



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE ELLIOTT  
**MEMBERS:** MS J FORECAST  
MR P MILLS

**BETWEEN:**  
Mr L Malhomme de la Roche  
Appellant

AND

Mr Fu Lee an Inspector of the Health and Safety Executive  
Respondent

**ON:** 24 January 2018  
**Appearances:**  
**For the Claimant:** In person  
**For the Respondent:** Mr J Meyer, solicitor

## **JUDGMENT**

The unanimous Judgment of the Tribunal is that the appeal is dismissed and the Prohibition Notice is affirmed.

## **REASONS**

1. This decision was given orally on 24 January 2018. The appellant requested written reasons.
2. By a claim form presented on 23 June 2017, the appellant Mr Leon Malhomme de la Roche appealed against a Prohibition Notice issued on 2 June 2017 in respect of works carried on at property known as The Sawmills, Dunsthil Road, Earlsfield, London SW18 4QL. The respondent contests the appeal.

### **The issue**

3. The issue for the tribunal is the hearing of the appeal against the Prohibition Notice.

### **Witnesses and documents**

4. The tribunal heard from the Inspector of Health and Safety Mr Fu Chaing Lee and from the claimant.
5. There was a bundle of documents of just over 250 pages. The documents and statements were very well prepared.
6. The parties agree that the correct name of the respondent is “Mr Fu Lee an Inspector of the Health and Safety Executive” and the record is amended accordingly.

### **The background**

7. The claimant owns the building known as The Sawmills, Dunsthil Road, Earlsfield, London SW18. It consists of three units which were undergoing renovation works.
8. On Friday 2 June 2017 the respondent’s Inspector, Mr Fu Chiang Lee, served a Prohibition Notice number FCL/020617/01 on the appellant saying that the works on Unit 3 involved a risk of falling through unprotected openings and edges a distance liable to cause personal injury in contravention of Regulation 6(3) of the Work at Height Regulations 2005. The Inspection considered that the appellant had not taken sufficient steps to prevent persons from falling.

### **The parties’ respective cases**

9. The appellant’s position was that no work was being carried out at a height, liable to cause personal injury when the notice was served. The appellant said that no work was being carried out in the vicinity of any unprotected opening.
10. The appellant said that work to one of the openings was to remove concrete shuttering, which also formed a safety barrier and replace it with scaffold boards placed across the opening and a platform below through which materials and tools could be passed up and down between the levels. He said that the work took place from underneath the opening and it was protected continuously.
11. The appellant said that the purpose of the work on 2 June 2017 was to tidy up Unit 2.
12. The appellant’s case is that a full safe system of work was in place including a Health and Safety Policy and Procedures, a Construction Phase Plan, Method Statements, Risk Assessments and a series of safety measures to ensure a safe place of work. These measures included barriers, fences and a safety fall arrest net and platforms on the basement floor or riverbed.
13. The respondent inspector formed his opinion on discussions with the appellant and his own observations that the hierarchy of control mechanisms mandated by the Work at Height Regulations 2005 were not being followed. His observations included:
  - a. the lack of edge protection around the two openings in the concrete slab which presented a risk of persons falling from height into the

basement area below (i) one of these openings, at the far end of the site adjacent to the river, was only partially covered by wooden boards. There was one ladder leading into the basement through that opening and (ii) the second opening was adjacent to the site entrance to the left. There were ladders leading into the basement through this opening too, although the respondent's understanding was that these were not being used to provide access.

- b. A risk of falling from height from the metal framework of a balcony that was to be installed over the adjacent river, whilst there were wooden boards resting over the metal beams there were gaps between the wooden boards and the metal framework which were large enough persons to fall through.
14. The respondent did not accept the appellant's assertion that no work was being carried out in the physic vicinity of any unprotected openings. During the inspector's time on site, the appellant informed him that persons were either removing materials from the basement or moving materials into the basement; the only means of access to and egress from that area was via the openings described in paragraph 11(a) above. The inspector photographed two persons accessing the area via the ladder described at paragraph 11(a)(i). Those persons, as well as persons walking across the concrete slab towards the unprotected openings, were, in his view, at risk of falling and sustaining serious injury.

#### **Findings of fact**

15. The appellant is an engineer and property developer. He has a degree in mechanical engineering sponsored by British Aerospace. He has been a project manager and has experience in the aerospace industry including health and safety responsibility, quality audits and training.
16. The site in question comprises three riverside units on the River Wandle and was being converted into office space for small businesses. The unit in question in these proceedings was unit 3 and the issue concerns two openings in the ground floor level leading to the basement. There was also a steel framed balcony partially overhanging the river.
17. The HSE received a complaint from a member of the public who was concerned about safety at the site. The member of the public was concerned, amongst other things, about the safety of passers-by and in oral evidence the Inspector told us that this included sparks flying from steel cutting equipment near to the perimeter and there was a nearby nursery which gave rise to concerns. The member of the public forwarded some photographs by email and these commenced at page J212 of the bundle. Page J212 showed gaps and haphazard boarding which we find was likely to and did cause concerns to a member of the public.
18. Mr Fu Lee's principal inspector assigned to him the task of making an inspection at the site. Mr Fu Lee attended site unannounced on Friday 2 June 2017. It is not in dispute that he spent an hour and a half on site in the middle of the day. He met with the appellant and had a discussion with him, they made a walking inspection of the site, he took 9

photographs and made notes both before and after issuing a Prohibition Notice. His notes started at page J183.

