

By: Eric Hotson, Cabinet Member for Corporate and Democratic Services

Benjamin Watts, General Counsel

To: Policy and Resources Cabinet Committee – 20 November 2018

Subject: Legal Update

Classification: Unrestricted

Summary: This report provides the update requested by Members reviewing a recent Health and Safety Executive prosecution.

Recommendations: The Committee is asked to note the contents of this report.

Introduction

1. This report provides Members with details of a recently concluded Health and Safety Prosecution.
2. Members had specifically asked to be provided with further detail around the prosecution and some assurance regarding the current situation.

The Proceedings

3. KCC was prosecuted by the Health and Safety Executive in respect of an incident at a school in 2013 where there was exposure of asbestos.
4. There were two charges brought against KCC. The first, under the Health and Safety at Work Act 1974 related to 'protecting people other than those at work from risks to their health and safety arising out of or in connection with the activities of people at work'. The second, under Regulation 10(1) of the Control of Asbestos Regulations 2012 related to 'ensuring adequate information, instruction and training is given to employees who were liable to be exposed to asbestos' and to ensure that employees, such as the Headteacher, who supervised others had adequate information, instruction and training.
5. The incident involved the removal of a flue and steriliser unit in a school kitchen. A flue and steriliser unit had been removed by the school caretaker leaving an asbestos rope exposed. The HSE contended that the kitchen staff and pupils had been at risk of exposure. Our expert assessment obtained for the proceedings stated that there was **minimal risk of exposure**.

6. Both offences carry a maximum unlimited fine. The HSE indicated in their documents that they considered a fine in the range of £550k to £2.9m to be appropriate, with a starting point of £1.1m, on the basis that their view was that the offence was of high culpability and harm. That fine could have been levied in respect of each count, and the potential fine was therefore in the region of £550k to £5.8m. On the HSE's case, the fine would have been in the region of £2.2m.
7. Upon receipt of the summons from the HSE, it was evident that a joined-up approach from the Council would be necessary. The prosecution had several different elements to it, including educational, financial, health and safety alongside the obvious legal challenge. It was vital that each of these issues was considered both strategically and operationally.
8. It was agreed that the litigation would be led by Lauren McCann from the Office of the General Counsel who would support the Health and Safety Officers from a legal perspective and lead on the legal strategy, with advice from external lawyers specialising in these kinds of complex criminal proceedings.
9. The Health and Safety officers, Flavio Walker and Tony Carty, dealt with the proceedings from an operational perspective and offered their expert view and experience. They were able to ensure that the Council's policies and procedures were evidenced to the Court and fully explained the Council's approach.
10. Throughout the proceedings senior officers and Cabinet Members were provided with regular briefings, including recommendations and advice, in order that fully informed instructions could be provided to the external lawyers. Briefings were also offered to the Leader of the Opposition and the Leader of the Labour group.
11. The approach taken ensured that there was strategic and operational oversight at all times and that a unified and clear position was put forward.
12. This paper has been drafted as an OPEN paper in pursuance of local government transparency. Further detail on the legal strategy can be provided to Members in an exempt briefing if it is desired.
13. The hearing took place on 31st August 2018 and the Council was represented by a barrister, the legal and health and safety teams and the hearing was also attended by Amanda Beer to demonstrate to the Judge that the Council had due regard to the proceedings and was treating them with the utmost importance.

14. The Council offered an early guilty plea to the Regulation 10 charge and, as a result, the prosecution offered no evidence in respect of the second charge. Submissions were made by the prosecution and by our barrister to the level of harm and culpability appropriate in this case. The prosecution was unable to provide reasons why the level of harm could be anything but low given that the risk of death was, at most, 0.009%.
15. On culpability, the Judge determined that the case fell within the medium range, as we had submitted, and that there was a lower category of harm than had been put forward by the HSE.
16. The Judge determined a starting point of £400k. Reductions were then given as the Council cooperated throughout the proceedings and had taken matters seriously. It was acknowledged that the local authority does not exist to make a profit. In those circumstances, the Judge made a reduction to £300k.
17. A further reduction was applied due to our submission of a guilty plea at the first opportunity which meant the total fine levied against the Council was £200k (plus prosecution costs of £21.5k). As mentioned at paragraph 6 above, the HSE starting point was in the region of £2.2m.

Sentencing Remarks

18. Members of this Cabinet Committee were keen to understand what lessons have been learned by the Council both prior to the Hearing and subsequently.
19. Some of the Judge's sentencing remarks are helpful in setting the picture of where the Council was at the time of the incident in 2013, and where it is now – there having been changes for the better.
20. The Judge had the benefit of a statement from Tony Carty that set out the policies and practices of KCC for the management of asbestos at the relevant time. That included an Asbestos Management Policy that made clear that any works that may be asbestos related had to be carried out by a licenced asbestos contractor; regular asbestos management surveys were carried out and kept at the school; a school Health and Safety policy was in place which made reference to the Headteacher's duties and responsibilities as regards training; schools were required to submit annual monitoring returns which included the provision of information about training needs; information, training seminars and programmes were regularly provided by KCC to inform and train employees, including those in school, about asbestos related issues.
21. The Judge also found that KCC did have appropriate systems in place to address the provision of information and training about and to address the risks to health and safety in relation to asbestos issues. The failing here was

in having robust systems to “ensure, check and monitor that those systems were being properly followed.”

22. Ultimately, there were systems in place but the Judge found that these were not sufficiently adhered to or implemented. The Judge also acknowledged that there had been appropriate response from KCC and a change in the policy documents. Those changes to the policy documents came before this committee for approval.

23. Members of this Committee are aware from previous reports that officers are working on the Council’s response to the Grenfell tragedy and the consequential issues for management of estates for organisations such as KCC. This work includes legal and Health and Safety implications. The further learning from this case is being cascaded through that ongoing officer work and the deployment of Lauren McCann and Flavio/Tony to support the ongoing legal and health and safety advice in that area.

Conclusion

24. The joint working approach to respond to this prosecution undoubtedly contributed to the positive outcome. The Judge also commented on the appropriate response from KCC and the change in policy documents.

25. This was an important case that was taken seriously by the Council and which significantly mitigated the organisational risk and financial exposure. A range of changes have occurred since the incident referred to in this case and which were positively referenced by the Judge. However, the Council is not complacent and will continue to make changes where they are necessary to improve the Council’s policies and approach and the extent to which they are implemented by schools.

Recommendations: The Committee is asked to note the contents of this report.

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