Health and safety update

March 2018

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Bridgend Council facing prosecution over death of a 15-year old pupil

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Fines and sentences

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Ejector seat manufacturer fined £1.1m for death of Red Arrows pilot

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Airport baggage handler fined £502,000 after two incidents at Luton Airport

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Engineering company fined £500,000 after worker is run over by a tipper truck

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Round up

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International Standard for Occupational Health and Safety Management Systems now published

On 12 March 2018 the International Organization for Standardization (ISO) published ISO 45001:2018, with the aim of reducing occupational injury and illness globally. It is an international standard for occupational health and safety management systems. more›

In the news

Supreme Court decides that evidence not available to a HSE inspector at the time of issuing a prohibition notice can be taken into account on an appeal of the notice

In April 2013 the HSE served a prohibition notice on Chevron North Sea Ltd following an inspection of their offshore oil installation. The notice related to alleged corrosion of stairways and staging leading to a helipad, which it was said gave rise to a risk of falling.

The company appealed the notice under Section 24 HSWA 1974 relying upon subsequently obtained expert evidence that the metalwork passed the British Standard strength test, and that there was no risk of falling through it.

Section 24(2) HSWA 1974 states as follows:

"A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an [employment tribunal]; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit."

The employment tribunal (ET) allowed the company's appeal and cancelled the notice. The ET held that for the purposes of the company's appeal they were entitled to use any reasonable and supporting evidence obtained since the notice was issued.

The HSE appealed to the Inner House but they upheld the ET's decision. Both decisions were in contrast to *Hague (One of Her Majesty's Inspector of Health and Safety) v Rotary Yorkshire Ltd* [2015] EWCA Civ 696, which ruled that the validity of the notice should be considered in accordance with evidence known at the time it was issued, not with the benefit of hindsight.

The HSE therefore appealed further to the Supreme Court who unanimously dismissed their appeal for the following reasons:

- the company's appeal was against the notice itself and not the inspector's findings or his opinion based on evidence available to him at the time
- there was no good reason to limit the ET's findings to the evidence, which was or should have been available to the inspector
- the company's appeal should have enabled the ET to consider subsequent evidence. Otherwise, this would result in a narrow interpretation of Section 24 HSWA 1974, which would be unjust given the implications of the notice, eg possible damage to reputation and exposure to criminal proceedings.

Whilst the decision will no doubt be welcomed by duty-holders considering the appeal of enforcement notices, it remains to be seen whether the HSE will now adopt a more cautious approach to issuing them.

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Roofing company has fine reduced on appeal

In *R v Wessexmoor Ltd* [2018] EWCA Crim 288, a roofing company's fine of £160,000 was reduced to £110,000 on appeal.

The company had been sentenced at Southwark Crown Court in June 2017 after a worker fell two storeys from a roof suffering life-changing injuries. The company was sentenced for a breach of Regulation 6(3) of the Work at Height Regulations 2005, contrary to section 33(1)(c) HSWA 1974.

The company appealed the sentence on two grounds:

- they had submitted that the likelihood of harm was category 2 (medium) but the Court gave no reasons for deciding that the breach fell within harm category 1 (high). Furthermore, the Court was wrong to apply this category
- the Court had failed to reduce the fine from what should have been a starting point of £160,000, accounting for mitigating factors, such as an early guilty plea and lack of aggravating factors.

The first ground was dismissed. The Court of Appeal holding that just because the job in question was relatively short did not mean that the risk of serious injury was reduced. Category 1 was the appropriate likelihood of harm category.

However, the company was successful on the second ground. The sentencing judge had erred by increasing the fine from the starting point of £160,000 up to £240,000 and then failing to account for the mitigating factors.

The Court of Appeal undertook the following sentencing steps to reach a fine of £110,000:

- the starting point was £160,000 (Micro – High culpability – Harm category 1) and rose to £200,000 due to the serious harm actually suffered
- the mitigating factors (no previous convictions, good health and safety record, a number of character references) reduced the fine from £200,000 to £165,000
- finally a one-third reduction was applied for the early guilty plea, reducing the fine further to £110,000.

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Ministry of Defence handed censure for death of Royal Navy engineer on board HMS Bulwark

On 11 June 2014, 42-year old Neal Edmonds was carrying out maintenance work on a lift within HMS Bulwark, when he was fatally crushed by a moving lift shaft. At the time of the incident the vessel was docked at Devonport naval base, Plymouth.

At an Inquest in 2015 it was revealed that Mr Edmonds had reported for work more than three times over the drink-driving limit after a previous night of heavy drinking. He had apparently been warned by colleagues not to get into the lift but he entered it nonetheless. He instructed a technician to move the lift up and down from a control box. It was during this process when Mr Edmonds became fatally trapped between the lift's car and shaft.

