EMPLOYMENT TRIBUNALS

Appellant: Clancy Docwra Limited

Respondent: Mark Welsh, HM Inspector of Health & Safety

Heard at: Nottingham

Heard on: 22, 23, 24 & 25 May 2023

Before: Employment Judge Victoria Butler
Ms K McLeod
Mr S Conner

Representation

Claimant: **Mr H Vann, Counsel**
Respondent: **Mr I Wright, Counsel**

RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is that Prohibition Notice P/20220622/MPW01 is cancelled.

REASONS

1. This is an appeal by Clancy Docwra Limited (the Appellant) against a Prohibition Notice issued against it on 22 June 2022 by Mr Mark Welsh, HM Inspector of Health & Safety (the Respondent).

The Prohibition Notice ("the Notice")

2. The Notice issued by Mr Welsh described the relevant activities as *"any work within excavations, where a risk from collapse and/or material being dislodged or falling creates a danger to persons (e.g. sides not shored/battered/stepped and loose soil and work being carried out at low level)"*.

3. The activities were located at Wardentree Lane, Spalding, Lincolnshire PE11 3UG.

4. The Notice confirmed that the circumstances giving rise to a risk of serious personal injury were "*persons working in the excavations are at risk of being struck, buried or trapped by any collapse or fall or dislodgement of any material"*.

5. Mr Welsh recorded a contravention of Regulation 22(1) Construction (Design and Management) Regulations 2015 in that *"You, as a contractor, have failed to take all practicable steps, e.g. shoring/battering back/stepping the sides of an excavation, to prevent danger to persons from an excavation collapse or fall or dislodgement of any material"* (page 54).

The appeal

6. The Appeal was lodged on 11 July 2022 which was supplemented by a '*final grounds of appeal'* dated 19 August 2022. The Respondent was given opportunity to respond in full.

7. The parties attended a telephone preliminary hearing on 1 September 2022 at which appropriate orders were issued in readiness for this hearing.

The issues

8. We must decide whether to cancel or affirm the Notice. If we affirm the Notice, we will consider whether any modification is required to the wording of it.

9. We must decide whether the activity described in the Notice involved a risk of serious personal injury because: *"Persons working in the excavations are at risk of being struck, buried or trapped by any collapse or fall or dislodgement of any material".*

10. We must also decide whether the activity described was in contravention of Regulation 22(1) of the Construction (Design and Management) Regulation 2015 ("CDM") because the Appellant "*…… failed to take all practicable steps e.g., shoring/battering, back/stepping the sides of an excavation to prevent danger to persons from an excavation collapse or fall or dislodgement of any material".*

11. If we decide that the activity prescribed in the Notice did not involve a risk of serious personal injury, we should allow the Appeal and cancel the Notice.

12. If we decide that the activity being carried out involved a risk of serious personal injury, we must go on to decide whether we would have served the Notice itself on 22 June 2022. In reaching our decision, we must take into account all relevant matters relating to the service of the Notice and the Appeal against it whether such matters were known or could have been known by Mr Welsh when he served the Notice. We must also take account of matters of which we are aware at the time of the Appeal Hearing but which were not known to Mr Welsh when he served the Notice.

13. If we decide we would have served the Notice, then we should dismiss the Appeal

and affirm the Notice (with or without any modification). If we decide we would not have served the Notice, then we should allow the Appeal and cancel the Notice.

Preliminary issue

14. In accordance with its duty of disclosure, the Appellant disclosed two internal documents, namely an Executive Panel Review and Internal Investigation Report. The Appellant submitted that these internal investigation documents would not assist us and should be disregarded because they contained demonstrable factual inaccuracies and, therefore, proceeded on a false basis. Furthermore, they tended to usurp our function and might hinder us in reaching our own independent conclusion.

15. We heard submissions from both parties and, on balance, declined the Appellant's application to exclude them. In our view, they were relevant to the issues we were required to determine. Furthermore, we were capable of understanding their context within the matters we were required to decide.

