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Our Ref: NK:TM:609038

2 June 2008

Attention: Mr. Steve Davies
Textile Clothing & Footwear Union of Australia
28 Anglo Road
CAMPSIE NSW 2194

By Facsimile: 9787 1561

Dear Sir,

RE: TRANSPORT WORKER'S UNION OF NEW SOUTH WALES v FLETCHER INSULATION (NSW) PTY LTD

We enclose, for your information and records a copy of the Decision of His Honour Chief Industrial Magistrate Hart dated 30 May 2008.

His Honour determines that the Corporation did breach s.136 of the Occupation Health & Safety Act on 6 September 2006 when Mr. Davies an authorised official was obstructed, hindered and impeded from carrying out his site safety inspection and was ordered to leave the premises.

The matter will be listed for mention in the near future for the purpose of setting a date for a sentencing hearing.

Yours faithfully,
W.G. McNALLY JONES STAFF

NATHAN KEATS
Email: nathan@mcnally.com.au

encl

CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION: Criminal

PARTIES:
Informant: TRANSPORT WORKERS UNION OF NEW SOUTH WALES (Mr Anthony Sheldon)

Defendant: FLETCHER INSULATION (NSW) PTY LTD

Case No: 20014071/07/2

Hearing Dates: 15 October 2007, 16 October 2007, 23 November 2007, 17 December 2007, 20 December 2007, 13 March 2008

Date of Decision: 30 May 2008

Legislation: Occupational Health and Safety Act 2000, Section 78, Section 106, Section 136

Magistrate: G J T Hart

Representation:

Solicitor for the Prosecutor
Mr N Keats
W G McNally Jones Staff
Solicitors

Counsel for the Prosecutor
Mr B Docking

Solicitor for the Defendant
Ms K Thomas
Middletons
Solicitors

Counsel for the Defendant
Ms W Thompson

REASONS FOR DECISION

1 The Defendant herein pleads not guilty to a charge of breaching Section 136 of the Occupational Health and Safety Act 2000. The allegation is that the Defendant did obstruct, hinder or impede an authorised official namely Stephen Davies, in the exercise of the official's functions under the Occupational Health and Safety Act 2000.

2 In September 2006 the Defendant company operated a factory at premises situated at Minto in the State of New South Wales. Within the factory a manufacturing process was carried out whereby insulation materials were produced for use in the building industry.

3 Mr Stephen Davies, who was at material times the assistant secretary of the relevant union attended at the site on 6 September 2006 accompanied by organiser Mr Peter Lane for the purpose of conducting a safety inspection at the site exercising a statutory entitlement provided in Section 78 of the same legislation.

4 The facts in this case are somewhat unusual when regard is had to the relevant facts in other Section 136 prosecutions that come before this Court from time to time. In this case the conduct said to constitute an offence under Section 136 did not occur at the time the authorised official initially attended at the site with a view to conducting a safety inspection, but rather, approximately two hours later after a safety inspection had been conducted over a period of some two hours. The Prosecutor contends that the conduct of the Defendant in bringing the inspection to an end and requiring Mr Davies to leave the premises constituted a breach of Section 136. The Defendant submits that the safety inspection had taken place

and that, when all relevant circumstances are taken into account, the action of the Defendant of bringing the inspection to an end did not constitute an offence under Section 136.

5 The Defendant contends that it is entitled to a finding of not guilty for two reasons. The first, in summary, is that the conduct of Mr Davies during the course of the safety inspection was such that the Defendant was entitled to bring the safety inspection to an end without infringing Section 136 of the Act. Secondly, it is submitted that Mr McIntosh, the plant manager representing the Defendant, who was the person who ordered Mr Davies to leave the premises did so in circumstances where he was operating under a mistaken belief as to relevant facts which were both reasonably and honestly held by him. In such circumstances, it was submitted, the Defendant was entitled to be acquitted notwithstanding the nature of the breach which has been held in previous cases to be an offence of strict liability.

