Case Numbers: 3303920/2020, 3303923/2020
and 3304826/2020 (V)

EMPLOYMENT TRIBUNALS

Appellants		**Respondent**
(1) Mr L Griffiths (2) Mr B Wilcock (3) Indespension Limited	v	Northampton Borough Council

Heard at: Watford, by Skype **On**: 23 June 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Appellants: Mr M Hayton QC, of counsel; Mr J Green, solicitor
For the Respondent: Mr J Chadwick, solicitor

RESERVED JUDGMENT

(1) By consent, the appeals of the first and second appellants, Mr Griffiths and Mr Wilcox, are allowed, and the prohibition notices against which they appealed are cancelled with no order for costs.

(2) The appeal of the third appellant, Indespension Limited, is dismissed.

The appeal and the manner in which it was conducted

1 These three joined cases are appeals under section 24 of the Health and Safety at Work etc Act 1974 ("HASAWA 1974") against prohibition notices, issued under section 22 of that Act by an inspector employed by the respondent, Ms Karen Young, on 10 March 2020. The hearing was listed to be heard by an Employment Judge sitting alone and was intended to occur on 9 June 2020, but it was postponed by me on the application of the respondent on the basis that (1) the hearing was no longer urgent as the respondent had put in place steps designed to prevent a recurrence of the circumstances which had led to the appealed notices being issued and (2) it was thought that the case had settled. It

subsequently became clear that the case had not settled, although the respondent had agreed to the cancellation of the prohibition notices issued against the first and second appellants. On 9 June 2020 I re-listed the substantive hearing. The intended new date was 22 June 2020. In fact, that date clashed with another one in my diary, of which I was not aware on 9 June 2020, and the hearing occurred instead on 23 June 2020.

2 The hearing was an urgent hearing, and was listed to take place by video, using the internet and appropriate software in the form of CVP software. The reason for the hearing not being held in person was, as everyone was aware, the then-current national response to the Covid-19 pandemic.

3 Notice of the hearing in public was, I understand, put on the relevant Her Majesty's Courts and Tribunals' Service website. That was notice that the hearing was going to take place via CVP. I started the hearing shortly before the allotted time of 10:00, and Mr Green and Mr Hayton were able to attend it and participate in it fully, but Mr Chadwick and Ms Young (who was going to give evidence) could not do so. They were able to see and hear Mr Green, Mr Hayton and me, but we could not see them, and they could not speak to us, using the CVP software.

4 I left my web browser with the CVP hearing on it open for the next 30 minutes and tried to enable the hearing to take place via first Teams and then Skype for Business. The former would not work with Mr Chadwick's and Ms Young's computers, as they had, they said (via communications made otherwise than via CVP) only Skype on their computers.

5 I was able to start the hearing using Skype instead of CVP, and Mr Chadwick and Ms Young were eventually (just before 10:50) able to join the hearing using Skype. I had to close my CVP hearing link in order to be able to use my webcam on Skype. By the time I did that, at 10:32, no member of the public had asked to join the CVP hearing. In the circumstances, I concluded that it was both in the interests of justice and proportionate to conduct the hearing using Skype, albeit that no member of the public could have joined that hearing.

6 I then conducted the hearing, sitting alone. After the hearing had ended, and after I had started to deliberate, I realised that the hearing should have been listed to be heard by a full tribunal of three. On 24 June 2020, I therefore ensured that the parties were written to by the tribunal's staff, pointing that out and stating that there were now three alternatives: (1) the parties agreeing in writing to me continuing to determine the case without lay members, (2) me re-hearing the case, but this time sitting with lay members, and (3) the appeal being put before a freshly-constituted tribunal. The parties (in practice, there were now only two) both subsequently stated that they were content for me to continue to determine the case without lay members. There was a delay before their responses were put before me, and I was then unable for practical reasons to return to my

deliberations until this month (September). I apologise to the parties for the delay in the issuing of this judgment.

References below to "the appellant"

7 Given that the first and second appellants were not present or represented (which they did not need to be, given that the respondent had agreed to the cancellation of the prohibition notices issued against them), I refer below only to the third appellant, and in doing so, I refer simply to "the appellant".

The evidence which I heard

8 I heard oral evidence from Ms Young only. The appellant adduced no oral evidence and relied on only documentary evidence.

