EMPLOYMENT TRIBUNALS

Appellant: G D Precision Engineering Ltd
Respondent: Richenda Jane Dixon
One of Her Majesty's Inspectors of Health and Safety

Heard at: Nottingham
On: 8 & 9 February 2021
10 February 2021 (Reserved)
Before: Employment Judge Blackwell
Members: Mr K Rose
Mr J Purkis

Representation
Appellant: Glen Dickens, Managing Director
Respondent: Cyril Adjei of Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The Unanimous Decision of the Tribunal is that The Improvement Notice dated 21 November 2018 is Affirmed subject to the Modification set out paragraph 78 of this Decision.

RESERVED REASONS

1. Mr Dickens represented the Appellant and gave evidence on their own behalf. We also took into account a written statement of an employee of the Appellant, Mr R Harrison. Mr Adjei of Counsel represented the Respondent and he called Mr J S Corbridge, a retired Principal Specialist Inspector of Mechanical Engineering. We also took into account a written statement of the Respondent, Ms R J Dixon. There was an agreed bundle and references are to page numbers in that bundle.

Agreed facts and law and issues

2. This is an appeal against an Improvement Notice dated 21st November 2018, which was served by the Respondent on the Appellant (serial number RJD 01/18/11/09) ("the Notice").

3. The Appellant is a company that carries out engineering and metal working from commercial premises situated at 4, Bessell Lane, Stapleford, Nottingham NG9 7BX ("the Premises"). For the purposes of this work and at the time the Notice was served, it made use of a number of different machines – including milling machines that were located on the first floor of the Premises ("The Milling Machines").

4. Mr Glen Dickens is and was at all material times the managing director of the Appellant. At the time the Notice was served, the Appellant employed 3 people at the Premises.

5. The Notice was served following a visit on 27th September 2018 to the Appellant's premises by the Respondent and her colleague, Jim Corbridge, HM Specialist Inspector of Mechanical Engineering and PC Joseph Taylor 3643, a police officer, during which they were denied access to the Premises by Mr Dickens. However, they met with him outside the Premises, viewed videos on his phone of The Milling Machines being operated and discussed the guarding arrangements to The Milling Machines. Following the visit, Mr Corbridge prepared a report which he submitted to the Respondent. The Respondent then served the Notice.

6. This visit followed previous visits on and after 10th May 2017 by other members of the Health and Safety Executive's ("the HSE") staff to the Premises, and lengthy correspondence between the HSE and the Appellant regarding the guarding of The Milling Machines, amongst other things.

7. The Notice asserts that there was a breach of s.2 of the Health and Safety at Work etc Act 1974 ("HSWA") and a breach of the Provision and Use of Work Equipment Regulations 1988, Regulation 11. It requires the Appellant to work down a hierarchy of measures to take steps to improve the guarding to The Milling Machines to the extent that it is practicable to do so.

8. The Notice was served with a Schedule (setting out how compliance with the Notice could be achieved) and an accompanying letter containing a Notification of Contravention (which provides further information about the breaches of the law identified by the Respondent and how this can be remedied).

9. The Notice was served pursuant to s.21 of HSWA. The exercise of this power is conditional upon an inspector forming the opinion that a person is contravening one or more relevant statutory provisions or has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated.

10. The Appellant's appeal against the Notice is pursuant to s.24 of HSWA.

11. An appeal against an Improvement Notice lies to an Employment Tribunal, pursuant to s.24(2) HSWA.

12. The procedure governing the appeal is set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Regulation 13(1) applies the rules set out in Schedule 1 unless other procedural rules apply. No other rules apply.

13. Rule 105(2) of Schedule 1 makes a limited modification to the application of the procedural rules in the case of appeals against Improvement (and Prohibition) notices. This modification is that references in the procedural rules to a 'claim' shall be read as references to an Appeal and references to the 'Respondent' shall be read as referring to an Inspector of health and safety.

14. The powers of the Tribunal on hearing an appeal are to cancel or affirm the notice and if it affirms the notice, the Tribunal may modify it (s.24(2) HSWA).

