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HEALTH AND SAFETY COMMISSION

Civil liabilities on employees created by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003

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Cleared by Nick Starling, Director, Policy Programmes, on 15 November 2004
Issue

1. The planned amendment of the Management of Health and Safety at Work and Fire Precautions (Workplace)(Amendment) Regulations 2003 to expressly exclude the right of third parties to bring a civil claim for damages against employees in breach of the Management of Health and Safety at Work Regulations 1999.

Timing

2. Routine.

Recommendation

3. That the Commission notes this paper.

Background

4. The Management of Health and Safety at Work and Fire Precautions (Workplace)(Amendment) Regulations 2003 (“the 2003 Regulations”) allows employees to claim damages from their employer, in a civil action, where they suffer injury or illness as a result of the employer being in breach of the Management of Health and Safety at Work Regulations 1999 (“MHSW”) or the Fire Precautions (Workplace) Regulations 1997 (“FPW”). The 2003 Regulations also allow civil claims against employees for a breach of the employees duties under reg. 14 of MHSW that results in injury or illness.

5. These amendments have been offered by the UK to the European Commission to address their concerns over the implementation of the EC Framework Directive on health and safety (89/391/EEC).

6. The matter has already been the subject of the following HSC papers : HSC/00/284

November 2000); HSC/00/293 (21 November 2000); HSC/00/294 (5 December 2000), HSC/01/150 (25 September 2001) and HSC/02/118 (15 October 2002) . Following earlier HSC discussions the Chair wrote to DETR Ministers on 12 December 2000 recommending that the UK address the EC's concerns over MHSW by undertaking to remove the civil liability exclusion for breach of statutory duty towards employees (thus enabling an employee to bring a claim for damages against their employer for injury or illness caused by their employer's failure to comply with MHSW). Ministers agreed and in January 2001 the EC was notified that MHSW would be amended and, on the recommendation of Home Office Ministers, corresponding amendments would be made to the civil liability exclusion provisions in FPR.

Argument

HSC's consideration of responses to consultation

7. The Commission, in its consideration of responses to the consultative document in September 2002 (see HSC/02/118), addressed conflicting views over the proposal that employees as well as employers should be open to compensation claims for breach of their statutory duties (be it from their fellow employees, employer, or third parties. Views differed among consultees as to whether employees should be liable for damages for injury or ill health arising from breach of regulation 14 of MHSW.

8. Some consultees supported the proposal contending that it would capture those cases where accidents resulted from employees failing to abide by control measures, and which would not necessarily be pursued by the enforcing authorities. However, other consultees were concerned about its possible practical effects, including the need for employees, or where appropriate their trade unions, to have personal indemnity insurance cover. Concerns too were expressed about the potential liability of employees to third parties. HSE advised that the scope for claims against employees (who are already open to common law claims for negligence) was limited in practice by vicarious liability (that is the legal principle that the breach by the employee was so closely connected with the performance of their employment that it would be fair to place the liability on their employer).

9. TUC and UNISON proposed removing any such confusion by amending the draft regulations, so that employees were not open to civil claims. The Commission having considered the issue of employee liability concluded that the regulatory proposal should proceed as set out in the consultative document drafted. It was considered inappropriate to maintain the civil liability exclusion for employees given that the proposals arose in context of the Framework Directive and that the Directive places duties on both employers and workers.

10. In conclusion the Commission noted the TUC's proposed amendment to exempt employees from civil liability claims. The Commission agreed to the regulatory proposals as consulted on. In addition the HSC agreed to monitor the effects of the changes and assess the impact of the new civil liabilities on both employers and employees.

11. The new Regulations came into force on 27 October 2003.

Issues concerning employee liability raised by Public Concern at Work

12. Guy Dehn, Director of Public Concern at Work (PCaW), wrote to the HSC Chair and Ministers in June 2004 to raise a number of concerns in relation to the amendments so far as they relate to employees. The main focus of concern was that the new Regulations have been constructed to permit claims against employees by third parties who are affected by the work activity eg members of the public. The correspondence from PCaW, including their report on the liabilities created by the 2003 Regulations and their own Counsel's Opinion on the matter, is attached at **Annex A**. HSE, following receipt of the correspondence from PCaW, instructed Counsel in August 2004 on the issues raised concerning employee liability.

13. PCaW noted that while the new civil liability placed on employers was restricted to actions for damages brought by their employees the liability on employees was drawn more widely with the opening up of actions by third parties. PCaW also noted concerns that had been raised by business that in light of the law relating to vicarious liability the liability of the employee to third parties for damages arising from ill health or injury caused by the breach would in effect be borne by their employer.

14. The underlying policy intention of HSC/E in placing a civil liability on employees for a breach of their duties under MHSW was to promote employee responsibility and to ensure that liability was placed on the person who caused the breach. The intention was that the breach by the employee would be actionable by an employee employed by the same employer. It was not intended to give rise to actionable claims against employees by their employer or third parties.

15. PCaW published a Press release together with a report and their Counsel's Opinion in 6 October 2004 (see **Annex A**).

16. HSE received Counsel's Opinion on issues concerning employee liability in early October 2004 (see **Annex B**). Counsel advised, among other things, that :

- third parties would have the right to bring civil claims against employees for personal injury caused by a breach of duty under MHSW;
- cases in which an employer would not be vicariously liable for personal injury caused by an employee's breach of duty under regulation 14 of MHSW would be very rare and may never arise;
- the 2003 Regulations when read with the common law on vicarious liability, give effect to the principle of employer's responsibility in Article 5 of the Framework Directive;
- if the Government was minded to introduce new laws to expressly exclude the right of third parties to bring a civil claim for damages against employees it would not be exposed to the risk of a community law challenge by a third party.

HSE's proposed way forward

17. HSE, having considered the issues raised by PCaW and its own Counsel's Opinion on these matters, proposes to amend the 2003 Regulations to exclude the right of third parties to seek damages from employees in breach of their duties under MHSW. HSE will prepare consultative proposals concerning amending Regulations, which it plans to present to the Commission for consideration at its February meeting. Results of

consultation will be presented to the Commission in June and the amending Regulations will, subject to the Commission's agreement, go forward to Ministers before the Summer recess.

Consultation

18. Subject to Commission agreement we are proposing to consult for a period of eight weeks on the new regulatory proposals. The consultative proposals will be sent as a matter of course to those 123 organisations and individuals who commented on the 2003 Regulations and other key stakeholders. Other Government Departments, including DWP, ODPM and the Scottish Executive (general fire safety is a devolved matter), will be closely involved in taking the amending Regulations forward. We will keep Public Concern at Work and other stakeholders informed of progress.

Presentation

19. There has been stakeholder and Press interest in the matters raised concerning the liability of employees to actions for damages by third parties for breach of MHSW. HSE is in the process of providing updated advice on the liabilities arising from the 2003 Regulations and alerting stakeholders to the proposed regulatory changes that we are proposing to consult on.

Financial/Resource Implications for HSE

20. The financial/resource implications for HSE of taking this work forward are currently being assessed. This assessment will be included in the Commission paper containing the draft consultative proposals for new Regulations.

Action

21. That the Commission notes the paper.