16. Mr Roy Cotterill, Regional Lead for Safety/IMR and IMDS provided a witness statement, but it did not deal with the two documents subject to the above application. Unfortunately, the Appellant's solicitors had not provided an alternative/additional statement to deal with them if the application was refused. However, Mr Vann managed to secure an additional witness statement overnight which the Respondent was able to deal with.

The evidence

17. For the Appellant, we heard evidence from Mr Cotterill and Mr Robert Millard, Construction Engineering/Temporary Works Expert.

18. For the Respondent, we heard evidence from Mr Mark Welsh, Inspector of Health and Safety and Mr Peter Stickley, HM Specialist Inspector of Health and Safety.

Our Findings of Fact

19. We find the following facts relevant to this Appeal. We resolved any conflicts of evidence on the balance of probabilities.

20. By way of background the Appellant is an Alliance Partner of Anglia Water.

21. In June 2022, work was being undertaken by the Appellant's operatives at a new Bellway Homes Development near Pinchbeck, Lincolnshire. The new housing development was adjacent to Wardentree Lane and required the laying of new water connections for the houses under construction.

22. The Appellant's team were tasked with excavating the carriageway whilst operating under two-way traffic lights on the far side of a half road crossing and locating the water main in private land, on the local residents' front gravel driveway.

23. The water pipe connection had already been laid and the Appellant was going to connect on to it. A water meter bypass was to be installed inside the new

development and, once all connections had been completed, the excavations would be sanded, chambered up and taped, ready for back fill and reinstatement (para 10 RC's statement).

24. The Appellant did not undertake the excavation itself. Rather, the work was subcontracted to NRI Civils. It is not clear to what extent they used the risk assessments prepared by the Appellant or whether they undertook their own assessments.

25. The Appellant has the following relevant overarching documents:

Safe Work in Excavations – management information document

26. Safe Work in Excavations is for ensuring compliance with the CDM. In section 3 entitled "*Hazards*" it confirms that *"Seven people are killed each year with another 239 suffering from serious injuries whilst working in excavations. Soil conditions can vary greatly within any excavation, even over short distances. No soil, whatever the nature, can be relied on to support its own weight, an excavation collapse can occur without warning. Never underestimate the risks involved whilst working in an excavation. It is quite common for one cubic metre of soil to collapse into an unsupported excavation and the soil displaced can weigh as much as one ton"*.

27. It proceeds to set out risks related to excavations and highlights its aim to *"Implement effective excavation standards and provide effective means to control the risks"* (page 181).

28. In the heading "Methodology" it states that *"a written risk assessment and method statement is to be produced for all excavation works. Where appropriate, the contracts generic risk assessment and method statement can be utilised…."* (page 184).

Safe Work in Excavations – operatives information document

29. The purpose of this document is *"to detail the procedures which MUST be taken to prevent injury to persons engaged in any excavation work and to members of the public and to set out the principals of the minimum requirements for managing excavation hazards and the processes by which safe excavation and digging works are controlled"* (page 239).

Management of Temporary Works

30. Appendix 1 is a guide on risk and classification of temporary works taken from the Health and Safety Executive SIM02/210/04 which lists shallow excavations less than 1.2m deep as simple and/or potentially low risk temporary works (page 235).

The Construction Phase Health and Safety plan

31. A construction phase site-specific Health and Safety plan was initially drafted on 2 June 2022 and updated by Mr L Smith on 15 June 2022. The plan covered a work

duration of three days commencing on 22 June 2022 (page 140).

Method statement

32. Mr Smith also completed a method statement confirming that the duration of the work was three days, and that the excavation would be backfilled on Friday 24 June 2022 (pages 146-147).

33. The document covered the connection of the pipes (page 148). Under the "Sequence and Method of Works" section, it confirms that the gang would receive the work pack which included the site-specific risk assessment method statement, amongst other documents.

34. Under the heading "*Working Area*" it states that excavations are to be monitored at the start of shift and before every entry (page 149).

