENRC appeal to be heard by Court of Appeal in July

Legal Privilege: *SFO v ENRC*

- Documents generated as part of an internal investigation around financial irregularities (solicitors and forensic accountants)
- SFO required ENRC to produce certain documents
- ENRC declined, citing legal privilege
- ENRC's claim for privilege was denied by the High Court

Legal Privilege: *SFO v ENRC*

- Judgment:
 - *An investigation is a preliminary step taken, and generally completed, before any **decision to prosecute is taken** in accordance with the published guidance*
 - *The claim for litigation privilege falls at the first hurdle (litigation not contemplated)*
 - *But even if a prosecution had been reasonably in contemplation, the documents for which litigation privilege is claimed were not created with the dominant purpose of being used in the conduct of such litigation*
 - *Documents created with the specific purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege*
 - *A claim for privilege over lawyers' working papers will only succeed if the documents would betray the trend of the legal advice*

Legal Privilege: *Bilta*

- Issue arose out of an allegation of MTIC fraud, specifically "carbon credits"
- **15 February 2010:** HMRC advised RBS it was seeking to establish any culpability re parties in the supply chain
- **29 March 2012:** HMRC wrote a letter to RBS which first communicated that there might be grounds to deny RBS's claim for input tax
- For almost two years, RBS conducted an internal investigation
- *Bilta*, the claimant, sought:
 - The documents created after 29 March 2012 during the course of the investigation that led to the report provided by RBS to HMRC dated 28 January 2014
 - 29 transcripts of (ex-)employee interviews that the claimants were most interested in obtaining

Legal Privilege: *Bilta*

- **Key issue:** were the documents created for the sole / dominant purpose of litigation?
 - *“It seems to me that the HMRC letter did indeed amount to a watershed moment”*
 - *“HMRC stated for the first time in the HMRC letter that it considered that it had sufficient grounds to deny RBS nearly £90 million by way of input VAT”*
 - *“the fact that RBS appointed external solicitors specialising in tax litigation within weeks of receipt of the HMRC letter strongly suggest that RBS anticipated a claim and was gearing up to defend it”*
 - *“the collaborative and cooperative nature of RBS's interactions with HMRC did not change the position”*
- The ENRC judgment was not determinative; the claim was **dismissed**

Legal Privilege: *Paul Jukes*

- Gaskells NW Limited was a waste and recycling company
- Mr Jukes was the transport and operations manager
- A baling machine was used by the company to compact paper and cardboard into bales
- On **23 December 2010** an employee was fatally injured in the baling machine.
- Mr Jukes was not interviewed by the HSE and the police until **June 2012**
- Mr Jukes provided a detailed, prepared statement in which he ***denied*** being responsible for health and safety at the premises
- The prosecution relied upon an earlier signed statement, **dated 9 February 2011**, provided to Gaskells' solicitors:
 - *"Following the redundancy [of a former colleague] I took over formal responsibility for health and safety"*

Legal Privilege: *Paul Jukes*

- **At trial, was this signed statement admissible?**
- On behalf of Mr Jukes, it was argued that it was a privileged document.
- Mr Jukes had given the statement at a time when he was an employee of Gaskalls, and the company solicitors were acting on behalf of the employees and the company

- **In ruling that the statement was admissible**, the judge held that it was material evidence.
- Why?
 - It contradicted Mr Jukes' account in his 2012 interview
 - At the time that the 2011 statement, there were no investigations or proceedings in existence.
 - Proceedings ***may have been contemplated***, but the mere fact that a statement was provided did not (of itself) make it privileged.

