Case Number: 1600876/2020
1600958/2020
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EMPLOYMENT TRIBUNALS

Claimant:	**Nemein Limited**	
Respondent:	**Health and Safety Executive**	
Heard at:	**Cardiff**	**On: 2, 3, 4, 5 and 6 August 2021 and 20, 21 and 22 September 2021**
Before:	**Employment Judge S Moore**	
Members:	**Mr C Stephenson**	
	Mrs W Morgan	

Representation:
Claimant: Mr I Bridge (Counsel)
Respondent: Mr A Hughes (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:-

(1) Pursuant to Section 24(2) of the Health and Safety at Work Act 1974 the following Prohibition and Improvement Notices are affirmed;

Prohibition Notice JHET140220/01 (nickel plating)
Prohibition Notice JHET140220/02 (anodising)
Improvement Notice JHET140220/03 (powder coating)
Improvement Notice JHET140220/04 (metal working fluids)

REASONS

Background and introduction

1. This is the decision of the Employment Tribunal in the case of Nemein Limited (the Appellant) v Helen Turner, one of Her Majesty's Inspectors of Health and Safety (Respondent). Nemein Limited appeal against and seek the cancellation of two Prohibition Notices and two Improvement Notices served on 20 February 2020. The appeal was presented to the Employment Tribunal on 11 March 2020. Prescribed forms are not necessary in cases where the Tribunal is exercising its Appellate jurisdiction (Regulation 12(2)(b) of the Employment Tribunal (Constitutional Rules of Procedure) Regulation 2013. On 27 March 2020 a Preliminary Hearing was held before Judge Jenkins. Judge Jenkins directed that the Appellant was to serve all evidence upon it wished to rely at the Appeal Hearing on the Respondent by 8 May 2020. This was agreed to take place on 22 May 2020. To that end the Appellant served a significant volume of documentation on the Respondent on the above said date along with a further submission titled "Response to HSE Notices" which set out a 38 page document providing further particulars of the grounds of the appeal. Neither the ET1 and attached grounds nor the 38 page document raised a ground of appeal on the basis that the Notices should be cancelled as they were unclear. That position was first advanced by Mr Bridge at the hearing on 2 August 2021 in the draft List of Issues that Judge Moore directed him to prepare to assist the Tribunal in understanding and clarifying the issues in the claim.

2. No application to amend the grounds of appeal was made to advance a ground that the Notices should be cancelled on the basis that Notices were unclear.

3. Mr Hughes objected to the List of Issues on this very basis and submitted that if the Appellant wished to rely on new grounds they should apply to amend. No such application to amend was made.

4. The Tribunal sat in person and also as a hybrid hearing over the above dates in Cardiff Employment Tribunal. We heard evidence from Ms Helen Turner, HM Inspector of Health and Safety and Ms J Helps, HM Specialist Inspector in Occupational Hygiene for the Respondent. For the Appellant we heard evidence from Ms S Bourne, Company Director and Mr L Till, Company Director. A number of other witness statements were served by the Appellant namely from Mr C Sherriff and Mr J Brown but as these witnesses were not called to give evidence in person we have not attached any weight to the written witness statements that were before us. There was an agreed bundle running to 905 pages.

5. The following issues arose during the hearing which are necessary to record in our reasons. On 11 November 2020, the Appellant made an application for specific disclosure of any complaint or report made to the Respondent regarding the Appellant's work practices which resulted in the inspection if and only if such complaint or report was made on behalf of two of the Appellant's former employees. This Application was resisted by the Respondent and a Telephone Preliminary Hearing took place on 5 January 2021 before Judge Brace to determine the application. Judge Brace ordered that by 26 January 2021 the Respondent should provide to the Appellant redacted copies of any complaint or report made to the Respondent regarding the Appellant's work practices which resulted in the inspection which, for the avoidance of doubt should include redacted copies of all written reports or notes of telephone conversations. Judge Brace directed that the redaction should ensure that the identity of the individuals making the complaint or report was not at that stage disclosed.

6. The Respondent disclosed redacted documents and the Appellant did not raise any issues in respect of the disclosure until the first day of the hearing on 2 August 2021 when Mr Bridge made an application for the unredacted version of the documents to be disclosed to the Appellant. The Tribunal enquired as to why the application was being made on the first day of the hearing given the disclosure was provided in January 2021 and Mr Bridge accepted that the application should have been made sooner. There had been a recent change in the legal team for the Appellant which was the explanation put forward. The Appellant also submitted that they suspected the redactions were wider than that had been ordered by Judge Brace. The Respondent's position was that the redacted material could lead to the identity of the informants.

7. The Tribunal therefore read the unredacted material in order to decide whether to order the full disclosure. We referred the parties to the case in **Plymouth City Council v White EAT 0333/13** which provides that if there was dispute between the parties the relevant document(s) should be confidentially inspected by the judge to resolve the matter. The same judge should not then subsequently conduct the substantive merits hearing unless the parties agreed. The parties did not object to the Tribunal continuing to hear the claim following our review of the redacted material.

8. It transpired that there had been additional calls with call handlers with the informants that had not been disclosed in the redacted material. Mr Hughes updated the Tribunal on the outcome of the investigations and confirmed there had been a further telephone call the contents of which were subsequently disclosed to the Appellant. Upon reviewing the unredacted disclosure the Tribunal ordered that some of the redactions be removed as

they went beyond that that had been ordered by Judge Brace in that there were redactions that did not relate to the identity of the informants. An agreed text of the redactions was reached between the parties and this was added to a supplementary bundle which also contained the pleadings.

9. On 3 August 2021 Mr Hughes raised with the Tribunal that he considered he did not feel on an equal footing as he believed that Mr Bridge had had opportunities to make open speeches and they had been incorrect in law. The Tribunal did not take the view that Mr Bridge had given an opening speech albeit Mr Bridge had taken opportunities to set out the Appellant's case in response to questions and discussion of matters the Tribunal wanted clarified. On these occasions Mr Hughes' comments had also been sought. Nonetheless Mr Hughes maintained that unless the Tribunal confirmed they would not read Mr Bridge's List of Issues he felt he was on an unequal footing. In the circumstances the Tribunal decided to permit both parties to have 10 minutes to make opening speeches which they did so on 3 August 2021.

10. It was apparent throughout the proceedings that feelings were running high between the parties. The Tribunal had to manage the proceedings appropriately including taking short breaks and reminding parties, representatives and witnesses not to talk over each other or the Tribunal.

Findings of Fact

11. The Appellant was founded in 2013 by Ms Bourne and Mr Till. It is an engineering company based in Brynmenyn, Wales focussed on developing and prototyping a number of products aiming to reduce environmental impact in the energy sector. At the time of this Employment Tribunal the Appellant employs 10 full time employees at the time of the matters in dispute there were 8 employees. Ms Bourne and Mr Till do not have any health and safety related qualifications but have wide industry experience in engineering. Mr Till has a BEng in Electromechanical Engineering and Ms Bourne studied mechanical engineering and energy studies at degree level followed by postgraduate materials and engineering management.

Background to the Inspection

12. As per the Order of Judge Brace, the identity of the informants who initially contacted the HSE regarding the Appellant's remain unidentified. There was a series of HSE records and emails between the informants and Inspector Turner before the Tribunal. It would appear that the first notification that took place was on 29 January 2020 which made allegations in respect of the nickel plating and powder coating. We do not intend to significantly set out all of the allegations that were made by the informants

against the Respondent albeit to say that it was shown that some of the allegations were significantly exaggerated and could not have been factually correct. For example the allegation that there had been a test of ammonia levels in front of employees during a lunch break and the fumes detected coming from the small jar were in excess of 1,000 parts per million. As was common ground and agreed by Inspector Helps this would simply not have been possible as such high levels of ammonia would not have been able to have been tolerated by people present. It is also common ground that the complaints by these informants led to the inspection of the Appellant by the Health and Safety Inspector. We accepted Inspector Turner's evidence that other than the complaints prompting the inspection, the content of the allegations was not relevant. Inspector Turner carried out her inspection with an open mind and in the same way she would do for a normal similar duty holder. Furthermore there were other triggers for the selection of the Appellant for inspection namely that the HSE's work plan has included metal fabrication as a specific industry sector targeted for pro-active inspection. Of particular concern were risks to respiratory health which were often found to be poorly managed. Accordingly the Appellant fitted the criteria for an inspection as well as the complaints that have been received.

