

## THE HSE'S CHIEF LEGAL ADVISER CONFIRMS TO TURNSTONE LAW TEAM BARRISTER, BEN RICH, THAT UNCHALLENGED FEE FOR INTERVENTION NOTICES CAN BE USED IN A CRIMINAL PROSECUTION AS AN ADMISSION OF GUILT.

*Companies who pay fees for HSE's inspections without appealing, may find their decision is used in any criminal prosecution as evidence that they admit there was a material breach. Speaking to Ben Rich in January 2013 (just after the first FFI invoices were sent out), the HSE's Chief Legal Adviser, Peter McNaught, said it would be wrong to rule out any class of evidence, even where the criminal case turned on whether there was a contravention at all.*

Firms who refuse to pay invoices issued under the HSE's Fee for Intervention scheme could face court action even before the criminal case, however he said the HSE would have to think "long and hard" about whether to start civil proceedings if the contravention was disputed.

In a wide ranging interview in the week after the first round of invoices were dispatched, Mr McNaught told Ben Rich that 1,419 bills worth over £700,000 were sent out, covering October and November 2012. Around one in ten were for more than £1000; seven out of ten were for less than £500.

In the longer term, the Fee for Intervention scheme could raise one pound in every eight spent by the HSE, an estimated £37 million. "It is a concern that our inspectors will be seen as having to raise money" Mr McNaught said, "but they have been exercising their judgement about notices for many years and are used to making fair decisions about these sorts of issues. Clearly if notifications are being given when they should not be, then there will be disputes and people will not pay."

1

The HSE will be allowed to keep up to £23 million of the fees in 2014-2015. The rest will go back to the Government. Mr McNaught said that should reassure duty holders worried that inspectors would be looking for excuses to charge. "Because we have to give the excess to the Treasury there is no incentive to aim at a maximum. There are no targets for the organisation or individual inspectors".

### INTERVIEW WITH PETER McNAUGHT

*Peter McNaught has been at the Health & Safety Executive for 4½ years, first as Head of Enforcement and more recently Chief Legal Adviser. Before joining the HSE he worked in the CPS which he joined when it was created in 1986. Mr McNaught spoke to Ben Rich in the week after the first invoices of the fee for intervention scheme were sent out.*

**Ben Rich:** How many invoices were sent out?

**Peter McNaught:** Our Board has just been given the first figures for this. For the October and November 2012 period, 1,419 invoices sent out. The total value of those was £727,644.81. Of those around 10% were for more than £1000, 70% were for less than £500, and 30% were for less than

For Further information about Turnstone Law, please see [www.turnstonelaw.com](http://www.turnstonelaw.com) , email [admin@turnstonelaw.com](mailto:admin@turnstonelaw.com) or call +44 (0) 20 3664 8226.

£200. That leaves 20% which were between £500 and £1000.

**Ben Rich:** One concern that has been raised with is that if people pay your invoices, and then there is a criminal prosecution, the fact that they paid will be used effectively as a confession, an admission of the breach.

**PMcN:** This is not an unusual situation. The same dilemma arises where an enforcement notice is issued and complied with. A duty holder might be concerned that by not appealing the notice it is an acceptance of the contravention. That evidence is adduced in court sometimes. It can be to show that there were practical precautions which could have been taken. In other cases the issue at stake is not whether or not there was a contravention, so the notice is just background. We cannot give any future assurances of the way in which evidence will be used in any particular case. Equally we are not actively looking at using them in criminal trials.

**BR:** Normally companies receiving a bill might consider just taking a commercial decision to pay it, on the grounds it is not worth the expense and effort of challenging it. But if it might be used against them in court, that puts them in a quandary doesn't it?

**PMcN:** A large percentage of our prosecutions result in guilty pleas. And a large number indicate failures that will not be defensible in court. Companies can still take those decisions. They might decide there is a risk it will be used against them. We will have to consider what we do on a case by case basis. They can make their decision and then if they decide not to pay, we will have to take an individual decision on whether we should take civil proceedings to recover the fees. It is difficult to generalise about this but if there was a situation where the issues in the criminal trial are clearly the same as the issues that are the subject of the contravention that led to the fees being incurred we would have to think long and hard about whether we should start any civil proceedings [to recover the fee] before the criminal case. In any case those proceedings could be stayed by the court pending the criminal prosecution.

