

# Trial by the Tyne

## The lowdown on the showdown on the quayside

Following multiple visits by ten different HSE inspectors to his small rural sawmill at Wingates near Morpeth in Northumberland, owner and operator David Troup could be forgiven for thinking the next inspector would be 'Jacques Clouseau'. Contrasting advice from different inspectors; being accused of removing guards that were never there in the first place; presentation (by HSE) of wrongly dated photographs; and the need to inform and educate one inspector on basic machine specification and operation had clearly left this hard working man and his four loyal employees confused and worried about their futures (see *An Inspector Calls*, *Forestry Journal* August 2009).

You read about it in national newspapers and see it on consumer protection programmes, and may even have experienced it yourself, where small businesses and private citizens are treated unfairly by big organisations such as clearing banks and utility providers. The more you try to resolve the situation, the more 'ground soldiers' are thrown at you and the deeper and thicker the quagmire becomes. The predictable cause is poor line management and the failure of top management to grab the situation by the 'scruff of the neck' and resolve it smartly before it gets out of control.

Be that as it may, the Wingates Sawmill saga moved inexorably on in classic 'Pink Panther' style to a full hearing, following David Troup's refusal to withdraw an appeal against a Prohibition Notice (PN) placed on one of his machines, the correct and full specification and description being a 'Jocar 1250 Serra Dupla Log Band Saw manufactured in 1985/6 Serial Number 062'.

The hearing took place on 26 and 27 November at the Employment Tribunal Offices on Quayside, Newcastle-upon-Tyne, with a three-person presiding panel comprising Dr DJ Watt (the Judge), Mrs K Venters and Mr D McGregor. The claimant, David Troup, represented himself. The respondent, Mr Andrew David Mulligan, HSE Inspector at Gosforth, was represented by an in-house lawyer called Darren Dunn. All further statements by and questions posed by HSE during the hearing unless otherwise specified are by

HSE's legal counsel.

The core ground in Troup's appeal was clear, narrow and succinct: a) he had been asked to introduce and install guarding measures that he believed would restrict machine operator visibility and therefore put his workers at risk, which it subsequently did, resulting in a serious accident, thankfully injury free; b) the machine was, and still is, wrongly specified and described on the PN; and c) the terms of the original and still in-force PN were changed contrary to HSE's own guidelines.

For their part HSE claimed the matter was not a test of compliance (with the PN), nor an analysis of the rights and wrongs of advice given (by HSE to Troup), but centred purely and simply around the competence of Mulligan to place the original PN. We sat in anticipation waiting for the 'to and fro' to begin but were disappointed as argument ensued about who should go first.

HSE said convention ruled that they (as respondent) should go first and started to quote all sorts of legal precedents. Troup said the sheer number of inspectors involved in the HSE evidence and many pictures not relating to the machine in question meant that HSE going first would cloud the issues (which it did). He asked the Judge to let him go first with a short chronology of events. The Judge ruled in favour of HSE.

As per convention and by law the two parties had presented their written submissions and evidence to the tribunal (and through it to each other) in March 2009. As the hearing began HSE presented two colour-coded folders (red and blue) to the tribunal. David Troup said these were much thicker (combined) than the single folder he was given in March 2009. HSE said it was the same material but in a different format. David Troup quickly flicked through and realised they contained new materials, omitted materials from March 2009 and contained original pictures with different dates. HSE subsequently admitted there were changes in content as well as format compared with their evidence submitted in March 2009.

David Troup objected saying, "I am not a computer and can-



David Troup with (left) Paul Fox, Jocar operator, (second left) Philip Sparrow, who co-wrote the article in August's magazine, and, (right) friend and neighbour, Ray Noble.

not digest all these changes on the spot." He then offered to go through the new HSE folders item by item (for the Panel's benefit) to identify all the changes. The Judge declined his offer and subsequently encouraged a clearly reluctant David Troup to proceed. At this point a legal counsel for the claimant would have called for an immediate postponement and would almost certainly have got it. David should not have entered this hearing without legal counsel.

