EMPLOYMENT TRIBUNALS

Appellant: Wyldecrest Parks Management Limited

Respondent: Rushcliffe Borough Council

Heard at: Nottingham via CVP

Heard on: 11 and 12 December 2024

Before: Employment Judge Victoria Butler

Representation

Claimant: **Mr D Sunderland, Director**
Respondent: **Ms A Walker Solicitor**

RESERVED JUDGMENT

1. The decision of the Employment Judge is that Improvement Notice 24/00002/HO4S21 is affirmed[1].

REASONS

Background

1. This is an appeal by Wyldecrest Parks Management Limited (the Appellant) against an Improvement Notice issued on 12 January 2024 by Mr Philip Scotney, an authorised Health and Safety Inspector of Rushcliffe Borough Council (the Respondent).

The Improvement Notice ("the Notice")

2. The Notice was issued because, in Mr Scotney's view, Section 3(1) of the Health and Safety at Work etc Act 1974 and Regulation 3(1) of the Management of Health

[1] Subject to the outcome of the appeal/s

and Safety at Work Regulations 1999 had been contravened. The terms of the notice are as follows:

> *You conduct an undertaking, a caravan site, on the premises known as Radcliffe Park, Wharf Lane, Radcliffe on Trent, NG12 2AP. There is a cliff adjoining the eastern boundary of the site. The design and layout of the site is such that the usable space extends all the way to the eastern boundary. As a result, users of the site, such as residents, visitors and contractors will find themselves proximate to the base of the cliff.*
>
> *In December 2023, a number of large boulders fell from this cliff, which resulted in them falling into the pitch area of No 16 Cliff Rd damaging the fencing and home placed on it.*
>
> *Whilst your risk assessment completed in December 2019 identifies rock fall as a hazard, the likelihood score was identified as a 'remote occurrence'.*
>
> *Considering that there has now been recent rock fall and following consultation with a Geotechnical Surveyor, we are of the opinion that the likelihood of further rock fall is definite/certain.*
>
> *You have a duty to conduct a suitable and sufficient risk assessment. Your risk assessment now requires updating and additional controls to be put into place to reflect this increased risk rating.*

3. The schedule of works to be completed is:

> *"You must conduct a new suitable and sufficient risk assessment of the risks posed to the site by the cliff. This assessment shall have proper regard to:*
>
> - *the recent rockfall incident of 2023;*
> - *recommendations provided to a Rushcliffe Borough Council commissioned Geotechnical surveyors:*
>   - *continual routine monitoring/assessment of the exposed rock face as previously advised by yourselves that is being carried out.*
>   - *Permanent remedial measures - a rigid fence (designed specifically for mitigation/capture of rockfall) should be installed behind the existing retaining wall to a designed height of approx 1.2-1.5m however this will be subject to specialist design. A further survey of the cliff could be undertaken where access is made available to the rock face to identify any additional remedial methods.*
>
> *This assessment must include an identification of hazards and give details of such control measures as are needed to remove and/or reduce those hazards so far as is reasonably practicable."*

4. The compliance period ended on 15 April 2024.

The appeal

5. The appeal was lodged on 2 February 2024 which was supplemented by an amended grounds of appeal dated 12 July 2024. The grounds are:

    1) The Appellant is not an employer and the Health and Safety at Work etc Act does not apply. Further or in the alternative

    2) The land is domestic premises and not covered by the Health and Safety at Work etc Act. Further or in the alternative

    3) The land to be assessed is not in the ownership or control of the Appellant. Further or in the alternative

    4) The Notice is invalid. Further or in the alternative

    5) The requirement of the Notice goes beyond what is reasonable. Further or in the alternative

    6) The Appellant is unable to comply with the requirement of the Notice.

The preliminary hearings

6. The parties attended a telephone preliminary hearing on 3 July 2024 at which a further preliminary hearing was listed to: "*Determine whether the Health and Safety Act 1974 applies to the premises that are the subject of appeal against an Improvement Notice presented by the appellant on 2 February 2024".*

7. The preliminary hearing took place on 10 September 2024 before Employment Judge M Butler and grounds 1, 2 and 3 of appeal were considered.

