

HSC/05/19

PROPOSED REGULATIONS TO AMEND THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS 1999 (“MHSWR”) AND THE HEALTH AND SAFETY (CONSULTATION WITH EMPLOYEES) REGULATIONS 1996 (“HSCER”) CONCERNING CIVIL LIABILITIES FOR BREACH OF DUTIES IMPOSED BY THOSE REGULATIONS

REGULATORY IMPACT ASSESSMENT

PURPOSE AND INTENDED EFFECT

Issue

1. Following correspondence between the European Commission (EC) and the UK Government over the “civil liability exclusion” in the Management of Health and Safety at Work Regulations 1999 (the “1999 Regulations”) in the context of the UK’s implementation of the Framework Directive (89/391/EEC. In light of this correspondence the UK undertook to remove the exclusion - both from the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997 (the “ 1997 Regulations”- for breach of statutory duty towards employees, and to consult on proposals to this end. Amending Regulations were brought into force in October 2003 – the Management of Health and Safety at Work and Fire Precautions (Workplace)(Amendment) Regulations 2003 the (“2003 Regulations”) – to remove “civil liability exclusions” from both the 1999 and 1997 Regulations.

2. The underlying policy intention of HSC/E in placing a civil liability on employees for a breach of their duties under the MHSWR 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. The proposed new Regulations (the *Management of Health and Safety at Work and Health and Safety (Consultation with Employees)(Amendment) Regulations xxxx*) are intended to remedy this unintended consequence.

3. The proposed new Regulations :

- Will amend the Management of Health and Safety at Work Regulations 1999 to expressly exclude the right of third parties to bring a civil claim for damages against employees in breach of Regulation 14 of those Regulations
- Will remove the civil liability exclusion for breaches of duties by employers in the Health and Safety (Consultation with Employees) Regulations 1996 in line with the changes made in 2003 to MHSWR.

Results of consultation

4. Comments from consultees on the regulatory proposals preceding the 2003 Regulations centred on the effect that the removal of the civil liability exclusion would

have on the volume of compensation claims by employees. Three responses to the consultation were received from trade associations stating that the removal of the exclusion would result in an absolute increase in the volume of claims. Reasons cited for this increase included the rise of no-win no-fee actions, the increasingly litigious environment and the reduced burden of proof under civil law. The responses also raised the concern that any increase in claims would result in a consequent increase in employer's liability insurance premiums.

5. Balanced against these assertions were responses received from the Federation of Insurance Lawyers and a major law firm. These responses supported the view in the RIA that the proposals would not lead to a significant increase in the volume of compensation claims. In their experience injured/ill employees often already cite any breach of the MHSWR as evidence of negligence in support of a civil claim under the common law. Although the burden of proof is lower in civil action than in prosecutions by enforcing authorities (where it must be proved beyond reasonable doubt), the responses state that the most important issue for claimants to prove is that of causation. In the context of a claim under the 1999 Regulations, it would have to be proven on a balance of probabilities that an inadequate/unsuitable risk assessment was of material causative relevance to the injury/illness.

6. In the light of the conflicting responses received during the consultation the conclusions of the RIA have not been revised. HSE expects that the increase in total claims as a result of these proposals – if any – to be small.

Risk assessment

7. These proposals do not address health and safety issues directly, rather the methods for compensating employees when health and safety measures fail.

Objectives

8. The proposals intend to amend the civil liability provisions in the MHSWR by removing the right for third parties to seek damages from employees in breach of their duties under the 1999 Regulations. Further it is intended to remove the civil liability exclusion in the HSCER to align them with the provisions of the 1999 regulations. .

Options

Approaches considered

9. The UK was bound to amend the 1996 and the 1997 Regulations in line with its undertakings at paragraph 1 above. However, this undertaking requires only that the UK amend the 1999 and the 1997 Regulations so that an employer's own employees have a right of action in civil proceedings.

Issues of equity and fairness

10. The proposed amendment to the MHSWR will remove the possibility of actions being brought by third parties against employees for breach of their duties under those Regulations.

11. The proposed amendment to the HSCER represent a transfer of funds within the private sector (ie, from employer to claimant (employee)) in the first instance. Since the organisations affected are commercial concerns, we might expect any additional costs to be passed through to consumers. However, the effects will be dissipated by the availability to such organisations of employers' liability insurance (under the Employers' Liability (Compulsory Insurance) Act 1969), which covers employers for the cost of such claims. The actual number of potential claims, as discussed below, is expected to be very small.

