EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108935/2021
Hearing Held in Glasgow by Cloud Video Platform (CVP) on 23 to 25 August 2021
Employment Judge O'Donnell
Tribunal Member L Brown
Tribunal Member N Bakshi

Mr B Singh	**Claimant** **Represented by:** **Mr Singh**
HSE	**Respondent** **Represented by:** **Mr Olson (Counsel instructed by Anderson Strathern)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-
1. By consent, Improvement Notices Serial Numbers IJC/1 9032021/1, IJC/1 9032021/2, IJC/1 9032021/3 and IJC/1 9032021/4 are cancelled.
2. Improvement Notice Serial number IJC/1 9032021/5 is affirmed.
3. Prohibition Notice Serial Number PN/DOBSB/1 60321/02 is affirmed.
4108935/21 Page 2
4. Prohibition Notice Serial Number PJC/1 603202 1/1 is affirmed with the following modifications:-
a. The reference to the *"Health & Safety at Work etc Act 1974 sections 2(1) and 3(1)"* is deleted.
b. The final handwritten section of the Notice which follows the typewritten word *"because"* is amended to read as follows:-
You have failed to ensure that the work at height activity you are in control of is, to the extent of your control, *properly planned, appropriately supervised and, so far as is reasonably practicable, carried out safely.*
5. Prohibition Notice Serial Number PN/DO/BSB/1 60321/01 is affirmed with the following modification:-
a. The final handwritten section of the Notice which follows the typewritten word "because" is amended to read as follows:-
You have failed to take suitable and sufficient measures to prevent, so far

as is reasonably practicable, and to the extent of your control, a *person falling a distance liable to cause serious personal injury e.g., there are voids in the floor, gaps in edge protection and unsuitable edge protection (rope and timber) to prevent the risk of a fall.*

REASONS

Introduction

1. The Appellant has brought an appeal against three Prohibition Notices served on him by the Respondent on 16 March 2021 and five Improvement Notices served on him by the Respondent by letter dated 19 March 2021.

2. At the outset of the submissions on behalf of the Respondent, counsel for the Respondent indicated that the Respondent did not seek to uphold the first four Improvement Notices (Improvement Notice Serial Numbers IJC/1 9032021/1, IJC/1 903202 1/2, IJC/1 903202 1/3 and IJC/19032021/4). The Tribunal, therefore, issued a Judgment by consent cancelling these Notices.

3. The Tribunal was referred to a range of legislation in both the evidence of the witnesses and submissions and these will be mentioned multiple times in this Judgment. The Tribunal does not intend to refer to this legislation by their full titles each time they appear in the Judgment and so it will identify this legislation as follows:-

a. The Health and Safety at Work etc Act 1974 will be referred to as "the 1974 Act".
b. The Provision and Use of Work Equipment Regulations 1998 will be referred to as "the Equipment Regulations".
c. The Work at Height Regulations 2005 will be referred to as "the Height Regulations".
d. The Construction (Design & Management) Regulations 2015 will be referred to as "CDM".

4. The Tribunal will also refer to the Respondent by the abbreviation "HSE".

Evidence

5. The Tribunal heard evidence from the following witnesses:-

a. The Appellant
b. Jagdeep Singh.
c. James Caren, a Health & Safety Inspector.
d. Duncan Officer, a Health & Safety Inspector.
e. Graeme McMinn, Principal Health & Safety Inspector.

6. There was an agreed bundle of documents prepared by the parties. Certain documents were added to the bundle in the course of the hearing. References to page numbers below are references to the pages in the bundle.

7. This was not a case where there was any real dispute of fact and the Tribunal did not have to resolve any conflict between the evidence of the various witnesses in relation to the issues it had to determine.

8. There was no real challenge to the credibility and reliability of the witnesses from either side. The Tribunal had no reason to doubt that the evidence

given by all the witnesses was reliable and credible.

Findings in fact

9. The Tribunal made the following relevant findings in fact.

10. The case is concerned with the construction of a new Gurdwara (Sikh temple) in Irvine. It is being constructed on a plot of land accessed from George Court in Irvine and will be referred to in this Judgment as “the George Court site” or “the site”.

11. The plot of land was originally wholly owned by the Appellant and he had purchased it in 2014. After health issues in 2019 and 2020 including surgery, the Appellant decided to sell the portion of the plot on which the new Gurdwara was being built to someone else. He was concerned that if he passed away then this might impact on the project and he wanted to pass ownership to a younger person who would continue the project. The sale of the relevant portion of the plot was completed by a disposition dated February 2020 (pp372-373).

12. There is an existing Gurdwara in Irvine and the decision to build the new temple was taken several years ago. The process started in 2015 with the Appellant seeking planning permission for the new temple to be built at the George Court site. He engaged an architect with whom he had worked before to assist in drawing up plans and engaging with North Ayrshire Council in relation to the necessary applications to the Council.

13. A first stage Building Warrant (p4) was granted to the Appellant by the Council on 10 May 2016 and a second stage Warrant (p1 8) was granted on 26 November 2019, again in the Appellant’s name.

14. There was no construction company engaged to build the new temple. Rather, members of the Sikh community would attend the site to work on a voluntary basis. They do so in order to carry out Seva which is one of the objectives or pillars of the Sikh religion which requires the carrying out of charitable works or selfless service for the good of the community at large and not just the Sikh community.

15. There were some instances where some companies were paid to do work at the site. For example, utilities companies were engaged to connect supplies such as electricity. There were other instances where a company was engaged to deliver and pour cement for the foundations of the building and another instance where a company installed posts into the ground to provide the necessary support for the structure.

16. However, in relation to the work with which this case was concerned, no one who did that work was engaged to do so as an employee by the Appellant or any other person. Neither did they attend as part of their own trade or business. No one was paid to do any work at the site, if they had then it would not be Seva. Individuals will attend the site when they have time to give to the project and those who are in attendance can vary from day-to-day.

17. Funding for the project to pay for material and for the instances, such as those described above, where a specialist contractor was needed, came from donations from members of the Sikh community and, for a period of time,

from the existing Gurdwara which has a charitable trust.

18. The Appellant did make donations to the costs along with others. He also arranged for the specialist contractors described above; he took on this role because members of his family have a construction company and, therefore, had the necessary contacts within the industry to know who would be able to take on the work in question.

19. The work done at the George Court site is not organised or directed by a single person. Rather, those who attend the site on a particular day will discuss amongst themselves what tasks need done and then agree between themselves who will carry out which tasks. If the Appellant was at the site on a particular day then he would be one of those engaged in these discussions and would be involved in the decisions made during that discussion.

20. In September 2020, HSE were contacted by a member of the public who raised concerns about the construction work at the George Court site. An Inspector was sent to investigate and met with the Appellant. The Inspector formed the view that no work was being carried out.

21. More concerns were raised in the next few days and so a further visit was made by the same Inspector and a colleague. The Appellant came to the site when called by those present and an inspection was carried out. At that time, investigations made by those Inspectors indicated that the existing Gurdwara was the “client" for the purposes of CDM and so a decision was taken to serve Prohibition and Improvement Notices on the Gurdwara for failing to manage the health and safety risks at the site.

22. The Gurdwara appealed all the Notices served on them on the basis that they were not the client. In support of the appeal, they provided minutes of meetings of the Temple which appear at pp69-81 .

23. These minutes show the Appellant as being the general secretary with other individuals holding other offices as well as various “ordinary” trustees. The most relevant meeting took place on 26 January 2020 with the minute starting on p77. On pp78-79, there is a discussion about the continued funding of the construction of the new temple by way of donations from the Gurdwara with concerns being expressed about the increasing costs of the project. A vote was taken at which the proposal to suspend further donations until there was a new budget, funding options, and completion date. The vote was carried. The Appellant, who was present at the meeting and had made an opposing proposal to continue donations, stated that he resigned and then left the meeting along with some other trustees. The minute recorded this.

24. HSE, specifically Mr McMinn, took the view that this evidence demonstrated that the Gurdwara was potentially the client for the purposes of CDM up to the meeting in January 2020 but not after that date. In these circumstances, the Notices served on the Gurdwara were withdrawn and cancelled.

25. HSE continued to receive concerns about the work being done at the George Court site and so Mr McMinn arranged for a further visit in order for an inspection to be carried out.

26. On 16 March 2021, James Caren (JC) and Duncan Officer (DO) went to Irvine to carry out a site visit of the George Court site. Prior to the visit, JC

had carried out some preliminary investigations including a check with the Land Registry which identified the Appellant as the owner. The reason for this, which was not and could not have been known to HSE (or anyone else) at the time, is that the new owner of the site had not registered the sale with the Land Registry by this time and did not do so until May 2021 . On the face of the public record, therefore, the Appellant owned the site.

27. The Inspectors met at a car park near the site outside an Aldi supermarket and other shops. They could see the site and the structure being built. DO took photographs from the car park (p92), one of which showed the whole structure and another which was zoomed in on the roof where two figures could be seen, one standing and the other crouching. The inspectors had seen 4 or 5 people on the site in high visibility jackets including those on the roof. One of the men was operating a telescopic forklift (described below as a telehandler) which was being used to lift people to the upper floors of the structure.

28. JC and DO identified that they could not get access to the site from the car park, which was surrounded by a fence. They then drove round to George Court where they could see there was a gate, which they found to be locked. They could see two men on the ground about 10-15 metres away and JC called to them. The men approached the gate and JC explained who he and DO were and why they had come. They asked for access to the site but did not get a response from the men.

29. JC asked who was in charge and the two men walked away to get a third person, the Appellant. At the time neither JC nor DO knew the Appellant's identity.

30. JC repeated what he had said to the other men and explained that HSE had received concerns from a member of the public about people working at height on the site. He asked for access to the site but the Appellant did not provide it at this time, explaining that they were only volunteers and there was no construction work. JC explained that refusing access to the site could be a criminal offence. At this point, the Appellant walked away and said the Inspectors should come back tomorrow. JC had also asked for the Appellant's name and he did not give it.

31 . Neither JC nor DO had previous experience of being denied access to a site. They discussed it and decided to contact the police, but first phoned Mr McMinn to confirm that this was the correct course of action. He agreed that it was.

32. The police were called and two officers attended the George Court site. One 5 of them discussed what had happened with JC and DO whilst the other walked round the site and discovered a gap in the fence. The Inspectors and the police officers used this gap to gain access.

33. JC and DO carried out an inspection of the site and from this identified a number of issues which they considered gave rise to risks to health and safety:-

a. The telehandler was in what they considered to be a poor state of repair with visibility aids either missing or damaged; a large mirror at 15 the rear of the vehicle was missing entirely and a side mirror was damaged. A set of lights at the rear of the vehicle was hanging off.

It was considered by the Inspectors that anyone using the telehandler would not have a sufficient view around the vehicle, particularly to the rear, for it to be used safely. Pictures of the telehandler showing its condition were taken by DO and produced at pp99, 103-105.
b. The telehandler was being used to lift people from the ground to the upper floors of the structure by using a man-riding cage which was lifted up on the forks at the front of the vehicle. Anyone being lifted up would then have to climb out of the basket onto the structure. The Inspectors did not consider this to be a safe method of lifting people as there was a risk of falling when getting in and out of the cage at height.
c. The Inspectors also had concerns about how the cage was attached to the forks. The forks had been slotted into brackets on the bottom of the cage and the cage secured to the telehandler by fabric straps which the Inspectors considered to be frayed and in poor condition. They considered that there was, therefore, a risk of the cage becoming free of the forks whilst someone was in it. DO took photographs of the cage and the telehandler which were produced at pp97-98.
d. The Inspectors were also concerned about the lack of proper edge protection to prevent falls from the roof and the upper floors in a number of regards:-
i. The barrier on the roof consisted of wooden batons which the Inspectors did not consider would be sufficient to withstand the impact of someone falling against them. Further, the space between the edge of the roof and the barrier was larger than recommended and someone could fall between these. Pictures of this arrangement were taken by DO and produced at pp 90, 94, 96, 98, 100 and 102.
ii. On the upper floors, the edge protection consisted of a variety of methods, none of which the Inspectors considered provided adequate protection against falls. These included a rope, crossbeams in an X shape and some cladding. Again, DO took pictures of these which were produced at pp 93, 94, 96, 99, 100 & 102.
iii. There was also an internal void in the structure with the roof being incomplete as well as the flooring on the upper floors. There was no edge protection or other measures put in place to prevent someone falling into this space.

34. After the inspection, JC and DO spoke to the Appellant again. By this time he had provided his name. The Appellant denied that construction work was being carried out and that he knew who was in charge. He stated that he did not have keys to the site and that he had been let on to the site by someone named Harjinder who had left and locked the gates behind him. The Appellant stated that he did not have contact details for this individual. He stated that he was present at the site to keep an eye on it.

35. By this time, two further police officers had attended the site to assist. The first two officers had spoken to the two men to whom JC and DO had originally spoken. There had been issues with the identification of these men and so those officers had taken them away when the second pair of officers arrived.

36. JC and DO were of the view that there were immediate risks of serious injury to anyone working on the site arising from the issues identified above. They decided to issue Prohibition Notices in an effort to prevent those risks. They considered that the Appellant should be named on those Notices because they came to a view that he was in control of any work being done. This was for a number of reasons including his apparent ownership of the site, his presence on site during the earlier visits in 2020 and that it was he who had been brought to speak to them when they asked who was in charge. They did note that the Appellant had suggested that someone named Harjinder was in charge but could not provide contact details for this person.

37. JC and DO returned to their cars and prepared three Prohibition Notices to be served on the Appellant, two by DO and one by JC. These are produced at pp351-353 and were set out in the following terms:-
a) The Notice Serial Number PN/DO/BSB/1 60321/02 (p351) identified a risk of personal injury arising from the poor condition of the telehandler (specifically the damaged and missing visibility aids) which could lead to a risk of collision with persons on the site. It was stated that this amounted to a breach of Regulation 5(1) of the Equipment Regulations because the Appellant had failed to ensure that the telehandler is maintained in an efficient state, efficient work order and good repair.
b) The Notice Serial Number JC/1 60321/1 (p352) identified a risk of personal injury arising from the man-riding cage being attached to the telehandler by slings rather than being positively attached and also arising from workers climbing in and out of the basket on to the steel structure. This was identified as a breach of Regulation 4(1) of the Height Regulations and ss2(1) & 3(1) of the 1974 Act because the Appellant had failed to ensure that work at height of which he is in control is properly planned, supervised and carried out safely.
c) The Notice Serial Number PN/DO/BSB/160321/01 (p353) identified at risk to personal injury arising from persons being exposed to a risk of falling a distance. This was identified at a breach of Regulation 6(3) of the Height Regulations because the Appellant had failed to take suitable and sufficient measure to prevent such falls giving examples of the voids in the floor, gaps in edge protection and a failure to use suitable edge protection.

38. JC and DO then returned to the George Court site to give the Notices to the Appellant. The Appellant declined to take the Notices from JC and DO when they sought to hand these to him. The Appellant and HSE agreed that this visit took place during the Covid 19 period. It was suggested that they would place the Notices on the windscreen of a van on the site (secured by the windscreen wipers) on the basis that the police had advised them that the Appellant was insured to drive that van and it appeared to them that it was how he had travelled to the site. This was also declined by the Appellant. In the end, the Notices were left on the ground outside a caravan on the site with a rock placed on them to secure them. This is shown in photographs taken by DO which appear at p106.

39. At this point, JC and DO were told by one of the police officers that a member of the public who lived in the flats near the site had informed the officers that there were two men on the roof of the structure lying down out of sight of those on the ground. Given that JC and DO had prohibited the use of the telehandler and there was no other equipment on the site to bring these men

down, a fire engine was summoned by the police.

40. After the visit, JC carried out further investigations about the work being done at the site. During the course of this, he identified various companies which had provided services at the site such as those described above involving the pouring of concrete and the support pillars which were installed. He obtained information from these companies about who contracted them and paid for their services; he was provided with a range of documents had various names on them including “Baldev Singh”, “Mr Singh” and the initials “BSB”. There were also the names of limited companies including Stable Homes Ltd and JC had identified, from a Companies House search, that the Appellant had been a director of that company on various occasions in the past.

41. JC wrote to the Appellant by letter dated 19 March 2021 (pp325-335) setting out a description of what happened at the site visit on 16 March 2021. The letter goes on to say (p326) that JC is satisfied that the Appellant is in control of a construction project at the George Court site and that HSE is the appropriate regulator. It is then stated JC has identified a number of contraventions of health and safety law. The reasons why JC has come to this conclusion are set out in detail from pp327-335. This deals with the Prohibition Notices served on 16 March and the five Improvement Notices which accompany the letter.

42. The Tribunal is no longer concerned with the first four Improvement Notices given the concession made by the Respondent regarding these at the hearing and so makes no findings of facts about these.

43. The fifth Improvement Notice (Serial Number IJC/1 90321/5) appears at pp342-344. It identifies the Appellant as a contractor and relates to breaches of CDM Regulation 15(2). These are said to be that he had failed to plan, manage and monitor the construction work carried out by him or by health and safety. It goes on to state that the Appellant should take steps to remedy this by 13 April 2021 and, at p344, there is a schedule of the steps to be taken.

Respondent’s submissions

44. The Respondent’s agent made the following submissions.

45. The general proposition which the Tribunal were being asked to accept was that the Appellant was a “contractor" as defined in Regulation 2(1) CDM and so had the duties set out in Regulation 15(2).

46. In particular, it was submitted that the Appellant had control over workers, which can include volunteers.

47. Mr Olson took the Tribunal through the definitions of the terms “contractor” and “business” in Regulation 2(1) CDM. It was submitted that the work being done was an undertaking; this term was not defined in CDM and so should be given its ordinary usage and that the planning and building of the temple falls within this.

48. He then went on to submit that the work being done fell within the definition of “construction work" and that the George Court site was clearly a “construction

site” under the definition in CDM.

49. It was submitted that CDM contemplates certain people being identifiable in a construction project such as the client and the contractor. The client plays an important role but HSE does not need to identify who the client is; it is sufficient to identify a contractor doing work on the site. The Appellant says he is not the client and there may be a question as to who this is) but HSE does not need to identify the client where a contractor is identified.

50. Mr Olson then went through the relevant provisions of the 1974 Act starting with s21. This section makes reference to provisions made under the 1974 Act and CDM is made under the Act. It is, therefore, a relevant statutory provision and the Improvement Notice at p342 was properly served.

51. Turning to s22, Mr Olson explained that the difference between this and the previous section is that improvement notices have to identify a contravention of a relevant statutory provision whereas a prohibition notice does not and, rather, identifies a risk of serious personal injury. In this particular case there has been reference to various statutory provisions but that is not necessary because it is the risk of serious personal injury that matters.

52. Mr Olson also made reference to s24 which set out the powers of the Tribunal in dealing with an appeal against Improvement and Prohibition Notices.

53. Reference was made to the *Chevron* case (below) for various propositions which Mr Olson said could be drawn from it. Specifically, that the Tribunal was not limited to assessing the genuineness and reasonableness of the Inspectors’ decisions and it can form its own views of the facts giving due regard to the Inspectors’ opinion and expertise. The focus is on the risk and the Tribunal looks at all the evidence, both the facts at the time and any evidence produced after that may show no risk.

54. There was also reference made to *R v Chargot Ltd (trading as Contract Services)* [2009] ICR 263. Although this was a case involving a prosecution under the 1974 Act, it was submitted that it was an analogy for what HSE had to prove in an appeal under s24. In a prosecution, HSE has to prove that the result which the appellant must achieve or prevent under the Act was not achieved or prevented. It is then up to the appellant to show they had done all that was reasonably practicable. In this case, it was submitted that it was the result under Regulation 15(2) CDM that HSE had to prove and it was for the Appellant to say what he actually did to show he had done all that was reasonably practicable.

55. Mr Olson submitted that HSE had proved a breach of Regulation 15(2) CDM as there was evidence of risks to health and safety and there was no evidence that the Appellant took any steps to remove these risks.

56. The term "worker” in Regulation 15(2) is used to refer to workers under a contractor’s control but is not defined in CDM. Given that CDM contemplates undertakings done on a not-for-profit basis which could involve the use of volunteers it was submitted that, in ordinary usage, the term would include voluntary workers. If it did not then it creates a gap (as there would be in this case) and there would be no responsibility to protect the health and safety of voluntary workers just because they are volunteers.

57. In relation to the issue of control, it was noted that the Appellant claims that he is one of a number of volunteers who worked by consensus but he accepted that he shared in the responsibility for the group's actions and was not saying that anyone controlled him. It was submitted, therefore, that he has control over the work albeit this control was shared. Mr Olson drew an analogy with a partnership where control over the work is shared between the partners where one partner who acquiesces to the directions being given by the other partners would not be able to say they were not in control.

58. Mr Olson submitted that, in terms of findings of facts as to what occurred at the site visit on 16 March 2021, the Tribunal should adopt what was said in the letter from JC starting at p325.

59. In terms of the Prohibition Notices, Mr Olson started with the Notice at p352. He accepted that the 1974 Act did not apply and invited the Tribunal to delete the reference to this in the Notice. The Height Regulations did apply and if the work had been planned then the telehandler and cage would not be used due to the risk of falling. Reference was made to Regulation 3 which applied the duties in the Regulations to any person who has control over work done by any person and not just to employers and self-employed persons.
Mr Olson invited the Tribunal to uphold the Notice in relation to the Height Regulations and also to add a reference to Regulation 15(2) CDM because the work being done had not been properly planned, managed and monitored to avoid risks to health and safety.

60. Turning to the Prohibition Notice at p353, Mr Olson submitted that there was no doubt that there was a risk of serious personal injury in terms of the risk that someone could fall off the roof, either through the internal void or through the barriers and there was no evidence to contradict that. On the second floor, the only protection was a rope whereas the first floor had incomplete sheeting or crossbeams. A comparison was made with the picture at p354 for an example of proper barriers. There were no proper measures taken; the rope and wooden barriers were not sufficient. The Tribunal was invited to uphold the Notice and add a reference to Regulation 15(2) CDM.

61. In relation to the Notice at p351, the Tribunal was invited to uphold this and, again, add a reference to Regulation 15(2) CDM. In terms of the Equipment Regulations, it was submitted that the terms of Regulation 3(3)(b) was sufficient to cover the Appellant.

62. It was submitted that the evidence established HSE's description of events as set out at pp327-328 but, on the assumption that the Tribunal accepts the evidence of the Appellant, Mr Olson made the following submissions:-
a. Any evidence which may be said to contradict that of the Respondent's witnesses is inferential rather than direct evidence.
b. The Inspectors asked to speak to the person in charge on 16 March and it was the Appellant who came to the gate.
c. The Inspectors saw people working on the site and people do not ordinarily work on construction sites for free.
d. The Appellant has not led evidence from the people working at the site on 16 March.
e. In relation to the evidence from Jagdeep Singh, it was submitted that he had not been working at the site since the start of the year.
f. The only evidence was the Appellant's and it was clear in the way in which he behaved that he was obstructive and uncooperative. He

had said he could not contact the owner which was patently false.

63. It was submitted that it was in the nature of things on construction sites which come to the Respondent's attention that there are bad practices and such sites do not have efficient payroll systems and records.

64. Evidence had been heard of payments made by the Appellant and it was said by him that he was simply the person making the payment but a more obvious explanation was that he was in charge. He was the one who instructed the architect and it was his name on the planning permission and building warrants.

65. Mr Olson submitted that the Appellant was the driving force behind the construction and asked the Tribunal to infer that the Appellant was employing people (in the broad sense) on the site. This was not essential to the Respondent's case but would bolster the Respondent's position.

66. The Appellant had been asked during his evidence what advice he had taken and his reply was that he had been told that the 1974 Act did not apply and so volunteers had to look out for themselves. It was submitted that this was a strange construction of the Act which would mean that volunteers fell through a gap and had no protection in relation to health and safety. This is clearly wrong and CDM protects volunteers. All volunteers are "contractors" under CDM if doing work rather than doing the work under the instruction of others.

67. It was submitted that the HSE had jurisdiction in terms of s22 of the 1974 Act as activities which were covered by CDM were being carried out. In the alternative, the Tribunal could delete the reference to the statutory provisions in the Prohibition Notices as there is no need to identify these provisions for the purposes of s22.

68. The Tribunal raised a number of matters in relation to which it sought to clarify the Respondent's position and Mr Olson made the following submissions in relation to those matters.

69. First, the issue of the ownership of the land was said to be neutral. The fact that the Appellant was no longer the owner did not prevent him having the necessary control. There was no evidence that the owner was the one in control. It was accepted by the Respondent that ownership passed on the date of the disposition and the fact that it was not registered with the Land Registry until later simply meant that the new owner could not challenge any competing rights. It was noted that there had been no explanation for why the registration did not take place for some months.

70. Second, there was a question as to whether there was any dispute of fact and Mr Olson submitted that the Respondent's witnesses had given evidence about which they had not been challenged. Further, there was almost no contradictory evidence from the Appellant's witnesses other than how the man-handling cage was attached to the telehandler's forks.

71. It was submitted that there was no evidence that those on the site were volunteers and the Tribunal were invited to find that they were not volunteers. The Tribunal asked what evidence showed that these individuals were not volunteers and Mr Olson replied that there was no direct evidence but was

inviting the Tribunal to draw this inference because people do not go up buildings to work without being paid.

72. Third, in relation to the issue of control, it was asked whether a member of the public on the site who could remove the keys from the telehandler would be said to have control under the relevant statutory provisions. Mr Olson submitted that they would not because a member of the public would not be covered by the relevant provisions where they were not part of the process and were external to it. It was said that there has to be a line at which it is said that someone does not have control.

73. Finally, Mr Olson was asked how it would work where volunteers were sometimes at the site and sometimes were not. He submitted that when a volunteer was not at the site then they were not responsible. However, when they were part of the shared decision-making process then they were in control and the fact that they had no veto did not mean there was no control. In these circumstances, "process" means the discussion about what was to be done and how it would be done.

74. It was not being submitted that the Appellant was part of an unincorporated association and there was no evidence of this.

75. In rebuttal of the Appellant's submissions, Mr Olson clarified that the 1996 Regulations referred to by the Appellant's representative were repealed by Regulations in 2007 which were in turn repealed and replaced by CDM.

76. The Tribunal asked for Mr Olson's comments on the submissions made on behalf of the Appellant about the definition of "work" in the 1974 Act. Mr Olson submitted that s52 of the 1974 Act says it only applies to the Part of the Act and that definition is not imported into Regulations made under the Act.

77. Further, Regulations can extend the meaning of work. The term "construction work" has the specific meaning in CDM and does not depend on the definition of "work" in s52 of the 1974 Act. To put it another way, s52 cannot be inserted into CDM.

78. Mr Olson made a similar point in relation to the Height Regulations and if the Appellant's meaning of "work" was adopted then Regulation 3(3)(b) is not given effect. It was submitted that Regulation 3(3)(b) is not needed to give effect to the definitions of the other persons to whom the Regulations apply and it must mean something different.

Appellant's submissions

79. The Appellant's representative made the following submissions.

80. Reference was made to the HSE website which outlines its history and makes repeated references to work, workers, employers and employees.

81. The 1974 Act states that its purpose is to secure the health and safety of people at work and to protect people not at work from activities at work. It was submitted that the message was clear that it was about work and that the Act went on to define "work" in s52 and that where it was used it was as defined in this section.

82. It was submitted that, although s52(2) says that the meaning can be extended, this meaning was not extended by any subsequent Regulations. Reference was made to the Height Regulations and to the Construction, Health & Safety and Welfare Regulations 1996 which defines “construction work” at Regulation 2 and “construction site". If the word “work” is removed from these then they lose all meaning and the word “work" is deliberate.
83. In relation to the 1996 Regulations, this was all linked to the other Regulations and use the same terms and phrases. These apply to construction work carried out by persons at work and the two words have to be used together. It has to be work as defined in the 1974 Act and then you look to see if it is construction work.

84. The Height Regulations at Regulation 2 refers to work at height and it was submitted that this is work as defined in the 1974 Act; these Regulations were made from the Act.

85. It was, therefore, only sensible to conclude that the word “work” was defined in the 1974 Act and the Regulations did not seek to change this meaning.

86. The word "work" is also used for work equipment and so the telehandler and cage do not meet this definition because it is not used by persons at work.

87. Regulation 3 of the Height Regulations says that they apply to employers in relation to work so you have to have an employer and you have to have work. The subsequent Regulations in the Height Regulations apply duties to employers.

88. In relation to the Equipment Regulations, the equipment has to be used at work although not exclusively. Regulation uses terms “work", “at work", “employer” and “employee”. They did also apply to the self-employed and to a person who has control of the equipment but it is control at work and this is all linked. Reference was made to Regulations 4, 5 and 6 of the Equipment Regulations all which use the term “employer” and the Appellant is not an employer.

89. The term “undertaking” is defined in s1 1 61 of the Companies Act 2006 and that definition was set out. It was submitted that the same phrase was used in the health and safety legislation and there had to be some link between them. It was submitted that the definition in the 2006 Act does not apply to what is being done at the George Court site.

90. Turning to CDM, it was submitted that this was made under powers given by the 1974 Act.

91 . In relation to Regulation 2 CDM, the Appellant had been taken through these and there was not a business, trade or undertaking (as that last term is defined in the Companies Act) and it has already been established that there was no “work”.

92. It was submitted that the definitions of "construction work” and “construction site” did not apply.

93. In relation to the definition of “contractor”, reference was made to the definition of “business" and the previous submissions as to why this definition did not apply in this case. In any event, this definition applied to “work” as

defined in s52 of the 1 974 Act and this did not cover what was being done at the George Court site.

94. In these circumstances, it was submitted that CDM did not apply.

95. The building being erected was not in the furtherance of anyone's business and so the "domestic client" definition was the most apt definition for this project. There are people working for free for their own devotion to their beliefs.

96. Reference was made to the HSE's own guidance on their self-build portal which describes the scenario of someone who does all the construction work themselves and employs no-one. This is a DIY project because no-one is at work as defined in the 1974 Act. If it is a self-build then CDM does not apply and the HSE does not get involved. A self-builder is allowed to have help but such people are not at "work".

97. It was submitted that it was unrealistic to think of any house in the UK which was built by one person; they would be allowed an architect to make plans; materials would be delivered to the site; no self-builder could connect the building to the various utilities.

98. In relation to the site in this case, it was zoned in the local plan for housing and if one person built a house on it then, even though they would face risks, CDM would not apply. There needs to be a distinction between things done on someone's own time at their own risk from work done at own risk. This does not make someone a contractor.

99. The question was asked whether, once the temple is built and volunteers do painting and cleaning, would this fall within CDM. CDM defines a "place of work" and does so for a reason.

100. The Appellant does not agree that he is a contractor but, rather, a volunteer. Reference was made to Regulation 15 CDM and the repeated use of the term "worker". It was said that this term was defined in s230 of the Employment Rights Act 1 996.

101. A reference was made to Regulation 26 CDM which relates to prevention of drowning and it was submitted that people were free to do as they like in relation to water but CDM only kicked in when there is construction work.

102. It was said that the HSE website says that the law does not generally apply to volunteers and there needs to be at least one employee for health and safety law to apply.

103. In relation to the two authorities relied on by Mr Olson in his submissions, the Tribunal's attention was drawn to the fact that these involved employers and employees.

104. The George Court site has perimeter fencing distant from the building and so people on the other side of the perimeter are not at risk.

105. There was mention in the evidence of the Appellant being a director of a construction company but this was because he became a director to provide a director's loan.

106. The Appellant had not sought publicity about the building. It was his name on the plans but planning permission and the building warrant go with the land.

107. The Appellant does not employ anyone, anywhere and does not own the site or the telehandler.

108. No-one had been injured on the site.

109. The project was not completely unregulated as it complies with local authority regulations.

110. The Appellant had had health issues; he cannot direct people and makes no money from the site. If he is prohibited from the site then this makes no difference to any other volunteer; no commercial operation could function in this way.

111. The budget was not large in proportion to what is being built.

112. In relation to the keys for the telehandler, these were different from car keys and not specific to each vehicle; one key runs them all.

113. In terms of access to the roof of the building, it was submitted that the photos show scaffolding and there could be ladders lying down.

114. In relation to the cage attached to the telehandler, it was submitted that JC said it could move from side-to-side but, in cross-examination, he accepted that it was on rails. Therefore, it was submitted that it could not move from side to side. JC had also said that he had not inspected below the cage.

115. If the Tribunal was minded to change the Prohibition Notices then the Appellant should be told what legislation he has breached. Where “activities” are referred to in such Notices then this can only be taken to relate to the statutory provisions and does not change the meaning of “work” under the 1974 Act.

116. It was noted that the Inspectors did not seek to remove the keys for the telehandler and that they have the phone number and email for the new owner of the land who was not unknown to them.

Relevant Law

117. The power of HSE Inspectors to serve Improvement and Prohibition Notices are found at ss21 & 22 of the 1974 Act-

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.

22.— Prohibition notices.

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

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

(3) A prohibition notice shall —

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

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

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

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

(4) A direction contained in a prohibition notice in pursuance of subsection (3)(d) above shall take effectfa)

at the end of the period specified in the notice; or

(b) if the notice so declares, immediately.

1 1 8. A person on whom such notices are served is given the right to appeal to the Employment Tribunal under s24 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.

(3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection, then—

(a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;

(b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction).

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an [employment tribunal] under this section.

119. In *HM Inspector of Health & Safety v Chevron North Sea Ltd* [2018] SC 132,

it was confirmed that, in deciding whether or not a notice (of either type) had been correct, the Tribunal was entitled to take account of information not known to the HSE Inspectors at the time the notice was served. It was not a case that the Tribunal, in hearing an appeal under s24, was concerned only with whether the notice was correct based on the information available and known at time but, rather, whether the evidence as a whole showed that it was correct.

120. Section 52 of the 1974 Act provides a definition of *"work"*\~

52.— Meaning of work and at work.

(1) For the purposes of this Part —

(a) "work" means work as an employee or as a self-employed person;

(b) an employee is at work throughout the time when he is in the course of his employment, but not otherwise; [...]

(bb) a person holding the office of constable is at work throughout the time when he is on duty, but not otherwise; and

(c) a self-employed person is at work throughout such time as he devotes to work as a self-employed person;

and, subject to the following subsection, the expressions "work" and "at work" in whatever context, shall be construed accordingly.

(2) Regulations made under this subsection may —

(a) extend the meaning of "work" and "at work" for the purposes of this Part; and

(b) in that connection provide for any of the relevant statutory provisions to have effect subject to such adaptations as may be specified in the regulations.

(3) The power to make regulations under subsection (2) above shall be exercisable by the Secretary of State.

121. Regulation 3 of the Equipment Regulations describes the application of the duties imposed by those Regulations:-

3.— Application

(1) These Regulations shall apply-

(a) in Great Britain; and

(b) outside Great Britain as sections 1 to 59 and 80 to 82 of the 1974 Act apply by virtue of the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 1995 ("the 1995 Order").

(2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.

(3) The requirements imposed by these Regulations on an employer shall also apply-

(a) to a [relevant self-employed person], in respect of work equipment he uses at work;

(b) subject to paragraph (5), to a person who has control to any extent of-

(i) work equipment;

(ii) a person at work who uses or supervises or manages the use of work equipment; or

(Hi) the way in which work equipment is used at work, and to the extent of his control.

(4) Any reference in paragraph (3)(b) to a person having control is a reference to a person having control in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or

not).
(5) The requirements imposed by these Regulations shall not apply to a person in respect of work equipment supplied by him by way of sale, agreement for sale or hire-purchase agreement.
122. The Equipment Regulations go on to set out the various duties which are placed on those to whom the Regulations apply.
123. Regulation 3 of the Height Regulations describes the application of the duties imposed by those Regulations:-
3.— Application
(1) These Regulations shall apply-
(a) in Great Britain; and
(b) outside Great Britain as sections 1 to 59 and 80 to 82 of the 1974 Act apply by virtue of the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2001.
(2) The requirements imposed by these Regulations on an employer shall apply in relation to workfa)
by an employee of his; or
(b) by any other person under his control, to the extent of his control.
(3) The requirements imposed by these Regulations on an employer shall also apply to-
(a) a [relevant self-employed person], in relation to work-
(i) by him; or
(ii) by a person under his control, to the extent of his control; and
(b) to any person other than a self-employed person [or relevant selfemployed person], in relation to work by a person under his control,
to the extent of his control.
124. The Equipment Regulations go on to set out the various duties which are placed on those to whom the Regulations apply.
125. Regulation 2 of CDM sets out the definitions to applied to various terms used in the Regulations and the relevant ones are:-
2.— Interpretation
(1) In these Regulations—
"business" means a trade, business or other undertaking (whether for profit or not);
“client” means any person for whom a project is carried out;
“construction site” includes any place where construction work is being carried out or to which the workers have access, but does not include a workplace within the site which is set aside for purposes other than construction work;
“construction work” means the carrying out of any building, civil engineering or engineering construction work and includes —
(a) the construction, alteration, conversion, fitting out, commissioning, renovation, repair, upkeep, redecoration or other maintenance (including cleaning which involves the use of water or an abrasive at high pressure, or the use of corrosive or toxic substances), decommissioning, demolition or dismantling of a structure;
(b) the preparation for an intended structure, including site clearance, exploration, investigation (but not site survey) and excavation (but not pre-construction archaeological investigations), and the clearance or preparation of the site or structure for use or occupation at its conclusion;
(c) the assembly on site of prefabricated elements to form a structure or the disassembly on site of the prefabricated elements which, immediately before such disassembly, formed a structure;
(d) the removal of a structure, or of any product or waste resulting from demolition or dismantling of a structure, or from disassembly of

prefabricated elements which immediately before such disassembly formed such a structure;
(e) the installation, commissioning, maintenance, repair or removal of mechanical, electrical, gas, compressed air, hydraulic, telecommunications, computer or similar services which are normally fixed within or to a structure, but does not include the exploration for, or extraction of, mineral resources, or preparatory activities carried out at a place where such exploration or extraction is carried out;
"contractor" means any person (including a non~domestic client) who, in the course or furtherance of a business, carries out, manages or controls construction work;
"domestic client" means a client for whom a project is being carried out which is not in the course or furtherance of a business of that client;
"place of work" means any place which is used by any person at work for the purposes of construction work or for the purposes of any activity arising out of or in connection with construction work;
126. Regulation 15 of CDM sets out the duties placed on contractors under CDM and Regulations 15(2) states:-
(2) A contractor must plan, manage and monitor construction work carried out either by the contractor or by workers under the contractor's control, to ensure that, so far as is reasonably practicable, it is carried out without risks to health and safety.

Decision

127. The Tribunal will start by addressing what was the primary argument advanced, very ably, on behalf of the Appellant. If this argument is correct then it is a complete answer to the appeal and the Tribunal need go no further.

128. The Appellant's position is that what was being carried out at the George Court site does not amount to *"work'* as that term is defined in s52 of the 1974 Act and that where the term *"work'* is used in the various statutory instruments relevant to this case then it should be read as a reference to the definition in s52.
129. Pausing there, the Tribunal agrees that what is being carried out at the George Court site is not *"work'* as defined in s52. The definition in s52 requires work to be done either as an employee or self-employed person and the Tribunal is satisfied that there was no express evidence that anyone carrying out tasks at the site (including the Appellant) was engaged to do so under either a contract of employment by the Appellant or anyone else.

130. Further, the Tribunal considered that there was no evidence from which it could draw any inference that anyone carrying out tasks at the site was an employee. Although Mr Olson urged the Tribunal to effectively apply judicial knowledge that people would not carry out the activities in question without being paid, the Tribunal considered that, in the circumstances of this case, it was not prepared to do so.

131. Similarly, the Tribunal was satisfied that the tasks were not being carried out by self-employed persons as there was no evidence, either express or from which the Tribunal could draw an inference, that anyone working on the site was doing so as part of self-employment.

132. Rather, it was very clear to the Tribunal that the persons working on the site

were doing so on a voluntary basis as part of their religious beliefs. In particular, this work was done as *Seva,* an important part of the Sikh religion relating to charitable works.

133. In these circumstances, the Tribunal is satisfied that this is not *"work'* as defined in s52 of the 1974 Act. If it is correct that that word, when used in the relevant statutory instruments, should be read as having the same meaning as it does in s52 then the argument made by the Appellant's representative is correct and none of the regulations relied on by the Respondent apply to the particular tasks being carried out at the George Court site.

134. However, the Tribunal does not consider that, as a matter of law, the approach urged on it by the Appellant's representative is correct. This is not intended as a criticism; the argument was presented very cogently and clearly but, understandably, given that the representative was not legally qualified, there are certain principles relating to the interpretation of statutes of which he would not be aware and which mean that his argument cannot succeed.

135. In general, each statute should be read on its own terms and the meaning of words used in one statute cannot be used to interpret the same words in another unless there is an express provision to this effect such as that seen in the Equipment Regulations where it adopts the definition of *"construction work'* from CDM.

136. The reason for this is that where a specific definition is applied to a particular term in a statute then it can only be said that Parliament intended that definition to be used in the context of that statute and not any other legislation. It cannot, therefore, be assumed that Parliament intended the relevant definition to be used in any other legislation and if it does intend that this should be the case then it would say so (as it does in the Equipment Regulations).

137. The meaning of any term used in a statute should, therefore, be the interpretation used in the relevant statute and, where no specific meaning is given, the ordinary meaning of the word should be used.

138. A good illustration of why this approach is taken in interpreting statutes, in the context of this case, is the term "undertaking" which is used in the definition of *"business"* in CDM. The Appellant's representative suggested that the definition in s1161 of the Companies Act 2006 which describes an "undertaking" as a body corporate, partnership or unincorporated body carrying out a trade or business should be used to interpret the same term in CDM.

139. However, s1 161 makes it clear that this definition is for the purposes of the Companies Act and so Parliament's clear intention is that this definition should only be used in interpreting that Act and there is no basis to say there is any intention to apply it to any other legislation. Further, the term "undertaking" in s1161 is an umbrella term for a body carrying on a trade or business but in CDM the term is used as an alternative to trade or business and it is clear that the term *"undertaking* in CDM means something other than trade or business. To adopt the definition in s1 161 for the purposes of CDM would not produce a sensible result as it would mean that the term

"business" in CDM would be defined as "trade, business or other trade or business".

140. It is to avoid such issues that legislation should be read on its own terms and definitions used in one statute should not be used in others unless it is clear this is what Parliament intended.

141. Turning back to the term *"work",* there is nothing in the 1974 Act or in the relevant statutory instruments which states that the definition in s52 should be applied to those other statutes. Indeed, s52 expressly says that it applies to that Part of the Act (that is, Part 1) and so Parliament's express intention can only be said to be to apply the definition to that extent.

142. Further, the Tribunal was not taken to, and has not identified, any decisions of the higher courts which has applied the s52 definition to the word "work" where it appears in the relevant statutory instruments in this case.

143. For these reasons, the Tribunal does not accept the argument that the definition of *"work"* in the various statutory instruments which apply to this case should be the definition used in s52 of the 1974 Act. Rather, the word not being defined in those statutory instruments, the Tribunal gives it its ordinary definition in the various contexts in which it is used and considers that "work" can include work done on a voluntary basis as well as work done under a contract of employment or any other type of contract

144. For the same reasons, the Tribunal does not adopt the definition of the term "worker" used in s230 of the Employment Rights Act 1996 where that term is used in the relevant health and safety legislation which applies in this case. Section 230 expressly says that the definition applies where the term "worker" i s used in that Act and cannot be read as automatically applying to the same term where it is used in other legislation. Other employment legislation uses the term "worker" and expressly adopts the definition from the 1996 Act but the health and safety legislation relevant to this case does not contain any provision adopting such a definition and leaves the term undefined. The Tribunal, therefore, gives the term its ordinary usage and this can include volunteers

145. However, rejecting the broad argument that what was being done at the site is not covered by the legislation at all is not the end of the matter. The Tribunal still needed to be satisfied that the work done at the George Court site, and the Appellant's involvement in that work, falls within the scope of the various statutory instruments. These issues require to be resolved in order to determine whether the various Notices have been correctly served on the Appellant.

146. The Tribunal will begin with the remaining Improvement Notice (Serial number IJC/1 9032021/5) and the question to be addressed is whether the Appellant was a contractor as defined in Regulation 2(1) CDM.

147. The definition of *"contractor** involves a number of terms which are also defined in Regulation 2(1) and the first of these is *"construction work'.* The Tribunal is satisfied that the very broad definition of *"construction work'* in Regulation 2(1) is more than capable of encompassing the work being done at the George Court site. The description of what is being done at the site is of a structure being built and this is clearly within the definition.

148. An interesting argument was made on behalf of the Appellant which involved an analogy with a self-build, where an individual is building their own home, which involves friend and family assisting the person engaged in the selfbuild. Whilst there may be a question as to whether CDM applies to such a scenario and those involved would be considered as client and contractors for the purposes of the Regulations, this is not a question which the Tribunal is being asked to answer in this case. It is quite clear that this is not a selfbuild as neither the Appellant nor anyone else working on the construction are doing so for themselves.

149. Given the Tribunal's finding that the work being done is *"construction work'* then it follows that the George Court site falls into the definition of *"construction site"* in Regulation 2(1) as it is clearly the place where construction work is being done.

150. Finally, in relation to the various terms within the *"contractor* definition, the Tribunal concludes that the work being done falls within the definition of *"business"* as the work is an undertaking (done not for profit) on the basis that there has been an undertaking by those involved to build a new Gurdwara for the local Sikh community.

151. The Appellant did not dispute that he carried out construction work at the site. It was his evidence that he was one of those who carries out the work at the George Court site albeit that there are others who also carry out such work. The Tribunal considers that this is sufficient to satisfy the definition of *"contractor* and it does not, for the purposes of the Improvement Notice relating to CDM, need to go further to address the issue of whether the Appellant controls or manages construction work.

152. The Tribunal is, therefore, satisfied that the Appellant is a *"contractor* for the purposes of CDM as he carries out construction work in the course of an undertaking.

153. In these circumstances, the provisions of CDM, therefore, apply to the Appellant and there was no evidence presented to the Tribunal that he had complied with the duties placed on a contractor under Regulation 1 5(2). The Tribunal, therefore, finds that he has not satisfied that duty and so the Improvement Notice was correctly served on the Appellant.

154. The fact that others may also be contractors under CDM and have similar duties as the Appellant (with which they may or may not have complied) does not mean that the Improvement Notice has not been correctly served on the Appellant

155. The Tribunal did give consideration as to whether the Notice should be modified to remove the reference to "workers under your control". However, if there are no workers under the Appellant's control (as is his case) then this will cause him no prejudice. If there are then he is required to comply with the relevant matters set out in the Improvement Notice in respect of such workers.

156. In these circumstances, the Tribunal affirms Improvement Notice Serial number IJC/1 9032021/5 without modification.

157. Turning to the Prohibition Notices, the Tribunal will start by making a point

which applies to all three relating to the application of the statutory instruments which are relied on in those Notices.

158. Those instruments make reference to various duties imposed on employers and so the Tribunal can well understand why the argument was made on behalf of the Appellant that these do not apply to him because he is not the employer (as the Tribunal has found him not to be).

159. However, Regulation 3(3) of both the Equipment Regulations and the Height Regulations extend the scope of those duties beyond just employers to two further categories of person. In the first of these categories the duties are extended to self-employed people. This is not relevant in this case given that the Tribunal has found that the Appellant is not carrying out work at the site as a self-employed person.

160. It is the second category into which the Appellant may potentially fall as this applies to *"any other person"* so long as they have the necessary degree of control as described in Regulations. If he falls within this then both sets of Regulations apply to him and he has duties under those Regulations.

161. To put it another way, whenever the term *"employer"* is used in the two sets of Regulations then it must be read as including not just those who would normally be understood to be an employer as well as anyone falling into those additional categories described in Regulation 3(3) of both Regulations.

162. A further point which applies in relation to all three Prohibition Notices is that it is irrelevant that there have been no reported injuries at the George Court site. The purpose of the Notices (and the legislation) is to prevent or reduce the risk of injury and the question for the Tribunal is whether there is such a risk.

163. With that said, the Tribunal will now address each Prohibition Notice in turn starting with the Notice at p351 (Serial Number PN/DOBSB/160321/02).

164. This Notice relates to a contravention of Regulation 5(1) of the Equipment Regulations and so the first question for the Tribunal is whether the Appellant falls within the scope of the Regulations by virtue of Regulation 3(3)(b) being a person who has control, to any extent, of work equipment, persons at work who use equipment or the way in which equipment is used at work. The Tribunal considers that the wording of the Regulation is very broad in relation to control and there does not need to be sole or absolute control but simply some control even if it is minimal.

165. The term *"work"* is not defined in the Equipment Regulations and, for the reasons set out above, the Tribunal is not prepared to read this as being restricted to the definition in s52 of the 1974 Act. It gives the word its ordinary meaning and considers that it includes the work being done at the George Court site.

166. On the Appellant's own evidence he attends the site and, when he does attend, engages in the decision-making process as to what work is done, who does it and how it is to be done. Whenever he does so, he is, therefore, part of the group which exercises control of the telehandler, of those who use or how it is used and so he does have control, albeit as part of that group. This

degree of control is sufficient to bring him into that third category of persons to whom the Equipment Regulations apply because it states that control to any extent is enough.

167. Further, Regulation 3(4) makes it clear that the reference to control in Regulation 3(3)(b) is to control in relation to the carrying on of a trade, business or undertaking (whether for profit or not). In context of its decision relating to the Improvement Notice and the application of CDM, the Tribunal has already concluded that the Appellant was carrying on an undertaking (albeit with others) and that conclusion applies in relation to the Equipment Regulations for the same reasons as it does in relation to CDM.

168. The Appellant did not seek to dispute the Notice in relation to the risk identified in it nor did he seek to dispute that the issues identified in the Notice amounted to a contravention of Regulation 5(1). Indeed, it is difficult to see how he could have disputed such matters given the clear evidence presented to the Tribunal that the telehandler was either missing visibility aids or such aids were damaged. There is clearly a risk of injury in such circumstances as any person using the telehandler would not have sufficient visibility of their surroundings.

169. In these circumstances, the Tribunal affirms Prohibition Notice Serial Number PN/DOBSB/160321/02.

170. In the Tribunal's view, and this will apply to all three Prohibition Notices, the fact that there are others who form the decision-making group and the Appellant is not in sole, or even majority, control of the work does not invalidate the Notice served on him. It may be that there are others on whom similar notices could have been served but the Tribunal is only concerned with the notices served on the Appellant in this appeal.

171. The second Prohibition Notice Serial Number PJC/1 6032021/1 is found at p352. This Notice relates to risks arising from the use of the telehandler and man-riding cage to lift people to the upper floors of the structure. It is said that this breaches the general duties of health and safety under ss2 & 3 of the 1974 Act as well as the specific duty under Regulation 4 of the Height Regulations.

172. The first point to make about this Notice arises from the Tribunal's finding above that the work done at the George Court site does not fall within the definition of "work" in the 1974 Act and that, therefore, the provisions of the 1974 Act do not apply. In these circumstances, the Tribunal deletes the reference to the 1974 Act from the Notice.

173. Turning to the Height Regulations, for the reasons set out above in relation to the Equipment Regulations, the Tribunal considers that the work done at the site falls within the scope of these Regulations and the issue is again that Regulation 3(3) extends the duties in the Regulations beyond just employers (and the self-employed) to a third category of persons in relation to work done by persons under their control.

174. However, the wording in this Regulation is different from the Equipment Regulations and it does not state that it is control to "any *extent'* but rather that the Regulations apply to this third category *"to the extent of their control".*

175. For the same reasons as set out above for the Equipment Regulations, the Tribunal considers that, when he is part of the group making decisions as to

what work is to be done at the site on any particular day, the Appellant is exercising control and so does fall into the third category of person covered by the Height Regulations.

176. The control exercised by the Appellant is not, however, sole control or even majority control and the wording in the Height Regulations makes it clear that the duties in the Regulations only apply to the extent of the control by any person in the third category. This requires to be reflected in the wording of the Notice which, as presently worded, places a broader obligation on the Appellant as it could be read as applying to the Appellant when he is not present and not in control. The Tribunal, therefore, considers that the Notice requires to be re-worded to make it clear that any obligation on the Appellant in relation to work at height done by others only applies to the extent of his control.

177. There was also a challenge to the risks identified in the Notice relating to how the man-handling cage was attached to the telehandler. The Tribunal does not consider that, even if this challenge had been successful, it is sufficient to strike down the Notice because it was also based on the risk involved in using the cage and telehandler to lift people to the upper floors of the structure in and of itself, regardless of how the cage was attached. There was no real challenge to that risk other than the suggestion that there could have been ladders on the site which were on the ground out of sight. However, although that suggestion was put to the Respondent's witnesses in cross-examination, there was no evidence led by the Appellant that there were such ladders (or any other alternative means of reaching the upper floors and roof). In these circumstances, the Tribunal has not made and, indeed, could not make any finding that there was no risk of injury because some means of reaching the upper floors, other than the telehandler, was being used.

178. The only question would be whether the Notice should be modified to remove the reference to risks arising from how the cage was attached. The Tribunal considers that it should not be modified; the Tribunal was presented with positive evidence of the cage being on the forks of the telehandler and secured by straps as shown in the photographs taken on the day. Although there was a challenge to that evidence in cross-examination of the Respondent's witnesses and it was put to them that the cage was bolted to the forks, there was no positive evidence led by the Appellant to show that, on the day of the inspection, the cage was more securely attached. There is, therefore, no basis on which the Tribunal could conclude that that element of the Notice was incorrect and should be deleted.

179. The Tribunal also gave consideration as to whether the Notice should be modified to add a reference to CDM as suggested by Mr Olson. However, the Tribunal did not think that this added anything to the Notice and that there was no reason for CDM to be added.

180. The Tribunal, therefore, affirms Prohibition Notice Serial Number PJC/1 6032021/1 with the following modifications:-
a. The reference to the *"Health & Safety at Work etc Act 1974 sections 2(1) and 3(1)"* is deleted.
b. The final handwritten section of the Notice which follows the typewritten word *"because"* is amended to read as follows:-
You have failed to ensure that the work at height activity you are in control of

is, to the extent of your control, *properly planned, appropriately supervised and, so far as is reasonably practicable, carried out safely.*

181. The same point is made in relation to this Notice as is made about the first in relation to the fact that the Appellant may not be the only person on whom such a notice could be served does not invalidate it.

182. The final Prohibition Notice Serial Number PN/DO/BSB/1 60321/01 is at p353 and it relates to risks to persons working at height falling from the structure and being injured which is said to contravene the Height Regulations.

183. For the same reasons as set out above in relation to the second Prohibition Notice, the Tribunal finds that the work done at the site is covered by the Height Regulations, that the Appellant falls within the third category of person on whom the duties in the Regulations apply and that the wording of the Notice should be amended to make it clear that those duties only apply to the extent that the Appellant has control over those who carry out work at height.

184. There was no challenge to the risks identified in the Notice and the Tribunal considers that there would be very little basis to do so given that there was no dispute that there was nothing to stop someone falling from the upper floors and roof into the internal void and that there was inadequate protection for falls from those places on the outside.

185. For the same reasons as set out above, the Tribunal does not consider that the Notice needs to be modified to add a reference to CDM.

186. The Tribunal, therefore, affirms Prohibition Notice Serial Number PN/DO/BSB/1 6032 1/01 with the following modification:-

a. The final handwritten section of the Notice which follows the typewritten word *"because"* is amended to read as follows:-
You have failed to take suitable and sufficient to measure to prevent so far as is reasonably practicable and to the extent of your control, *a person falling a distance liable to cause serious personal injury eg there are voids in the floor, gaps in edge protection and unsuitable edge protection (rope and timber) to prevent the risk of a fall.*

187. Again, the fact that the Appellant is not in sole control and that there may be others on whom similar notices could be served does not invalidate this notice.

Employment Judge: Peter O'Donnell
Date of Judgment: 08 October 2021
Entered in register: 13 October 2021
and copied to parties