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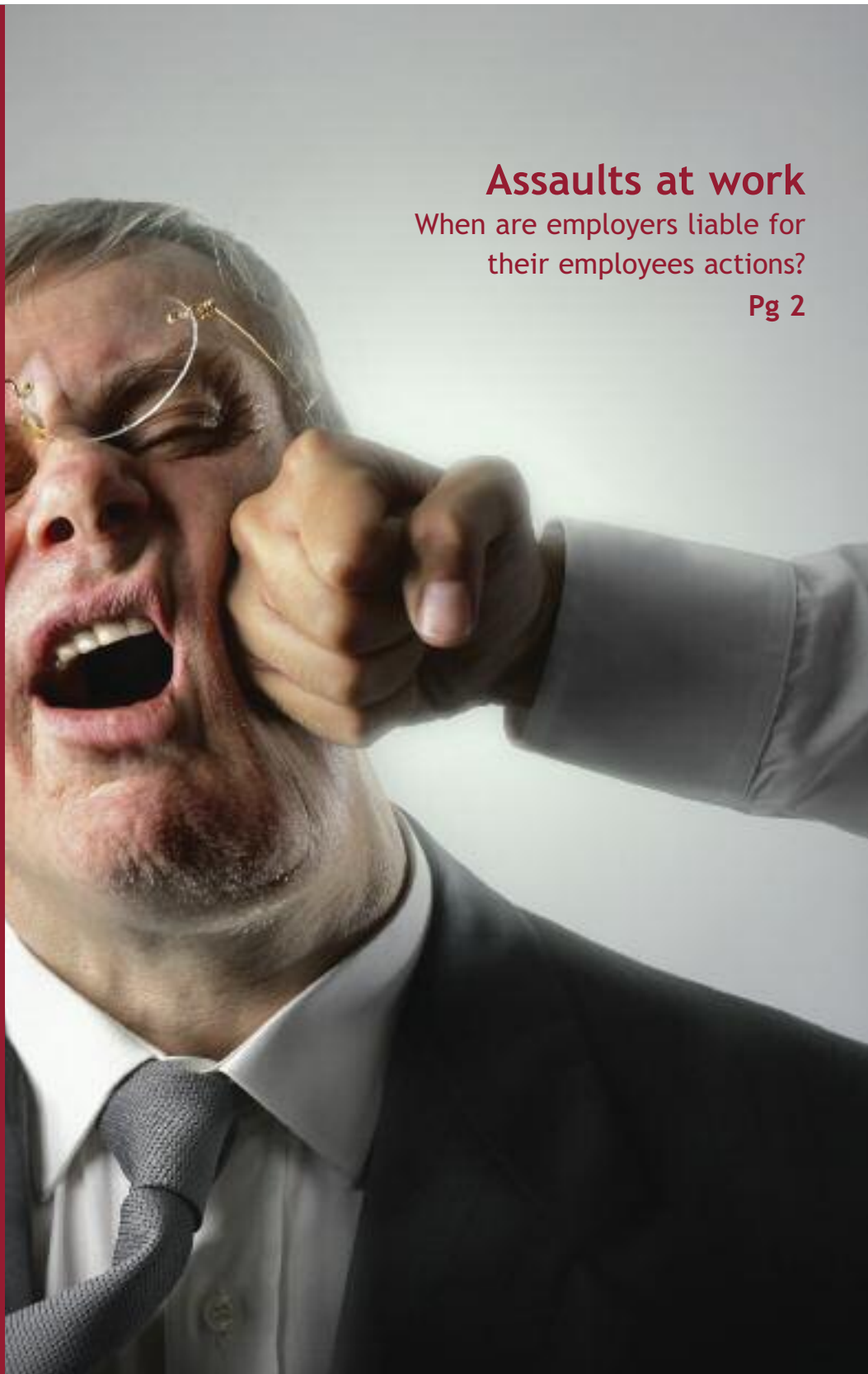

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Who is responsible for assaults at work?

