

Sentencing guidelines to impact on Scottish firms

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THE Health and Safety at Work Act 1974 has UK wide application and Scottish courts have for some time had regard to the Definitive Sentencing Guidelines on Corporate Manslaughter and Health and Safety Offences Causing Death ('the Guidelines') which apply in England and Wales when sentencing in Scottish cases (see Lord Clarke in *Dundee Cold Stores & Others v HMA* (2012) HC-JAC 102).

It will therefore be of interest, and perhaps concern, to both practitioners and businesses in Scotland that

following a public consultation, the English Sentencing Council have released updated "Definitive Guidelines for health and safety offences" which will come into effect in England and Wales on 1 February 2016, with retrospective effect.

The new Guidelines make a number of significant changes to the landscape of sentencing in such cases. With the inception of the Scottish Sentencing Council in 2015 it will be interesting to note whether an equivalent set of Guidelines is to be produced for Scotland. In the interim,

there is no reason to doubt that the new Guidelines will also be applied in the Scottish courts, like their predecessor.

Sentencing Council member Michael Caplan QC stated that: "These guidelines will introduce a consistent approach to sentencing, ensuring fair and proportionate sentences for those who cause death or injury to their employees and the public or put them at risk. These offences can have very serious consequences and it is important that sentences reflect these."

The aim of the Guidelines in selecting an appropriate level of financial penalty is that it "should not be cheaper to offend than to take the appropriate precautions".

This comes as a response to the perception that current sanctions fail to secure the appropriate level of punishment and deterrence. Businesses should be aware that the level of fines to be imposed after 1 February 2016, in cases involving serious breaches, are expected to be considerably higher than they are at present, particularly in cases where a serious injury or fatality result.

The Guidelines set out a range of financial penalties having regard to defined categories of harm and culpability, on an axis. The sentencing court is invited to select a starting point from the range according to the circumstances of the case and

– significantly – the size of the organisation, before making adjustments. Companies with an annual turnover of more than £50 million can expect fines of up to £10 million for the most serious of breaches. In addition to considering the finances of the offending company – as is the practice at present – courts will take into consideration the wider financial position of the business when selecting the appropriate fine; meaning that the courts may look beyond the resources of a subsidiary company to those of the parent. Adjustments will be made having regard to the profitability of the company, whether resulting in an increase or decrease in fine. It is important to note that the Guidelines indicate that whilst the potential for any fine to put an offending Company out of business will be a relevant consideration, in certain cases this may be an acceptable consequence.

Where the fine will fall upon public or charitable bodies, the Guidelines indicate that the fine should be substantially reduced if the organisation can demonstrate that the proposed fine would have a significant impact on the provision of its services. The Guidelines also provide examples of aggravating and mitigating factors to be taken into account when adjusting the fine selected.

Factors which will be considered to be aggravations include, but are not limited to:

poor health and safety record; cost-cutting at the expense of safety; and fabrication of documentation or licences.

Mitigating factors listed include, but are not limited to: the lack of an adverse history with the HSE or lack of previous convictions; where steps have been taken voluntarily to remedy the problem; self-reporting, co-operation and acceptance of responsibility.

The Lord Advocate, Frank Mulholland QC, commenting in September 2015, stated that: "...we will continue to enhance the efficiency and effectiveness of our work to help make Scotland a safer place. It is vital that good health and safety practice is embedded across the public, private and third sector. We do not want to have to deal with the consequences of health and safety failures. It is better they don't happen in the first place."

There is clearly a growing appetite for health and safety prosecutions in Scotland, as evidenced by the number of such prosecutions almost doubling between 2014 and 2015. The trend looks set to continue and businesses would be well advised to ensure continued compliance with their health and safety obligations; and if there is any indication that an offence may have been committed, to seek specialist legal advice immediately, in order to best protect their position in any subsequent HSE investigation and criminal prosecution.