EMPLOYMENT TRIBUNALS

Appellant: **Mr A A Wilson**

Respondent: **Mr D Coackley (one of Her Majesty's Inspectors of Health and Safety)**

Heard at: Nottingham

On: 10, 11 February and 19 March 2021

Before: Employment Judge Smith
Mr R Jones
Mrs L Lowe

Representation
For the Appellant: In person
For the Respondent: Mr J Millington (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that prohibition notice P/22/06/2020/DAC/01 is affirmed but modified to omit reference to Section 2(1) of the Health and Safety at Work etc Act 1974

REASONS

Introduction

1. By way of an ET1 form presented to the Employment Tribunal on 15 July 2020 the Appellant (Mr Adrian Allan Wilson) appealed the prohibition notice issued to him by the Respondent (Mr David Coackley, one of HM Inspectors of Health and Safety) on 22 June 2020. The prohibition notice reference number is P/22/06/2020/DAC/01.

2. The grounds of appeal were clarified by Employment Judge Camp at a preliminary hearing which took place on 18 September 2020. There are two, and they are set out as follows:

    (1) The prohibition notice was unreasonably issued and, in particular, that the Respondent's conclusion that the Appellant's activities were dangerous was irrational; and,

    (2) The circumstances in which the notice was issued amounted to an abuse of process and, in particular, that the Respondent had no right in law to go into the Appellant's home, where he was carrying out the activities the prohibition notice relates to, and that a police officer – Sgt Hunter – misinformed the Appellant that the Respondent had a warrant permitting the Respondent to enter his home.

3. The Respondent resists the appeal in its entirety.

4. The Tribunal heard live evidence from the Appellant on his own behalf, from the Respondent on his own behalf and from Mr Craig Watkins (Safety Officer & Gas Manager at Coleman UK Ltd, trading as Campingaz/Sevylor). Each witness had produced a witness statement. The Tribunal was also presented with an appeal bundle amounting to some 133 pages, within which reference was made to three items of video footage. That footage was also presented to the Tribunal and was viewed. The Appellant also presented a small number of additional documents, which the Tribunal considered.

5. At the outset of the appeal hearing the Appellant made an application for the hearing to proceed in "secret", under **r.50 Employment Tribunals Rules 2013**. The application was advanced by the Appellant on two grounds and it was refused on both, for the following reasons:

    (1) The first was his contention the publicity or wider dissemination of the video footage as a result of it being shown at the hearing might put his neighbour (who had taken the videos) at risk and might infringe her **art.8** rights under the **European Convention of Human Rights**. The Tribunal took the view that an order that the hearing be heard in "secret", or in private, would not prevent the wider dissemination of the footage where this is already in the hands of third parties, as this footage is, even if the neighbour's **art.8** rights were engaged. Equally, an order would not prevent the naming of any individual such as that who took the videos. That individual does have **Convention** rights including **art.8** but it was difficult to envisage how a private hearing would prevent harmful publicity to her in a case where the videos have already come into the hands of a third party.

    (2) The second argument advanced by the Appellant regarded public safety. He argued that if the videos are disseminated others might take up cylinder filling, perform it unsafely and that as a result there is a risk to the public safety. We found that argument unconvincing. Whilst that could not logically be excluded as a possibility it appeared to the Tribunal to be a very remote possibility. Furthermore, even if that argument came within the ambit of the **Convention** it would plainly be one that is outweighed by the interests of

open and public justice, carrying out the proportionality exercise as we are required to do. As **r.50(2)** makes plain, we are required to give full weight to the principles of open justice; we considered that to be a heavy burden and one that was not outweighed in this case.

6. The Tribunal proceeded to hear evidence and submissions, and following a day of deliberations we determined the appeal.

Findings of Fact

7. In or around 2014 the Appellant decided to explore the possibility of refilling and selling Campingaz cylinders. Such cylinders are used to store butane, which is a liquified petroleum gas (LPG) and marketed widely for recreational use. LPG is highly flammable and heavier than air. Prior to embarking upon this venture he undertook searches on the internet into the quantities of LPG that one could keep without having to obtain a licence. He did not undertake any training on the subject of refilling such cylinders, whether from Campingaz, Calor Gas or any other source. Whilst the Appellant concluded that he was competent to carry out such refilling, by his own admission the information he was able to find about it and the legality of doing it was "very sketchy".

