FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 9 March 2021

A New Dawn in Regulatory Enforcement

Hosted by FOIL's Regulatory Law SFT, this event was led by **John Cooper QC** of **Crown Office Chambers** and looked at the impact of the pandemic on health and safety and the work of the Health and Safety Executive (HSE) in its investigations.

IN BRIEF

How has Covid-19 affected HSE and other regulators' investigations and prosecutions?

What steps should lawyers be taking to protect clients' interests?

Everyone is now used to undertaking a wide range of work, including various types of hearing, from the comfort of a home office. There are some disadvantages (not having the same degree of interaction with the client), but in the longer term these changes are likely to remain: particularly for administrative type hearings. The courts will also wish to use remote hearings to assist in reducing the considerable backlog in cases.

It seems that the HSE and other regulators have come under pressure during the early part of 2021 to get back into the field and investigate how undertakings are adhering to covid related safety measures, including risk assessments and method statements.

At the end of February, in the construction sector, the HSE had carried out 4,000 spot checks, of which 3,500 involved site visits and the others remote contact. Of these over 2,000 resulted in no action; 957 in verbal advice; 500 in written advice; and 101 enforcement action. This suggests that the HSE is adopting a far more conciliatory approach in covid related matters, unless it sees obvious cases of non-compliance.

Jonathan Edwards of **HCR Law** was asked how this view measured against his experience of what is happening.

Jonathan made particular mention of the education sector in which a huge number of schools had received regulatory visits between September and December 2020 and some 80% had been found to be taking the correct measures and had a really good understanding of the government guidance and how to comply with it. Only in 1% of cases had the HSE found it necessary to issue an improvement notice.

It was of concern that although the HSE statistics for 2019/2020 showed only 355 prosecutions, 95% of those were successful. This highlighted the problems for defendants with S40 Health & Safety at Work etc. Act, which reverses the burden of proof, once risk is established. The HSE also seems to recognise the potential problems of bringing covid related cases (in view of the numerous possible sources of infection) in favour of alternative means of addressing and resolving any concerns. It could also be that the HSE is cherry picking cases where there has been blatant non-compliance and are not contested.

It was noted that the annual cost of workplace accidents is a very significant £5.2bn, which has resulted in 28.2m working days being lost. Another statistic that caught the eye was the current level of lung disease deaths, put at 12,000.

Like everyone else, the HSE has had to adapt its working practices, including carrying out post incident interviews remotely, principally by telephone. This is less stressful for the interviewee, who is also able to access a variety of resources before responding to a question, which hasn't always been possible at in-person interview. One issue to consider is whether or not there should be agreement to have the interview recorded (Zoom or Teams) and how that might be used in evidence.

The HSE is dependent on government funding. In these latest figures, its expenditure amounted to £230m, of which only £90m had been recovered through e.g. Fee For Intervention. The HSE still appears to be struggling with resourcing and the latest evidence of this is the outsourcing of "Covid compliance spot checks and inspections" to outside contractors.

Chris Newton of **Keoghs** was then asked about his experience in the care sector. Inevitably, this sector had been heavily impacted. Early on it was struggling to keep pace with ever-changing guidance and the discharge of NHS patients into care homes. Where incidents occurred, a variety of different regulators might be involved, depending on whether a visitor, employee or patient was affected. Supporting the care homes remotely, during these investigations has been a real challenge and has involved trying to explain the regulatory process; how to deal with interviews; dealing with disclosure (including care records); and sometimes carers for whom English is their second language. This has meant developing products that address these difficulties and assist in handling the cases remotely but that cannot take away the advantages of face-to-face meetings, particularly in more serious cases, where such meetings provide more effective support.

John Cooper expressed the view that while everyone was now familiar with the risks of covid and the need to assess risks and put in place the necessary steps to minimise the risk of infection, a new concern was that of 'jabbing', i.e., a requirement that someone is vaccinated before they are allowed to work for a company. **Chris Newton** confirmed that this was, understandably, a major

issue in the care sector but it raises issues in employment law, discrimination, equality law and other areas. The reality is that such a requirement in the care sector could result in staff shortages and may not be practicable. The preferred approach is persuasion, in some cases using 'vaccine champions' to promote the benefit of being vaccinated. This involves financial and time investment.

Jonathan Edwards observed that under the Public Health (Control of Disease) Act 1984, no one can be compelled to undergo mandatory medical treatment. Art 8 of The European Convention on Human Rights and the other statutory protections for individuals support the view that there is no mechanism by which people can be forced to have the injection. The strongest argument probably comes from the Health & Safety at Work Act and the employer's duty to provide a safe place of work: that may justify including a requirement to be vaccinated in future contracts pf employment, particularly where an employee is working with vulnerable people in a vulnerable environment.