Legal Privilege: *Paul Jukes*

- Why were proceedings not contemplated?
- Judgment:
 - *In February 2011, no decision to prosecute had been taken by the Health and Safety Executive and matters were still at the investigatory stage*
 - *An investigation is not adversarial litigation*
 - *There was no evidence led that, at the time that the company's investigations in February 2011, it was realistic to expect the HSE would be satisfied that it had enough material to stand a good chance of securing convictions*
 - *The privilege was that of the company (the company's solicitors had never acted for Mr Jukes)*

GDPR

- Any information that relates to an identified or identifiable natural person is considered 'personal data'.
 - For example: induction paperwork; PPE records, etc.
- But, there will be also be good reasons for retaining data:
 - Where there is a **statutory requirement** to keep records (i.e. the law obliges that records be kept)
 - For example, training records
 - Where there is a **legitimate interest** in maintaining records
 - For example, the proper management of health and safety

GDPR

- Reference to personal data that ought not present issues:
 - Conducting an investigation following a health and safety incident
 - Legal obligation to submit a RIDDOR report
 - Legal obligation to comply with information requests (section 20)
- But, the more difficult issue is the extent to which an investigation report is distributed.
- Can personal data be removed or redacted?

Enforcement

Challenging Enforcement Notices

Challenging Enforcement Notices

HM Inspector of Health and Safety v Chevron North Sea Limited [2016]

- An appeal from a decision of the Employment Tribunal at Aberdeen.
- Facts:
 - The inspector considered that stairways and staging were unsafe. He therefore served a prohibition notice on Chevron.
 - The installation manager had offered an undertaking that the remedial work would be undertaken straight away, and that the staging and stairways would not be used until the works had been completed.
 - Subsequent testing revealed that, except for the panel which had been sheared by the fire axe, all met the British Standard requirement.

Challenging Enforcement Notices

HM Inspector of Health and Safety v Chevron North Sea Limited [2016]

- **Decision (Employment Tribunal):**
 - The Tribunal cancelled the Prohibition Notice
 - The Inspector appealed the decision of the Tribunal.
 - Raised a particularly important issue on the scope of an appeal to the Tribunal under section 24 of the Health & Safety at Work etc. Act 1974.
 - Whether, and to what extent, the Tribunal can take into account information which was not available at the time of the notice.

Challenging Enforcement Notices

HM Inspector of Health and Safety v Chevron North Sea Limited [2016]

- **Decision (Court of Session):**
 - An appeal under section 24 of the Health & Safety at Work etc. Act 1974 is an appeal on the facts
 - *There is no sound basis for restricting appeals to what would in essence be a form of judicial review of the inspector's opinion. An appeal on the facts is a much wider concept*
 - *It also enables an appellant to prove that the factual content of the notice was wrong*
- Appealed to the UK Supreme Court

Challenging Enforcement Notices

HM Inspector of Health and Safety v Chevron North Sea Limited

- **Decision (Supreme Court):**
 - Resolved a conflicting position between Scotland and England
 - Employment Tribunal is entitled to take into account evidence that was not known, nor indeed could reasonably have been known
 - Lady Black: the inspector “*might just as well feel less inhibited about serving it, confident that if it turns out that there is in fact no material risk, the position can be corrected on appeal*”.
 - Might we see greater enforcement activity?
 - In turn, an increase in appeals being taken to the tribunal?
 - Potentially time consuming investigative work may be required

Fee for Intervention

- Significant changes to amend the dispute process
- Brought about by an application for Judicial Review by *OCS Group UK*
 - Judicial Review case settled in advance of hearing
 - Withdrawal by HSE of the Notice of Contravention
 - Agreement to revise the dispute process for challenging FFI invoices
 - Introduced: 1 September 2017
 - Cost remains £129 per hour

Fee for Intervention (2)

- New Process:
 - **Stage 1:** Query (within 21 days) (undertaken by PI)
 - If query not upheld by PI
 - **Stage 2:** Disputes (within 21 days)
 - Considered by a Disputes Panel
 - Independent of HSE
 - Consists of a Chair (lawyer) and two members (practical experience of H+S management)
 - Panel details provided to duty holder in advance
 - Provision of all relevant information and evidence



Recent Prosecutions



Recent Prosecutions

- HSE Statistics for 2016/17
 - First full year where new sentencing guidelines (England and Wales) have been in effect
 - Fines rising to £69.9 million (from £38.8 million)
 - Notwithstanding a fall in the number of cases prosecuted
 - Prison sentences for directors



Recent Prosecutions

- A reminder of the Sentencing Guidelines:
 - Level of culpability
 - Seriousness of harm risked
 - Likelihood of harm occurring
 - Turnover
- That assessment allows the Court to determine the correct category
- Thereafter, the Court selects the appropriate sentence ranges



