



Compass Chambers

Health & Safety Update

Peter Gray QC & Kate Bennett

18th November 2016



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HEALTH AND SAFETY SENTENCING: THE NEW LANDSCAPE

Peter Gray QC

2016 ENGLISH SENTENCING GUIDELINES

- INTRODUCED 01 FEBRUARY 2016:
- WHY?
 - TO EXTEND GUIDELINES TO NON-FATAL;
 - TAKE ACCOUNT OF MAGISTRATES' UNLIMITED SENTENCING POWERS;
 - “TO INCREASE LEVEL OF FINES IMPOSED SO AS TO ACHIEVE THE OBJECTIVE OF IMPOSING A FINE WHICH WOULD BE FELT BY DIRECTORS AND SHAREHOLDERS”.

OVERVIEW OF GUIDELINES:

- ASSESSMENT BY COURT OF :
 - CULPABILITY (4 LEVELS);

- ASSESSMENT BY COURT OF:
 - (A) SERIOUSNESS OF HARM RISKED (3 LEVELS);
 - (B) LIKELIHOOD OF HARM (3 LEVELS);
 - (A) AND (B) = HARM CATEGORY (4 LEVELS)

- RESULTS FED IN TO FINANCIAL MATRIX:
 - RANGE OF FINES DEPEND ON CATEGORY OF TURNOVER



FINANCIAL MATRIX

- FINANCIAL CATEGORIES:
 - LARGE: >£50 MILLION
 - MEDIUM: £10-£50 MILLION;
 - SMALL: £2-£10 MILLION;
 - MICRO: <£2 MILLION
 - (VERY LARGE): “GREATLY EXCEEDING LARGE”



KEY POINTS RE RANGES

- VERY WIDE;
- ANY ADJUSTMENT CAN DOUBLE LEVEL OF FINE;
- ADVISING CLIENT OF POTENTIAL OUTCOME FRAUGHT WITH UNCERTAINTY.

SCOTTISH POWER

GENERATION LTD V HMA

- OVERVIEW OF DECISION APPEALED
AGAINST:
 - SECTION 2 HSWA
 - NON-FATAL (SERIOUS INJURIES)
 - TURNOVER: >£1 BILLION
 - APPLIED THE GUIDELINES
 - £2.5 MILLION REDUCED TO £1.75 MILLION

GROUNDINGS OF APPEAL AGAINST SENTENCE:

- WRONG TO APPLY 2016 GUIDELINES:
 - NOT APPLY IN SCOTLAND;
 - ADDRESSING DEFICIENCIES IN ENGLAND;
 - INVOLVE MECHANISTIC/RIGID APPROACH;
- IF ENTITLED TO APPLY, ERRED IN APPLICATION;
- WHETHER BY REFERENCE TO 2016 OR 2010 GUIDELINES, SENTENCE WAS EXCESSIVE.



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THE DECISION:

- APPEAL ALLOWED:
 - £1.5 MILLION REDUCED TO £1.2 MILLION TO TAKE ACCOUNT OF PLEA.



THE DECISION ON 2016 GUIDELINES

- SENTENCE SHOULD CONFORM WITH DOMESTIC PRECEDENT;
- THEREFORE BEGIN BY ASSESSING STARTING POINT WITHOUT REFERENCE TO 2016 GUIDELINES;
- THEREAFTER ENTITLED TO HAVE REGARD AS CROSS-CHECK;
- IF A DIFFERENCE IN OUTCOME???

STRATEGIC THINKING GOING FORWARD (1):

- A BESPOKE APPROACH:
 - DO THE GUIDELINES ASSIST? IF SO:
 - DO WE NEED TO HAVE COMMENT BY CROWN IN ANY NARRATIVE?
 - IF GUIDELINES DO NOT ASSIST:
 - INVITE COURT TO PROCEED WITHOUT REGARD TO THEM;
 - NOT OBLIGATORY TO HAVE REGARD TO THEM.



STRATEGIC THINKING

GOING FORWARD(2)

- CHALLENGING THE PRINCIPLE OF THE FINE REQUIRING “TO BE LARGE ENOUGH...TO BRING MESSAGE HOME”
 - CAN ONE ARGUE THAT MESSAGE ALREADY GOT HOME?”

STRATEGIC THINKING

GOING FORWARD(3)

- ADVISING THE CLIENT/THE BOARD:
 - POTENTIAL RANGE OF PENALTY;
 - (MUCH MAY DEPEND UPON CROWN APPROACH).
- MERITS OF GOING TO TRIAL?
 - POSSIBILITY OF ACQUITTAL;
 - DIMINUTION OF CREDIT FOR PLEADING;
 - AT WORST, PERHAPS, A TRIAL IN MITIGATION.



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APPEALS AGAINST HEALTH & SAFETY NOTICES

Kate Bennett, Advocate

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APPEALS AGAINST HEALTH & SAFETY NOTICES

- Summary of Law & Procedure
- The test to be applied by Employment Tribunal
- The different approach/test in Scotland and England

HEALTH & SAFETY NOTICES

- What are they?
- Improvement Notices (S21 HSWA 1974)
- Prohibition Notices (S22 HSWA 1974)
- Consequences
- Effect of Appeal



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IMPROVEMENT NOTICE

SECTION 21 HSWA 1974

Inspector may serve notice if of opinion:

- A breach is being committed; or
- Has been, & likely to continue.