15. On an appeal, the Tribunal must decide whether it would have served the notice at the time it was served based on the information which was available to the Inspector or ought reasonably to have been made available following such investigation as ought reasonably to have been undertaken.

16. The Tribunal can also take into account evidence or matters that come to light after a notice has been served (even if the Inspector did not know or ought not reasonably to have known of it) if it sheds light on the state of affairs at the time the notice was served.

Issues for determination

17. Whether at the time the Notice was served, the Appellant had taken effective measures to prevent access, so far as is practicable, to the rotating cutters of The Milling Machines.

18. Whether the HSE has since 10th May 2017 changed what requirements it stated were necessary to comply with the law regarding the guarding of The Milling Machines.

19. Whether the Tribunal would have served the Notice when the Respondent served it based on the information to her at that time or which ought to have been available to her following such investigation as she ought reasonably to have undertaken.

Statutory law

20. Section 2 of the Health and Safety at Work etc. Act 1974

"**2 General duties of employers to their employees**.

(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

(4) Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers

under subsection (6) below and shall have such other functions as may be prescribed.

(5). . . . . .

(6) It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.

(7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in [subsection (4)] above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed."

21. Section 21

"**21 Improvement notices.**

If an inspector is of the opinion that a person—

(a) is contravening one or more of the relevant statutory provisions; or

(b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated,

he may serve on him a notice (in this Part referred to as "an improvement notice") stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period within which an appeal against the notice can be brought under section 24) as may be specified in the notice."

22. Section 24

"**24 Appeal against improvement or prohibition notice.**

(1) In this section "a notice" means an improvement notice or a prohibition notice.

(2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an [employment tribunal]; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.

(3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection, then—

(a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;

(b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction).

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an [employment tribunal] under this section."

23. Regulations 11 of the Provision and Use of Work Equipment Regulations 1998

"**Dangerous parts of machinery**

11.—(1) Every employer shall ensure that measures are taken in accordance with paragraph (2) which are effective—

(a) to prevent access to any dangerous part of machinery or to any rotating stock-bar; or

(b) to stop the movement of any dangerous part of machinery or rotating stock-bar before any part of a person enters a danger zone.

(2) The measures required by paragraph (1) shall consist of—

(a) the provision of fixed guards enclosing every dangerous part or rotating stock-bar where and to the extent that it is practicable to do so, but where or to the extent that it is not, then

(b) the provision of other guards or protection devices where and to the extent that it is practicable to do so, but where or to the extent that it is not, then

(c) the provision of jigs, holders, push-sticks or similar protection appliances used in conjunction with the machinery where and to the extent that it is practicable to do so, but where or to the extent that it is not, then

(d) the provision of information, instruction, training and supervision.

(3) All guards and protection devices provided under sub-paragraphs (a) or (b) of paragraph (2) shall—

(a) be suitable for the purpose for which they are provided;

(b) be of good construction, sound material and adequate strength;

(c) be maintained in an efficient state, in efficient working order and in good repair;

(d) not give rise to any increased risk to health or safety;

(e) not be easily bypassed or disabled;

(f) be situated at sufficient distance from the danger zone;

(g) not unduly restrict the view of the operating cycle of the machinery, where such a view is necessary;

(h) be so constructed or adapted that they allow operations necessary to fit or replace parts and for maintenance work, restricting access so that it is allowed only to the area where the work is to be carried out and, if possible, without having to dismantle the guard or protection device.

(4) All protection appliances provided under sub-paragraph (c) of paragraph (2) shall comply with sub-paragraphs (a) to (d) and (g) of paragraph (3).

(5) In this regulation—

"danger zone" means any zone in or around machinery in which a person is exposed to a risk to health or safety from contact with a dangerous part of machinery or a rotating stock-bar;

"stock-bar" means any part of a stock-bar which projects beyond the head-stock of a lathe."

Further findings of fact

24. The milling machines are KRV machines as shown at 174C. At all relevant times, the Appellant had three of these machines located on the first floor of their premises. A photograph of one of these machines in situ is at 410.

