



February 2016

Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences – Sentencing Guidelines



John MacKenzie

john.mackenzie@shepwedd.co.uk

Kevin Clancy

kevin.clancy@shepwedd.co.uk

As of 1 February 2016, a definitive guideline issued by the Sentencing Council for England Wales comes into effect concerning sentencing of health and safety offences, corporate manslaughter and food safety and hygiene offences. Of particular note is that the guideline applies to all organisations and offenders aged 18 and older, who are sentenced on or after 1 February 2016 (in England and Wales) ***regardless of the date of the offence.***

Introduction

Where once such fines might have been measured in hundreds of thousands of pounds, it is more likely that such fines will now be measured in millions of pounds. In addressing perceived criticisms that the old regime passed sentences that were insufficient (and inconsistent) given the actual harm caused and the financial means of the offender, the message sent out by the new guideline is clear – organisations should now be viewing such regulatory matters as a priority. The guideline also attempts to provide a framework for consistency in sentencing decision-making by judges. However, being able to accurately predict what fine might be imposed in a particular set of circumstances may still remain as tricky post-1 February 2016 as it was before.

In settling upon the fine to be imposed, the Court will now be expected to follow a step-by-step process, with the ultimate aim of imposing a fine that is sufficiently substantial so as to have a real economic impact which will bring home to management and shareholders the need to comply with health and safety legislation. That focus on economic impact is not confined just to turnover but will have regard to matters such as the organisation's profit before tax, directors' remuneration, assets, etc.

Offence Category

The Court must first determine the offence category. That is done by determining the level of culpability (ranging from a flagrant disregard of the law to a minor or isolated incident) and then considering the harm (both the seriousness of harm risk and the likelihood of the harm arising). The latter consideration also includes determining whether the offence exposed a number of workers or members of the public to the risk of harm and whether the offence was a significant cause of harm.

Fixing the Fine

Thereafter, the Court must focus on the organisation's annual turnover in order to fix upon a starting point for the fine. The annual turnover is applied to a matrix that takes into account culpability and harm. For an organisation with a turnover of £50 million plus, that could mean a fine of up to £10 million.

Adjustments

Thereafter, the Court will make adjustments to the starting figure to take into account any aggravating and/or mitigating factors. Aggravating factors would include matters such as the organisation having a poor health and safety record, previous convictions, or concealing the illegal nature of the activity. Mitigating factors would include there being no previous convictions, a high level of co-operation following the incident, and self-reporting.



Proportionality

That analysis should allow the Court to ensure the fine is proportionate overall, and fulfils the wider aims and objectives of effective sentencing. Finally, any fine might attract a reduction depending on any assistance given to the prosecution and to benefit from a discount as a result of a guilty plea (if relevant).

Conclusions

The best-case scenario is, of course, for an organisation to avoid a regulatory offence being committed in the first

instance. When the worst-case scenario does strike, organisations will want to ensure that they have already put in place robust policies and procedures, and invested in establishing a culture of compliance, in order to permit the organisation to persuasively set out mitigating factors and hopefully reduce a potentially high penalty. Although the guideline only applies in England and Wales, it will also be interesting to see in due course how the guideline is considered by the Scottish Courts, and the weight the Courts are prepared to attach to the guideline in fixing sentences.

Key contacts

If you require advice or further information on any of the matters raised in this guideline, please get in touch with one of the key contacts listed below, or your usual Shepherd and Wedderburn contact.



John Mackenzie, Partner

Commercial Litigation

T +44 (0)131 473 5437

M +44 (0)783 453 5176

E john.mackenzie@shepwedd.co.uk



Kevin Clancy, Associate

Commercial Litigation

T +44 (0)131 473 5798

M +44 (0)788 961 5573

E kevin.clancy@shepwedd.co.uk



Nicola Innes, Solicitor

Commercial Litigation

T +44 (0)131 473 5452

M +44 (0)772 522 3724

E nicola.innes@shepwedd.co.uk