8. The Appellant began selling Campingaz cylinders (model numbers 904 and 907) around the same time. In the early part of his venture, although it is not clear precisely when, the Appellant purchased full and partially full cylinders and sold them to members of the public. Shortly after this time he began to acquire empty cylinders for the purpose of refilling and selling them on to the general public. He did so with the intention of passing on the funds acquired to an organisation the Appellant described as a charity, "Friends of Sherwood Forest". A screenshot of the Friends of Sherwood Forest website appeared in the bundle and described the *"sale of Campingaz as* [its] *main source of funding"*.

9. In his schedule of loss the Appellant quantified that his venture resulted in the sales of approximately 10 cylinders a week with a profit margin of £20 per cylinder. He estimated that the loss of funding to Friends of Sherwood Forest at between £5,500 and £8,800. It is clear that the funds acquired by the Appellant in respect of his selling refilled Campingaz cylinders was not insubstantial.

10. In 2017 the Nottinghamshire Fire and Rescue Service requested entry to the Appellant's house to carry out a home safety visit. The Appellant refused to grant the Fire Service permission to enter.

11. On or around 18 June 2020 Nottingham City Trading Standards Service received a complaint regarding the Appellant's activities. The complaint was that he was *"decanting large calor gas bottles, tipping it upside down into smaller camping gas bottles in his back garden – he gets small/rusty cans & camping gas bottles and sands them down and sprays them blue to sell. He does have weighing equipment that he uses once filled the bottles. It may be that he sells them at a market as he packs them into his boot at 5am in the morning."* That complaint was reported to the Health and Safety Executive by Ms Hanson of Trading Standards on 18 June, and the matter referred to the Respondent.

12. Shortly after this the Respondent made preparations to attend at the Appellant's property with the intention of doing so on 22 June 2020. He arranged to be accompanied by Sgt Hunter and another unnamed officer of Nottinghamshire Police, Ms Bailey of Trading Standards, and Mr Wright of Calor Gas. Sgt Hunter contacted the Appellant in advance and the Appellant told him that he would refuse entry to any persons unless they had a warrant.

13. The Respondent and the accompanying persons attended at the Appellant's house shortly after 11.30am on 22 June 2020. Whilst the Appellant expressed his unhappiness about the visit, he did permit the Respondent and the group to enter his back yard through a side gate.

14. The Respondent did not have a warrant to enter the Appellant's property. He considered that he had the power to enter under **s.20** of the **Act**. The Respondent told us, and we accepted, that the word "warrant" is used in general parlance amongst health and safety Inspectors to refer to their "instrument of appointment" card which evidences their appointment to that office. We accepted that the Appellant was told by Sgt Hunter that the Respondent had a "warrant" and that this was a genuine, if mistaken, assumption on his part. That reference to a "warrant" was to the power of entry Sgt Hunter understood the Respondent had, under **s.20**.

15. The Respondent took photographs of the scene in the Appellant's back yard. These photographs were produced to the Tribunal and appeared in the bundle at pages 49 to 56.

16. Whilst in the back yard the Appellant and the Respondent had a discussion. That discussion concerned the Appellant's activities, the equipment that was present in the back yard, and the process used by the Appellant to refill Campingaz canisters. The Appellant described his process to the Respondent in the following terms:

    (1) The Appellant had a 15kg Calor Gas canister and a number of smaller Campingaz cylinders in his back yard. That was evident from the photographs.

    (2) The Appellant's filling method was described as placing the 15kg Calor Gas cylinder on a small work bench, upside down, and connecting it to one of the smaller Campingaz cylinders using a hose. The smaller cylinders would be filled by gravity. The hose was evident from the photographs, although the complete set-up of the equipment was not.

    (3) The Appellant said that he checked the cylinders were full by using "experience" and by using a set of scales commonly used to weigh luggage. These scales were evident from the photographs. The scales themselves were not calibrated, which in the Respondent's opinion meant they were potentially inaccurate. The Appellant's method for checking their accuracy involved him weighing items for sale on eBay and comparing the readings given by his scales and those given by the scales at the Post Office. The Appellant told us that he could be reasonably sure of accuracy to within one or two grams.