A summary of the circumstances which gave rise to the appealed prohibition notice

9 The background to the appeal was helpfully summarised in the skeleton argument put before me by Mr Hayton on behalf of the appellant in the following manner:

> '3. The Appellant, IL, is based in Bolton but has retail branches including that at Northampton. The business involves the selling, hiring, repair, refurbishment and servicing of trailers for vehicles and the fitting of towing equipment including tow bars.
>
> 4. On 27 February 2020, an employee of IL, Barry Goulden, sustained an amputation of his little finger and lacerations to his ring and middle fingers on his right hand whilst assisting a colleague, Mr Wilcock, who was cutting a sheet of wood using a handheld powered circular saw. The saw belonged to Mr Wilcock despite the fact that there was a company owned saw on site. The wood that was being cut was securely clamped in two places to wooden pallets that were at the site and were being used as temporary work benches.
>
> 5. A report was made of this incident pursuant to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 ("RIDDOR"). Following this report the Respondent attended at the premises and in due course issued Prohibition Notice against IL which is now the subject of this Appeal.'

The appealed prohibition notice

10 The appealed prohibition notice was dated 10 March 2020 and was copied at pages 16-17 of the respondent's bundle. The notice's terms were these:

"I, Karen Young, one of the Health and Safety Inspectors of Northampton Borough Council being an Inspector appointed by an instrument in writing made pursuant to Section 19 of the said Act and entitled to issue this notice, hereby give you notice that I am of the opinion that the following activities namely:–

cutting of materials using a circular saw on a temporary work platform

which are under your control at Indespension, 34 Rothersthorpe Crescent, Northampton NN4 8JD involves a risk of serious personal injury and that the matters which give rise to the said risks are:–

The working practices for cutting materials using a circular saw on a temporary work platform such as stacked pallets, with a second person holding the material whilst the saw is in operation exposes the operator and second person to risk of injury of laceration or amputation from exposure to the saw blade or debris ejected from the saw

I am further of the opinion that the said matters involve contraventions of the following statutory provlsions:–

Health and Safety at Work etc Act 1974 section 2 (2)(a)
Provision and Use of Work Equipment Regulations 1998 Regulation 4

because:–

you have not maintained plant and systems of work that are safe or provided suitable work equipment that is so far as is reasonably practicable, safe

and I hereby direct that the said activity shall not be carried on under your control immediately unless the said contravention(s) and matters have been remedied.

I further direct that the matters specified in the schedule which forms part of this notice shall be taken to remedy the said contravention(s) or matters."

11 The Schedule to that notice was in these terms:

"Provide a safe system of work for cutting materials, including provision of a suitable workstation to allow the material to be adequately secured and supported and suitably located to prevent any risk of injury to operators or other persons.

or

Any other equally effective measure subject to the prior approval of the Health and Safety Inspector."

The reasons stated on the ET1 form for appealing

12 Both of the notices served on the individual appellants, Mr Griffiths and Mr Wilcox, were challenged in the ET1 forms initiating the appeals on this basis:

> "The Notice was handed to me (pre-typed) at the end of a day of the Inspector interviewing me and colleagues at a time when it was also stated that an identical notice would be served on my employer. The Notice is invalid because it seeks to impose a duty on me as recipient of the Notice which I understand can only be imposed on employers. That means the Notice is invalid and in addition, it was unreasonable and unnecessary for any such formal action to be taken against me without first having asked me about my status. If that had been done, the Inspector would have realised that the Notice was wrong and in all the circumstances would not have served it."

13 The notice which was the subject of the appeal which I heard on 23 June 2020 was appealed for these reasons (which I quote precisely, i.e. without correcting the textual errors), which were stated in the ET1 form:

> "The Notice was served on Indespension Limited on 10/3/2020 (Ref: WK/202004792A) following a day of the Inspector interviewing two members of staff. The Notices are invalid because they seeks to impose the same duty on Indespension and requirments as those required of the employees. that means the Notice is invalid and in addition, it was unreasonable and unnecessary for any such formal action to have be taken without first having contacted the company to seek clarification and if that step had been undetaken the inspector would have relaised the notices were wrong and in all the circumstance would not have taken the actions that she did."

The basis of the appeal by the time the appeal was heard by me

14 By the time that the appeal was before me, the appellant's position was that the prohibition notice dated 10 March 2020 which was served on the appellant, of which I have set out the terms in paragraphs 10 and 11 above, should be cancelled because (and I quote from the skeleton argument of the appellant):

> '12. In this case, IL has, in the aftermath of the incident that led to the injury to Mr Goulden, undertaken to ensure that no work of any sort involving the use of circular saws will be carried out at any of IL's branches. The work that the Inspector formed the opinion would give rise to a risk of

serious injury is, therefore, not "likely to be carried on" in the future; in fact, the contrary is true.