8. The outcome was that the Health and Safety at Work etc Act 1974 applies to the Appellant.

9. The Appellant applied for a reconsideration of the decision which was not upheld. The parties were notified of this on 3 December 2024.

The postponement request

10. The Appellant requested a postponement of this hearing because it is appealing the decision of Employment Judge M Butler.

11. Furthermore, the Tribunal issued the incorrect guidance on how to challenge the decision in the first instance – the guidance issued related to appealing to the EAT, rather than the High Court. As it stands, the Appellant has filed appeals in both jurisdictions. Each says it is not the correct jurisdiction to hear an appeal albeit both appeals have now been accepted. This is a matter the Appellant will have to resolve. I did however confirm that if it relied on the guidance issued erroneously for the purposes of time limits for lodging an appeal, and such appeal is out of time,

the Tribunal would confirm, on request from the relevant court, that the error had occurred.

12. The Respondent was of the view that the grounds of appeal not subject to appeal in the higher courts could be dealt with at this hearing.

13. I took some time to deliberate the competing factors but concluded that it was in accordance with the overriding objective to deal with the outstanding points because the parties were before me and in a position to proceed and, once the appeal/s is/are concluded, there is no need for the parties to return to the Tribunal on a future date.

14. It was agreed that I would address grounds 4, 5 and 6 of the appeal.

Tribunal composition

15. The case was listed before me sitting alone. It should have been listed before a full Tribunal.

16. I asked the parties if they consented to the hearing proceeding before me alone and flagged that the Presidential Guidance on Panel Composition, which came into effect on 29 October 2024, anticipates that Judges may often consider it appropriate to have a full Tribunal in cases such as this.

17. That said, both parties provided written consent for the case to proceed before me sitting alone and I was satisfied that it could proceed on this basis given the matters for deliberation.

The hearing

18. The parties agreed a bundle of documents which contained the Appellant's statement of case.

19. The Respondent made a late application to submit two witness statements regarding an alleged conversation between two members of the Respondent and the Appellant's Area Manager. The Area Manager said that he was advised by the Respondent during a site visit that no further action was required in respect of the rockfall.

20. The Appellant objected to the late application and considered it an ambush. However, he took the pragmatic view that given the points for deliberation, they were not particularly relevant. On this basis, the Respondent was content for them to be submitted as hearsay evidence and, to the extent they were relevant, I would attach appropriate weight to them in the absence of cross examination. As it happened, I did not consider them relevant, and the parties made no submission on them either.

21. Both parties relied on submissions only, so I did not hear any evidence. The only legislation relied on was the Management of Health and Safety at Work Regulations 1999. There was reference to legislation relating to Mobile Homes and

Caravan Sites which are not relevant for the purposes of my deliberations – these are points subject to appeal at the EAT/High Court. Neither party referred me to any case law.

The issues

22. I had to decide whether to cancel or affirm the Notice. If I decided to affirm it, I had to consider whether any modification was required to the wording. The issues agreed with the parties for determination were:

    i. Was there a contravention of Regulation 3(1) The Management of Health and Safety at Work Regulations 1999?

    ii. If there was, did the Respondent act reasonably in serving the Notice?

The facts

2019

23. On 26 June 2019, the Respondent issued the Appellant with an Improvement Notice in respect of the same cliff face. The Appellant appealed and the appeal was heard on 26 and 26 November 2019 before Employment Judge Dyal. His decision was not subject to an appeal. Relevant passages from that judgment which describe the site are as follows:

    The eastern boundary of the Park is adjoined by a cliff…… (para 30)

    It is worth describing part of the eastern boundary of the park in a little more detail. There is a boundary fence that is around 2m high. That fence holds back a bank of earth on the other side which is approximately the same height as the fence. Trees and other vegetation grow in the bank of earth which is a few metres deep. Behind the mound of earth the cliff face rises. The cliff face is vegetated including with mature trees (para 31).

    There are a little over 70 mobile homes on the park as well as a bungalow, a site office, roads and communal spaces. The mobile homes are used as 'only or main' private residences rather than as holiday lets…….. (para 32).

