EMPLOYMENT TRIBUNALS

Appellant **Respondent**
TMF Dordon Limited **AND** **Mr A Nayar**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham On: 3 and 4 April 2017

Before: Employment Judge Dimbylow Members: Mr J Wagstaffe
Mr K Palmer

Appearances:
For the appellant: Miss J Kendrick, Counsel
For the respondent: Mr C Adjei, Counsel

JUDGMENT having been sent to the parties on 10 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim. This is an appeal by TMF Dordon Limited (the appellant) against an Improvement Notice numbered 307635721 (the Notice) issued by Mr Alexander Omesh Nayar, HM Inspector of Health and Safety (the respondent). The claim form was presented at the tribunal office on 20 December 2016. The tribunal gave notice of this hearing to the parties by letter dated 4 January 2017, and at the same time directions were given for the just disposal of the case. The response form was lodged with the tribunal office on 23 January 2017 and the appeal resisted in full.

2. The issue. Stated shortly, we must answer the question, do we find that section 24 of the Health and Safety at Work Act 1974 was engaged at the time that the Notice was issued and did this cause the Notice to be issued?

3. The evidence. We received oral evidence from the following witnesses:

(1) The respondent; and

(2) Mr Stephen Robert Holland on behalf of the appellant.

We also received documents which we marked as exhibits as follows:

C1 appellant's draft list of issues-not agreed

R1 agreed bundle of documents (74 pages)
R2 respondent's draft list of issues-not agreed
R3 respondent's skeleton argument
R4 respondent's bundle of legal materials including these authorities:
Readmans Limited v Leeds City Council [1992] COD 419
Chilcott v Thermal Transfer Ltd [2009] EWHC 2086 (Admin)
MWH UK Ltd v Wise [2014] EWHC 427 (Admin)
Hague v Rotary Yorkshire Ltd [2015] EWCA 696 (CA)
R5 respondent's witness statement
R6 trial timetable-agreed

4. A brief outline of the law on appeals against Improvement Notices

- The appeals against such notices are dealt with in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in the Rules of Procedure in the first Schedule to those Regulations

- Rule 105 of the Rules of Procedure relates to appeals against improvement and prohibition notices and provides that the rules in Schedule 1 as modified apply to such appeals.

- Therefore, the Employment Tribunal has an appellate jurisdiction.

Rule 105 Application of Schedule 1 to Appeals Against Improvement And Prohibition Notices

- Rule 105 is quite brief and contains the following provisions:-

> *"(1) A person ("the appellant") may appeal an improvement notice or a prohibition notice by presenting a claim to a Tribunal office –*
>
> *(a) before the end of the period of 21 days beginning with the date of the service on the appellant of the Notice which is the subject of the appeal; or*
>
> *(b) within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time*
>
> *(2) For the purposes of an appeal against an improvement notice or a prohibition notice, this schedule shall be treated as modified in the following ways –*

(a) references to a claim or claimant shall be read as references to an appeal or to an appellant in an appeal respectively;

(b) references to a respondent shall be read as references to the inspector appointed under section 19(1) of the Health and Safety Act who issued the notice which is the subject of the appeal."

Definitions

- By rule 1 Health and Safety Act means Health and Safety at Work etc. Act 1974

- By rule 2 Improvement Notice means a notice under section 21 of the Health and Safety Act (HSWA) which 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."

- Appeal Against Improvement or Prohibition Notice

Section 24 of the HSWA refers and provides: -

"(1) In this section 'a notice' means an improvement notice or a prohibition notice.

(2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an Employment Tribunal; and on such an appeal the Tribunal may either ***CANCEL OR AFFIRM*** *the notice and, if it affirms it, may do so either in its original*

form or with such modifications as the Tribunal may in the circumstances think fit.

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

*(a) in the case of an **AN IMPROVEMENT NOTICE,** the bringing of the appeal shall have the effect of **SUSPENDING THE OPERATION OF THE NOTICE** until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;*

***(b)** in the case of **A PROHIBITION NOTICE,** the bringing of the appeal shall have the like effect **IF, BUT ONLY IF,** on the application of the appellant the Tribunal so directs (and then only from the giving of the direction).*

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an Employment Tribunal under this section."