13. The Tribunal should consider the company's undertakings in considering this appeal and it is entitled so to do'.

15 Mr Hayton specifically accepted that the activity which led to the amputation of Mr Gould's little finger was carried on unsafely. Mr Hayton also said that the appellant was seeking only the cancellation of the appealed notice. Thus, no modification of that notice was sought by the appellant in the event that I determined that the notice should not be cancelled. However, Mr Hayton's skeleton argument included in its final substantive paragraph (number 17) the bald assertion that "the Notice as served upon IL lacks precision and clarity."

The facts

16 The factual basis for the issuing of the notice was not disputed. The only factual matter to which I need to refer in addition to the background which is evident from the above quotations is the "undertakings" to which Mr Hayton referred in his skeleton argument as having been given by the appellant. Those undertakings were at pages 36 and 37 of the appellant's bundle.

17 At page 36 Mr Wilcock and Mr Griffiths had put their signatures (giving by hand the date of 11 March 2020) underneath these words:

> "We, the undersigned, acknowledge that we have been told not to use a circular saw or jig saw and agree not to use a circular saw or jig saw whilst working at Indespension until further notice."

18 At page 37, there was a document with the following text, below which Mr Wilcock and Mr Griffiths had put their signatures, using a handwritten date of 27 April 2020:

> "**<u>Cutting of floorboards</u>**
>
> With immediate effect, circular saws have been taken out of service at all Indespension branches.
>
> It is understood that branches require floorboards to be cut to unique sizes in order to complete trailer servicing or repairs etc. With this in mind, if a floorboard requires cutting, the options are as follows:
>
> 1. Order the floorboard to be pre-cut at Horwich and shipped with your next load.

2. Take the full board to your local timber merchant or saw mill to be cut to the required size.

With both options, there will be associated costs and/or lead times. The costs incurred must be charged to the customer.

As previously advised, all circular saws **MUST** be removed from operation and rendered inoperable immediately. If the circular saw is owned by an employee it must be taken home permanently – confirmation is required that this has been completed. If the circular saw at your branch has been provided by Indespension, it must be returned (for my attention) to Head Office as soon as your branch reopens.

I acknowledge that I have read, understood and will comply with the details and instructions on this letter."

The relevant law

The statutory provisions

19 Section 22 of the HASAWA 1974 provides:

'(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.'

20 Section 24(2) of that Act provides:

> "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."

The applicable case law

21 The manner in which section 24(2) operates was considered by the Supreme Court in *HM Inspector of Health and Safety v Chevron North Sea Ltd* [2018] UKSC 7, [2018] ICR 490 ("*Chevron*"). In that case, the Supreme Court disapproved (and therefore in practical terms overruled) the decision of the Court of Appeal in *HM Inspector of Health and Safety v Rotary Yorkshire Ltd* [2015] EWCA Civ 696 ("*Rotary Yorkshire*"). In paragraph 21 of his judgment in the latter case (with which Tomlinson and Kitchin LJJ agreed), Laws LJ said this:

> 'There is, we are told, so far no decision of this court on the scope of a section 11 appeal [i.e. an appeal under section 11 of the Tribunals and Inquiries Act 1992, which is the route for appealing a judgment such as this one; the appeal is to the High Court and not the Employment Appeal Tribunal] or, indeed, of an appeal against a prohibition notice under section 24(2) of the HSWA. The scope of a section 11 appeal is, in my judgment, the same as that of any other statutory appeal on a point of law only. There is no particular magic in the words, "dissatisfied in point of law", the appellant must show that the Employment Tribunal has perpetrated a material legal error, a misconstruction of a relevant statutory provision, a finding of fact not rationally supportable on the evidence or a procedural error leading to unfairness. All these are very familiar categories.'

22 In both that case and the *Chevron* case, the focus of the court's inquiry was the extent to which an employment tribunal could take into account knowledge which became available after the time when a prohibition notice was issued in deciding whether to allow the appeal against the notice. In both cases, however, the knowledge which later became available concerned only the safety of the activity or equipment at the time of the issuing of the prohibition notice. In *Rotary Yorkshire*, the Court of Appeal decided that in an appeal under section 24 of the HASAWA 1974, a judicial review approach is required to be taken.

