

# Health & Safety Bulletin

January 2009

## "Employer jailed for safety breach"

Dramatic headlines such as the above are now likely since the Health & Safety (Offences) Act 2008 (HSOA) became effective on 16 January 2009.

The HSOA does not create any new health & safety offences but revises the penalties courts can impose, including the possibility

of individuals being imprisoned.

Whilst it has always been possible to sentence an individual to a term of imprisonment in the Crown Court, such prosecutions in relation to workplace accidents are rare, and the usual penalty for health & safety offences has been a fine. It

must also be remembered that the recent Corporate Manslaughter and Homicide Act 2007 specifically excludes culpability for an individual.

Health & safety offences broadly fall into two categories. Firstly are breaches under the substantive legislation, usually the Health & Safety at Work etc. Act 1974 (HSWA) and, secondly, what might be termed "regulatory offences" under the myriad workplace and related regulations, such as the Health & Safety at Work Regulations 2001, or the Provision and Use of Work Equipment Regulations 1998.

At present, a magistrates court can only impose fines as follows:

- Up to £20,000 for an offence under HSWA or a similar Act;
- Up to £5,000 if the offence is under a regulation.



In the more serious cases, sentencing will take place in the Crown Court where fines are unlimited.

The maximum fines the magistrates can impose do not change for offences under HSWA, but they can now also pass a term of imprisonment of up to 12 months. Fines remain unlimited in the Crown Court but it has the option of imprisoning an individual for up to two years.

For regulatory offences, the maximum fine in the magistrates court increases from £5,000 to £20,000 and there is also the option of imprisonment.

Clearly, where an employer is a sole trader or partnership, a prosecution is more likely to be against a named person and HSOA will clearly place such individuals at greater risk of imprisonment. However, what happens where the defendant is a company or other corporate body?

In the majority of cases, the charges are more likely to be in the name of the company or other organisation, although directors and senior management are not immune. There is provision under section 7 HSWA to bring a charge against an employee personally for failure to take reasonable care. Furthermore, section 37 HSWA provides that a director can be charged personally where any offence committed by the company has been committed with his consent, connivance or neglect.

We expect that these greater sentencing provisions are only likely to affect the most serious cases. Nevertheless, whilst it is still

early days, there must be a distinct possibility that the Health & Safety Executive and other bodies exercising health & safety functions will also look to bring charges against directors and senior managers personally where there have been serious failings on their part. If this is the case, then they could be in danger of going to prison for up to two years.

### Further upward pressure on fines

On a similar topic, the Sentencing Advisory Panel is also recommending much larger fines for health & safety offences.

It is recommending that all such fines will be based on average annual turnover. Quite clearly, turnover is inevitably a much larger figure than profit.

The starting point for fines will be 2.5 per cent of average turnover, going up to 7.5 per cent where there are serious aggravating factors.

In respect of corporate manslaughter, the Panel is recommending that the fine should fall somewhere between 2.5 per cent and 10 per cent of turnover, with a starting point of around 5 per cent.

Although the courts have imposed substantial fines in recent years, for example £4 million for the Network Rail case and £15 million for the Transco fatal gas explosion in 2005, these would be increased many-fold under the present recommendations.

Whatever the position, there seems to be little doubt that fines for health & safety offences will increase substantially in the future. ■

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