EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	2 to 10 September 2024
Appellant:	Ringway Infrastructure Services Limited		
Respondent:	Sarah Bird (Health and Safety Executive)		
Before:	Employment Judge Ramsden		
	Mr A Greenland		
	Mr C Mardner		

Representation:

Appellant	Mr K Morton KC, Counsel
Respondent	Mr Menzies, Counsel

RESERVED JUDGMENT

Background

1. The Health and Safety Executive (the **Executive**) is a statutory body created by the Health and Safety at Work etc Act 1974 (the **1974 Act**) and given certain powers, functions and duties in relation to health and safety. The Executive has the duty to make adequate arrangements for the enforcement of relevant health and safety-related statutory provisions.
2. The Respondent is a person appointed by the Executive as an inspector, and conferred with powers which include the power to issue an improvement notice under section 21 of the 1974 Act.
3. The Appellant carries out highway maintenance pursuant to contracts with local authorities and county councils (its clients) throughout the UK including, as is relevant for this case, Hertfordshire County Council (the **Council**).
4. When a client deems a highway issue to be an emergency, the Appellant's Emergency Stand-By (**ESB**) Crew is tasked to attend.

5. On 2 November 2020 the Appellant was notified that members of the public had reported a branch overhanging the carriageway on Lieutenant Ellis Way in Hertfordshire, a dual carriageway which, at the place of the overhanging branch, had a 50 mph speed limit and no hard shoulder (the **Incident**). Two members of the Appellant's ESB, Michael Bennett and Tom Harman, travelled to the area in the early afternoon in response.

6. Tragically, the first of the two to arrive at the scene, Mr Bennett, was killed. It appears that he parked his van at the nearside of the road and got out of it. Shortly thereafter the intoxicated driver of a speeding car oversteered to avoid Mr Bennett's van, lost control, hit the central reservation and rebounded, causing fatal injuries to Mr Bennett.

7. On 16 July 2021 the Respondent issued to the Appellant:

   a) an improvement notice pursuant to section 21 of the Health and Safety at Work etc Act 1974 (the **1974 Act**) (with serial number SB01/2021/16/17) (the **Notice**); together with

   b) a 'notice of contravention', which explained the basis upon which the Notice was issued,

   pertaining to the Appellant's risk assessment for the work conducted by its ESB operatives. The Respondent concluded that the Appellant's risk assessment process contravened the requirements of Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 (the **1999 Regulations**), which require that a suitable and sufficient risk assessment is carried out.

8. It is the Appellant's appeal against that Notice which is the subject of this hearing.

9. This matter has been the subject of three preliminary hearings, the last of which recorded a list of issues which had been agreed between the parties and is appended to this judgment.

The appeal and a modification sought by the Respondent

10. The Appellant asks the Tribunal to uphold it appeal against the decision of the Respondent to issue the Notice, and to cancel that Notice. It relies on the following grounds of appeal:

    a) That the Appellant is not in breach of Regulation 3(1) as alleged, as the Appellant's risk assessment *is* suitable and sufficient (**Ground 1**);

    b) The dynamic risk assessment process completed by the ESB Operatives *does* take account of road speed and type (**Ground 2**);

    c) The Notice confuses and conflates the specified Regulation 3(1) with Regulation 3(6) of the 1999 Regulations (**Ground 3**); and

d) The Notice is not warranted, having failed to properly take account of the nature of a dynamic risk assessment, and/or in fact serves to increase rather than reduce risk (**Ground 4**).

11. The Respondent accepts that the terms of the Notice conflate the requirements of sub-paragraphs (1) and (6) of Regulation 3 of the 1999 Regulations, and seeks one modification to it. The Notice as issued stated the Respondent's belief that the Appellant, as an employer, was contravening (in circumstances that made it likely that the contravention would continue or be repeated) Regulation 3(1) of the Regulations, and her reasons for that opinion were:

    "*The dynamic assessment of risk completed by the Emergency Stand-by Operatives fails to include road speed and type as a hazard.*"

12. The Respondent does not seek to modify her reasons, but seeks to amend the reference to the underlying breach to include both sub-paragraphs (1) and (6) of Regulation 3 of the 1999 Regulations.

The hearing

13. Both parties and all witnesses giving oral evidence to the Tribunal attended the hearing 'in person', as did the Employment Judge and Mr Mardner. Mr Greenland attended by CVP.

14. The Appellant was represented by Mr Morton KC and the Respondent by Mr Menzies.

15. The parties had agreed a bundle of 1011 in length. On the first day of the hearing the Appellant applied, without objection from the Respondent, to add two additional documents into evidence, being copies of Government publications of 9 September 2020 and 31 October 2020, outlining Covid-19 measures and requirements. The Tribunal agreed to admit those documents into evidence, which took the Bundle to 1020 pages.

16. The Tribunal made it plain to the parties that they could only rely on the Tribunal reading and considering those documents in the Bundle to which it was taken by written or oral witness evidence or submissions, but that the parties should not assume that the Tribunal would otherwise read any contents of the Bundle which neither party was relying on.

17. Both parties applied for some CCTV footage – dashcam footage from Mr Bennett's front windscreen, showing Mr Bennett's view as he drove down Lieutenant Ellis Way immediately prior to the incident – of 4:30 minutes in length, to be admitted into evidence. Each party considered it relevant, and it was admitted. The Tribunal watched that footage twice.

18. Expert witness evidence was provided to the Tribunal by John McEvoy, instructed by the Respondent, and David Roffe, instructed by the Appellant.

19. Other oral witness evidence was provided by David Olley, the Respondent's Operations Manager for its contract with Hertfordshire County Council.

20. Ms Bird provided a written witness statement, but was on maternity leave and unavailable at the time of the hearing, and so the Respondent did not intend to call her to give oral evidence – to which the Appellant had no objection in light of the fact that the Tribunal's function is effectively to re-take the decision Ms Bird took. The Tribunal, conscious of the expectation that it pay "*due regard*" to Ms Bird's opinion and expertise, considered that it may have questions which it would expect Ms Bird to answer, although it noted that it had a fair bit of material in which Ms Bird had expressed her view on the issues, significantly:

    a) the Notice itself;

    b) the Notice of Contravention, explaining Ms Bird's rationale for issuing the Notice and her view on other matters relevant to Appellant's obligations under Regulation 3 of the 1999 Regulations; and

    c) Ms Bird's written witness statement.

21. Ms Bird could not make herself available for Tribunal questions, as she was in labour. However, the Tribunal considered it had a sufficient understanding of her view from the evidence listed above to pay due regard to her views and expertise.

22. The Appellant sought permission, on the first day of the hearing, for Mr Olley to rely on a supplementary witness statement, with an appended document containing information pertaining to the training records of various of the Appellant's personnel. The Respondent did not object, and it (and its appendix) was admitted into evidence by the Tribunal.

23. The List of Issues had been agreed by the parties ahead of a Preliminary Hearing, but the Tribunal suggested that an additional issue should properly be considered, namely whether the Notice should be amended, and if so, in what terms. The parties agreed with this suggestion, and that was added as a further issue to the List of Issues (which amendment is included in the version appended to this judgment).

Facts

24. The factual background is largely undisputed by the parties. By way of further detail on the facts already outlined:

<u>Undisputed facts</u>

The Appellant's process

25. The Appellant is a supplier of road maintenance services to the Council. In fulfilling that role, when an emergency satisfying the description of a "category 1" "high hazard defect" is reported, the Appellant needs to assess the risk associated with the reported high hazard defect, as well as the risk(s) of options

of how it responds to it, and it needs to take control measures to eliminate, or if that is not possible, minimise those risks. Under the terms of its contract with the Council, the Appellant is required to complete the initial assessment of the high hazard defect within two hours of the report of the incident being received by it.