The HSE investigation concluded that there were failings on the parts of all involved in the incident, including the MoD, which failed to have in place a safe system of work for working within the lift and for its maintenance.

The MoD pleaded guilty to a breach of Section 2(1) HSWA 1974. However, as the MoD is a government body it has Crown immunity from prosecution. A Crown censure was therefore imposed, with the effect of there being an official record of the MoD breaching its statutory duty.

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Bridgend Council facing prosecution over death of a 15-year old pupil

On 10 December 2014, Ashley Talbot, a 15-year old pupil at Maesteg Comprehensive School, suffered fatal injuries in a collision with a mini-bus on the school's grounds. Bridgend County Borough Council will now be prosecuted for a breach of Section 3(1) HSWA 1974.

The minibus was being driven by a PE teacher with one other child suffering minor injuries and the incident itself being witnessed by other children.

The Council has issued a statement (click here to view) and will appear in Court on a date to be confirmed.

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Fines and sentences

Skip firm employee sentenced after seriously injuring a co-worker

On 2 August 2017 Mr Daividas Rupeika drove an excavator into another excavator at a site in Wimbledon, South-West London. He then reversed at speed crushing a pedestrian co-worker against a wall resulting in serious injuries.

The incident was captured on CCTV and shown at Southwark Crown Court in a relatively rare prosecution under Section 7 HSWA 1974. This relates to the general duties of care owed by employees, Section 7(a) stating that "It shall be the duty of every employee while at work to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work."

Mr Rupeika pleaded not guilty to two charges of breaching Section 7(a) HSWA 1974. One charge was for deliberately driving his excavator into another, which was being driven by a workmate. The second charge related to him driving too fast in the circumstances.

Mr Rupeika was found guilty by a jury on both counts. On 16 February 2018 he was sentenced to six months' imprisonment suspended for two years. He was ordered to undertake 40 hours of unpaid work. He was also ordered to pay costs of £500 and a victim surcharge of £115.

This case is a useful reminder of the HSE's power to prosecute an individual employee rather than an employer, a power which will be exercised in circumstances where the employer has taken all reasonably practicable steps to ensure compliance with adequate systems of work. Here, the offence was solely the result of Mr Rupeika's actions.

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Tata Steel fined £1.4m after maintenance electrician is fatally crushed

On 23 April 2010, Thomas Standerline, a 26-year old electrician, was working for Tata Steel (UK) Ltd (Tata Steel) at their Scunthorpe plant. He was working within a cage in order to inspect the power supply of one of two cranes used for transporting large pieces of hot metal. The cranes were run on electrical conductor rails.

Mr Standerline climbed into the cage to inspect the bottom crane, which had been isolated, but the higher crane was still being operated, and trapped and crushed Mr Standerline, there being inadequate clearance between the top of the cage and underside of the crane.

The HSE charged Tata Steel and their contractor Harsco Metals Group Ltd (Harsco) who employed the crane drivers. However, at a trial starting in September 2017 the HSE offered no further evidence against Harsco and the jury was directed to acquit them.

Although Harsco operated these, the cranes were the property of Tata Steel, who was responsible for their maintenance and operation. One of the main causes of the incident was a failure in the system for operating the cranes and a lack of communication with the Harsco crane drivers.

At a sentencing hearing on 2 February 2018 in Hull Crown Court, Tata Steel was fined £1.4m after pleading guilty under Sections 2 and 3 HSWA 1974. They were also ordered to pay costs of £140,000.

During the sentencing of Tata Steel, Judge Jeremy Richardson QC referred to two previous incidents in 2008 and 2010. Furthermore, specialist inspectors had attended the premises only two months before the accident, recommending a better system of isolating the cranes.

The Judge also referred to the widely-publicized fine of £1.5m for Tata Steel in 2017, which had been reduced on appeal, relating to inadequate machine guarding and serious hand injuries suffered by two workers in separate incidents.

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Ejector seat manufacturer fined £1.1m for death of Red Arrows pilot

On 8 November 2011 Flt Lt Sean Cunningham, a 35-year-old Red Arrows' pilot, was ejected from a Hawk T1 jet at RAF Scrampton, Lincolnshire. He was stationary whilst pre-flight checks were being carried out on the aircraft. Despite being air-lifted to hospital the pilot had suffered multiple and fatal injuries.

The manufacturer and supplier of the ejector seat was Martin Baker Aircraft Company Ltd.

The HSE investigation revealed that the ejector seat firing handle had been left in an unsafe position. This left it vulnerable to accidentally activating the seat. Although there was a safety pin within the firing handle it was found to be ineffective, with later tests showing that it could still be inserted into the seat even when it was in an unsafe position.

An extensive investigation was carried out by the HSE alongside Lincolnshire Police, the Coroner and Ministry of Defence. The HSE found that during the 1990's the company had been made aware of issues with the above mechanism but failed to pass these onto RAF personnel.