The burden of proof is upon the respondent to show that there was the alleged breaches of the health and safety provisions. In this case the respondent was of the opinion the appellant was in breach of two statutory provisions, namely: section 2 (1) and section 3 (1) HSWA. We extract parts of the 2 sections for ease of reference:

"Section 2 HSWA: General duties of employers to their employees.

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

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

Section 3 HSWA: General duties of employers and self-employed to persons other than their employees.

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

In determining whether the respondent had or should have had the requisite opinion we know that we must focus our attention on what was happening on the ground at the time the Notice was served and we must reach our own decision considering the view and expertise of the respondent and decide whether we would have served the Notice at that time had we been the respondent.

5. Findings of fact. We make our findings of fact based on the material before us, considering contemporaneous documents where they exist, and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have considered our assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

6. The appellant is a small employer with four employees; including Mr Holland who is the director and shareholder; and effectively the owner of the business. The appellant's primary activity is the repair, maintenance and service of HGVs, trailers, plant and equipment. 50% of the appellant's turnover is derived from work done for another business called Maritime Transport Limited ("Maritime"). The appellant rents premises, a workshop, owned by Maritime. The workshop includes offices and rest areas. Maritime has an amenity block on site, and both businesses share the toilet facilities in the amenity block. At the time that we had to consider, there were 6 Maritime employees and 3 employees of the appellant on site. Maritime ran two shifts and had a supervisor on both shifts. Maritime employees wore a uniform with their name on it and the appellant's employees just had overalls. The two groups of employees shared the facilities. The yard where events under consideration took place was in two parts; the first was a trailer park and the second was a place for containers; described as a stacking yard, with some 200 containers, 4 straddle carriers and 2 gantry cranes to unload containers

from trains which ran through the yard. There was little to distinguish or demark the systems of operating between Maritime's employees and those of the appellant. Specifically, the appellant carried out work involving maintenance, repair and service of the straddle carriers. It also MOT'd trailers and maintained them. It was not part of the function of the appellant to lift containers, as this was Maritime's job.

7. The straddle carrier is a non-road vehicle that is used to lift, move and stack standard sized freight containers. It does this by straddling the container. The straddle carrier is operated by a person in a control cab at the top of the vehicle, at a height of about 14 metres from the ground. This height is necessary to provide clearance to accommodate the freight containers. A further feature of the straddle carrier is that a high degree of visibility is required by the operator in the control cab; to ensure that the vehicle can safely manoeuvre and lift the freight containers. For this reason, there are large amounts of safety strengthened glass within the control cab and this includes the floor, which consists of two panels of glass and a steel grating.

8. An accident occurred involving a straddle carrier. We summarise what happened. The straddle carrier involved in the accident had been moved from Leeds two weeks earlier to be serviced before being put back into use at the Dordon, Tamworth, site. On the day of the accident, servicing was being carried out by two of the appellant's employees; one of whom was Mr Martin Tarbuck (the injured person). Two of Maritime's operatives, namely Mr Craig Bagley and Mr Steve Tarbuck (who is not related to Martin Tarbuck) were cleaning the straddle carrier. Mr Bagley informed Steve Tarbuck that a glass panel in the cab needed to be replaced because it was broken. It was agreed that Mr Bagley would remove the panel and the grating in preparation for the panel to be replaced with a new one. This left an aperture in the floor of the control cab which was the size of the missing glass panel and grating. The grating was attached by hinges to the cab, forming the floor with the glass. It was possible to change the glass without removing the grating; but this did not happen. After Mr Bagley had removed the panel he placed a sign at the bottom of the access ladder. It was a printed card, and it seemed to us from a photograph (at p.34 of the bundle) it was about A4 size, and it stated: "Do not use". He also told the appellant's two employees (Mr Martin Tarbuck and Mr Tony Clarke), that the "panel" had been removed. This information, we find on the balance of probabilities, did not include the word "grating". At this point, the appellant's employees wished to carry out a functionality check on the straddle carrier's brakes and lights; and therefore, Martin Tarbuck climbed up the ladder to the cab, in doing so ignoring the sign, to carry out the test, while Mr Clarke stayed on the ground. Martin Tarbuck then fell through the gap in the cab left by the missing glass panel and grid. On entering the cab he fell from a height of about 14 metres to the ground.