23 *Chevron* concerned a prohibition notice issued in respect of steel stagings and stairways providing access to the helideck on an oil rig. The "central facts" were described by Lady Black JSC, with whom the other members of the Supreme Court agreed, in paragraphs 5 and 6 of her judgment:

> '5. The prohibition notice served on Chevron stated that the inspector was of the opinion that there was a risk of serious personal injury because:
>
> > "The steel grating of the stagings and the stairway treads are in a weakened condition because of corrosion which compromises safe evacuation."
>
> 6. Having launched an appeal in May 2013, Chevron arranged in July 2013 for the metalwork which had been of concern to the inspector to be removed from the installation and tested. The results of the testing were set out in an expert report dated March 2014. In short, with the exception of a panel which had been damaged during the inspection by an inspector striking it with a fire fighting axe in order to test the extent to which it was corroded, all the metalwork passed the British Standard strength test, and there was no risk of personnel being injured by falling through it. Without the damage, the damaged panel may well also have passed the test, but the damage made it impossible to determine its safety.'

24 Lady Black described the effect of sections 22 and 24 of the HASAWA 1974 in the following passage:

> '**The framework of the relevant provisions of the 1974 Act**
>
> 10. A prohibition notice directs that the activities to which it relates shall not be carried on unless the matters that, in the opinion of the inspector, gave rise to the risk of serious personal injury have been remedied (section 22(3)(d)). The notice can be drawn up to take effect immediately or at the end of a specified period (section 22(4)). Where the notice is not one with immediate effect, section 23(5) enables an inspector to withdraw it at any time before the date on which it is to take effect. There is no provision for an immediate notice to be withdrawn; it appears that the only way, under the statutory scheme, in which such a notice can be dislodged is by an appeal. A prohibition notice is not automatically suspended by an appeal. However, the appellant may apply to the tribunal for a direction suspending it from the date of the direction until the appeal is finally disposed of or withdrawn (section 24(3)). A public database of notices is kept by the Health and Safety Executive. Notices are entered on the database by virtue of statutory requirements in some cases, and otherwise as a matter of policy. However, registration is deferred to allow for the appeal process and, in the event of a successful appeal, does not take place.

11. It is an offence to contravene a prohibition imposed by a prohibition notice (section 33 of the 1974 Act). This applies in full force to activity during the appeal period except in relation to a period during which the tribunal has directed that the notice is suspended.

The practical effect of a prohibition notice

12. Understandably, the appellant is at pains to emphasise, as an important part of his argument in support of his appeal to this court, that it is vital for inspectors to be able to take prompt and effective action to ensure compliance with the provisions of the 1974 Act. A prohibition notice is a powerful tool in the inspector's hands. It not only enables him to step in when he is of the opinion that a particular activity will involve a risk of serious personal injury, it also improves public safety by encouraging employers to have good systems in place so that they can demonstrate to the inspector that there is no material risk and thereby avoid the disruption of a prohibition notice.

13. The service of a prohibition notice on a business has the potential to do considerable harm to it. Having to cease the activity in question will inevitably result in disruption and is likely also to have a financial cost, but there may be other serious consequences as well, including significant damage to the business's reputation and its ability to tender for contracts. This is reflected in the fact that, according to the appellant, a very common motivation for an appeal against a notice is to avoid registration of the notice on the Health and Safety Executive's public database.'

25 Lady Black then went on to state the issue which arose for determination in the appeal in *Chevron* and the effect of the *Rotary Yorkshire* decision in the following passage:

'**The issue**

14. It is common ground between the parties that a section 24 appeal is not limited to a review of the genuineness and/or reasonableness of the inspector's opinion, but requires the tribunal to form its own view of the facts, paying due regard to the inspector's expertise. It is also common ground that the tribunal should be focussing on the risk existing at the time when the notice was served. These agreed propositions still leave room, however, for the debate about what material the tribunal is entitled to take into account when forming its view of the facts as they were at the material time.

15. The appellant invites us to adopt the reasoning of the Court of Appeal in the *Rotary Yorkshire* case (supra). Rotary Yorkshire were arguing for the

broad interpretation of section 24 supported by Chevron in the present case and the inspector for the more limited interpretation for which the appellant contends. Laws LJ (with whom the other members of the court agreed) said:

> "31. … the question for the inspector is whether there is a risk of serious personal injury. In reason such a question must surely be determined by an appraisal of the facts which were known or ought to have been known to the inspector at the time of the decision. He or she is concerned with the prevention of injury at that time, that is the focus of the provision, which, it should be remembered, contemplates action in a possible emergency. The employment tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector's action.
> …
>
> 34. To accede to [Rotary Yorkshire's] argument would, I think, risk distorting the section 22 function. The primary question for the employment tribunal is whether the issue of the notice was justified when it was done. An inspector may rightly apprehend a risk and be justified in acting on his or her apprehension even though later necessarily unknown events may demonstrate that, in fact, there was no danger. Section 24 is not, in my judgment, to be construed so that it may appear to call in question the propriety of a notice which it may well have been the inspector's duty to issue at the time."