26. The Appellant's process for doing so involves the following key steps:

    a) A generic risk assessment for emergency callouts (not specific to any particular callout, or any callout type) is maintained by the Appellant;

    b) When a report of a defect on any of the Council highways maintained by the Appellant is received by Council, the significant details of that report are captured in a data entry form. This includes a description of the defect as well as its reported location;

    c) The incident report form is sent to a Supervisor of the ESB Operatives, who determines which pair of Operatives to task with the assessment of the high hazard defect, taking account of the training they have received;

    d) The incident report form is sent to the designated Operatives, and the generic risk assessment is available to them on their PDAs;

    e) Those Operatives travel to the site of the reported high hazard defect, and carry out a dynamic assessment of the risk it poses, and the appropriate response to it. That response may involve:

        (i) The ESB Operatives themselves taking steps to remedy the defect if they can safely do so;

        (ii) The ESB Operatives tasking another team to take action (e.g., arboriculturists to deal with a fallen tree, another team to deal with any concerns involving power cables, etc.); or

        (iii) The ESB Operatives tasking a specialist Traffic Management team (or a supplier of traffic management services) to come and manage the traffic on the road so that the ESB Operatives can complete their assessment if it has not been possible for them to safely do so, and/or another team to safely come and do the required remedial work.

27. The Appellant's practice is that the results of both the generic and the dynamic risk assessment processes are recorded, though not all risks and control measures are documented.

28. In the case of the generic risk assessment, the Appellant maintains a spreadsheet which sets out:

    a) A list of activities;

    b) A description of the hazards anticipated in relation to each activity;

    c) An identification of who might be harmed;

d) The level of risk that that hazard could cause harm, which is assessed by:

(i) A rating having been given of between 1 and 4 of the severity of the harm that is anticipated should that harm occur, with 1 being "*minor*" and 4 being "*fatal*";

(ii) A rating having been given of the probability of that harm occurring, again using 1 to 4, with 1 being "*possible*" and 4 being "*likely*";

(iii) Multiplying those numbers together and using that product to compare the risk level, with 16 being a "*high*" risk, 1 being a "*low*" risk. This gives the ability to compare the risk levels posed by the various anticipated hazards;

e) The control measures which are expected to eradicate or minimise those risks; and

f) An estimate of the residual risk level once the control measures have been taken (again, using 1 to 4 for severity, 1 to 4 for probability, and using the products so as to compare the residual risk levels).

29. This spreadsheet is referred to below as the **Generic Risk Assessment**. The version which applied at the time of the Incident was dated 27 July 2020, and the Appellant's unchallenged evidence is that this document is subject to continual review and sometimes amendment.

30. The expert witnesses, Mr McEvoy and Mr Roffe, agree that a "dynamic risk assessment" is properly defined as an undocumented continual process of identifying hazards and the associated risks and taking steps to eliminate or reduce them in a rapidly changing circumstance. The Tribunal accepts their evidence.

31. As regards the dynamic risk assessment carried out by the Appellant's ESB Operatives (referred to as the **Dynamic Risk Assessment** below), the *record* of the Dynamic Risk Assessment is done by one of the ESB Operatives completing the pair's agreed responses to a questionnaire, and often uploading photographs, on a personal hand-held device (a **PDA**). The *process* of the Dynamic Risk Assessment begins at an earlier point, from the time the ESB Operatives are tasked with responding to the incident by their supervisor. From that moment the Operatives start to think about where they need to go to visually inspect the incident, often with the Operatives having a deep knowledge of the local roads, so they start to use that local knowledge to anticipate information relevant to their assessment (e.g., knowing the topography of the road, its peak traffic periods, etc.).

What happened on 2 November 2020

32. As described above, Mr Bennett and Mr Harman were notified by the Appellant of a reported emergency on 2 November 2020 at Lieutenant Ellis Way. They were sent the Generic Risk Assessment by the Respondent, together with the data entry form containing the key details of the report that had been received of the high hazard defect on that road (the **Incident Report**). The information of note in the Incident Report was:

    a) The reported location of the hazard;

    b) A description of it: "*02/11/21 13:37 ****EMERGENCY**** TREE BRANCHES OVERHANGING – Tree branch*"; and

    c) The "*Priority*" assigned to it, being "*Emergency response (2 hour)*" (designated by the Council on the basis of the report received from a member of the public).

    Neither the Generic Risk Assessment nor the Incident Report identified:

    d) Lieutenant Ellis Way as a dual carriageway; or

    e) the speed limit that applied to the location of the reported defect (which was 50 mph).

33. The task assigned to Mr Bennett and Mr Harman on 2 November 2020 was to:

    a) carry out a real time assessment as to whether there was a danger to the travelling public;

    b) if so, determine what corrective action was necessary to remove that danger; and

    c) identify the hazards, and assess the related risks and appropriate control measures, associated with their determined course of corrective action.

    If they could safely repair the defect they were to do so, but their primary task was of assessment and determination of the next course of action.

34. The task of assessment in itself could involve hazards, and the first responsibility of Mr Harman and Mr Bennett was to identify those hazards and related risks, and ensure appropriate control measures were in place, before undertaking the assessment itself.

35. At the time of the Incident there were Government restrictions in place in response to the Covid-19 pandemic, and in light of those Mr Harman and Mr Bennett considered it appropriate to travel in separate vehicles.

36. Mr Bennett arrived at the location before Mr Harman, and drove through the section of the road which included the site of the reported high hazard defect. Mr Bennett and Mr Harman then met in the car park of a nearby school to discuss the situation, and how they would best be able to undertake their assessment and determine the approach course of action. The PDA to record their

considerations and conclusions (in line with the Appellant's practice) was in Mr Harman's possession.

37. They decided to go to the site of the overhanging branch (Mr Bennett for the second time and Mr Harman for the first) to carry out a further assessment by stopping their vehicles near it. Their plan was that Mr Harman would drive in front, with Mr Bennett following in a vehicle which bore markings identifying it as a vehicle involved in highway maintenance and which had a beacon which could be turned on to display flashing lights. When Mr Bennett, who knew where the overhanging branch was located, indicated that he was pulling over, he would turn on his beacon lights, and Mr Harman would also indicate and pull over in front of Mr Bennett's vehicle, with Mr Bennett's vehicle warning oncoming traffic that they were obstructing the highway.

38. Mr Bennett realised slightly too late that he was at the location of the branch. This had two consequences:

    a) He turned on his van's indicator too late to enable Mr Harman to pull over in time, so while Mr Bennett pulled over, Mr Harman had to carry on to the next roundabout before travelling in the opposite way down Lieutenant Ellis Way until he could turn around again and rejoin the side of the highway with the overhanging branch and Mr Bennett; and

    b) Although they had intended that Mr Bennett's van would pull over upstream of the overhanging branch, so that vehicle would have provided a barrier against the hazard the branch posed to the oncoming traffic as well as the hazard posed to Mr Bennett by exiting his van to walk to the overhanging branch, he in fact pulled over after he had passed the branch.

39. There was no hard shoulder or footpath at the location, and Mr Bennett drove onto the vegetation at the side of the road, so the width of his vehicle was half in the vegetation and half obstructing the first (slow) lane of the dual carriageway. His vehicle displayed flashing lights and warning signs.

40. Mr Harman, when driving down the other side of the dual carriageway, could see Mr Bennett's van pulled to the side with Mr Bennett still in it. Mr Bennett was wearing hi-vis clothing.

41. In the time between Mr Harman passing and Mr Harman getting near to Mr Bennett's vehicle on the correct side of the carriageway, Mr Bennett exited onto the carriageway.

42. A third party, Duval Daly, was speeding down the dual carriageway without having an appropriate licence or insurance, and whilst over a specified limit for three different types of drugs (cocaine, cannabis and diazepam). When he noticed Mr Bennett's van, he over-compensated when steering his car to go around it, steered into the central reservation, rebounded off that and went back towards Mr Bennett's van. Mr Bennett was struck and subsequently died of his injuries.

