EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103144/2019

Held in Glasgow on 10, 11 and 12 December 2019 and 10, 11 and 31 December 2020

Employment Judge M Kearns
Members: Mrs P McColl
Ms N Bakshi

Stevenson Bros (Avonbridge) Limited	**Claimant**
Kim Munro **HM Inspector of Health and Safety**	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the Improvement Notice serial number IN/03/KM/010319/03 issued to the Appellant on 1 March 2019 is cancelled.

REASONS

1. The appellant is Stevenson Bros (Avonbridge) Limited, a family business engaged in road haulage. On 16 January 2019 an accident took place involving one of the appellant's drivers (SM). SM was re-sheeting his trailer by pulling the easy sheet back across the top of the trailer from the ground using a rope. The rope snapped and the driver fell backwards and broke his leg. The respondent conducted an investigation culminating in the issue of an Improvement Notice to the appellant on 1 March 2019. By application to the Employment Tribunal dated 21 March 2019 the appellant appeals against the Notice. The respondent resists the appeal.

Evidence

2. The parties produced a joint bundle of documents (J) and referred to them by tab number. The respondent gave evidence on her own behalf. The appellant called Mrs Jennifer Hunter, its director with responsibility for health and safety. They also lodged an affidavit from Mr George Henderson, retired HGV driver and yard foreman, along with a letter from his doctor confirming that Mr Henderson is undergoing continuing management of his chronic serious illness and is unable to travel distances due to this.

Findings in Fact

3. The following material facts were admitted or found to be proved:

4. The appellant is a road haulage contractor. It is a family business which started in 1948. It has around 100 employees, 75 of whom are HGV drivers. The appellant operates in terms of a Goods Vehicle Operator's Licence which was issued on 18 February 1992 and re-issued on 13 January 2017. Under the terms of its licence the appellant is required to carry out full inspections of all its goods vehicles every six weeks and keep records of those inspections. The appellant is a member of the Road Haulage Association.

5. In or about May 2018 the appellant was inspected by Mr Easson of HSE. No significant concerns were raised during or following his visit.

6. Every driver who works for the appellant holds a Class 1 Heavy Goods Vehicle ("HGV") driving licence and a Certificate of Professional Competence. (These involve 35 hours of training which includes training in carrying and securing loads.) At the start of their employment the appellant's drivers are put through a thorough induction process (J3). They are issued with a job description (J4) which states that one of their responsibilities is to: "*undertake a daily walk around check/first use check of any equipment prior to use. These must be recorded in your defect book & any defects must be reported to the workshop for rectification. Any defects occurring during your shift should be recorded & reported in same way.*"

7. The drivers' induction training also includes a 'General Health and Safety Toolbox Talk' (J5). The handout from this talk is included in the drivers' handbook. So far as relevant, this states:

"***CHECKPLANT/EQUIPMENT BEFORE USE***

- *Pre use checks can prevent injuries.*
- *Do not use any equipment or plant with defects – report any defects immediately to supervisor or site personnel.*

…

- *If pulling over sheet from the ground check the condition of the ropes before use and ensure you are on a level surface*."

8. Drivers are issued with a company handbook which contains (amongst other things) the appellant's method statements, DVSA and HSE information, drivers' hours and tachograph information, copies of the site rules of the appellant and their customers, contact telephone numbers, company rules, risk assessments and safety notices. Drivers are generally allocated the same vehicle (cab plus trailer) for which they are responsible. Occasionally drivers may be asked to change trailer. SM, the driver who had the accident on 16 January 2019 signed for his handbook on 31 May 2012 (J2). The appellant has a system for ensuring the documents in the handbook are updated as necessary and signed for by their drivers.

9. The person with primary responsibility for overseeing health and safety within the appellant is Mrs Jennifer Hunter, one of the appellant's directors. Mrs Hunter has a NEBOSH qualification. The appellant has a system in place for assessing risk. Risk assessments are updated at least annually and additionally in response to any incident arising. The risk assessments of relevance for present purposes are the 'Yard risk assessment' as updated in October 2018 (J9) and the Loading/unloading trailers risk assessment, also updated in October 2018 (J10). The yard risk assessment covers the appellant's own yards and customer sites. It has the following column

headings: Activities carried out; Hazards/Effects; Persons at risk; Initial risk; Current controls to reduce risk; and Residual risk. At J9/3 the risk assessment has a section on "*use of ropes, straps, sheets, buckles etc"*. The hazards identified were: "*Strike by ropes – straps – minor/major injury; unexpected springback of ratchets; hand entrapment/abrasions/cuts – minor injury"*. The persons identified as at risk were the driver and persons in the vicinity. The current controls in place to reduce risk in relation to ropes etc were stated as: "*All ropes + straps must be checked prior to use to prevent failure. Be aware of any pedestrians in the area if throwing ropes to facilitate rolling over easy sheet. (Some sites will have dedicated area for strapping/sheeting). PPE to be worn."* The appellant had never had a re-sheeting rope break before January 2019 and they did not foresee this happening in their risk assessments.

10. The loading/unloading trailers risk assessment (J10) also has a section on the use of ropes, straps, sheets, buckles etc. It again identifies the same potential hazards as identified in the yard assessment and states under "*current controls to reduce risk*": "*All ropes + straps must be checked prior to use to prevent failure…"*

11. The appellant's risk assessments are issued to all drivers, placed on notice boards (J17/2 and J17/3) and included within drivers' handbooks. If an incident occurs, the appellant updates its risk assessments and also issues safety alerts (J17/3) to bring a particular risk issue to the attention of its employees. When a driver starts their employment with the appellant their induction includes training in the appellant's risk assessments and method statements. If drivers are inexperienced when they start with the appellant, they will be mentored for a period by a more experienced driver. When risk assessments are reviewed and updated, they are again discussed with drivers who are required to sign an acknowledgement. The appellant keeps records that its employees have seen, acknowledged and looked at risk assessments. These acknowledgements are added to the employees' training records.