When are employers legally liable for acts of violence by employees? **Simon Dewsbury** considers some recent court rulings

WHEN RICHARD Weddall, the deputy manager of a care home, tried to find someone to cover the nightshift for a staff member who had called in sick, he could not have imagined that it would result in a violent assault.

Senior health assistant Mr Marsh didn't respond well to being called at home that evening. He had been drinking and formed the impression that Mr Weddall was mocking him for being drunk.

Soon afterwards, he called the care home declaring that he intended to resign. He then rode on his bike to the home and attacked Mr Weddall, who was sitting in the front garden. Mr Marsh then apologised and fled the scene. He later pleaded guilty to the assault and was sentenced to 15 months imprisonment.

Mr Weddall sued his employer, Barchester Healthcare Limited, for his injuries on the ground that it was vicariously liable for the actions of Mr Marsh.

But even though the trial judge described the attack as "utterly unprovoked, very violent … no words of any significance were spoken… before the blows were struck", it was ruled the employer was not vicariously liable for it because the circumstances surrounding the assault took Mr Marsh outside the course of his employment.

Not wholly satisfactory

The same was said about the attack by Mr Brown on John Wallbank, the managing director of Wallbank Fox Designs Ltd, a small bed frame manufacturer.

Mr Brown was described in court as not a "wholly satisfactory employee" and that on occasion it was difficult to get through to him. On the day of the assault, and the day before it, he had to be reminded to switch on the oven.

When Mr Wallbank then noticed that Mr Brown had failed to fully load the oven he asked: "Why didn't you load the rest of it on? You just lost an oven load of heat."

Although he did not say this in an angry fashion, he accepted that he was frustrated because he had spoken to Mr Brown about the issue before. Mr Brown did not respond to Mr Wallbank's question. Instead he approached Mr Wallbank, put his hand on his face and threw him onto a table that was about 12 feet away. Mr Wallbank sustained a fractured vertebra in his lower back. Mr Brown was dismissed for gross misconduct and was convicted of grievous bodily harm.

Appeal

The victims of both attacks appealed the court decisions that their employers were not vicariously liable for the assaults.

The Court of Appeal (CA) agreed that Mr Marsh was not acting in the course of his employment when he attacked Mr Weddall. His actions, it agreed, were the "spontaneous criminal act of a drunken man who was off duty".

"The assault was clearly an act outside the course of his employment, so that Mr Marsh's employers, Barchester Healthcare Limited, cannot be held vicariously liable", one judge said.

The CA took a different view of the Wallbank case. Here the violence was closely related to his employment and was a spontaneous and almost instantaneous response to an instruction. It could not be described as a prank or a "frolic of his own".

Comment

The 2001 case of Lister -v- Hesley Hall Ltd significantly extended the circumstances where an employer could be found to be vicariously liable for the torts - civil wrongs - of their employees.

That case involved sexual abuse by an employee of children in his care. Case law had previously suggested that such abuse could not be seen as happening in the course of an employee's employment, since it was clearly something that was unauthorised.

However, because Hesley Hall had undertaken to care for the resident children and had entrusted that obligation to the abuser, his acts were so closely connected with his employment that it was held to be fair and just to hold the care home vicariously liable.

It is this "close connection" which has become the test. The high water mark is probably Mattis -v- Pollock [2003]. In that case, a nightclub owner was held vicariously liable for the violent conduct of a doorman, even though the incident happened some time after an initial altercation and the doorman had returned to the club having gone home to get a knife.

This established an employer could be vicarious liable for assault, even where it may be intentional or premeditated.

Courts had previously been unwilling to impose liability where assaults were motivated by revenge.

An important part of the court's reason for finding the employer liable was that the doorman's training had encouraged and expected him to keep order at the nightclub in an aggressive and intimidatory manner.

The court took a broad approach, looking at the set of events as a whole.

