

CONSULTATION ON RISK ASSESSMENT

Introduction

A complaint common from union reps is that too often they are not consulted adequately – or at all – about risk assessments that employers have carried out. This could happen in a variety of areas but one where this can particularly be seen is when new accommodation is provided for workers or existing workplaces are refurbished.

This Reps Bulletin is designed to address these issues by drawing on the law, codes of practice and relevant publications so that reps can know where they stand and how they can challenge situations where consultation is inadequate, or even where reps have been forgotten or ignored all together.

The legal position

1) Background

The recently re-issued Brown Book that gives guidance on the Safety Representatives and Safety Committees Regulations 1977 (SRSC Regs) draws attention to Section 2(6) of the Health and Safety at Work Act 1974 (HASAW Act).ⁱ This Section puts a *duty* (or obligation) on employers to consult safety representatives *"with a*

view to the making and maintenance of arrangements which will enable him and his employees to make and maintain arrangements that will enable employer and employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees" and thereafter checking that these measures work.

As the Brown Book notes, "the arrangements for cooperation are an indicator of employer commitment: the priority given to protecting people's lives."

2). SRSC – obligation to consult

The obligation imposed by Section 2(6) of HASAWA is reflected in the duty on employers to consult, where a union is recognised, with safety reps under Regulation 4A of the SRSC Regs.ⁱⁱ These Regulations require that:

"Employers must consult safety representatives *in good time* with regard to matters concerning their health and safety at work."

3). Defining "in good time"

But what does "in good time" mean?

Whilst not defined, according to the Brown Book (at Paragraph 41), 'good time' means that "before making

decisions involving work equipment, processes or organisation which could have health and safety consequences for employees,” employers should “allow time to:

(a) provide health and safety representatives with information about what they propose to do;

(b) give the health and safety representatives an opportunity to express their views about the matter in the light of that information; and then

(c) take account of any response.”

4).Does the duty include risk assessments?

Under the Management Regulations,ⁱⁱⁱ employers have a duty to assess the health and safety risks that their employees are exposed to while they are at work. They are also under a duty to supply that information, together with details of preventative measures, to employees.

In addition to the general risk assessment duty, employers are also obliged to tell employees about specific preventative measures, including in relation to fire safety and evacuation procedures, noise levels at work, first aid, etc (see Appendix 1 of the Brown Book).

Regulation 4A of the SRSC Regulations requires employers to consult health and safety representatives about all of these risk assessment matters before telling employees about what has been decided and before they make changes (see Paragraph 37(c) and 38-

40 of the Brown Book). In fact, the guidance makes practical suggestions about the experience of workers contributing to formulating risk assessments, especially when it is remembered that co-operation between employees and employers is at the heart of health and safety.

In addition, Appendix 3 of the Brown Book lists a number of other legal requirements where safety reps should be consulted, including on risk assessments.

Appendix 3 also references the obligations to consult under the Construction (Design and Management) Regulations 2007 (CDM Regs 2007).

Consultation in connection changes to accommodation and work places

The CDM Regs 2007 were replaced on 6th April 2015 by new regulations with the same name (referred to here as CDM 2015^{iv}).

The CDM 2015 regs apply:

- “to the whole construction process on all construction projects, from concept to completion;”
- And describe what “each duty holder must or should do to comply with the law to ensure projects are carried out in a way that secures health and safety.”

Inherent throughout the CDM 2015 regs is the need to identify and manage risks at all stages of a project.

Within the provisions of CDM 2015 is an acknowledgement of the general duty to consult 'in good time' with union appointed safety reps, where a union is recognised, as required by the SRSC Regs.^v

CDM 2015 identifies specific duty holders associated with each phase of the inception, design and construction of a building, allocating each role particular health and safety responsibilities.^{vi}

On this basis, it is the 'principal contractor' who is the person who should "plan, manage, monitor and coordinate health and safety in the construction phase of a project"^{vii} and, therefore, has responsibility to consult and engage with workers,^{viii} including around managing risks.

