

Safety, Health and Welfare at Work

Published 23 April 2018

Implications for companies based in Ireland

In April 2017 the Court of Criminal Appeal increased a fine imposed on Kilsaran Concrete by the Circuit Criminal Court from €125,000 to €1 million. The three judge court held that the sentence imposed by the Circuit Criminal Court was unduly lenient and increased the fine to €2 million, reducing it to €1 million due to mitigation. The primary aggravating factor in respect of this case appears to have been the disregard for safety procedures in place in respect of the operation of a piece of machinery in an unorthodox manner.

In summary, while recent decisions of the Circuit Court suggest that the guidelines set down by the Court of Appeal have not yet been implemented, employers should be conscious that there is a real possibility that such guidelines could be implemented in the future.

Brief overview

This case concerned the use of a piece of machinery to manufacture pre-cast concrete products which resulted in the death of an employee. The facts of the case illustrate that a decision was taken to use the piece of machinery in an unorthodox manner to produce a bespoke product. However in doing so, certain safety measures in place, a manual override switch and safety cage, were disregarded. As a result of this Mr Barry Gargan, a 26 year old employee of the company, was crushed inside the safety cage causing instant death.

At first instance the company pleaded guilty to one count of failing to manage and conduct work activities in such a way as to ensure, so far as was reasonably practicable, the safety, health and welfare at work of the employees of an undertaking, resulting in personal injury to an employee. The Circuit Criminal Court imposed a fine of €125,000 on the company with six months to pay and a further fine of €10,000 on the employee who had instigated the unorthodox procedure.

The decision

The Safety, Health and Welfare at Work Act 2005 provides for a maximum fine of €3,000,000. The Court of Appeal indicated that the level of fine should be considered under four headings: (i) gravity of the offence; (ii) mitigation; (iii) proportionality and (iv) sentencing policy issues. In respect of gravity of offence the court held that there are three primary categories which can be represented in financial terms as follows:

- Low - €0-€1,000,000
- Mid range - €1,000,000 - €2,000,000
- High range - €2,000,000 - €3,000,000

In respect of mitigation, the court held that compensation paid should not be taken into account unless they result in some degree of hardship for the accused. The court used the example of a "man of straw" with little or no income who borrows from family or a credit union to pay the compensation. In those circumstances the court held it may be taken as a demonstration of remorse. In relation to the company in this case it was held that regardless as to whether there was a high excess (a decision that would have been taken for purely commercial reasons) the court should not take into account payments made particularly in circumstances where significant portions of it are made by an insurance company. The court held that a guilty plea, co-operation with the investigation, remorse, remedial steps and a generally good safety record were all factors which ought to be taken into account. The court indicated that anything more than a 50% discount for mitigation would be, in its estimation, generous.

With regard to the issue of proportionality the court held that where there are offences of moderate culpability (more minor technical breaches of the legislation) these ought to attract a fine toward the lower end of the range and the court indicated these breaches would likely attract fines in excess of €100,000. The court stated that sentencing judges ought to indicate the range within which the offence falls and then to consider the respondent's financial resources and ability to pay. The sentencing court should not disregard the full available range of fines in favour of some lesser range unless it is justified in the interests of proportionality.

Finally, in respect of sentencing policy the court held that there is a need for retribution and deterrence while of course considering mitigation in respect of such breaches and fines should be imposed which reflect this.

The court overturned the fine of €125,000 and replaced it with a fine of €2,000,000 reduced by 50% to €1,000,000 taking account of the mitigation in this case.

Effect and application

Prior to this case fines for companies ranged from between €100,000 to €250,000. It was thought that the effect of the decision would be an increase in the level of fines imposed by Irish courts in fatal injuries cases.

To date this anticipated increase does not appear to have materialised. In cases in which we have been involved since this judgment, and indeed other cases which have been dealt with by the courts, the level of fines imposed has remained within the pre-Kilsaran Judgment range.

This is most clearly demonstrated by way of example. In two tragic fatal injuries cases handled by our team since this judgment the Circuit Court imposed fines of €100,000 and €40,000. While both defendants had very strong mitigation and excellent health and safety records the level of fine imposed indicates that perhaps the sentencing guidelines as set out by the Court of Appeal may not have found favour with the Circuit Court in dealing with such cases.

While this is currently the case both employers and insurers should continue to give due consideration to the possible implications of the above decision in respect of Health and Safety prosecutions. It is still quite likely that the decision will have considerable impact on sentencing in workplace fatal injuries cases into the future. The guidance given by the Court of Appeal is similar in nature to the sentencing guidelines in use in the United Kingdom and it has been long argued that similar guidelines should be used in Ireland in such cases.

In either event, early support during the investigative stage of the process can greatly assist employers in responding to and assisting the HSA appropriately while ensuring the company receives the best advice in respect of such assistance. It is important for employers to be conscious of their rights against self incrimination as well as other rights applying in such cases.

If you require any further information please do not hesitate to contact a member of our Regulatory team:

Authors



Gary Rice

Dublin

+353 (0)1 231 9654

grice@dacbeachcroft.com



Aidan Healy

Dublin

+353 (0)123 19669

ahealy@dacbeachcroft.com



Niall Sexton

Dublin

+353 (0)1 231 9675

nsexton@dacbeachcroft.com



Brian Ormond

Dublin

+353 (0) 12319691

bormond@dacbeachcroft.com