13. Much of the matters the Tribunal heard about during these proceedings were related to the alleged conduct of two former employees of the Appellant. Some considerable detrimental allegations have been made against these individuals during the course of the proceedings and they have not appeared as witnesses. Whilst no anonymity orders have been made in respect of these individuals the actual identity of the individuals is not relevant and they do not need to be named. We will therefore refer to them as employee A in respect of the former Operations Manager and employee B in respect of the Production and Process Technician.

14. Employee A was the former Operations Manager at the Appellant and this individual left the employment on 31 December 2019. Both Ms Bourne and Mr Till gave extensive evidence of the significant breakdown in the relationship between employee A and the Appellant in the lead up and departure from the business. It is the Appellant's case that employee A deliberately sabotaged the Appellant's business both in respect of removal of documents (both paper and backed up IT) as well as deliberately leaving open the premises on 31 December 2019. Employee A had previously been responsible for health and safety at the Appellant with overall responsibility for all aspects of operations including the processes which were subject of the notices. Having heard the evidence we do not find this to be strictly accurate insofar as it was clear that Mr Till was responsible for the nickel plating procedures.

Inspection

15. Inspector Turner and Inspector Helps originally visited the Appellant on 11 February 2020. The Inspectors arrived in the morning and were met by Ms Bourne. Ms Bourne explained that it was not a good time for a visit as she was expecting the Welsh Government visitors imminently to talk about investment in the company. They had a brief preliminary discussion and Ms Bourne informed the Inspectors as Chief Executive she was responsible for health and safety. Inspector Turner decided it would be better to return another day to inspect when either Ms Bourne or Mr Till was available to give them their full attention. Ms Bourne informed them of dates that she wished them to avoid but did not tell the Inspectors that the Appellant closed on Friday afternoons.

16. The Inspectors accordingly returned to visit on the afternoon of Friday 14 February 2020. Where relevant, we refer to Inspector Turner and Inspector Helps notes taken during the visit below. Some of those notes were made before the visit as a prompt or an aide memoire to the Inspectors. Ms Bourne walked the inspectors around the premises for the inspection.

17. We firstly set out some general findings of fact regarding the inspection and the inspectors' qualifications. Inspector Turner has a postgraduate diploma in Occupational Health and Safety and is a chartered member of the Institute for Occupational Safety. She has been employed by the Respondent since 1993. Inspector Helps is a Specialist Inspector in Occupational Hygiene. She has been employed in that role since 2001. She has a Diploma of professional Competence in Occupational Hygiene and holds a Preliminary Certificate in Measurement of Hazardous Substances. She is also a Chartered Occupational Hygienist.

18. In Unit 3 of the premises, there was an unfinished wooden balcony and stairs to a nearly constructed mezzanine with no edge protection for half the balcony or stairs apart from hazard tape which left an open drop from the first floor level. Inspector Turner told the Tribunal that as soon as she saw this she was aware that the costs recovery would come into play given the extent of the breach with the mezzanine.

19. The inspectors observed some chemicals being stored without bunding[1] including two 25 litre containers of 96% sulphuric acid. In Inspector Turner's opinion chemicals did not appear to be stored in any planned way, for

[1] Bunding is a technical term and describes a spill container to ensure that chemical containers are placed in suitable spillage containers in the event of a leak or spill of the chemical container itself which would enable the spillage to be captured.

example they were not separated by incompatible substances or managing risk of damage or spillage. In particular we were shown a half container full of sulphuric acid and another of sodium hydroxide which is an alkali and we were informed that these should not be stored together because if mixed accidentally, for example through a spill or a leak, they could cause a reaction releasing heat and fumes.

20. Beneath one eyewash station was an un-bunded container of sulphuric acid. The Inspectors also uncovered electrical wiring deficiencies in the anodising line area which were accepted by Ms Bourne.

21. It was put to the inspectors that their notes contained errors. One of the alleged errors was reference to a crane. Mr Bridge asserted in cross examination of both the inspectors that there was no crane. On revisiting the notes of the evidence and the Appellant witness statements we record that the Appellant led no evidence as to whether there was a crane or not. The presence of a crane or otherwise is not relevant. We also find that Inspector Help recording a date of the first visit as 10 February instead of 11 February, her references to a laser, MOD contracts and describing the pump as a compressor not to be of any relevance nor do we find that this should affect the credibility of her evidence.

22. Following the inspection, Inspector Turner attended an inquest on 17 February 2020. She was due to be on annual leave the remainder of the week but such was her concern at her opinion of serious risk at the Appellant she worked on 18-20 February 2020.

23. As requested, Ms Bourne had sent Inspector Helps the Material Safety Data Sheets ("MSDS") so that she could review the hazardous substances in use. Ms Bourne also submitted some photos and updated pictorial work instruction (see paragraph 48 below).

24. The Prohibition and Improvement Notices were not issued on the day of the inspection. Inspector Turner considered serving them immediately but she was unclear on what chemicals were actually being used and the level of risk they presented. Inspector Turner asked Inspector Helps to summarise her advice in writing. This was duly provided by Inspector Helps in an email of 19 February 2020 and she listed the hazard statements in respect of the exposure to the chemicals in use as outlined in paragraph 45. Inspector Helps told Inspector Turner that it appeared that products were being manually tipped[2] into treatment tanks and also emptied manually with potential for splashing, spillage and contamination. She highlighted the absence of a water shower and eyewash and the lack of gauntlets, aprons

[2] See paragraph x below regarding pumps

or respirators with a potential for skin and eye contact during the handling of all these liquids.

25. Inspector Turner had regard to the Enforcement Management Model which is a (non statutory) framework for making decisions. She concluded that she had found multiple breaches of health and safety law meaning that the duty holder factor 'standard of general conditions' was poor. There were a number of other matters Inspector Turner considered enforcing that had been observed during the inspection which she believed could have led to further prohibition notices but decided to focus on what she considered to be the most hazardous which was suitable risk management for substances hazardous to health.

26. In between the visits on 11 and 14 February 2020 the Appellant had decided to engage a Health and Safety Consultant and Ms Bourne informed Inspector Turner of this.

27. Inspector Turner telephoned Ms Bourne on 20 February 2020. Between the inspection, Inspector Turner had not attempted to contact Mr Till and he had not attempted to contact Inspector Turner.

Hierarchy of risk control

28. Inspector Turner told the Tribunal that when assessing health and safety, the Inspectors consider a hierarchy of risk control. This is the hierarchy of control required by Regulation 7(3) of the COSHH Regulations 2002. This provides a series of control options to prevent exposure to hazardous substances considered in order based on reliability and effectiveness. At the top of the hierarchy would be the elimination of the hazardous substance, at the bottom of the hierarchy is equipment or devices worn by exposed individuals including PPE. Eliminating a substance means there is no exposure but if this is not possible a reliable form of control would be expected to be in place for example adopting a process so it releases less of the substance or reducing the employees exposure to the substance.

Issuing of the notices

29. Inspector Turner served two Prohibition Notes and two Improvement Notices on the Appellant on 20 February 2020. They were accompanied by a covering letter and a 7 page document setting out the material breaches and reasons why they were considered in breach along with links to suggested industry guidance.

30. We turn now to give a factual description of the four procedures which were subject to the various Notices.

Nickel plating Prohibition Notice

31. The Prohibition Notice in respect of nickel plating stated as follows:

> The Inspector was of the opinion that the nickel plating line and related chemical storage, handling and disposal involved a risk of serious personal injury. The matters which give rise to the risk was no adequate control measures or safe systems of work to avoid employees' exposure to substances hazardous to health. The statutory provisions said to be contravened were the Health and Safety at Work Act 1974 Section 2(1) and COSHH Regulations 2002 Regulation 7 as the exposure of employees to substances hazardous to health had not been prevented or adequately controlled.