(4) The Appellant described the nature of his activities in selling the refilled Campingaz canisters and his purpose of funding the Friends of Sherwood Forest.

(5) The Appellant said that he checked for gas leakages by running his thumb around the seal of each cylinder. He told the Respondent he had portable gas detector but when questioned, he could not confirm what type of gas it was designed to detect.

17. In the same discussion the Respondent mentioned to the Appellant the fact that there is a Code of Practice regarding this kind of activity. That is the UKLPG Code of Practice 12:2005 Recommendations for Safe Practice in the Design and Operation of LPG Cylinder Filling Plants, produced by the UKLPG which is the trade association for the LPG industry in the UK. The Tribunal was shown a copy of Section 5 of that Code of Practice, which concerned cylinder filling operations appeared at page 69 in the bundle. The Appellant asked the Respondent questions about the Code of Practice on 22 June 2020 and he appeared to be unware of its existence. In evidence the Appellant confirmed that he did not know of its existence at the time.

18. The Appellant carried out his activities in his back yard. The Tribunal was shown the photographs (referred to above) and three items of video footage (to which we shall return). From this we were able to ascertain that the space in which the Appellant was carrying out refilling was outdoors but nevertheless highly confined. It was surrounded on three sides by high brickwork, both of the Appellant's own property and that of his neighbour. The yard also had a number of wheeled refuse bins and other large objects situated inside it, further confining the available space.

19. At the conclusion of his attendance on 22 June 2020 the Respondent removed some 19 Campingaz cylinders from the Appellant's premises.

20. The video footage was not available to the Respondent at the time he and his party attended at the Appellant's house. It was provided to him on 29 June 2020 by Trading Standards, who had originally acquired it from the Appellant's neighbour. It was the neighbour in fact who had taken the footage of him carrying out his refilling activities in his back yard, from the vantage point of her property. This footage was shown to the Tribunal and, although those items of footage were relatively short they did show the Appellant carrying out his refilling process. The videos showed the following:

(1) The first showed the upturned 15kg Calor Gas cylinder on top of the work bench, connected to a Campingaz cylinder via the hose. The Appellant is sitting down next to the work bench for most of this footage but at one point is seen to stand and pour water from a kettle over the upturned foot of the Calor Gas cylinder. Having done so, the Appellant then entered his house and left the equipment unattended.

(2) The second showed the Appellant using spray paint to colour a Campingaz cylinder. That was the Appellant's standard practice, following which he would apply a flammable warning sticker. The information label that normally appears on such cylinders in addition was obliterated by this practice. Such

labels inform consumers of the contents of Campingaz cylinders and include directions for their safe use, such as “Do Not Heat” and “Do Not Destroy”. Prior to the spray painting the Appellant ground down any rusted parts of the cylinders.

(3) The third showed the Appellant sitting next to the work bench with the upturned 15kg Calor Gas cylinder on top of it, connected to a Campingaz cylinder by the hose. The 15kg cylinder is seen to wobble. We found that the 15kg cylinder was inadequately secured to the workbench as a result, and that this was typical of the Appellant’s set-up and process.

21. Mr Watkins was not present at the Appellant’s property on 22 June 2020. He became involved on 30 June 2020 when the Respondent approached him via email to discuss the concerns he had about the Appellant’s activities. The Respondent forwarded him the videos referred to above, and a discussion took place. Mr Watkins sent the Respondent some information about the industrial refilling process and set out his concerns about the Appellant’s activities in an email (pages 106-107 of the bundle). We shall return to his expressions of concern later in this judgment.

22. At the hearing the Tribunal was also shown a photograph of a drain located in the Appellant’s back yard, close to the area in which he was carrying out his refilling activities. The Appellant suggested that this drain had within it a water trap. The Respondent was unable to comment. The Appellant’s contention was that the existence of a water trap would prevent leaked LPG from entering the drainage system. The Tribunal was provided with no evidence that would have substantiated the Appellant’s assertion and for this reason we did not accept it.