12. Under the DVLA licensing scheme HGV drivers have responsibility for their vehicles and loads. They have a duty to report any concerns or defects to the appellant to rectify. The appellant's drivers are required to carry out an inspection of their vehicle and trailer every morning before they enter or drive it. This is a legal requirement. The drivers are competent to identify mechanical faults on their vehicles and trailers. They are required to record the details of their inspections and note any defects or repairs required on a daily defect check form (J15) in a book kept in the cab of their vehicle. Each check form has a carbon copy. The forms have a list of items to be checked off and a 'free form' section which states: "*Record below any accidents (however small), vehicle defect or irregular circumstances. Hand white duplicate copy into office. Vehicle defect must also be reported to the senior maintenance and repair engineer who will initial the top copy."* If drivers find a vehicle defect, they submit a defect report to the appellant's transport manager. If there are no defects the driver records 'nil defects' and the form advises the transport manager accordingly. The defect book produces carbon copies which must be given to the transport manager. Monthly checks are carried out by Mrs Hunter or the transport manager to ensure they have one defect report per vehicle for every day the vehicle was in use. This defect checking system does not require the driver to check his rope as part of the daily vehicle inspection before setting off and the defect report sheet does not contain boxes for anything not integral to the vehicle or trailer. Instead, the rope should be inspected on first use, and if it is discovered to be unsafe upon inspection, this must be reported in the free form section of the driver's daily defect report. The appellant receives a number of defect report forms each year that refer to ropes or straps needing to be replaced. Indeed, SM had himself submitted defect forms on 31 December 2018 (J15/67) and 3 January 2019 (J15/69) where he had noted in the free form section that a trailer roof strap was needing replaced. Drivers knew the system for reporting that a rope or strap was defective and needed to be replaced. In the event that a replacement rope was required, the appellant would either get another rope sent out to the driver or the driver could re-sheet using the handle as per step

19 of the below-mentioned method statement and replace the rope on return to the yard. The drivers were aware of this system.

13. The appellant's drivers are all issued with ropes by the appellant. The drivers do not supply their own ropes as erroneously noted and understood by the respondent. The appellant uses polypropylene ropes, similar to those used in the fishing industry. The appellant had not had any previous incidents involving rope failure. As at early 2019 the appellant's yard foreman Mr George Henderson made up and issued drivers with ropes for the purpose of re-sheeting trailers. Mr Henderson had worked for the appellant for 39 years and in that time had made up and issued hundreds of re-sheeting ropes. He therefore had a lot of experience with ropes. He kept a large coil of rope in the appellant's garage stores. When he made the ropes for re-sheeting he would pull out a full length of rope, cut it, and then pull another length that he would make into a "V" shape. He would then tie the two pieces of rope together to make a "Y" shape. He would tie the same knot every time. The knot was very strong and Mr Henderson was not aware of any of his knots ever having failed. Mr Henderson would use the same knot to tie the top ends of the "Y" to dog clips that he would attach to allow them to be clipped to the top sheet of the trailer. Mr Henderson was not interviewed by the respondent as part of their investigation.

14. When drivers wanted replacement ropes, they would go to Mr Henderson or to the transport manager Thomas Hunter. Once the ropes were made up, they were hung in a locked cabin at the back of the office so that drivers could not help themselves. The key was kept in the main office. When a driver asked for a new rope Mr Henderson or Mr Hunter gave them one from the cabin. The issuing of the rope was not recorded. In Mr Henderson's experience, the only way to check a rope is when rolling it out or back up in the hands. A driver would take it out of the storage box and unroll it using his hands and could see and feel the condition of the rope. After he had clipped it and used it to re-sheet then he would roll it back up again using his hands and would be checking it again as he did this. A person could see if the strands were breaking and would know the rope needed to be replaced.

15. The appellant has company rules (J8). So far as relevant for present purposes, these state: "*Follow procedures, work instructions and risk assessments"* and "*Check all equipment before use and report any defects".*

16. The appellant issues 'method statements' to its drivers in relation to specific tasks. These set out for the drivers the method they must follow to carry out that particular task. The appellant's method statements are compiled in consultation with the drivers. They are then issued to the drivers for incorporation in their handbooks. They are also issued to customers so that they can make sure the drivers comply with them whilst on their sites. Customers may have additional site rules which drivers are required to follow. The appellant's method statements are used for employee training. The method statements are intended to ensure that drivers carry out their work as safely as possible.

17. The appellant has a method statement for 'Loading Bulk into WFs/Tippers' (J12). Its drivers are trained to carry out bulk loading using this method which comprises 23 steps. The method statement is in the following terms:

"LOADING BULK INTO WFs /TIPPERS

1. *Immediately after cleaning the trailer at previous delivery, ensure the easisheet is rolled over for travel (prevents trailer contamination).*

2. *Obtain instructions from either the site foreman or authorised personnel regarding the site rules/unloading area.*

3. *Ensure the vehicle and trailer are parked; on level ground, in a safe place, and are not obstructing access roads, pedestrian walkways, doors, fire equipment or emergency exits.*

4. *Hi visibility clothing, suitable footwear, hard hat, eye protection and hand protection must be worn at all times.*

5. *Before exiting the vehicle, ensure the vehicle handbrake is applied and retain the keys.*

6. *Unbuckle straps on the offside of the trailer and pull them free from the ratchet.*

7. *Insert a rope or strap into the eyelets of the two centre straps to aid re-sheeting;*

8. IF YOU NEED TO USE THE TRAILER CATWALK AND A FALL ARREST SYSTEM IS AVAILABLE ONSITE, YOU MUST USE THE FALL ARREST SYSTEM (onsite personnel will provide instruction and training on use).