16. This reasoning did not commend itself to the Inner House in the present case. Lord Carloway said, with the agreement of the other two members of the court who also added helpful reasoning of their own:

> "28. The fundamental problem with the approach of Laws LJ is that it prohibits an appeal on the facts in a situation where it can be demonstrated that the facts or information upon which the inspector proceeded were wrong. That is the essence or purpose of many appeals on the facts. In short, there is no sound basis for restricting appeals under section 24 to what would in essence be a form of judicial review of the inspector's opinion. An appeal on the facts is a much wider concept and … it enables an appellant to prove, using whatever competent information is available at the time of the tribunal's hearing on the appeal, that the factual content of the notice was wrong and that, accordingly, however reasonable the inspector's opinion was at the time, had the true facts been known, he would not have reached it."

17. The answer to the issue which has divided the Court of Appeal and the Inner House does not jump out from the wording of section 24, and the matter must therefore be considered in the light of the statutory scheme as

a whole. This leads me to conclude that the Inner House was correct in its interpretation of the section.

18. When the inspector serves the notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the notice comes into existence. However, as it seems to me, when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. Here, as the inspector spelled out in the notice, the risk that he perceived arose by virtue of corrosion of stairways and gratings giving access to the helideck, and the focus was therefore on the state of that metalwork at the time when the notice was served. The tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to a risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must, in my view, be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, 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.

19. 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 him to be deterred from serving the notice by the possibility that, should more information become available at a later stage, his concerns may turn out to be groundless. Indeed, he might just as well feel less inhibited about serving it, confident that if it turns out that there is in fact no material risk, the position can be corrected on appeal.

20. The effectiveness of a prohibition notice is in no way reduced by an appeal process which enables the realities of the situation to be examined by a tribunal with the benefit of additional information. Once served, the notice provides immediate protection, reinforced by the existence of criminal sanctions. It is common ground between the parties that, even if ultimately cancelled by a tribunal, any contravention of the notice prior to cancellation would still be a criminal offence.

21. Furthermore, there does not seem to me to be any reason to suppose that the wider interpretation of section 24 would undermine the role that

prohibition and improvement notices play in encouraging employers to have robust systems in place with a view to demonstrating easily, when an inspection takes place, that no risk exists. A prohibition notice remains in force during the appeal process, unless suspended by the tribunal, and such is the disruption and financial loss that this may cause that employers have plenty of encouragement to do what they can to avoid getting into such a situation in the first place.

22. The appellant argues that permitting the tribunal to look beyond the material available to the inspector will introduce into the appeal process undesirable delay and cost, both financial and in terms of the Health and Safety Executive's human resources, when the aim should be that any appeal is concluded speedily. This does not deflect me from my view as to the correct interpretation of section 24. The appeal must be launched within 21 days and its progress thereafter will be under the control of the tribunal. In any event, the continuing impact of the prohibition notice may well be an incentive for the employer to marshal his case speedily so as to free himself from the notice as quickly as possible.

23. Turning to the situation of an employer in receipt of a prohibition notice, it is clear that there are potent considerations in favour of the wider interpretation of section 24. As the inspector cannot withdraw an immediate prohibition notice, even if he is completely convinced by material produced subsequently by the employer, the only means by which the notice can be cancelled under the statutory scheme is an appeal. Yet if the appellant's interpretation is right, in such a case the appeal process would not dislodge the notice, which would remain in force, with all the attendant disadvantages for the business, even though the perceived risk never in fact existed. Indeed, it is even possible that in some cases, in order to be able to restart the activity named in the notice, an employer might have to carry out works which have been demonstrated to be unnecessary. The appellant argues that, in practice, confining the tribunal's role narrowly would not cause any problems because, provided with convincing evidence that there was in fact no risk, the inspector would recognise that and not seek to enforce the notice, although the notice would still be registered on the public database because, the appellant argues, that is appropriate to reflect the fact that it was correctly served on the basis of the information then available to the inspector. This suggested solution does not, in my view, address the problem. The notice would still have the capacity to damage the reputation of the employer and his ability to do business. Furthermore, it cannot be right, in circumstances such as these, that the employer continues, after his appeal is concluded, to be exposed to the possibility of criminal proceedings, however improbable it is that proceedings would actually be taken. In addition, the appellant's proposal proceeds upon the basis that the inspector is able to accept the evidence put forward subsequently by the employer, but he may not be able to do so.