**BR:** You cannot say, though, that there is any policy that the fact that a company paid your invoice will not be used in court as evidence that they admit the material breach even where the fact of that breach is the issue in the criminal case?

**PMcN:** No. Even where the contravention is the issue in the criminal case, we cannot say we would never enforce the fees, or use the fact that fees have been paid as evidence the contravention is accepted. It would not be right for us to take a blanket policy decision like that. We could not properly make an advance decision that a whole class of evidence that might be relevant and admissible would not be used.

**BR:** What was the idea behind the fee for intervention scheme?

**PMcN:** After the coalition government came to power in May 2010, the Minister for Employment published his views in terms of the future direction of health and safety law, and his idea was a reduced number of pro-active inspections, i.e. not in response to a complaint or an incident. We

For Further information about Turnstone Law, please see [www.turnstonelaw.com](http://www.turnstonelaw.com) , email [admin@turnstonelaw.com](mailto:admin@turnstonelaw.com) or call +44 (0) 20 3664 8226.

were already of the view that it was wrong to define good outcomes in terms of the number of inspections. We wanted to move away from effectively random inspections which the Government felt was a burden on business, and go to places where we thought there was more likelihood there was something needing looking at. The second driver was the government's intention to reduce the grant in aid. The initial settlement with the Treasury was a 35% reduction in funding over three years. That made us focus on how helpful it would be to maintain the level of activity but reduce our dependence on central Government. It was either make inspectors redundant or find ways of paying for some of our current activities.

**BR:** Doesn't this just amount to a regulatory fine without having to go through a prosecution?

**PMcN:** We have been very clear that it is not a regulatory fine. It is directly related to the costs we incur for performing our functions, and not linked to seriousness of the breach.

**BR:** Can you give a brief description of how it works? What is the process that leads to an invoice being issued?

**PMcN:** The first step of the process is for the written notification of contravention to be issued by the inspector. Once that has been done the inspector records the time that he has spent on that work, which is payable at £124 an hour. That is calculated according to a general Government formula used by all departments who make these sorts of charges. It is designed to cover all the HSE's costs including back office, personnel and so on, so full recovery of the cost incurred. Then he will insert the hours done into our system, and that will automatically result in an invoice in due course.

3

**BR:** You are going to issue invoices every two months. Will those cover all chargeable work that has been done over the 2 months, or will people generally get the bill all at once at the end?

**PMcN:** Every two months all the chargeable work will be billed out, so a duty holder could get a number of invoices as the investigation proceeds.

**BR:** What happens if the duty holder successfully appeals against a notice?

**PMcN:** If there is an appeal against an improvement notice and it succeeds, the HSE must pay back any costs associated with that notice, or the part of it that is quashed.

**BR:** How serious does a breach have to be before Fee for Intervention would be triggered?

**PMcN:** Material breach is not defined in the Regulations. The word does not even appear there. The payment is determined on there having been a contravention where the inspector thinks a written notice should be issued. There is guidance that goes with the Regulations, called HSE/47, and within that there is guidance about how to determine whether a breach is material. That judgement uses existing measures which determine the level of action, including the enforcement management model. We give examples there of the types of issue that will result in fees being payable. There

For Further information about Turnstone Law, please see [www.turnstonelaw.com](http://www.turnstonelaw.com) , email [admin@turnstonelaw.com](mailto:admin@turnstonelaw.com) or call +44 (0) 20 3664 8226.

could be situations where an inspector decides that, for example, written advice should be given, but where he also decides that no fee will be charged. At the top end, a prohibition notice is very likely to involve a material breach. At bottom end breaches might be seen where the seriousness of the breach, or the response of the duty holder, are such that no fees would be charged. We are aware that duty holders are concerned about the discretion being given to the inspectors, but they exercise that sort of discretion already in relation to notices and prosecution decisions and they are used to making fair decisions on these sorts of issues.

**BR:** If the notice is appealed, are the invoices frozen?

**PMcN:** No. If the recipient appeals they will still receive the invoice and then they will have to decide whether to pay it. If they decide not to, then it is open to us to go to the civil courts to enforce payment. There is no policy that says we would not do that before the appeal is decided; it would have to be decided on a case by case basis.