Information sources

12. The financial issues surrounding the proposals have been examined by HSE. There are no other significant economic impacts.

BENEFITS

Health and safety benefits

13. The proposals do not address health and safety issues directly.

Other benefits

14. The financial implications of the proposals are discussed below. There are no other associated cost-savings.

COSTS

Business sectors affected

15. All business sectors are potentially affected by the proposed removal of the civil liability exclusion in the HSCER although which and how many individual businesses are affected in practice will depend entirely on how many employees bring compensation claims as a result of these changes.

Practical effects

16. Amendment to the Management of Health and Safety at Work Regulations 1999 to remove scope for possible claims for damages against employees by third parties¹³. The practical effect will be to reduce the likelihood of claims against employees by third parties. The Health and Safety (Consultation with Employees) Regulations 1996 In practice, the law of negligence (under common law) together with any "targeted" regulations aimed specifically at the situation causing the injury would generally form the basis of a claim of damages by a worker against his em-

ployer. If, in addition, the employer had failed to undertake to consult as required by the HSCER and a claim was also brought under those Regulations, then the claimant would need to show that the absence of consultation contributed materially to the ill health or injury. Given that it is often easier to demonstrate failure to comply with the targeted regulation (which may often be prescriptive), then a further claim under the HSCER would not usually significantly improve the prospects of success at trial.

17. However, there are two circumstances where a worker may look to the HSCER:

- a Cases in which there has been no breach of targeted regulations, or any other common law duty, or where there may be difficulties in proving either;
- b Cases in which the case on causation is complex, and the worker wishes to supplement his claim by relying on the 1996 Regulations.

It is thought that there would not be a significant number of cases in which a claim in negligence would fail but one under the HSCER would succeed.

18. Research conducted on behalf of HSE, "*Analysis of compensation claims related to health and safety issues*", published in 2003, revealed average costs of claims across a range of industries of £1.7k for exposure to noise, to £4.2k for slips, trips and falls, to £4.3k for manual handling.

19. Current research is underway to establish if the number of claims would change as a result of the 2003 amendments, some results should be available from this research in Spring 2005. It is the opinion of legal advisors that any increase in claims would be relatively small as the category of cases that the MHSWR would be referred to by a worker looking to found or supplement a claim for damages are very small. Most cases would not be stand-alone claims but would be to supplement claims, such as claims relating to the law of negligence. Expert opinion holds that the quantum of damages would not increase as a result of the amendments.

Compliance costs

20. In terms of resource costs, any organisations affected will incur administrative costs in dealing with the paperwork associated with compensation claims, and in the costs of both their own personnel and that of any legal representation in defending an action. We are unable to estimate the numbers of future compensation claims initiated by these changes, but expect them to be very small.

21. Following any successful claims, companies will also incur costs in compensation payments. These are not resource costs to society, since they represent a transfer of funds from one party to another. The scale of these transfer payments would be case specific, and widely variable.

Compliance costs for a typical business

22. This would be widely variable. Only a very small number of businesses would be affected.

Impact on small and medium sized enterprises

23. There may well be a disproportionate impact on those small businesses subject to new claims, as the cost of defending a claim would be proportionately greater than for large companies. Again, we believe the numbers of businesses affected will be very small, and the effect on any business found liable to pay compensation may well be taken account of in awards by the court.

Costs to HSE

24. None, other than a very small administrative cost in developing these proposals.

Other costs

25. None.

ENVIRONMENTAL IMPACTS

26. There are no environmental impacts associated with these proposals.

BALANCE OF COSTS AND BENEFITS

27. There are very little resource costs and benefits associated with these changes.

Total compliance costs

28. These are uncertain, but the resource costs will be very small. Any compensation awards, which represent transfer payments, will be decided by the courts.

Uncertainties

29. As detailed in the text.

ARRANGEMENTS FOR MONITORING AND EVALUATION

30. HSC/E has undertaken to monitor how/whether the amendments impact on the number of compensation claims, both against employers and employees, and to encourage industry to develop systems for identifying "unmeritorious" claims.