23. This issue had been raised as a concern by the Respondent, who told us – and we accepted – that because LPG is heavier than air it will naturally fall and if in doing so it falls into drains that can be problematic. Mr Watkins told us more specifically that if LPG entered into the drainage system it posed a risk of explosion. Given his experience in this field and the clarity with which his evidence was conveyed, we accepted it as fact.

24. The location where the Appellant was carrying out his activities was in close proximity to his kitchen. The Respondent described in evidence the potential sources of ignition might be present in or around a domestic house, pointing to the examples of static, a neighbour coming outside to smoke a cigarette or to the use of light switches and other domestic appliances. On this same matter Mr Watkins drew a contrast with gas plants where all such switches and appliances would be rendered “intrinsically safe” so that they would not produce a spark.

25. Whilst the Respondent was under the initial impression that the Appellant may have been involving other people in his activities and could not exclude the possibility that this may include persons who could be described as employees, this impression turned out to be erroneous. It arose because the Appellant referred to himself as “we”, indeed suggesting that there was more than one person involved in his activities. He often referred to himself, in the singular, as “we” at the hearing itself. The prohibition notice issued to the Appellant on 22 June 2020 was therefore issued under **s.2(1)** – the provision covering the duties of employers *vis-*

à-vis their employees – as well as **s.3(2)**, by the Respondent acting under this entirely genuine misapprehension.

26. In his ET1 the Appellant assured the Respondent that he *"will not be bottling Gas again."*

The industry Code of Practice

27. Section 5 of the UKLPG Code of Practice (referred to above) makes detailed recommendations which the Tribunal found to be of material importance to this appeal, as follows:

    (1) 5.3 – *"All personnel carrying out the filling operation should always have received the level of training required to allow them to carry out all duties expected of them competently and safely, including a complete understanding of the plant operating procedures and site evacuation plan."*

    (2) 5.3 – *"The scales used for check weighing should have been approved by Weights and Measures Division of the Department for Trade and Industry, have been regularly serviced, and checked for accuracy. If filling scales are themselves approved by Weights and Measures… they should be subject to a daily checking regime."*

    (3) 5.4 – *"When filling by weight, care should be taken that the tare weight of each individual cylinder is correctly set on the filling scale, and that the correct nett weight is set."*

    (4) 5.4 – *"Where cylinders are to be filled by volume they should be proved to be completely emptied of liquid before being sent for filling."*

    (5) 5.5 – *"… checks should be in place to ensure that all cylinders are being correctly fitted within the appropriate tolerance."*

    (6) 5.5 – *"Cylinders should be checked for absence of leakage from any source including valves and fittings. Leaking cylinders should be made safe immediately… Faulty seals should always be replaced."*

    (7) 5.5 – *"All appropriate labels, valve sealing caps or plugs and any valve protection caps should be fitted before leaving the filling area."*

The witnesses' assessment of risk

The Appellant – Mr Wilson

28. The Appellant contended that he was competent at carrying out his activities because, he said, *"I just have a natural ability to undertake various tasks. I know what's required. I understand the physics."* Given his complete lack of training in relation to LPG filling, the Tribunal did not accept that the Appellant was in a position to determine for himself that his activities did not pose a risk of serious personal injury. On his own admission, the Appellant knew from before he started carrying out his activities that there were risks and dangers involved. The fact that

he carried out internet searches to determine some of the legalities of what he intended to do confirmed to us that he had some appreciation that the risks posed by his activities were of much greater seriousness than the case he pursued in this appeal.

29. Furthermore, the Tribunal did not accept the Appellant's evidence that *"customer satisfaction"* or the fact that hitherto his activities had resulted in no accidents were factors which supported his assertion that the activities did not pose the necessary risk.

The Respondent – Mr Coackley

30. It is factually correct that the Respondent did not himself observe the Appellant carrying out his refilling process; he took the Appellant's word as amounting to an accurate statement of the activities in question, and based his opinions on safety and risk on that account.