32. The covering letter that accompanied the Prohibition Notice explained that the notices had to be brought to the attention of the Appellant employees.

33. The 7 page accompanying document explained that some of the products being used for nickel plating and anodising had been assigned hazard statements in terms of exposure via inhalation skin and eye contact and listed a number of significant harmful possible consequences. She also stated that the Appellant was currently storing, handling and using the chemicals and using them in combinations with little knowledge of the health risk and correct precautions. Inspector Turner stated that the Appellant had no COSHH risk assessment or safe systems of work and the example procedural documents showed to her at the visit made no reference to health and safety precautions. Ms Turner informed the Appellant they needed competent advice on how to safely operate these procedures and the correct health and safety precautions to take.

Nickel plating

34. Nickel plating is a procedure whereby a thin layer of nickel is added to metal objects. The procedure in operation at the Appellant was electroless nickel plating, which does not involve an electrical charge instead the part which is to be plated is dipped into the tanks, left in the electroless nickel plating tank for a period of time and deposition continues at a rate until the nickel is depleted or the part is removed. The final tank is heated to certain temperatures. The equipment requires a series of tanks to hold the chemicals into which the parts are dipped with a fixture which enables parts

to be moved from one tank to another, Mr Till set up the nickel plating procedure in conjunction with a Mr Kirby at McDermid Chemicals. There was a series of sampling and processes trialled by Mr Till in the years up to the issues before the Tribunal. Mr Till prepared a set of instructions that were before the Tribunal. This was referenced as evidence 36 submitted to the Respondent in May 2020. The Tribunal had sight of a photograph of a Lever Arch folder containing nickel plating development process and records. We did not see all of the records in the bundle only a photograph of poly pockets containing some of the records (some of the records were in the bundle). This file was in a cupboard at the time of the HSE visit but it was not considered in any detail by the Inspectors if at all.

35. At the time of the inspection the small heating circuit used to heat the tanks had been disconnected so that larger heaters and more stable temperature control could be fitted. The line was not operational but could have become operational at any time.

36. The nickel plating procedure was a procedure and development by Mr Till and only Mr Till operated the procedure other than Mr Paul Cabble who was the Development Engineer. This was apart from employee B undertaking one titration process. Mr Till had undertaken a series of experiments during the time preceding the proceedings. The Appellant relied upon the series of spill response sheets and the nickel plating documentation described above as demonstrating adequate control of the nickel plating process. It was Inspector Turner's evidence was that this was not the case. In respect of the chemicals in use during this procedure, there were 10 chemicals/substances in use. Only one was mentioned in the documentation produced by Mr Till which was Bondal. The material safety data sheet stated that Bondal is a corrosive highly toxic (via skin ingestion or inhalation) and can cause cancer and reproductive effects. Bondal coming into contact with acid can also release hydrogen cyanide gas which can be very toxic. The only health and safety information on the nickel plating instruction/process was as follows,

"Warning: Bondal can emit toxic gases when contaminated with acid or exposed to fire/hot temperatures".

There were a further 9 chemicals/substances used in the procedure for which there was no health and safety information provided in the documents before the Tribunal in respect of nickel plating.

Container handling and storage procedure

37. The Appellant's container method statement process provided that chemical containers should be in labelled designated storage with spill

trays. The technical term is “bunding”. The chemical storage of 25 litre containers photographed by the Inspectors at the visit did not have this in place. Specifically a 25 litre container of sulphuric acid was photographed placed under an eyewash station with no such storage and we also had sight of similar 25 litre containers placed on shelving next to each other not placed in spill trays.

38. Mr Till’s evidence, which we accepted was that the chemicals in the tanks would not need replenishment for years with the exception of the ENP tank which may require replenishment once or twice a year.

Pump

39. A dispute had arisen between the parties about the method of transferring chemicals between tanks and also from the container containing the chemicals into the tank. On the nickel plating line there was an agitation and filtration pump which was used effectively to stir the contents of the tank. The Inspectors observed that this was not suitable or could not be used to transfer liquids from one container to another. Mr Till’s evidence was that for chemical transfers there were two manual pumps available on the day of the inspection. This included a pump which belonged to employee A which was outside by the fire escape (the Appellant does not know why it was moved to this place) although they suspected it had been placed there by employee B, and an additional pump in storage in the cupboard which has since been replaced after a minor leak was found. The Inspectors did not see the transfer pumps at the time of the inspection. The Appellant’s were critical of the inspectors declining to look at the pump that had been placed outside allegedly by employee B.

40. After the inspection Ms Bourne sent a photo of the same agitation pump to Ms Turner. In the covering email Ms Bourne stated, **“we are using a pump for the chemicals”.** The inspectors reasonably understood from the email and photo that Ms Bourne was still maintaining that the agitation pump was the pump being used for the transfer of chemicals by her attaching a photo of that pump. Indeed this position was maintained in the Response to HSE notices document filed in May 2020 where Ms Helps was said to have been **“unable to identify a chemical pump…which was in plain sight at the visit. A photograph was later sent”.**

41. The Appellant subsequently provided further information on the type of pump used to transfer chemicals as part of the May 2020 response. The pump used was a Beckson 236PF. The pump was not suitable for pumping solvents thinners or acid concentrations greater than 50%. On the plating process sheet drafted by Mr Till it refers to use of a hand pump and does specify under warnings that the hand pump should not be used for pumping solvents, thinners or acid concentrations greater than 50%. Inspector

Turner commented that this sheet did not give information as to how the transfer of chemicals should be done safely and there was no cross reference to another procedure. Further Inspector Turner observed that the pump manufacturers' website had included detailed safety related information on how to use the pump including the risk of static electricity which was not included or referred to in the Appellant's procedure.

42. Inspector Helps told the Tribunal that the provision of information about this pump did not change her view that there was not a safe system of transferring chemicals. The inspectors still did not know what pump would be used for transferring the 96% sulphuric acid for dilution. Further, she would have expected to have seen a selection of pumps for differing chemicals. She also pointed out that a pump would be needed to transfer the chemicals from the tanks to a waste container. This would be required for example for any decommissioning. Therefore a 200 litre nickel plating tank and 70 litre anodising tank would require 241 and 84 strokes respectively using the Beckson pump (which had a capacity of 0.83 litres).

Chemical dip procedure

43. Inspector Turner's evidence which we accepted was that the dip procedure provided by the Appellant was not a safe system of work because it failed to address inhalation risk during anodising (see below) and plating. We find this was more a process type document explaining how to dip the parts. Whilst it includes the specification of personal protective equipment (no respiratory equipment), it refers to separate work instructions. We accepted Inspector Turner's evidence that it would be preferable to have a single set of procedures and instructions which incorporated a suitable and sufficient risk assessment. Lastly there was no mention of what to do in the procedure in the event of unforeseeable adverse consequence such as something falling into the tank and splashing. It should be noted that the tanks had lids but those lids could be removed and would be needed to do so during some of the parts of the procedure.

44. The Appellants also referred to a titration procedure document but again this procedure was more a process type of level of instructions rather than a document incorporating safe systems of work. It did refer to work instructions and emergency procedures for titration and we had sight of a risk assessment for titration also. This had been created by employee A in April 2019 which recorded a number of actions that needed to be done before production starts such as a sink to be provided in the anodising / nickel area. As at the time of the inspection there is no evidence that any of those actions had been undertaken. The risk assessment recommended that all tanks be labelled. At the time of the inspection the plating tanks were not labelled other than the water tanks. The risk assessment also required

a COSHH assessment for each tank and no such COSHH assessments were available.

45. There was no sink or running water in the process area for washing skin in an emergency. In relation to the substances used in the nickel plating process the MSDS sheets referenced the following potential hazards: (we do not list all of the hazards here as there were too many but the following were the ones that were relevant to the question of whether there was a risk of serious personal injury) serious eye damage, severe skin burns, may damage fertility or unborn child if swallowed, irritation of airways and sensitisation (occupational asthma), corrosiveness. One particular chemical of nitric acid was toxic/corrosive when held.