9. SPECIAL PRECAUTIONS

a Do not jump from the body of the trailer or the steps

b In strong winds, shelter your trailer if possible

c Avoid skin contact with hot surfaces eg exhaust systems

d Take extra care in wet or icy conditions and poor surfaces (dirt can be retained in boot tread reducing grip)

e Ensure nets, ropes, hooks/straps are in good condition";

10. *The easisheet has to be removed from the top of the trailer;*

a. access the front platform of the trailer by the steps, using the handles provided

b. fit handle to either the offside or centre pole

c. wind the handle clockwise to the nearside of the trailer

d. use the steps provided to access ground level

11. *Prior to loading check the trailer is suitable and clean for the bulk goods.*

12. *Also, the internal door must be at the front of the trailer and ensure the doors are securely fastened.*

13. *Advise site personnel the trailer is ready for loading and highlight the cross bars on the trailer to the loader.*

14. *Onsite personnel will check trailer cleanliness and will request details of the last 3 loads (TASCC goods only).*

15. *Return to your vehicle and await further instructions.*

16. *Upon completion and when instructed by site personnel proceed to onsite weighbridge to check the weight of the load. You may need to discharge or add some material as instructed by site personnel.*

17. *Site personnel will advise when loading is complete and the relevant paperwork will be supplied.*

18. *If the easisheet can be rolled across using the ropes applied earlier;*

    a. *pull the ropes, which were inserted into the eyelets of the two centre straps. This will pull the sheet across the trailer.*

    b. *If you are having difficult* [sic] *pulling the sheet across please follow the instructions for rolling the sheet across from the trailer catwalk."*

19. *If the easisheet has to be rolled across from the top of the trailer.*

    a. ***IF A FALL ARREST SYSTEM IS AVAILABLE ONSITE, YOU MUST USE IT.***

    b. *access the front platform of the trailer by the steps, using the handles provided*

    c. *fit handle to either the offside or centre pole*

    d. *wind the handle anticlockwise to the side of the trailer*

    e. *use the steps provided to access ground level.*

20. *The straps will fall down and should be inserted into the ratchet*

21. *Tensions the straps*

22. After a visual inspection (loose material/trailer security) you may proceed to site exit adhering to site rules.

23. Should the load not be delivered direct to delivery location, drivers should check the trailer security before leaving the vehicle & trailer (and also when returning) to ensure goods have not been damaged in anyway. If you have any doubts speak to your TM immediately.

IF YOU SEE ANYTHING UNSAFE/UNUSUAL PLEASE CONTACT YOUR TRANSPORT MANAGER FOR ADVICE.

SIGNED PRINT NAME DATE"

(The method statement also contains two exception boxes for specific vehicles which are not relevant to this case.)

18. There are two alternative methods used across the haulage industry for drivers to choose from when re-sheeting the trailer. The re-sheeting by rope method is step 18. (This was the method selected by SM). The alternative method is to re-sheet by rolling the easy sheet across the top of the trailer from the catwalk using the handle as in step 19. The appellant's drivers receive training on the method statement at induction. All drivers receive training on both re-sheeting methods (using the rope and using the catwalk). There is only one way to remove the easy sheet from the trailer, and that is by climbing up to the catwalk and using the handle to wind/roll it up. Contrary to the Improvement Notice reasons, the rope cannot be used to remove the sheet. It can only be used to replace it. When replacing the sheet or 're-sheeting', some drivers opt not to use the rope at all and prefer to re-sheet using the handle, ladder and catwalk. Others feel better re-sheeting from the ground.

19. So far as it relates to ropes used for re-sheeting trailers, the instruction at 9e of the method statement is an instruction to inspect the rope to identify whether it can be safely used and to detect any deterioration or defect. If such deterioration or defect is identified, the system (as specified in step 18b of the method statement) was to use the alternative method at 19 and replace the

rope. As set out above, any defect or deterioration of the rope must be stated on the free form section of the daily defect report. SM, the driver who had the accident with the rope signed to confirm that he had received the original method statement on 18 May 2016. He signed for the revised method statement (J12) on 25 June 2018 (J1/7).

20. Under the company rules (J8), method statement (J12), and risk assessments (J9 & 10), drivers are responsible for checking their equipment, including ropes. Drivers are competent to identify mechanical defects on their vehicles and trailers. They are also competent to inspect their ropes by the method described in the next paragraph, which is the obvious way to do it. The appellant's drivers store their ropes either in the cubby hole in their vehicle or in the storage box on the trailer. The decision as to which of these two storage options is used is regarded by the appellant as a matter for the driver to decide because drivers keep their ropes with them and whether the box on the trailer is used to store a driver's rope will depend on whether the driver always drives the same trailer or not.

21. When the driver takes the rope out for first use, he is required by the method statement to ensure that it is in good condition. When he is unravelling it at the start, he should see and feel the condition of the rope as he feeds it through his hands. When he has finished, the driver should see and feel the condition of the rope again as he feeds it through his hands to coil it for stowage.

22. On 19 November 2018 Mrs Hunter circulated the revised yard and loading risk assessments in a memo (J11) sent to all drivers in which she stated: "*Risks are identified, control measures put in place and regular reviews to reduce the risk of accidents and injury. If you see anything during your working day which you believe to be an unsafe practice please approach the individual concerned and express your concerns. Thereafter please report to a director via a near miss card (available from the transport or workshop office). Any equipment should be visually checked before use and if found to be defective should be removed from service and reported to a director."* SM, the driver

who had the accident described below signed on 9 December 2018 to confirm that he had received the revised risk assessments and would review them and feedback as required (J1/4).

