

IOSH THAMES VALLEY BRANCH

LEGAL UPDATE - 2017

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Topics

- Important changes in the last year
- Looking ahead to 2018
- Review of significant cases under the new Sentencing Guidelines
- A look at the latest appeal against sentence



BREXIT

- Theresa May triggered Article 50 on 29 March 2017
- Businesses now on notice that within 2 years we will leave the EU
- The Great Repeal Bill- [It will repeal the European Communities Act 1972](#)
- Will convert existing EU law into domestic law, wherever practical, to preserve existing laws that come from the EU so that there's no great change on the day we leave.
- EU laws can be unpicked later on.

Fees For Intervention (FFI)

- OCS Group UK Ltd- Judicial Review re dispute process- accepted by the HSE
- Current process- suspended- lack of independence, very difficult to challenge
- New process- In force from 1 September 2017- keep an eye out for it!
- HSE's Annual Report and Accounts 2015/16 – income from FFI £14.7m but cost of recovery £17.5m!



Sentencing Reductions for Guilty Plea

- Definitive Guideline on Reduction in Sentence for a Guilty Plea, applies from 1 June 2017
- Normal Rule: maximum reduction available if guilty plea is at the ‘first opportunity’
- Guideline formally introduces exceptions to the normal rule- includes following situation where:
- “there were particular circumstances which significantly reduced the defendant’s ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made”.

New PPE Regulations

- New EU Regulations apply to the manufacture, importation and distribution of PPE from **21 April 2016**.
- Places duty of care on importers/ distributors
- European Regulation (EU) 2016/435
 - **21 April 2018**: New Regulations apply in full.
 - **21 April 2019**: PPE certified under old directive can no longer be placed on the market.
 - **21 April 2023**: all certificates under old directive expire.
- The Personal Protective Equipment at Work Regulations 1992 still apply.

HSE STATISTICS 2015/2016

HSE Stats – fatal / non fatal injuries (2015/16)

Key figures for Great Britain

- 1.3m working people suffering from work-related illness
- 2,515 mesothelioma deaths
- 144 fatal injuries to workers
- 72,702 non fatal injuries reported to RIDDOR
- 621,000 non fatal injuries to workers
- 30.4m working days lost at an estimated cost of £14.1bn

<http://www.hse.gov.uk/statistics/>

Prosecutions – 2015/16

Prosecutions

- **696** cases
- **660** cases resulting in conviction for at least one offence
- **95%** conviction rate
- **£38,266,663** total fines (2015-2016)
- **£57,980** average fine per conviction

LOOKING AHEAD



ISO 45001

- Aims to provide a framework to improve employee safety, reduce workplace risks and create better, safer working conditions all over the world.
- Designed for use by any organisation (irrespective of size or industry) and to be integrated into existing H&S programmes.
- Further draft circulated mid April 2017.
- Can feedback via IOSH to the consultation
- Committee responsible for drawing it up meeting again in September 2017 with a view to finalisation by end of the year.

HSE Business Plan 2017-18

- Undertake targeted programme of 20,000 inspections
- Inspection timescale targets
 - 80% fatal incident investigations within 12 months of taking on investigation
 - 90% non fatal within 12 months of incident.

HSE Sector Plans

- The HSE has published sector plans for 19 sectors- still in draft form
- Show top three priorities per sector for next 3-5 years
- Available on the HSE website- worth a look for your sector
- Each identifies the priorities of the HSE for that area

Management of Mental Health



Work Related Stress – Policies

- Stress – inability to cope with demands placed upon them (applies to all levels of the business)
- Legal position
 - Work related stress is not RIDDOR reportable
- HSE Stress Management Standards – not a legal requirement but.....
 - Implications of work related stress?
 - Cases?



HSE Management Standards

- The result of several studies back to 1980's
- Identify primary sources of stress at work
- Recommends a strategy for organisational improvement

“The Management Standards represent a set of **conditions** that, if present, reflect a high level of health well-being and organisational performance”

Recognising a mental health problem

People experience mental health differently, you may notice no change- importance of an open culture.

Signs may include:

- Changes in people's behaviour, mood or interaction
- Changes in productivity and motivation
- Struggling to make decisions and get organised
- Tired, anxious, withdrawn
- Losing interest in tasks previously enjoyed
- Changes in habits- appetite change, increased drinking and smoking

Potential Liability

- If leads to an accident, may be prosecution under Health and Safety at Work Act 1974. The fact of knowing a person was suffering from stress, anxiety or depression and taking no action could be an aggravating feature.
- May lead to civil action that as an employer- or in an employment like relationship- you were vicariously liable for a negligent act or omission, for an assault or even sexual assault.

Graham v Commercial Bodyworks Ltd

- Court of Appeal 2015
- Injuries were sustained by a body shop employee
- Co-worker had sprayed his overalls with an inflammable substance and then used a cigarette lighter in his vicinity.
- The actions causing the injury were intentional and did not arise from anything which was inherent in the nature of the employment.
- The employer was not vicariously liable

Morrisons Supermarkets Plc 2016

Mohamud v WM Morrison Supermarkets Plc Supreme Court , March 2016

- Employee at a petrol station verbally abused customer in unprovoked attack
- Followed him out of the petrol station shouting at him to leave
- Employer held vicariously liable for assault of customer by employee.

Cox v Ministry of Justice 2016

- Ministry of Justice held vicariously liable for injury caused by non employee
- Prisoner carrying out work in a kitchen negligently caused injury to another worker
- Not an employee but sufficient connection between what he was doing as furthering the aims of the Ministry of Justice (rehabilitation of offenders)
- Enough to give rise to vicarious liability.

SENTENCING GUIDELINES CASE UPDATE

2016 H&S Sentencing Guidelines

- Apply to health and safety, corporate manslaughter and food safety and hygiene offences in England and Wales from 1 February 2016.
- Nine step approach to calculate fines.
- Fines now explicitly linked to company turnover to have 'a real economic impact'.
- Significant fines imposed solely based on the risk of injury.

Impact of sentencing guidelines

- Huge increase in fines seen in the last year
- Fines over £1m now the norm for large companies
- Fines Total: **Feb 2015 - Feb 2016 = £30.3m**
- Fines total: **Feb 2016 - Feb 2017 = £54m**

Increase by geographical area

Area	2015-16	2016-17	% change
West Midlands	£76k	£832k	↑1094.7%
North East	£45k	£412k	↑915%
London	£47k	£198k	↑421%
Yorkshire	£116k	£57k	↓ 200%

Fines post-1 Feb 2016

- **Very large**

- Travis Perkins – **£2m** (May 16) – fatal
- Network Rail - **£4m** (Sept 16) – fatal
- Tarmac Trading - **£1.3m** (Oct 16) – fatal

- **Large**

- G4S Cash Solutions - **£1.8m** (Sept 16) – non injury
- Decco - **£2.2m** (Sept 16) – fatal
- Merlin Attractions - **£5m** (Sept 2016) – non fatal
- Cristal Pigment UK - **£3m** (Nov 2016) – fatal

Fines for Medium Organisations

- **Watling Tyre Service Ltd – fatal**
 - T/o of £20-25m
 - Fine of £1m = 5% of t/o
- **ADG Equipment Ltd – fatal**
 - T/o of £14m
 - Fine of £800,000 = 6% of t/o (and 36% of PBT)
- **Embrace All Ltd – fatal**
 - T/o of £13m
 - Fine of £1.5m = 11.5% of t/o (and 24% of PBT)

Whirlpool UK Appliances



- **Facts**

- Whirlpool Factory, Bristol, tumble dryer manufacture
- Sub contractor moving a heat detector, standing on elevated platform between two conveyors with baskets hanging down
- Elsewhere in the factory maintenance of the conveyor was ongoing
- Conveyor maintenance workers could not see injured
- Conveyor was started and a basket hit the platform toppling it
- Fatal injuries

Whirlpool UK Appliances

- Breach
 - S3(1) HSWA 1974
 - Inadequate risk assessment for maintenance and inadequate permit to work for heat detector
- Sentencing remarks
 - Turnover: £16.25 billion (v large)
 - Culpability: low
 - Harm: category 3
 - Early guilty plea, good safety record, full co-operation with investigation

Whirlpool UK Appliances

- Fine starting point: £1.2m
- Fine: £700,000
- Commentary:
 - Treated as very large under guidelines?
 - Guidelines for large company: £35k starting point
 - Starting point of £1.2m and final fine £700k well outside range for large co.

Merlin Attractions

Facts

- In June 2015, passenger train on Smiler rollercoaster collided with empty train
- Operatives overrode system's safety mechanisms to allow train to proceed
- 16 passengers suffered physical and psychological injuries
- **Turnover:** £385m (2015)

Fine

- £5m



Amanda Telfer fatality, London 2012.

- August 2012, unsecured windows on pavement
- Sentenced May 2017
- Site Supervisor (IS Europe Limited)- found guilty after trial of gross negligence manslaughter and health and safety breaches- one year imprisonment
- Site Manager (Westgreen Construction Limited)– 6 months imprisonment suspended for 2 years
- Company- Health and Safety breaches- IS Europe Limited £250 fine

APPEALS AGAINST SENTENCE

- **Facts**

- Two workers suffered injuries to their hands in two separate incidents.
- Firstly, a worker lost two thirds of his left hand and his middle and ring fingers whilst trying to clear a blockage on a steel tube manufacturing line which had unsuitable guarding
- Secondly and in a separate incident, a worker lost part of his little finger when his left hand was caught, again in an inadequately guarded machine

- **Turnover: £4.2bn / Loss before tax: £306m**

- **Fine: £1.98m** (£185,000 for the first offence and £1.8m for the second offence)

Tata Steel – Appeal- June 2017

- Appealed on the basis that the original fine:
 - Error in harm categorisation of offence 2? (high likelihood because it had happened before)
 - Should judge have gone outside sentencing range for offence 2?
- **Appeal allowed**
 - Offence 2-Not high likelihood – medium
 - Starting point therefore decreased and overall fine now £1.5million

So.....

- Lots of changes planned for 2017 /18
- HSE focus on certain sectors – need to be proactive
- New FFI process
- Mental health, becoming more important
- Keep an eye on Brexit
- Sentencing Guidelines set to have greater impact, particularly on cases commenced after Feb 2016.

Questions?



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