Anodising

46. Anodising is a electrolytic process for producing thick oxide coatings usually on aluminium and its alloys. Ms Bourne's statement described this as a small lab scale system with tanks of about the size of a kitchen sink rather than an industrial process where tanks are the size of baths or much longer. This procedure was operated by employee A initially until employee B who came in as a contractor in October 2019 was engaged to carry out this process. The process improves the wear and corrosion resistance of aluminium. The equipment required were chemical tanks to hold the part and ensure electrical circuit was maintained and a controlled power supply. Some tanks required temperature control depending on ambient conditions. This procedure was set up by employee A. Mr Till's evidence was that he intended to optimise the anodising process for safer and efficient operations, upscale it or remove it completely depending on the business conditions and Mr Cabble's assessment of the process after employee A's departure. The Tribunal saw evidence that the Appellant undertook anodising for a number of clients and this was ongoing up until the date of the inspection. It was a regular activity as can be seen by the anodising record sheets in the bundle specifically the Appellant's were performing anodising for a client we shall call "VT".

Anodising Prohibition Notice

47. The Prohibition Notice in respect of anodising was very similar to the nickel plating notice. It stated as follows:

The Inspector was of the opinion that the anodising line and related chemical storage, handling and disposal involved a risk of serious personal injury and the matters which give rise to the said risks were that there were

no adequate control measures or safe systems of work to avoid employees' exposure to substances hazardous to health. The statutory provisions said to be contravened were the Health and Safety at Work Act 1974 Section 2(1) and COSHH Regulations 2002 Regulation 7 as the exposure of employees to substances hazardous to health had not been prevented or adequately controlled.

48. In relation to the anodising procedure, following the inspection the Appellant had provided a revised work instruction for anodising. Inspector Turner advised she supported the step by step pictorial approach that was being taken and described it as the nearest document to a safe system of work that had been submitted. However she remained of the view it did not reflect the outcome of a suitable and sufficient risk assessment of the anodising procedure.

49. The Tribunal was unclear what the Appellant's position was in respect of the status of the anodising line. In their further grounds submitted in May 2020 it stated that the anodising line was under consideration for being decommissioned. The actual active usage was in our view of limited relevance as the notice included storage handling and disposal of chemicals which would encompass the activity required to decommission and dismantle an anodising line and store/dispose of the chemicals safely. Furthermore risk assessments and safe systems of work would be required to decommission safely.

50. In any event, as noted above the anodising records show it was ongoing. The records show it had taken place on two occasions in January 2020 and on 6, 7 and 14 February 2020 with 632 components being anodised with the contract with VT.

51. In the minutes of a meeting between Mr Till and Ms Bourne dated 6 January 2020 it stated under the heading "Anodising" as follows:

" Anodising set up is not suitable for greater volumes from V-Track alone and will be upscaled. Short term outsourcing of overspill will be done by South Wales Metal Finishers."

<u>Anodising risk assessment</u>

52. On 13 February 2020 which was 2 days after the first attempted health and safety inspection, the Tribunal had sight of an email from Paul Cabble to Mr Till and Ms Bourne which stated as follows:
"Hi both, following our conversation with Terry I've drafted the attached risk assessment".

In the body of the email was a link to a COSHH risk assessment for anodising dated 13 February 2020. Mr Cabble described physical actions required as follows,

- Bund the anodising area;
- Install a common hood and extraction to each station (Mr Cabble referred to advice from Mr Kirby about the need for vapour being discharged above head height);
- Install a sink;
- Make lab coats, gloves, respirators and face masks available;
- Label all waste;
- Assign waste containers for titration.

53. In respect of these suggested physical actions we find that none of these actions can have previously or currently been in place otherwise Mr Cabble would not be referencing the need for them to take place after having had the discussion with Mr Kirby.

54. The email goes on to discuss suggested paperwork and the requirement to update substance register, check all MSDS sheets are available, create waste disposal plan, create emergency spillage plan, create work instruction for anodising, titration tank cleaning including warnings and record PPE provisions in a register. Mr Cabble also referenced that tank cleaning and titration would need a risk assessment. Mr Cabble referred to an attached typical work instruction layout he had seen used in the past commenting that it would usually have all safety warnings on it and laminated versions displayed at operator stations. This was reference to a document called **"Anodising work instructions – draft"**. We find that this was the anodising pictorial guide we have referenced paragraph 48 above and further that for this reason this is the first occasion on which such a document had been created.

Powder coating

55. Powder coating is another process which the Appellant says was introduced at the behest of employee A. This is a procedure whereby powder is applied to metal to prevent corrosion. It is applied electrostatically and then cured with heat or light.

Powder coating Improvement Notice

56. This provided as follows:

I hereby give you notice that I am of the opinion that at
(Location of premises or place of activity) 4 Squire Drive, Brynmenyn Industrial Estate, Bridgend CF32 9TX

you, as an employer
are contravening the following statutory provisions :

Health & Safety at Work etc. Act 1974, Section 2(1)
Control of Substances Hazardous to Health Regulations 2002, Regulation 7
Dangerous Substances and Explosive Atmospheres Regulations 2002, Regulation 6

The reasons for my said opinion are :
that you have not prevented or adequately controlled employees' exposure to substances hazardous to health during powder coating; and you have not ensured that the risk of fire or explosion from powder coating is eliminated or reduced so far as reasonably practicable.

57. In respect of powder coating there is a dispute between the parties about the information provided to the Inspectors at the visit by Susan Bourne regarding the future viability of this procedure. It was the Appellant's case that the decision had been taken to discontinue powder coating and the time of the Inspectors visit the whole procedure had been effectively dismantled and therefore there was no prospect of powder coating operations resuming. Ms Bourne's evidence described the process as having been electronically locked off from operations since January 2020 and being in a process of being dismantled at the time of the visit. Ms Bourne told the Tribunal that she made it clear to the Inspectors that the process going forward was unlikely. She acknowledged that the Inspectors commented to take expert advice if the intention changed in the future. Ms Bourne stated that it had been discussed with the Inspectors that it was employee A's intent to set up on a larger scale not the Appellants as the Appellant operated with small parts that fit into the palm of the hand and a large booth would not have served the Appellant's business. Ms Bourne pointed to several factors as evidence that the powder coating was clearly not operational. The LEV (extraction system) had been dismantled and was stored in the car park awaiting collection. There was no powder present on site for powder coating and therefore there could have been no risk of explosion. Furthermore the powder volumes were so small that the risk would have been negligible even if powder had been present. There was no lighting in the storage area where the dismantled equipment was kept and the Inspectors had had to use telephone torches to inspect the area. Ms Bourne also relied on minutes of a meeting between her and Mr Till of 6 January 2020. The relevant sections are as follows:

"[Employee A] is expected to set up a company, suitable for upscaling of processes to absorb VT work before he can is key….. current powder coating and anodising set ups are not suitable for operation if required volumes are upscaled….
…..
Powder coating

LT remains unhappy with powder coating inhouse due to increased risk of dust and powder affecting ultra high vacuum generation. Considerable efforts to maintain cleanliness (beyond normal powder coating levels) which enhancing HSE performance are not sufficient to enable vacuum activities to continue. LT now of opinion [employee A's] insistence on bringing in powder coating was a deliberate move to sabotage … Development. [Employee A's] ridiculous plans for installing bigger powder coating facility would get in way of … Manufacture and effectively destroy core business. LT vetoed implementing any of [employee A's] powder coating expansion plans. SB and LT make decision to phase out powder coating entirely after current small batch orders are fulfilled and suitable sub-contractor is found. LT/SB to evaluate HW powder coating and trial with a view to preferential supplier for all future powder coating work. Final decision to be taken in March 2020.

58. Ms Bourne was asked about what she informed the Inspectors under cross-examination and insisted that she had not informed the Inspectors that powder coating was being developed although she accepted that she confirmed it was one of the processes they had been undertaking. This was important as one of the grounds of the Appellant's appeal was that powder coating was not operational. The Grounds of Appeal lodged in 2020 stated that the Respondent was advised at the visit that a final review to disband the process was pending subject to a contract facility being sourced.