23. On 10 December 2018 the appellant issued a safety alert to its drivers, workshop and yard staff (J13) in the following terms: "*If you find equipment is not working as expected it should be reported to the workshop/manager for rectification. Working with defective equipment could lead to a personal injury for you or the next worker if equipment not checked prior to use and the worker is unaware. If the task is manual and requires more effort than normal please ask for assistance from other staff/site personnel or contact your manager for advice."* The respondent's record (J14) shows that this was issued to SM on 11 December 2018.

24. On 16 January 2019 SM, who was one of the appellant's drivers, was re-sheeting his trailer after loading at the site of one of the appellant's customers. SM was on the ground beside the trailer pulling the easy sheet back over the trailer with a rope when the rope snapped and SM fell back sustaining fractures to his leg. At some point after the accident SM completed an accident investigation form (J16). On his accident form SM stated "*I then through* [sic] *the rope from the N/S back over to the O/S to pull the topsheet over but as I was doing so the rope snapped as I had full tension on it which then resulted in me causing severe injury to my right leg".* He also stated that he "*checked the rope every time before use*". In a telephone conversation with the respondent's visiting officer Nikki Jack (J29) SM said that he had checked the rope prior to use and found no problems with it. Mrs Hunter submitted an injury report form to the respondent on 18 February 2019 (J24) following a telephone conversation with Mrs Jack.

25. Following the accident, Mrs Jack carried out an investigation. She spoke to the customer at whose site the accident had occurred. She was provided with photographs of the rope (J27), but the actual rope was not available for examination. In her notes Mrs Jack observed that the photograph showed the blue rope "*attached to the curtain*", whereas, in fact the photograph shows it

attached to the straps from the roof. She noted that the photograph: "*shows the rope in a poorly maintained condition frayed with additional repair knots from previous breaks".* In fact, the knot in the photograph (27/3) was not from a previous repair but was the knot at the base of the "Y" piece. There was no evidence of previous breaks. The appellant does not repair and re-use ropes. They are accessible and cheap to replace and a repaired rope would not be fit for purpose. If a rope needed to be replaced the drivers knew that they were required to notify the transport manager and obtain a fresh one from the yard.

26. Mrs Jack contacted Mrs Hunter by telephone on 18 February 2019 and made a note of her call (J29). She requested Mrs Hunter to send her the appellant's risk assessments, method statement and SM's training record and Mrs Hunter did so immediately by email dated 18 February 2019 (J25). During the telephone call Mrs Hunter described the re-sheeting process to Mrs Jack, but Mrs Jack appeared unfamiliar with HGV terms and did not record the process accurately in her note of the call (J29/2). Mrs Hunter had referred to a top sheet, not a curtain. The mechanism for unwinding the sheet is a handle or key, not a ratchet. The ladder access is on the trailer. Mrs Jack also noted (erroneously) that some of the appellant's drivers had supplied their own ropes, whereas in fact all ropes used by the appellants' drivers for re-sheeting are supplied to the drivers by the appellant and were, at the relevant time, made up by Mr Henderson. Mrs Jack appeared to have misunderstood that although drivers retained their rope when moving between vehicles that was still a rope provided to them by the appellant. The notes state at J29 page 4: "*The guidance does not tell the employees what equipment should be used, where it should be obtained or how it should be stored or maintained".* The appellant's drivers knew to get their ropes from Mr Henderson, the yard foreman or Mr Hunter the traffic manager. Drivers knew that ropes should be replaced and not maintained.

27. In a note dated 25 February 2019 on the same page (J29/2) of a telephone call with SM, Mrs Jack stated: "*Training: He received training on the job and was shown how to sheet the trailer. IP has not seen any instructions or SSOW for this process."* This was incorrect. By the time she had the call with SM on

25 February Mrs Jack had received from Mrs Hunter SM's training record (J1/8) which contained a copy of the loading bulk method statement (J12) signed by SM as having been received by him on 18 May 2016. His training record also contained a copy of the updated method statement (J1/7) signed by SM as having been received by him on 25 June 2018. Also, in SM's training records (J1/4) was a receipt signed by him for updated risk assessments dated 9 December 2018. Mrs Jack did not challenge SM's statement that he had not seen any instructions or SSOW for this process despite her having received these documents a week earlier. Apart from SM, the respondent did not speak to any drivers about their understanding of the systems in place. Mrs Jack also noted at J29/2 that "*IP said he checked the condition of the rope prior to use and found no problem with it".* (IP stands for 'injured party'.)

28. Mrs Jack visited the appellant on 27 February 2019. She was accompanied by the respondent, Kim Munro, now Mrs Ross, who is one of the appellant's inspectors with the power to issue notices. The respondent had been a Health and Safety Inspector for approximately 5 years, during which time she had carried out around 425 inspections where she had been lead investigator, of which around 75 had concerned accidents. She had been involved in a further 300 investigations in which she had not been the lead investigator. The respondent is a general inspector. She covers factories, farms, transport, hospitals, schools and distilleries. In relation to transport she had done 3 accident investigations, all related to vehicles reversing without banksmen or auditory signals. The respondent had very little experience of haulage.

29. The visit by the respondent and Mrs Jack to the appellant on 27 February 2019 lasted around 50 minutes. The respondent made a note of the visit (J29/4). The note of the visit contains factual errors suggesting that the processes in respect of which the Improvement Notice was issued were not fully understood by the respondent and Mrs Jack. The note had the wrong surname for the injured party. The respondent also erroneously noted that: "*Mrs Hunter told Mrs Jack that she did not know who had ropes that the company had issued and who had their own ropes."* Mrs Hunter was not asked about this at the meeting. The note appeared to rely upon Mrs Jack's

previous misunderstanding as noted above. The respondent's notes also stated: "*There is no clear safe system of work for drivers in terms of removing and replacing the trailer sheeting. An instruction document is available however, it is vague in terms of the method to be followed."* The method statement (J12) referred to by the respondent as 'an instruction document' is set out in full in paragraph 17 above. The instructions in the method statement were not vague. They were generally detailed and specific. The method statement sets out a clear system of work for removing and replacing trailer sheeting.