31. At paragraph 19 of his witness statement the Respondent summarised his opinion on the safety risks posed by the Appellant's activities. We accepted that this paragraph was an accurate expression of his opinions and he was not challenged about them in cross-examination. He formed the view that,

> "… *the filling activities being undertaken by the Appellant involved a risk of serious personal injury or even death. There was no proper equipment for the filling of the canisters, and a real risk of a leak which could then ignite and lead to an explosion. Balancing a cylinder upside* [down] *on a "workmate" type bench did not appear to be very stable and* [had] *the cylinder fallen physical damage could have led to a gas escape. There were also drains nearby. LPG is heavier than air and if released could easily get into the drains. He was doing this in his back yard/garden with a neighbour very close – and was putting both himself at risk but also anyone who lived nearby or was in the area. I felt this risk was so serious that it needed to be stopped immediately…".*

Mr Watkins

32. Mr Watkins fairly accepted that he had only viewed the short video footage and whilst he may not have seen the full extent of the Appellant's activities, he was able to base his opinions concerning safety and risk purely on the footage he viewed. In his witness statement Mr Watkins stated, and we accepted, that each cylinder contains 350 times its own volume, compressed. He said, and we further accepted, that,

> *"In the event of an explosion the radius affected would be approximately 50-100 metres. In the event of fire, the fire brigade would have no idea how many cylinders were on site, endangering their lives."*

33. In cross-examination he also added that,

> *"Your neighbours could have a barbeque and you could have spillage. You would blow the roofs off and walls down and those people would not be*

expecting to go out in their garden and get blown up. It leads on to [the Appellant] *endangering everyone in the vicinity."*

34. The judicial member asked Mr Watkins what might happen if there had been a gas leak at the Appellant's location. His reply, which we accepted as a factual expression of his view, was:

"It could result in an explosion. It could result in death or serious injury, not only to the person undertaking the filling but to people in the vicinity such as neighbours. An explosion in a confined area such as where the filling operation was being undertaken could result in damage to property as well."

35. At paragraph 10 of his witness statement Mr Watkins set out some 13 individual concerns about the risks posed by the Appellant's activities. We similarly accepted that these sub-paragraphs were an accurate statement of his opinions and did not agree with the Appellant that Mr Watkins was lying, the suggestion of which having initially been made in cross-examination. On the risks identified, Mr Watkins's evidence was considered, properly explained and consistent with his witness statement even under challenge. The Appellant ultimately and rightly withdrew his allegation that Mr Watkins was dishonest. The 13 individual concerns he expressed were largely based upon the key components of the UKLPG Code of Practice referred to above, and were:

(1) *"Total disregard of all filling practices – no duty of care applied by the person conducting the illegal filling to those around him, both in the immediate vicinity and beyond.*

(2) *No duty of care for those around him. The cylinder contains 350 x its own volume compressed into the cylinder. In the event of an explosion the radius affected would be approximately 50-100 metres. In the event of fire, the fire brigade would have no idea how many cylinders were on site, endangering their lives.*

(3) *None of the filling equipment is tested or complies with any regulation.*

(4) *No safety checks on the valve or cylinder before passing on to his 'customer' resulting in a possible danger of leakage.*

(5) *No recognised standard of weighing the cylinder – danger the cylinder could be over-filled.*

(6) *If the cylinder is out of test date and being filled, this is another example of a dangerous practice and neglect.*

(7) *Filling in a confined space – no gas-leak monitoring equipment.*

(8) *Filling next to a domestic property, leading to potential to damage to neighbouring premises as well as his own in the event of an explosion.*

(9) *No storage facility – normally cylinders are stored in secure cages.*

(10) *Removal of the text panel (observed when seeing the spraying operation) – therefore no hazard warning to the end used – the fire brigade or others have no idea of the explosive nature of the contents.*

(11) *No signage on the premises to warn or indicate of the activity.*

(12) *The end user and further end user has no idea if the gas has been modified.*

(13) *The end user and further end used has no idea of any points on the integrity of the cylinder, including cylinder health, valve, and quantity of gas within the cylinder."*

36. The Tribunal noted that in his evidence Mr Watkins made reference to the Appellant's activities as being *"illegal"*. Whilst we accepted that that was his understanding, we make no finding about whether it was indeed illegal and the Respondent did not adopt the position that it was. It is not necessary for us to do so.