HSE were off the blocks with Troup's fears soon justified. HSE witnesses included three front-line inspectors but strangely not Dr Stephen Britton, who made the first visits in January and April 2008 together with, and senior to, Mulligan. Britton had set the ball rolling with an Improvement Notice (IN) on the same Jocar (complied with). His clearly catalytic role subsequently featured prominently in evidence given by Principal Inspector David Cole. It intensified during questioning by David Troup with Cole frequently referring to conversations with Britton about Wingates. This begged the question as to why Britton was omitted as a witness from the hearing by HSE and was not there to answer.

HSE's evidence was wide-ranging with much unrelated to the Jocar and its PN. Newly introduced evidence from HSE soon started to cause confusion. HSE referred the panel to a series of pictures with 'red asterisks' and 'red arrows' but apparently nobody else had them. When it turned out Troup did not have a particular picture, HSE offered to give him theirs. When Judge Watt questioned an HSE witness about a particular picture it turned out to be of a different machine, the subject of its own PN and Appeal.

For these reasons I have not attempted a blow by blow account

(*Forestry Journal* hasn't enough pages) but will cover and consider the key points of Troup's appeal against the PN and questions arising during the hearing about PNs in general. Finally I hope to identify organisational aspects that caused this long drawn out saga (nearly two years) to develop and drag on the way it did. Hopefully others in the industry who may find themselves in a similar situation (heaven forbid!) will find it instructive.

### No first-hand knowledge

Front-line inspectors (as distinct from HSE expert witnesses) visiting Wingates Sawmill lacked, by their own admission, substantive knowledge of the structure, function and operation of wood processing machines individually and within sawmills as integrated wood processing plants. HSE Inspector Graham Watson, who visited Wingates with Mulligan on 4 February 2009 and again on 15 October, was asked in his opening statement if he had wide experience. He said, "I do not have extensive knowledge of machines used in sawmills."

When asked why he did not instruct the duty holder (David Troup) on the most appropriate solution to satisfy demands in his PN, Mulligan replied, "I can tell them what is wrong. I can't be expected to know what the best solution is because I am not qualified."

Watson, asked by David Troup why there were thousands of machines coming into the country carrying CE marks but with much less guarding than he was being told to install, making him feel singled out, replied, "I cannot comment because I don't have first-hand experience. You need to put that question to people with more experience than me."

As a result of this lack of experi-



David Cole and Pam Waldron queue for refreshments during a break in proceedings.

ence, it would appear that any guidance offered to duty holders by the HSE is primarily in the form of HSE publications, or by means of referral to other organisations that the HSE feels can give the advice that they clearly cannot. Under questioning Cole admitted how he suggested David Troup at Wingates, with four employees sawing larch and spruce, could benefit by taking a lesson from Alcan Aluminium UK at Lynmouth, Northumberland, where twin-head band saws are used to cut aluminium ingots. Mulligan went even better, raising the spectre of health and safety at the Nissan car factory just down the road in Sunderland, the largest in the United Kingdom, with robots and a workforce of more than 2500. You couldn't make it up if you tried!

Not one of the front-line inspectors has seen the Jocar in operation. HSE apparently has a specialist 'wood division' although none of its officers has ever visited Wingates in an effort to help solve a clearly protracted problem related specifically to wood processing.

### The Prohibition Notices – accuracy and scope

Principal HSE Inspector David Cole (Mulligan's line manager) told the tribunal how his inspectors always try to visit in pairs. Such a pair arrived on 17 September 2008, returning to issue the PN the following day. Andrew Mulligan arrived with Victoria Wise, who had just arrived from the 'Construction Division' and was being shown the ropes. The pair went all over, inspecting machinery and general 'housekeeping' at Wingates Sawmill. Mulligan said the toilet looked in poor shape and Miss Wise tested the 'pump flush'. They returned the next day with Mulligan issuing the now fateful PN on the Jocar.