At a hearing in May 2017 the company had pleaded not guilty to Section 3(1) HSWA 1974. However, the company changed their plea to guilty in January 2018. On 23 February 2018 the company was fined £1.1m at Lincoln Crown Court and ordered to pay costs of £550,000.

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Airport baggage handler fined £502,000 after two incidents at Luton Airport

Swissport GB Limited has been fined £502,000 and ordered to pay costs of £44,444 at Luton Crown Court following two incidents at Luton Airport in 2015.

The first incident happened on 23 June 2015. A team leader and his team were unloading baggage from an aircraft onto a flatbed lorry. A colleague was then instructed to take the bags to the airport terminal. The colleague entered the cab of the flatbed, checked his mirrors and drove away, not realising the team leader was still on the back of vehicle when he drove away. The team leader fell to the floor suffering bruising and injury to his spine.

The second incident happened on 9 September 2015. Another team leader was using a high-loader. This has a platform which raises cargo from the ground to the aircraft. The high-loader had been partially raised when the team leader began climbing the access ladder. As he climbed the ladder he slipped and fell to the ground injuring his right foot.

For the first incident the Court heard how Swissport GB failed to have any adequate risk assessment or safe system of work, which would have considered the risk of employees falling from the vehicle. For the second incident there was a failure to plan and supervise work at height on the high-loaders.

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Engineering company fined £500,000 after worker is run over by a tipper truck

On 15 October 2015 a ground worker suffered a serious leg injury after being run over by a tipper truck on a housing development site, Burntwood Business Park, Staffordshire. There had been various tipper trucks on site delivering various materials. At the time the worker was walking along a temporary haul road when he was struck.

The HSE's investigation revealed that the contractor, M V Kelly Ltd of Birmingham, had failed to provide protected walkways and had no control over vehicles accessing the site. The HSE also found that it was common and accepted practice for personnel to walk along the haul roads with no updated traffic plan or system in place.

The company pleaded guilty to a breach of Regulation 27(1) of the Construction (Design and Management) Regulations 2015. On 13 February 2018 North Staffordshire Justice Centre fined the company £500,000 and ordered them to pay costs of £30,000 and a £120 victim surcharge to the victim.

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Birmingham restaurant fined £50,000 for serving food on unclean wooden boards

Following an outbreak of food poisoning affecting 14 diners, Birmingham City Council visited Ibrahim's Grill and Steak House, Acocks Green, Birmingham in October 2016.

A number of hygiene issues were identified by the Council and in particular the use of wooden boards for serving food to diners. The Council stated that the boards were "incapable" of being cleaned. Although hygiene improvements were made, on a return visit two months later the HSE discovered that the wooden boards were still being used.

The company was therefore prosecuted for failing to comply with an improvement notice regarding use of the wooden boards. It pleaded guilty and was fined £50,000 and ordered to pay £670 in costs and a £120 victim surcharge. The hearing took place at Birmingham Magistrates Court on 4 January 2018.

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Round up

The General Data Protection Regulations (GDPR) draw ever closer

The GDPR (Regulation (EU) 2016/679) will come into force from 25 May 2018 and supersede the Data Protection Act 1998. As an EU Regulation the GDPR will have direct applicability for all member states.

The GDPR will come into force despite Brexit, as it will apply before the UK's withdrawal from the EU. The Government has expressed its wish for the GDPR to apply post-Brexit.

The aim is to bring UK law on data protection more in line with the ever-changing digital world and keep up with the significant amount of data now collected and stored. The GDPR is also aimed at providing individuals with more control and power regarding their own data. For example, the terms and conditions for limiting or withdrawing data are to be simplified.

In a health and safety context the GDPR will likely be relevant when dealing with any health and safety process or system. These might include significant personal data regarding customers, employees or service-providers within a particular field, eg occupational health records, complaints or contractual documents.

This data needs to be processed and controlled in the GDPR-compliant way to avoid what will now be significantly increased sanctions. The maximum fine which can be imposed is €20m or 4% of global turnover in the most serious cases.

Readers may find this link useful in considering their obligations ahead of the GDPR's implementation.

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International Standard for Occupational Health and Safety Management Systems now published

On 12 March 2018 the International Organization for Standardization (ISO) published ISO 45001:2018, with the aim of reducing occupational injury and illness globally. It is an international standard for occupational health and safety management systems.

The project committee for ISO 45001:2018 commenced in 2013 consulting over 70 countries with the British Standards Institution serving as the committee secretariat.

ISO 45001:2018 replaces OHSAS 18001 and will attempt to make integration with other management systems simpler. For businesses with certification under OHSAS 18001 there is a 3-year transition period to move to the new standard.

For more information on the standard please click here.

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