37. In addition, at paragraph 11 Mr Watkins stated, and for the same reasons as expressed above we accepted, that,

"I had a lot of concerns about what I saw on the videos. In my view, this was a very risky and dangerous operation, which could have led to an explosion. Given the location in which the operation was being conducted (i.e. a domestic garden/yard) and the potential 50-100m radius for that explosion, and the other cylinders which were being stored on site, this could have seriously injured or even killed not only the person conducting the filling operation, but also neighbours or passers-by, and any members of the fire brigade or emergency services who were called to deal with the incident. It was extremely dangerous and in my view it was essential that it was stopped immediately."

38. Neither the Respondent nor Mr Watkins were challenged about the fact of their observations of the Appellant, his equipment and his activities. Furthermore, save as above the Appellant did not substantially challenge the evidence the Respondent and Mr Watkins gave as to their opinions regarding the risk of serious personal injury posed by the Appellant's activities. We found the Respondent and Mr Watkins to be truthful and compelling witnesses who gave accurate accounts of what they did observe and cogent explanations of the risks as they understood them.

The Law

Power to enter premises

39. **Section 20** of the **Health and Safety at Work etc Act 1974** ("the **Act**") confers certain powers upon Inspectors of health and safety appointed under **s.19** of the **Act**. Insofar as its provisions are material to this case, this section provides that:

(1) Subject to the provisions of section 19 and this section, an inspector may, for the purpose of carrying into effect any of the relevant statutory provisions within the field of responsibility of the enforcing authority which appointed him, exercise the powers set out in subsection (2) below.

(2) The powers of an inspector referred to in the preceding subsection are the following, namely –

(a) at any reasonable time (or, in a situation which in his opinion is or may be dangerous, at any time) to enter any premises which he has reason to believe it is necessary for him to enter for the purpose mentioned in subsection (1) above;

(d) to make such examination and investigation as may in any circumstances be necessary for the purpose mentioned in subsection (1) above;

(f) to take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (d) above; [and,]

(m) any other power which is necessary for the purpose mentioned in subsection (1) above

40. For **s.20** purposes, the word *"premises"* is defined by **s.53**. Unlike other parts of the **Act** it does not distinguish between *"domestic"* and *"non-domestic"* premises. It provides as follows:

"premises" includes any place and, in particular, includes—

(a) any vehicle, vessel, aircraft or hovercraft,

(b) any installation on land (including the foreshore and other land intermittently covered by water), any offshore installation, and any other installation (whether floating, or resting on the seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof), and

(c) any tent or movable structure…

Prohibition notices

41. **Section 22** of the **Act** provides that:

(1) This section applies to any activities which are being or are [likely] to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.

(2) If as regards any activities to which this section applies an inspector is of the

opinion that, as carried on or [likely] to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as "a prohibition notice").

(3) A prohibition notice shall—

(a) state that the inspector is of the said opinion;

(b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;

(c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and

(d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied.

42. The word *"risk"* in the context of **s.22** is to be given its ordinary meaning, conveying the idea of a possibility of danger (**R v Board of Trustees of the Science Museum [1993] 1 WLR 1171**, Court of Appeal).

43. In relation to the *"activities to which the statutory provisions apply"* referred to in **s.22(1)**, above, **s.3(2)** imposes a statutory duty on *"every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health and safety"*. In this regard,

    (1) A *"self-employed person"* for this purpose is defined by **s.53** as *"an individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others"*; and,

    (2) An *"undertaking"* for this purpose is defined by **reg.2** of the **Health and Safety at Work etc Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015** ("the **Regulations**"), either as one listed in the **schedule** to the **Act**, or *"where it is not listed… may pose a risk to the health and safety of another person (other than the self-employed person carrying it out or their employees)"*.

Appeals against prohibition notices

44. By **s.24(2)** of the **Act**, a person on whom a notice is served may 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. By **s.82(2)** of the **Act**, modifications include additions, omissions and amendments.

45. The task for the Employment Tribunal in determining appeals against prohibition notices is to examine the notice itself. Whilst the opinion of the Inspector is one relevant factor to which we should have regard, the Tribunal's task involves an evidential inquiry into the facts and a determination of whether the activities carried out by the person in question *etc.* did in fact give rise to a risk of serious personal injury. If on the facts there was not, at the material time, such a risk then the prohibition notice may be modified or cancelled depending on the circumstances of the case. (**HM Inspector of Health and Safety v Chevron North Sea Ltd [2018] UKSC 7**, Supreme Court).