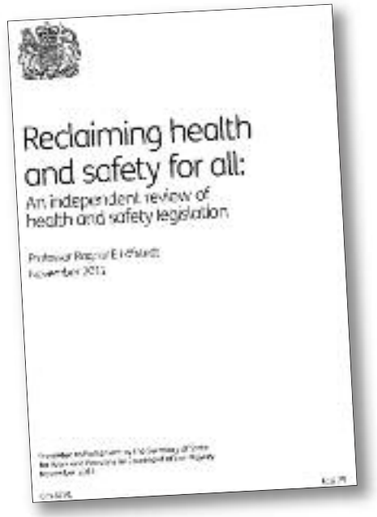
The essential differences between Mattis -v- Pollock and the Weddall case are that Mr Marsh's actions did not occur as a result of being given instructions by the employer which encouraged him to behave violently and that he was off duty throughout the whole of the incident

No doubt Mr Weddall felt that this was rather harsh since he had simply been doing his normal job.

He would of course be entitled to make a claim for criminal injuries compensation, though this would probably be significantly less than he would have been entitled to should he have succeeded against his employer.

Health and Safety under attack... again

Keith Patten looks at the government's response to the Löfstedt review of health and safety


Reclaiming health and safety for all:
An independent review of health and safety legislation

AS IF THE media didn't contain enough anti-health and safety propaganda before the coalition government came to power, ministers – the Prime Minister in particular – are stoking the fire. Rarely does a week go by without one blaming health and safety regulations for the country's economic woes.

I wrote in the last Health and Safety News [Autumn 2011 www.thompsonstradeunionlaw.co.uk/information-and-resources/health-and-safety-news.htm] that when the Lord Young review of health and safety, commissioned by David Cameron, failed to come up with the "right" answers, the employment minister Chris Grayling asked Professor Ragnar Löfstedt to have another go.

It was relatively reassuring that when the Löfstedt report, *Reclaiming health and safety for all*, was published last November, it recognised that the benefits of regulating health and safety in the workplace were significant.

Regulations "broadly right"

It concluded: "There is no case for radically altering current health and safety legislation. The regulations place responsibilities primarily on those who create the risks, recognising that they are best placed to decide how to control them and allowing them to do so in a proportionate manner.

"There is a view across the board that the existing regulatory requirements are broadly right, and that regulation has a role to play in preventing injury and ill health in the workplace. Indeed, there is evidence to suggest that proportionate risk management can make good business sense."


Professor Löfstedt

But, not all is well. The report also made recommendations that are likely to weaken the protection of workers.

As the TUC noted in its response, the report failed entirely to grasp the opportunity to suggest anything that might improve health and safety.

Inevitably, the government is focusing on the comments and recommendations that are the most negative and which best fit with its ideological drive to weaken regulatory protection of workers' rights and safety. All indications are that Löfstedt is unimpressed.

At a meeting of the Westminster Legal Policy Forum he said, in response to a question from the union that represents Health and Safety Executive (HSE) inspectors, that he was concerned about the government's treatment of his review. "I am concerned my review could be misused," he said.

The first sentence of the government's response to Löfstedt gave the game away. It repeated their mantra about the need to tackle "the pervasive compensation culture" said to be gripping the country.

This is despite the fact that Löfstedt did not find evidence of a compensation culture (neither did Lord Young or other reports in recent years) and that workplace injury claims, which are the minority of personal injury claims (80% being road traffic accidents) have been falling year-on-year. Löfstedt was opposed to any large-scale change in the regulation of workplace health and safety and the government has largely had to fall in behind that.

But there is danger in his recommendation for a review of some sets of regulations with a view to consolidating or repealing some obsolete ones.

While there is nothing wrong in principle with this approach, and indeed the HSE had been carrying out a long standing and ongoing review process before Löfstedt came along, care must be taken to ensure that laws that actively protect workplace safety are retained.

So far the government has come up with a short list of fairly obscure regulations for repeal. But they need to be considered carefully. The justification is that equivalent protection is provided under other regulations.

