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THE CALM BEFORE THE STORM? COVID-19 AND ENFORCEMENT NOTICES

By John Cooper QC and Mike Atkins

Introduction

In a statement to the House of Commons on 23rd June, the Prime Minister set out the Government's next steps in the easing of the lockdown:

“Thanks to our progress, we can now go further and safely ease the lockdown in England... given the significant fall in the prevalence of the virus, we can change the 2 metre social distancing rule from the 4th of July... Where it is possible to keep 2 metres apart, people should. But where it is not, we would advise people to keep a social distance of ‘1 metre plus’, meaning they should remain 1 metre apart while taking mitigations to reduce the risk of transmission... While the experts cannot give a precise assessment of how much the risk is reduced, they judge these mitigations would make ‘1 metre plus’ broadly equivalent to the risk at 2 metres, if those mitigations are fully implemented.”

From 4th July, people will be able to mix more freely with members of other households and additional businesses will be able to re-open, including restaurants, pubs, cinemas and hotels.¹

As many commentators have observed, these changes are being introduced just as the true

impact of Covid-19 in this country is becoming clearer (most notably in care homes), and at a time when other countries which have started to re-open are suffering a resurgence in the number of cases.

The HSE's approach

Throughout the lockdown period, the HSE has made clear that whilst it hopes to work constructively with businesses, it will use the full range of its enforcement powers where necessary to ensure the safety of those at work.

In an open letter to the food industry of 21st April 2020,² the HSE confirmed that:

“Following an investigation HSE cannot give a guarantee that, regardless of the circumstances, we would not prosecute, or take one of the other enforcement actions open to us. (emphasis added)”

Likewise, in a joint statement with the TUC and CBI of 23rd April 2020,³ the HSE stated that:

“Social distancing is a key public health measure introduced by Public Health England to reduce the spread of infection. Most employers are

¹ <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do-after-4-july>.

² <https://press.hse.gov.uk/2020/04/21/open-letter-to-the-food-industry-during-coronavirus-outbreak/>

³ <https://press.hse.gov.uk/2020/04/03/coronavirus-a-joint-statement-between-hse-the-tuc-and-the-cbi/>

going to great lengths to ensure social distancing wherever possible...

But if it comes to the HSE's attention that employers are not complying with the relevant Public Health England guidance (including enabling social distancing where it is practical to do so), **HSE will consider a range of actions ranging from providing specific advice to employers through to issuing enforcement notices, including prohibition notices.** (emphasis added)

In the early stages of lockdown, the HSE had largely moved to working remotely and had limited the number of visits to businesses. The HSE resumed inspection visits to construction sites in the second half of May. The Government has also announced £14m of additional funding for the HSE,⁴ an amount approximately equal to the HSE's income in 2018/19 from Fee for Intervention.⁵

There are already examples of the HSE coming under significant political and public pressure to take enforcement action where clusters of cases have occurred, for example in relation to the cases reported at a food manufacturer in Cranswick, near Barnsley.⁶

The HSE's current statement on 'Regulating occupational health and safety during the coronavirus outbreak'⁷ confirms that:

As we move into a new phase of supporting a safe return to work across Great Britain, HSE is adjusting the focus of its activities, including visits to business premises and sites which will be conducted in line with social distancing

regulations and guidelines... **HSE... will carry out work to check that appropriate measures are in place to protect workers from COVID-19 [and] will resume targeted proactive inspection work of high-risk industries... [and will] continue to investigate work related deaths across all industry sectors, the most serious major injuries and dangerous occurrences and reported concerns, including those related to social distancing and COVID-19.** (emphasis added)

The HSE's guidance on social distancing⁸ explains that:

Where HSE identifies employers who are not taking action to comply with the relevant public health legislation and guidance to control public health risks, e.g. employers not taking appropriate action to socially distance or ensure workers in the shielded category can follow the NHS advice to self-isolate for the period specified, we will consider taking a range of actions to improve control of workplace risks. These actions include the provision of specific advice to employers **through to issuing enforcement notices to help secure improvements with the guidance.** (emphasis added)

The hierarchy of enforcement action dictates that where possible the HSE should seek to address any perceived shortcomings by providing advice and information rather than resorting to more serious forms of enforcement.

Beyond advice and information, it seems likely that employers' first experiences of more

⁴ <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>

⁵ <https://www.hse.gov.uk/aboutus/reports/ara-2018-19.pdf>

⁶ <https://www.bbc.co.uk/news/uk-england-south-yorkshire-53150467>

⁷ <https://www.hse.gov.uk/coronavirus/regulating-health-and-safety/index.htm>

⁸ <https://www.hse.gov.uk/coronavirus/social-distancing/index.htm>

serious enforcement action will come in the form of improvement or prohibition notices, no doubt accompanied by a Notification of Contravention, rather than immediate prosecution.