**BR:** How much money is supposed to be raised from the new fees?

**PMcN:** We estimated that the fee for intervention scheme could bring in £37million a year. Of course our records up to now do not record the sort of detailed information we will need for deciding invoices so we have had to make some working assumptions. The agreement with the Treasury is that for the last six months of 2012-2013 HSE can keep £10m of whatever it raises. In 2013-2014 it's £17m and after that in 2014-2015 it's £23 million. This reflects the fact that many of our current investigations pre-date the scheme, and no charges will be levied for those. Anything above those figures will be kept by the Treasury.

4

**BR:** What do you say to people concerned that you will have a strong incentive to get as much money from this as possible

**PMcN:** Well because we have to give the excess to the Treasury, you might say that while we have an incentive to raise the 10, 17, or 23 million we do not keep anything above that so there is no incentive to aim at a maximum. There are no targets for the organisation or individual inspectors. We want inspectors to exercise their judgment in the way they have done up until now. That is not to say there will not be management control or checks on how the scheme is operating.

**BR:** What proportion of your budget will be funded by this?

**PMcN:** The total HSE budget is currently £170m. So you can see that this year that would be around 6%; in a couple of years if we raised £23 million it would be around 13-14% assuming our budget stays the same. Of course these days you can't be sure the budget won't go down!

**BR:** You're a public sector organisation, you have budgets and projections for a few years ahead and these figures must be in your plans already?

**PMcN:** If we do not raise that money we will have to find efficiencies but there are other things we

For Further information about Turnstone Law, please see [www.turnstonelaw.com](http://www.turnstonelaw.com) , email [admin@turnstonelaw.com](mailto:admin@turnstonelaw.com) or call +44 (0) 20 3664 8226.

are doing in terms of IT, estate, shared services, which would enable us to do that. We wouldn't necessarily have to start losing inspectors or cutting back the inspection work.

**BR:** It's inevitable isn't it that inspectors will feel under pressure to raise enough money from the inspections, or at best the duty holders will be worried that inspectors will feel under pressure?

**PMcN:** The regulations are clear in HSE/47 about when charges can be levied, but clearly if notifications are being given when they should not be then there will be disputes and people will not pay. We would have to demonstrate that the decisions had been properly taken in accordance with the policy and guidance.

**BR:** You can understand that there will be concern that inspectors will be inclined to find breaches so that they can charge fees.

**PMcN:** It is a concern that our inspectors will be seen as having to raise money. Perhaps surprisingly we got quite positive responses in the pilot studies. Many duty holders said fair enough, we've breached the rules and so it's fair we should pay £500 or whatever for the costs. Of course they were not actually being charged for it [in the pilot].

**BR:** Do you worry about the image of health and safety as being about stopping the rest of us doing perfectly reasonable things?

**PMcN:** I do worry about that. The one thing that I found noticeable when I arrived here was the attitude, the approach and commitment of the HSE people, especially the inspectors. They had a really strong sense of the public value of the work they were doing, and a very balanced approach to the way they do it. That is shown by the fact that we only bring about 600 prosecutions a year. That is very few compared to the number of investigations.

**BR:** What is your favourite health and safety myth?

**PMcN:** The conkers one is the one that keeps getting brought up, that children were banned from paying conkers because of health and safety concerns. A recent one I heard about concerned our Chair, Judith Hackett. She was at her daughter's graduation and they had a professional photographer there who had set up a special background to take photographs against. They had put up a barrier saying "no-one beyond this point for health and safety reasons". But it was clear that the real point was that they did not want people getting close enough to use their own cameras and exploiting the special background!

**BR:** Peter McNaught, thank you for speaking to me.

***This interview by Turnstone Law team barrister, [Ben Rich](#), first appeared in the 2 Hare Court Regulatory Crime Newsletter.***

For Further information about Turnstone Law, please see [www.turnstonelaw.com](http://www.turnstonelaw.com) , email [admin@turnstonelaw.com](mailto:admin@turnstonelaw.com) or call +44 (0) 20 3664 8226.