19. Mr Fu Lee, whom we will refer to as the Inspector, has worked for the HSE in his current role since November 2013. When he went to site he had therefore been in this role for just over 3.5 years.
20. The Inspector was told by the appellant that there were five labourers working on site that day. The Inspector observed two of those labourers. The labourers were engaged directly by the appellant who did not use a building contractor for this project. There was also no foreman engaged on site. The appellant therefore had direct supervisory responsibility.
21. At the time the Inspector visited it is undisputed that the appellant was working in his on-site office.
22. The matters observed by the Inspector which were of concern to him were two unprotected openings in the ground floor concrete slab leading to the basement. He observed two construction workers accessing the basement from a ladder.
23. We saw from his photographs on page 5 of his statement a worker at the top of a ladder and we were told and could see and therefore find that he had an extension lead in his left hand. He therefore only had one hand free to hold the ladder and/or steady himself. The appellant confirmed that anyone on approach to the ladder would only have the boarding, such as it was, to help prevent a fall before reaching the ladder. In the Inspector's view the boarding left gaps that were large enough to allow a person to fall through and we find from his photographs that this was the case.
24. We also saw on page 6 of the Inspector's statement a photograph of another worker (wearing different coloured clothing) who was further down the same ladder. All photographs were in much larger copy in the main bundle.
25. Next to another large opening close to where we saw the two workers on the photographs, was a traffic cone adjacent to an unprotected edge. The tribunal asked the appellant about the cone. He said "*I would never do that. One of my operatives did that. I would never knowingly have left the building in that condition.*" He said he would not have left it unattended. We could see two other traffic cones in the photograph on page 6 of the Inspector's statement (shown also on page J191).
26. We find that the cones were in position when the workers were using the ladder, prior to the Prohibition Notice being served.
27. The Inspector also noted that the balcony overhanging the river was incomplete and there were gaps between the wooden boards and the metal framework. The gaps were large enough for persons to fall through and the gaps had unprotected edges. We saw this in the photograph in his statement at page 8.
28. At page 19 of the appellant's statement we saw a worker who was unscrewing bolts and putting them back. In the photograph we could see the worker standing on a trestle platform comprising four thin boards,

placed in the river. The appellant was asked what was to prevent the worker from falling into the river. He said there was nothing, other than that he could steady his hand.

29. The HSE Guidance which applies to working from height was shown at pages J035 (in a diagram) and page J226 which formed part of the guidance relating to construction work. The other Guidance starting at page J027 was specifically in relation to roof work. Both sets of guidance set out a hierarchy of control measures, starting with avoiding working from height, moving on to prevention measures, through to minimising or mitigating risks. The appellant was aware of these measures and the requirement to work through them stage by stage, from avoidance, through prevention to mitigation.
30. One of the measures the appellant used to minimise the risks of working from height was the placing of aquacel blocks underneath the relevant openings. They were intended to provide a stable working platform. The appellant's view is that they would also prevent the risk of serious personal injury in the case of a fall from above by reducing the length of the drop.
31. Aquacels are made from high density plastic, strong enough to withstand the weight of a lorry. They come in blocks of 100cms x 50cm by 40cm and can be assembled in various configurations. On page 5 of the appellant's statement we saw an aquacel below one of the openings in question, at 80cm in height. The surface area was considerably smaller than the opening above. In answer to tribunal questions the appellant said that the gap extended by a metre to 1.5 meters beyond what was shown in the photograph which was larger than the aquacel in any event.
32. The appellant said that he considered that the aquacels were safer than a ladder and safer than a trestle for short duration work of not more than half an hour. According to the HSE Guidance at page J056, short duration work means tasks that are measured in minutes rather than hours. He considered it was not reasonable or practicable to hire a platform with safety rails for short duration work. If items are being passed up and down there is a worker at the top and one at the bottom. We find that there was more than one item that needed passing up and down and the safety risk was present to both workers.
33. We find that if anyone fell from the opening, the aquacel would not prevent the risk of serious personal injury. It is a hard substance with hard square corners. The workers we saw in the photographs were not wearing hard hats. If a worker's head or neck met the corner of the aquacel in a fall we have no hesitation in finding that this is likely to result in serious personal injury.
34. There were no safety nets in use on 2 June 2017. The appellant said he had safety nets but they were in bags put away and were not in use. They had been used in previous work on the site.
35. At page 9 of the appellant's statement we saw a stepped formation of aquacels under an opening. The appellant was asked what was to stop a person passing things down from the opening, from falling. The

appellant said that “typically there would be a handrail”. He was asked if there was a handrail in place and he said there was not, but they were “in the process” of putting one there. He accepted that there were none there when the Inspector attended.