9. Initially, it was thought that Martin Tarbuck might die because of the severity of his injuries. He has done remarkably well to survive; although his injuries were described to us as catastrophic and life changing. He is 33 years of age. The accident happened about 4.25pm on 7 November 2016. It was dark. There were lights at ground level; but above that it would have only been dimly lit.

10. It is not our function to attribute responsibility for the accident. Martin Tarbuck in his witness statement dated 3 February 2017 accepted that on the day of the accident he was working with Mr Tony Clarke, Danny Orchard and Craig Bagley. When they were working, employees of the appellant, Maritime employees and other contractors were crossing each other's path and working together. Martin Tarbuck believed that Tony Clarke was a self employed contractor for Maritime, or possibly the appellant; but he would have been working for Maritime previously.

11. Martin Tarbuck stated that: "At about 3:50pm Tony asked me to check the lights on the carrier. This was a 2 man job with one person in the cab pressing the pedal and one on the ground checking the lights, in this case Tony. I finished working on a trailer at about 4:25. I hadn't noticed that the glass on one of the floor panels in the cab was cracked. Craig Baggley of Maritime had earlier said that he had taken the glass out and tried another piece but it didn't fit. Craig had originally been cleaning another carrier with the jet wash but it was broken, so he decided to try and fix the glass. He said he was going to get Steve Tarbuck's dad to sort the glass as he works at Shard End Glass. I then decided to climb up the ladder, enter the cab to perform the light check procedure, even though I knew there was a problem with the glass. I didn't know if it was there or not. You can actually put the metal grill back in place even if the glass isn't in position. I noticed a 'do not use' sign fixed to the ladder at about chest height. Regarding this sign - it is regularly used to inform the drivers not to operate the carrier. Both TMF and Maritime would use the sign when a problem is identified. Examples of when the sign would be used include something being taken off the engine, or if the ropes need changing after LOLER checks."

12. On the day of the accident Mr Holland was not there. He was ill and had gone home early. Martin Tarbuck did not physically see Craig Bagley remove the glass and as per his witness statement he said this:

> "Tony was in charge of the service and I was the most senior TMF employee on site. Tony was usually on site about 2 days a week. He would be paid by Steve Holland. Normally we would be asked to fix something like a broken glass panel. I don't know why Maritime had decided to fix the glass.
>
> Before the accident the only way Maritime or TMF Dordon would prevent access to the straddle carrier cabs in the event that a danger was present, would be to use the 'do not use' sign. We never use any physical means of blocking access to the ladder so that you couldn't climb it. If there had been a physical barrier it would have made me questions things and I would have asked someone and not climbed up. I had never seen any similar ladder blocking system used by Maritime employees. I have heard of risk assessment, I have never seen a risk assessment from either TMF or Maritime in relation to preventing access to the straddle cabs when there is a danger present. Likewise I have never had any training provided by either TMF or Maritime about

> the procedure to be followed if entry into the cab has been prevented because of a danger."

13. The respondent has been an inspector for just over 21 years and has worked in the fields of: factories, the construction industry and major accident hazard sites. He has considerable experience in carrying out investigations concerning serious injuries and fatalities. Over the years he has served many Prohibition Notices and Improvement Notices.

14. The respondent visited the premises of Maritime and the appellant based at Ansley Hall Drive, Birch Coppice Business Park, Tamworth in Staffordshire on 8 November 2016 in order to commence enquiries in relation to the accident to Martin Tarbuck. He had seen a RIDDOR report (47-49) which gave details of the accident; and during the visit he made notes, and we saw these at pages 60-67. He met Mr Simon Lunken who is the Maritime Transport Risk and Compliance Manager, John Bailey the General Manager of Maritime, Mr Holland (although he only spoke to him briefly), and several police officers who were also in attendance. Mr Lunken explained the circumstances of the accident. The respondent then proceeded to issue two identical Prohibition Notices against Maritime and the appellant which prevented access to the control cab of the straddle carrier in question. Service of the Prohibition Notices on both parties was deemed appropriate in his opinion given the fact that serious injury had already been sustained by Martin Tarbuck. We found he reasonably considered it critical that the risk of reoccurrence be ameliorated immediately.

