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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 :

Progress report

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Issue

1. To :

- Report progress on the consultation earlier this year to correct the unintended consequence in the making of the Health and Safety at Work and Fire Precautions (Workplace)(Amendment) Regulations 2003 (the "2003 Regulations") concerning the remote possibility of employees being liable to civil claims by third parties for damages resulting from a breach by that employee of their duties under the Management of Health and Safety at Work Regulations 1999 leading to ill health or injury;
- Set out plans for a more detailed paper for presentation to the Commission meeting in early 2006 covering the results of consultation concerning the proposed change to rectify the unintended consequence in making the 2003 Regulations (described in detail in para. 3(a) below) and other connected matters concerning civil liability that the Commission need to be aware in formulating their advice to Ministers on the way ahead.

Recommendation

2. That the Commission:

- (a) notes the report, and;
- (b) agrees to HSE's proposal to bring forward detailed options to amend the law to remove the possibility of employees being open to civil claims by third parties for damages for workplace injury or ill health and on broader civil liability issues to a meeting of the Commission early in 2006.

Background

3. Following HSC consideration and agreement (see HSC/04/131 discussed at the HSC meeting on 7 December 2004) we consulted on two regulatory proposals in the consultation letter issued in February 2005, concerning proposals to amend the

Management of Health and Safety at Work Regulations 1999 (the “Management Regulations”) and the Health and Safety (Consultation with Employees) Regulations 1996 (HSCER) “Management Regulations” and the “Consultation Regulations” concerning civil liability. The regulatory proposals consulted on sought to :

(a) to amend Regulation 22 of the “Management Regulations” by excluding the right of third parties to seek damages from employees in breach of their duties under the “Management Regulations”. It was never the intention of HSC/E to create this new right and it was considered important to rectify this by a further change in the law thereby avoiding unintended civil proceedings – we gave an undertaking to Ministers to act to remove the “anomaly” in Summer 2004 when Public Concern at Work brought it to Ministers and our attention;

(b) to remove the civil liability exclusion in the “Consultation Regulations” – creating a right of action in civil proceedings for employees against their employer for damages leading to ill health and/or injury arising from a breach of the duty in Regulation 5. The underlying intention here was to harmonise the provisions concerning the civil liability of employers in the “Consultation Regulations” with those liabilities in the “Management Regulations” thereby ensuring consistency. Although the EC has not raised the issue directly there remains the possibility, albeit remote, that the civil liability exclusion could be viewed as under implementation of the Framework Directive.

Argument

4. In all 39 responses were received in response to the consultation - 18 from trade unions and employee organisations and 7 from employer and/or trade organisations. It is clear from these responses that there was wide-ranging agreement on dealing with the unintended consequence of the 2003 Regulations concerning the exposure of employees to civil liability claims by third parties set out in para. 3(a). However other civil liability issues were raised which in some cases require further discussions with stakeholders in advance of the Commission’s consideration in December :

- The CBI expressed major reservations about the added complexity the proposed amendments would give rise to, “many of the proposals now put forward are yet again piecemeal and partial and may have unintended consequences because the exemptions from exemptions structure have become too complex to understand what the principles were in the first place.”;
- The TUC and its affiliated unions while in agreement with the proposed rectification of the law to ensure that employees are not liable to claims for damages by third parties argued strongly that we should, with respect to employees, return to the position pre-2003 Regulations whereby employees had no civil liability for damages arising out of their breaching duties imposed upon them under the “Management Regulations”.

5. Comments from those responding have raised questions whether there is a case for a more fundamental review of the whole approach to civil liability leading to damages that have resulted from workplace injury or ill-health. A fundamental review, if agreed, should examine the extent to which civil liability in relation to claims for damages arising from workplace injury or ill health assists in driving health and safety improvements. There is evidence to show the law is not the motor force for improvement we intend it to be. The first step, should the Commission agree would be to explore the scope and feasibility of such a review taking account of the views of key stakeholders including Government, employers, trade unions and insurers. Meetings have been arranged with DWP and the

Department of Constitutional Affairs to discuss the linkages of such a review to major areas of work they are currently undertaking. As this paper notes it is our intention to bring forward detailed proposals to the Commission meeting in December both on the issues consulted on and the effectiveness of the current approach to civil liability more broadly.

Presentation

6. It should be noted that any failure to act swiftly to rectify the unintended consequence of the 2003 Regulations, that is, the potential liability of employees to claims for damages by third parties, could lead to public criticism from certain stakeholders. As noted in para. 1 above the likelihood of employees being found liable for damages to third parties arising from a breach of the Management Regulations leading to ill health or injury is remote. However other important issues have been raised during consultation, which, with Commission agreement, necessitate more detailed consideration over a longer timeframe.

Action

7. That the Commission:

- (a) notes the report, and;
- (b) agrees to HSE's proposal to bring forward detailed options to amend the law to remove the possibility of employees being open to civil claims by third parties for damages for workplace injury or ill health and on broader civil liability issues to a meeting of the Commission early in 2006.