59. Both Inspector Helps and Inspector Turner's evidence corroborated by the notes taken at the time of the visit and later typed record that they were informed by Ms Bourne that powered coating was being upscaled. Inspector Turner accepted Ms Bourne's assurance that the small scale powder coating was out of use at the time of the inspection however she remained of the view that it was entirely usable if they decided to restart it. The LEV had been removed from the small scale powder coating area however none of the other equipment had been removed or disconnected and was readily available for use. Ms Turner's evidence is that Ms Bourne told herself and Ms Helps that powder coating was to be scaled up imminently. Inspector Turner's notes of the discussion were in the bundle before us. These stated as follows:

"powder coating is out of commission at present – mezzanine floor and a new extracting system no powder coating – locked off" and further on **"working around contractors as well mezzanine floor being completed at the moment small volumes at present will scale up to production levels so equipment reflects that."**

60. It was not clear whether this was in respect of powder coating (as to what was going to be scaled up) however later in the note it states as follows **"powder coating will be done in end of unit – space for LEV to go in round mezzanine"**. Furthermore, Inspector Helps notes also record that Ms Bourne informed her powder coating would be upscaled in the future. Inspector Helps had taken photographs of the area that she maintained Ms Bourne had told her was going to be used in respect of insulation of a new powder coating facility and these photographs were in the bundle.

61. In the meeting at the end of the inspection Inspector Turner's notes recorded **"design of booth so can't lean in"** as one of the bullet points they had reminded Ms Bourne about. Inspector Turner told the Tribunal that they would not have even had that conversation if Ms Bourne had not been explaining upscaling plans. There was a further follow up conversation between Ms Bourne and Inspector Turner on 20 February 2020. In the notes of this discussion taken by Inspector Turner, Ms Bourne referred to a delay in plans caused by builders and made the comment that "if the company is still in business". Inspector Turner also referred to the upscaling plans in the letter covering the improvement notice and also in the covering email.

62. Mr Till relied on an email from himself to Mr Cabble dated 20 November 2019 in this email Mr Till commented as follows **"in the meantime I need less powder coating and building dust in the way before we start so can we look at sub-contracting this"**.

63. Further in Inspector Turner's conversation with David Walters (the Health and Safety Consultant appointed by the Appellant just after the inspection), he told Inspector Turner that he advised the Appellant to cease powder coating without extraction. In the photographs of the powder coating booth taken by the Inspectors it was apparent that there was significant black staining on the wall behind the booth from the black powder that had been in use.

64. On the balance of probabilities we have concluded that there must have been a mention of upscaling of plans for all of the corroborative documentary evidence from the Inspectors to make any sense. It is simply implausible in our view that the notes would have been written in the way we have set out above covering a discussion of upscaling of plans given the corroborative documentary evidence produced by the Inspectors. For these reasons we find that the Inspectors were informed by Ms Bourne that powder coating was potentially going to be upscaled.

65. Following the inspection, the Appellant sent the Inspectors photographs of evidence that the booth had been dismantled and the wall cleaned after the inspection. No information had been provided as to how the powder coating was decommissioned and the overspray powder on the walls and surfaces had been cleaned.

66. There was some dispute between the parties about whether or not any powder remained on the premises at the time of the inspection. The Appellant's witnesses told the Tribunal that there was no powder on the premises but the photographs of the Inspectors at the time of the inspection suggested otherwise. In the photographs before the Tribunal of the powder coating area there was (in addition to the large amount of black powder on

the wall behind the booth which was a white wall completely stained black) evidence in the photographs of powder around the booth on the bench and on the equipment. Inspector Helps' witness evidence described 3 crates under the bench of the powder coating unit, two of which were lidded and one was unlidded which contained the black powder. Inspector Helps also had observed an old dirty reusable half mask respirator located on the bench fitted with 2 combination filters that were out of date.

67. Ms Bourne informed Inspector Helps that this particular respirator had not been supplied by the Company and the Appellant asserted that it had been placed there as an act of sabotage by either employee A or employee B. Inspector Helps discussed the legal requirement to fit tight fitting respirators to ensure they had fitted the user correctly and that Ms Bourne had no knowledge of that requirement.

68. In the document accompanying the notices, Inspector Turner acknowledged that the powder coating was currently out of use pending installation of an extracted larger booth and that the LEV had been dismantled. She also acknowledged that the respirator had not been fitted to any employee and had not been supplied by the company.

69. Ms Bourne was asked about the presence of powder during cross-examination. Ms Bourne was directed to the photographs in the bundle of the blue and black containers which Inspector Helps says contained the unlidded container of powder. Ms Bourne told the Tribunal that the box on the left was lidded and she could not say what was in there but referred to her procedures that the powder was kept in a cabinet stored and locked. Ms Bourne told the Tribunal she did not believe there was powder in the boxes but she could not say for sure when directly asked by the Judge. Ms Bourne maintained that the Inspectors did not lift the lids of the lidded boxes. She then changed her evidence (that she could not say for sure there was no powder in the boxes) to say that after the inspection she looked and the boxes did not contain powder. Mr Hughes asked Ms Bourne how she knew the unlidded box had no powder in it and Ms Bourne told the Tribunal she had "*one of the guys remove all of the boxes in areas there was no evidence of any powder".* Ms Bourne then said that they had not put in any evidence on powder as the operation had ceased and they did not understand they needed evidence on this.

70. We find on the balance of probabilities that we prefer Inspector Helps' evidence that there was powder in the unlidded box as can be seen in the photograph and also because of the photographs demonstrate that there was powder in and around the area at the time of the inspection not only on the back wall but on the bench and worktop also and splashes of powder on the surrounding back wall behind the extraction booth.

71. In addition to what was located on the inspection the Appellant asserted that all reasonable measures had been taken to control employee exposure to the powder. The powder in use was called Jet Black RAL9005 and the Safety Data Sheet according to Ms Bourne's statement confirmed that it was not flammable and of low explosion risk. Ms Bourne also gave evidence that the volumes maintained at the Appellant's business the premises would not be high enough to cause fire explosion even if the powder was flammable which it was not. The MSD sheet in respect of this powder stated that there was a risk, if inhaled that the dust may irritate the respiratory system and frequent inhalation of dust over a long period of time increases the risk of developing lung diseases. In respect of skin contact the sheet provided that prolonged contact may cause dryness of the skin sensitisation or allergic reactions. In respect of eye contact the dust may cause slight irritation. The sheet confirmed the product was not flammable. The Appellant relied upon this to demonstrate that there was no risk of explosion as had been identified in the improvement notice.

72. Inspector Turner told the Tribunal that this demonstrated that the Appellant did not have an understanding of the risk of dust explosion. She explained that combustible dust suspended in air can form a potentially explosive mixture, and if a source of ignition is introduced it can cause an explosion. Sometimes the first explosion mobilises dust from the surroundings (on surfaces, ledges and beams if these are not cleaned regularly) and if this leads to a secondary larger dust explosion it can have even more serious consequences such as building collapse. There is an upper and lower explosive limit for the dust involved. The MSDS for the powder gives a lower explosive limit range of 20-70g/m3. A dust cloud of this concentration resembles a very dense fog. A competent DSEAR should identify how such a concentration might arise and what mitigating measures are required. The MSD sheet had also advised on earthing to prevent sparking from static electricity which is a potential source of ignition.

73. We accepted Inspector Turner's evidence. We had due regard to her expertise and there was no other credible evidence to the contrary. The Appellant had not provided a DSEAR risk assessment to the Tribunal as there was none in place in relation to the powder.

74. The MSD sheet provided that when the powder was being cleaned the powder should be dampened with water if necessary and they should be careful not to create dust clouds if using shovels or brooms. Protective clothing must be worn including eye and face protection, hand protection, appropriate footwear and additional protective clothing. There should be an eyewash station and safety shower and contaminated work clothing should not be allowed out of the workplace. Respiratory protection complying with

the approved standards should be worn if a risk assessment indicated inhalation of contaminants is possible.