15. The respondent visited the site again the following day, when he met Mr Lunken, John Bailey, DC Catherine Baines from Warwickshire Police and Caroline Depledge a solicitor appointed to represent Mr Steven Tarbuck. Again, the respondent made brief notes in his notebook. The primary purpose of visiting at that time was to further assist the police with their enquiries (as primacy for the investigation still resided with them at that stage) and to request production of relevant documents, including the technical specification of the vehicle involved.

16. During the visit the respondent spoke to Mr Lunken about his concern that neither Maritime nor the appellant appeared to have a system or procedure in place to prevent access to the control cab of the straddle carrier when a hazard was present in the cab. The practice of placing a "Do Not Use" sign at the bottom of the straddle carrier's ladder did not prevent physical access and was therefore inadequate. The lack of a system to prevent physical access meant that if there were hazards present operatives would still be able to gain access to the cab and thus they would be exposed to a risk to their health and safety.

17. The respondent confirmed that Mr Lunken did not dispute that Maritime did not have a system of access prevention in place other than the use of the sign, and nor did he state that the appellant had such a system. Given that the operatives of both companies regularly worked in close physical proximity with each other (as the accident demonstrated), it would be expected that each would know of the existence of the other's systems of access

prevention. Although not interviewed about this at the time, Mr Holland confirmed that there was no written or formal system. There were no standard operating procedures. Those which we were specifically referred to later were contained only in his mind.

18. By 9 November 2016 it became apparent that Martin Tarbuck's injuries were no longer considered life threatening and therefore on 10 November 2016 the respondent visited the premises of Warwickshire Police Headquarters to affect a handover of the matter from the police to HSE thereby taking over the lead role. As part of the handover HSE was given all the materials obtained by the police during their initial response, including witness statements, photographs and a police log (50-51).

19. Thereafter, the respondent considered whether he would serve Improvement Notices on Maritime and the appellant. During this time the focus of his concern was not who had caused or was responsible for the accident (and this was a matter for the ongoing investigation - including the still ongoing criminal process). His concern was that neither company had a management system in place that prevented operatives accessing the control cabs of the straddle carriers when hazards were present in those cabs. The incident had brought to light a wider failure to put in place effective measures to ensure the safety of operatives working for both companies. He decided therefore the most appropriate course of action would be to issue Improvement Notices which required the identification and acquisition of suitable engineering control measures to be deployed if access to the control cabs of the straddle carriers needed to be prevented.

20. On 30 November 2016, therefore, he issued two identical Improvement Notices on the appellant and Maritime along with associated Notices of Contravention. We saw these things and the accompanying letters in the bundle (39-41, 42-45, 52-54 and 56-59). Each of the Notices had a Schedule attached which set out how compliance with the Notice could be achieved.

21. There was no appeal by Maritime against either Notice. There was no appeal by the appellant against the Prohibition Notice. However, solicitors for the appellant wrote to the respondent on 9 January 2017. This included the assertion that Maritime was in fact to blame for creating the hazard that led to the accident; and if for some reason the appellant had to prevent access to a straddle carrier control cab it would not have used the "Do Not Use" sign. It was claimed that a physical barrier would have been used. Further, in spite of this, and without prejudice to the appeal, it went on to say the appellant had taken steps to comply with the Notice. It was said that the appellant had a portable guard made, that could be fixed to the bottom of the straddle carrier's ladder by a chain and padlock. Three photographs of the guard were enclosed with the letter. Copies of the letter and the photographs were at pages 1-6 of the bundle. The respondent confirmed that this arrangement was satisfactory; and it complied with the Notice that he had issued. However, the letter did not contain any evidence that at the time the respondent served the Notice the appellant had in place a system that prevented physical access to a straddle carrier's cab. In the letter, there was an assertion that there was such a system in place but no evidence was

produced. The respondent has asked for the evidence; but this has not been provided.