35. In terms of the excavation itself (which occurred pre 22 June 2022), the document is clear that *"during excavation the ground conditions and depth will be continuously monitored, if the excavation becomes unstable or deeper than 1.2m the team are to stop work and contact the agent it may be possible to step or batter the excavation depending on other utilities/ground conditions, however, if temporary works is required it must be installed by trained and competent person (sic), the excavation could be destabilised by vibration, surcharge on water increase, in accordance with Clancy procedure."* (page 150).

Over-arching risk assessment

36. A thorough job specific risk assessment was also undertaken in June 2022 in respect of all three excavations on site. In provided that: *"all excavations to be carried out by trained and competent personnel in accordance with (IAW) HSG47 and authorised evacuation method statements. Excavations below 600mm must be assessed for step digging, battering or temp work measures dependent on soil conditions. Excavations over 1.2m in depth must be assessed for a suitable temporary works design. Temporary Works process to be adhered to….. excavations under 1.2m in depth must be assessed at all times: if deemed unsafe; the team are to stop work and report to their Field Performance Manager. Daily Dynamic to be completed before breaking ground activity takes place…."* (page 156).

37. On 17 June 2022, Mr Smith undertook an inspection in relation to the installation of the NAV meter bypass. He did not identify any health and safety risks to persons being trapped or buried by an accidental collapse, fall or dislodgement of materials from the excavation sides, roof or adjacent to it. The report confirms that a repeat inspection after any substantial alterations, any event likely to effect strength or stability or within seven days is required (pages 165). As such, subject to any substantial alterations or event likely to affect the strength or the stability of the trench, the inspection report deemed the trench safe for the period in question.

38. The Appellant's operatives who undertook the work on the day in question were Mr Reece May and Mr Richard Benson. Both operatives had been briefed on the

contents of the Construction Phase Health and Safety Plan and both were qualified in "Excavation in the Highway" and "Reinstatement and compaction of backfill materials" (pages 265 and 271).

22 June 2022

39. On 22 June 2022, both Mr May and Mr Benson completed an Excavation Dynamic Risk Assessment specifically in relation to the trench within which they were working.

40. In particular, in response to the question *"Is the excavation deeper than 1.2m and/or does it need trench support, battering back or stepping?"* The answer was *"no"*.

41. In relation to the question *"Do you need to enter the excavation and if "yes" is it stable and safe to enter? (complete excavation inspection report before entry)"* the answer was *"yes"*.

42. The final question was *"Is it safe to start/continue working"* and the answer was *"yes".*

43. The Dynamic Risk Assessment is clear that *"If the answer to the last question is no – do not start work. Contact your Supervisor/Line Manager for advice. If the work/site conditions change – repeat the assessment process"*. The Dynamic Risk Assessment was signed by both Mr May and Mr Benson (page 166-168).

44. A permit to dig was also completed rather than a permit to work form. However, the same types of questions are addressed in both. More particularly, the relevant section for the purposes of this Appeal is in relation to the applicable safety system of work and which it provides: *"Appropriate trench support is mandatory for all excavations over 1.2m deep. Due consideration is required to be given to shallower excavations in poor ground conditions. Training on proposed proprietary shoring systems must have been undertaken prior to its use on site"*.

45. A permit to dig was issued by Mr Joe Wenman and accepted by Mr May. The permit was valid from 22 June 2022 until 24 June 2022 to cover the installation process over the three days (page 171).

The Trench

46. The trench itself was 0.85m to 1m deep, 2.7m wide and 5m long. Accordingly, it was significantly wider and longer than it was deep. Furthermore, it had remained inert for a number of days and at the very least at least circa 500mm was cohesive material, probably clay, and the remainder was also cohesive given that there was no collapse when Mr May was stood above it.

Mr Welsh's Visit to Site

47. On 22 June 2022, Mr Welsh was visiting a new Bellway Homes Construction site off Wardentree Lane and noticed the site in question in passing. His visit was

impromptu. He observed that Mr Benson was sitting down in the excavation but towards the south side (which he did not deem unsafe) and Mr May was bent over the pipe from a standing position. He asked them both to leave the trench because, in his view, it was not battered back to a safe angle.