6 The allegations made by the Prosecutor are conveniently summarised in the short particulars which are set out in the Court Attendance Notice. The short particulars are as follows:-

1 *Stephen Davies is and was an "authorised representative" of an industrial organisation of employees, namely the Transport Workers' Union of NSW, because at all material times he was an officer of that organisation who was authorised under Part 7 of Chapter 5 of the Industrial Relations Act 1996.*

2 *Mr Davies, as an authorised representative of the industrial organisation of employees, entered the 3 Stoney Batter Road Minto premises of the defendant at about 9.05 am on 6 September 2006 for the purpose of investigation suspected*

breach of the occupational health and safety legislation arising out of any of the following:

a *Information that an actual incident occurred on 2 September 2006 at those premises, in that a finger of Phillip Jenkins was jammed in machine cogs on line 3 and it had been crushed resulting in part of that finger being removed.*

b *Complaints about the guarding of machines and in particular line 3, the slitting blades, the forklift being bogged in the outside area when it rains and fire extinguishers, hoses and reels had not been serviced for some time.*

3 *Mr Davies, as an authorised representative of the industrial organisation of employees, had reason to believe those premises was a place of work where members of that organisation (or persons who are eligible to be members of that organisation) work. The Textile Clothing and Footwear Sub-Branch is and was at all material times a Sub-Branch of the Transport Workers' Union of NSW.*

4 *Mr Davies, as an authorised representative of the industrial organisation of employees, notified the occupier of those premises of his presence on the premises as soon as reasonably practicable after entering the premises, in that he had a conversation with the receptionist, filled in the visitor's book, had a conversation with Alastair McIntosh and at the defendant's request was then accompanied on the inspection by Ms Tanya Wehi who Mr McIntosh said was a member of the safety committee.*

5 *Mr Davies was in possession of an authority issued by the Industrial Registrar under Part 7 of Chapter 5 of the Industrial Relations Act 1996 but was not required to produce the authority by the occupier of the premises.*

6 *During the inspection and after managers of the defendant approached, Mr Peter Lane, another authorised representative of the industrial organisation of employees accompanying Mr Davies, showed the defendant a copy of WorkCover NSW's "FACT SHEET POWERS OF AUTHORISED TRADE UNION OFFICERS".*

7 *Mr Davies, as an authorised representative of the industrial organisation of employees, at about 10.55 am on 6 September 2006 then showed the defendant a copy of section 78 of the Occupational Health and Safety Act 2000.*

8 *The defendant did obstruct, hinder or impede Mr Davies by any one aspect or combination of aspects as follows:*

a The defendant did not let the inspection of Mr Davies continue.

b The defendant directed that Mr Davies get out of the factory.

c The defendant did not allow Mr Davies to do anymore and this prevented:

i The completion of the industrial organisation's inspection notes.

ii The taking of further photographs by Mr Davies.

d The defendant did insist that Mr Davies give 24 hours notice before making an inspection."

7 The allegations found within the short particulars referred to above are, for the most part, facts which are agreed between the parties. In evidence, it emerged that the hand injury suffered by Mr Jenkins had resulted in a crush injury to a finger and not in any part of the finger being removed. The details concerning Mr Jenkins' injury are not material in any event. It is clear that no issue was raised by the Defendant concerning the authority of Mr Sheldon, as secretary of the TWU NSW, to bring the prosecution. Nor is any objection taken to the statutory authority of Mr Davies to attend at the site and conduct a site inspection for safety purposes on 6 September 2006. It is not disputed that persons working at the site included members and persons eligible for membership of Mr Davies' union. Further, it is not in dispute that both Mr Davies and his colleague Mr Lane were at all material times in possession of right of entry permits issued by both the Industrial Registrar of New South Wales under the Industrial Relations Act 1996 and by the Federal Registry pursuant to the provisions of the Workplace Relations Act 1996, and that both were able, if requested, to present such right of entry permits for inspection on the day in question.

8 Given that the purpose of the site inspection was to investigate suspected breaches of the occupational health and safety legislation, there was no requirement for Mr Davies or Mr Lane to provide the Defendant with any notice of the inspection. The legislation does however require such authorised officials to notify the occupier of the premises as soon as practicable after arriving to commence such site safety inspection. In this case this was done. The agreed facts are that Mr Davies and Mr Lane first attended at the reception area within the Defendant's premises and spoke to a receptionist asking to see Mr McIntosh the plant manager. Whilst Mr Davies had not previously met Mr McIntosh, Mr Lane was aware that Mr McIntosh was the plant manager as Mr Lane had visited the site on approximately

three prior occasions in his role as organiser. Mr McIntosh had come out to the reception area and invited Mr Davies and Mr Lane into his office where a conversation took place which would appear to be been conducted with appropriate courtesy and civility on both sides. Mr McIntosh was informed that following the recent injury involving Mr Phillip Jenkins, the union had received some telephone calls from members raising a number of specific safety problems at the site which were not limited to the adequate guarding of machinery which had specific relevance to the Jenkins incident.

9 From the evidence given at the hearing, it would appear that Mr Davies and Mr Lane were endeavouring to explain to Mr McIntosh that they were there to conduct a site safety inspection with particular focus on those matters which had been raised by the members in the telephone conversations referred to. On the other hand, the evidence suggests that Mr McIntosh was himself very strongly focused on the incident on about 1 September 2006 when Mr Phillip Jenkins had been injured. Mr McIntosh had apparently endeavoured, unsuccessfully, to make contact with Mr Phillip Jenkins following the accident and because he had not had the opportunity to speak directly to Mr Jenkins, he was anxious to know what account Mr Jenkins was giving of the accident including what Mr Jenkins was telling the union about the incident.

10 Further, Mr McIntosh, during the initial meeting in his office, was at pains to present himself to Mr Davies and Mr Lane as a person who was committed to occupational health and safety matters, and to inform them that the factory was already undergoing significant improvements to its occupational health and safety policies and procedures.

11 In his evidence to the Court, Mr McIntosh asserted that whilst Mr Lane had been reasonably relaxed at the initial meeting, he thought Mr Davies had been *"confrontationist"* from the outset. However, there is nothing in the evidence to support such an assertion. Having heard the accounts given by Mr McIntosh, Mr Lane and Mr Davies of the initial discussion in Mr McIntosh's office, it would appear that Mr McIntosh had some anxiety about the union visit and was strongly motivated to establish a friendly and informal relationship with the union officials which was not responded to by Mr Davies. Mr Davies apparently remained formal in his manner whilst being entirely civil and professional in the way he carried out his task. I do not find that Mr Davies was in any way *"confrontationist"* upon his arrival at the premises, and in fact the evidence would suggest that all three men conducted themselves in an entirely appropriate, courteous and civil fashion. There was no requirement under the legislation for Mr Davies and Mr Lane to sit in Mr McIntosh's office and discuss the suspected breaches with him. Their statutory obligation was to notify Mr McIntosh, as the representative of the occupier of the premises, that they were on site and conducting a site safety inspection. The fact that they were prepared to sit in Mr McIntosh's office and explain to him in some detail the purpose and background of their visit, and to discuss with Mr McIntosh the matters that he wished to raise with them, especially concerning the Jenkins' incident, contradicts any suggestion that Mr Davies was confrontationist in his approach at the commencement of the visit.

12 Thereafter, Mr McIntosh accompanied Mr Lane and Mr Davies as they began an inspection of the factory premises. There were three processing lines within the factory known as line 1, line 2 and line 3. Mr McIntosh took the two officials immediately to the machine where Mr Jenkins had suffered injury when his finger was caught within the moving parts of

machinery. From the evidence before the Court it would appear that Mr McIntosh wished to demonstrate to the union officials that the machine in question was guarded and was guarded in such a fashion that Mr Jenkins would not have been able to bring his finger into contact with the moving parts of the machine without first removing the guarding. Mr McIntosh apparently wished to discuss with the union officials his surprise that Mr Jenkins would do such a thing in circumstances where the manufacturing process was such that it was a simple matter to turn off the machine before removing the guarding if it were necessary to access the machine to free a blockage or for some other such purpose.

13 This is consistent with Mr McIntosh having a view that the incident involving Mr Jenkins was likely to flow very much from Mr Jenkins own conduct and that he wished the union officials to be aware of that possibility rather than for them to form an unnecessarily harsh view of the company's and his, Mr McIntosh's, concern about occupational health and safety matters.