If that is true, then the proposals may cause no harm. But all regulations were introduced for a reason.

Watering down

Unless it can be shown that the purpose has ceased to exist or is genuinely met by an equivalent standard elsewhere, then the watering down of such protections is dangerous.

> Why should people have to suffer the consequences of accidents just because they work in environments that are lower risk?

Away from the workplace, the shocking proposed repeal of the Adventure Activities Licensing Act and replacement with a voluntary code of practice demonstrates the road the government is going down.

Another Löfstedt recommendation, adopted by the government, is to exempt most self-employed people from workplace health and safety regulation where their work activities are "low risk". This proposal could have unforeseen consequences if not thought through very carefully.

The government gives the example of self-employed people carrying out office-type work. But very few people, even the self-employed, work in total isolation. Does this mean that, for example, there would be no obligation on a self-employed office-based worker to ensure that their workplace is safe? What then of the person who delivers the stationery and trips over a tear in a carpet? Are they to have no protection?

Low risk or no risk?

The problem is that "low risk" does not mean "no risk". Why should people have to suffer the consequences of accidents just because they work in environments that are lower risk?

Another Löfstedt proposal will impact on the ability of injured workers to claim compensation for their injuries. Most health and safety regulations already provide a defence for an employer to a compensation claim if the employer has done all it reasonably could to prevent the accident happening.

But there are a few that impose an absolute liability on the employer. These are almost all of long standing and arise in situations where the cause of the accident is something entirely under the employer's control.

For example, if someone is injured because of some defect in a piece of equipment provided by their employer then the current law is that it is no defence for the employer to say that they had a proper system of maintenance and inspection. Most people would probably think that was right and fair. Professor Löfstedt and the government do not.

They think it is unfair for an employer to have to pay compensation where the employer was not at fault.

But what about fairness and justice for the injured worker? They're not at fault and didn't ask to be injured. All they were doing was using a piece of equipment, supplied by their employer, in good faith. The government's proposal would remove the right to compensation for workers in those circumstances unless they can prove fault.

Löfstedt may not have been all bad, but there is little in it that is positive. It will not prevent a single workplace accident and, though clearly not the professor's intention, it provides the government with opportunities to weaken the position of workplace health and safety.

Because many of these proposed changes are quite technical, there is a risk that they will not be resisted. But resisted they should be in order not to allow those gains we have made over the years to be taken away from us, slowly, piece by piece.

Asbestos

Contemporaneous guidelines

Another challenge by a defendant in an asbestos claim on the grounds of what they ought to have known at the time of the exposure is bad news for claimants, writes **Andrew Venn**

THE PROSPECT of employers using the defence in the Baker -v- Quantum Clothing Group Ltd (see Health and Safety News Autumn 2011 www.thompsonstradeunionlaw.co.uk/information-and-resources/health-and-safety/autumn-2011-how-low-will-they-go.htm) deafness case to defend mesothelioma claims heralded "even more uncertainty, hardship and anxiety for some of the most disadvantaged claimants in our society", my colleague Judith Gledhill warned.

The Baker defence was essentially about employers and their insurers relying on official guidance published at the time of the exposure, which it transpired was unsafe, to rescue them from liability for noise damage.

Now, in the mesothelioma claim of **Williams -v- University of Birmingham** (2011) EWCA CIV 1242, the Court of Appeal (CA) has commented that official asbestos exposure guidelines, current at the time of the claimant's exposure in 1974, were relevant in determining whether the university was at fault.

Mr Williams was exposed to asbestos while carrying out undergraduate experiments in a service tunnel that contained asbestos lagged pipes. He was in the tunnel for between 52 and 78 hours in total.

Negligent exposure

His widow pursued the claim after his death on the basis that the university had negligently exposed her husband to asbestos which had caused the mesothelioma. The university admitted that Mr Williams had been exposed to asbestos but alleged the level of exposure was insignificant. It said that it had therefore not been in breach of its duty of care and the exposure to asbestos had not caused the mesothelioma.