Health and Safety in the workplace is a serious business. Incorrectly installed, operated, monitored and

maintained machinery and equipment poses serious risks and hazards and therefore risks to 'life and limb'. HSE laboured the point and coming from a background in Pesticide Application Machinery and writing internationally on 'Condition Monitoring' I can understand why. By the same token any consideration of, and inspection for, health and safety must be equally exacting. Recognition and identification of machine type and specification and comprehensive understanding of how it functions and operates, both standalone and as part of the sawmill operation, is essential and basic. Wrongly identify the machine and you wrongly identify the risk, says David Troup.

Fundamental to David Troup's appeal was misidentification of his Jocar in the PN (ADM 180908/1) issued by Mulligan on 18 September 2008. And there no excuse for this mistake because the Jocar carries a prominent manufacturer's plate saying exactly what it is. When given the hand-written PN by Mulligan he observed the machine was referred to as a 'Jocar Multi Cut Band Re-Saw' and recalls how he immediately objected to the description because the Jocar is neither 'multi-band' nor 're-saw'. Troup told Mulligan that a 're-saw' is hand-fed and therefore the operator is in close contact with the blade, unlike the Jocar which is mechanically fed. Industry standards for the two machines are therefore completely different said Troup. "I was concerned that this misidentification could lead to confusion over what was required." This caused Mulligan to ask, "What is the machine called," to which Troup replied, "A double slabber." Mulligan subsequently entered 'Double Slabber' in brackets on the end but did not correct the original mistake. Troup signed in the margin to this effect assuming that it would be corrected.

But the mistake was never cor-

rected and the subsequent typed PN still says 'Jocar Multi Cut Band Re-saw' but now with ('double scabber') because Mulligan's upper case 'L' could easily be mistaken for an upper case 'C', especially by keyboard operators not familiar with sawmill terminology. If trained officers are not totally familiar with correct terminology, why on earth should typists be?

Troup says the PN was asking him to install systems and safeguards inappropriate to his machine. Mulligan told the tribunal there was only one Jocar in the mill so everyone knew what they were talking about... Really?

It was not until late on day two of the tribunal, during evidence given by HSE expert witnesses (HSE Principal Inspector Richard Wilson and Safety Consultant John Gubb), both with first-hand knowledge of mechanical engineering and hands-on experience of sawmill machinery and sawmill organisation, that the tribunal was actually told the machine was a 'Jocar 1250 Serra Dupla Log Band Saw manufactured in 1985/6, Serial Number 062'.

Risks identified on the PN clearly relate to the operation of the Jocar, yet no inspector visiting Wingates Sawmill has seen the Jocar in operation. Andrew Mulligan, who served the PN – and who has visited Wingates at least eight times since January 2008 – told the tribunal he had never seen the Jocar in operation.

### Prohibition notices – serving and lifting

David Troup says utter confusion describes instructions from, and his dealings with, the HSE. Judge Watt and Mr McGregor said on several occasions how they entirely understood why Troup felt that way, given different inspectors with different views. Many comments, especially from McGregor, implied that what Troup needed was clarity and appropriate expert guidance, rather than simply being told what was wrong but not how to solve it.

And confusion is the best word to describe what happened to Troup after the PN was served. All front-line HSE inspectors giving evidence said they would say what is wrong but not how to put it right. That is up to the duty holder they say. He is the one who knows how the machine functions and operates, and who knows the organisation of his sawmill overall, clearly inferring that they do not. Cole said, "The person who creates the risk solves it. I am not a consultant."

For practical purposes the duty holder can lift the PN, once complied with by remedial work, and according to his judgement machine operation may resume. He doesn't have to call in an HSE inspector or get written permission to restart. Of course, this doesn't stop any inspector arriving afterwards to say the changes fail to fulfil compliance, thus exposing the duty holder to criminal proceedings. As there appears to be no requirement for written 'lifting' of the PN by HSE, the duty holder may get 'the nod' from one inspector, and be in hot water with another, which happened to David Troup.