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IMPROVEMENT NOTICE

CONSEQUENCES:

- Recipient to take action within specified period of time
- Registered on HSE's website
- Criminal offence to breach

EFFECT OF APPEAL:

- Notice suspended until appeal concluded



PROHIBITION NOTICE

SECTION 22 HSWA 1974

Inspector may serve notice if of opinion:

- Activity being carried on/likely to be carried on giving rise to risk of serious personal injury;
- No requirement that any offence.



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PROHIBITION NOTICE

CONSEQUENCES:

- Recipient to cease activity until remedial steps taken
- Registered on HSE's website
- Criminal offence to breach

EFFECT OF APPEAL:

- Notice not suspended automatically



APPEAL PROCEDURE

- Appeal to Employment Tribunal
- Section 24 HSWA 1974 & Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
- Appeal within 21 days



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APPEAL PROCEDURE

SECTION 24 HSWA 1974

Employment Tribunal....

- may affirm
- may cancel
- If affirms, may modify



ANY POINT IN APPEALING?

If don't appeal:

- Impact on business?
- Reputational damage?
- Offence to fail to comply with notice (cost)
- If appeal, will be sisted in any event if criminal prosecution in contemplation
- Failure to do so commented upon in criminal proceedings



ANY POINT IN APPEALING?

PRIOR TO 2008

– NO!

“The Foremans Test” (*Foremans Relocatable Building Systems v Fuller*)

- Test based on reasonableness and honesty
- Low standard for HSE to meet; Inspector need only satisfy the ET that opinion genuinely held and based on reasonable grounds



ANY POINT IN APPEALING?

CHILCOTT V THERMAL TRANSFER LTD [2009] EWHC 2086 (ADMIN)

- Test NOT limited to reviewing genuineness and/or reasonableness
- Focus on point of time notice served
- Would ET have issued that notice at that time?
- Paying due regard to expertise
- Entitled to have regard to information which may not have been in existence at date of notice



ANY POINT IN APPEALING?

CHILCOTT (para 12) per Charles J.

“...What the court’s function is, is to identify on the evidence before it, which is not restricted to matters that were in existence before a particular date, what the situation was as at that particular date. Did the relevant risk exist?.....”



AND THEN.....

HAGUE V ROTARY YORKSHIRE LTD [2015] EWHC Civ 696

- Endorsed Charles J's view in *Chilcott* at para 12
- BUT, reached opposite conclusion!
- ET restricted to looking at information known at time —
“on basis of information available to inspector or ought reasonably to have been available following such investigation as ought reasonably to have been undertaken” (per MWH UK Ltd v Wise [2014] EWHC 427 Popplewell J, para 22)



AND THEN.....

HAGUE (para 27) per Law LJ.

“ ...What facts are the Employment Tribunal to consider? Those which go to the propriety of the prohibition notice at the time it was issued or also later events amounting to hindsight and of which the inspector at the time had no knowledge or means of knowledge....”



AND THEN.....

HAGUE (para 31) per Law LJ.

“...the question for the inspector is whether there is a risk of serious personal injury. In reason such a question must surely be determined by an appraisal of the facts which were known or ought have been known to the Inspector at the time of the decision....The Employment Tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector’s action..”



BUT IN SCOTLAND.....

HSE V CHEVRON NORTH SEA LIMITED [2016]
CSIH 29; 2016 S.L.T. 561

- Inner House declined to follow *Hague*
- Allowed Chevron to rely on evidence that was not before the Inspector and which he could not reasonably have been expected to know about



HSE V CHEVRON

- At the time the notice was issued, was there actual risk of serious personal injury?
- That question should be answered on the basis of all the available evidence
- Not concerned with propriety of the notice, the reasonableness of decision, nor the extent of the Inspector's knowledge
- Alternative - to restrict appeals to no more than a form of judicial review. This could not have been parliament's intention.



HSE V CHEVRON

(para 28) per LP Carloway

“The fundamental problem with the approach of Laws LJ is that it prohibits an appeal on the facts in a situation where it can be demonstrated that the facts or information upon which the inspector proceeded were wrong. That is the essence or purpose of many appeals on the facts. In short, there is no sound basis for restricting appeals under section 24 to what would in essence be a form of judicial review of the inspector’s opinion....”



HSE V CHEVRON

.An appeal on the facts is a much wider concept and, endorsing the views of Sullivan and Charles JJ, it enables an appellant to prove, using whatever competent information is available at the time of the Tribunal's hearing on the appeal, that the factual content of the notice was wrong and that, accordingly, however reasonable the inspector's opinion was at the time, had the true facts been known, he would not have reached it".



WHICH TRUMPS?

- Supreme Court to determine whether *Hague* or *Chevron* approach correct.....





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