30. The respondent's notes (J29/4) went on to say of the method statement (J12) that: *"Several possible methods are described leaving it to driver discretion and offering no guidance on the situations where each may be appropriate."* It is an exaggeration to say that "*several possible methods are described*" in the method statement. The method statement contains only one method for un-sheeting and two methods for re-sheeting the trailer.

31. The respondent's notes (J29/4) stated: "*The guidance does not tell employees what equipment should be used, where it should be obtained or how it should be stored or maintained. NOC issued to review and update this document."* A further paragraph stated: *One of the methods described in the instruction document involves using a rope to pull the sheet over. There is no specific instruction of where these ropes should be obtained. Some drivers have their own, otherwise these can be "made up" for them at the store room in the yard. A length of rope is cut for the driver from a larger reel. No records are kept for this. Some ropes are kept by the driver, some are left with the vehicle. There is no inspection programme in place for ropes issued to drivers. Responsibility is placed on driver to ensure rope is in good condition but no instruction or training giving on how this should be assessed. No guidance is given how long a rope should be kept. Explained to company that it is okay to have the checks completed by the drivers but they should understand how to identify concerns with the ropes and there should be a method of recording this such as adding it to daily check sheets. This should also be monitored to ensure checks are being completed. IN issued requiring company to devise a*

programme of inspection and to ensure any damaged ropes are replaced." The respondent's misapprehension that some drivers supplied their own ropes led to her criticism that the drivers were not told where to obtain them. In fact, the drivers knew to get their ropes at the appellant's yard from Mr Henderson or the transport manager. Thereafter, the drivers would take ownership of them. However, they all came from the appellant's yard courtesy of Mr Henderson. None of the appellant's drivers were acquiring ropes from other sources, so the question of where to obtain them did not arise. Furthermore, the appellant replaces ropes. They do not 'maintain' them.

32. The respondent issued an Improvement Notice (J20) to the appellant on 1 March 2019. The Notice stated that she was of the opinion that the appellant had contravened sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and regulation 6(2) of the Provision and Use of Work Equipment Regulations 1998. The reasons given for the Inspector's opinion were that: "*You have failed to ensure, so far as is reasonably practicable, the health, safety and welfare of your employees by failing to ensure that work equipment exposed to conditions causing deterioration which is liable to result in dangerous situations, namely the rope used to remove and replace the sheeting on your trailers, is inspected at suitable intervals*." The Schedule to the Notice stated:

"*To comply with this Notice you should:*

1. *Devise and implement a system of inspection and monitoring to ensure that:*

- *the ropes used to remove and replace the sheeting on your trailers are inspected at suitable regular intervals, as determined by your risk assessment;*

- *Where deterioration means that the rope is no longer in a safe condition, it is removed from use.*

OR

2. *You should take any other equally effective measures to remedy the said contravention.*

33. The appellant appeals to this Tribunal against the Improvement Notice. For the reasons set out below, the Tribunal finds that the Inspector's opinion that the appellant was in breach of sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and regulation 6(2) of the Provision and Use of Work Equipment Regulations 1998 was partly based on a misunderstanding of the facts and of the appellant's processes as set out above. The Tribunal finds that at the time the Notice was served on the appellant on 1 March 2019 the appellant was not in breach of sections 2(1) and 3(1) of the Health and Safety at Work Act 1974 and regulation 6(2) of the Provision and Use of Work Equipment Regulations 1998.

Observations on the Evidence

34. The Tribunal had two or three opportunities to view a video produced by the appellant demonstrating the relevant parts of the method set out in the Method Statement for Loading Bulk into WFs/Tippers' (J12) as the appellant expected it to be carried out. The respondent was asked questions in reference to the video and Mrs Hunter also gave evidence about it, verbally explaining what was happening. Although the video was of assistance as an illustration of the process, nothing more was taken from it than that. The appellant lodged an affidavit containing the evidence of Mr George Henderson, their former yard foreman. Mr Henderson was unable to attend the tribunal hearing because of serious illness. Given the nature of his condition, the tribunal understood that the current pandemic would make his attendance even more inadvisable. In considering the affidavit evidence, the tribunal bore in mind that the respondent had not had the opportunity to test it in cross examination.

Applicable Law

Substantive Law

35. Section 2(1) Health and Safety at Work etc Act 1974 provides as follows:

"***2 General duties of employers to their employees***

(1) 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.

36. Section 3(1) Health and Safety at Work etc Act 1974 provides that:

"***3 General duties of employers and self- employed to persons other than their employees***

(1) 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."

37. The Provision and Use of Work Equipment Regulations 1998 (PUWER) states so far as relevant at regulation 6(2):

"*(2) Every employer shall ensure that work equipment exposed to conditions causing deterioration which is liable to result in dangerous situations is inspected -*

(a) at suitable intervals; and

(b) each time that exceptional circumstances which are liable to jeopardise the safety of work equipment have occurred."

38. Regulation 2 of PUWER concerns interpretation and provides:

"*inspection" in relation to an inspection under paragraph (1) or (2) of regulation 6 –*

(a) Means such visual or more rigorous inspection by a competent person as is appropriate for the purpose described in the paragraph;

(b) Where it is appropriate to carry out testing for the purpose, includes testing the nature and extent of which are appropriate for the purpose;"

Provisions relating to Improvement Notices and Jurisdiction of the Employment Tribunal.

39. Section 21 of the 1974 Act concerns improvement notices and is in the following terms:

"***21 Improvement notices***

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."

