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Albion Chambers REGULATORY NEWSLETTER

Challenging Ofsted suspensions (childcare providers)

A high hurdle and a low threshold

Under section 69 of the Childcare Act 2006 and Regulation 9 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, Ofsted may suspend a Childcare Provider's registration where:

The Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.

Typically such suspensions arise where Ofsted need to conduct an investigation into a complaint, and the seriousness of the complaint is such that the service needs to be suspended in order for the investigation to be carried out. Examples tend to include allegations of abuse or unexplained injuries, and the suspension will be for a period of up to six weeks, although a further period of suspension can be imposed.

Regulation 12 gives a provider a right of appeal against the suspension to the First-Tier Tribunal (Care Standards), whereby the Tribunal stands in the shoes of the decision-maker as at the date of the hearing, and essentially remakes the original decision. The Tribunal does not, however, make findings of fact or resolve disputed issues of fact, which are left for any substantive hearing rather than considered at this interim stage.

How then is the test in Regulation 9 interpreted? In the case of *Ofsted v GM & WM* [2009] UKUT 89 (AAC), the Upper Tribunal considered Regulation 9 and decided as follows:

- The contemplated risk must be one of significant harm;
- 'Reasonable cause to believe' is an expression in ordinary English and means what it says;
- The fact that the Regulation 9 threshold is passed does not necessarily mean that the power of suspension in Regulation 8 must be exercised;
- Other than to allow time for an investigation, it is difficult to see for what other purpose a suspension could be applied;
- A suspension imposed on the ground that there is an outstanding investigation can only be justified for as long as there is a reasonable prospect of that investigation showing that such steps are necessary;
- If a suspension is imposed to allow time for an investigation, Ofsted should make it clear what further steps need to be carried out.

The test in Regulation 9 is frequently said to be a low threshold. Practitioners should note that this is not the wording used by the Upper Tribunal, who describe it as 'a threshold'. Nevertheless, the statutory language of 'reasonable belief', 'may expose' and 'risk of harm' all lead in practice to the First Tier Tribunal interpreting the provision as a low threshold.

That low threshold has led to an extremely low appeal success rate before the Tribunal in recent years. One has to go back to July 2016 to find the last case where an appeal was allowed; since that time 40 consecutive appeals against suspension have been considered and rejected.

What hope, then, is there for individuals and organisations who are subject to suspension notices? While action will always be situation-specific, the following principles may assist:

1. Take action to isolate and remove potential risk. If an allegation concerns only one staff member, consider suspending that staff member under investigation to avoid the necessity for the whole service to be suspended;
2. Make representations to Ofsted during the period of suspension. Where action has been taken, Ofsted have a duty under Regulation 11 to lift the suspension where the Regulation 9 test is no longer satisfied;
3. Consider what other organisations may be able to assist. If the police have discontinued an investigation, is there information available which may undermine the evidential basis for Ofsted's approach.

Ultimately, where a suspension has been imposed, history shows that it is incredibly difficult to challenge. Unless strong grounds for appeal exist, practitioners may consider it best advice to their clients to work with the regulator to allay concerns rather than pursuing a potentially costly appeal process.

Alexander West

When is a nuisance not a nuisance?

The recent case of *Morgan Credit Limited ("MCL") v SWWRL and others* was a private prosecution brought by a company in South Wales. The prosecutor alleged that the defendants – a wood-recycling company and three of its directors and managers – were guilty of statutory nuisance. That allegation arose from the (undisputed) fact that the defendant company had deposited many thousands of tonnes of woodchip on the prosecutor's land in late 2015. The prosecutor sought a conviction and an order that the defendants remove all of the

woodchip from the land, at an estimated cost of many hundreds of thousands of pounds.

The history of why the woodchip came to be on the prosecutor's land was a protracted one. In short, the defendant company had a problem with overstocking of woodchip at its yard and needed somewhere to offload. Meanwhile, the landowners had been hoping to sell their land to developers of a biomass plant who, in turn, might have used woodchip as feedstock for the plant if it had ever been approved and constructed. So, with some nods and winks – but with no written agreement in place – the defendant company moved some large piles of woodchip onto the prosecutor's land.