> In those circumstances, a forum is required in which to determine the continuing dispute between the inspector and the employer or, putting it more constructively and in the spirit of the health and safety legislation, to determine whether the circumstances that concerned the inspector did in fact give rise to a relevant risk. The appeal process provides that necessary forum.
>
> 24. I would therefore interpret section 24 of the 1974 Act as the Inner House did. In my view, on an appeal under section 24, the tribunal is not limited to considering the matter on the basis of the material which was or should have been available to the inspector. It is entitled to take into account all the available evidence relevant to the state of affairs at the time of the service of the prohibition notice, including information coming to light after it was served. I would accordingly dismiss the appeal.'

26 The circumstances of the *Rotary Yorkshire* case were comparable to those in the *Chevron* case. In the *Rotary Yorkshire* case, the circumstances which gave rise to the appealed prohibition notice were shown after the notice was issued to have been safe at the time when the notice was issued: the notice in the *Rotary Yorkshire* case was issued in respect of some electric cabling which might or might not have been 'live', and which was shown after the notice was issued not to be 'live', and not to have been 'live' at the time of the issuing of the notice.

27 There is an appellate case concerning a situation which was much more comparable to the situation in issue here. That case is *Railtrack plc v Smallwood* [2001] EWHC Admin 78, [2001] ICR 714 ("*Smallwood*"), decided by Sullivan J (as he then was). That case concerned the situation which gave rise to a serious train crash (at Ladbroke Grove). The crash occurred because of a train passing through signal SN109 "at danger" (as described by Sullivan J in paragraph 3 of his judgment). The prohibition notice prevented Railtrack from carrying on activities which it itself had, after the crash, decided it would do all it reasonably could do to avoid resuming. Paragraph 30 of the judgment of Sullivan J is in these terms:

> "When I asked Mr Henderson QC (who appeared on behalf of Railtrack) what was the purpose of the appeal to this Court, he answered that Railtrack had a duty to maintain public confidence in the railway system which, despite accidents such as Ladbroke Grove, remains a very safe means of public transport. It was important, he submitted, that allegations of criminal conduct (namely the contravention of the statutory provisions specified in the notice) should not be made when no activities were taking place and when Railtrack was, of its own volition, doing everything that it reasonably could to ensure that SN 109 and the routes leading to it would not be used. He submitted that there was an important principle at stake where an employer, such as Railtrack, had deliberately shut down operations in the interests of safety and had made it plain that there was no

likelihood of those operations being resumed pending the outcome of all necessary inquiries and the approval of relevant bodies such as the inspectorate, it should not be liable to service of a prohibition notice under section 22 of the 1974 Act. It would be oppressive for that statutory power to be used in such circumstances."

28 In paragraph 61 of his judgment in that case, Sullivan J said this:

'The issue dividing the parties can be fairly shortly stated. Mr Henderson submits that "activities" in section 22 of the 1974 Act means what it says: an active, not a passive state of affairs. In the aftermath of the crash there were no activities of the kind described in the notice being carried on as at 8 October 1999.'

29 In paragraphs 90-92 of his judgment, Sullivan J said this:

"90. There is no dispute that the underlying purpose of the 1974 Act is preventive, to protect not merely employees (section 2), but also members of the public (section 3) (see *R v Board of Trustees of the Science Museum* [1993] ICR 876). The starting point must be the ordinary meaning of the words in section 22(1) of the 1974 Act, but that does not mean that they should be interpreted literally, or in a vacuum without regard to the factual context in which the section is likely to be engaged. A purposive approach to interpretation, one which renders section 22 of the 1974 Act effective in its role of protecting public safety, should be adopted.

91. Section 22 of the 1974 Act is (together with section 25 which gives inspectors power to seize articles or substances which are a cause of imminent danger) one of the most powerful weapons in an inspector's armoury. Subject to any direction from the tribunal, a prohibition notice under section 22 takes immediate effect, and is not suspended by an appeal to the tribunal. This may be contrasted with an improvement notice under section 21, which is suspended pending the outcome of an appeal (see section 24(3)). It is a criminal offence punishable with a substantial fine and/or imprisonment to contravene any requirement of a prohibition notice (see section 33(1)(g)).

92. Thus, it is to be expected that the power to issue a prohibition notice would be available to an inspector in the aftermath of a very serious accident. Whilst the facts of each accident will be unique, all other things being equal, it is to be expected that the more serious the accident, the greater the likelihood that operations, to use a neutral expression, will be suspended, to enable the injured to be treated, the bodies of the dead to be recovered, fires to be extinguished, the police to investigate and damage to be repaired."

