



Fisher Scoggins Waters

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Disputes Resolution

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**HSE's Fee for Intervention
Costs Recovery Scheme (FFI)**

By

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Background to FFI

- ▶ *Good Health and Safety, Good for Everyone (2011) – shifting the cost of regulation from the taxpayer to businesses that “are found to be in **serious breach** of health and safety”.*
- ▶ Report to HSE Board upon original FFI Consultation (2011) – in relation to the dispute process – *“Consultees commonly used the phrase ‘judge and jury’ to describe HSE on this point”.*
- ▶ Introduced in 2012 – The Health and Safety (Fees) Regulations 2012, now the Health and Safety and Nuclear (Fees) Regulations 2016.
- ▶ Last year 50% of proactive HSE inspections led to a FFI bill (*Health and Safety at Work Magazine 8 May 2017*)



FFI Scheme

- ▶ Notification of Contravention (NoC) – **material breach** of health and safety law by duty holder in the opinion of the inspector.
- ▶ Invoice(s) - £129 per hour
- ▶ The amount charged under FFI and/or whether there has been a material breach can be challenged.
- ▶ Query Stage – determined by principal inspector (line manager of inspector)
- ▶ Dispute Stage – determined by panel
- ▶ Following JR by OCS HSE amended dispute process – 1 Sept 2017



View of FFI – Part 1

Martin Temple Report January 2014 following appointment by DWP to review HSE (at time Chair of EEF):

“.....I am very concerned at the strength of feeling from stakeholders that FFI damages HSE’s reputation for acting impartially and independently.”

AND

“...It is a dangerous model which links, directly or indirectly, the funding of the regulator to its income from ‘fines’”



View of FFI – Part 2

Martin Temple following his appointment as Chair of HSE in an interview with *Health and Safety at Work Magazine* (October 2016):

“I think that some of my initial concerns have been addressed...We talk about [FFI] in a different way, we talk about why it is really there. The really important thing is to draw people’s attention to the fact that the duty holders have got to make it a safe place to work. And if they don’t, then they have to pay the penalty – and will hopefully be more diligent in the future. In a way we’re making a bigger thing of it than we need.”



When an inspector calls

Martin Temple Report 2014:

“.....health and safety legislation is goal-setting and risk based. This means that the discussion that takes place between the regulator and the regulated about what is reasonably practicable is vital”

Helping Great Britain work well (2016 HSE Strategy Document):

“HSE will look to act increasingly as an enabler, supporting businesses.....by providing simple, accessible and relevant advice and challenging so-called ‘experts’ who overprescribe and over-interpret requirements”.



Potential impact of FFI upon duty holders

- ▶Criminal proceedings – note interview of Peter McNaught by Ben Rich 2013
- ▶The level of costs claimed by HSE
- ▶Practicality of complying with NoC
- ▶The cost of complying with the NoC
- ▶Tendering for work (disclosure at PQQ stage)



Background to OCS JR

- ▶ OCS is a facilities management company
- ▶ Contract to provide horticultural at Heathrow Airport
- ▶ Inspection following a RIDDOR report of HAVS diagnosis
- ▶ NoC 4 August 2014 – Inspector of opinion that OCS in material breach of regulation 6(2) – management of vibration risk – and 7(2) – suitable health surveillance – of the Control of Vibration at Work Regulations 2005
- ▶ Query (1 Dec 2014) and Dispute (28 Feb 2015) rejected.



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OCS v HSE – JR Grounds

- ▶ ***The dispute process under FFI*** – whether the decision making process was unlawful – OCS argued that the process failed to comply with common law principles of natural justice and/or Article 6 ECHR and/or Article 1 of the First Protocol (A1P1) ECHR: and
- ▶ ***The rejection of a query and dispute by HSE of the August 2014 NoC*** – OCS argued the specific dispute was not determined in accordance with the common law principles of natural justice and/or the decision was irrational.



Minimum required by common law

- ▶ HSE to put its allegations to the duty holder;
- ▶ To provide disclosure;
- ▶ To permit a response and submission by duty holder;
- ▶ A dispute to be determined independently and impartially.



Proceedings

- ▶ 23 March 2015 – pre-action letter
- ▶ 20 April 2015 – HSE reply saying claim will be contested
- ▶ 28 May 2015 JR issued
- ▶ 18 June 2015 – by consent case stayed to allow HSE time to consider claim further – a number of stays followed
- ▶ 15 July 2016 Stay lifted



Proceedings - continued

- ▶ 20 September 2016 Permission granted by Mr Justice Kerr: *“It is arguable that the HSE is, unlawfully, judge in its own cause when operating the FFI scheme; and that the scheme is either unlawful or is being operated in an unlawful manner”*
- ▶ Trial set for 8 and 9 March 2017
- ▶ 7 February 2017 – OCS agrees to withdraw claim on basis that HSE agrees to introduce new dispute process by 1 September 2017 to meet the minimum requirements of the common law, the main terms are set out in the schedule to the consent order. Further HSE withdraws specific NoC and pays OCS’s costs of JR.
- ▶ 2 June 2017 HSE consultation CD284 closes.



New dispute process

- ▶ See *Fee for intervention – query and dispute process*:
<http://www.hse.gov.uk/fee-for-intervention/assets/docs/ffi-queries-dispute-process.pdf>
- ▶ Query stage unchanged except principal inspector may now speak to duty holder
- ▶ Dispute panel previously comprised two HSE managers and an independent person. Now to be chaired by an independent lawyer (AG civil panel) and two independent people with experience of health and safety management



New dispute process - continued

- ▶ HSE will provide the panel with all relevant information that was available to the inspector on which their decision was based. The consent order term was as follows: *“Subject to any need to protect sensitive material, HSE will disclose and recorded information/evidence upon which HSE seeks to rely to show that FFI is payable”*.
- ▶ 60% of respondents to consultation were in favour of there being a different process where the amount of the fees is small and/or there is no dispute about material breach. HSEW considering options. Note OCS NoC was for just over £2,000. Further there have been some very large invoices.
- ▶ Panel will have the discretion to hold a meeting in *“exceptional circumstances”*
- ▶ HSE will suspend the dispute process until the outcome of an appeal of Improvement/prohibition notice or prosecution decision is known



THE END

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