    Firstly, it is just not true that the 2006 report indicated no specific issue other than those inherent with being at the bottom of any cliff. For instance, it identified a specific risk of falling trees...(para 76).

    Secondly, there was a report of a rockfall in 2006, discussed in the 2006 report, and one that sounds serious. A rockfall damaged a garage. It may (or may not) technically be true that this was not reported by a resident or the council but that is not the important point: what matters is whether it happened and it appears to have done so. The 2006 report also indicates that a' very mature tree' had apparently fallen to the cliff bottom (para 77).

    Thirdly, as Ms Frain told Mr Sunderland in March 2019, since 2006 there had been four complaints of rock or treefall by residents to the council (para 78).

Fourthly, even if the risks were limited to those inherent in being at the bottom of a cliff, that did not make them any less serious or belittle them in any way. Rockfall from a cliff is dangerous even should it be true that it is a risk applicable to all cliffs (79).

24. A consideration in the 2019 appeal also relevant to this appeal is the Geologist's report produced in 2006. Of note, in the 2019 appeal, Mr Scotney accepted that the 2006 report remained valid at that time because thirteen years is not a long time is geological terms. The report addressed the risk of rockfall as follows:

"Two protuberances of claystone rock were evident in the upper horizon of these exposures and their water-worn faces demonstrated how the flow of rainwater cascading over the flat surface of the rock had then undercut into softer claystone and mudstone below the upper hard clay stone etc, gradually eroding the softer stratum.

Eventually gravity will take over and what may be a very substantial protruding block of rock weighing up to several tonnes could fall to the foot of the near vertical almost sheer rock face. It would obviously be too heavy and too angular in overall shape to roll westwards beyond the bank bottom.

There were the remains of several such blocks of largely very hard claystone etc visible along the foot of the cliff and it was noteworthy that they had apparently remained just where they had fallen.

They marked the staged limits of progressive water flow cutback erosion and taking the rock face into solution, both of which has had the effect of slowly moving the exposed cliff face to the east.

The development of the hard rock protuberances can however be controlled by chiselling away overhangs to reduce them so that they are cut flush with the near vertical rock face below.

……

Although the major risk of rockfall is that described above, the almost vertical natural sheer of the exposed cliff face will always also carry a risk of spalling rock falls taking place.

An example of such a fall having taken place was visible from a collapse of part of the northern limit of the exposure just below its hard rock capping, where a large semi subconchoidal sliver of mudstone rock had evidently been lubricated by surface water and recently fallen from the face" (pages 34 - 38)

25. Following the appeal, the Appellant produced a risk assessment and erected a retaining wall with decorative and chain link fencing above it to capture small rockfall. It was also agreed that a two-metre buffer zone would be maintained between the bottom of the cliff face and the plots. The assessment and wall met the requirements of the Notice.

26. Post 2019, four more caravan plots were installed in front of the cliff face reducing the buffer zone by 17cm.

The 2023 rockfall

27. On 11 December 2023, the Respondent was notified that there had been rockfall at the eastern boundary resulting in damage to plot No. 16. Mr Scotney visited the site and took photos (pages 105 – 110). The photos evidence that boulders had fallen onto No. 16 causing damage, albeit not extensive.

28. Mr Scotney wrote to the Appellant that day as follows:

> *"…….Attached are some photos taken today. If the resident or someone else had been in that area at the time of the fall, it is highly likely that they would have been seriously injured or even worse.*
>
> *You'll recall that back in 2019, this Council served a Health and Safety Improvement Notice on Wyldecrest Parks relating to completing a risk assessment of this area of the site. The risk assessment you provided detailed rockfall as a hazard and had been risk rated. There were also control measures listed on this assessment and additional measures required. This assessment made mention of a link fence at the bottom of the cliff, designed to catch any smaller rocks from entering the occupied area. The rocks that have fallen in this instance are much larger boulders and as such this fence, seen in one of the attached photos, was insufficient to stop them.*
>
> *As a matter of urgency, please can you inform us of the actions you intend to take to resolve this incident. Initial matters would be:*
>
> - *Removal of those boulders in the rear/side of No.16, to fully assess what damage has been done to the property and/ or base*
> - *Removal of the protruding boulder still in situ on the cliff face, currently being propped up by a tree*
> - *The need for a refreshed geological survey of this cliff area to indicate whether there are additional concerns about other rock falls occurring to the properties along this cliff edge*
> - *An updated risk assessment now that it's evident that the likelihood of rockfall is now a certain/actual future occurrence.*
> - *An installation of a larger and more substantial retaining wall/fence along the cliff edge, suitable to prevent future incidents of boulders from crashing onto plots and into homes occupied on them"* (page 111).