The Executive investigates

43. The Executive investigated the incident, with the Respondent as the nominated inspector. That investigation culminated with her concluding that the Dynamic Risk Assessment completed by Mr Harman and Mr Bennett was neither suitable nor sufficient to satisfy the requirements of Regulation 3(1) because it failed to include and take account of information about road speed and type as a hazard. Specifically, the Respondent found that this information was available to the Appellant, and determined that:

 "*Failure to include these hazards and suitable measures to reduce the risk so far as is reasonably practicable may lead to a similar incident*".

44. The Notice issued to the Appellant required it to:

 "*include in your assessment of risk the hazards of working on a live carriageway and the measures taken, so far as is reasonably practicable, to ensure the safety of your employees and those affected by your work activity*".

45. Specifically, the Notice directed the Appellant as follows:

 "*In order to comply with this notice:*

 Your assessment of risk for being at work on a live carriageway must include (but not be limited to) the road speed and road type.

 AND

 Your assessment must include the measures taken, so far as is reasonably practicable, to ensure the safety of your employees and those affected by your work activity.

 AND

 You must record the significant findings of your assessment and any group of your employees identified by it as being especially at risk.

 OR

 You may comply with this notice by any other equally effective means to remedy the said contraventions."

46. The Appellant appealed against the decision to issue the Notice on 3 August 2021.

The conviction of Mr Daly

47. Mr Daly, the driver of the car which struck Mr Bennett, has since been convicted of the offences of:

 a) causing death by careless driving while intoxicated;

b) causing death while driving without having an appropriate licence; and

c) causing death while driving with no insurance,

and has been given a custodial sentence.

48. The sentencing remarks of Kay J at Mr Daly's trial included:

> "*[Mr Bennett's] van is highly visible. It says on it that it's a highway maintenance van and it had its emergency lights flashing. He was wearing hi-vis clothing. The weather was fine. There was a long stretch of road in which it could be seen. The expert evidence is that he could be first seen from 270 metres away, which is about 12 seconds in travelling time, if you are driving at the speed limit. The experts also say that although you might see that vehicle from that distance, you would only realise that it was a parked vehicle from about 113 metres away.*
>
> *Nevertheless, that would give you ample time, if you were driving in a reasonable manner, to move into the second lane of the carriageway and steer in a – in a perfectly safe manner around the vehicle. Calculations indicate that you were driving between 61 and 73 miles per hour at the point when you first took evasive action. Accordingly, you were driving well in excess of the speed limit. It appears that you steered in a somewhat overcompensating manner, to go round the vehicle, no doubt because you were travelling too fast. You had seen the vehicle perhaps too late, and as I'll come to in a moment, you were suffering the effects of substantial amounts of drugs that you had taken….*
>
> *The consumption of cocaine is frankly remarkable…*
>
> *A forensic toxicology consultant has calculated backwards and has suggested you could well have been anything up to 20 times over the limit, at the relevant point of collision… You had also taken cannabis, which was over the limit, not to such startling quantities, and also diazepam.*"

Finding of fact

Does the Dynamic Risk Assessment completed by the Appellant's ESB operatives take account of road speed and type? (relevant to Ground 2 of the appeal)

49. The Appellant says:

a) Its ESB Operatives are local to the area covered by the contract between the Appellant and the Council – they know the roads covered by the contract well;

b) Its ESB Operatives are required to undertake a Dynamic Risk Assessment of reported category 1 high hazard defects, and this involves a visual inspection of the site to which the report relates. All ESB Operatives are drivers, and they drive to the reported location, and therefore necessarily take account of road speed and road type; and

c) The parties agree that the Appellant is not required to write down its Dynamic Risk Assessment. The Appellant's practice is that its ESB Operatives record aspects of their Dynamic Risk Assessments by use of PDAs pre-programmed with a questionnaire form to capture information. The fact that road speed and road type are not specifically identified in the prompts/questions on the PDA does not mean those matters are not considered.

50. The Respondent says that the Appellant did not ensure that its risk assessment process required consideration of road speed and road type, as neither 'road speed' nor 'road type' were specifically cited in its Generic Risk Assessment or the PDA prompts for its Dynamic Risk Assessment.

51. The Tribunal finds that the Dynamic Risk Assessment process undertaken by the Appellant's ESB Operatives (and the process that was undertaken at the time the Notice was issued) *does* involve those Operatives taking account of road speed and road type. The expert evidence from both parties, and the factual evidence from Mr Olley, is that the Dynamic Risk Assessment process begins from the time the task is assigned by a Supervisor to a pair of ESB Operatives. From the moment of assignment, the pair start to think about how to get to site, and how to undertake a visual inspection of the high hazard defect. As a visual inspection involves travelling to site (any photographs submitted with the report of the defect are not considered sufficient, and in any event were not provided to the ESB Operatives at the time the Notice was issued), this necessarily involves them driving the relevant highway to get to that site. Road type and road speed are therefore part of the many pieces of information that the ESB Operatives are considering as part of the Dynamic Risk Assessment process, even if those are not written down in the Incident Report or in the information required to be captured by the PDA prompts.

Law

<u>The basis on which the Notice was issued</u>

52. Section 2(1) of the 1974 Act provides as follows:

"*It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.*"

53. Regulation 3 of the 1999 Regulations requires that:

"*(1) Every employer shall make a suitable and sufficient assessment of—*

(a) the risks to the health and safety of his employees to which they are exposed

whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions…

(6) Where the employer employs five or more employees, he shall record—

(a) the significant findings of the assessment; and

(b) any group of his employees identified by it as being especially at risk."

The context in which the 1999 Regulations were made

54. The 1999 Regulations are made pursuant to section 15 of the 1974 Act, and are successor regulations to regulations passed in 1992. The 1992 regulations were the principal method of implementing the EC Framework Directive (89/391/EEC) (the **Directive**). Although the UK has left the European Union, the UK courts and tribunals are bound by retained EU law immediately before 11pm on 31 December 2020 (though national principles of interpretation now apply to it).

55. The purpose of the Directive is to set out minimum standards for the protection of the health and safety of workers, and Article 5 includes:

"*1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work…*

3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.

4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

The relevant statutory scheme: appealing against an improvement notice issued pursuant to section 21 of the Health and Safety at Work etc Act 1974

56. Section 21 of the 1974 Act provides:

"*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."

57. Pursuant to section 33(1)(g) of the 1974 Act, it is an offence for a person to contravene any requirement imposed by an improvement notice. That criminal liability is not part of this appeal, but it underlies the seriousness of non-compliance with an improvement notice.

58. Section 24 concerns appeals against improvement notices (and prohibition notices), and states, in subsection (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.*"

59. Section 82 states that, for these purposes, the term "*modifications*" "*includes additions, omissions and amendments*".

60. The High Court in *MWH UK Ltd v Wise (Inspector of Health and Safety)* [2014] EWHC 427 (Admin) considered that when the Employment Tribunal concluded that there had been a breach of the relevant health and safety legislation, it must:

"*put itself in the putative position of the inspector and decide what improvement notice, if any, is justified. It must then affirm, modify or cancel the Notice in accordance with its views. That necessarily involves forming its own view as to the cause of any breach of duty which it has found, because the purpose of the improvement notice is to identify what should be done to prevent or minimise the risk of such a breach occurring in the future… Accordingly in this case the Tribunal was not only entitled but bound to consider modification of the Notice in the way it regarded as best suited to promoting health and safety in the future, by reference to its conclusions on the cause of the breach*".