14 It is not entirely clear how much time in total was taken up with the initial discussion in Mr McIntosh's office and the specific inspection of the machine which Mr Jenkins was using at the time of his accident. However, after those steps had been taken, Mr Davies and Mr Lane proceeded, in the company of Mr McIntosh, to conduct a more general inspection of the premises as a whole. This started with the two process lines that were in operation on the day, and the third line which was down whilst maintenance work was being carried out on it. Mr Davies had with him a pro forma check list for occupational health and safety inspections which had apparently been prepared by or for the union and on the check list he was making notes concerning his observations during the site inspection.

15 The Prosecutor relies on the evidence of Mr Davies and Mr Lane as to the sequence of events which followed. The Defendant relies upon the evidence of Mr McIntosh, Mr Roberts, Mr Diaz and Mr Bugeja. Apart from Mr McIntosh, the Defendant's witnesses were persons who had been engaged in some supervisory capacity by the Defendant at the premises as at September 2006.

16 There are a number of discrepancies in the evidence between the various accounts given as to who was present and participating in the site safety inspection at different times, the content of various conversations, and the order in which events unfolded. In several cases the witnesses were being asked to recall events of more than a year earlier without having been asked to make any record of their recollections during the intervening period. In all of the circumstances, given the frailties of human memory, the discrepancies as to matters of detail and the order in which events occurred are understandable. It is clear that at some point Mr McIntosh took the view that it was inconvenient for him to continue to be personally present whilst the inspection continued. His evidence is that he asked Mr Davies how long the inspection would take and was given an unhelpful response with words to the effect *"as long as it takes"*. Mr McIntosh decided to absent himself from the inspection and informed the union officials of his intention to go and attend to his managerial tasks. The response from Mr Davies was to ask whether someone else could be provided to show him and Mr Lane the rest of the factory, for example, someone from the occupational health and safety committee and, as a consequence, Mr McIntosh left the group and arranged for an employee, Ms Tanya Wehi, to take over the role showing Mr Davies and Mr Lane around.

17 After leaving the inspection group, Mr McIntosh, on his evidence, had a conversation with his superior officer at head office. He also had a telephone conversation with the company's Human Resources Manager. The evidence of Mr McIntosh is that the net result of these telephone conversations was to the effect that the union officials were not entitled to come onto the site and conduct an inspection without first giving twenty-four hours notice and that as a consequence of the failure of Mr Davies and Mr Lane to provide such twenty-four hours notice, Mr McIntosh was entitled to order them to leave the premises immediately and that in the view of the company's head office that was an appropriate course for him to adopt.

18 At about this time Mr Davies and Mr Lane had reached a point in their inspection where they wished to go outside the main factory building and inspect a storage area to the rear of the building where various raw materials used in the manufacturing process were stored. The evidence of Mr Davies and Mr Lane is that one of the safety matters specifically raised by members of the union by way of complaint is that the surface of the storage area was in poor condition, there were pot holes in the bitumen, and in areas where the surface was a dirt surface it was susceptible to bogging when wet because the area was used by employees driving forklift trucks to place and retrieve the stored materials. The evidence is that instead of venturing into this area without prior discussion, Ms Tanya Wehi was informed that they wished to go outside to inspect this area that was used by forklift trucks and specific approval was sought. Ms Wehi indicated that she would need to check with Mr McIntosh as to whether this was in order or not. Ms Wehi went off to find Mr McIntosh to discuss the matter with him whilst Mr Davies and Mr Lane waited for her return.

19 It was not a requirement of the Act that Mr Davies and Mr Lane seek such approval. However, no criticism could be levelled at Mr Davies and Mr Lane for taking such a step. Whether it was taken for reasons of courtesy or whether it was taken out of concern for occupational health and safety issues, it appears to the Court to have been a sensible approach.