The current approach being adopted by the regulatory authorities provides the opportunity for discussion about what they see as the way forward. There has not been a deluge of enforcement proceedings, which is some evidence of a differing and lighter handed approach to this problem. There is also HSE guidance on its website about when a RIDDOR report is triggered by a covid incident, so that should be considered before there is a rush to report something. No RIDDOR report is required by care homes for patients or visitors, so its application is relatively limited in that area. Where, however, a report is required, it should be succinct, factual and not include any opinion (the guidance does not require that an in-depth investigation is made in covid cases). This is a key time to seek legal advice: the costs incurred can prove to be far less than those of unravelling the consequences of a badly completed report. This feeds into a general lack of planning by organisations about how to respond effectively when the HSE arrives on site and exercises its considerable powers of investigation. Inspections at construction sites are a relatively common occurrence, there were 1700 last year alone. It remains a high-risk sector. Organisations would be well advised to plan properly for this eventuality. Key personnel should be identified and know exactly what their role and responsibilities will be if an inspector calls. If it goes badly at the start, it rarely ends well.

Equally as important is for organisations to engage with the HSE before there is an incident; getting to know the local inspector(s) and engaging with them, to build relationships, can often lead to the HSE taking a more conciliatory approach.

If enforcement action is taken by the issue of an Improvement or Prohibition Notice, and that Notice is then appealed the Employment Tribunal will now not only look at the situation as it was when the Inspector issued the Notice but, Since Chevron North Sea Ltd, must look at any new information which might suggest the risk did not exist. This is a significant development. In that case expert evidence was allowed to demonstrate that a staircase and gratings did not pose a risk of injury.

The CPS recently issued guidance about the public interest in not pursuing some prosecutions and/or finding alternative means of resolving them. This was in part to address the problems of the backlog in cases. With local authority prosecutions, this has fed into some authorities issuing cautions and/or taking a contribution to costs, rather than pressing on with the prosecution.

There have been a number of examples of the HSE accepting alternative means of resolution. During the current pandemic the HSE has been inviting organisations to make a greater number of written submissions before a charging decision is taken. It has been possible to build in to these submissions arguments on evidential sufficiency and public interest which the prosecution must be satisfied of before proceeding with a criminal case. In some cases, no further action has been taken, in others the HSE has been content to deal with matters by way of a caution or cost contribution.

There is also evidence that suggests that recoveries under the Fee For Intervention Scheme are not being pursued with as much vigour as before the pandemic. That may well change once covid restrictions are lifted and there is more normality.

Are the courts taking a different approach to sentencing because of covid? Recent experience suggests they may be, with one Crown Court imposing a lower fine than had been anticipated and allowing payments to be staggered over a lengthy period, to reflect the financial impact of the pandemic on the defendant.

On the other hand, in a case where the HSE was prepared to negotiate a plea to a lesser offence, the judge had imposed a fine so high, that it has been appealed.

An important new factor is how accounts are presented, as the typical three years' worth usually relied on may no longer be representative of the impact of covid. It is important to present independently prepared management accounts, showing the current position. Much will depend on the nature of the business and how it has fared during the pandemic. Any fine must be just and proportionate.

Some businesses, such as the care sector, have spent vast sums on dealing with covid and this will need to be brought to the attention of the court if facing a financial penalty. However, the regulator appears to be taking this into account already, with evidence of a reluctance to prosecute (or of deliberate delay in doing so).

On delay, there is real concern with the backlog of cases and the time it continues to take to pursue prosecutions. It is important to record and preserve any evidence that demonstrates that a defendant has suffered prejudice as a result of these delays in order to build an abuse of process argument and seek a dismissal of the proceedings. . Organisations are very frustrated by these delays, which sometimes occur even in relatively straightforward cases. This has led, in some cases, to judicial intervention to reduce the delay. In some cases, delay might be argued to reduce prosecution costs.

It was noted by one guest that in Scotland there appears to be a postcode lottery for similar offences and the level of fines imposed. It was felt that in England and Wales, any differences of approach were more down to the judges.

Looking to the future, in the care sector the major concern was in securing robust evidence. There will be pressure on the regulator(s) to prosecute, to assist with civil claims (which will await the

outcome of the prosecution) but the delay will impact on the quality of evidence. There will also be arguments around causation, with so many possible sources of infection.