29. The Appellant did not reply to this e-mail. In the meantime, Mr Scotney commissioned a further geological report from Fairhurst Engineering Solutions which was produced on 21 December 2023 by e-mail. The report was broadly in agreement with the 2006 report and recommended continual

monitoring/assessment of the exposed rock face, temporary remedial measures to inhibit further rockfall and permanent remedial measures. The recommendation was that a rigid fence should be installed behind the existing retaining wall to a designed height of 1.2-1.5m (page 113).

30. Mr Scotney e-mailed the Appellant again on 22 December 2023 explaining that the current wire/wooden fencing was clearly now unsuitable to deal with the fall of large boulders across the exposed cliff face and the recent survey recommended the installation of a rigid fence to a designed height of 1.2-1.5m subject to specialist design. He concluded the e-mail by saying:

> *"As mentioned in my e-mail of the 11th December 2023, you will also need to review your risk assessment in light of this incident. Parts of this assessment will need to include consideration of a further, geotechnical assessment, and a more formal recording of any regular monitoring/ assessments carried out by Wyldecrest themselves.*
>
> *We have spoken to residents under the cliff face who have all said that access to the outside of their plots is available for you to carry out assessments and works to this area.*
>
> *We will also be writing formally to yourselves in the New Year and would invite you to submit comments to ourselves, at your earliest opportunity, indicating what actions you now intend to take and the time scales for these actions. This will assist us to agree some reasonable time scales to get these works completed"* (page 122).

31. Again, the Appellant failed to reply to this e-mail.

The Notice

32. On 12 January 2024, Mr Scotney issued the Notice. The wording mirrors the same as the modified 2019 Notice save it is amended to reflect the 2023 rockfall. This prompted a lengthy reply from the Appellant on 16 January 2024 disputing that the Health and Safety at Work etc Act 1974 applied and also, in essence, placing responsibility for the area on the occupiers. The Appellant stated that the 2019 risk assessment was carried out on a goodwill basis to work with the Respondent amicably in the spirit of co-operation. The Appellant confirmed that despite its position on the applicability of the legislation, it had given instructions to contractors to have a more robust wall erected. It invited the Respondent to withdraw the Notice (page 132).

33. On 17 January 2024, Mr Scotney replied reminding the Appellant that it had not replied to his December e-mails. He explained that the Appellant's initial risk assessment in 2019 was found not to be suitable or sufficient hence the 2019 Notice. He told the Appellant that it had continued responsibilities under the Health and Safety at Work etc Act 1974, despite other obligations it may have. Mr Scotney saw no reason why the Respondent's letter and Notice would change the Appellant's plans to install a more robust wall and reminded it of the right of appeal. (page 135).

34. The Appellant responded the same day, again disagreeing that the Health and Safety at Work etc Act applied and expressing disappointment that Mr Scotney had not agreed to withdraw the Notice. It went on to say:

> *"Given the way you have presented the circumstances in the email we would not wish that anything we chose to do on a goodwill basis would prejudice us and the difference in opinion as to the best way to resolve this i.e. by consultation or by enforcement we will only carry out any works that we believe we are required to do unless it is determined by the Tribunal otherwise"* (pages 148-149).

35. On 12 January 2024, Mr Scotney confirmed that he would not withdraw the Notice but would be happy to continue dialogue over the compliance period. He saw no reason to delay the proposed works (page 155).

36. On 24 January 2024, the Appellant e-mailed Mr Scotney confirming that it would be appealing the Notice, and that the relevant legislation did not apply to it (pages 165-166).

