Recent developments in Health and Safety Law

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A bit of real law for a change

Litigation Privilege and Internal Investigations

- 2 recent cases have called into question whether litigation privilege can apply to internal investigations including health and safety matters. To claim litigation privilege the following must apply:
  - Litigation must be in progress or in contemplation.
  - The communication is to have been made for the sole or dominant purpose of conducting that litigation and
  - the litigation must be adversarial, not investigative or inquisitorial.

BILTA (UK) Ltd (in liquidation) and ORS v Royal Bank of Scotland PLC and ANOR [2017]

- Case related to “missing trader intra-community fraud” involving the trade in carbon credits. The fraud involves avoiding paying VAT to HMRC and instead paying the VAT receipt to third parties before going into liquidation.
- Allegation from the claimant’s RBS allowed the frauds to take place disadvantaging the claimants.

Documents sought by the Claimant

- 2009 HMRC became aware of the scale of the missing trader fraud and began to investigate. RBS part of the investigation.
- RBS instructed solicitors to carry out its own internal investigation which resulted in providing a report to HMRC.
- The claimants sought disclosure of RBS documents created during the course of the internal investigation. These included transcripts of interviews with RBS employees and ex-employees.
- RBS resisted disclosure arguing the documents were subject to litigation privilege.

Were the documents created for the sole or dominant purpose for conducting litigation?

- At the time created HMRC had determined sufficient grounds to deny RBS nearly £90 million of VAT.
- Parties agreed they had been created at a time when litigation was in contemplation so the first test for litigation privilege was satisfied.
- Key question for the Court was were they made for the sole or dominant purpose of conducting that litigation?

Were the documents created for the sole or dominant purpose for conducting litigation?

- In the High Court, Sir Geoffrey Vos concluded that:

  "The documents and interviews were brought into being by RBS and its solicitors for the sole or at least dominant purpose of expected litigation following an expected assessment in respect of over claimed inward VAT. The documents were therefore, covered by litigation privilege."

- In support of his conclusion he noted the following:
  - HMRC have notified RBS of their grounds to deny inward VAT and in response RBS instructed external solicitors so they were "gearing up" to defend the claim.
  - The fact that RBS co-operated with HMRC investigation did not preclude its own internal investigation being conducted for the dominant purpose of litigation.
  - The report prepared by RBS's external solicitors and provided to HMRC expressly stated it did not waive privilege to the underlying material e.g. employee interviews.
  - RBS may have been seeking to persuade HMRC not to make an assessment on VAT and such attempts to persuade a party from litigation or to settle a claim are subsidiary to the dominant purpose of litigation. Fending off a claim is part of a continuing form on the road of litigation and it cannot be considered a separate purpose.
- Conclusion: RBS did not have to disclose the requested documents from its internal investigation.

Health and Safety Executive. R (on the application of) v Lukes (2018)

- Criminal proceedings for failing to take reasonable care of employees under Section 7 of the Health & Safety at Work Act 1974.
- Appellant convicted of the offence in the Crown Court. Conviction related to an incident where a colleague was fatally injured in a baling machine used to compact paper and cardboard waste.
- Appealed the conviction on the basis the prosecution relied upon a witness statement which he said was subject to litigation privilege and therefore should not have been admitted by the Trial Judge in evidence.

The document concerned

- First interview by the police and HSE appellant provided a prepared statement which denied being responsible for health and safety of the company.
- During the investigation an earlier statement prepared by the appellant came to light in which he stated "… I took over full responsibility for health and safety."
- Appellant contended the earlier witness statement had been provided to him by the company solicitors and so was subject to litigation privilege and not admissible as evidence.

Was adversarial litigation in contemplation at the time of preparation of that witness statement?

- Lord Justice Flaux upheld the Trial Judge's finding that the early statement was not privileged. The key question in this case was whether litigation was in contemplation at the time the statement was made. It was found that:
  - At the time the appellant gave the earlier statement the HSE was still investigating the incident and had not taken the decision to prosecute.
  - Such an investigation is not "adversarial litigation".
  - The reasonable contemplation of criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution.
  - Litigation was not therefore in contemplation so as to protect the witness statement from use.

What if the document had been privileged?