As well as being consistent with the hierarchy of enforcement action, this would reflect the potential effectiveness of enforcement notices in securing improvements. It would also reflect the practical reality that the progress of any prosecution would likely be delayed by the backlog of cases building up in the criminal courts.

Key aspects of the law on enforcement notices

Improvement notices

Under section 21 of the Health and Safety at Work etc. Act 1974, an inspector may issue an improvement notice if he or she is of the opinion that a person is contravening one or more of the relevant statutory provisions, or that there has been a contravention in circumstances that make it likely that the contravention will continue or be repeated. The notice must identify the provision(s) in question and the reasons why the inspector is of that opinion. The recipient of the notice must remedy the contravention within the period specified in the notice (which may not be shorter than the 21-day time limit for bringing an appeal).

Prohibition notices

Under section 22, an inspector may serve a prohibition notice if he or she is of the opinion that activities under the control of a person

involve, or will involve, a risk of serious personal injury. The inspector must specify the matters which, in the inspector's opinion, give rise to, or will give rise to, the risk. Where the inspector also considers that there is, or will be, a breach of any of the relevant statutory provisions, the inspector must identify the provision(s) and the reasons why the inspector is of that opinion. A prohibition notice requires the recipient to cease the activities to which the notice relates.

The vast majority of prohibition notices in health and safety investigations specify that they are to take effect immediately, but an inspector may serve a deferred prohibition notice whereby the prohibition takes effect on a date specified in the notice.

It seems likely that deferred prohibition notices will be used more widely in the context of Covid-19,⁹ since service of a deferred notice would permit an inspector to obtain the improvements sought under threat of prohibition, and would have the advantage (for the inspector and the dutyholder) that there would be an opportunity for the inspector to withdraw the notice once the improvements are made, without the need for an appeal.

Withdrawal and extension of notices

An inspector may withdraw an improvement notice or a deferred prohibition notice or may extend the time for compliance. There is no power to withdraw or extend an immediate prohibition notice.

Appeals

The recipient of a notice can appeal to the employment tribunal, which may cancel the notice or affirm it, if necessary with

⁹ At present the only situation referred to in the HSE's Enforcement Guide where service of a deferred prohibition notice would be appropriate is where stopping the activity immediately would introduce additional risks, but there is no reason why the Enforcement Guide could not be updated to reflect new circumstances: <https://www.hse.gov.uk/enforce/enforcementguide/notices/notices-types.htm>.

modifications. Whether the notice is an immediate or deferred prohibition notice or an improvement notice, any appeal must be brought within 21 days. This strict time limit can only be extended if it was not reasonably practicable to lodge the appeal within time: *London Borough of Wandsworth v Covent Garden Market Authority* [2011] EWHC 1245 (QB).

An appeal automatically suspends an improvement notice pending determination of the appeal. A prohibition notice is suspended only if the tribunal so directs, and then only from the giving of that direction. Breach of a notice that has not been suspended is a criminal offence.

Test on appeal

The leading authority on appeals against enforcement notices is the decision of the Supreme Court in *Chevron North Sea Ltd* [2018] 1 W.L.R. 964. An inspector carrying out an inspection of an offshore installation served a prohibition notice because the metal stairways and staging on an evacuation route were corroded and he was of the opinion that there was a risk of serious personal injury from falling through them. Chevron subsequently obtained an expert report which showed that in fact there was no such risk and appealed the notice.

The Supreme Court confirmed that an employment tribunal hearing an appeal is not limited to reviewing the reasonableness of the inspector's opinion. The appeal is not against the inspector's opinion, but against the notice itself. In the case of an appeal against a prohibition notice, the tribunal had to focus on the risk, if any, existing at the time the notice was served.

The Supreme Court held, overturning the decision of the Court of Appeal in *Rotary Yorkshire Ltd v Hague* [2015] EWCA Civ 696, that the tribunal was not limited to considering material that was, or should have been, available to the inspector. The tribunal had been entitled to take Chevron's expert report into account and it had been correct to cancel the notice.

The decision in *Chevron* leaves some interesting and potentially important questions unanswered. For example, the tribunal may conclude on the evidence before it (which, in light of *Chevron*, may include evidence that was not available to the inspector) that the contravention (in the case of an improvement notice) or the risk of serious personal injury (in the case of a prohibition notice) did indeed exist. It is not certain whether that is the end of the matter, or whether the tribunal is entitled (or even obliged) to go on to consider whether it would have issued a notice at the time the inspector did, taking into account factors such as the impact of serving an enforcement notice, the availability of other enforcement options, and proportionality.

