Birketts

WELCOME TO THE SPRING 2018 ISSUE OF

Health and Safety Help!

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Welcome to our latest edition of Health and Safety Help! How things have changed since our last edition.

Laura Thomas
Partner (Barrister)
01473 299173
laura-thomas@birketts.co.uk

The team has grown with the addition of Simon Caltagirone and Daniel Hart in Cambridge, and we have achieved nationwide rankings for health and safety in Chambers & Partners – so all in all, 2017 was a good year!

We have a real mix of articles in this edition; from analysis of who HSE are prosecuting - prosecutions of directors have more than doubled, through to what happens when there are prosecutions (health and safety fines are up by 80%). In addition, new team member Daniel Hart looks at a Supreme Court case on prohibition notice appeals and I examine the issue of legal privilege in accident investigations.

From 1 May 2018, we are moving to an 'opt-in only' subscription format for all of our newsletters, seminars and events. To ensure that you continue to receive the latest news, legal updates and seminar information, please register and select the areas that are of interest to you.

We welcome any questions that you might have, or if there are issues on which you would like us to comment please do get in touch. Our aim is to provide a regular newsletter, but if you would like to see news stories as they happen, please follow us on LinkedIn and Twitter. For updates on our corporate social responsibility, please follow us on Facebook.

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Prosecutions of directors more than doubled

Julie Gowland
Senior Associate
01603 756413
julie-gowland@birketts.co.uk

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According to figures from the HSE, the number of directors and managers prosecuted in recent years has more than doubled. In stark contrast with this increase, the number of employees being prosecuted by the HSE is dramatically falling.

The increase in personal risk that company directors, managers and officers carry is as a consequence of section 37(1) Health & Safety at Work Act 1974 (HSWA). This section allows company directors, managers and officers to be personally prosecuted for offences committed by a body corporate; when it's proved that the offence was committed with their consent or connivance or attributable to any neglect on their part. Directors can also be charged for breaching other regulations and sections of the HSWA.

The HSE are now increasingly willing, some would argue actively seeking, to bring personal prosecutions against those in control of businesses:

- 46 directors and senior managers were prosecuted under Section 37 in 2015 to 2016
- prosecutions of employees has fallen to just one in 2015 to 2016.

Of those 46 prosecutions, 34 directors were convicted, one was found not guilty and the HSE offered no evidence against the remaining 11. Of the 34 convicted, 12 were given prison sentences; the longest prison sentence being two years, and two were disqualified from being directors; one for two years and one for ten years.

These figures clearly demonstrate an increased zeal of the HSE to prosecute and hold accountable the most senior individuals within a corporation, often ignoring more culpable employees. This shift in focus, and the increase in custodial sentences, is clearly a worry for the boardroom. This, coupled with the fact that fines are now routinely hitting the £1m mark for non-fatal offences since the new sentencing guidelines came into effect in February 2016, makes for a worrying time for directors.

The rationale behind this shift in focus appears obvious; health and safety culture within an organisation can only be improved if led from the top. It is clear that the HSE and courts want to ensure that those with the highest authority in organisations take full responsibility for the health and safety failings of their business. Whilst most people are aware of their health and safety duties, not all always adequately protect or prepare themselves for a situation in which their business is involved in a serious health and safety incident.

At Birketts we often advise organisations after a health and safety incident has occurred and the HSE or Police are on site. Our advice is to ensure that, as a business, you are fully aware of your health and safety duties and are prepared should an incident occur. Consideration of health and safety should be treated as a priority by all organisations, importantly, by the directors or senior managers of those organisations.

We offer training courses and presentations to boards on their duties under health and safety law so please don't hesitate to contact us if we can help.

Finally, please don't forget the Birketts' health and safety mantra:

1. Say what you do.
2. Do what you say.
3. Have the paperwork to prove it.

Health and safety fines up by 80%

Emma Long
Paralegal

In February 2016 changes to sentencing guidelines meant that fines imposed were set to increase. Prosecution data released by the HSE showed an 80% increase in fines from 2015/16 to 2016/17. This was the first complete year where the new sentencing guidelines have been in effect. However, interestingly, the number of prosecutions brought by the HSE has reduced to the lowest numbers in five years.

In 2016/17 the largest single fine awarded to an organisation was £5m, in contrast to the largest fine of 2014/15 which was £750,000. Since the implementation of the new guidelines the average fine has increased from £29,000 in 2014/15 (a full year under the old guidelines) to £128,000 in 2016/17.

The number of custodial sentences given to individuals has also increased by 2% since the new guidelines have come into force.

Construction, agriculture and manufacturing industries remain the highest risk for fatal injuries to workers - although these numbers are the lowest compared to the annual average from 2012/13 to 2016/17.

New test for appealing health and safety enforcement notices[2]

Daniel Hart
Associate
01223 326582
daniel-hart@birketts.co.uk

The Supreme Court, in the recent case of *HSE v Chevron North Sea Limited* on 8 February 2018, has widened the test to be applied on an appeal against enforcement notices served by HSE or Local Authority Inspectors under Sections 22 and 23 of the Health and Safety at Work Act 1974. The court ruled that an employment tribunal is entitled to take into account all of the evidence relevant to the circumstances existing at the time the notice was served, including information coming to light afterwards.