Unfortunately for the widow, her legal team misdirected the court on what the correct test was and the judge applied the wrong legal test for proving negligence

At the original trial the judge decided that exposure to asbestos had materially increased the risk of Mr Williams contracting mesothelioma.

The court also ruled that the university knew or ought to have known that the pipe lagging in the tunnel contained asbestos and that low level exposure could cause mesothelioma.

She stated: "...the repeated visits to the tunnel, even if only over a period of eight weeks, were nevertheless such that there was a material increase in the risk that Mr Williams would contract mesothelioma as a result. In those circumstances I find that there was a breach of duty and that the defendant was negligent."

Unfortunately for the widow, her legal team misdirected the court on the correct test for proving negligence and the judge applied the wrong legal test. The university appealed on the basis that the judge was wrong to have found it had breached its common law duty of care to Mr Williams and wrong that the exposure to the asbestos fibres had caused the mesothelioma.

Error in law

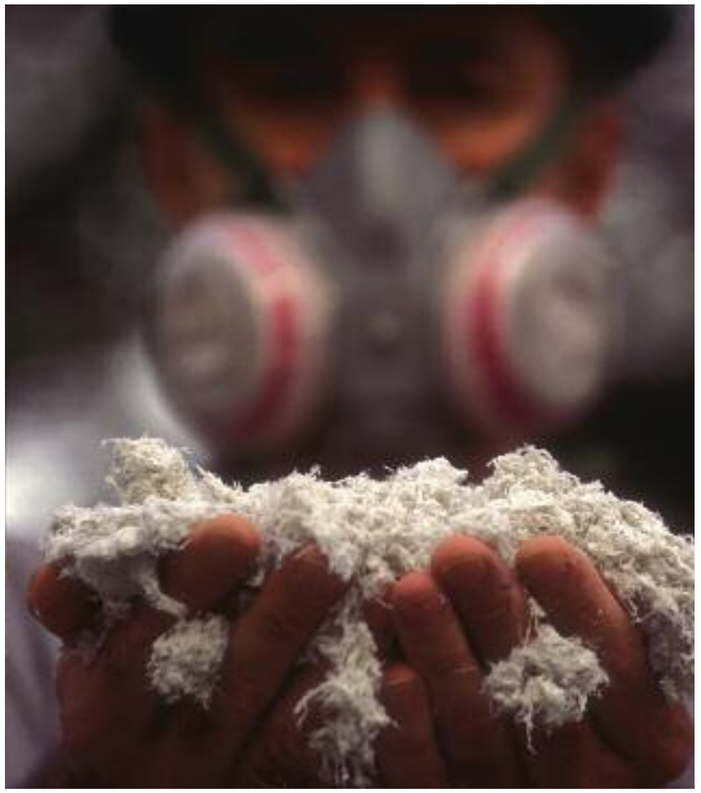
The CA allowed the appeal because the trial judge had erred in law by following the incorrect submissions made by the claimant's legal team.

On appeal the university also argued that it could only be found to have breached its duty of care if permitting Mr Williams to conduct experiments in the tunnel would expose him to a foreseeable risk of contracting an asbestos-related disease.

It was stressed that this issue of foreseeability had to be judged on the knowledge and standards of 1974 and not against the knowledge and standards of today. The university also argued that the question of whether the level of asbestos exposure was sufficient to increase the risk of contracting mesothelioma only arose after the court had concluded that it had breached its duty of care.

These orthodox legal principles in a mesothelioma claim were restated by the CA: ➲

- The claimant must prove the defendant owed a duty of care (This will apply automatically in cases where the claimant is or was the defendant's employee).
- The claimant must prove the defendant breached that duty by exposing the claimant to asbestos in circumstances that, judged by the official guidance and standards of the day, it was reasonably foreseeable that the claimant could develop asbestos-related disease.
- The claimant must prove that the breach of duty materially increased the risk of mesothelioma
- And the loss and damage suffered must not be too remote.



