

Health and Safety: What does it cost?

March 2009

Introduction

The Health and Safety (Offences) Act 2008 ("**the Act**") came into force, on 16 January 2008. The Act increases the maximum fines for a number of health & safety offences as well as extending the range of charges which can result in sentences of imprisonment.

The maximum fine that can be imposed on summary complaint (Sheriff Court (no jury) or magistrates court) has been increased from £5,000 to £20,000 and for many offences includes the possibility of a sentence of up to 12 months in prison. In more serious cases which come before a Sheriff & Jury or the High Court the maximum penalty remains an unlimited fine and up to two years imprisonment. However the Act allows a wider array of charges to be tried in the higher courts and be subject of imprisonment.

It is intended that the Act will result in a real incentive to employers to take their health and safety responsibilities seriously and act as a deterrent to those who may otherwise find ways to avoid them.

Over the last few years there has been a significant change in the public and political attitude to health & safety offences. This has been mirrored by the courts where substantial fines have been imposed.

What factors are relevant?

The recent case of *HMA v Munro & Sons (Highland) Limited 2009* provides a useful insight. A 30-tonne digger rolled off a transport lorry operated by Munro onto the A9 and hit a car killing the passenger and injuring the driver. Munro plead guilty to a breach of the Health and Safety at Work Act 1974 ("**HSWA**") by failing to conduct its undertaking in such a way as to ensure that members of the public who may be affected by its undertaking were not exposed to risks to their health or safety. The Court initially imposed a fine of £3,750 (it was open to them to impose an unlimited fine) and the Crown appealed the sentence on the grounds that it was unduly lenient. The Court of Criminal Appeal agreed and increased the fine to £30,000.

The Court of Criminal Appeal relied upon a list of mitigating and aggravating factors, derived from previous case law, which should be considered when determining the appropriate level of fine:

- Failing to fulfil duties of HSWA that relate to public safety are more serious and Courts can take a more serious view if public safety is an issue;
- Historically fines have been too low (so don't look to previous case law as an indication of what level of fine to expect);
- Fines need not have any correlation with turnover or profit but should be within the company's means;
- The severity of the breach;
- A death resulting from the breach is an aggravating factor and multiple deaths will be considered more serious;
- A breach with a view to profit is a serious aggravating factor;
- Degree of risk and extent of danger – was it an isolated risk or continued over a longer period?
- Mitigating factors will include prompt admission of guilt, steps taken to remedy deficiencies and a previous good safety record;
- There will not be consistency or proportionality of fines between cases;
- Public bodies are not immune but the effect of fine on public services will be considered;
- Where a breach has occurred because of the negligence or inadvertence of an individual that does not reflect fault of the management or training provided, a deterrent sentence on the company is not appropriate.

The lower Court had stated that in imposing the fine, the principal consideration was Munro's ability to meet a financial penalty based on their net profit for the year preceding the hearing. The Court of Criminal Appeal rejected this approach and stated that the gravity of the offence, any mitigating or aggravating factors

together with Munro's ability to pay should be considered. But overall the policy underlying the HSWA and the public interest should be paramount in imposing a fine.

Consultation Paper on Sentencing

The Court of Criminal Appeal also considered the relevance of the Sentencing Advisory Panel's ("the Panel") "*Consultation Paper on Sentencing for Corporate Manslaughter*" (applicable in England and Wales only but not yet finalised) which suggests as a starting point for a death occurring for breach of the HSWA, a fine amounting 2.5% of average annual turnover during the 3 years prior to the offence. Such a fine could be reduced to 1% or increased to 7.5% depending upon mitigating or aggravating factors. The Court of Criminal Appeal concluded it was of some, but limited, assistance in the present case where the overriding factor was punishment in the public interest.

The Panel's consultation paper was recently considered in another appeal against sentence case heard in the High Court: *LH Access Technology Limited and Border Rail and Plant Limited v HMA 2009*. LH and Border pled guilty to breaches of HSWA by failing to provide safe system of work and carry out necessary risk assessments resulting in the death of an employee of Border Rail and were fined £240,000 each. In the appeal, both LH and Border compared the fines to the Panel's recommendation (i.e. between 1% and 7.5% of turnover) claiming the fines were unduly high. In the case of LH it was five times greater than its average annual profit and in excess of 7.5% of its turnover. In the case of Border, the fine was 9% of annual turnover. The Court of Appeal rejected the appeal and reaffirmed the level of fines commenting that any recommendations of the Panel are not in any sense prescriptive and the initial fines were within the range of reasonable levels of fine available.

Business Impact

As a result of the Act, more offences under the HSWA will be subject to an unlimited fine. Moreover, there seems to be a shift toward imposing and upholding greater fines, especially where public safety is or could be at risk. It is clear that the Scottish Courts will not slavishly follow 'one size fits all' guidance proposed by the Panel in England and Wales and therefore it will not be possible to anticipate what level of fine will be imposed based on the turnover of the offending company.

The recent Scottish case of *R v Chargot Limited 2008* reaffirmed that the burden of proof for breaches under

the HSWA is very easily discharged by the prosecution – it is sufficient for the prosecution to prove that the broad underlying principles of the HSWA were not achieved or prevented. With fines on the up and prosecutors sharpening their pencils, it is even more crucial that organisations pay more than just lip service to their health and safety obligations.

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:



Diane Turner

Associate

0141 273 6710

diane.turner@burness.co.uk



Claire Miller

Senior Solicitor

0141 273 6787

claire.miller@burness.co.uk

If you would like to opt out of future e-bulletins, please contact webmarketing@burness.co.uk

Burness LLP

Edinburgh 0131 473 6000

Glasgow 0141 248 4933

www.burness.co.uk

50 Lothian Road, Edinburgh EH3 9WJ Fax: 0131 473 6006
DX ED73 LP60

120 Bothwell Street, Glasgow G2 7JL Fax: 0141 204 1601
DX GW154 LP5

Burness LLP is a limited liability partnership registered in Scotland (SO300380).

The registered office is at 50 Lothian Road Festival Square Edinburgh EH3 9WJ. Lawyers with offices in Edinburgh and Glasgow at which a list of partners is available for inspection.

© March 2009. Burness LLP. All rights reserved.