20 In any event, Mr McIntosh returned to the group and instead of indicating agreement that the storage area could be the subject of inspection, a confrontation of a verbal type then took place. Given the conflicts in the evidence provided by the various witnesses, it is difficult to reconstruct with any certainty the precise order in which things were said and by whom. The defence version of events is essentially that Mr McIntosh again raised the question of how long the inspection was going to take and upon receiving a reply from Mr Davies that indicated that as far as Mr Davies was concerned the timing was open ended, Mr McIntosh told Mr Davies and Mr Lane that they were to leave the site immediately. Further, he informed them that the reason for his decision was that they were required to give twenty-four hours notice and in those circumstances they were not empowered to be on the site because of lack of notice. Further, Mr McIntosh indicated his dissatisfaction in circumstances where he accused Mr Davies and Mr Lane of having misled him in relation to the question of notice.

21 The Prosecutor's case is that whilst Mr McIntosh may have raised a question earlier concerning the amount of time that would be required to complete the inspection, on this occasion when he returned with Ms Wehi, he made no further enquiry in that regard but simply ordered the inspection to cease forthwith relying on his assertion that Mr Davies and

Mr Lane could not conduct the inspection without first giving twenty-four hours notice, and as that had not been given on this occasion they were ordered to leave the site forthwith.

22 It is clear on the evidence that following Mr McIntosh instructing Mr Davies and Mr Lane to leave the site forthwith that there was a verbal altercation. This involved raised voices, yelling, some swearing and some threats including threats made by Mr Davies to the effect that there would be Court action taken if the inspection was stopped.

23 I am satisfied on the evidence that attempts were made by both Mr Davies and Mr Lane to draw to the attention of Mr McIntosh the wording of Section 78 of the Act, and also to point out to him that the requirement for twenty-four hours notice before exercising a right of entry relates to use of the right of entry pursuant to the provisions of the Industrial Relations Act 1996 but not to a right of entry pursuant to the Occupational Health and Safety Act 2000.

24 It is clear, on the evidence, that at some point in time Mr Lane provided Mr McIntosh with a document referred to as a fact sheet, a publication of the WorkCover Authority of New South Wales, which was a double sided document containing on one side a summary of the relevant provisions of the Occupational Health and Safety Act 2000, whilst on the reverse side was a similar summary in relation to the relevant provisions of the Industrial Relations Act 1996. The evidence of Mr Lane is that he handed the fact sheet to Mr McIntosh prior to Mr McIntosh leaving the group and going to his office after arranging for Ms Tanya Wehi to replace him on the inspection. Mr Lane's version is supported by Mr Roberts who gave evidence that Mr McIntosh showed him the fact sheet in Mr McIntosh's office at about the

time that Mr McIntosh was making his phone calls. Mr McIntosh, on the other hand, recalls receiving the fact sheet from Mr Lane only after he had returned to the group and says that he only had time to skim the fact sheet rather than read it carefully. The Defendant's version of events is that during the verbal altercation that occurred, Mr McIntosh had the fact sheet in his hand and was pointing out to Mr Davies and Mr Lane that the document they had themselves provided made reference to the requirement of twenty-four hours notice. The Defendant's case is that Mr Davies said "*The fact sheet is wrong.*" Whilst the evidence of Mr Davies and Mr Lane is that they both endeavoured to point out to Mr McIntosh that he was reading the wrong side of the fact sheet and should consult the side dealing with occupational health and safety matters, but that the level of heat and agitation had reached a point where everyone was yelling and the matter was not being discussed in a calm and logical fashion.

25 The evidence before the Court is that after Mr Davies and Mr Lane had been escorted to the exit from the building, Mr Lane had gone back to the reception area and had asked to see Mr McIntosh with a view to making one last attempt to get Mr McIntosh to look at the appropriate part of the fact sheet and to give proper consideration to the wording of Section 78 of the Occupational Health and Safety Act. After being kept waiting for some fifteen minutes, Mr Lane was informed by Mr McIntosh that he, Mr McIntosh, was not prepared to discuss the matter any further, and he again ordered Mr Lane to leave the premises.

26 It is clear that Mr Davies and Mr Lane had not finished their inspection at the time they were ordered to leave the premises. In particular, they had indicated a desire to inspect the area which was used by forklift trucks and in relation to which specific complaints had been

made by their members at the site. Further, it is clear that being instructed to leave the site and being physically escorted from the factory to the exit of the building would constitute conduct caught by Section 136, namely conduct which constitutes the obstruction, hindering or impeding of an authorised officer in the exercise of their official functions.