Enforcement notices in the context of Covid-19

It is essential that employers carry out a Covid-19 risk assessment. A Covid-19 risk assessment is listed as the first of the Government's '5 steps to working safely',¹⁰ which explicitly cross-refers to the general HSE guidance on risk assessment¹¹ and on 'Working safely during the Coronavirus (COVID-19) outbreak'.¹² The risk assessment process should include, where

¹⁰ <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/5-steps-to-working-safely>

¹¹ <https://www.hse.gov.uk/simple-health-safety/risk/index.htm>

¹² <https://www.hse.gov.uk/coronavirus/working-safely/index.htm>

necessary, a review of existing risk assessments and safe systems of work.

The HSE guidance on Covid-19 risk assessment states that:

As an employer, you must protect people from harm. This includes taking reasonable steps to protect your workers and others from coronavirus.

As Simon Antrobus QC and John Cooper QC have highlighted in their previous articles, guidance of this sort appears to assume that Covid-19 is to be regarded as a workplace risk notwithstanding that it is not a risk created by the employer or which is under the employer's control, and this approach appears to be at odds with some of the guidance relating to more specific regulations, such as COSHH and RIDDOR.¹³

Nonetheless, on a workplace inspection, an inspector will inevitably ask to see the employer's Covid-19 risk assessment. The guidance states that:

You must identify what work activity or situations might cause transmission of the virus... [and] act to remove the activity or situation, or if this isn't possible, control the risk.

Although the guidance cross-refers to the HSE's example template risk assessments,¹⁴ these do

not so far include an example Covid-19 risk assessment (whether for any specific industry or more generally) or a suggested list of factors for employers to consider.¹⁵

There is considerable emphasis on the importance of engaging with employees¹⁶ and on the expectation that businesses with 50 or more employees will publish their risk assessments on their website.¹⁷ It may well be that the HSE will focus their attention, at least in the first instance, on businesses that have either not published a risk assessment or whose risk assessment appears to be less than thorough.

Businesses would no doubt be well-advised to identify the guidance they have taken into account when preparing their risk assessments and choosing and implementing their control measures, and to confirm that they have cooperated closely with their workforce (and, where applicable, trade unions).

Likewise it would be sensible to carry out regular and detailed review of the risk assessments to take account of any changes to the law, guidance, or understanding of the effectiveness of possible controls.

This would be consistent with the approach to questions of safety and reasonable practicability as explained in *Stokes v Guest, Keen and Nettelfold (Bolts and Nuts) Ltd* [1968] 1 W.L.R.

¹³ Simon Antrobus QC and John Cooper QC, 'What are the Health and Safety Responsibilities of Employers for COVID-19?' <https://www.crownofficechambers.com/2020/05/06/what-are-the-health-and-safety-responsibilities-of-employers-for-covid-19/>, and 'COVID-Secure – The New Dawn of Regulatory Enforcement' <https://www.crownofficechambers.com/2020/05/20/covid-secure-the-new-dawn-of-regulatory-enforcement/>.

¹⁴ <https://www.hse.gov.uk/simple-health-safety/risk/risk-assessment-template-and-examples.htm>

¹⁵ There is a high-level example risk assessment on the HSE Northern Ireland website: <https://www.hseni.gov.uk/publications/example-covid-19-risk-assessment-template>.

¹⁶ <https://www.hse.gov.uk/coronavirus/working-safely/talk-to-workers.htm>

¹⁷ For example, <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work>

1776, and as applied in *Baker v Quantum Clothing Ltd* [2011] 1 W.L.R. 1003:

“... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, **where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it...** He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent. (emphasis added)”

This is perhaps all the more important in light of the announcement of the new ‘1 metre plus’ approach, whereby 2 metre distancing may be relaxed provided that other control measures are in place.

A business might well be called upon to explain why it considered that 2 metre social distancing was not achievable, and why it considered that, applying the Prime Minister’s test, the “mitigations [the employer put in place] would make ‘1 metre plus’ broadly equivalent to the risk at 2 metres, if those mitigations are fully implemented”.

Where the employer decides not to follow some aspect of the guidance it will need to be ready to explain why. The same will be true of

any decision, at a later stage, to change or discontinue a control measure.

It is impossible to overlook the difficulties faced by employers in circumstances where so much about the risk and the relative effectiveness of possible control measures is unknown. Those difficulties must be all the greater when (to quote the Prime Minister again) even the experts “cannot give a precise assessment of how much the risk is reduced”.

That said, an employer is, as ever, likely to be on stronger ground if it can demonstrate that it carefully considered these questions at the time (for example, by reference to a risk assessment and/or revised safe systems of work) than if it is in the position of seeking to justify its decisions in retrospect.