61. The Tribunal is entitled to consider all evidence relevant to the state of affairs as at the time the notice was issued, including evidence that has come to light after that time (*HM Inspector of Health & Safety v Chevron North Sea Ltd* [2018] UKSC 7). The function of the Tribunal when considering the appeal is not to appraise the propriety of the inspector's decision-making in light of the information available to them at the time the notice was issued, but to determine, in light of all the information now available about the state of affairs at the time the notice was issued:

    a) whether there was a breach;

    b) if so, whether there was a risk of such a breach occurring in the future; and

    c) (having identified the cause of the breach) whether steps should be taken to promote health and safety in the future.

It is no criticism of the inspector when new material leads to a different conclusion about risk from the one they reached.

62. The Court of Appeal in *Tangerine Confectionary Ltd and Veolia ES (UK) Ltd v R* [2011] EWCA Crim 2015 observed (in paragraph 36) that:

"*Foreseeability of risk (strictly foreseeability of danger) is indeed relevant to the question whether a risk to safety exists... In most cases, absent the sort of time factor which obtained in* Baker v Quantum*, it is likely that consideration of foreseeability will add little to the question whether there was a risk. In most cases, we think, the principal relevance of foreseeability will be to go to the defence of all reasonable practicable precautions having been taken… What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it.*"

Application to the appeal here

Ground 1: The Appellant is not in breach of Regulation 3(1) as alleged, as the Appellant's risk assessment is suitable and sufficient

63. Answering this question requires consideration firstly of which part/s of the Appellant's process is/are potentially capable of amounting to an "*assessment*" for Regulation 3(1) purposes – is it:

    a) Just the Generic Risk Assessment; or

    b) The Generic Risk Assessment together with the Supervisor's assessment for assignment purposes; or

    c) The Generic Risk Assessment together with both the Supervisor's assessment for assignment purposes and the Dynamic Risk Assessment?

64. Once that question is answered the next enquiry is whether that process/those processes (as they stood on 16 July 2021, the date the Notice was issued) amounted to "*a suitable and sufficient*" assessment, satisfying the obligation in Regulation 3(1).

Part 1: Which part/s of the Appellant's process is/are potentially capable of amounting to an "assessment" for Regulation 3(1) purposes?

65. The Appellant's primary position is that it is only its Generic Risk Assessment which is the "*assessment*" for Regulation 3(1) purposes, and it characterises the Dynamic Risk Assessments conducted by its ESB Operatives as one of the control measures for the risks anticipated by the Generic Risk Assessment.

66. In the alternative, the Appellant says that it is both the Generic Risk Assessment and the Dynamic Risk Assessment that amounts to the "*assessment*" for Regulation 3(1) purposes.

67. The Appellant avers that the Inspector was wrong in the Notice to align the "*assessment*" required by Regulation 3(1) with its Dynamic Risk Assessments alone, which she implicitly did by the terms of the reason for her opinion that the Appellant breached Regulation 3(1) when she stated that reason as:

"*The dynamic assessment of risk completed by the Emergency Stand-by Operatives fails to include road speed and type as a hazard.*"

68. The Respondent says that the whole of the Appellant's process leading up to the point that an ESB Operative walks onto the carriageway comprises the Appellant's "*assessment*" for Regulation 3(1) purposes, and the Dynamic Risk Assessment conducted up until that point is part of that.

69. The Tribunal finds that the Appellant's Generic Risk Assessment and the result of its Supervisor's assessment for assignment purposes amounts to the Appellant's "*assessment*" for Regulation 3(1) purposes. We do not consider that that assessment includes any Dynamic Risk Assessment conducted by the ESB Operatives. We reach that conclusion for the following reasons:

    a) Both parties have agreed that the obligation to record significant findings in Regulation 3(6) does not apply to the Appellant's Dynamic Risk Assessments. The legislative drafting of Regulation 3(6) assumes that the assessment covered by Regulation 3(6) is the same as that covered by Regulation 3(1), with the obligation to record in Regulation 3(6) applying to "*the assessment*" - a term which only derives meaning from the assessment the employer is otherwise obliged to conduct, which in this case is pursuant to Regulation 3(1).

    b) The obligation in Regulation 3(1) applies in context of the employer's overarching duty in section 2(1) of the 1974 Act to "*ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees*". The terms of Regulation 3(1) make that plain: "*Every employer shall make a suitable and sufficient assessment of- (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work… <u>for the purpose of</u> identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions*" (emphasis added). The assessment is a necessary part of the employer meeting its section 2(1) duty. If the employer could delegate the assessment responsibility, or any part of it, to the very employees whom section 2(1) is designed to protect (i.e., those employees facing the operational risks with which this legislation is concerned), that would nullify the protection of the legislative scheme.

    c) That is plain from the scheme of section 2(1) of the 1974 Act and Regulation 3(1) of the 1999 Regulations, and so there is no question of purposively interpreting that legislation, but this also accords with the terms of the Directive which, in Article 5.3, provides that "*The workers'*

obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer".

d) The Tribunal therefore concludes that the Dynamic Risk Assessment does not form part of the "*assessment*" for Regulation 3(1) purposes.

70. The Appellant, as a corporate person, must do the "*assessment*" for Regulation 3(1) purposes through individuals employed or otherwise empowered to make decisions on its behalf, but those individuals must, in our view, exclude those of its employees facing the risks being assessed. We regard the Appellant as doing this in two ways:

a) By the terms of its Generic Risk Assessment; and

b) By the tasking decision taken by the ESB Operatives' Supervisor. This tasking decision, according to the oral evidence from Mr Olley, takes account of the training received by the various members of the ESB Operative team. He gave the example of the situation where the Appellant is made aware by the police of a serious road traffic accident that requires a lane closure. In such a case, Mr Olley said, the Supervisor would dispatch a pair of Operatives containing at least one person with the appropriate training to carry out that lane closure. That tasking decision involves consideration of the risks to the health and safety of the employees involved, and the measure taken to mitigate those risks is ensuring that what the Appellant considers appropriate training has been undertaken by one or more of the persons on the team.

*Part 2: Does that process/those processes provide "*a suitable and sufficient*" assessment, satisfying the obligation in Regulation 3(1)?*

71. The Appellant says that its risk assessment process is "*suitable and sufficient*", and the Respondent disagrees.

72. The Respondent now says (as clarified in submissions) that the Appellant's risk assessment process for ESB Operatives was deficient in eight respects at the time the Notice was issued:

a) The Generic Risk Assessment should include road type and road speed;

b) The Generic Risk Assessment should include hazards, risks and controls pertaining to inspections. It says that the Generic Risk Assessment is focused on post-assessment actions;

c) The Generic Risk Assessment process should be supported by a Risk Assessment Method Statement for the task of inspections conducted by ESB Operatives;

d) The Dynamic Risk Assessment process, requiring a response to the questionnaire on the PDA, involves too many prompts, and prompts which are confusing;

e) The Dynamic Risk Assessment questionnaire on the PDA is flawed because it does not include road type and road speed;

f) There is a lack of suitable training for ESB Operatives on risk assessment;

g) The supervision and monitoring of the work of the ESB Operatives is insufficient to ensure that risk assessment work is being carried out properly, and that ESB Operatives are adhering to training they have been given; and

h) The instruction given to the ESB Operatives about the work they are to do is confusing as to whether they are to inspect, conduct traffic management and/or carry out repair works.

These eight criticisms are referred to below as the **Respondent's Developed Case**.

73. The Tribunal concludes, based on the evidence presented to us, that the Appellant's risk assessment process is "*suitable and sufficient*", for reasons explained below.