Recent Prosecutions: agency workers

- **Warburtons Limited**
- Provision and Use of Work Equipment Regulations 1998
- Agency worker was injured when his arm became trapped in a machine for 20 minutes
- Cleaning the machine was not the agency worker's role
- He was left with friction burns requiring skin grafts
- Machine guarding was said to be inconsistent
- The trapping point was simply overlooked
- Remedial action would have been quick and inexpensive
- £1.9 million fine



Recent Prosecutions: individual prosecuted

- **Martinisation London Limited**
- Two construction workers asked to perform a lifting operation at height
- Lifting a sofa over balcony railings and through an upper floor window
- No supervision or training
- No method statement or risk assessment prior to the task being undertaken
- Safety advice was ignored (time/financial issues)
- Both workers fell and died



Recent Prosecutions: individual prosecuted

- **Martinisation London Limited**
- Director: charged under section 37, 1974 Act.
- Found guilty
- Sentenced to 14 months' imprisonment; CDDA disqualification (4 years)
- Company: found guilty under section 1(1) of the *Corporate Manslaughter and Corporate Homicide Act 2007*; found guilty under sections 2 and 3, 1974 Act.
- Fined £2.4m (£1.2m per death) and £650,000 (1974 Act)



Recent Prosecutions: working at height (Scotland)

- **M and W Tarmacadam Limited, Dumfries Sheriff Court**
- Employee asked to cut overhanging branches
- Stood on bonnet of a tar laying machine
- Fell into the tar hopper, causing permanent paralysis from waist down
- There was a failure to properly plan the work at height
- The company pleaded guilty to breaching Regulation 4 of the Work at Height Regulations 2005
- Prosecuted at summary level in the Sheriff Court
- **Fined £10,000**



Recent Prosecutions: a successful appeal

- **Tata Steel**
 - Originally fined £1.98 million, reduced to £1.5 million (2 offences)
 - Workers' hands trapped in unguarded machinery
 - **At trial**, the judge had determined
 - for the first offence: culpability (medium); the harm risked (Level B); likelihood of harm (medium).
 - for the second offence: culpability (high); harm risked (Level B); high likelihood of harm (high).



Recent Prosecutions: a successful appeal

- **Tata Steel**
 - On appeal, it was recognised that there had been only one previous incident, and that the machinery had operated for around 150,000 hours without an incident
 - *“None of this detracts from the admitted high culpability for the incident – which could have been prevented by simple precautions – but it does tell against the high likelihood characterisation.”*

Questions & Answers

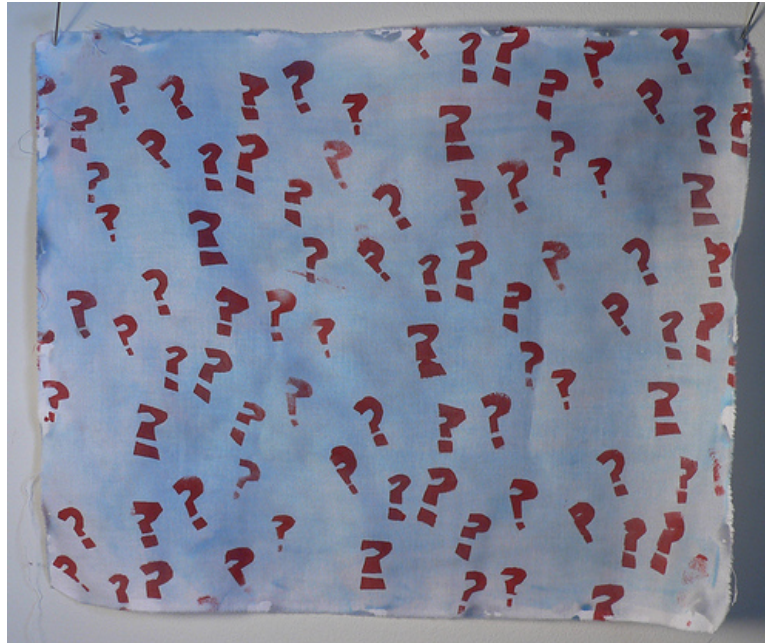


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