37. On 2 February 2024, Mr Scotney responded, confirming his position remained unchanged. He went on to say:

> *"You have already stated you had a contractor lined up to complete the remedial works yet haven't provided details of what these works would be or a timescale for when works would be completed. We're disappointed that rather than carry out these works, you've now chosen to go down an appeal route, therefore delaying works that are need (sic) to protect your residents from further rock fall.*
>
> *Timescales within the notice are reasonable, especially considering you already began planning these works before this notice was served….."* (page 164)

38. On 29 February 2024, Mr Scotney e-mailed the Appellant requesting an update on the works (page 181).

39. On 1 March 2024, the Appellant replied saying it was told to do nothing and given the Notice, it would wait for the outcome of the appeal to this Tribunal (page 180). An exchange took place thereafter in which the Appellant stated that his Area Manager was told by a representative of the Respondent not to do anything (pages 178 & 179). Mr Scotney explained that he felt obliged to issue the Notice due to the lack of response to his initial e-mails.

40. On 18 April 2024, the Appellant e-mailed Mr Scotney as follows:

> *"I do not appear to have received a response to my e-mail of 6th March 2024.*
>
> *Our Area Manager stands by his statement that the Council told him not to do anything as Wyldecrest had done everything that had been asked from them. You have not provided any evidence to refute that.*

Notwithstanding this we remain of the view that the Health and Safety at Work etc Act does not apply to Radcliffe Park and that the Notice should be withdrawn.

We did however inform you that we would be carrying out such works as we deemed necessary to comply with our obligations under the Site Licence conditions and the terms of the 1983 Mobile Homes Act.

Those works on now complete –

1, as a Permanent remedial measure, a rigid fence (designed specifically for mitigation/ capture of rockfall) has been installed behind the existing retaining wall to a designed height of approximately 2.75 metres.

2 We have conducted a new suitable and sufficient risk assessment of the risks posed to the site by the cliff. This assessment has had proper regard to the recent rockfall incident of 2023.

3 Continual routine monitoring/assessment of the exposed rock face continues to take place.

Given that this would comply with the requirements of the Notice issued under the Health and Safety at Work etc Act, even if it did apply, it would seem that the Council's requirements have now been satisfied.

You are now therefore invited to withdraw the Notice or mark it as satisfied to avoid the need for the ongoing Appeal. Should you agree to do so, we would undertake to withdraw the Appeal.

I appreciate you may wish to visit the park to inspect so please just let me know at your earliest opportunity……" (page 177).

41. On 19 April 2024, Mr Scotney replied and asked for the design specifications of the rigid fence including details of installation methods and materials used copy, a copy of the Appellant's updated risk assessment and evidence of its monitoring/assessment since the rockfall in December 2023 and the details of what the monitoring would consist of (page 184).

42. The Appellant replied the same day maintaining its stance that the Respondent had told its Area Manager that it did not need to do anything. However, it went on to say:

> *"There is no requirement to provide you with any updated risk assessment, which has been carried out for our own internal benefit as it is not a legal requirement or to provide any design specification to the wall, however as we have them and should the matter proceed to a full hearing they would be produced, we have no issue in the spirit of cooperation to provide you with copies on a without prejudice basis.*
>
> *The area remains monitored as has been for the last four years on a*

monthly basis by checking fixed points to identify movement and this remains in place. Given that the wall has only recently been installed, it is too early to monitor.

You are now again invited to withdraw the notice upon which we will undertake to withdraw the appeal with no order as to costs……..” (page 191).

43. The risk assessment had been undertaken during the week prior and addressed the identified risks and the matters in the Notice (pages 208 – 211). It had clearly been updated since the 2019 risk assessment albeit matters still relevant remained within it. This was copied to Mr Scotney along with the method statement for the new rigid fence.

44. On 22 April 2023, Mr Scotney visited the site and observed that only a small area of work had been undertaken by No. 16 and was not extended across the whole area, nor had it been constructed to plan (pages 212 – 223 and 235 – 237).

45. On 24 April 2024, Mr Scotney e-mailed the Appellant setting out in detail why the Appellant had failed to construct the wall to plan. He also said he was awaiting a reply to his previous question on 19 April, namely whether the updated risk assessment was its updated version completed because of the current Notice (page 224).