36. The appellant accepts that the situation on site presented a hazard but his case was that because no relevant work was going on at the time, there was no risk. With regard to the aquacels he accepted that there was a risk of injury but said that it was reduced or halved by the presence of the aquacels. The appellant denied that materials were being passed up or down the ladder at the time of the inspection. However, we find that he cannot have known this for certain because he accepts that he was in his office at the time the Inspector arrived.
37. He could said what typically should have happened and for example that he would not have condoned the presence of the traffic cones indicating the unguarded openings. However, there were no handrails and there were 3 traffic cones present.
38. The respondent said that appellant had concentrated on the lower end of the hierarchy with mitigation measures rather than working step by step through the hierarchy with a view to avoidance and prevention. The appellant said that his workers knew the site and what they needed to do to stay safe. He accepted at the outset of his cross examination that some of his workers were less experienced than others and needed more supervision.
39. The appellant’s case is that all that was going on at the site on 2 June 2017 was to make the site safe and to prepare it for the next stage of works. He said that immediately after the Inspector’s visit a handrail was put in place and other measures were carried out which are photographed in his witness statement.

### The law

40. Section 2(1) of the Health and Safety at Work Act 1974 provides that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
41. Section 3(1) provides that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.
42. The material parts of sections 21 and 24 provide as follows:
  21. *If an inspector is of the opinion that a person—
    - (a) is contravening one or more of the relevant statutory provisions; or
    - (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated,he may serve on him a notice (in this Part referred to as “an improvement notice”) stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period within which an appeal against the notice can be brought under section 24) as may be specified in the notice.*

24. (1) *In this section "a notice" means an improvement notice or a prohibition notice.*  
(2) *A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an [employment tribunal]; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.*

43. Section 22 sets out the circumstances in which an inspector may serve a Prohibition Notice, as follows:

(1) *This section applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.*

(2) *If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as "a prohibition notice").*

(3) *A prohibition notice shall—*

(a) *state that the inspector is of the said opinion;*

(b) *specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;*

(c) *where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and*

(d) *direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied. ...*

44. The meaning of "risk" in this context has been held to mean "material" as opposed to "trivial or fanciful" - ***R v Chargot 2008 UKHL 73***. It conveys "*the idea of a possibility of danger*"; actual danger is not required - ***R v Board of Trustees of the Science Museum 1993 ICR 876***.
45. Regulation 6(3) of the ***Work at Height Regulations 2005 (SI 2005/735)*** provides that where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.
46. The tribunal should focus on the moment the notice was issued, assess the risk at that time and consider whether it would have issued the notice. The tribunal should have due regard to the view of the Inspector and the Inspector's expertise and assess the risk as at the relevant date - ***Chilcott v Thermal Transfer Ltd 2009 EWHC 2086 (Admin)*** - Charles J. Are you

47. The Tribunal must put itself in the putative position of the inspector and decide what improvement notice, if any, is justified. It must then affirm, modify or cancel the Notice in accordance with its views. That necessarily involves forming its own view as to the cause of any breach of duty which it has found, because the purpose of the improvement notice is to identify what should be done to prevent or minimise the risk of such a breach occurring in the future, so as to fulfil the statutory purpose of promoting health and safety at work - *MWH UK Ltd v Wise 2014 EWHC 427 (Admin)* – Popplewell J.

### Conclusions

48. We remind ourselves following *Chilcott* that the test we have to apply is to focus on the moment the Notice was issued and we must assess the risk at that time and consider whether we (the tribunal) would have issued the Notice. We do not look at matters with the benefit of hindsight or the measures that were put in place immediately after the Inspector's visit.
49. We put ourselves in the putative position of the Inspector who spent an hour and a half on site, did a walking inspection, spoke with the appellant, took photographs and made contemporaneous notes and witnessed two different workers accessing the basement via a ladder in one of the openings.
50. The Inspector formed the view from his observations that there was a risk of serious personal injury and this led him to serve the Prohibition Notice.
51. We have considered what we would have done in his shoes. We would have had no hesitation in following the same course of action in issuing a Prohibition Notice.
52. We find that there was a material risk to any one of the 5 labourers on site, or anyone else visiting site, from falling through more than one unprotected opening, which had no safety or guide rails and which had unprotected edges. There was also a danger of falling into the river from the balcony structure with a similar lack of protection. We find that placing traffic cones next to a large unprotected opening is completely unacceptable. There was a total of three cones in a single photograph.
53. The appellant agreed by saying he would never have put them there and would never have left the building in that condition. Nevertheless that was the condition that the Inspector found on Friday 2 June 2017. There was a total of three unprotected openings at the same time. It was not the case of one opening being addressed at a time. As the appellant would not have agreed to the cones being placed on site, it tells us that at least one of his labourers was sufficiently concerned at the risk to place traffic cones next to the unprotected openings.
54. We agree with his course of action in issuing the Prohibition Notice.
55. Accordingly we dismiss the appeal and affirm the Prohibition Notice.



**Case no: 2301704/2017**

**Employment Judge Elliott  
Date: 24 January 2018**