30 In paragraph 94 of his judgment, Sullivan J said this:

> "In my judgment, it would be very surprising, and a significant lacuna in the Act if an inspector, in the aftermath of such a serious accident, when operations have been suspended precisely because of the gravity of the accident, was unable to issue a prohibition notice upon the basis of a present risk of serious personal injury."

31 The conclusions of Sullivan J on the manner in which section 22 of the HASAWA 1974 is to be applied where an activity was being, but is not at present being, carried on, are in paragraphs 98-104 of his judgment. Like the other passages of the authorities which I have set out above, they bear close scrutiny. They are in the following terms:

> '98. Looking at the words of section 22(1) of the 1974 Act in this context, and bearing in mind in particular the fact that section 22 must have been intended to confer powers upon inspectors, not merely prior to, but also in the aftermath of, the most serious accidents, I am satisfied that "activities" are (still) being carried on for the purposes of section 22 if they have been temporarily interrupted or suspended as a result of a major accident. I do not consider that such an interpretation does any violence to the ordinary meaning of the words in section 22, provided they are considered in a realistic context.
>
> 99. The word "activities" cannot sensibly be given a literal meaning in any event. In a literal sense, "activities" may cease, and a state of inactivity prevail, for any one of a number of reasons: during the lunch break, over the weekend, during holiday periods. It may be a question of fact and degree in each case, but I do not consider that merely because activities have been temporarily suspended, that means that they have ceased, for the purposes of section 22.
>
> 100. All the surrounding circumstances, including the reason for the temporary inactivity will have to be considered. There may well be a distinction to be drawn on the facts between a factory that is inactive because the employer has gone bankrupt and dismissed all of his employees, and a factory that is inactive because it has closed for the summer holidays. If, however, the factory has just closed, and the workers have been sent home, because of a tragic accident, I do not consider that activities will have ceased for the purposes of section 22. The position may be different if, not as a result of an accident, but pursuant to a pre-planned closure programme, for example, to replace outdated and unsafe machinery, the factory is at a standstill for some weeks or months.
>
> 101. I mention this example because Mr Henderson expressed a concern that, if the inspector's approach was correct, prohibition notices might be

served where an employer had deliberately closed down a factory for such work to take place or, in the railway context, where Railtrack had, on a pre-planned basis deliberately closed down a station or a stretch of track to enable upgrading work, for the purpose of improving safety, to take place.

102. I need only say that that is not this case. There is a very considerable difference between a pre-planned closure of the kind described above and a closure forced upon an employer as a result of a serious accident. Inspectors can be relied upon to use their expertise and common sense in distinguishing between those two very different factual situations. If a prohibition notice is issued unnecessarily or officiously the position can always be put right on appeal to the employment tribunal.

103. The use of premises, for example, for industrial or residential purposes, under the Town and Country Planning Act 1990 continues for the purposes of that Act, despite temporary interruptions. Whether the use has ceased is a question of fact and degree. I accept that this analogy is far from exact. "Activities" may be of shorter duration than a "use", or to put it another way, "a use" for planning purposes will generally be based on activities over a relatively long period of time. Nevertheless, I am satisfied that just as a use may continue for planning purposes, even though there are temporary interruptions when nothing is actually taking place on the ground, so "activities" will continue for the purposes of section 22 of the 1974 Act even though they have been interrupted as a result of a serious accident.

104. Thus, the inspector was entitled to frame the notice in the present tense and to conclude that so long as there was a risk, however remote, that the infrastructure referred to in the notice might be brought back into full use, a prohibition notice could be issued.'

32 However, Sullivan J added the following comment, before stating that the appeal had to be dismissed:

'105. Although not the basis for my decision, given Railtrack's concern about public confidence, I repeat my view that service of the notice could only have served to improve public confidence. The proposition that in the aftermath of a major accident the public should rely on the decision of the employer that particular operations will not resume, would not be conducive to public confidence, however substantial the employer and however genuine its intentions. Dr Smallwood had a discretion as to whether to serve a prohibition notice in the light of the dreadful consequences of this very serious accident. I endorse the tribunal's conclusion, "that the inspector had no choice other than to place a prohibition notice in respect of signal SN 109".'

A discussion

33 It seemed to me that if the appellant's contentions set out in paragraph 14 above were correct, then it would be open to any (for example corporate) employer that had received a prohibition notice issued under section 22 of the HASAWA 1974 to give an undertaking that it would not again do that which was the subject of the prohibition notice and be entitled to succeed in its appeal under section 24 of that Act. That did not seem to me to be right.