25. The milling machines are very versatile and can work in different planes. The Appellant's work was bespoke and varied. They did not do production work.

26. We accept that Mr Dickens is a vastly experienced operator of milling machines and other machinery. We accept that Mr Corbridge is not and that he has never seen the milling machines in operation. However, that omission lies at the Appellant's door.

27. In 2007 and 2008, prohibition and improvement notices were issued but there was no reference to the milling machines in those notices and we accept that the milling machines were present and in use at that time.

28. On 15 May 2017, a Notice of Contravention was served on the Appellant following a visit by Mr Stanley, HM Inspector of Health and Safety. The section relevant to the milling machines is paragraph 4 at page 88, which reads as follows:

> "***4.0 Provision and Use of Work Equipment Regulations 1998, Regulation 11(1)***
>
> *4.1 Following my visit, in subsequent telephone conversations you have advised me you have additional milling machines on your first floor which were not discussed during my inspection. You confirmed over the telephone that these milling machines do not have any physical guards provided.*
>
> *4.2 As detailed above, Regulation 11 requires you to prevent access to dangerous parts of machinery.*
>
> *4.3 To comply with the above law you should achieve the same guarding standards as described in point 1.4 on all your milling machines.*"

29. 1.4 reads as follows:

> "*1.4 To comply with the law you should consider implementing the recommendations from Mr Grady's report. You should assess your guarding standards (keeping in mind the recommendations above), make a record, and implement any additional control measures found from that assessment.*"

30. On 18 August 2017 a specialist engineering inspector, Mr Grady, visited together with Mr Stanley who had issued the Notice of Contravention of 15 May.

31. Mr Dickens asserts that on that visit full agreement was reached as to effective guarding on the milling machines. He points to an email from Mr Stanley of 18 August at page 246:

> "*…*
>
> *Point 1.0 & 4.0 – It was confirmed that for work where it is reasonably practicable to provide effective guarding you would do so, but for work where guards were not reasonably practicable which would not be done. …*"

32. As he frequently does, Mr Dickens only cites that part of a document which suits him. In fact, that paragraph continued:

> "*I requested that a record of this is made as a way of demonstrating that you have implemented the guarding hierarchy as detailed in the Regulations.*"

33. Mr Dickens asserts and we accept that with the exception of the milling machines, the other issues raised in the Notice of Contravention were resolved. He says in his Proof of Evidence at paragraph 6:

> "*…*
>
> *7, The 7th issue which is, the current one, isn't in Cath's letter detailing "all" our breaches in law, because it hadn't been invented at this point.*
>
> *…*"

34. However, on the second page of that letter at page 260, the following is said:

> "*A visit by our specialist and inspector took place on 18 August 2017 because you did not respond positively to the NoC. At this visit, PSI Paul Grady advised that the KRV (and similar) milling machines should be risk assessed, considering safeguarding measures from the guarding hierarchy. He acknowledged that there were factors that could make retrofit guarding impractical e.g. type of work undertaken and drew attention to the need for enclosure guarding where practicable. …*"

35. A second Notice of Contravention was served on 13 September 2017, pages 91 to 94. At paragraph 4 on page 93 is the relevant section, which reads as follows:

> "*First Floor Milling Machines*
>
> *4.1 Inspector Grady has confirmed that the three milling machines require enclosure guarding wherever practicable. This would be judged on a job-by-job basis. Suitable guards and other protection devices would need to be readily available for safeguarding these machines to*

the extent practicable for the variety of work that you undertake.

4.2 To comply with the law you should provide enclosure wherever practicable. This could be achieved by providing a fish tank table guard or adjustable cutter guard. Where it is not practicable to provide fixed guarding you need to confirm the circumstances and the reasons why fixed guarding cannot he achieved.

4.3 It is pertinent to note that whilst swarf guards can be an effective guard on the ground floor milling machines, the smaller size of the first floor milling machines reduces the effectiveness of these guards, as the can easily be bypassed by reaching around. So these on their own could not be sufficient to safeguard the dangerous parts (rotating tools) of these first floor milling machines."

