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HEALTH AND SAFETY COMMISSION

The European Court of Justice (ECJ) judgement on the SFAIRP infraction

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Cleared by DCE on 21 June 2007

Cleared by CE on 22 June 2007

Issue

1. The conclusion of the SFAIRP infraction case following the ECJ judgement which found in the UK's favour.

Timing

2. Routine. Commissioners were alerted by email to the ECJ's final judgement, which was delivered on 14 June 2007.

Recommendation

3. That Commissioners note:
 - The ECJ judgement (Annex 1) with the Court's conclusions at paragraphs 36-60.
 - The line to take at paragraph 9.

Background

4. The European Court of Justice delivered its judgement on 14 June 2007 on the European Commission's (EC's) case against the UK for allegedly under implementing the Framework Directive, by use of the qualifier 'so far as is reasonably practicable' (SFAIRP) on an employer's duty to safeguard his or her workers.
5. Formal proceedings commenced in March 2005. The UK government has robustly defended the case throughout. Had the UK lost there would have been a damaging period of uncertainty, particularly on civil liability obligations, until the law was amended and the potential for an increased cost burden to business.

Argument

6. The ECJ judges have dismissed every aspect of the EC's case against the UK. The Court ruled that Article 5(1) embodies an employer's general duty of safety without specifying any form of liability and does not support an interpretation that the

Community legislature otherwise intended to prescribe a no-fault liability regime. The Court concluded that the Commission had failed to establish in what respect the SFAIRP clause affected the extent of the general duty.

4. The UK's Counsel in the case has commented that this is a good win for the UK, and we believe that the judgment offers no encouragement for the EC to come back on this issue in future. Nevertheless, the EC officials responsible for pressing this case have indicated their disappointment at the outcome. In their view, the decision has weakened the Directive. This is also the view of the European Trade Union Confederation (ETUC).

Consultation

5. The UK policy line on defending the SFAIRP principle was agreed by Ministers collectively in June 2005, before the UK defence was submitted.

Presentation

6. HSE issued a press notice on the day of the judgement which is at Annex 2. The Chair commented on the case in a speech given on the day of the judgement to the Yorkshire and Humberside Branch of IOSH. DWP Ministers (Lord McKenzie and Anne McGuire) presented a written parliamentary statement on the issue in both the House of Lords and the House of Commons.
7. The judgement received positive press coverage from the FT including a statement from the General Secretary of the TUC. It was also welcomed at the CBI health and safety Committee. It is likely to be widely covered in health and safety specialist press and law journals.
8. As in all ECJ proceedings, all documentation relating to this case, such as the pleadings, is confidential and remains so even after conclusion of the proceedings. The only information in the public domain is the Official Journal summary of the case¹ and the official publication of the Attorney General's Opinion and the final ECJ judgement on the ECJ's website² and in the Official Journal.

Line to take

9. If questioned about the ECJ judgement, Commissioners may wish to use the following:

¹ http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_143/c_14320050611en00180019.pdf

² <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-127/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

I am very pleased by this outcome. The Court has dismissed the European Commission's view that our use of the phrase "so far as is reasonably practicable" is contrary to European Community law. This is a victory for common sense.

We continue to believe that the right way forward is a proportionate and risk-based approach protecting employees and others effectively, whilst allowing commonsense to be applied when deciding on what protective measures to adopt."

Clearance

10. This paper has been cleared by Legal Advisors Office.

Costs and Benefits

11. No change. If the UK had lost the ECJ case, there would have been significant costs for HSE and both the private and public sectors in dealing with the consequences of changing occupational safety and health legislation.

Financial/Resource Implications for HSE

12. Costs incurred by HSE relate primarily to staff time in the Legal Advisor's Office and the Policy Group. Estimated costs are around £84,500 in staff costs over between 2005 and 2007. By convention, legal Counsel's fees for preparing the UK case and representing the UK at the Court hearing have been paid by TSol. HSE have paid approximately £35,250 for work advising on possible options for change as part of contingency planning. A further estimated £10,000 was spent on consultancy fees for a legal academic to undertake a variety of support work aimed at strengthening and supporting the UK case.