40. The right to appeal against the notice is contained in section 24 of the 1974 Act:

"***24 Appeal against improvement or prohibition notice***

(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."

41. As Mr Pugh submits, the test the tribunal applies to an appeal against an improvement notice is not confined to reviewing the inspector's opinion on public law grounds, for instance reasonableness. Instead, the tribunal is to decide whether, at the time the notice was served, the breach existed. (HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132).

Discussion and Decision

42. It was common ground that the tribunal's task in this appeal is to decide whether, at the time the respondent's Improvement Notice was served, the appellant was contravening the statutory provisions set out therein. In HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132) the Supreme Court observed (in relation to a prohibition notice, the test for which is that activities involve a risk of serious personal injury) that what matters when the inspector serves the notice is that he is of the opinion that the activities in question involve a risk of serious personal injury. "*However,.. 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*." As Mr Pugh and Mrs Duff both submitted, the tribunal must look at all the relevant facts and take its own view on those facts as to whether (in this case, which relates to an improvement notice and not a prohibition notice) at the relevant time the appellant was contravening the relevant statutory provisions.

43. As Mr Pugh further submits, (by reference to Chevron paragraph 18): "*The inspector's opinion about 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 the tribunal is not confined to the evidence that was before the inspector. Mr Pugh also cited Railtrack v Smallwood [2001] ICR 714 (paragraph 44) as authority for the proposition that the tribunal ought to have

due regard to the inspector's expertise where relevant. On this point, the respondent was asked about her areas of expertise and experience in cross examination. She said that she had carried out around 425 inspections where she had been lead investigator, of which around 75 had concerned accidents. She had been involved in a further 300 investigations in which she had not been the lead investigator. The respondent said that she is a 'general inspector' covering factories, farms, transport, hospitals, schools and distilleries. She stated that in relation to transport she had done 3 accident investigations, all of which had related to vehicles reversing without banksmen or auditory signals. The respondent was frank with the tribunal that although she had done some transport inspections, she had very little experience of haulage.

44. The 'relevant statutory provisions' stated in the Improvement Notice to have been contravened included section 3(1) of the Health and Safety at Work Act 1974. 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".* The respondent was asked in examination in chief who she had anticipated may be exposed to risk by the appellant under this section. She said she had had in mind the appellant's drivers who might be affected if a rope snapped when they were visiting customers' sites. However, section 3(1) is only concerned with persons <u>not</u> in the employment of the recipient of the Notice, whereas the drivers are the appellant's employees. The respondent's answer appeared to suggest that the appellant had been stated to have been contravening section 3(1) erroneously, or possibly as a 'belt and braces' approach in the event that any of the appellant's drivers were not employees. However, in a somewhat shamelessly leading question, the respondent's then representative (not Mr Pugh) asked the respondent: "*In the video we saw that there was a small rubber wheel attached to the end of the rope. If the rope snapped with the wheel attached…?"* The respondent replied: "*Yes. Someone could be hit by it. It could go into the path of an oncoming vehicle."* The Tribunal concluded

from the facts in this case that the likelihood of such an eventuality was exceedingly remote. The rope snapped according to SM's account of the accident (J16) when he had full tension on it. On the facts before us there had been no previous incidents involving rope failure. Mrs Hunter said it had never happened before to her knowledge. If the rope was being thrown over the trailer it would not be under full tension. From the way this evidence was elicited we were unsure whether it had actually been in the respondent's consideration at the time she served the notice or whether it had occurred to her for the first time when giving her evidence. We concluded on the facts before us that there was no contravention of section 3(1) of the Act.

45. We turned to consider section 2(1) of the 1974 Act and Regulation 6(2) of the PUWER Regulations. For ease of reference, section 2(1) provides "*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."* Regulation 6(2) states: "*(2) Every employer shall ensure that work equipment exposed to conditions causing deterioration which is liable to result in dangerous situations is inspected -*

(a) at suitable intervals; and

(b) each time that exceptional circumstances which are liable to jeopardise the safety of work equipment have occurred."

46. The appellant's position was that they already had a system of inspection in place to ensure that ropes used to aid re-sheeting were inspected at suitable intervals and replaced when necessary and they were not, therefore, in contravention of the provisions set out in the Notice. We considered the facts at the relevant time and made the findings set out above.

47. We considered the systems the appellant had in place against the requirements of the relevant statutory provisions in s. 2(1) and Regulation 6(2). The appellant operates in terms of a Goods Vehicle Operator's Licence under which it is required to carry out full inspections of all its goods vehicles every six weeks and keep records of those inspections. Every driver who

works for the appellant holds a Class 1 Heavy Goods Vehicle ("HGV") driving licence and a Certificate of Professional Competence the obtaining of which involved training in carrying and securing loads. At the start of their employment the appellant's drivers are put through a thorough induction process (J3) and issued with a job description (J4) which states that one of their responsibilities is to: "*undertake a daily walk around check/first use check of any equipment prior to use. These must be recorded in your defect book & any defects must be reported to the workshop for rectification. Any defects occurring during your shift should be recorded & reported in same way."* Thus, from the start of their employment, drivers are required to record and report any defects in their defect books. This message is consistently communicated to them and is considered sufficiently important to feature in their job descriptions.

48. The drivers' induction includes a 'General Health and Safety Toolbox Talk', the handout from which is included in the drivers' handbook. It continues the emphasis on not using defective equipment, specifically stating:

- *"Do not use any equipment or plant with defects – report any defects immediately to supervisor or site personnel."* and
- *"If pulling over sheet from the ground check the condition of the ropes before use and ensure you are on a level surface*."