36. At this stage, the relationship between Mr Dickens and the Health and Safety Executive had broken down. Mr Dickens disputed the level of fee he was being charged and had raised a formal complaint about Mr Stanley's inspection. That fell to Ms Lassey to respond to, she being the Deputy Director for the Midlands Field Operations Division. She responded on 18 January 2018 at pages 277 and 278. She accepted a number of deficiencies on the part of the HSE but went on to say:

"*…*

There is clear disagreement over the guarding of the large lathe and first floor milling machines and our view is they have not been satisfactorily resolved. Both of these outstanding matters can be quickly and easily dealt with by providing:

…

Details of the additional guarding that is available for the first floor milling machines or written confirmation that no work is undertaken where additional safeguards (for example 'fish tank' or adjustable cutter guards) could be used.

…"

37. Mr Dickens asserts that he did so and states that Inspector Stanley confirmed that at pages 256 in the bundle. In fact, Mr Stanley writes as follows:

"*…*

However, Paul's findings at the visit were not that "no further guarding was required". He acknowledged that there is a variety of work undertaken on your machines, some of which include factors that could make retrofit guarding impractical, but he did make specific comment of the need to provide guarding where practicable. On the KRV (and

similar) machines he advised that these should be risk assessed, considering safeguarding measures from the guarding hierarchy. …"

38. At page 290, Mr Wild of the HSE writes to Mr Dickens at pages 290 and 201 acknowledging the receipt of photographs and information. In that email he accepts that point number 1 of the second Contravention Notice has been complied with but in relation to the first floor milling machines, he states:

> "*You provided photographs of the use of the rotary table, the dividing head and drive keyway machining operations. We accept that the workpiece shown on the rotary table is unlikely to be safeguarded further. Regarding the photographs of the dividing head and drive keyway machining operations, we consider that further fixed or moveable guards are practicable. There appears to be space at the front of the end of the machine to attach a fixed guard, which can be put in place when setting up the workpiece; or a moveable guard (as illustrated below) could be used and moved in to position before you start machining. It is your choice whether you fabricate your own guard or purchase one. Your guarding solution could be interchangeable between the machines but it must be put in place where practicable when the machine(s) are being used."*

39. At page 291 is a photograph and the context continued:

> "*This means that point 4.0 of the original notice of contravention has not yet been complied with. Can you let me know how you intend to improve the safeguarding of these machining operations?*
>
> *…*"

40. Mr Dickens made a number of complaints which led to a report by Mr Kingscott, which we see at pages 175 – 192. The complaints raised by Mr Dickens are set out at page 175 and include an allegation of dishonesty against Mr Stanley. It seems to us to be a thorough and objective assessment of the complaints made and Mr Kingscott does make a number of criticisms of Mr Stanley, see for example paragraphs 70, 71 and 72, which again Mr Dickens quotes selectively from in his Proof of Evidence. Mr Kingscott specifically rejects the allegation of dishonesty against Mr Stanley at paragraphs 62 – 66. Paragraph 72 reads as follows:

> "*72. Mr Dickens has taken a robust line and indicates that in his considerable experience that guarding solutions are not easily achieved or not possible. The line taken by HSE is perhaps not clear enough at this early stage that the guarding standard may be relaxed (where the machinery is being operated by trained, experienced and suitably skilled operatives) however the guarding solution needs to guard the dangerous parts so far as it practicable and "justified" further to an assessment and this should be recorded such that the employees using the machine are clear*

> *what is required. This is complex in this situation as the dutyholder in this case does a wide range of work and each job may need to be assessed individually. The position with regards to the hierarchy of controls, options and assessment is however clarified in the second NOC.*"

41. In our view, with the exception of the words in brackets above, this is a fair summary of the position as at the time of the issuing of the second NOC. However, we think that the words in brackets are ill advised and plainly wrong. Skilled operators are equally prone to moments of inattention and there is no justification in our view for any distinction to be drawn.