Foreseeable risks?

In the CA Lord Aikens confirmed that, in the context of this case, the question the court had to decide was: "Ought the university reasonably to have foreseen the risk of contracting mesothelioma arising from Mr Williams' exposure to asbestos fibres by undertaking... experiments in the tunnel... to the extent that the university should (acting reasonably) have refused to allow the tests to be done there, or taken further precautions or at least sought advice."

Referring to **Baker -v- Quantum Clothing**, he reiterated the view, as set out by the majority of the Supreme Court in that case, that in relation to the common law duty of care of employers, the standard of conduct to be expected was that of a reasonable and prudent employer at the time, but taking account of developing knowledge about the particular danger concerned.

In terms of the knowledge the university had, or should have had, about the dangers posed by the degree of exposure of Mr Williams to asbestos fibres when carrying out the experiments, the CA observed that the Factory Inspector's Technical Note 13 of March 1970 was the appropriate guide.

Comment

For many years courts and solicitors acting for claimants and defendants have taken the view that any asbestos exposure after 1965 that was more than minimal was evidence of a reasonably foreseeable risk of mesothelioma.

For that reason the strategy of defendants has been to focus on challenging causation. However, in Sienkiewicz -v- Grief (UK) Ltd, the Supreme Court last year indicated that it is very unlikely that defendants will in future successfully defend claims on grounds of causation.

Williams clearly demonstrates a shift in defendant insurers' strategy in mesothelioma claims by moving away from disputed causation and instead relying on Baker, and no doubt now on the CA decision in Williams, to deny liability on grounds of foreseeability and breach of duty.

Williams is a stark reminder that mesothelioma sufferers and their families should always seek specialist legal advice. The issues involved in recovering compensation in mesothelioma cases require a level of specialist experience and expertise that is unlikely to be found in general legal practice and even in most non-specialist personal injury firms.

Thompsons specialist asbestos litigation team has been at the forefront of all major legal challenges in this rapidly developing area of law and provides an entirely cost free service to trade union members and their families affected by asbestos disease.

Don't rule out reps

With facility time in the public sector under threat, **Godric Jolliffe** looks at the legal obligations on employers to work with health and safety reps

ON THE SAME day as the public sector industrial action last year, the Prime Minister announced a review of public sector trade union facility time, prompted by a report from the Taxpayers' Alliance. One area the report did not deal with is the vital work of health and safety reps, not least because there are significant legal requirements for employers to work with them.

Photo: John Harris/reportdigital.co.uk

Choosing safety reps

The main legislation dealing with safety reps is the Safety Representatives and Safety Committees Regulations 1977 (SRSC). An employer is only obliged to have safety reps where they are appointed by a recognised trade union (reg.3(1) SRSC) and the trade union has notified the employer in writing (reg.3(2)).

The rep must have, so far as is reasonably practicable, been employed by the employer in the preceding two years or had at least two years experience in similar employment (reg.3(4)). There is no set number of reps but this is a matter for agreement between the union and the employer. The Health and Safety (Consultation with Employees) Regulations apply where there is no recognised trade union. This article only deals with union safety reps.

Consultation duty on employers

Employers must consult safety reps to make arrangements for employer and employees to "co-operate effectively in promoting and developing measures to ensure the health and safety at work of employees, and in checking the effectiveness of such measures" (Section 2(6) of the Health and Safety at Work etc. Act 1974 (HSWA)).

Safety reps themselves have an obligation to represent employees in consultation with their employers (s.2(4) HSWA). The HSE's *Consulting workers on health and safety* Approved Code of Practice (ACoP) says that to fulfil s.2(4) HSWA functions reps should:

- bring to the employer's notice, normally in writing, any unsafe or unhealthy conditions (although this does not rule out doing so orally).
- encourage cooperation between their employer and his employees
- take all reasonably practicable steps to keep themselves informed

Employers do not have to follow ACoPs but if prosecuted they must be able to persuade the court that alternative measures followed were sufficient to comply with the law.