49. The drivers are issued with handbooks and the appellant has a system for ensuring the documents in the handbook are updated as necessary and signed for by their drivers. SM's training records contained signed copies of the method statement updated in 2018 and signed acknowledgements of updated risk assessments and safety alerts, suggesting that the appellant has a good system in place for communicating updated health and safety policies, systems and instructions to its staff.

50. The 'Company Rules' (J8) require employees to: "*Check all equipment before use and report any defects".*

51. The appellant has a system in place for assessing risk. Risk assessments are updated annually and additionally in response to any incident arising. It is true that the precise risk of a rope snapping was not foreseen in the hazard sections of the two relevant risk assessments. However, the 'current controls in place to reduce risk' in relation to ropes etc were stated as: "*All ropes + straps must be checked prior to use to prevent failure."* Mrs Duff submitted that accordingly, the risk assessment recognised the activity, acknowledged that injury could result from rope failure and had control measures in place which were the same as they would have been had the risk assessment specified "rope breaking" in the hazard section. We accepted this submission and noted from Mrs Hunter's evidence, which we accepted, that the appellant's risk assessments are reviewed in response to incidents arising.

52. The drivers had been trained in the bulk loading method statement. Item 9 of the method statement (J12) for carrying out the activity in question contains "**SPECIAL PRECAUTIONS**" and requires the driver to 'ensure that the rope is in good condition'. If it is discovered not to be in good condition, the appellant either gets another rope out to the driver or the driver can re-sheet using the handle as per step 19 of the method statement and replace the rope on return to the yard.

53. We noted that item 18 of the method statement says that if the easy sheet can be rolled across using the ropes applied earlier, then the driver is to pull the ropes which will pull the sheet across the trailer. However, the next instruction states: "*b. If you are having difficult* [sic] *pulling the sheet across please follow the instructions for rolling the sheet across from the trailer catwalk."* Thus, if the rope is difficult to pull across, the instruction is to use the alternative method at item 19.

54. The vehicle defect checking system does not require the driver to check his rope as part of the daily vehicle inspection before setting off and the defect report sheet does not contain boxes for anything not integral to the vehicle or trailer. However, the system was relevant to rope inspection to the extent that if, on inspecting a rope or strap etc prior to use, the driver found it needed

replacing, he was required to note this on the free form section of his daily defect report form. This was consistent with the instruction in the job description. In the event that such a defect was noted on the form, presumably the driver should not tick the "nil defect" box (though SM has done so at 15/67).

55. With regard to Regulation 6(2) of PUWER, we accept that the rope would be 'work equipment' and that being used in all weathers, coiled and stowed in a box might amount to 'conditions causing deterioration which is liable to result in dangerous situations'. It follows that there ought to be a system for inspecting it at suitable intervals and each time exceptional circumstances liable to jeopardise its safety occur. Regulation 2 defines "*inspection"* for this purpose as: "(a) *such visual or more rigorous inspection by a competent person as is appropriate for the purpose described in the paragraph; (b)Where it is appropriate to carry out testing for the purpose, includes testing the nature and extent of which are appropriate for the purpose;"* With regard to (b), we did not understand it to be suggested by the respondent that it was appropriate to carry out testing of the rope and no method for doing so was put forward. We concluded that 6(2)(a) appeared to be the applicable provision.

56. "Competent persons" are covered in the respondent's Approved Code of Practice and Guidance (J32 page 24 paragraphs 90 to 94). They are persons who have the necessary knowledge and experience. The inspection can be done by an in-house employee with an adequate knowledge of the equipment to enable them to know what to look at (the key components) *[In this case, the rope]*; what to look for (fault-finding) *[In this case, deterioration or damage]*; and what to do (reporting faults, making a record, who to report to) *[In this case, drivers use the free form section of the defect report sheet, which goes to the traffic manager.]* Class 1 HGV drivers are experienced in working with re-sheeting ropes. They are trained in securing loads. We considered that the respondent's drivers were 'competent persons' in relation to inspecting their ropes. We accepted Mr Henderson's affidavit evidence that the only way to check a rope was to feel it and look at it to see whether it was

worn or damaged. We considered that the appellant's method statement (J12) gave their drivers detailed and specific steps to follow in carrying out the loading task. As said above, we did not agree with the respondent's comment that the method statement was vague. The instruction at 9e of the appellant's method statement was to ensure the rope was in good condition before using it. We did wonder whether it could be improved by adding something like: "*Inspect your rope by feeding it through your hands to feel it and see whether it is worn or damaged"* to paragraph 9.e. of the method statement, but that is arguably just stating the obvious and we did not think that the failure to spell this out was a contravention of the relevant provisions. We accepted Mrs Hunter's evidence that the drivers knew that in the event that the rope or any other piece of equipment needed to be replaced they required to say so on the defect report form, notify the transport manager and obtain a replacement rope from the yard foreman. We considered that the defect report forms dated 31 December 2018 (J15/67) and 3 January 2019 (J15/69) were clear evidence that drivers knew that the form was to be used for this purpose. This corroborated Mrs Hunter's evidence to that effect.

57. The appellant's duty under section 2(1) is to ensure, so far as is reasonably practicable, the health, safety and welfare at work of its employees. Straightforward hazards such as possible rope failure may only require simple safety precautions for control, such as visual and manual inspection to identify defects or deterioration and ensure a rope is safe to use. As stated in the previous paragraph, the way to check a rope is to feel it and look at it. Obviously, there is a residual risk that even a careful inspection may not reveal a weakness in a rope. We concluded that, subject to our reservations in paragraph 60 below, the appellant had a system in place for inspecting re-sheeting ropes at suitable intervals; that this was a control measure for the risk of rope failure; and that it was sufficient to meet section 2(1) of the Health and Safety at Work Act 1974 and PUWER regulation 6(2).