Conclusions

46. The Tribunal's unanimous judgment in relation to the matters in issue in this appeal is set out below. However,

    (1) Issues 1 and 2 equate to the Appellant's second ground of appeal, namely his contention that the circumstances in which the prohibition notice was issued amounted to an abuse of process and, in particular, that the Respondent had no right in law to go into the Appellant's home, where he was carrying out the activities the prohibition notice relates to, and that a police officer – Sgt Hunter – misinformed the Appellant that the Respondent had a warrant permitting the Respondent to enter his home.

    (2) Issue 3 equates to the Appellant's first ground of appeal, namely his contention that the prohibition notice was unreasonably issued and, in particular, that the Respondent's conclusion that the Appellant's activities were dangerous was irrational.

47. The Tribunal considered that the logical approach to dispose of this appeal was to consider the grounds of appeal in this order.

(1) Did the Respondent have the power to lawfully enter the Appellant's property?

48. The Appellant submitted that **s.20** conferred no such power upon the Respondent because, he contended, the word *"premises"* within **s.20(2)(a)** did not include domestic premises such as his house. He said that provision was only apt to cover premises to which the public would have some form of access, giving the example of a flat above a shop. The Appellant was unable to direct the Tribunal to any authority in support of this proposition. We considered carefully the definition of *"premises"* as set out in **s.53**, which is very broad and contains no such qualification of the kind the Appellant contended. The Respondent directed us to other parts of the **Act** which do draw a distinction between *"domestic"* and *"non-domestic"* premises and emphasised that the same distinction does not apply to **s.20** cases.

49. We rejected the Appellant's submission and determined that the word *"premises"* within **s.20**, as defined in **s.53**, included private dwelling houses such as the

Appellant's house. Had Parliament intended to draw the kind of distinction contended for by the Appellant it could have done so, as indeed it had done in other parts of the same piece of legislation. The definition provided by **s.53** was admittedly broad but unambiguous, and there was no proper basis for us to read into or otherwise infer such a distinction in this instance. In our judgment, the Respondent's contention was to be preferred and for **s.20** purposes *"premises"* did include the Appellant's property.

50. Further, in our judgment the Respondent did have the authority to enter the Appellant's property. He did not need a warrant. That power to enter was conferred upon him by **s.20** of the **Act**. As we have found, the Respondent entered the property with the agreement of the Appellant; it was therefore consensual. Furthermore, we have found as a fact that it was the Respondent's genuine belief that it was necessary for him to enter on 22 June 2020 because of the risk of serious personal injury that he had reason to believe existed at that property by virtue of the Appellant's activities. Whilst unfortunate, the fact that Sgt Hunter may have mistakenly referred to the Respondent's power to enter as a *"warrant"* was not, in our view, of any materiality to the question of whether the Respondent did indeed have a lawful basis for entering.

(2) Did the provisions of the Act apply to the Appellant?

51. In furtherance of his abuse of process argument the Appellant submitted that the provisions of the **Act** did not apply to his situation, for a number of reasons. The first of these related to his contention that the *"activities to which the statutory provisions apply"* referred to in **s.22(1)** did not include his activities because what he was doing was not for his own personal gain but for the benefit of a charity. We have made no finding on whether the Friends of Sherwood Forest is indeed a registered charity as no evidence was provided of the same.

52. As to the activities being carried out by the Appellant, as we have found these involved placing a 15kg Calor Gas cylinder on a small work bench, upside down, and connecting it to one of the smaller Campingaz cylinders using a hose. The smaller cylinders would be filled by gravity. This was done so that the Appellant could sell the refilled cylinders; he did indeed sell them and obtain money for doing so. He used that money to fund Friends of Sherwood Forest. For this reason it was clear to us that the Appellant fell within the definition of *"self-employed"* as set out within **s.53** because whilst he was not acting under a contract of employment he was nevertheless acting *"for gain or reward"* even though the monies he acquired were passed on to Friends of Sherwood Forest.

