

Resounding decision in favour of health and safety inspectors

04 Jun 2013 Health and safety law

What was the case about?

On 8 March 2011, Mr Henry Whale was killed while working at Mangaohane Station, near Taihape, when a tractor he was driving tipped over and crushed him. Two health and safety inspectors (one of whom was Ms Utumapu) went out to the Station to commence an investigation under the Health and Safety in Employment Act 1993 (the Act).

Ms Utumapu sought to arrange an interview with two of the employer's directors. They said they would not meet her until a written summary of the proposed questions was provided, along with a number of documents.

Ms Utumapu declined to provide actual questions, but set out the general areas to be covered in the interview. This included a focus on relationships, roles and responsibilities, health and safety management, and health and safety practices in the workplace including conditions, materials or equipment that affect employees working on the station.

Subsequently, she issued a formal notice requiring the directors to attend the interview. The directors instead took judicial review proceedings, claiming that Ms Utumapu had acted unlawfully in requiring them to submit to an interview without the detailed information sought.

High Court

The High Court declared the inspector's actions unlawful. The Court said that an inspector is required to provide a broad indication as to the purpose of the interview and the types of allegations which the interviewee might face. Further, the 'conditions' the inspector could ask about pursuant to section 31(1)(f) were limited to the physical environment of a workplace, rather than the systemic methods of identifying and addressing hazards, and the adequacy of these methods.

The Court also ruled that where the employer is a company, the inspector could not nominate, or require the employer to nominate, a person to be interviewed on the employer's behalf.

Court of Appeal

The Court of Appeal disagreed and set aside the High Court's declaration. The Court said that the statutory provisions setting out inspectors' powers were 'unequivocal'. Inspectors can ask questions and interviewees are obliged to answer them, except where this would incriminate the interviewee.

Further, the Court said a corporate employer can be required to answer questions and make a statement, and the inspector is entitled to stipulate either by name, title, or both, the person or persons required to answer questions or make a statement. This goes further even than the approach taken by the former Department of Labour prior to the High Court's decision. The Department's practice was to require the employer to put one person forward for interview on its behalf, but to interview others on a voluntary basis.

Finally, the Court said that an inspector is not bound to provide the interviewee with a broad indication of the purpose of the interview and the type of allegations which may be made – this would be to 'impose a gloss onto the inspector's powers'. The general information provided by Ms Utumapu was fair and she was not required to provide more specific details.

Practical tips

In light of the Court of Appeal's judgment, employers (and their legal advisors) would be well advised to reassess their strategies for participating in health and safety investigations. Some practical tips include:

- taking steps to identify at an early stage the most appropriate people for interviews, so that if the inspector wants to carry out interviews, the employer can put forward the most appropriate people (bearing in mind that the inspector can require others if they think this is necessary)
- liaising with their legal advisers to ensure as far as possible that internal investigations and discussions about the investigation process and strategy are protected by legal privilege; and
- ensuring any individuals who are required by a health and safety inspector to attend interviews or answer questions fully understand the process. This will include making sure they are clear about the obligation to answer questions, subject to the privilege against self-incrimination.