75. In relation to risk assessment control measures, procedure housekeeping and storage for powder coating Ms Bourne told the Tribunal in her witness statement that it had existed in both hard copy in the file on the shelf outside the offices and electronically but the HSE Inspectors declined to visit the office area when offered. However since the visit she discovered documentation including the risk assessment had been removed believed to be by employee A or employee B. Ms Bourne had believed it to be there at the time and later discovered it was not. Therefore if the Inspectors had asked to see the records they could not have done. Ms Bourne also told the Tribunal that the powder coating records were maintained in a blue A4 book and folder in a filing cabinet but these were also subsequently found to have been removed and pages of the processes torn out again allegedly by either employee A or employee B.

76. At the time of the Tribunal hearing there was still no risk assessment of any nature in relation to powder coating.

Metal working fluids Improvement Notice

77. The Improvement Notice in respect of the metal working fluids stated as follows:

    The Inspector was of the opinion that the Appellant was contravening the S 2 (1) of the Health and Safety at Work Act 1974 and Regulation 7 and COSHH Regulations 2002. The reasons for the opinion were that they were not preventing or adequately controlling employees' exposure to metal working fluid which is a substance hazardous to health. Attached was the Schedule which set out effective measures that needed to be taken to comply with the Notice with the assistance of a competent person. These were in summary to implement protection measures to adequately control the skin and inhalation exposure of employees to metal working fluids. There were 3 sub requirements to include appropriate work processes, equipment systems and engineering controls, control of exposure at source including adequate ventilation systems and organisation measures and where the adequate control of exposure cannot be achieved by the means to provide suitable PPE.

    There needed to be a record of the control measures as safe systems of work and information instruction and training on the control measures to relevant employees had to be provided. The Appellant also was required to

identify and record suitable management arrangements to monitor and maintain the control of the measures.

78. In the covering letter Inspector Turner stated as follows:

> **"You are operating CNC machines using Relubro metal working fluid. There is a risk to your employees from skin irritation, dermatitis and serious lung conditions from poorly controlled exposure to metal working fluid."**
>
> Guidance was provided by way of a link to the UKLA/HSE Good Practice Guide for Safe Handling and Disposal of Metal Working Fluids.

79. The main issue of concern was the lack of respiratory health surveillance. It was common ground that the Appellant had conducted health surveillance in respect of dermatitis and kept records. There were two new CNC machines in the machine shop. Metal working fluids can cause occupational asthma and other lung diseases if breathed in. The CNC machines did not have an LEV extraction system in place. The Inspectors were of the view that other checks could be undertaken or procedures could be undertaken to reduce the risk. The Inspectors were informed by the employees present that they used compressed air guns to remove the metal working fluid and swarf from the components which they did with the enclosure of the door partially closed to reduce splashing and demonstrated this to the Inspectors. There were no dip slides in place to test for bacterial growth. The suggestion was that if alternative cleaning methods were not available to the air gun a modified nozzle could be fitted to allow it to be operated at reduced pressure thus reducing the spread of the metal working fluids during the cleaning process.

80. Ms Bourne told the Tribunal that the suggestion to fit LEV to the fully enclosed CNC machines was unreasonable as it was asserted that modifying the new machines would have breached the warranty and they were financed and not fully owned by the Appellant. We had no evidence form the manufacturers to corroborate this. Further that the machine environment was fully enclosed. Ms Bourne told the Tribunal that following the HSE advice the advice given was implemented immediately to reduce the pressure on the air gun, add longer nozzles and introduce a time delay between the machine stopping and opening the enclosure doors to ensure that no mist would be present in the breathing zone. They also ordered dip slides and undertook weekly PH readings. They have also purchased an incubator to ensure that they are able to take the appropriate bacterial sampling even though they dispute that this is necessary.

81. The Inspectors evidence with regard to the risk of or why in their view there had been a contravention of COSHH was as follows, in summary:

a) There was no LEV fitted to the machines or a delay on the doors to allow mist to settle before the doors open which resulted in inhalation exposure and contamination of skin and clothing to the operatives.

b) The use of the compressed air gun rather than preventive cleaning methods also resulted in inhalation exposure and contamination of skin and clothing.

c) There was no microbiological monitoring being undertaken and no respiratory health surveillance for asthma and occupational hypersensitivity pneumonitis. The FOD Work Plan and Enforcement Guidance indicate that each of these non-compliances warranted an Improvement Notice. This is referenced to a manufacturing sector workplan for 2019/20 which set out the inspection programme which was implemented to target sectors where carcinogens asthmagens were regularly used produced or process generated. There was reference to occupational lung disease causing the death of 12,000 people in Great Britain annually with 18,000 new cases of occupational lung disease per year caused or exacerbated by work.

Risk Assessments

82. According to Inspector Helps the risk assessments drafted by Mr Cabble did not provide information on the processes, hazardous substances, routes of exposure, health effects, current control measures, any required improvement to the control measures and the requirement for health surveillance and it was not suitable and sufficient. The nickel plating and anodising risk assessments were identical and also included some of the recommendations as in the titration risk assessment which demonstrated they were actions that were due to be taken and had not been taken such as install sink, provide titration waste containers and label waste.

83. In respect of document control most of the Health and Safety documents provided by the Appellant do not have a date, author, version number or review date apart from the anodising record sheets and tank maintenance sheets. This suggested to Inspector Helps that document control procedures for health and safety were not being implemented which she described as a key component of quality and compliance programmes.

84. The updated anodising work instruction provided that the operator should wear arm splash protection but the accompanying photograph did not show the operator wearing any such arm protection and omitted to mention sulphuric acid mist.

85. In respect of mist inhalation on nickel plating Mr Till's evidence was that there was very little mist from the procedure due to the design that he had

incorporated namely the inclusion of chroffle balls on top of the tanks and the lids. Inspector Helps did not agree with this assessment and specifically pointed to the dipping procedure which did not recognise inhalation risk and was of the view that the operator needed to wear a respirator to control exposure to the nickel mist given there no LEV provided at the tank. Inspector Helps accepted that chroffle balls may reduce the nickel mist to some degree but remained of the opinion that LEV was still required unless the tank was fully enclosed. In relation to transfer chemicals no evidence was provided to the Inspectors of the correct pumps at that time.

IT systems

86. The Appellant's evidence was that Employee A had not only removed hard copy documents including risk assessments but had also removed these from their IT systems meaning no copies could be reproduced. Ms Bourne told the Tribunal that their IT contractor was unable to provide a copy of the back up and on learning this they terminated the contract with them immediately.

The Law

87. The power to serve a Prohibition notice is contained s22 HSWA 1974 and can be exercised by the Inspector if s/he forms the opinion that the activities carried on by or under the control of the person in question involve or will involve the risk of serious personal injury (NHSWAs 22(2)). The power to serve an Improvement notice is contained in S21 HSWA 1974. If the inspector is of the opinion that a person is contravening (or has contravened and is likely to be repeated)) one or more of the relevant statutory provisions he/she may serve a notice stating the opinion and requiring the person to reedy the contravention.

88. An appeal against a Prohibition Notice and Improvement Notice is made to the Employment Tribunal (s24(2) HSWA. The Tribunal may cancel or affirm the notice, and if it chooses to affirm it can modify its terms.

Health and Safety at Work Act 1974

89. Section 2 (1) 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.

Control of Substances Hazardous to Health Regulations 2002

90. Regulation 7 provides:

7 Prevention or control of exposure to substances hazardous to health

(1) Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.

(2) In complying with his duty of prevention under paragraph (1), substitution shall by preference be undertaken, whereby the employer shall avoid, so far as is reasonably practicable, the use of a substance hazardous to health at the workplace by replacing it with a substance or process which, under the conditions of its use, either eliminates or reduces the risk to the health of his employees.