27 The Defendant submits that by the time Mr Davies was instructed to leave the premises, he had had ample time to carry out his inspection of those matters which constituted the suspected breaches of the Occupational Health and Safety Act. The Defendant submits that Mr Davies was acting in an improper manner in the way in which he conducted the inspection, and in those circumstances he was acting outside or in abuse of the authority given to him to conduct such an inspection and in those circumstances the Defendant was not in breach by bringing the inspection to an end. As part of this submission the Defendant relies upon Section 767 of the Workplace Relations Act which provides that a permit holder seeking to exercise rights under the occupational health and safety law of a State in accordance with Section 756 or 757 of the Act *"must not intentionally hinder or obstruct any person, or otherwise act in an improper manner."* In this case the two union officials were clearly seeking to exercise their rights pursuant to the occupational health and safety laws of the State of New South Wales. The occupier of the premises was clearly a constitutional corporation, and in those circumstances both officials attended at the site armed not only with their New South Wales right of entry permits but also with the Federal permits issued by the Federal Registry of the Federal Commission. It is reasonably clear on the authorities that the entitlement of such officials to retain their right of entry permits is subject to compliance with the relevant regime put in place under the Workplace Relations Act which authorises the Industrial Registrar to issue and revoke such permits depending on

matters of compliance and other issues. I accept the submission on behalf of the Defendant that at all material times the entitlement of Mr Davies and Mr Lane to rely upon their Federal right of entry permits is governed by the relevant Federal legislation. This means that any conduct by an authorised official which constitutes obstruction or hindering or improper conduct is susceptible to investigation and censure pursuant to the Workplace Relations Act 1996. The Defendant has not in submissions placed before the Court any basis for an argument that the provisions of the Workplace Relations Act provided the Defendant with an entitlement on 6 September 2006 to itself obstruct, hinder or impede an authorised officer during the course of an authorised inspection.

28 In any event, the evidence advanced on behalf of the Defendant falls far short of establishing any obstruction, hindering or improper conduct on the part of Mr Davies or, for that matter, Mr Lane. It is clear that after Mr McIntosh called the inspection to an end, there was a verbal altercation where there was yelling, angry voices and apparently some swearing. The specific evidence concerning the use of swear words is marked by considerable conflict in relation to who said what. I am satisfied that Mr Davies raised his voice and spoke angrily in response to Mr McIntosh who arrived in an agitated fashion and, with some anger, ordered Mr Davies and Mr Lane to leave the premises. I do not find that Mr Davies used improper language during the course of this argument and in any event, there can be no basis for the Defendant to submit that the decision to obstruct Mr Davies was justified by his language or behaviour following his being ordered off the site. If any conduct or language is to be relied upon as providing the basis for a reasonable decision to bring the inspection to an end, it must obviously have occurred prior to the decision being made.

29 The Defendant also claims that at an earlier stage in the inspection, Mr Davies spoke in an inappropriate fashion to Mr Roberts and used some swear words during the course of the inspection. My view of this evidence is that it constituted an attempt by the Defendant to find some justification for the decision to obstruct that was not necessarily relevant at the time. Evidence given on behalf of the Defendant included evidence which constituted a clear attempt to exaggerate Mr Davies' conduct especially in the evidence of Mr Roberts and Mr Bugeja. I found the evidence of Mr Bugeja most unreliable and that he purported to give detailed evidence concerning aspects of the inspection when it is clear that he was not even present in the inspection group at the time.

30 The evidence before the Court is that when the inspection group visited the process line which was down for the day whilst maintenance was occurring, there were a number of electrical leads and cables lying about in an area that was used for pedestrian traffic and which constituted a trip hazard. The trip hazard operated as a hazard not only for employees of the Defendant but any other persons coming onto the site including Mr Davies and Mr Lane. Pursuant to Section 8(2) of the Occupational Health and Safety Act, the Defendant obviously owed a duty of care to such visitors. The evidence is that Mr Davies noted the trip hazard and made some comment to Mr Roberts to the effect that the leads and cables should be tidied up *"before you kill someone"*. Mr Roberts gave evidence that when Mr Davies had spoken to him in disapproving tones, he also used swear words in the communication. Mr Davies did not recall using any particular swear words on the day although he gave frank evidence to the effect that the particular swear words alleged against him were in use at the factory amongst the employees and members of management and that

when put in context there was nothing offensive or exceptional in the use of such language. Mr Davies gave evidence that on the day no-one, including Mr McIntosh, made any comment or complaint to him concerning language that was used.