42. The position in early 2018 is that the HSE are not satisfied with the guarding of the milling machines. On 27 April 2018, at page 334, Mr Wild records Mr Dickens' position as:

> "*I will not and I cannot change the way we guard our milling machines so you need to decide what action you are going to take,*"

43. Mr Wild goes on:

> "… *Our view is that either a fixed or moveable guard can be OK, but any guard should be secured in place, in order to comply with the law and provide suitable protection for the machinist. It appears that we are unfortunately at an impasse. We have not seen this guard being used on these machines, nor seen these machines in use. As we only have one photograph of a guard being used on the first floor milling machines we need to undertake a site visit.* (That photograph is at 326). *This is so you can demonstrate to us all the different levels and arrangements of guarding and risk control you have for these machines (as this one guard will not be the answer for every job), before we make a decision on whether we take any further enforcement action.*
>
> *…*"

44. Mr Dickens responded on the same day to the effect that Mr Grady had been satisfied on his visit and therefore no other visit was necessary and, further, that he was now being victimised by the HSE and would be taking his complaint to the Ombudsman over the weekend.

45. There was further correspondence but the impasse remained.

46. At 348, Mr Wild informs Mr Dickens by email of 5 June 2018 that a further visit will be needed. Mr Dickens responds and at page 351 he says:

> "*…*
>
> *This month is our 29th anniversary and we haven't had a single incident regarding safety in all that time but obviously you know best so close us*

> *down or have me arrested if that's what you want, but don't expect this to be brushed under the carpet.*
>
> *…*"

47. The intention had been to make an unannounced visit but in fact HSE did liaise with Mr Dickens to fix a time for a visit. Mr Wild had decided that given the accusations against Mr Grady, it would be better if an entirely new team attended. That team was Ms Dickson and Mr Corbridge.

48. The visit took place on 27 September 2018 and Ms Dickson and Mr Corbridge were accompanied by a uniformed police officer, PC Taylor. Mr Taylor wore a bodycam and recorded the dealings with Mr Dickens, a transcript of the discuss is at 95 to 149. That transcript is agreed with the exception of the quote at page 110: "*Don't piss on my intelligence …*". It is accepted that that should have read: "*Don't insult my intelligence …*".

49. This led Ms Dickson to make the unfortunate and incorrect assertion at paragraph 23 of her evidence.

50. We have both read the transcript and watched the video derived from the bodycam. It is clear that the HSE were refused entry to the Appellant's premises. Mr Corbridge was shown two videos on Mr Dickens' telephone. These are referred to both in the Notice itself (see page 79) and Mr Corbridge's report at 166.

51. The first video contained the still photograph which is at page 174E, whereon Mr Corbridge has added to the photograph the screen that he saw on the video.

52. As to the second video, the photograph at 410 (and 326) is a photograph taken from that video.

53. That then was the only evidence that Mr Corbridge could work from. It remained the position that no one from the HSE had seen the milling machines in operation.

54. As to the videos, the impression Mr Dickens gives derived from the transcript is that at least one of those videos is an actual working example. However, in cross-examination he confirmed that both videos were simulations and not actual work.

55. After the visit, Mr Corbridge wrote a report beginning at 165 and dated 11 October. This was the basis for the issue of the Notice. At page 170, Mr Corbridge sets out his conclusions.

56. Mr Corbridge's conclusions are conclusions largely echoed in the Notice at pages 79 and 80. Mr Corbridge's conclusions at 170 are as follows:

> "*…*

4.1 The tools of the milling machines were capable of causing injury. The most likely type of accident was an injury to a finger, or hand in the event of contact with the rotating cutter.

4.2 The splash screen shown in the two videos, on 27 September, on Mr Dickens mobile phone, and the photograph supplied by Mr Dickens did not meet the requirements of a suitable fixed guard, primarily because the guard was not fixed, and not interlocked with the drive of the machine, and it also did not enclose and restrict access to the dangerous parts to the extent it was practicable to do so.