Under reg.4A SRSC employers must consult safety reps in good time about measures including:

- the introduction of any measure at the workplace that may substantially affect the health and safety of the employees the reps represent (reg.4A(a))
- health and safety information the employer must provide to safety reps under relevant statutory provisions (reg.4A(c))
- the health and safety consequences for the employees the reps represents of the introduction of new technologies into the workplace (reg.4A(e)).

Employers must give safety reps time off with pay during working hours as necessary to represent the employees in consultations with the employer (reg.4(2)(a) SRSC).

Employers must provide facilities and assistance as safety reps may reasonably require to carry out their functions under s.2(4) HSWA and the SRSC.

Although "good time" is undefined by the SRSC the ACoP says that before making decisions involving work equipment, processes or organisation that could have health and safety consequences for employees, employers must allow time to:

- provide reps with information about what they are proposing
- give reps the opportunity to express their views in light of that information
- take account of any response.

Employers must also give reps time off with pay to:

- investigate potential hazards and dangerous occurrences at the workplace and examine the causes of accidents (reg.4(1)(a))

- investigate complaints by any employee relating to that employee's health, safety or welfare at work (reg.4(1)(b))
- make representations to the employer on the investigations listed above (reg. 4(1)(c)) and on general matters affecting the health, safety or welfare at work of the employees at the workplace (reg.4(1)(d))
- carry out inspections (see below) (reg. 4(1)(e))
- represent the employees they are appointed to represent in consultations at the workplace with Health and Safety Executive (HSE) inspectors or any other enforcing authority (for instance local authority inspectors) (reg.4(1)(f))
- receive information from inspectors in line with s.28(8) HSWA, which requires inspectors to provide reps with information to keep them adequately informed about health and safety and welfare (reg.4(1)(g))
- attend safety committee meetings in their capacity as safety reps in connection with these functions.

However, these functions are not specific duties for reps (though, note there are more general duties for all employees imposed by sections 7-8 of the HSWA).

Reps must also be given time off for training in aspects of their functions "as may be reasonable in all the circumstances" considering any HSE ACoP relating to time off for training (reg.4(2(b)). The ACoP says safety reps should be given time off as soon as possible for basic training.

The union should inform management of any course it has approved and supply a copy of the syllabus, normally giving at least a few weeks' notice of the safety reps nominated for attendance.

Inspections

Safety reps have the right to inspect the workplace, or any part of it, if they have not inspected it in the previous three months and they give reasonable notice to the employer (reg.5(1)). This can be done sooner than three months if there has been a substantial change in the conditions of work (reg.5(2)).

The ACoP says that:

- reps should record their inspections and give a form to the employer; if reps make a report and remedial action is not taken the employer should say why in writing
- where possible the employer and the reps should plan a programme of formal inspections in advance.

Safety reps may also carry out inspections following a notifiable accident, or dangerous occurrence or notifiable disease if it is safe to do so and the interests of the union members might be involved (reg.6(1)).

Safety reps also have the right, on reasonable notice, to inspect and take copies of any document relevant to the workplace or the union members that the employer has to keep by statutory provision with exceptions including documents concerning the health record of individuals (reg.7).

Committees

Employers are obliged to set up a safety committee to review consultation arrangements with reps under section 2(7) HSWA. This obligation is triggered where at least two safety reps make a written request to the employer to establish the committee (reg.9(1) SRSC). The committee must be established within three months of the request (reg.9(2)(c)).

The *Consulting workers on health and safety* ACoP says that the committee's objective should be the promotion of cooperation between employer and employees in instigating, developing and carrying out measures to ensure the health and safety at work of employees. Specific functions of the committee might include studying accidents to stop them happening again and considering reports of reps following inspections.

The ACoP says the committee may also be able to:

Employers must give safety reps time off with pay during working hours as necessary to represent the employees in consultations with the employer

- advise on appropriateness and adequacy of the rules of health and safety proposed by managers
- draw attention to a need to establish rules for particular hazardous work activity or class of operations.