31 Not only do I find, on the evidence, that the conduct of Mr Davies was in no way improper, but in any event I find that the defence is simply not available to the Defendant in circumstances where the evidence of Mr McIntosh is quite clear, namely that the decision to order Mr Davies and Mr Lane from the site arose unequivocally from his view that the two officials were required to give twenty-four hours notice and that their failure to do so warranted their removal from the site.

32 In his evidence Mr McIntosh made clear that in his telephone conversations with his immediate superior and with the company's human resources manager, the discussion had concerned the issue of twenty-four hours notice only. Further, at the time he returned to the inspection party he had already received from head office an instruction to the effect that he could and should end the inspection and require the two men to leave the site. The evidence of Mr McIntosh was that in his view he still retained a degree of discretion in relation to the matter, and that if he had come to the view that the balance of the inspection would be extremely short, it would have been within his discretion to allow that to occur rather than have an unpleasant confrontation with the union officials. However, when he returned to the group and formed the view that the inspection was open ended in terms of time, he decided to proceed to put in place the instruction he had received from head office and bring the inspection to an immediate close.

33 Mr McIntosh, when communicating by telephone with his supervisor Mr McClelland, and with the human resources manager, Ms Ray, had conferred only in relation to the issue of lack of notice. There is no evidence of any allegation of improper conduct on the part of Mr Davies either in relation to the use of swear words or the tone of voice that he adopted when speaking to Mr Roberts or any other such matter. Consequently, to the extent that Mr McClelland or Ms Ray was the relevant decision maker within the corporation, it could not be suggested that they relied on the conduct of Mr Davies as a basis for a decision. Likewise, to the extent that Mr McIntosh had the ultimate discretion to make a decision on behalf of the corporation, his clear evidence is that the reason for his decision was the failure of the union officials to provide twenty-four hours notice.

34 In my view, any submission based on the contention that the inspection was taking too long is entirely baseless. It is conceivable that a union official could be tempted to use Section 78 of the Occupational Health and Safety Act for an inappropriate purpose such as conducting inspections of such length and frequency that they create a nuisance at the work site. In this case there is no evidence that Mr Davies or Mr Lane or any other officer of the union had previously conducted a site safety inspection at the premises. Further, it is abundantly clear that this particular inspection was triggered by phone calls from members raising complaints in the context of there having been an incident in the factory during the previous week when one of the members of the union had suffered a crush injury to his finger. The two officials had spent the first hour, or a period of approximately one hour, in the company of Mr McIntosh, firstly talking to him in his office and then going with him to the area where Mr Jenkins had been injured. There is no evidence of any concern being expressed to Mr Davies or Mr Lane during that period of about an hour which suggested

that there was any concern on the part of Mr McIntosh about the amount of time that the inspection might take. After about an hour, Mr McIntosh decided that he had given up enough of his own time and only then made an enquiry as to how long the inspection might take. The union officials were clearly not required to detail the suspected breaches they wished to investigate, they were not required to give an estimate of the time they would need to conduct the inspection and further, they were not required to keep to any particular timetable or schedule in relation to the inspection. Consequently, any concern or anxiety or anger that Mr McIntosh developed in relation to the duration of the inspection, arose entirely from his own lack of familiarity with the relevant legislation and the powers given to authorised officials under that legislation.