74. The original case put by the Respondent in the Notice is that the Appellant's risk assessment process is not suitable and sufficient because "*The dynamic assessment of risk completed by the Emergency Stand-by Operatives fails to include road speed and type as a hazard*". That case has altered in the course of the hearing, but taking that assertion first:

a) The Tribunal has concluded that the Dynamic Risk Assessment is not part of the risk assessment process required by Regulation 3(1) as regards the risks posed to the health and safety of the ESB Operatives, because the Appellant cannot delegate its duties under Regulation 3(1), or section 2 of the 1974 Act, to its employees facing those risks whom this legislation is designed to protect.

b) This is not to say that the Dynamic Risk Assessment cannot form part of the Regulation 3(1) risk assessment for *other* employees (e.g., the traffic management team), but we have not heard evidence about whether the product of any Dynamic Risk Assessment does in fact form part of a Regulation 3(1) assessment for other employees of the Appellant besides the ESB Operatives.

c) As regards the ESB Operatives, we find that the original breach asserted by the Inspector is not made out – any flaws (if there are any) in the Dynamic Risk Assessment process cannot form the basis for a breach of Regulation 3(1) as regards the assessment of risks posed to the ESB Operatives by their work.

75. As for the Respondent's Developed Case, for the same reason as for her original case, we find the criticisms of the Dynamic Risk Assessment listed in sub-

paragraphs d) and e) above do not support a finding that the Appellant breached Regulation 3(1).

76. As for the Respondent's Developed Case in sub-paragraph a) above, we find that the Respondent has not put a case that road type (road speed is considered below) must *necessarily* form part of the assessment conducted under Regulation 3(1) *for the work of the ESB Operatives*.

a) While the Notice of Contravention purports to explain the basis for the Inspector's opinion that the Appellant has contravened Regulation 3(1) by failing to include road type in its assessment, in fact that document explains only why the Inspector considers a high-speed road to present an increased chance of harm to ESB Operatives than a road with a lower speed. There is no explanation as to why consideration of whether the road is a single or dual carriageway is something that must form part of a "*suitable and sufficient*" assessment of risks to ESB Operatives.

b) The Tribunal found the evidence of the expert instructed by the Inspector, Mr McEvoy, to be careful, considered (in the main) and clear. Mr McEvoy expressed the firm view that road type was a matter of relevance to the correct approach to traffic management, not to assessment *per se*. We have not been presented with evidence from either the written witness statement of the Inspector nor the written or oral evidence of Mr McEvoy that road type should form part of, for example, the assessment of risk to the ESB Operatives of their work in assessing defects where a drive-by assessment is sufficient and the recommended response is no further action. The relevance of road type only applies where traffic management is needed. It is noteworthy that Ms Bird's witness statement contains only criticism of the Dynamic Risk Assessment, and makes no criticism at all, in fact, of the Generic Risk Assessment.

c) Where the work of the ESB Operatives *does* involve traffic management, the Generic Risk Assessment requires consideration of road type because the control measures include "*Set up traffic management according to Chapter 8 and Group TM Manual*", and both Chapter 8 and the Group TM Manual differentiate between the necessary training required to carry out traffic management depending on road type (and road speed), and so the part of the Generic Risk Assessment that does require consideration of road type – the risks associated with traffic management - is then engaged.

77. The other criticism in the Respondent's Developed Case sub-paragraph a) relates to the allegation that the Appellant's Generic Risk Assessment does not include road speed. In fact, the Tribunal finds that the Generic Risk Assessment *does* take account of road speed. The Generic Risk Assessment includes a row which comprises:

a) Activity: "*Struck by vehicle*";

b) Hazards: "*Severe injury, fatality*";

c) Who might be harmed: "*Operatives*";

d) Risk Level (where the highest is 16): "*4 x 4 = 16*"; and

e) Control Measures: "*Ensure the correct Traffic Management is set up as per Chapter 8. Operatives must be trained, competent and must carry out a dynamic risk assessment on arrival.*
Ensure all operatives are properly inducted and aware of the nature of the work to be undertaken and any specific risk."

("*Chapter 8*" is a reference to the Executive's guidance entitled "Traffic Signs Manual, Traffic Safety Measures and Signs for Road Works and Temporary Situations".)

78. The labelling here has room for improvement, for example:

a) the activity cannot rightly be described as "*Struck by vehicle*", and must be something like "Carrying out assessment of hazard and any repair works"; and

b) the hazard (which the parties say, by reference to the Executive's guidance document HSG268, is "*something in your business that could cause harm to people, such as chemicals, electricity and working at height*") is not "*Severe injury, fatality*", but rather a reference to the fact that "Moving vehicles" on the carriageway present a hazard to the Operatives,

but the Risk Level, at 4 x 4, assesses the severity of harm at the highest it can be, "*Fatal*", and the probability of harm as "*Likely*", both before the Control Measures are taken.

79. It is therefore evident that the Appellant *has* taken road speed into account in that assessment of severity and probability of harm – those levels cannot be set any higher than the Appellant has rated them.

80. Moreover, the control measures for this risk – including "*Ensure the correct Traffic Management is set up as per Chapter 8*" – also engage consideration of road speed, as the Chapter 8 approach to traffic management varies with road speed limit (and whether the road is a single or dual carriageway). Also as noted in the control measures, "*Operatives must be trained*", and such training would be needed in order to understand what is the "*correct*" traffic management. Both Mr Bennett and Mr Harman had received traffic management training (by means of the National Highways Sector Scheme course known as "NHSS 12 D", accredited by the respected training award body, LANTRA) which emphasised that they could implement traffic management on certain roads but not on others, including high speed dual carriageways. The slides of part of that NHSS 12 D training shown to us in evidence include a slide that says "*Ensure you obtain the following information as a minimum*", followed by a list which includes "*Road Speed*". By referring to the correct Traffic Management as per Chapter 8, and to the fact that

Operatives must be trained, the control measures in the Generic Risk Assessment engage the users of that Generic Risk Assessment in thinking about road speed.

81. Therefore we find that the Appellant *did* take account of road speed limit when, as part of its Generic Risk Assessment, it assessed the risk level of ESB Operatives being struck by a vehicle, and when, as part of its control measures in response to that risk, it trained Mr Bennett and Mr Harman.

82. As for sub-paragraph b) of the Respondent's Developed Case (the Respondent's assertion that the Generic Risk Assessment should include hazards, risks and controls pertaining to inspections), we find that it does.

   a) The Appellant's description of Activities and Hazards could be improved, but the Generic Risk Assessment identifies hazards (in the sense of things in the work the ESB Operatives do for the Appellant that could cause them harm) sufficiently that is clear which parts of the Generic Risk Assessment are engaged by the incident report for the reported hazard that the ESB Operatives are to assess.

   b) As for the specific criticism the Respondent has made about the absence of a line item for encroaching vegetation, the Tribunal considers "*Fallen Tree*" to be a good proxy for that (bearing in mind there will be variations on that theme in these situations).

   c) Realistically, the list of risks in the Generic Risk Assessment cannot be exhaustive – the experts and Mr Olley agree that the range of hazards that the ESB Operatives could be called to inspect is huge, and a lengthy Generic Risk Assessment that cannot be easily navigated by the ESB Operatives so that they understand the risks and mitigations identified by the Appellant would not protect them – but the obligation on the Appellant is not to make a comprehensive assessment of possible risks the ESB Operatives could face, but rather to make a "*suitable and sufficient*" assessment of those risks. The *Tangerine* case cited by the parties refers to risk assessment as a process involving foresight, and we agree that it is, but there are many, many risks that are foreseeable but which have varying degrees of likelihood of occurrence, or where the foreseeable harm is very low. The foreseeability of risk is not the only way to identify which risks should be included in a "*suitable and sufficient*" assessment. We are satisfied that, where the inclusion of all foreseeable risks would inhibit the ability of this document to effectively guide appropriate control measures, the Appellant should filter all foreseeable risks by reference to risk levels - in the Appellant's use of that phrase – i.e., taking account of both likelihood and severity of harm, and include those that exceed a threshold of risk level score. We were not taken to evidence of how this was done, but nor has the Respondent pointed us to any omitted risks besides that of encroaching vegetation, which we consider covered.

