

'FFI Six Months On.....'

Ron Reid Partner, Shoosmiths LLP



Ron began by giving us some brief details about his team at Shoosmiths and their work. Ron explained that he runs a team which 'sits on both sides of the fence', prosecuting on behalf of the HSE and also taking prosecutions on the employers behalf.

HSE and Charging:

Ron reminded us that the HSE has, since 1975, had the ability to charge (under S43(2) HSWA) for services, although it never has. It should be remembered that there is no fee for verbal advice, fees arise from proactive as well as reactive visits. Costs are calculated in 6 minute units and the cost of specialist advice can also be claimed in addition to the £124 per hour. The original estimate for costs recovered in a full year was £43.6 million. Currently, the recovery costs are 39 million. Charges are not retrospective and cannot apply to employees, only companies. Remember that, like COMAH, the hourly rate can be raised.

If the inspection lasts three quarters of an hour and the breach comes to light at the end, the charge will be for three quarters of an hour. Non-payment is a civil debt and therefore has to be recovered in a civil court. Ron admitted that he knows of no court action as yet.

Don't Want to Pay?:

Appeal against your Notice if you think it is incorrect. There is a process if you want to dispute the Fee (see Ron's slides www.bhsea.org.uk). If an initial review, carried out by a Principal Inspector does not resolve the situation, the Appeal will go to a 'senior HSE Manager' i.e. the Head of Operations. If the dispute is still not resolved, the matter is referred to a disputes panel consisting of a senior HSE manager with operational experience; an HSE senior manager from HSE's planning, finance and procurement division and an external member drawn from industry or trade unions. Ron challenged the independence of this Panel, which seems heavily weighted in favour of the HSE. HSE could out vote 2 to 1 and Ron raised the issue of whether a QC might challenge the Panel and its independency from a Human Rights perspective.

If there is an intention to dispute the fee, Ron recommends that the breakdown of the fee is asked for and checked. Perhaps there is an opportunity to blame someone else and/or claim that someone else is also in breach?

Peter Galsworthy recommended that the employer should not be afraid to ask why there has been a material breach leading to the issue of the Notice, or to challenge the HSE about how the decision to issue the Notice under the EMM has been arrived at.

What About Consultants?

Ron suggested that consultants need to think about their terms and conditions of employment. Could there be any claim on the consultant if something is missed in the audit?

Where Are Breaches Occurring?

Following a Member's question, Peter reported that the Field Operations Division is taking the 'lions share' of the Notices and therefore doing the ground breaking work. Ron advised that no particular industry is in court more than any other however there have been a few good FFI cases in the food industry and involving bakeries.