46. On 13 and 14 May 2024, the Appellant contacted the Respondent to request available dates to discuss the works (pages 238 and 239). Mr Scotney responded as follows providing available dates:

“*Happy to propose some dates. I'm just curious as to what discussions you'd like? The schedule within the improvement notice is clear and the plans and proposals (date March 2024) submitted by Mr Sunderland on 19th April 2024, would be sufficient to comply with this notice*” (page 238)

47. The Appellant did not reply.

The law

48. Regulation 3 of The Management of Health and Safety at Work Regulations1999 provides:

Risk assessment

3.—*(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.

Discussion and conclusions

Ground 4 – the Notice is invalid

49. Mr Sunderland submitted that the Notice was invalid by virtue of Regulation 3(6). There was no requirement on the Appellant to provide a risk assessment because it has less than five employees.

50. Ms Walker did not seek to argue that the Appellant had more than five employees. Rather, her interpretation of Regulation 3 was that it applies to general risk assessments in the workplace rather than risk specific ones. The exclusion for employers with less than five employees is to relieve the burden on them to produce detailed assessments about all risks. There is nothing within the Regulation preventing the Respondent from requiring an employer, regardless of size, to produce a risk specific assessment.

51. In response, Mr Sunderland submitted that Ms Walker was simply seeking to change the interpretation of the legislation and, if it was meant to cover general risk assessments in isolation, it would say so.

52. On analysis, I agree with Ms Walker's submission. Regulation 3(1)(a) requires an assessment of all risks to an employer's employees or, in the case of 3(1)(b), to persons not in employment arising out of or in connection with the employer's conduct of his undertaking. The exclusion in Regulation 3(6) relates to the need to record the significant findings of an assessment and any group of an employer's employees identified as being at risk.

53. There is nothing within Regulation 3 preventing an appropriate body from requiring a small employer to produce a risk assessment relating to a specific, identified hazard. The Notice was issued in respect of an actual risk following an occurrence of rockfall and, therefore, I am satisfied that the exclusion does not apply, and it was validly issued.

54. Furthermore, as pointed out by the Respondent, Employment Judge Dyal considered it reasonable to have a risk assessment in place for a particular risk.

Ground 5 - the Notice goes beyond what is reasonable

The 2019 risk assessment already covered the risk

55. Mr Sunderland submitted that the Employment Tribunal in 2019 determined the specification of the 2019 Notice and that the issue of a further Notice was an abuse of process.

56. He argued that the 2019 risk assessment was in response to the risks already identified in the 2006 report. The report had already identified the risk of rockfall beyond small stones – "*Eventually gravity will take over and what may be a very substantial protruding block of rock weighing up to several tonnes could fall to the foot of the near vertical almost sheer rock face".*

57. Furthermore, the report recorded that there had already been a significant rockfall - *"An example of such a fall having taken place was visible from a collapse of part of the northern limit of the exposure just below its hard rock capping, where a large semi subconchoidal sliver of mudstone rock had evidently been lubricated by surface water and recently fallen from the face".*

58. As such, the 2019 assessment already covered the risks and no new risk had been identified – it was the same risk. The only difference was that there had been a rockfall, which had already been anticipated, hence the erection of the retaining wall. As such, there was no need to issue a further Notice.

59. Ms Walker disagreed, her submission being that the existing fencing was breached as evidenced by the photographs. It was no longer adequate as it had failed to prevent the boulders from falling onto the site. This in turn rendered the existing risk assessment and supportive measures unsuitable and insufficient.

60. Mr Sunderland's submission on this point is not without merit given the risks identified in 2006 and the Respondent's satisfaction with the solution post the 2019 appeal.

61. However, it is far outweighed by Ms Walker's argument. It is abundantly evident that the existing measures could not, and did not, contain the fall of boulders thereby posing a real risk to the health and safety of those residing or working on site should it occur again.

62. Mr Sunderland argued that the boulders had not gathered momentum and that the Respondent's statement that someone could have been injured or worse was emotive. However, having regard to the size of the boulders and damage to the mobile home, whilst not extensive, I am satisfied that if a person had been hit by one or more, even at slow place, they would have suffered injury.