53. However, the Appellant's general contention appeared to us to be illogical. If his assertion was correct in law, HM Inspectors of Health and Safety would have no competence to enter into premises being used for charitable activities even when there was a clear and present risk of serious personal injury. In submissions, pursuing this logic further Mr Millington referred to the Live Aid concert or other such enormous undertaking to which, by virtue of its charitable purpose, the reach of the Inspectorate would not extend despite the presence of thousands of people and possible risks to their safety.

54. The Appellant directed us to no authority which supported his position. We considered that the language of the statute was plain and unambiguous and the kind of distinction the Appellant contended for could not be supported upon a proper reading of **ss.22** or **53**. Given its inherent absurdity and the absence of any statutory or judicial authority in support, we rejected his submission. The suggestion that the Respondent's entry into the Appellant's premises amounted to an abuse of process was, for the same reason, similarly absurd and was rejected.

(3) Was there a risk of serious personal injury?

55. This question is the essential one for the Tribunal to determine, based upon its findings of fact. Whilst the Appellant has stated, and we have accepted, that he has given an assurance to the Respondent that he will no longer be *"bottling Gas"*, the question for the Tribunal is whether in carrying out such activities there is a *"risk of serious personal injury"* as defined by **s.22(2)**. The fact that the activities have ceased does not mean that there would not be a *"risk of serious personal injury"* if they were carried out. It appears to us that the purpose of the legislation, in light of **Chevron**, is to consider whether the necessary risk did exist at the time the prohibition notice was issued.

56. Despite his evidence, in submissions the Appellant conceded that his activities gave rise to the necessary risk of serious personal injury, but that as a *"responsible, competent person"* the level of risk in his case was *"minimal"*. His disagreement with the Respondent was about the degree of risk; essentially, the Appellant contended that the Respondent (and Mr Watkins) had exaggerated the level of risk. Mr Millington submitted that the level of risk as the Respondent, and Mr Watkins, saw it was commensurate with and supported by the evidence.

57. The Tribunal agreed with the Respondent and Mr Watkins' views on the level of risk, but given the Appellant's concession that the necessary risk had been established it was not necessary for us to make findings as to its gravity above what **s.22(2)** requires. The Tribunal is purely required to determine whether the Appellant's activities gave rise to a *"risk of serious personal injury"* and the Court of Appeal has defined *"risk"* in the context of **s.22** as conveying the idea of a possibility of danger (**R v Board of Trustees of the Science Museum**).

58. Whilst we agree with the Respondent and Mr Watkins' views on the level of risk, our determination is a factual one. For the reasons expressed in this judgment, we fully accepted the factual assertions made by the Respondent in paragraph 19 of his witness statement, and those made by Mr Watkins in paragraphs 10 and 11 of his witness statement. We further accepted the additional explanations they gave in evidence, as set out in our findings. To us it was clear that the methods adopted by the Appellant would give rise to precisely those risks and the possibility of danger as identified by those witnesses. We are reinforced in our view having viewed the photographs and in particular the video footage. The risk of serious personal injury did exist at the material time, in precisely the ways the Respondent and Mr Watkins described. The Appellant's contention that their views were irrational could not be sustained and we had no hesitation in rejecting it.

Outcome

59. For these reasons, we affirm the prohibition notice but modify it so as to exclude reference to **s.2(1)** of the **Act**. The Appellant was carrying out his activities, for the purposes of the **Act**, as a self-employed person and not an employer. Whilst we have accepted that the Respondent took a precautionary view about this at the time given the Appellant's use of the word *"we"* when referring to himself in the singular, and that that was the reason for the inclusion of reference to **s.2(1)**, it was superfluous. The correct provision under which the notice was issued was **s.3(2)** of the **Act** alone.

Appeals from the Employment Tribunal

60. Appeals from the Employment Tribunal in prohibition notice cases are governed by **s.11(1)** of the **Tribunals and Inquiries Act 1992**. Such an appeal must be presented to the High Court, not the Employment Appeal Tribunal. The time limit for doing so is set out in **Civil Procedure Rule r.52.12(2)(b)**, which provides that any appeal must be filed 21 days after the date of the decision of the lower court which the Appellant wishes to appeal.

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Employment Judge Smith

Date: 23 March 2021