

Nuclear**CONNECT**

MANAGEMENT • PROCUREMENT • SUPPLIERS

WWW.NUCLEARCONNECT.CO.UK

ISSUE 17 APRIL 2014 £12.50



Making ITER work



Decommissioning with
the neighbours

ILW: NDA moving in
a regional direction

Tipping the gender
balance in nuclear



Q&A

with

**ROGER
HARDY**

Cavendish Nuclear

Commercial deployment of fast reactors

written by

**DR TIM
FOX**

IMechE

Developing nuclear leaders

written by

**AL
MATHER**

Centre for Leadership Performance

NEW ENVIRONMENTAL OFFENCES DEFINITIVE GUIDELINES



Words:
Gareth Davies and
Cheryl Parkhouse

On 26th February 2014 the Sentencing Council published new guidelines for judges and magistrates on sentencing environmental offences. These guidelines will impact upon those both working in the nuclear industry and elsewhere and take effect from 1st July 2014.

This is the first time guidelines have been produced for environmental offences and they set out 12 clear steps to be followed whenever sentencing individuals or organisations of such an offence. One of the aims of the guidance is to help categorise offences and offenders in order that a consistent approach can be taken and that the calculation of fines is proportionate to the size of the offender and the seriousness of the offence. This follows the conclusions of the Sentencing Council that the levels of some fines were previously too low and did not reflect the seriousness of the offence committed.

This is the first time guidelines have been produced for environmental offences.

The development of sentencing guidelines over time

Sentencing in the past has been based on a number of recognised mitigating or aggravating factors which have been developed through various cases.

These factors were established by the Court of Appeal to determine penalties in the health and safety case

of *R. v F Howe & Son (Engineers) Ltd [1999] 2 All E.R. 249* and can be seen reflected in the new guidelines.

The *Sea Empress* case then applied the same factors to an environmental offence. This was the memorable case from 2000 in which the Milford Haven Port Authority was fined after the *Sea Empress* oil tanker was grounded upon rocks as she was being guided into port by a pilot employed by the Port Authority. In this case the Court held that it was not necessary to frame guidelines for sentencing, but there were a number of factors relevant to sentencing which should be considered. In applying *Howe*, the Court of Appeal considered the size, structure and financial position of the Port Authority, and concluded that, whilst a substantial fine was needed to mark the seriousness of the offence, it should not be so heavy to destroy the Authority's business with consequent impact upon the local economy. The Port Authority successfully argued the fine was manifestly excessive and consequently had it reduced to £750,000 from £4m.

Recently, in January of this year, the Court of Appeal dismissed an appeal by Sellafield Ltd regarding a fine of £700,000 for offences relating to the disposal of radioactive waste. In dismissing the appeal the Court considered the same factors for determining the appropriate level of fines. It concluded however that in this case a £700,000 fine represented only 2 per cent of the company's weekly turnover and therefore could not be criticised.



The Sellafield Ltd appeal was heard in conjunction with an appeal by Network Rail Infrastructure Ltd, another huge national company, with a weekly turnover of £119m and profits of £14.4m. Network Rail was appealing against a fine of £500,000 following a collision at an unmanned level crossing which resulted in very serious injuries to a child. The Court of Appeal again considered the structure of the company and found that any fine imposed would not inflict any direct punishment on shareholders and could be said to harm the public. They concluded however that a fine of £500,000 already reflected a sizable discount for the mitigation advanced and a materially greater fine again could not be criticised.

The new guidelines

However, once the guidelines come into effect on 1st July 2014, the courts will be required to consider all 12 of the sentencing steps. In particular, the following steps are key in setting the level of the fine:



Step 3: Determining the offence category

This considers both the culpability of the offender and harm caused:

- (a) The culpability of the offender can fall into Deliberate, Reckless, Negligent, Low or No culpability.
- (b) Harm caused is categorised into four categories, with examples provided of the seriousness of the harm caused or risk of harm caused.

Step 4: Starting point and category range

This provides a sliding scale of fine taking into account the size of the organisation. By applying the offence categories to the sliding scale for the offending company, the starting point of the fine in pounds and the range of fine can be calculated. These go up to a quoted maximum of £3m but may be greater for companies falling into the 'Very Large' category. The company size is broken into five categories:

- (a) Micro – Turnover or equivalent: not more than £2m;
- (b) Small – Turnover or equivalent: between £2m and £10m;
- (c) Medium – Turnover or equivalent: between £10m and £50m;
- (d) Large – Turnover or equivalent: £50m and over;
- (e) Very Large – Where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

Once the starting point for the fine has been calculated, then there are a series of factors that increase or reduce the seriousness of the offence and these can trace their roots back to the cases considered above.

Step 6: Check whether the proposed fine based on turnover is proportionate to the means of the offender

The guideline states that: "The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance."

"The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance."

This final point is one which large companies will need to be aware of and which has caused concern that fines facing large companies may be likely to rise once the guidelines come into effect.

In conclusion, it will be interesting to see how the guidelines are used and applied when they come into force in July and, in particular, whether the levels of fines set will differ greatly from those we have seen to date.

If this article raises any issues you would like to discuss or you would like to suggest subjects for future articles, please contact Cheryl Parkhouse or Gareth Davies on:

*Cheryl Parkhouse:
cheryl.parkhouse@burges-salmon.com;
tel: 0117 902 6640*

*Gareth Davies:
gareth.davies@burges-salmon.com;
tel: 0117 307 6920*

*The latest version of the Burges Salmon nuclear glossary of key terms and acronyms is now available to be downloaded at
www.niauk.org/a-to-z-glossary*

■ ■
Images:

© Michael Brown -
Fotolia.com