35 The second limb of the Defendant's case is that notwithstanding the fact that the offence is one of strict liability, Mr McIntosh had a reasonably held and honest belief that he was entitled to bring the inspection to an end because of the failure on the part of the union officials to give twenty-four hours notice. In cross-examination Mr McIntosh gave candid evidence that he was entirely wrong in his belief, and this had been explained to him some weeks after 6 September when two WorkCover inspectors had come to the site together with Mr Davies and Mr Lane and Inspector Hinton had explained to Mr McIntosh the scheme of the Act and the fact that Mr Davies and Mr Lane had not been required under the legislation to provide twenty-four hours notice. The evidence of Mr McIntosh was that whilst he was aware now of the relevant provisions of the Act as a consequence of the information given to him by Inspector Hinton, on the day in question he had a belief that union officials were required to give him twenty-four hours notice and that they had misled him in relation to their right to conduct the inspection.

36 I accept the evidence of Mr McIntosh that on 6 September 2006 it was his honest belief that he was entitled to bring the inspection to a close for this reason. However, this evidence does not necessarily assist the Defendant. I accept the submission made by Mr Docking on behalf of the Prosecutor that the mistake in question was a mistake of law and not a mistake of fact. In any event, I also find that the honest belief of Mr McIntosh was not reasonably held. The evidence is clear that both Mr Davies and Mr Lane made frequent attempts to provide Mr McIntosh with relevant information concerning their rights. He had every opportunity to take note of the provisions of Section 78 of the Occupational Health and Safety Act which was in clear terms and which was referred to him on more than one occasion. Secondly, it was pointed out to him on a number of occasions that he was looking at the wrong side of the fact sheet and that he should turn the page over and read what was recorded there in a WorkCover Authority document. He refused to listen. Even when Mr Lane went back to see him some fifteen minutes later, Mr McIntosh was stubbornly refusing to listen to what he was being told. He had apparently worked himself up into such a state of agitation that he refused to listen to anything he did not wish to hear. Having decided, in discussion with others, namely Mr McClelland and Ms Ray, that the union officials had misconducted themselves in some way, he was simply not interested in hearing from them and refused to discuss the matter in a reasonable fashion. He maintained his incorrect understanding of the legal position by refusing to consider the information that was provided to him and which would have overcome his ignorance. Whilst his approach had unfortunate consequences, I do not wish to overstate the blame that should be directed to Mr McIntosh. He had taken the sound precaution of speaking to his immediate superior as well as the corporation's human resources manager and he had apparently received incorrect

advice from the company hierarchy. He was the representative of the company at the *"coalface"* endeavouring to project a good image for the company in relation to its occupational health and safety standards, and at the same time endeavouring to have amicable dealings with the union officials only to be informed that he had been misled and deceived by the union officials and that he should go down and engage in a confrontation with them and eject them from the premises. Mr McIntosh was clearly placed in a situation that he was not comfortable with and unfortunately his response to the situation was to become angry and to unreasonably refuse to give the union officials an appropriate opportunity to explain the scheme of the Act which gave them a statutory right to continue with their inspection.

37 Mr McClelland was not called to give evidence in the proceedings and nor was Ms Ray. To the extent that they were decision makers on behalf of the corporation, the only evidence is that provided by Mr McIntosh who had telephone conversations with those company officers. To the extent that Mr McClelland and Ms Ray had an understanding of the relevant legislation, it would appear to have been inaccurate and as a consequence Mr McIntosh was misled not by the union officials but by his corporate colleagues.

38 There is no basis upon which the Court could find that any belief held by Mr McClelland or Ms Ray constituted an honest and reasonably held mistake of fact for the purposes of providing a basis for a defence for this corporate defendant. As indicated above, I accept the submission that the relevant mistake was a mistake of law and in any event the proposition that an erroneous belief is reasonably held must be established by evidence which has been appropriately tested in cross-examination. In this case the only corporate

representative called to give evidence as to the basis of their belief was Mr McIntosh himself.

39 For the above reasons I find that the defence of honest and reasonably held mistake of fact is not open to the Defendant. I therefore find that the Defendant was in breach of Section 136 of the Occupational Health and Safety Act on 6 September 2006 when Mr Davies, an authorised official, was obstructed, hindered and impeded from carrying out his site safety inspection and was ordered to leave the Defendant's premises.

40 In view of the above finding, the matter will be listed for mention in the near future for the purpose of setting a date for a sentencing hearing.

41 I publish my reasons for decision.

G J T Hart
Industrial Magistrate

30 May 2008