Management representation on the committee should be aimed at ensuring:

- adequate authority to give proper consideration to views and recommendations
- the necessary knowledge and expertise to provide accurate information to the committee on company policy, production needs, and on technical matters in relation to premises, processes, plant, machinery and equipment.

Far in advance

Dates for committee meetings should be arranged in advance as far as possible, as much as six months or a year ahead, and there should be sufficient time during each meeting to ensure full discussion of all business.

Crucially, the ACoP adds that the work of the committee should not be a substitute for management arrangements for effective checks of health and safety precautions.

Although the SRSC give reps relatively wide powers, with two crucial exceptions they cannot use the courts to enforce them. The ACoP says disagreements on interpretation of the regulations should be settled through the normal machinery for resolving employment relations problems and it may be appropriate to involve ACAS.

However, the HSE, or local authority if it has responsibility for the workplace, does have the power to prosecute employers who fail to follow their safety obligations. Alternatively they can serve notices, that a situation be improved or ends, through improvement or prohibition notices (s.21/s.22 HSWA). The ACoP says health and safety inspectors can enforce for failure to comply with legal duties on procedural matters and will apply the HSE's enforcement policy.

However, a search of the HSE's prosecutions database found no record of prosecutions involving the SRSC nor under sections 2(4) or 2(6) HSWA. The Prospect union, which represents HSE inspections, told a Department of Work and Pensions committee that the HSE's line was to avoid the regulations.

However, safety reps can bring a claim to an employment tribunal where:

- time off has not been permitted to undertake their functions under reg.4(2) (reg.11(1)(a))
- the employer has failed to pay him for time off in his function as a safety rep (reg.11(1)(b)).

In general, such complaints must be made within three months of the failure (reg.11(2)). A tribunal has the power to make a declaration that the complaint was well-founded and may award compensation to the employee (reg.11(3)). In cases involving a failure to pay for time off, a tribunal must order the employer to do so (reg.11(4)).

The majority of the case law deals with time off for training. The ACoP says that regulation 4(2) SRSC requires employers to allow health and safety representatives paid time as is necessary for training in aspects of their functions that is "reasonable in all the circumstances".

It goes on: "The important point is that what is reasonable in all the circumstances is not always just what is necessary. Training does not have to be the necessary bare minimum to fulfil the safety representatives' functions but it does have to be reasonable in all the circumstances (what must be necessary is time off with pay)."

In **Rama -v- South West Train**s [CO/310/96] the Queen's Bench Division dealt with a claim from a safety rep who was not allowed paid time off to attend a safety reps course. He attended in his own time and brought a claim that he should have been paid. The court held that the correct question was whether the training was reasonable to fulfil safety rep duties, not whether it was necessary.

Forbes J held: "I accept that training which is necessary to perform the functions set out in reg.4 is likely to form a significant part of any training in aspects of those functions as may be reasonable in all the circumstances. However, in my judgment, necessity is not necessarily determinative of all aspects of reasonableness for these purposes, although each case must be decided by reference to its own facts."

Conclusion

Unions should make full use of the relevant legislation and ensure that they have health and safety reps. However, with the squeeze on the public sector they should bear in mind that the HSE is unlikely to step in to enforce the law.

Further reading

The TUC's *Safety representatives and safety committees* is available from:
www.tuc.org.uk/extras/brownbook.pdf

***Consulting workers on health and safety*. Safety Representatives and Safety Committees Regulations 1977 (as amended) and Health and Safety (Consultation with Employees) Regulations 1996 (as amended) are available from:**
www.hse.gov.uk/pubns/books/l146.htm

A specific information site for health and safety reps from the HSE is at
www.hse.gov.uk/involvement/hsrepresentatives.htm

Legislation can be obtained from: www.legislation.gov.uk

Health and Safety News aims to give news and views on developments in health and safety issues and law as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

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