- The Court of Appeal found that, even if had litigation been in contemplation such as the statement was potentially subject to litigation privilege.
  - Any privilege was not the appellant's to claim. The statement had been given to solicitors who acted for the company and its managing director they did not act for the appellant. The privilege therefore belonged to the company and it's managing director but neither had claimed it. As the maker of the statement the appellant was "at best a potential witness who cannot rely upon [the company's] privilege for his own benefit."
  - If a privileged document falls into the hands of another party in criminal proceedings it is admissible subject to the power of the Court to exclude it as unfair evidence (section 78 PACE 1984). In this case neither the Trial Judge nor the Court of Appeal found the admission of this evidence would be unfair to either the prosecution or defence.

Litigation Privilege and Regulatory Investigations

- Both cases involved investigation by government authority.
- Both cases referred to the decision in Serious Fraud Office v Eurasian Natural Resources Corporation Limited (2017) in which the High Court granted a declaration that certain categories of documents generated through internal investigations were not privileged against disclosure to the SFO however each court treated this decision differently.

Litigation Privilege and Regulatory Investigations

- In the RBS case the Court did not find ENRC of assistance. The Court said you cannot simply apply conclusions reached about one company's interactions with the SFO in the different context of another company's interactions with HMRC. The Court did not agree with the conclusion in ENRC that documents created for the purpose of showing them to an adversary in litigation (so as to prompt settlement discussions) served a different purpose from documents created for the dominant purpose of defending oneself in litigation.
- In the HSE case the Court agreed with the assessment in ENRC of when litigation is in contemplation and how and why this assistance can differ between civil and criminal proceedings.

Litigation Privilege and Regulatory Investigations

"One critical difference between civil proceedings and a criminal prosecution is that… a person may well have reasonable grounds to believe they are going to be subjected to civil suit at the hands of a disgruntled neighbour… even when there is no properly arguable cause of action… criminal proceedings, on the other hand cannot be started unless until the prosecutor is satisfied that there is sufficient evidence in place for a prosecution… criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about the investigation… 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."

- A point to note, ENRC is currently subject to appeal and therefore the position may change.

How to approach regulatory investigations in light of these cases?

The following points arise in the cases:

- Litigation will not generally be in contemplation (such that litigation privilege applies) simply because a regulatory investigation has been commenced;
- An investigation will not necessarily lead to litigation or prosecution;
- Litigation may properly be in the party's contemplation sooner in the case of civil proceedings than criminal proceedings, because a criminal prosecutor needs to meet a certain evidential threshold before bringing prosecution.
- If the proceedings are inquisitorial rather than adversarial in nature e.g. inquests that documents prepared for them may not be necessarily protected by litigation privilege.
- Litigation may not be the sole purpose of a document in order for it to be protected by litigation privilege, just the dominant one.
- Documents prepared for the dominant purpose of conducting litigation can also be deployed for subsidiary purposes e.g. avoiding litigation or possibly due to a company policy of investigation all incidents (lessons learnt from Buncefield).

So why does all this matter?

- The cost of failure is increasing
- The HSE are aware of internal investigations and will start asking questions about who has done what and what have they produced
- External lawyers may only be able to assert privilege on certain information depending on who has instructed them
- Individuals interviewed by external lawyers may not be able to claim privilege on the information they have given- will they need their own lawyers and if the do who is going to pay for them
- Should you be reviewing your incident investigation policy?

Recent Developments in Health and Safety Law

- Some of the more significant judgments from Court of Appeal on the interpretation of the Guidelines.
- The judgment of the Supreme Court in Her Majesty's Inspector of Health and Safety v Chevron North Sea Limited, a case concerning appeals against prohibition notices.
- Some significant recent cases
- The new scheme for Fee For Intervention.

Appellant Decisions on the Sentencing Guidelines

R v Thelwall:

"The citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance. There may be cases where the court is asked to say something about a guideline where, in wholly exceptional circumstances — and we wish to emphasise that these are rare — the guideline may be unclear. In such circumstances the court will make observations which may be cited to the court in the future. However, in those circumstances it is highly likely that the Council will revise the guideline and the authority will cease to be of any application."

The assessment of harm

R v Tata Steel the relevance of previous incidents or a lack thereof:

- The prior incident in relation to the machine involved had happened 15 years earlier; and
- That machine had operated for 150,000-man hours without incident *"the period of operation without incident is a powerful pointer against the offence being one of high likelihood."*
- The circumstances of the accident were unusual as the injured employee was actually being retrained on the machine and would not ordinarily have been working where he was when injured.