Moreover, the items in the Appellant's Generic Risk Assessment list include other hazards which the Tribunal can foresee the ESB Operatives may be called out to inspect, such as "*Ice & Snow*", "*Fallen Power Lines*", "*Road traffic incident*", and "*Flooding*".

83. The Tribunal finds that the criticism in the Respondent's Developed Case at sub-paragraph c), that the Generic Risk Assessment process should be supported by a Risk Assessment Method Statement for the task of inspections conducted by ESB Operatives, was not effectively put by the Respondent.

a) It was explained to us that a "method statement" is a statement of who does what, when and how, so as to implement the control measures identified in a risk assessment. For example, a control measure to a risk might be training, and the method statement might specify the type of training, a minimum level of training, or any differentiation in training minima for different situations.

b) We heard very little evidence about method statements in the hearing. Mr McEvoy for the Respondent said that he would have expected a method statement for the task of assessment to be in place (and he praised the Appellant's Risk Assessment Method Statement for Traffic Management), but Mr Olley and Mr Roffe disagreed that the assessment task was amenable to a method statement, and they questioned what such a method statement would say, given the huge range of defects the ESB Operatives could be called out to assess.

c) No example method statements (whether for inspection or otherwise) besides the Appellant's own one for traffic management were provided in evidence.

d) There was little said to us about what such a method statement would contain, besides:

(i) The minimum competency requirements for attending crews by reference to their ability to conduct traffic management, and the Appellant answered that by saying that the ESB Operatives were instructed specifically not to carry out traffic management for which they had not received appropriate training; and

(ii) Vehicle specification for ESB work, but again, this position was not developed by the Respondent. There was no argument made that there were minimum characteristics of a suitable vehicle that should be used to conduct inspections unless those inspections involved traffic management, and the Appellant's position is that the ESB Operatives were instructed specifically not to carry out traffic management for which they had not received appropriate training.

e) More fundamentally it is far from clear that the absence of a method statement would contravene Regulation 3(1). Regulation 3(1) requires that

a suitable and sufficient assessment of risk is conducted for the purpose of identifying appropriate measures, but the Regulation does not require that details of the means of implementing those measures must be specified in order to satisfy Regulation 3(1).

f) We are not persuaded on the basis of the evidence and argument made to us that the Appellant is in breach of Regulation 3(1) by failing to have a Risk Assessment Method Statement supporting its Generic Risk Assessment.

84. The sixth way in which the Respondent's Developed Case avers that the Appellant's risk assessment process breached Regulation 3(1) is set out in sub-paragraph f), that there was a lack of suitable training for ESB Operatives on risk assessment.

a) The parties agree that LANTRA did not, at the time the Notice was issued, have any training specifically on the process of risk assessment undertaken by ESB Operatives (and people carrying out equivalent roles in other highways maintenance organisations).

b) The Appellant says that risk assessment formed part of many of the training courses its ESB Operatives undertook, emphasising that training on risk assessment forms part of its internal training as well as the accredited courses on traffic management that its ESB Operatives undertook with LANTRA (including Mr Bennett and Mr Harman).

c) Furthermore, Mr Olley gave evidence about the 'buddying' system the Appellant's Supervisors use when tasking emergency call out work, so that less experienced ESB Operatives are paired with more experienced colleagues, facilitating on-the-job training as well – considered by the Tribunal to be an important part of the suite of training where the range of high hazard defects the ESB Operatives could face was so wide.

d) It appeared at times that the Respondent was seeking to argue that all ESB Operatives should be trained in traffic management for all types of highways on which they may be sent to carry out inspections, but in fact the Tribunal did not understand that to be the Executive's position when submissions were made. (In any event, we heard evidence from Mr Olley that the risk assessment aspect of the two training courses with which Ms Bird was focused – the NHSS 12 D and NHSS 12 A/B courses – is in fact substantially the same.)

e) The Tribunal was not persuaded that, before ESB Operatives were tasked to conduct assessments on particular types of roads, such as high speed dual carriageways, it is necessary for those Operatives to have been trained and certified to conduct traffic management on those roads. Mr Olley gave clear evidence that the expectation of ESB Operatives is that if they deem traffic management necessary or appropriate their instructions

from the Appellant are clear that they may only carry out that traffic management themselves if they are appropriately trained and certified to do so on the type of road in question, and have the appropriate equipment. If they do not have the training and equipment, the ESB crew is required to inform their Supervisor and traffic management is provided from the Appellant's specialist team or by an external supplier. The ESB Operatives are tasked with assessing the defect if they can safely do so within the time period specified in the Appellant's contract with the Council.

f) The Tribunal is not persuaded that the Appellant is in breach of Regulation 3(1) because of a lack of suitable training – the Respondent has not made out that case.

85. The seventh way, described in sub-paragraph g), in which the Respondent's Developed Case posits that the Appellant's risk assessment process breaches Regulation 3(1) is that the supervision and monitoring of the work of the ESB Operatives is insufficient to ensure that risk assessment is being carried out properly, and that ESB Operatives are adhering to training they have been given.

a) As we have concluded that an ESB Operative's Dynamic Risk Assessment cannot form part of the assessment the Appellant is obliged to carry out with respect to the risks to *their own* health and safety while at work, the relevance of the supervision and monitoring conducted by the Appellant to the "*assessment[s]*" for Regulation 3(1) purposes can only be to ensure that the learnings from one ESB crew's Dynamic Risk Assessment are fed into either or both of the Generic Risk Assessment and the tasking process with respect to the assessment of risks faced by *other* ESB crews.

b) The Respondent offered no evidence about any failings on the part of the Appellant to maintain the Generic Risk Assessment or its tasking decision process to reflect learnings from past Dynamic Risk Assessments.

c) The Tribunal heard evidence from Mr Olley that, in the ten-year period the contract for highways maintenance has been in place between the Council and the Appellant, the Appellant was required to attend 587,998 Category 1 defects. Of those, 70,885 were high hazard defects, requiring a two-hour response time, and 3,303 were on dual carriageways with a speed limit of 50 mph or more. With numbers like these, it is clearly impossible for a Supervisor to monitor or review each occasion an ESB crew has responded to a Category 1 defect, or to a high hazard defect requiring a two-hour response time.

d) Mr Olley had not prepared written witness evidence on the Appellant's systems for supervision and monitoring (because it only became clear that the Respondent was making it in the course of the hearing), but in oral evidence he described the Appellant's system of supervision and monitoring as comprising:

(i) Audits of some of the assessments conducted by ESB Operatives, sometimes just internally, sometimes with the Council. The Appellant's vehicles are fitted with dash camera technology, so that footage (such as that viewed by the Tribunal in this case) could form part of any audit;

(ii) The use of motion sensor technology in the vehicles which would alert the local Transport Manager (Mr Olley in the case of this contract) and the Business Unit Manager if the vehicle swerved or were to brake suddenly, again prompting them to access the vehicle's dash cam footage;

(iii) Other technology in the vehicles which would detect if the people in them are not wearing seatbelts, or are using mobile telephones;

(iv) In addition to formal training programmes (internal and external), good practice and bad practice is highlighted in an annual health and safety meeting, which all staff attend;

(v) A further six sessions held in the course of the year where Mr Olley uses dash cam footage to cascade messages about appropriate or inappropriate actions;

(vi) A whistleblowing procedure that enables ESB Operatives to raise concerns about colleagues' conduct; and

(vii) A disciplinary procedure that responds to misconduct with measures ranging from 'a quiet word' to dismissal.