58. With regard to the accident itself, Mr Pugh submitted that SM's report that he checked the rope (J29/2) must be assessed critically. He submitted that the tribunal had the photographs of the rope (J27) and the evidence of the

respondent as to the condition of the rope. For the appellant, Mrs Duff submitted that there had been no analysis of what had caused the rope to break and any findings to that effect would be speculation. She said that the tribunal can only consider the evidence before it and that the only evidence about the condition of the rope prior to it snapping was in Mrs Jack's note at J29/2 that "*IP said he checked the condition of the rope prior to use and found no problem with it".* SM was the only person who knew the condition of the rope before it broke. Obviously, the photographs (J27) were taken after the break. Although they show the rope frayed, they do not give any indication of what it looked like beforehand. We agreed with Mrs Duff's submission that the tribunal is not in a position to make any finding that the rope was frayed and looked in poor condition before it snapped. The respondent had not recovered, tested or inspected the actual rope.

59. The tribunal concluded that the system the appellant already had in place for inspecting ropes satisfied regulation 6(2) of PUWER. The PUWER Guidance (J32 at paragraph 15) states: "*The term 'inspection' is used in PUWER. The purpose of an inspection is to identify whether the equipment can be operated, adjusted and maintained safely and that any deterioration (for example, any defect, damage or wear) can be detected and remedied before it results in unacceptable risks."* The Guidance also says at paragraph 81 (J32 page 23): "*Inspection does not normally include the checks that are a part of the maintenance activity although certain aspects may be common. For the purpose of this regulation, inspection does not include a pre-use check that an operator makes before using the work equipment. While inspections need to be recorded, pre-use checks do not."* Firstly, as stated above, there was no question of ropes being 'maintained'. The purpose of the instruction at 9e of the method statement was not related to maintenance of the rope, the purpose was to inspect it in the manner described in paragraph 15 of the PUWER Guidance quoted above, to identify whether it could be operated safely and to detect any deterioration or defect. If such deterioration or defect were identified, the system was firstly, (as specified in step 18b of the method statement) to use the alternative method at 19 and replace the rope; and

secondly, to note the defect/requirement for a replacement on the defect report form. Thus, although the appellant referred to the inspection of the rope as a pre-use check on occasions, we concluded that it met the definition of an inspection in all respects, though the recording system could be more robust.

60. PUWER Regulation 6(3), which was not referred to in the Improvement Notice provides that: "*(3) Every employer shall ensure that the result of an inspection made under this regulation is recorded and kept until the next inspection under this regulation is recorded."* With regard to the inspection recording system, Mrs Duff submitted that if a driver found a defect with a rope or strap, the system was for them to record this on their defect form (J15) and report it to the traffic manager. She pointed to the evidence of Mrs Hunter mentioned in paragraph 56 above, that a number of defect report forms each year referred to ropes or straps. Indeed, SM had himself submitted two defect forms on 31 December 2018 (J15/67) and 3 January 2019 (J15/69) where he had noted that a trailer roof strap was needing replaced. As mentioned earlier, we accepted that this evidence demonstrated that drivers knew the system for reporting that a rope or strap was defective and needed to be replaced. However, regulation 6(3) appears to envisage that the fact of the inspection is recorded, not just where there is a problem, but also where no defect is found and the rope inspected is in good condition, as happens with the vehicle reports. As Mr Pugh pointed out at paragraph 21 of his written submission, it would not be clear under the appellant's reporting system that the rope inspection was being recorded as having taken place if no defect was found. As he put it: "*The nil defect report cannot therefore be taken to confirm no defect on a piece of equipment not covered by those checks."* This could be sorted out fairly easily, for example by adding a box for re-sheeting ropes and straps to the defect report form (J15). In his additional remarks, Mr Pugh made the valid point that the purpose of adding a box for rope inspection on the form would be that it creates a prompt to the driver to check the condition of the rope. We took his point, though, to be fair, the method statement specifically prompts the driver to inspect the rope and ensure it is in good condition. We were satisfied that the appellant had a system in place for inspecting re-

sheeting ropes. We were not asked to modify the Improvement Notice by replacing the contraventions originally libelled with a reference to regulation 6(3). Arguably in any event, the appellants had a system in place to record the inspection in the free form section of the daily defect report form, so any such modification would not be either proportionate on the facts of this case or fair to the parties, who would not have had the opportunity to make submissions on the point.

61. The Tribunal concluded from the evidence of Mrs Hunter and the affidavit of Mr Henderson, which it accepted, that the respondent's understanding that some drivers supplied their own ropes and that Mrs Hunter did not know who had their own ropes and who had company ropes was erroneous. Furthermore, the respondent had also accepted Mrs Jack's erroneous assumption that the knot in the rope seen in the photograph (J27) was from an earlier repair. This then raised an issue about maintenance of ropes, which does not, in fact arise, because ropes are simply replaced and not maintained. We also concluded that the appellant's method statement and aspects of the process were not accurately or fairly summarised in the respondent's and Mrs Jack's notes (J29, page 4) for the reasons set out in our findings in fact above (paragraphs 25 - 27 and 29 – 31). These serious misunderstandings meant that at the point when she reached her opinion that the appellant was contravening the statutory provisions, the respondent did not have an accurate picture of the facts about the duty holder's activities, the hazards and the control measures in place to manage them. If the respondent thought that drivers were acquiring and knotting together ropes from anywhere, and repairing them with knots, instead of replacing them, we can see that an improvement notice would be entirely proportionate. However, that picture was not accurate.

62. In all the circumstances, we have reached the unanimous conclusion that the Improvement Notice cannot stand and should be cancelled. The appeal succeeds.

63. It remains for us to thank Mr Pugh and Mrs Duff for their excellent presentation of the respective cases and for the clarity of their submissions.

M Kearns
Employment Judge

20 January 2021
Date of Judgment

Date sent to parties **25 January 2021**