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Andrew Eyles
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24 September 2010

Dear Mr Eyles,

## RE: Consultation on the publication of ORR Enforcement Notices – TSSA Response

I am writing to you on behalf of the TSSA to reply to the invitation to participate in the consultation regarding the ORR's proposals for the publication of its Enforcement Notices.

From the outset, I can state that TSSA agrees with the approach that the ORR is proposing. The reasons highlighted under the heading "Issues" on the second page of your letter of 6th July adequately sum up the need for information that may affect our members both in terms of avoiding delays by early publication and keeping employees and their representatives informed.

There are occasions when the first that we know about the award of an Enforcement Notice is when it appears in the post. Members often advise us about issues and even the involvement of the ORR but it is not until the final notice is sent through that we know how serious the Regulator regards the matter, and in some cases that your inspectors have been involved. It is certainly the case that employers who are being investigated rarely keep the trade unions informed on such matters.

We would support the early publication of notices so that, where necessary, we are able to make representations on behalf of our members who may have been affected by the act or omission rather than waiting until after an appeal period, which can be delayed (paragraph 2.7, page 8 of Impact Assessment). Clearly, we are mindful of the continuation of the appeal period, acknowledging that it may affect the final content, or even award, of an Enforcement Notice.

One point that we would raise is that paragraph 8 of your letter states that you "currently" provide trade unions with copies of notices served. In paragraph 9 the proposal is to publish "summary" information on your website and may, where you consider it "appropriate," draw this information to "the attention of interested parties" in accordance with s28(8) of HSWA. The two points that we would raise in this regard are that:

1. ORR should supply the trade unions with copies of both the summary notice and the final notice in all circumstances. This is what happens now in respect of final notices and is currently sent by the appropriate inspector. Our concern is the use of the words "where we consider it appropriate" which allows the possibility, however remote given s28(8), that the trade unions may not receive that information. Section 28(8) appears not to impose any restrictions in supplying information, only that it should also be sent to the employer as well;

2. Of the amount of information that will be contained in a summary statement of the enforcement notice. Without seeing an example, it is hard to agree or disagree with the format that a summary notice may take. Our fear is that it could be meaningless, other than as an alert, but what you are proposing is implicitly more than this. With this uncertainty in mind, we would want to see a standard format for the summary notice that clearly identified the employer, those affected, the issue(s) and the required remedial action. Indeed, given the way many existing enforcement notices are relatively brief and direct, we would suggest that the actual notice is made available but with the caveat around a possible appeal.

Moving on. We would assume that there is an inaccuracy in paragraph 3.4 on page 9 of the impact assessment. It appears to suggest that "only four" of over 130 issued notices "have been unsuccessfully appealed," ie that the balance have all been successfully appealed. Surely, this should mean that only four have been successfully appealed because the point that is being made is that despite an opportunity to appeal, few are actually successful, adding to the reasons to publish details earlier (and our concerns about the content of summary notices).

Finally, we would also question why employers should be given a three day period before publication of summary notices (paragraph 3.5 of Impact Assessment). If the issue is about getting information into the public domain then that should take place immediately. Those employers at fault will often be aware of the potential for the issue of a notice from their interaction with the inspector and so will have had plenty of opportunity to prepare themselves for subsequent questions over the identified breach. It sounds almost like the employer at fault is being given a chance to prepare a defence or justification for what has happened, something that the appeal stage is designed to cater for.

In closing, we look forward to your response to our comments.

Yours sincerely

Rob Jenks
Policy Advisor