4.3 For the two jobs shown in the videos, in my opinion, it was practicable for access to the tools to be much more significantly restricted, i.e. for the tools to be more substantially enclosed, through the use of either a fixed or interlocked table guard, or a fixed or adjustable interlocked cutter guard as shown in HS(G) 129 and EN 13128, and Appendix A. In either case the guard should be fixed to the machine, or surrounding structure such that it cannot be removed without the use of a tool or interlocked with the drive of the machine.

…"

57. The Notice was served on 21 November 2018 with a compliance date of 14 December 2018. At page 84 are set out the measures necessary to comply with the Notice and they effectively set out paragraphs 2 and 3 of Regulation 11 but add:

"*4. Take any other equally effective measures to remedy the said contravention.*"

58. The Appellant duly appealed by the document shown at pages 1 – 11 of the bundle.

59. The concluding paragraph reads as follows:

"*Over the last 19 months I have told them and demonstrated on site the reasons why our guards are the most practicable way to guard our machines as we've done for the last 30 years without incident. Cath Cottam said that the HSE's Paul Grady acknowledges that in her letter but they have now issued me with an improvement notice that will close this business down. I have told my staff that there employment will be terminated on 24th December 2018*."

Conclusions

60. During the hearing, Mr Dickens told us that for the past three years he had been

the only operator of the milling machines. Thus, it could be argued that section 2 of the 1974 Act is not engaged because Mr Dickens told us he was not an employee of the Appellant.

61. However, we do not understand this to be his case. He appeared to accept that notwithstanding the fact that he had been the sole operator, he was not arguing that section 2 did not apply.

62. Turning now to the determination of the issues set out above. It seems to us logical to deal first with issue 3, namely:

> "**Whether the tribunal would have served the notice when the Respondent served it based on the information available to her at that time or which ought to have been available to her following such investigation as she ought reasonably have undertaken**."

63. It is necessary to know what information was available to the Inspector at the time of the issue of the Notice on 21 November 2018.

64. In our findings of fact, we have set out the history, namely the visits by Inspectors Stanley and Grady. We have recorded the relevant parts of both the Notices of Contravention and subsequent correspondence. What emerges from that is the following:

64.1 No Inspector has ever seen the milling machines in operation.

64.2 The machines have been viewed in situ but, as we have said, not in operation.

64.3 Mr Dickens provided a photograph (326) and detail in the email correspondence to which we have referred.

64.4 Mr Corbridge and Ms Dickson were shown two videos on Mr Dickens' 'phone on 27 September 2018 and there was discussion between Mr Dickens and Mr Corbridge as to what those videos showed, as is recorded in the transcript.

64.5 In respect of those videos, they have either been lost or destroyed by Mr Dickens. Mr Dickens, in our view unfairly, criticises the Inspectors for not videoing the video. We do not consider that Ms Dickson can be criticised for such a failure.

64.6 Mr Dickens made it abundantly plain that he would permit no further access to his premises and thus in our view there was no further investigation that Ms Dickson ought reasonably to have undertaken.

65. Thus, we conclude that the tribunal would have served the Notice on 27 November 2018 based on the information that was available to Ms Dickson on

that date. We would also add that there does not appear to have been any further information relevant to the service of the Notice post November 2018.

Issue 2

"**Whether the HSE has since 10 May 2017 changed what requirements it stated were necessary to comply with the law requiring the guarding of the milling machines.**

66. Mr Dickens draws our attention to a number of inconsistencies between the written comments of various Inspectors and the contents of the two Notices of Contravention and the Notice. We accept that there are inconsistencies but the theme is the same throughout. That theme is the hierarchical approach set out in Regulation 11. See in chronological order paragraph 4 at page 88, followed by a similar but expanded paragraph 4 at page 93 and then the Notice itself at page 84. All of these are clearly based upon the hierarchy set out in Regulation 11 and in our view Mr Dickens did understand the concerns of the HSE but throughout contended that those concerns were not well founded.

67. We therefore conclude that HSE since 10 May 2017 did not materially change the requirements it stated were necessary to comply with the law regarding the guarding of the milling machines.