The assessment of harm

- R v Diamond Box:

  "Tata Steel does not establish a principle that a substantial period in which risk did not in fact fruit into accident means that the likelihood of risk was not high. It all depends on circumstances of case."

- Instead look at:
  - How frequently was the particular action carried out/piece of machinery actually used?
  - Was this an "accident waiting to happen?"
  - What had been the attitude of management prior to the accident?

The assessment of harm — working at height

- R v NU Allen Holdings:
- Of 7,000 falls from height, only 39 proved fatal.
- *"Level A refers not just to "death" but also to "physical or mental impairment". The statistics show that some 3,000 falls led to 'major/specified injuries' in that period i.e. over 40 per cent. In our judgement the judge was right, therefore, to emphasise the risk of head injury from such a fall."*
- Is this correct? Both Level A and Level B refer to more than "physical impairment"
- What are "major/specified injuries?"

The assessment of harm working at height

R v Whirlpool Appliances:

- Starting point had been £35,000
- The breach had resulted in the death of an employee. It was appropriate to move up the starting point significantly.
- The Court of Appeal thought it appropriate to court move up a category and to the top of that category — starting point £250,000.

R v Havering Borough Council:

- Where there is injury caused this is an aggravating feature
- Where injury is less serious than the harm risked, it is still appropriate to move up within a category but not to move up another category.

Harm Categorisation - Lessons

- When assessing likelihood of harm it is necessary to look at all of the circumstances of an incident.
- Long history of operation without any incident may be suggestive of low likelihood but will not automatically be so. Perhaps the more important questions are how long was a an activity conducted safely or how long was an activity conducted unsafely.
- Cases involving work at height will continue to attract a range of debate on this issue. Beware of statistical analysis — not all work at height is highly likely to be fatal.
- Death will result in a significant increase.
- Lesser injury than the risk created will still justify an increase within the category but not moving up a category.

Very Large Defendants

- Do not use a multiplier — R v Thames Water
- R v Tata Steel — appropriate to start within the category for large (£1.1 million starting point), then move up a harm category (£2.4 million,) then apply a further increase to have a "real economic impact.
- R v Whirlpool Appliances appropriate to start in relevant category for a large defendant then move up a harm category.
- Is this the appropriate test for 'very large' defendants?
- Does this have a 'real economic impact?'

Very Large Defendants - Lessons

- Still unclear what the correct approach should be
- Still unclear what constitutes a very large company — in Whirlpool it was suggested a company with a turnover with a `multiple' turnover of £50 million per annum
- Approach thus far taken does not appear as tough as feared.
- If approach used in Tata Steel and Whirlpool is correct it is questionable whether the increase in fines is going to have the desired impact on 'very large' companies.

Operating Profit/Financial Circumstances

- R v MJ Allen Holdings — "highly relevant" to take into account the effect of a fine on operating profit (23% of operating profit).
- R v Whirlpool Appliances:

  "There is a significant difference between an organisation trading on wafer-thin margins and another, perhaps a professional services company where the profits shared between partners or shareholders is a substantial percentage of turnover. An organisation with a consistent recent history of losses is likely to be treated differently from one with consistent profitability. So too, an organisation where the directors and senior management are very handsomely paid when compared to turnover is likely to attract a higher penalty than one where the converse is the case."

Profitability - Lessons

- Profitability is obviously always a relevant factor.
- If a defendant is loss making the Court should examine why this is the case and the basis for the losses.
- The Court may well look at directors' salaries and dividends and consider how profits are distributed and in cases before the Court of Appeal this has been a recurrent feature.

Parent Company Support

- Considered in the context of the Environmental Guidelines — R v INEOS Chlorovinyls
- R v Tata Steel — the resources of a parent can be considered in exceptional cases
- What is the evidence in the annual report, accounts etc.
- What is the true picture of how a defendant operates?
- If considered this matter, it will allow the court not to decrease a fine based on perceived inability to pay. It will not allow the court to increase a fine (or go into the category for a larger company) to recognise the parent's resources.