22. The respondent interviewed Martin Tarbuck, and we saw his statement in the bundle. This contradicted what Mr Holland said via his solicitors. The appellant served a witness statement from Mr Holland dated 9 February 2017 ahead of the deadline for mutual exchange of statements as set out in directions issued by the Tribunal. Paragraph 20 stated on previous occasions when it was necessary to prevent physical access to a straddle carrier's cab the appellant had used a physical barrier to prevent access in the form of roping off or boarding off the entry point of the ladder. As far as the respondent was aware, this was the first time the appellant had made this claim. However, the appellant had still provided no evidence that this was a system that was in place at the time of the Notice was served; and as previously stated, Martin Tarbuck's witness statement contradicted the appellant's claim. That concludes the main chronology of events and facts that we wish to record.

23. The submissions. Miss Kendrick spoke first. She took us through her draft issues, or seven questions, and made submissions as to how we should answer them (C1). She submitted that the respondent had conducted himself unreasonably by failing to interview Mr Holland before issuing the Notice. Had the respondent interviewed him, he would have given evidence of two occasions in the past when there had been: firstly, a roping off when a top rail had failed on such a vehicle and; secondly, roping off because of damage to an access ladder. She submitted that sections 2 and 3 of the HSWA were not met. This was an accident caused by Maritime and not the appellant. Mr Bagley was at fault for moving the glass and the grill. She submitted that there was a demarcation of work; and that the evidence suggested that was the case, although she did concede in part that the two sets of employees did some work together. The appellant, she submitted, was faced with an unforeseeable hazard. It had no previous accidents or RIDDOR. Any breach of sections 2 and 3 were those of Maritime only. She submitted the appellant had the opportunity to put the defect right. It was not reasonably practicable to put the new guard in place. Miss Kendrick talked briefly to the case law in the respondent's bundle and emphasised how we must reach our own conclusion on the information reasonably available to the respondent at the time.

24. We then heard from Mr Adjei who spoke to his skeleton argument; and there is no need for us to repeat it all here. However, he did emphasise some points and we comment on some of those. He emphasised that the circumstances of the accident were not the reason for service of the Notice. There was nothing available to stop access to the cab. He posed the question: 'Was there a reasonable investigation by the respondent?' He said that the answer lay in the finding that there was no control, that there was no documentary evidence by the appellant of any control mechanism in place. Mr Holland had provided no supporting evidence for his assertion that there was. He drew our attention to the case of Chilcott and the guidance derived from it; in that it is possible to look back after the Notice, in order to shed light on the state of affairs that had existed at the time. It is the job of the Tribunal

to carry out a balancing act. He pointed to a conflict of evidence in this way. Mr Holland was away from the site ill. MartinTarbuck said that Tony was in charge and yet Mr Holland said Mr Tarbuck was in charge. What was the system to deal with unexpected hazards? He answered that by saying: there were none in place. There was a reasonable investigation. It was not a requirement, and it was not fatal, not to speak to Mr Holland. It was reasonable of him not to do so, on the basis of the Police and Criminal Evidence Act; not wanting to get in the way of police enquiries. We should find this a reasonable approach. If the respondent had not spoken to Mr Lunken, then Mr Adjei saw the respondent would be in some difficulty. He drew our attention to the conflict in the evidence between Mr Holland and his solicitors. He drew our attention to the roping and boarding off points raised by Mr Holland; but these were first referred to in his witness statement of 9 February 2017. Even so, there was still no evidence of a physical barrier or control measure from Mr Holland in spite of being asked about it. He submitted that sections 2 and 3 HSWA were both engaged and established; and there was an exposure to risk or harm. The core issue was that Martin Tarbuck was not prevented from accessing the cab; and was therefore exposed to a risk to his safety.