48. Mr Welsh considered that the ground appeared to be made ground and was cracking and crumbling and that the sides of the excavation should have been either battered back (sloped) to a safe angle or stepped. He took the view that there was a very real risk of serious personal injury posed to Mr May and Mr Benson within the excavation who could be struck or trapped by a fall or dislodgement of material i.e. the soil from the open edge of the excavation, particularly as both were positioned in the excavation with their bodies below the top edge of the excavation face.

49. Mr Welsh was also concerned that the movement of heavy goods vehicles could create a risk of vibration through the ground and soil in and around the excavation.

50. He asked to see a copy of the method statement and any other relevant documentation such as a risk assessment, permit to dig etc albeit a method statement is not required by law. Rather, it details how to carry out the works safely.

51. Mr Welsh was only provided with a copy of the method statement which, in his view, made no mention of any control measures to be used when excavations were less than 1.2m, even when operatives are kneeling/sitting in the excavation. This is despite the method statement directing that the ground conditions and depth will be continuously monitored and, if the excavation becomes unstable **or** deeper than 1.2m, the team are to stop work etc.

52. Mr Welsh was not provided with a copy of the risk assessment or permit to dig.

53. Mr May measured the depth of the trench willingly as instructed by Mr Welsh. He stood at the edge of the trench and there was no dislodgement of material. He had no concerns about his safety, and it would appear neither did Mr Welsh because firstly, he let Mr May stand and measure the trench in the absence of battering or stepping and secondly, he did not witness anything thereafter which alerted him to any movement of the material.

54. If there had been any real risk of collapse, we are satisfied, on the balance of probabilities, that Mr Welsh would not have allowed Mr May to stand where he did to undertake the measurements.

55. Mr Welsh's view is that any unsupported excavation is only safe without support if its sides are battered back sufficiently. It is clear, however, from the photos that the top section of the trench is sloped which would minimise the risk of the entire side collapsing in any event.

56. Mr Welsh spoke with the workers who agreed that they would step the sides before work continued. Mr Welsh served a Prohibition Notice on the Appellant requiring all work in the excavation to stop until all practicable steps, such as shoring/battering, back/stepping the sides of the excavation had been taken to

prevent a danger to persons from an excavation collapse/material being dislodged/falling. Mr Welsh's notes are at pages 59-61 in the bundle and the Prohibition Notice at page 54.

57. The next day the excavation was stepped and work continued.

The Expert Evidence

58. We heard evidence from Mr Peter Stickley for the Respondent. Mr Stickley is employed by the HSE as a Specialist Inspector in the Construction Engineering Specialist Team and is an expert in his field. Mr Stickley refers to HSE HSG150 – Health and Safety in Construction which provides that *"Any unsupported excavation will be safe without support **only** if its sides are battered back sufficiently, or if the excavation is in sound rock. Battering back the sides of an excavation to a safe angle is a simple and acceptable means of preventing instability"*. However, he does not refer to paragraph 343 (at page 376) which confirms that *"the need for adequate support will depend on the type of excavation, the nature of the ground and the ground water conditions"*.

59. Mr Stickley agrees that the Appellant's management documents for safe working excavations, which are intended to assist compliance with the CDM are *"Good and well aligned with industry good practice. They are appropriate for the works being undertaken".*

60. He considered that the Appellant has no measures in place to undertake an on-site risk assessment associated with excavations below 1.2m. He states, *"A reliance on the outdated 1.2m rule has prevented individual thought process and subsequently decisions and measures to make the excavation safer"* (para 6.1). In his view, the Appellant failed to take practicable steps to prevent danger from the excavation.

61. In respect of a risk of serious personal injury from the collapse of the excavation and/or materials being dislodged or falling he concluded that *"to cause serious personal injury a collapse would need to occur in tandem with the operative leaning over, with their head between the pipework and excavation face. This would be a possibility given the construction methodology used for this type of work. Whilst the excavation, in my opinion would have a low likelihood of collapsing a risk is still present and therefore there is the potential for serious harm should a collapse occur".*

62. We heard evidence from Mr Millard for the Appellant. Mr Millard's view is that the Appellant operated systems which identified and then implemented safety measures to manage residual risks. He says that the *"1.2m guidance value has been kept by Clancy even though it is from an outdated source, the Construction (Working Places) Regulations 1966 which were revoked in 1996.*

63. He highlights that none of the Appellants processes or guidance state that excavations below 1.2m do not require consideration for appropriate safety measures. They are subject to task specific risk assessments (page 122).