Unfortunately for all those involved, once the land sale and the biomass plant fell through, Natural Resources Wales stepped in and required the landowners to remove the decomposing wood, which was seen as a potential environmental threat. The landowners in turn brought this private prosecution to compel the defendants to remove the wood to landfill.

In the Magistrates Court the District Judge found the case of statutory nuisance proved against all four defendants and ordered them to remove the woodchip. I was instructed on the appeal to the Crown Court, where the main issue was whether the defendants' actions could properly be found to have created a statutory nuisance.

The relevant law was the Environmental Protection Act 1990 ("EPA"). Section 82 provides that a court may act on a complaint made by any person on the ground that he is aggrieved by the existence of a statutory nuisance. Proceedings to abate the nuisance are brought against the person responsible for the nuisance. If the Court is satisfied that the alleged nuisance exists it can make an order requiring the defendant to abate the nuisance. Section 79 defines the circumstances that constitute a statutory nuisance, here "an accumulation or deposit which is prejudicial to health or a nuisance". What exactly does that mean?

Our principal ground of appeal was that the deposit of these thousands of tonnes of woodchip was not, in fact, a nuisance. On the face of it that argument looked unlikely. As the prosecution put it: to place a vast amount of wood chip, which is capable of rotting, leaching, self-combusting, and which at the very least covers a large area of another's land is obviously a nuisance. It is a substantial and unreasonable interference with the landowner's ability to use the land whether for their own purposes or by some other person.

However, superficially plausible as this prosecution argument was, the law on statutory nuisance proved to be rather more complex. In the Crown Court, the judge accepted our "half time" submissions, allowed the appeal and dismissed all charges. He agreed with the prosecution that they needed to establish that there had been a substantial and unreasonable interference with their land. On the face of it, that was proved. But he agreed with us that they needed to go further than this. A nuisance had to be either a private nuisance or a public nuisance. Otherwise, it wasn't actually a nuisance within the meaning of the EPA. On the particular facts of this case the prosecution could not bring their case within either of those two categories.

For many of us who once studied law, there will be a dim memory of Lord Denning and the cricket case of *Miller v Jackson*. Although he was outgunned in that case, one thing that Denning said still holds true: "it is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour."

So, a private nuisance can only exist when a property is affected by something done on a neighbouring property. Commonly, that might be noise, smell, plants growing or water discharging. But this woodchip hadn't come from a neighbouring property; it had been brought on lorries from several miles away. This wasn't, then, a private nuisance.

Could the prosecution establish, instead, that this was a public nuisance? Well, a public nuisance can only exist if there is a nuisance that affects a section of members of the public, for example the users of a particular road or river or a group affected by a particular pollution. The prosecution, having perhaps been too confident in the strength of their case, had failed to obtain expert evidence to show what the environmental effects of the decomposing woodpile would be, and there was simply no evidence on which the judge could find a public nuisance proved.

And so there was, in law, no statutory nuisance.

No doubt the landowner thought that a private prosecution would bring a relatively quick and inexpensive resolution, as compared to proceedings in the civil courts. But many people would consider this an abuse of procedure; the increasingly limited resources of the criminal courts are not there to be used to settle private disputes that ultimately come down to questions of who should pay for something. As it turned out we didn't need to run that particular argument but – with the recent explosion in the use of private prosecutions – it may not be long before someone else has to.

Adam Vaitilingam QC

Remember, remember the errrm 31 October

Or should that be 31 January?

Some of the more cynical, jaded readers of the Regulatory Team Newsletter may believe that the tenuous link and cheap imagery between Guy Fawkes and the Brexit Red Tape Bonfire is simply a device to begin this article with a bang, because the underlying subject matter may be a little less than exciting.

To those more generous, naive souls, the writer thanks you. You can come again.

Purpose

This short missive seeks to undertake a bird's-eye review of what may happen once expected to be 31 October, but now 31 January, in relation to Health and Safety law.

As we know, the roots of much of our current Health and Safety legislation (in all its forms) begin with the various EC Directives. On that basis it is not unreasonable to suspect that when or if regulatory alignment is dispensed with, this will also include Health and Safety law.

The HSE

As a starting position it is probably worth looking at what the Health and Safety Executive says about it:

"Your duties to protect the health and

safety of people affected by your work will not change with Brexit."

Well, if that was the end of it this would be a very short article, but unfortunately it isn't. The HSE goes on to state that:

"We have made some minor amendments to regulations to remove EU references but legal requirements will remain the same as they are now. Health and safety standards will be maintained."

As we know, in some circumstances when it comes to interpretation of Health and Safety law, we will reference the original EC regulations. So even though things will 'remain as they are now' domestic law is now, in the language used, untethered from its foundations.

We then dig a little deeper into the HSE's position and we find The EU (Withdrawal) Act 2018 which is supported by three statutory instruments, including (as relevant for our purposes):

- The Health and Safety (Amendment) (EU Exit) Regulations 2018.

This, and the other statutory instruments diligently supplant references to the EC and similar, to more home-grown terms such as 'the executive, or 'the act', as just two examples.

The effect of untethering

This isn't to say that on 1 February there will be a marked shift or change in how Health and Safety applies to individuals and organisations, it won't, but the untethering does allow future governments to begin to make those changes.

We may be able to discern our direction of travel by reference to what particular politicians have been saying and have said during the Brexit campaign:

"We should go into those [EU] renegotiations with a clear agenda: to root out the nonsense of the social chapter – the working time directive and the atypical work directive and other job-destroying regulations" Boris Johnson

What may the phrase 'job-destroying regulations' be in reference to?

We may also get an extra nudge in a particular direction by recalling the kipper-gate comments of our current Prime Minister (at the time of writing, September 2019) during his Conservative leadership contest. No comment is made as to the accuracy or otherwise of those comments, but the assertion was made that it was EC Health and Safety law that made kipper smokers package their post-smoked kippers in plastic and ice before shipping. Some have questioned whether this requirement does stem from the EC, or whether its a domestic requirement, but, whatever the truth, Health and Safety law appears to be in the Prime Minister's cross-hairs.

A Trade Union position

A number of Trade Unions are alive to this risk and have set out their stalls in defence of Health and Safety law. For instance, in the TUC pamphlet which addresses this issue notes the following.

Michael Ford QC, who wrote on the impact of Brexit on workers' rights from Europe, [advised] that:

"if the last Government were not constrained by EU law to provide some effective remedy for breach of the Directives - which it now purports to do so by criminal law alone, without civil claims - it may well have taken the further step, consistent with its logic of reducing the 'perception' of burdens on business by repealing in whole or in part some of the health and safety regulations which implement EU law. In this light I think that many of the regulations which implement duties in EU health and safety Directives are both legally and factually vulnerable in the event of Brexit, to be replaced largely by a common law duty of care alone."

Michael Ford QC is an Employment Law Practitioner and Employment Tribunal Judge and also a Professor of Law at the University of Bristol (and rather a good cyclist one hears), so he very much approaches matters from an Employment Law perspective, the protection of employees – but his views may well cross apply to pure Health and Safety law. The underlying thrust certainly does.

Conclusions

Whether your preference is for something hard, soft or something in the middle, it would appear that a form of Brexit is more likely than a revocation of art. 50 (no political opinion or preference is expressed here), and if that's right then change is on the horizon.

No doubt the HSE's position as stated on it website is accurate, so far as it applies to the immediate aftermath of 31 January, but what the HSE website does not and cannot reflect is the noise of the tub-thumping rhetoric, the heat of the red-tape bonfires, as advocated by some during the past three or four years.

On this basis it would not surprise this writer if over the next few years we move closer to the nebulous common law duty of care and away from the black letter prescription of our current regulatory regime.

Richard Shepherd

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