(3) Where it is not reasonably practicable to prevent exposure to a substance hazardous to health, the employer shall comply with his duty of control under paragraph (1) by applying protection measures appropriate to the activity and consistent with the risk assessment, including, in order of priority—

(a) the design and use of appropriate work processes, systems and engineering controls and the provision and use of suitable work equipment and materials;

(b) the control of exposure at source, including adequate ventilation systems and appropriate organisational measures; and

(c) where adequate control of exposure cannot be achieved by other means, the provision of suitable personal protective equipment in addition to the measures required by sub-paragraphs (a) and (b).

(4) The measures referred to in paragraph (3) shall include—

(a) arrangements for the safe handling, storage and transport of substances hazardous to health, and of waste containing such substances, at the workplace;

(b) the adoption of suitable maintenance procedures;

(c) reducing, to the minimum required for the work concerned—

(i) the number of employees subject to exposure,

(ii) the level and duration of exposure, and

(iii) the quantity of substances hazardous to health present at the workplace;

(d) the control of the working environment, including appropriate general ventilation; and

(e) appropriate hygiene measures including adequate washing facilities.

(5) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a carcinogen [or mutagen], the employer shall apply the following measures in addition to those required by paragraph (3)—

(a) totally enclosing the process and handling systems, unless this is not reasonably practicable;

(b) the prohibition of eating, drinking and smoking in areas that may be contaminated by carcinogens [or mutagens];

(c) cleaning floors, walls and other surfaces at regular intervals and whenever necessary;

(d) designating those areas and installations which may be contaminated by carcinogens [or mutagens] and using suitable and sufficient warning signs; and

(e) storing, handling and disposing of carcinogens [or mutagens] safely, including using closed and clearly labelled containers.

Dangerous Substances and Explosive Atmospheres Regulations 2002

91. Regulation 6 provides:

6 Elimination or reduction of risks from dangerous substances

(1) Every employer shall ensure that risk is either eliminated or reduced so far as is reasonably practicable.

(2) In complying with his duty under paragraph (1), substitution shall by preference be undertaken, whereby the employer shall avoid, so far as is reasonably practicable, the presence or use of a dangerous substance at the workplace by replacing it with a substance or process which either eliminates or reduces the risk.

(3) Where it is not reasonably practicable to eliminate risk pursuant to paragraphs (1) and (2), the employer shall, so far as is reasonably practicable, apply measures, consistent with the risk assessment and appropriate to the nature of the activity or operation—

(a) to control risks, including the measures specified in paragraph (4); and

(b) to mitigate the detrimental effects of a fire or explosion or the other harmful physical effects arising from dangerous substances, including the measures specified in paragraph (5).

(4) The following measures are, in order of priority, those specified for the purposes of paragraph (3)(a)—

(a) the reduction of the quantity of dangerous substances to a minimum;

(b) the avoidance or minimising of the release of a dangerous substance;

(c) the control of the release of a dangerous substance at source;

(d) the prevention of the formation of an explosive atmosphere, including the application of appropriate ventilation;

(e) ensuring that any release of a dangerous substance which may give rise to risk is suitably collected, safely contained, removed to a safe place, or otherwise rendered safe, as appropriate;

(f) the avoidance of—

(i) ignition sources including electrostatic discharges; and

(ii) adverse conditions which could cause dangerous substances to give rise to harmful physical effects; and

(g) the segregation of incompatible dangerous substances.

(5) The following measures are those specified for the purposes of paragraph (3)(b)—

(a) the reduction to a minimum of the number of employees exposed;

(b) the avoidance of the propagation of fires or explosions;

(c) the provision of explosion pressure relief arrangements;

(d) the provision of explosion suppression equipment;

(e) the provision of plant which is constructed so as to withstand the pressure likely to be produced by an explosion; and

(f) the provision of suitable personal protective equipment.

(6) The employer shall arrange for the safe handling, storage and transport of dangerous substances and waste containing dangerous substances.

(7) The employer shall ensure that any conditions necessary pursuant to these Regulations for ensuring the elimination or reduction of risk are maintained.

(8) The employer shall, so far as is reasonably practicable, take the general safety measures specified in Schedule 1, subject to those measures being consistent with the risk assessment and appropriate to the nature of the activity or operation.

92. We were referred to a number of authorities by the parties. We do not set all of these out here and they can be referenced in the submission documents. We have had regard to these where relevant in reaching our conclusions.

93. **HMIHS v Chevron North Sea Ltd [2018] UKSC7** held that on an appeal against a Prohibition Notice the employment tribunal has to decide whether, at the time when the notice had been served, a risk of serious personal injury existed. The inspectors opinion about the risk and the reasons why he had formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but there was no good reason for confining the tribunal's consideration to the material that had been, or should have been available to the inspector; that the tribunal was entitled to have regard to what the risk in fact was, and, if the evidence showed that there was no risk at the material time, then notwithstanding that the inspector had been fully justified in serving the notice, it would be modified or cancelled as the situation required.

94. The primary burden of proof rests on the Inspector to show that the breach alleged has occurred. If the requirement is subject to the qualification of reasonable practicability it is for the appellant to show that it has done all that was reasonably practicable (Section 40 HSWA 1974).

95. The underlying purpose of the HSWA 1974 is preventive both in respect of employees and members of the public and a purposive approach to interpretation should be adopted **(Railtrack v Smallwood [2001] EWCH 78 para 90).** This case is also authority for the principle that "activities" could not sensibly be given a literal meaning in any event, since, in a literal sense, activities might cease, and a state of inactivity prevail, for any number of reasons, and it might be a question of fact and degree whether, because they had been temporarily suspended, they had ceased for the purposes of S22. In this case, 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 should be issued.

Conclusions

96. We firstly deal with those matters that we consider do not assist tribunal in deciding whether to affirm, modify or cancel the notices.

Allegations in respect of the sabotage and/or vexatious intent of the former employees

97. We agree to a certain extent with Mr Hughes's submission that this is largely irrelevant. The reasons we have reached that conclusion are as follows. The inspection took place on 14 February 2020 which is some six weeks after employee A's departure from the business. Even if employee A had undertaken the acts of sabotage attributed to him by the Appellant, the Appellant had had a period of six weeks to have begun to address issues of health and safety that were critical such as adequate risk assessments and safe systems of control. On the Appellant's own case they were unaware at the time of the inspection that critical health and safety documentation was not within the business and must have been missing for a period of at least six weeks. We also found it very surprising that the Appellant did not have suitable IT systems in place to have been able to have produced backed up documentation.

98. Ms Bourne's explanation as to why the Appellant did not know, until after the inspection, that employee A had removed all health and safety documentation was unsatisfactory due to the passage of time and in our judgment supports a conclusion that health and safety was not given appropriate priority. Whilst we accept the Appellant may have chosen to focus on other matters requiring urgent attention after employee's A's departure, this does not obviate the statutory obligations the Appellant was under nor can it be grounds for this Tribunal to cancel the notices.

99. The documentation we did have sight of that predated Employee A's departure was not demonstrative of a compliant workplace that suddenly changed on his departure due to the alleged removal of documentation. A titration procedure dated April 2019 had recommended a number of actions that had not been progressed by the time of the inspection some ten months later (see paragraph 44). Other documents relied upon by the Appellant were not subject to any document control procedures which in our judgment support Inspector Help's opinion that the Appellant could not demonstrate evidence of regular reviews of procedures (see paragraph 83).

100. Even if employee A did engage in the acts of sabotage we have concluded that the issuing of the notices was justified. The acts of sabotage were either not relevant (the reference to faulty wiring was not the subject of a notice) or there were other circumstances found at the inspection so as to justify the notices in any event.

101. We also do not accept that either the timing of the inspection or the fact that the notices were issued one week later to have any relevance to our decision on whether the notices should be upheld. The Appellant sought to make much of the fact that the Inspectors did not contact Mr Till but equally Mr Till did not contact the inspectors at any point after the inspection before the issuing of the notices. We were unable to understand on what basis it can be said that the Inspectors had a duty to contact Mr Till. They had been told that Ms Bourne was the person responsible for health and safety. The Appellant wished to bring any relevant material to inspectors attention in our judgment the onus was on the Appellants to have done so.