64. In his view, the size and depth of the excavation was appropriate for safe working practices and the lower level of material was clay which would self-support for days. There was a negligible danger of the excavation, or part of it collapsing at the point at which the Notice was issued. There was also negligible danger of material forming the walls of or, adjacent to, the excavation dislodging or falling – material being a volume of concern rather than just fragments. In his opinion there was no danger or risk of a person being buried or trapped in the excavation by material that could have been dislodged or fell and there was no risk of serious injury to the operatives working within the trench from collapse, partial collapse or from any material which may have been dislodged or fell.

65. In oral evidence, Mr Millard said there was simply no need for either worker to have leant over with their head between the pipework and excavation face and this would not represent a sensible way of working. Mr Stickley himself in cross examination accepted that there was no need for a worker to have their head between the pipe and the side of the trench.

66. An area of agreement between Mr Welsh, Mr Stickley and Mr Millard was that the dimensions of the base of the trench are a significant consideration to the risk.

The law

67. Section 22 of the Health and Safety at Work etc Act 1974 ("The HSWA") provides:

> *"**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 effect—

(a)at the end of the period specified in the notice; or

*(b)if the notice so declares, immediately.***"**

68. Section 24 of the HSWA provides a right of appeal against any such Prohibition Notice.

69. The approach to be taken was clarified in ***HM Inspector of Health and Safety v Chevron North Sea Limited [2018] UKSC7***. The relevant passage provide:

"*It is common ground between the parties that a section 24 Appeal is not limited to a review of the genuineness and/or reasonableness of the inspector's opinion but requires the Tribunal to form its own view of the facts, paying due regard to the inspector's expertise. It is also common ground that the Tribunal should be focussing on the risks existing at the time when the Notice was served….When the inspector served the Notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involved a serious risk of personal injury. If he is of that opinion, the Notice comes into existence. However, as it seems to me, when it comes to an Appeal, the focus shifts. The Appeal is not against the inspector's opinion but against the Notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the Tribunal looking at the facts on which the Notice was based. Here, as the inspector spelled out in the Notice, the risk that he perceived arose by way of virtue of corrosion of stairways and gratings giving access to the helideck, and the focus was therefore on the state of that metalwork at the time when the Notice was served. The Tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to a risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the Notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the Tribunals consideration to the material that was, or should have been, available to the inspector. It must, in my view be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, the evidence shows that there was no risk at the material time, then, not withstanding that the inspector was fully justified in serving the Notice it will be modified or cancelled as the situation requires.*

It is important to recognise that it is no criticism of the inspector when new material leads to a different conclusion about risk from the one he reached. His decision often has to be taken as a matter of urgency and without the luxury of comprehensive information….. I would therefore interpret section 24 of the 1974 Act as the inner house did. In my view, on an Appeal under section 24, the Tribunal is not limited to considering the matter on the basis of the material which was or should have been available to the inspector. It is entitled to take into account all the available evidence relevant to the state of affairs at the time of the service of the Prohibition Notice, including information coming to light after it was served".

70. In order for a risk to fall within section 22 of HSWA it must be a real, material risk

and not one that is trivial or fanciful. At paragraph 27 in RV Shargot Limited [2008] UKHL73 it provides *"The first point to be made is that when the legislation refers to risks it is not contemplating risks that are trivial or fanciful. It is not its purpose to impose burdens on employers that are wholly unreasonable. Its aim is to spell out the basic duty of the employer to create a safe working environment…. The law does not aim to create an environment that is entirely risk free. It concerns itself with risks that are material. That, in effect, is what the word "risk" which the statute user means. It is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against".*

71. We were referred to the following further cases: Chrysler UK v McCarthy [1978] ICR 939: Readmans Ltd v Leeds City Council [1992] C.O.D 419; and R v Board of Trustees of the Science Museum [1993] ICR 876.