34 None of the binding (i.e. *ratio decidendi*) statements in the applicable case law that I have set out above applies to the circumstances in issue in this case directly. However, there is in the judgment of Sullivan J in *Smallwood* a clear indication of the proper approach to take here. That indication is to the effect that it is consistent with the statutory scheme in the HASAWA 1974 and related legislation for it to be lawful to issue a prohibition notice under section 22 of that Act in circumstances where, as Sullivan J put it in paragraph 105: "the decision of the employer that particular operations will not resume [is made in the aftermath of a major accident]".

35 In addition, it was (as stated by Lady Black in paragraph 14 of her judgment in *Chevron*) "common ground that the tribunal should be focussing on the risk existing at the time when the notice was served". What was in issue in that case was, as Lady Black stated in the next sentence in that paragraph, "what material the tribunal is entitled to take into account when forming its view of the facts as they were at the material time".

36 The purpose of a notice issued under section 22 of the HASAWA 1974 is, as stated by Lady Black in paragraph 21 of her judgment in *Chevron*:

> "encouraging employers to have robust systems in place with a view to demonstrating easily, when an inspection takes place, that no risk exists".

37 As Lady Black put it in paragraph 23 of her judgment in that case:

> "a forum is required in which to determine the continuing dispute between the inspector and the employer or, putting it more constructively and in the spirit of the health and safety legislation, to determine whether the circumstances that concerned the inspector did in fact give rise to a relevant risk. The appeal process provides that necessary forum."

38 I regarded the following part of paragraph 102 of Sullivan J's judgment in *Smallwood*, as being a further indication of the right approach to take:

> "There is a very considerable difference between a pre-planned closure of the kind described above and a closure forced upon an employer as a result of a serious accident. Inspectors can be relied upon to use their expertise

> and common sense in distinguishing between those two very different factual situations. If a prohibition notice is issued unnecessarily or officiously the position can always be put right on appeal to the employment tribunal."

39 Paragraph 94 of Sullivan J's judgment in *Smallwood*, which I have set out in paragraph 30 above, also points in the direction of the appropriateness of the appealed notice here.

40 In my view, here, using the words of Lady Black in paragraph 23 of her judgment in *Chevron*, "the circumstances that concerned the inspector did in fact give rise to a relevant risk". I therefore came to the preliminary view that the fact that the appellant, after receiving the appealed notice, did those things to which I refer in paragraphs 16-18 above, could not mean that the notice had to be overturned.

41 I then asked myself what would have been the position if the appellant had immediately after the accident of 27 February 2020 issued to all of its branches the document whose text is set out in paragraph 18 above. I came to the conclusion that if that had been the position here and I had been satisfied on the evidence before me that the appellant had genuinely prohibited the activity which led to the amputation of Mr Gould's ring finger, then it is possible (on the basis of the *obiter*, i.e. non-binding, statement made by Sullivan J in the final sentence of paragraph 102 of his judgment in *Smallwood*, which I have repeated in paragraph 38 above) that the appeal could lawfully have succeeded.

42 However, that was not what had happened here. Only on 11 March 2020, the day after the appealed notice was served, was any kind of "undertaking" given by anyone acting on behalf of the respondent, i.e. in the statement signed by Mr Wilcock and Mr Griffiths at page 36 of the appellant's bundle, the text of which I have set out in paragraph 16 above. The document at page 37 of that bundle was signed by them only on 27 April 2020, at least suggesting (if not showing unambiguously in the absence of any other evidence) that that rather more comprehensive statement about how the appellant was going to act in the future was also created only after the appealed notice was served.

43 As for the clarity of the appealed notice and its precision, the submission referred to at the end of paragraph 15 above was not developed before me in oral submissions, and in any event I did not accept it.

In conclusion

44 In all of the above circumstances, I concluded that the appeal should be dismissed. I concluded that the appealed notice was appropriately issued, in that at the time of its issue and in the light of what became known subsequently, in the words of Lady Black in *Chevron* that I have repeated in paragraph 40 above,

"the circumstances that concerned the inspector did in fact give rise to a relevant risk", i.e. one within the meaning of section 22(2) of the HASAWA 1974.

45 If and to the extent that it was necessary to do so, I also decided that the appealed notice was issued neither (using the words of Sullivan J in paragraph 102 of his judgment in *Smallwood*, which I have set out in paragraph 38 above) "unnecessarily [nor] officiously".

46 For those reasons, the appeal of the third appellant is dismissed.

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Employment Judge Hyams

Date: 24 September 2020

Sent to the parties on:

.....25.09.2020.....

.....GDJ.....
For Secretary of the Tribunals