63. As such, Regulation 3(1) was engaged because the measures identified and adopted in the 2019 risk assessment no longer mitigated the risk to health and safety thus rendering the risk assessment unsuitable and insufficient. The rockfall breaching the existing fencing amounted to a significant change of events.

64. Given that the existing measures were clearly inadequate to prevent the risk of injury, I am satisfied that the Respondent acted reasonably in issuing the further Notice.

65. I also address the updated risk assessment itself. Ms Walker initially submitted that the Appellant had not updated the risk assessment in 2024, it had simply changed the date. Mr Scotney shared the same view in his witness statement within which he said: *"The risk assessment submitted was the same one completed on 2019 but with the name of the file changed to "April 2024". There was a review date of 12/12/20, where it had been assessed that the likelihood score should be decreased. There had been no reassessment of the likelihood element of this assessment or an attempt to rescore or review controls based on the recommendations of Fairhurst or ourselves*" (para 20, page 104).

66. On comparing both assessments, this analysis is clearly wrong. The risk assessment was updated in relation to 2023 rockfall and addressed the additional fencing to mitigate the risk, albeit the Appellant neglected to update the date of the assessment. The score for likeliness of occurrence remained at '*improbable'* given the additional measures.

67. The Respondent took issue with this score and submitted that it should have been increased to consider the risk before measures were implemented. The Appellant submitted that it was not for the Respondent to determine the scores.

68. I note that the 2019 assessment covered the risks identified at the time, which included rockfall, and scored the likeliness of occurrence as '*improbable*' after measures had been implemented and the Respondent raised no challenge then. The same approach appears to have been taken in the 2024 assessment. Regardless, this argument does not take the parties much further given I am obliged to assess the situation as of January 2024 when the Notice was issued.

Unreasonable to issue the Notice

69. Post rockfall, the Respondent wrote to the Appellant on two occasions seeking to understand what measures it was going to put in place to remedy the rockfall and prevent further risk, The Appellant did not reply. Given the rockfall and the lack of response on two occasions, I am satisfied that the Respondent acted reasonably in issuing the Notice to enforce remedy of the risk.

Failure to withdraw the Notice

70. Mr Sunderland also submitted that the Respondent acted unreasonably by not withdrawing the Notice despite being given opportunity to do so.

71. I am satisfied that it was reasonable to decline to withdraw it. The Respondent confirmed in this hearing that had the rigid fence been constructed to plan it would have withdrawn the Notice. Whilst the Appellant's method statements were to the Respondent's satisfaction, it had not confirmed that the risk assessment had been updated and thereafter, the remedial works had not been constructed in accordance with the plans, as evidenced in the photographs. The works remained unremedied at the time of this hearing.

Ground 3 – the Appellant was unable to comply with the requirement of the Notice

72. Mr Sunderland conceded that there was nothing physical or practical preventing the Appellant from complying with the requirements of the Notice. Rather, his argument was that the land was not in its ownership or control nor was it its responsibility. It seems to me that this is a point subject to the appeals in the higher courts and not one that I can determine.

Overall conclusions

73. I am satisfied that the 2019 risk assessment was no longer suitable or sufficient following the December 2023 rockfall which breached the existing fencing. It follows that there was a contravention of Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999. I am also satisfied that the exclusion in Regulation 3(6) does not apply to the Appellant in these circumstances and the Notice was validly and reasonably served.

74. In light of my findings above, and subject to the outcome of the Appellant's appeal/s, the Notice is affirmed.

75. I do not consider that the wording needs to be modified. It is not vague as asserted by the Appellant and follows the wording of the 2019 Notice. Indeed, the Appellant has updated its risk assessment and provided plans for a new rigid fence to the Respondent's satisfaction. The work simply needs to be completed to those plans.

76. On this point, Mr Sunderland confirmed that the Appellant, despite its view that it is not required to, will complete the works soon. It seems to me that if the works are completed to plan, this will dispose of the need for further litigation, but this is, of course, a matter for the Appellant.

_____

Employment Judge Victoria Butler

Date: 19 December 2024

JUDGMENT SENT TO THE PARTIES ON

.....19 December 2024.....

.....

FOR THE TRIBUNAL OFFICE

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