Conclusions

Was there a risk of serious personal injury?

72. We will deal with this consideration first as suggested by the Respondent. Mr Vann submitted that there was no risk of serious personal injury and that is, in essence, the end of the matter and the Prohibition Notice should be cancelled. Mr Wright submitted that the Appeal should be dismissed, and the Notice affirmed.

73. In reaching our conclusions we have had regard to the following matters. It is common ground that the excavation itself was dug out by NRI Civils and not the Appellant. The risk assessments were completed by the Appellant and to the extent that NRI Civils worked to them is unclear. However, what is clear is that both Mr May and Mr Benson were fully briefed on the risks, appropriately trained, and undertook a Dynamic Risk Assessment on the day of the works. Furthermore, Mr Smith had undertaken an inspection report which remained valid on the first day of work. The two individuals were, in our view, perfectly able to make an assessment about the safety of the excavation on the day in question.

74. We have had regard to the dimensions of the trench. We agree with Mr Vann that the likelihood of serious personal injury being caused would entail a collapse occurring in tandem with the worker leaning over, with their head between the pipework and excavation face is hypothetical.

75. Both experts agreed there was no need for an operative to work with their head between the pipe and the side of the trench. Furthermore, both experts agreed that the risk of collapse, being the mechanism of causing injury, was low. Mr Millard defined low as "negligible" whereas Mr Stickler would not define it.

76. However, it is quite evident from the photographic evidence that at least half of the side of the trench is solid material and, therefore, at best, the risk of falling material is limited to the top section which is, in fact, clearly sloped. So, if there was a collapse, the risk of serious personal injury is reduced dramatically. This, coupled with the size of the trench which allowed the workers considerable area within which to work and opportunity for escape in the event of collapse meant that any

risk was negligible.

77. Accordingly, we are satisfied that there was no real, material risk of serious personal injury at the time Mr Welsh inspected the site, or at all. As such, our unanimous decision is that the Appeal succeeds, and the Notice is cancelled.

Was there a breach of Regulation 22(1)?

78. Theoretically, we are not required to address this issue given our findings above. However, for completeness we think it fair to the parties that we do.

79. Regulation 22(1) provide that *"all practicable steps must be taken to prevent danger to any person, including, where necessary, the provision of supports or battering to ensure that …."*.

80. We are satisfied that the Regulation provides that the provision of supports or battering must be made where necessary and, it follows that there may be excavations where no such steps are required.

81. We are satisfied that firstly the trench did not require the provision of supports or battering in any event for the reasons we explained above. Secondly, in any event, the Appellant took all practicable steps to prevent danger.

82. We are satisfied that the Appellant assessed all excavations, including those of less than 1.2m in depth for support systems. Whilst the Respondent argues that no regard should be had for actual measurements, we are satisfied that the Appellant's methods of working provided for continuous monitoring and/or suitable monitoring regardless of depth. We accept Mr Cotterill's evidence that reference to 1.2m is in many respects, an additional measure to ensure that further steps are taken if an excavation is 1.2m or more rather than less attention being required if it is less.

83. We are also satisfied that those practicable steps included the Safe Working Excavations Management and Operative Guidance, the Management of Temporary works Guidance, the Construction Phase Health and Safety Plan, the Method Statement, the job specific risk assessment, the site inspection dated 17 June 2022, the daily Dynamic Risk Assessment dated 22 June 2022 and the permit to dig of the same date all amount to practicable steps.

84. Furthermore, Mr Benson and Mr May were trained appropriately to work in the excavation and were satisfied themselves that there was no risk of danger at all. Accordingly, we do not consider there was any breach of Regulation 22.

Would we have issued the Notice?

85. In light of our findings above, we would not have issued the Notice and it is, therefore, cancelled.

Employment Judge Victoria Butler

Date: 11 December 2023

JUDGMENT SENT TO THE PARTIES ON

...13 December 2023.....

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FOR THE TRIBUNAL OFFICE

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