It’s not just large organisations that are paying more

- Care home fined £100K after resident died
- £373K fine for Logistics company after an agency worker suffered multiple crush injuries when unloading a lorry
- £70K fine for construction company
- £20K fine for construction company for safety and welfare failings but where there was no injury

Prison can still be an option

- 12 week suspended sentence and 200 hours community service for forging documents to obtain a HSE asbestos licence
- Concurrent 5 and 2 months sentences for a builder whose actions resulted in the partial collapse of a house with no injuries 2 months for failure to report under RIDDOR
- Director six month community order and 4 month 7pm to 5am curfew under S37 HSAW for sub contracting gas installation work to someone he knew was not Gas Safe Registered (his son) Son 12 month order and 6 month curfew
- Joinery sub-contractor suspended 16 week sentence and 150 hours of unpaid work

Prohibition Notices

- Section 22 HSWA:

  "Where an inspector is of the opinion that an activity being carried on by an employer poses a risk of serious personal injury he may serve on the employer a prohibition notice. When a prohibition notice is served the activity must cease and it is a criminal offence for a person to contravene a prohibition notice."

- 10,000 issued in 2016/2017

- Effects of a notice:
  - Can stop a business operating
  - They are published on the HSE website — causing potential reputational damage and prevent the business winning tenders.
  - They can have implications in future prosecutions — a prohibition notice can be brought up as showing a poor health and safety record.

Prohibition Notices - Appeals

- Section 24 HSWA: Right to appeal within 21 days to the Employment Tribunal.
- What is the correct approach that the ET should take to evidence that was not reasonably available to the inspector at the time the notice was issued?

HM Inspector of Health and Safety v Chevron North Sea Limited

- Conflict of authorities between England (Hague v Rotary Yorkshire) and Scotland (HM Inspector for Health and Safety v
- Chevron North Sea Limited).
- The Supreme Court said there is:

"no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. [The Tribunal is] .... entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If...the evidence shows that there was no risk at the material time, then, notwithstanding that the inspector was fully justified in serving the notice, it will be modified or cancelled as the situation requires."

Consequences of Chevron

- Potentially, there will be a larger number of appeals being made under section 24, but not necessarily a larger number of effective appeals being heard.
- Greater use of experts in appeals.
- Will there be fewer notices issued by the HSE?

Fee For Intervention

- Health and Safety (Fees) regulations 2012 — duty of HSE to recover costs from those found to be in 'material breach' of health and safety laws.
- From the outset the scheme was controversial:
  - It applies only to the HSE
  - The cost was not insignificant - £129 per hour
  - The process of disputing FFI was flawed
- Judicial review by OCS Group
- Settled with a consultation for a new scheme

The New FFI Dispute Scheme

Came into effect from 1 October 2017:

- A fee for intervention will still be charged.
- If a recipient of an FFI invoice wishes to query it this must be raised within 21 days. It will then be dealt with by a Principal inspector (i.e. line manager of inspector who issued the notice) who will review the query, including if necessary consulting with recipient.
- If the FFI invoice is upheld in whole or part the duty holder will be told. A dispute can then be lodged and this will be considered by a Panel which is independent of the HSE. Within 21 days of dispute being raised the HSE is required to provide all the relevant information that was available to the inspector and on which the decision to issue the notification of contravention was issued.
- This panel will be made up of a lawyer, as chair, together with 2 other members with practical experience of health and safety management. Details and experience of Panel will be provided to the dutyholder before the Disputes panel meets.

Consequences of the new scheme

- There are likely to be more disputes raised as it is considered that dispute system is independent.
- However, contrast the new dispute scheme with the scheme for appealing against prohibition notices:
  - In FFI disputes, HSE still gets to select the members of the Panel — not so in Employment Tribunal
  - The Panel in FF1 disputes cannot consider additional material that was not known to the inspector at the time the notice of contravention was issued. Contrast this with the Chevron judgement.
  - The HSE will seek to obtain the costs of the dispute process should the decision go in their favour.

Final thoughts

- The recent cases on privilege may affect how your organisation goes about investigating incidents
- There may be a need for more lawyers to be involved in serious matters and investigations to obtain privilege
- There will be more challenges from the HSE about disclosure of investigation reports
- The cost of Health and safety is continuing to increase

Final thoughts

- If you feel that a FFI is unwarranted be prepared to appeal it
- A recent report from AXA PPP healthcare says 54% struggle to sleep at night and 1 in 10 experience insomnia
- 63% are unhappy with the amount of sleep they get and that sleep deprived workers cost the UK economy around £40 billion a year
- CDC in the US say sleep deprivation has overtaken obesity as the USA's greatest public heath issue.

So on that note

- Sleep well this evening!
- Any questions?

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