Responding to an enforcement notice

The nature of Covid-19 risk

As noted above, there is a serious question about whether Covid-19 is properly to be regarded as a workplace risk within the scope of the 1974 Act and the associated regulations (as opposed to an everyday risk). That becomes all the more important when one considers the reverse burden of proof that attaches to the general duties, and the possibility of individual liability, particularly for smaller businesses where directors and senior managers may be more closely connected to activities ‘on the ground’.

The issuing of a notice

The power of an inspector to issue an enforcement notice depends on the inspector being of the opinion required, namely that there is or will be a contravention of a relevant statutory provision (for an improvement notice) or that there is or will be a risk of serious

personal injury. For Covid-19, it may be that a risk of transmission of the virus is *by definition* a risk of serious personal injury, given the potentially serious consequences of infection. The inspector would also have to be satisfied that service of a notice would be appropriate in the circumstances, bearing in mind the hierarchy of enforcement and the other enforcement options available. On what basis will the inspector come to his or her opinion on these matters?

The HSE guidance in relation to RIDDOR, for example, states that the employer should make a report where there is “*reasonable evidence*” that the exposure was work-related, but there is little explanation of what this means in practice. Where an inspector attends in response to a report that one or more employees have fallen ill with the virus, how is the inspector to determine whether this was due to the way in which work activities were being carried out, or to the inadequacy of control measures, rather than to the fact that the virus is in general circulation in the population?

Similarly, where an inspector apprehends a risk of serious personal injury, how is the inspector to distinguish the risk resulting from any perceived shortcomings from the risk presented by the mere fact of workers coming together in the workplace (which is, after all, specifically authorised by the Government guidance)?

Inspectors, faced with what appear to be significant risks, and without all of the information that they might require to come to a final decision, may feel that the safest course is to issue a notice. In doing so they might draw some comfort from *Chevron*, in which the Supreme Court observed:

“

It is important to recognise that it is no criticism of the inspector when new material leads to a different conclusion about risk from the one he reached. His decision often has to be taken as a matter of urgency and without the luxury of comprehensive information. There is no reason for [the inspector] to be deterred from serving the notice... Indeed, he might just as well feel less inhibited about serving it, confident that if it turns out there is in fact no material risk, the position can be corrected on appeal.

”

Appeals

On an appeal against a Covid-19-related notice, the tribunal would have to decide whether there was a contravention or a risk of serious personal injury at the time the notice was issued. The tribunal would be entitled to take into account evidence that was not available at the time.

Given the ever-changing picture, this could well include guidance issued, research published, or test results received after the notice was served. Such material might confirm that the notice was entirely justified, or it might undermine the basis of the inspector’s opinion.

Engagement with inspectors

In the first instance, employers will no doubt seek to persuade inspectors that they do not need to issue a notice (in addition to any advice or information, or any Notification of Contravention) because the business will take any steps reasonably required.

If that is not possible, they may wish to invite the inspector to serve an improvement notice or a deferred prohibition notice, since the inspector would then have the opportunity to withdraw the notice if persuaded that the necessary action had been taken. An immediate prohibition notice, of course, provides the least flexibility of all.

It appears from the HSE's register of enforcement notices that to date only one improvement notice has been issued regarding Covid-19 and that no prohibition notices have yet been issued. The improvement notice was issued to a construction company for an alleged contravention of section 3(1) "*as you have not implemented measures to prevent the spread of COVID-19 in that you have not followed Public Health England's advice*". We are aware of another case in which a local authority has issued a deferred prohibition notice to a large retailer for "*failure to maintain, so far as reasonably practicable, social distancing measures*".¹⁸

That there may have been relatively few notices so far may be a reflection of the fact that there have been fewer inspections than normal during the lockdown period, and that regulators have been willing to give employers some leeway in these early stages.¹⁹ It is perhaps to be expected that they will take a firmer stance in the future, particularly if there is increased political and public pressure or if the number of cases were to begin to rise again.

Protective appeals

Employers who are served with an enforcement notice would be well-advised to consider appealing the notice to protect their position given (among other factors) the possibility that subsequent developments may undermine the notice, the fact that breach of a notice is a criminal offence, and the potential impact of a decision not to appeal on any future prosecution (it might be construed as an acceptance of the matters stated in the notice, and potentially admissible at trial as bad character evidence and/or at sentence as an aggravating feature). In the case of an improvement notice, the notice would be automatically suspended pending the hearing of the appeal.

Overall, employers whose approach is closely tied to the guidance, and who engage openly and actively with the HSE and local authorities as required, ought to have the greatest chance of avoiding enforcement notices even where shortcomings are identified. It remains to be seen how willing regulators will be to give businesses an opportunity to respond to intervention before taking such strong enforcement action.

¹⁸ It is possible that further enforcement notices have been served by local authorities, but there is no centralised register.

¹⁹ It may also be, given current circumstances, that the Register is not fully up to date.