102. The suggestion that inspectors cannot have been unduly concerned that there was a risk of a serious risk of personal injury because they took one week to the prohibition notices was not a credible submission and we reject it. The notices were in our judgment issued as soon as reasonably practicable.

103. We find the errors made by the inspectors in respect of notes in their notebook the time of the inspection to be irrelevant and we reject any suggestion that such minor errors should cast doubt of the credibility of the notes.

Nickel Plating Notice

104. Our findings of fact concerning the nickel plating process are set out at paragraphs 34-45 above. The terms of the notice are set out at paragraph 31.

105. It was common ground the procedure was not in active operation at the time of the inspection. We accept the operation was small scale. The process could be reinstated as actively operational at any time. Mr Till's evidence was that the heating circuit was disconnected. However it could have been reconnected at any time and it was the Appellant's case that they intended to install larger heaters. Applying **Railtrack v Smallwood** we find that the activity may have ceased but there was an absolute intent by the Appellant to restart the activity. As such, the fact that it was not operational at the time of the visit does not mean the notice should not have been issued.

106. The notice provided that the activity was the nickel plating line and relating chemical storage, handling and disposal involved a serious risk of personal injury. The matters giving rise to the said risks were no adequate control measures or safe systems of work to avoid employees exposure to substances hazardous to health.

107. The chemicals in use during the nickel plating process were plainly potentially hazardous to personal injury. There were ten chemicals in use (see paragraph 36). We did not accept that because the operation was small scale only undertaken by Mr Till, Mr Cabble and employee B on one occasions (titration) that this negated a risk of serious personal injury. It cannot be correct that if only one or two individuals could be injured this does not meet the definition.

108. The only documents that existed to demonstrate control measures and safe systems of work in respect of the nickel plating process were the spill response sheets, nickel plating procedure, dip procedure and titration risk assessment. We find these were inadequate. The nickel plating process only referenced one of the ten chemicals in use (Bondal). There was no information on the other chemicals. The dip procedure failed to address inhalation risk during plating. We accepted Inspector Help's evidence that the chroffle balls did not negate this risk (see paragraph 85). The titration risk assessment had been written ten months earlier and recommended actions had not been actioned.

109. The Appellant was not storing chemicals in the appropriate containers and a sulphuric acid container was being stored ("Un bunded") underneath an eyewash station.

110. Turning now to whether the Appellant provided sufficient further evidence since the inspection so as to amount to material showing there was no risk at the material time.

111. In relation to the information provided about the pump (see paragraphs 39-42), this was not information that assisted the Appellant. Ms Bourne told the inspectors that the pump they were using to transfer chemicals was the agitation pump. This mistake was repeated in the May 2020 document where the Appellant unreasonably criticised Inspector Helps for being unable to identify a chemical pump where they had provided an incorrect photograph. The Beckson pump information was also not material that could be relied upon as showing there was no risk. The document referencing the pump did not give information as to how chemicals could be transferred safely and it also did not include the stated

risk of static electricity. Lastly, it did not inform the inspectors as to what pump would be used to transfer the 96% sulphuric acid for dilution.

112. The chemical dip procedure did not identify or assess risk of something falling into the tanks and splashing.

113. The plating tanks were not labelled other than the water tanks. There was no COSHH risk assessment for each tank.

114. There was no sink or running water in the process area for washing skin in an emergency.

115. None of the evidence provided by the Appellant went any way to amounting to the type of material we would expect to see to justify cancelling the notice.

116. We agree with Mr Hughes that if the Appellant wanted to rely on a ground of appeal that the notices were not sufficiently clear, this should have been set out in the ET1 or May 2020 document. It was not sufficient to refer to it in a list of issues that was only produced at the request of the Judge at the beginning of the hearing.

117. The Respondent was entitled to know the case they were facing and had not understood the Appellant was advancing this allegation.

118. Even if the Appellant had relied on this as ground, in our judgment this would have failed. The notices were not, as was submitted, “in the broadest terms”. They set out the specific breaches clearly. The steps to remedy the breach were submitted to be “non specific” and that this approach does not follow the statutory approach. It was also said to remain unclear what steps need to be taken. We reject these submissions. The notice was accompanied by a schedule setting out in the clearest terms the measures that should be taken to comply. It was not for the Inspectors to set out a step by step instruction for the Appellants to follows. The Appellants were informed they should implement protection measures to adequately control the exposure of employees to the hazardous substances, with the assistance of a competent person. There was a priority list provided. There was also a detailed covering letter that also provided further information including links to guidance available.

119. For these reasons we uphold the notice and there is no basis on which to modify the notice.

Anodising line

120. Our findings of fact concerning the anodising process are set out at paragraphs 46 to 54 above. The terms of the notice are at paragraph 47. It was largely the same wording as for the nickel plating line. We found that anodising was ongoing and there was an intention to upscale.

121. As demonstrated by the Appellant's own risk assessment produced on 13 February 2020, there were significant steps that needed to be taken. Mr Cabble told Mr Till and Ms Bourne that Mr Kirby had advised a hood and extraction needed to be installed to each station. The full list of recommendations is at paragraphs 52. In light of our findings of fact at paragraphs 52 - 54 showing what was not in place and what was required to be put in place we have no hesitation in concluding that there was a risk of serious personal injury justifying the issuing of the prohibition notice.

122. Further, there was no Chevron material that would exchange this conclusion. The updated anodising instruction photograph did not reflect the advice to wear arm protection nor did it mention sulphuric acid mist risks. There was no evidence before the Tribunal that the Appellant had implemented the measures in Mr Cabble's risk assessment which was in any event still in adequate for the reasons provided by Inspector Helps at paragraph 82.

123. In relation to any contention that the notice was unclear as to the steps needed to be taken to remedy the defects, we reject this submission for the same reasons as set out above at paragraphs 116 – 118. For these reasons we uphold the notice.

Powder Coating

124. Our findings of fact concerning the powder coating process are set out at paragraphs 55 - 76. We found that the inspectors were informed by Ms Bourne that powder coating was potentially going to be upscaled.

125. In light of the findings of fact (no risk assessments, control measures or any documentation whatsoever relating to controlling employees exposure to the powder) we have no hesitation in finding that the Appellant both was contravening and had contravened the HSWA 1974, Regulation 7 of COSHH and Regulation 6 of DSEAR 2002.

126. We also found that although there had been attempts to clear up the powder coating area, that at the time of the inspection there was powder stored in an unlidded box and there was no evidence this has been

removed. Ms Bourne's evidence was unclear in this regard. In short, even at the hearing, Ms Bourne did not know what powder was present on site nor did she know whether it was lidded. Accordingly, on the evidence before this Tribunal the Appellant continues to store and will need to dispose of the powder.

127. We were concerned about the lack of evidence explaining how the attempted clear up was undertaken. It was telling that there was no consideration to the fact that even the clear up of the powder coating area had not been risk assessed.

128. Ms Bourne's evidence that there was no risk of explosion from the powder was not credible and was unverified by any documentation such as a risk assessment. We had due regard to the expertise of Inspector Turner's evidence.

129. We further reject the submission that the notice was unclear. If the Appellant still plans to decommission powder coating they should only do so taking the measures set out in the schedule to the notice. We see no grounds to modify the notice and we uphold it.

Metal Working Fluids

130. Our findings of fact concerning the metal working fluids notice are set out at paragraphs 77 to 81 above.

131. In light of the evidence set out at paragraph 81 we conclude that the notice should be upheld as the Appellant both was contravening and had contravened the HSWA 1974, Regulation 7 of COSHH due to the lack of respiratory health surveillance. We had due regard to the Inspectors expertise and there was evidence to the contrary other than Ms Bourne's opinion. Ms Bourne is not a qualified individual.

132. Whilst we acknowledge the Appellant has taken steps to address the inspectors concerns, we have seen no evidence of the control measures they were required to implement those steps nor have we seen any evidence that the Appellants have provided the information, instruction and training on these control measures to the relevant employees.

133. For these reasons we uphold the notice and we do not consider the notice should be modified.

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Employment Judge S Moore
Dated: 3 November 2021

JUDGMENT SENT TO THE PARTIES ON 4 November 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche