

HEALTH & SAFETY BRIEFING: CHALLENGING HSE ENFORCEMENT NOTICES AFTER CHILCOTT V. THERMAL TRANSFER LTD

Insight

This issue

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Recent decision of the High Court in England widens scope for employers to challenge HSE Enforcement Notices.

Inspectors from the HSE issue, on average, over 8,000 Prohibition Notices and Improvement Notices every year. Leaving aside the ramifications for day-to-day working life, these are placed on a public register, a breach automatically attracts criminal sanctions and they may have to be disclosed when tendering for work. They can have very dramatic consequences. Notices can be appealed under the Health and Safety at Work etc... Act 1974 to the Employment Tribunal and a recent decision of the High Court in England in *Chilcott v. Thermal Transfer Limited* has widened the scope of employers to make such challenges.

Facts

Thermal Transfer Limited engaged sub-contractors to carry out platform steelwork in relation to installation of cooling towers. An employee of the subcontractor fell from one of the platforms during construction and sustained serious injuries. Coincidentally an Inspector from the HSE happened to be visiting the site at the time and issued a prohibition notice stopping all further work on the platforms. The ground for doing so was that Thermal Transfer had failed to adequately plan the risks of work at height and persons falling.

There was a detailed risk assessment and method statement in place for carrying out the work. It adequately identified the risk of working at height and the control measures to be taken. It became apparent that the employee had simply not been following the method statement at the time of the accident. However, the Inspector was not familiar with Thermal Transfer or the documentation at the time of serving the notice.

Thermal Transfer appealed the Prohibition Notice. The appeal was successful in the Employment Tribunal and the notice was set aside. The HSE appealed to the High Court.

Issue

The question for the High Court was: How should an Employment Tribunal review these notices - Were they limited to reviewing the reasonableness of the Inspectors decision at the time or could they consider all the circumstances and come to their own view of whether they would have issued the notice?

The HSE has previously defended appeals on the basis that the correct approach was for the Tribunal solely to review the reasonableness of the Inspector's decision.



Decision

The court confirmed that the correct approach was for the employment tribunal to consider all the evidence and decide whether it would have issued a notice at the time.

This test gives the Employment Tribunal a much wider scope for review than purely looking at whether an Inspector's decision was open to him at the time. The High Court went on to specifically clarify two consequences of this general approach:

- The Tribunal can consider information that was not known to the Inspector. They are entitled to know what the actual situation was at the time the notice was served, irrespective of whether the Inspector knew about it or when the information came to light, and determine whether, in light of that, they would have issued a notice.
- The HSE sought to argue that the remote likelihood of an activity being repeated was irrelevant to the service of a notice and was not an adequate basis for cancelling it (based on an earlier decision in *Railtrack Plc v. Smallwood*). The High Court stated that this was not a separate rule and was 'subsumed' by the general assessment that the Tribunal had to carry out.

The court ultimately upheld the Tribunal's decision to cancel the prohibition notice, despite disagreeing with the test it had applied in order to reach that result.

Comment

This decision will strengthen the rights of businesses seeking to challenge an enforcement notice in the future. McGrigors Health and Safety team has carried out a number of successful appeals in recent years for various clients and this decision brings welcome clarification. The issue of whether the inspector acted reasonably will no longer be the test for whether a notice can be set aside.

The key points for any person receiving an enforcement notice to take from this decision are:

- Has the Inspector made enquiries? The HSE's own guidance states that an Inspector should ensure they have enough information to form the necessary opinion before serving a notice. The decision re-emphasises the importance of this requirement. The Inspector was not familiar with Thermal Transfer and did not take the time to fully investigate the procedures in place prior, yet served a notice criticising failure to plan. If the Inspector has failed to make any or only a limited enquiry then the notice may be more susceptible to challenge.
- Has information been overlooked? A notice is often served in the heat of the moment. There may well be relevant information that has been overlooked, which could now form the basis of a challenge. If you receive a notice then you should always take steps to review the circumstances and take legal advice. This should be done as early as possible as there is generally a time limit of 21 days to appeal.

For further information please contact:

LAURA CAMERON

Partner and Head of Litigation & Dispute Resolution

Tel +44 (0)141 567 8632

Email laura.cameron@mcgrigors.com

TIM YOUNG

Solicitor, Health & Safety Team

Tel +44 (0)141 567 8648

Email tim.young@mcgrigors.com



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