e) Mr Olley gave evidence that, save for the tragic case of Mr Bennett, no injury was sustained by any member of the ESB crews during the ten-year period the Appellant's contract with the Council has been in place. That record suggests, though does not prove, that the Appellant's risk assessment process is generally suitable and sufficient.

f) The Respondent pointed to some statements gathered by the Inspector in the course of her investigation from Mr Harman and other ESB Operatives, which offered a variety of comments on the supervision and monitoring at the Appellant's organisation. Some of those statements contain positive comments about the Appellant's supervision and monitoring (e.g., "*Any updates to procedures are shared to us by letters and toolbox talks*"), and others critical comments (e.g., "*people have different interpretations, which means gangs and crews work differently*", and "*I am not aware of any review process that takes place once a job is completed*"). The Tribunal places little weight on these statements, given they are not witness statements in these proceedings, and so the Appellant has not been able to cross-examine those individuals, nor has the Tribunal been afforded the opportunity to ask questions of them.

g) Our conclusion, therefore, is that – other than pointing to the facts that Mr Bennett lost his life while undertaking work for the Appellant, and aspects of what Mr Bennett did that day which Mr Olley said in evidence he would not have done had he been part of that crew - the Respondent has not put a case to us that the supervision or monitoring of the ESB crews was deficient or meant that Regulation 3(1) was breached. The limited evidence does not support a finding that the Appellant's supervision and monitoring of its ESB Operatives provides a basis for concluding that the Appellant has breached Regulation 3(1).

86. The eighth criticism made by the Respondent's Develop Case in sub-paragraph h) is that the instruction given to ESB Operatives about the work they are to do is confusing as to whether they are to inspect, conduct traffic management and/or carry out repair works.

a) It is not at all clear to the Tribunal how this is capable of amounting to or contributing to a breach of Regulation 3(1), particularly in light of our determination (which was not known to the Respondent at the time of making this submission) that the Dynamic Risk Assessment does not form part of the "*assessment*" for Regulation 3(1) purposes.

b) The Tribunal has not been shown any job description, employment contract or indeed any other document which sets out the task(s) assigned to the ESB Operatives generally or on particular occasions.

c) The Respondent bases its position on the statements gathered by Ms Bird prior to issuing the Notice. As stated above, and for the reasons there set out, the Tribunal places little weight on the content of those statements.

d) The Tribunal cannot conclude that the instructions given to ESB Operatives were confusing without either seeing those instructions or hearing evidence from those ESB Operatives. We do not find that the Appellant contravened Regulation 3(1) by the terms of its instructions to its ESB Operatives.

87. Turning then to the questions in the list of issues, and taking them slightly out of order:

a) **Is the Appellant's dynamic risk assessment for emergency call out work properly seen as a control measure or a risk assessment to which Regulation 3(1) relates? (Issue 2.b.i)**

As noted above, the Tribunal has concluded that the Dynamic Risk Assessment does not form part of the "*assessment*" in Regulation 3(1), as the people conducting that assessment are the employees facing the work-related risks, and it is the employer which must conduct the assessment pursuant to Regulation 3(1). While the employer in this instance is a corporate, and so must act through its directors or personnel, we consider that it cannot delegate that responsibility to the very employees to whom the duty is owed, or this would nullify the

protection Regulation 3(1) affords them. The Dynamic Risk Assessment *is* a risk assessment, just not one for the purposes of Regulation 3(1) as regards the ESB Operatives. (The Dynamic Risk Assessment conducted by the ESB Operatives may well form part of the assessment for Regulation 3(1) purposes for a distinct traffic management team employed or engaged by the Appellant.) As regards the ESB Operatives themselves, the Dynamic Risk Assessment is properly regarded as a control measure.

This means that **Issue 2.b.ii**, about whether the Dynamic Risk Assessment together with the Generic Risk Assessment collectively complies with Regulation 3(1), is not applicable.

Issue 4, of whether the Respondent was correct to focus on the Dynamic Risk Assessment in isolation in the Improvement Notice, is answered in the negative. The Tribunal finds that, as regards the risks posed to the ESB Operatives, the Dynamic Risk Assessment carried out by the ESB Operatives cannot form the basis for a conclusion that Regulation 3(1) was contravened.

b) **Is the Appellant's generic risk assessment for emergency call out work suitable and sufficient? (Issue 2.a)**

Also as described above, the Tribunal considers that the assessment carried out by the Appellant (and not through the ESB Operatives) is both the Generic Risk Assessment and the assessment involved in tasking the particular incident to a particular pair of ESB Operatives. In the latter case, this is based on the evidence from Mr Olley that tasking decisions involve the Supervisor looking at the training, skills and experience of the different team members and making staffing selections according to the Supervisor's anticipation of what the incident will involve.

The Tribunal has therefore considered whether the Generic Risk Assessment together with that tasking decision amounts to a suitable and sufficient assessment. We have concluded, on the basis of the evidence before us, that it is.

c) **To what extent is the ESB crews' knowledge, experience and training relevant when deciding whether there has been a breach of Regulation 3(1)?**

These matters are not relevant. The assessment of risk by the Appellant for the purpose of Regulation 3(1) does not include the Dynamic Risk Assessment carried out by the ESB Operatives. The risks faced by an ESB Operative in the course of their work are not different according to whether they are new to post or 'old hands'.

However, the Appellant's Generic Risk Assessment identifies in various places the ESB Operatives' knowledge, experience and training as a control measure to various hazards, so the response to the risk assessment – which is outside the

scope of the terms of Regulation 3(1) – will involve consideration of the ESB Operatives' knowledge, experience and training.

d) **Was the Appellant in breach of Regulation 3(1)? (Issue 1)**

For the reasons set out above, we do not consider that the evidence supports a finding that the Appellant was in breach of Regulation 3(1).

<u>Ground 2: The Dynamic Risk Assessment process completed by the ESB Operatives does take account of road speed and type</u>

88. As noted in the Facts section above, the Tribunal agrees that the Dynamic Risk Assessment process completed by the Appellant's ESB Operatives *does* take account of road speed and type.

89. Turning then to the questions in the list of issues under this Ground:

a) **Are road speed and road type hazards which must be taken into account as part of the risk assessment process? (Issue 5.a)**

As set out above in relation to Ground 1, the Tribunal has no basis for finding that road type must be taken into account as part of the risk assessment process required by Regulation 3(1).

In relation to road speed limit, we find the Appellant *is* required to take that into account as part of its assessment pursuant to Regulation 3(1). While Mr McEvoy, Mr Roffe and Mr Olley agreed that the speed of the actual traffic is more relevant to the ESB Operatives 'on the ground', the assessment required by Regulation 3(1) precedes the Dynamic Risk Assessment undertaken by the Operatives themselves – it has to be conducted before attendance on site when the related risk is being faced. However, in this phase of foresight, road speed limit is a good proxy for what the ESB Operatives might expect of the traffic speed on the road when they attend site – some drivers will drive quicker than the road speed limit, some slower, but the Appellant in its Regulation 3(1) assessment can gauge that expected range of vehicle speeds in the context of the road speed limit.

b) **Are road speed and road type factors taken into account by the Appellant as part of the risk assessment process and if so how and when? (Issue 5.b)**

As described above, yes, in the Generic Risk Assessment of the Appellant in the "*[Activities]*" of "*Setting up Traffic Management*" and "*Struck by vehicle*". Both those activities are given the highest risk level (absent control measures being taken) by the Appellant as part of that assessment. This assessment obviously pre-dates the assignment of any work to the ESB Operatives (or at least, any assignment of work from 27 July 2020 onwards, which the is the last time this Generic Risk Assessment was updated. No evidence was presented to us about the contents of prior versions, and so we cannot say when this factor was first included in the Generic Risk Assessment).

c) **Does the requirement for a suitable and sufficient risk assessment mean that in these circumstances the Appellant's PDA should expressly:**

(i) Identify road speed and road type as hazards;

(ii) Stipulate where the dynamic risk assessment should be undertaken;

(iii) Identify actions or control measures to be taken by reference to the road speed and road type?