Mulligan arrived unannounced on 8 December 2008, roughly three months after the PN was issued, since when guarding had been fitted in line with the PN. Mulligan was asked to go over the machine. He asked Troup whether he had blocked the pit off and, seeing he had, said, "That's fine." According to Troup a conversation ensued right next to the Jocar about general business activity. Mulligan asked Troup if he had orders 'to cut', adding that a lot of businesses were quiet. Troup said he had and Mulligan said, "Get on cutting," which Troup reasonably took to mean that the machine by which they were standing was now cleared for use.

Mulligan revisited eleven days later, this time accompanied by his boss, Cole, on the pretext of inspecting his 'welfare facilities'. Cole 'homed in like a hawk' on the Jocar, says Troup, asking Mulligan if the PN was still in place. Without waiting for an answer he said, "Well it is now." This came out in the hearing but with no official HSE written record for support, it became one person's word against another. Troup said Mulligan gave him the all-clear on 8 December 2008 and Mulligan said he did not.

### Prohibition Notice – no change

March 2009 – and the PN is already the subject of an appeal. Troup writes to Cole asking for some clarification over the Jocar. Cole replies the next day (4 March 2009) introducing another part of the machine perceived to be dangerous and not on the original PN – "The chain and sprocket drives associated with the inclined feed and the horizontal chain-drive feed, and take off conveyors."

HSE guidelines over changes to a PN outlined by Cole and other inspectors during the hearing are rigid and clear – a PN cannot be changed. Any additions require a

new PN or another to 'run parallel' to the original.

Troup said this letter changed the terms of the original PN. Under questioning Cole said it did not and apologised saying if the addition misled or confused, that wasn't his intention, and that he was only trying to help. HSE internal guidelines demand that any correspondence to the duty holder, in relation to an existing PN, which introduces material not on the PN, must state categorically that it (the new material) does not relate to the PN. Clearly mindful of the wrong machine identification still on the PN, Cole wrote immediately below the newly introduced item, "For clarification the PN refers to your Jocar Serra Dupla 1250 which is your only Jocar machine."

#### Repairs must not create hazards

Troup's original reservations about the HSE's demands for guarding the Jocar were related to potential loss of visibility by its operator and the hazards thus created. These fears were justified following a potentially serious accident where reduced operator visibility from new guarding resulted in a misaligned log, broken blades and flying metal (see *An Inspector Calls*, FJ Aug 2009). At the hearing Cole said, "Repair should not create hazard," although it appears to have happened in this case. In spite of reporting the incident to HSE it was never investigated, so David Troup asked Cole why not. Cole replied it was forensically impossible to do so.

The argument then returned to the root cause of the accident, with David Troup asking why Cole had insisted that any 'perimeter fence' guarding must be 1.8m high or nothing, with Cole denying he had introduced the 1.8m height requirement at all, instead referring Troup to 'Height/Reach' tables. This proved to be yet another of those 'Oh yes you did, oh no I didn't' sessions which could easily be resolved if front-line HSE inspectors made notes of their meetings and sent copies to duty holders for agreement on content!

The last person to speak was expert witness Richard Wilson, Principal HSE Inspector from Scotland, and one of the UK's most highly qualified and experienced in mechanical and production engineering. He did mention 1.8m as the ideal height for any 'perimeter fencing' for the Jocar but in a qualified way by pointing out it could be as low as 1.1m depending on circumstances and practicability.

David Troup praised the limited discussion he was allowed with Richard Wilson (and consultant John Gubb). He said they were the only ones he had met with technical knowledge, expertise and experience related to sawmilling technology and operation, crucial to solving a now clearly 'out of control' and 'out of perspective' situation. By now Troup had experienced 50 visits/meetings/case conferences and hearings involving just as many different people over and over again to solve guarding requirements for a 25-year-old Portuguese-made mechanically fed log band saw in a tiny sawmill employing four men.