Background

Dutyholders wishing to appeal against the service of an improvement, or prohibition notice, served by the HSE or local authority must bring proceedings in the employment tribunal.

Previously, the relevant test (in England) was whether service of the enforcement notice was justified, on the facts available to the inspector at the time the notice was served, and information available afterwards was irrelevant.

Facts in Chevron case

An inspection of an offshore installation operated by Chevron North Sea Ltd (Chevron) resulted in the service of a prohibition notice in respect of corrosion of stairways and staging as the inspector felt that there was a risk of serious personal injury from falling through them.

Chevron obtained an expert's report that all the metalwork passed the British Standard strength test and that there was, in fact, no risk of injury. Chevron appealed the notice to the Employment Tribunal. The tribunal ruled that it was entitled to consider the expert evidence and cancelled the notice. The inspector unsuccessfully appealed to the Scottish Inner House, which approved the tribunal's decision and held an appellant was entitled to whatever relevant evidence that was available at the time of appeal.

The Chevron case was referred to the Supreme Court because the decision created a direct conflict between the Scottish and English legal position on the test to be applied when considering the appeal of an enforcement notice.

Supreme Court decision

The Supreme Court confirmed that when an inspector served a notice, s.22 was concerned with whether he was of the opinion that the activities in question involved a risk of serious personal injury. However, on dealing with an appeal against the notice, the tribunal's focus was not solely concerned with the inspector's opinion but with the notice itself. The tribunal was, therefore, able to look at all of the facts on which the notice itself was based.

The reasons why the inspector formed the opinion and served the notice might be relevant in determining whether the risk existed, but there was no good reason to restrict the tribunal's consideration to the material that was available to the inspector. The tribunal was, therefore, entitled to have regard to any other evidence which assisted in ascertaining what the risk, if any, in fact was.

"Enforcement notices can have serious financial, operational and reputational implications for businesses.

The impact

Enforcement notices can have serious financial, operational and reputational implications for businesses. We often advise and represent dutyholders at appeals, but the decision in Chevron means that in future it may be easier and more worthwhile appealing against a notice where it is possible to gather evidence to show there is no serious risk of personal injury, even if such evidence was not available when the notice was issued.

It's been a privilege!

Laura Thomas
Partner (Barrister)
01473 299173
laura-thomas@birketts.co.uk

The law on legal privilege has always attracted attention and was an issue in the very recent health and safety case of *R v Paul Jukes in the Court of Appeal.*

What is legal privilege?

Privilege entitles a party to withhold written or oral evidence from a third party or a court. There are two main types of legal privilege; legal advice privilege and litigation privilege. Legal advice privilege extends to communications between a lawyer and client; e.g. emails where your lawyer is advising you on the merits of a case. Litigation privilege can apply to communications by a client or his lawyer and a third party; e.g. witnesses/employees.

Why is this relevant?

In many health and safety cases lawyers will investigate accidents on behalf of their clients, partly to ensure that such information is included under the umbrella of privilege. In the Juke case, counsel attempted to argue that communications between lawyers and a relevant witness (whose statement had been taken as part of an investigation) were covered by litigation privilege so they should not have been disclosed to the court.

The Court of Appeal disagreed.

Why did the Court of Appeal rule as they did?

A document will only attract litigation privilege if three conditions are satisfied:

1. Litigation is in progress or reasonably in contemplation.
2. The relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation.
3. The litigation is adversarial, not investigatory or inquisitorial.

"... a person who knows that he had committed a criminal offence may reasonably anticipate that if certain facts come to light, a prosecution is likely to follow..."

The Court of Appeal concluded that at the time the statement was taken no decision to prosecute had been taken by the HSE and matters were still at the investigatory stage. An investigation is not adversarial litigation. As Andrews J said in *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 QB, [2017] 1 WLR 4205 at [154]*: "Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction. Of course, a person who knows that he had committed a criminal offence may reasonably anticipate that if certain facts come to light, a prosecution is likely to follow, even if there is no investigation currently underway."

Does this apply to all accident investigations?

Not necessarily. It is a question of the particular facts and context of the case. It is still possible that, in some cases, litigation privilege could attach to communications/ statements given by witnesses in accident investigations.

How should health and safety accidents be investigated?

In our experience, most corporates still investigate their own accidents. Assuming the investigations are done well, this can be an effective tool for near misses or minor incidents. Of course, this would not attract any time of privilege so would be fully disclosable to the HSE. It is often the first thing they ask for when investigating accidents.

Our advice remains that it might be preferable to instruct your lawyers to investigate serious or complex incidents/accidents. It is likely that much of this investigation would attract privilege, which could prove beneficial. The question mark is simply over communications with third parties and whether these would be privileged; assuming you work on the basis that they would not, there is little risk.

We offer training courses on how to effectively investigate accidents, as well as offering a full and expert service to investigate serious, complex or indeed any accidents or incidents. Our 24 hour contact number is 0800 954 3771.