25. Our conclusions and reasons. We apply the law to the facts. We can see no defect in the procedure and neither party relied on any defect. We conclude that the respondent reasonably formed the opinion that the appellant contravened one or more of the relevant statutory provisions in circumstances that made it likely that the contravention would continue or be repeated. There appeared to be no safe system of work in place to prevent access to the cab when there was a hazard. Mr Holland's evidence confirmed that point to us; that any system such as roping off was only contained in his head, and he was not at work at the relevant time when the accident took place. The system could not be accessed by either the appellant's employees or those of Maritime. If he was not there, this would always be a problem. There was no training, no risk assessment and no health and safety information available. As we are encouraged to do, we construe sections 2(1) and 3(1) together. We find that the appellant was in breach of its duty; and the respondent was reasonable in coming to that conclusion. There was a failing in respect of section 2(1) (by failing to provide a system of work). Looking at section 2(1)(a) there was no plan. Furthermore, employees from both organisations including contactors (and the position of Tony Clarke appeared to have been that of a contractor), were dealt with in an ad hoc way. This led to confusion and risk on site. Turning to section 2 (1) (b), there were no arrangements for ensuring health and safety. The baton of responsibility was also passed on in an ad hoc way, for example, no one knew who was in charge in Mr Holland's absence on 7 November 2016 (and we have already pointed out the conflict in views). Then under section 2 (1) (c) there was no information, instruction, training and supervision provided.

26. We refer then to section 3(1); and this was particularly important because of the close working relationship between the two groups of workers who were present on site (those of the appellant and Maritime). The sign used was inadequate, misleading and exposed both sets of workers to risk. The respondent has established on the balance of probabilities that there was

a breach of the health and safety provisions in sections 2(1) and 3(1) in accordance with the Notice served; and his reasoning (39) is accurate and worth reciting here:

"The reasons for my said opinion are: The controls in place for preventing access to the control cabs of straddle carriers when a foreseeable hazard may be present are inadequate".

27. We then asked ourselves whether the health and safety provision was subject to the qualification of reasonable practicability? The appellant needed to show here that it had done all that was reasonable. This was not a real feature of the case before us. The appellant asserts this, stated shortly: that it was not our fault, it was someone else's. However, that was not the end of our analysis and we moved on to the more controversial point in our conclusions. Specifically, we were asked to consider, should the respondent have spoken to more people at the appellant and notably Mr Holland? In an ideal world, yes he should have done that, but on the facts of the case we find that it was reasonable for him not to do so for the reasons advanced. Firstly, he had spoken to Mr Lunken, the Health and Safety Manager at Maritime, and we repeat what we said about the existence of a close working relationship between the two groups of workers. Secondly, he was conscious of his obligations to Mr Holland under the Police and Criminal Evidence Act. Thirdly, Mr Holland and his colleagues could have been proactive; but sat back and did nothing. These were reasonable conclusions to come to. Furthermore, speaking to Mr Holland, and/or any other operatives we conclude, would have made no difference as there was no system in place; and there was a risk. Even if Mr Holland had explained the two circumstances of deployment previously, it would not have amounted to "a system" for the reasons we have already found. Thus, the outcome would have been the same and the Notice served.

28. We find that by this form of analysis we have answered questions 1 and 7 in the appellant's list of issues. We accept the respondent's submissions that questions 2 to 6 are either background or irrelevant to the issues that we have had to deal with in coming to our judgment or in our fact finding. We have touched on some as background in any event; but we do not have to be drawn into answering them all. We conclude that the respondent did not act unreasonably. He had such information that was reasonably necessary to issue the Notice. It was properly served. We accept the respondent's submission that any further investigation would have strengthened his case, particularly over the lack of systems in place to control or prevent access to the straddle carrier cab.

29. We say something briefly about both witnesses from whom we heard. The respondent was technically and professionally very adept; and he was open and honest. We found him to be credible and not mistaken. He knew his job well and he had experienced cases of serious falls in the past, including fatalities. As far as Mr Holland was concerned, he was not a good witness in his own cause. He was very vague in many of his answers; and frequently did not answer the question, going off at a tangent. He presented as defensive; and he used this hearing as an opportunity to deny

responsibility for the accident. Of course, this is not the reason or purpose for being here. Perhaps it is understandable that he was defensive, and rather closed in his evidence; as he faces potential criminal charges. No doubt he did not want to implicate himself; and that could have influenced how he presented to us.

Signed by Employment Judge Dimbylow on 25 May 2017

Reasons sent to Parties on 26 May 2017