Issue 1

"**Whether at the time the Notice was served, the Appellant had taken effective measure to prevent access, so far as is practicable, to the rotating cutters of the milling machines.**

68. This is the critical issue. It seems to us to turn on practicability. Mr Dickens' case, based on his vast experience of using the milling machines, is that he risk assessed each job and used the type of guard seen at 410 placed at its most effective position having regard to the workpiece that was being machined.

69. In his closing submissions, he told us that he could spend hours setting up the machine for a task that might take only 10 minutes and it was only at that point that he could assess what was the most appropriate guard. He went on that if it was necessary to put in place a fixed guard such as is described by Mr Corbridge, which would take further time, then it was more likely that the machinist would look over his shoulder to see whether he was being observed and if not to carry on working without a fixed guard.

70. In relation to the fitting of fixed guards as set out in Mr Corbridge's conclusion at page 170, Mr Dickens cross-examined Mr Corbridge at great length on the practicability of fixed guards. The cross-examination seemed to consist of Mr Dickens putting a problem to Mr Corbridge, Mr Corbridge suggesting a solution, and then Mr Dickens criticising that solution.

71. Mr Corbridge helpfully provided a diagram at 174F of a fixed guard, which he

said was both practicable and compliant with Regulation 11. Mr Dickens put a number of practical difficulties to Mr Corbridge, including the fact that it would restrict the diameter of the workpiece being worked upon. Mr Corbridge responded by specifying the use of brackets so that the screen could be taken further out from the workpiece and the tool. This was again criticised by Mr Dickens, principally because he argued that it would be possible to get one's hand under the screen. It seems to us that that would have required a contortionist to achieve.

72. We note, however, that when Mr Dickens was asked about the practicability of the screen shown at 174F by members of the tribunal, he appeared to accept that it was practicable and said: "*I could make such a screen in the time it takes you to get back to your car*". This seems to us to illustrate Mr Dickens' mindset. He has closed his mind to any proposal by the HSE.

73. It does therefore seem to us that a fixed guard of the type shown at 174F that could be applied in the circumstances shown would improve the safety of the operator. We therefore conclude that in that regard, the Appellant had not taken effective measures to prevent access so far as is practicable to the rotating cutters of the milling machines.

74. Another suggestion put forward by Mr Corbridge is the suggested use of interlocked cutter guards, an example of which is shown at paragraph 26 of Mr Corbridge's Proof of Evidence. There are other photographs in the bundle illustrating such a guard. Mr Dickens put a number of criticisms to Mr Corbridge. Firstly, he said that if the guard was interfered with by the machinist, which would cut off the interlocked power, then the cutting tool would shatter. That may well be so but it seems to us that it would only occur if the machinist attempted to open the guard whilst the machine was operating. Another criticism was that of visibility. We have to say that looking at photograph 410, Mr Dickens' favoured piece of Perspex is filthy. A third criticism was that such an interlocking guard was impractical because of its lack of movement and articulation. Mr Corbridge did not accept that criticism and nor do we.

75. Thus, this is another example of where there are more effective means of protecting the machinist.

76. We do accept that there will be circumstances where neither a fixed guard nor an interlocking guard would be practicable. It seems to us, however, that what Mr Dickens has done is to jump straight from the first stage of the hierarchical approach to stage 2 without proper consideration of what could be done under that hierarchy. We therefore conclude that taken in the round, the Appellant had not taken effective measures to prevent access, so far as practicable, to the rotating cutting cutters of the milling machines.

77. It therefore follows that pursuant to section 24, we affirm the Notice, subject to the modification set out in the next paragraph.

78. As we have recorded above, the date by which the contravention should be

remedied was 14 December 2018. We substitute a date of 28 days from the date that this decision is sent to the parties.

79. We understand Mr Dickens' position though we do not agree with it. We would respectfully suggest that he does invite an appropriately qualified inspector to his premises so as to demonstrate the use of the milling machines and to seek to agree a practicable regime of guarding, which would both satisfy the HSE and allow the Appellant to continue to operate.

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Employment Judge Blackwell

Date: 3 March 2021

JUDGMENT SENT TO THE PARTIES ON

4 March 2021

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FOR THE TRIBUNAL OFFICE

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