#### Four C words

Competence, clarity, clouding and confusion set apart this two-year saga with its fiasco flavour. The confusion created has clearly hung heavy on a hard-working man running one of the smallest sawmills in the UK, located in what is acknowledged to be an exceptionally exposed and aggressive environment as the name 'Wingates' (Windgates) implies. David Troup is at least producing something, and providing employment for four men, in a region with one of the highest unemployment rates in the country. He clearly deserves a lot more help, consideration and credit than he has been given so far. The extent of the evidence from the HSE cleverly clouded the issues David Troup has with the PN placed on his Jocar. The confusion created, and clarity lost, through insufficient technical knowledge and inexperience of sawmilling machines and sawmilling in general, clearly contributed to a much bigger and longer drawn out situation than there needed to have been.

#### No big bang

Anyone hoping for 'big bang' finale was disappointed, as the hearing drifted towards a classic British fudge, but at least there was the groundwork for a clear lasting solution. Judge Watt encouraged David Troup into last minute discussions with Pam Waldron, Head of Operations HSE (North East), to find a mutually acceptable solution. The net result was David Troup agreeing to withdraw this appeal and another separate appeal. In return the HSE promised to work closely with David Troup via Pam Waldron and Richard Wilson to identify the risks and priorities and thereby agree a written, time-sensitive action plan to resolve the situation. David Troup was happy to accept this, especially

since Richard Wilson is now directly and closely involved. Judge Watt finished by saying he could see David Troup had confidence in Richard Wilson and was pleased the two would be brought together for a quick and lasting resolution.

Pam Waldron, who together with the panel had visited Wingates Sawmill several days earlier, said the issues surrounding the Jocar were now nearly at completion. Both the Judge and Mr McGregor appeared to have come to this same conclusion during their questioning of the three front-line HSE inspectors called to give evidence at the hearing.

Nobody won but both parties are set to gain. David Troup will get what he originally asked for – clear guidance from experts like Richard Wilson who understands machinery and production engineering including sawmill operations. The HSE can reflect on the need to avoid expensive sledgehammers used to crack tiny nuts.

Judge Watt correctly advised how the tribunal was not a 'Court of Law' but its procedures are similar. I would not advise anyone to enter without professional legal representation because, on procedural

grounds at least, they will invariably find themselves at the butt end of a good old-fashioned 'pheasant shoot'.

These are not pleasant events. This one was tight, taut, and tense, and it was not nice watching one working man under onslaught from the combined weight of a big, powerful and all-expenses organisation funded by taxpayers, including small manufacturing businesses like Wingates Sawmill. With power comes responsibility and if you have the power to effectively, albeit indirectly, shut down a business, then there is duty to do it right.

At least there was some lightening up at the end. Pam Waldron asked Philip Sparrow (David Troup's friend and non-legal adviser) if he would open the window. Philip did so and asked, "Do you want to jump out?" Pam Waldron replied, "No, and I don't want to throw anyone out either." Philip then retorted, "I think I have hurt my arm opening the window."

Everyone left presumably feeling somewhat better, if not clearer. I certainly did after a few glasses of excellent 'Newcastle Brown' to clear the clouds before returning to London.

Dr Terry Mabbett

## FCA Members

enjoy a wide range of benefits\* including:

- **Political Representation**
- **Technical advice**
- **10% Trust discount on liability insurance**
- **Discounts from Major Suppliers**
- **FCA News magazine**
- **Monthly E-Newsletter**
- **On-line Directory (your own web presence)**
- **FCA Member Directory**
- **Best Practice CD**
- **FCA Credit Card**
- **Manufacturers' Parts Search**
- **TER Equipment Register**

The Association is currently working on the following issues:

- **Fuel Prices**
- **Training & Certification (a common sense approach)**
- **Weight Loss**
- **Lone Working Systems**
- **Gangmaster Licensing**
- **Urea**
- **Woodfuel**

\* Benefits vary according to membership category.

See [www.fcauk.com/membership.htm](http://www.fcauk.com/membership.htm)

To find out more, call 0870 042 7999