(Issue 5.c)

Regulation 3(1) does not require this, because the Dynamic Risk Assessment does not form part of the process of assessing risks to health and safety to the ESB Operatives for Regulation 3(1) purposes. The Dynamic Risk Assessment is part of the control measures the Appellant takes, but Regulation 3(1) does not require those to be recorded. Regulation 3(6) requires the significant findings of "*the assessment*" to be recorded (as the Appellant has five or more employees), but the assessment is, as described in Regulation 3(1), the assessment of risks to health and safety, not the measures that are then identified following identification of those risks (this is considered in greater detail below, in relation to Ground 3). The control measures are not required to be recorded by Regulation 3(1) or 3(6).

Ground 3: The Notice confuses and conflates the specified Regulation 3(1) with Regulation 3(6)

90. The Respondent accepts that the breach identified in the Notice is only of Regulation 3(1) – the requirement to make a suitable and sufficient assessment of risk – whereas the remedial action expected by the Schedule to the Notice, referring as it does to the Appellant "*record[ing] the significant findings of [its] assessment and any group of [its] employees identified by it as being especially at risk*", relies on a breach of Regulation 3(6). The Respondent maintains that that remedial action is required, and so seeks an amendment to the body of the Notice so that the breach it identifies is of both Regulation 3(1) and Regulation 3(6) of the 1999 Regulations.

91. While the Respondent agrees with the Appellant that there is no legal requirement to write down the findings of a Dynamic Risk Assessment, the fact that the Appellant chooses to do so means, it avers, that that record should appropriately include assessment of road speed and road type.

92. The Appellant disagrees. It says that as the parties agree that the findings of the Dynamic Risk Assessment are not required to be recorded, there can be no breach of Regulation 3(6) based on what the Appellant voluntarily records on its

PDAs - it cannot be breaching Regulation 3(6) by acting over-and-above the legal requirements.

93. We agree with the Appellant, for two reasons:

a) The first is the drafting structure of Regulation 3(6).

We have found in relation to Ground 1 that the risk assessment that is required to be conducted for the purposes of Regulation 3(1) must be that carried out by the employer, and cannot be delegated to its employees or workers who face the risks in question. In the context of the Appellant's process, the risk assessment carried out for Regulation 3(1) purposes is the Appellant's Generic Risk Assessment process, coupled with the assessment carried out by the tasking Supervisor of the relevant ESB Operatives.

Regulation 3 is divided into various sub-paragraphs:

(1) concerns the risk assessment to be conducted by an employer in respect of both the risks to the health and safety of its employees at work, and the risks to others by the conduct of the employer's business (it is only the risks to the employees which the Respondent relies on in this case as the basis for the averred breach);

(2) makes equivalent provision for a self-employed person to make a suitable and sufficient assessment of the risks to their own health and safety in relation to their work, along with the risks to others by the conduct of their business;

(3) sets out an obligation to review and update those assessments;

(3A) is an interpretative provision; and

(4) and (5) add to the requirements on an employer in relation to the employment of a young person.

Regulation 3(6) then provides that, where the employer employs five or more employees, it is to record:

"(a) the significant findings of <u>the assessment</u>; and (b) any group of his employees identified by it as being especially at risk" (emphasis added).

In other words, Regulation 3(6) is an additional requirement to record particular parts of the assessments required by the predecessor paragraphs. In the context of an employer obliged to conduct a risk assessment under Regulation 3(1), Regulation 3(6) obliges it to record the significant findings of that Regulation 3(1) assessment.

b) The second reason for our conclusion is the point made by the Appellant: if there is no legal obligation to record the significant findings of the Dynamic Risk Assessment (a point on which the parties agree), the Inspector cannot conclude that the Appellant has contravened Regulation

3(6) because it has taken steps over the legally-prescribed minimum and chosen to make a record of the findings of its Dynamic Risk Assessment.

94. The Tribunal answers, then, the questions in the list of issues as follows:

a) **Does Regulation 3(6) require the significant findings of the dynamic risk assessment to be recorded in writing? (Issue 6.a)**

No.

b) **If so, should the Notice be modified to refer to Regulation 3(6) in place of Regulation 3(1)?**

This is not applicable in light of the answer to the preceding question.

Ground 4: The Notice is not warranted, having failed to properly take account of the nature of a dynamic risk assessment, and/or in fact serves to increase rather than reduce risk

95. The Tribunal agrees that the Notice is not warranted, but because the Dynamic Risk Assessment does not form part of the "*assessment*" required by Regulation 3(1), and therefore how the ESB Operatives carried out the Dynamic Risk Assessment cannot be a basis for issuing a notice premised on a Regulation 3(1) contravention.

96. Turning, then, to the questions posed in the list of issues:

a) **Should the Improvement Notice be cancelled because:**

(i) It was not warranted and, in fact, may increase the risk to which the Appellant's employees are exposed; and/or

(ii) The Respondent's approach undermines the very essence of a dynamic risk assessment?

The Notice should be cancelled because there was no contravention of Regulation 3(1), and so the basis on which the Notice was issued was erroneous.

Should the Notice be amended, and if so, in what terms? (Issue 5)

97. The Tribunal does not consider it appropriate to Order any modification of the Notice – we have not found that the Appellant breached either Regulation 3(1) or Regulation 3(6) of the Regulations.

Conclusions

98. For all of the above reasons, the Appellant's appeal succeeds and the improvement notice is cancelled.

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Employment Judge Ramsden

Date: 12 September 2024

Sent to the parties on

Date: 18 September 2024

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

List of Issues

As agreed between the parties on 12 October 2023 and recorded in the Orders of EJ Mclaren of 16 October 2023.

Ground 1

1. Was the Appellant in breach of Regulation 3(1) ?
2. This will require determination of whether,:
    a. The Appellant's generic risk assessment for emergency call out work was suitable and sufficient;
    b. Whether the dynamic risk assessment:
        i. Is a suitable control measure or is it itself a risk assessment to which Regulation 3(1) relates and, if it is a risk assessment to which the Regulation relates, whether it is suitable and sufficient; or
        ii. Together with the generic risk assessment collectively complies with Regulation 3(1).
3. To what extent is the ESB crews' knowledge, experience and training relevant when deciding whether there has been a breach of Regulation 3(1)?
4. Whether the Respondent was correct to focus on the dynamic risk assessment in isolation in the Improvement Notice.

Ground 2

5. The relevance of road speed and road type to the risk assessment process:
    a. Are they hazards which must be taken into account as part of the risk assessment process?
    b. Are these factors taken into account by the Appellant as part of the risk assessment process and if so how and when?
    c. Does the requirement for a suitable and sufficient risk assessment mean that in these circumstances the Appellant's PDA should expressly :
        i. Identify road speed and road type as hazards;
        ii. Stipulate where the dynamic risk assessment should be undertaken;

iii. Identify actions or control measures to be taken by reference to the road speed and road type.

Ground 3

6. It being conceded that Schedule to the Improvement Notice conflates Regulation 3(1) and Regulation 3(6) the remaining issues are:
   a. Does Regulation 3(6) require the significant findings of the dynamic risk assessment to be recorded in writing? And, if so;
   b. Should the Notice be modified to refer to Regulation 3(6) in place of Regulation 3(1)?

Ground 4

7. Should the Improvement Notice be cancelled because:
   a. It was not warranted and, in fact, may increase the risk to which the Appellant's employees are exposed; and/or
   b. The Respondent's approach undermines the very essence of a dynamic risk assessment?

(As added by the Tribunal with the parties' agreement on 3 September 2024:)

8. Should the Improvement Notice be amended, and if so, in what terms?