In addition, during the design phase of a project, the designers are required "to address health and safety issues from the very start" of the process because the "earliest decisions can fundamentally affect the health and safety of those who will construct, maintain, repair, clean, refurbish and eventually demolish a building. The health and safety of those who use a building as a workplace may also be affected."^{ix}

Reps Action

One of the issues with CDM 2015 appears to be the absence of the

requirement to involve workers from the outset in the design of a building.

However, TSSA would argue that whilst the CDM 2015 guidance relates to the actual phases of construction of a building, the duty is still on the employer wishing to relocate staff into the premises to ensure consultation takes place "in *good time* concerning health and safety issues related to their work" (SRSC Regulations 4A).

Earlier in this Bulletin reference was made to the standard of consultation in relation to "in good time" (see page 1 and 2). In practice, what this means is that reps should be consulted before decisions have been made about a proposal. In their dealings with employers, therefore, reps should point to this requirement, insisting that genuine consultation, in accordance with the SRSC guidance, takes place.

Regulation 4A(1)(a) specifically describes "the introduction of any measure at the workplace which may substantially affect the health and safety of the employees the safety representatives concerned represent" as a circumstance requiring consultation.

This is a general requirement but HSE guidance^x applies this measure to new equipment as well as to the risks and dangers arising from work and how to get rid of them.

On this basis, and noting the 'in good time' requirement (ie, to be able to influence change), safety reps must be

involved from an early stage in the design of work places to ensure:

- TSSA members have a chance to influence the shape, layout and facilities in the space that they will spend a lot of time working in;
- The experience that members bring in operating work processes are recognised and accounted for (including, for example, space between desks, lighting levels, heights of desks in ticket offices, positioning of IT facilities, etc);
- Identification of risks thrown up by the design and incorporation of measures to remove them;
- Legal standards are incorporated.

And once the design and construction have taken place, then there is the need to be involved with risks associated with revised working practices, fire safety arrangements (including evacuation) and other measures such as house-keeping and the provision of appropriate first aid facilities.

On this basis, reps are recommended to familiarise themselves with the material in this Bulletin and especially the guidance in the endnotes.

TSSA would advise reps who feel that they are not being consulted about risk assessments, including in relation to accommodation changes, that they should raise the issue with their manager stating their legal rights to be

consulted. In the event that nothing changes – or doesn't change sufficiently – then the issue should be referred to the Company's Safety Committee or the appropriate Company Council. Advice on the issue can be obtained from the rep's TSSA Organiser or the Union's Helpdesk.

Acknowledgements and further information

This Bulletin was prepared using the material available from the HSE in the notes below as well as in the updated version of the Brown Book that is available on the TSSA Website (and has been sent to Safety Reps).

ⁱ See:

<http://www.legislation.gov.uk/ukpga/1974/37/section/2>

ⁱⁱ Where a union is not recognised, the Health and Safety (Consultation with Employees) Regulations 1996 apply.

ⁱⁱⁱ See Regulation 3 of The Management of Health and Safety at Work Regulations 1999 at <http://www.legislation.gov.uk/uksi/1999/3242/regulation/3/made>

^{iv} See HSE's "Managing health and safety in construction: Construction (Design and Management) Regulations 2015 – Guidance on Regulations available to download at:

<http://www.hse.gov.uk/pubns/priced/l153.pdf>

^v See Page 9, Paragraph 12 and 13 of CDM 2015 Guidance (link as above)

^{vi} See Table 1, Pages 6 and 7 of CDM 2015 (link as above)

^{vii} See Page 7 of CDM Guidance (link as above)

^{viii} See Pages 42-43, Regulation 14 of CDM 2015 Guidance (link as above)

^{ix} See Page 26, Paragraphs 75 and 76 of CDM Guidance (link as above)

^x See HSE's "Consulting employees on health and safety: A brief guide to the law" available at:

<http://www.hse.gov.uk/pubns/indg232.pdf>