

Neutral Citation Number: [2018] EWCA Crim 752

Case No: 201702624 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM WOLVERHAMPTON CROWN COURT

HHJ B. BERLIN

T20160572

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/04/2018

**Before :**

LORD JUSTICE GROSS

MRS JUSTICE LAING DBE
and

MR JUSTICE PHILLIPS

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**Between :**

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|  | **R (HEALTH AND SAFETY EXECUTIVE)**  | Respondent |
|  | **- and -** |  |
|  | **ATE TRUCK & TRAILER SALES LTD** | Appellant |

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**James Puzey** (instructed by **Health and Safety Executive**) for the **Respondent**

**James Leonard** (instructed by **Pinsent Masons LLP**) for the **Appellant**

Hearing dates : 15th March 2018

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Approved Judgment

**Lord Justice Gross :**

INTRODUCTION

1. This appeal concerns the application of the Sentencing Council’s *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline*, effective from 1 February 2016 (“the Guideline”), which has been reviewed in a number of recent authorities. As will be seen, some complexity arises, principally because of the basis of plea pragmatically agreed between prosecution and defence.
2. On the 24th April, 2017, in the Crown Court at Wolverhampton, the Applicant (“ATE”) pleaded Guilty to a Count of failure to provide a suitable and sufficient risk assessment as required by Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations 1999 (“the Regulations”), contrary to s.33(1)(c) of the Health and Safety at Work etc. Act 1974 (“the Act”).
3. On the 16th May, 2017, ATE was sentenced by HHJ Berlin to a fine of £475,000, payable within 3 years, plus £20,000 towards the prosecution costs, likewise payable within 3 years. A Victim Surcharge Order of £120 was additionally imposed.
4. No evidence was offered against ATE on a separate Count of failing to discharge the duty to non-employees imposed by s.3(1) of the Act and a Not Guilty verdict was duly entered in that regard.
5. The application for leave to appeal against sentence was referred to this Court by the Single Judge. We grant leave.
6. The matter arises out of a tragic accident which resulted in the death of Mr William Price. As did the Judge, we express our sympathy for the family of the deceased. That sympathy cannot determine the outcome of the appeal and no fine of whatever amount can bring back Mr Price – but the family’s sense of devastation and loss is well understood.

THE FACTS

1. ATE, based in Wolverhampton, dealt in trucks and trailers. Mr Price, 63 years old at the time of his death, was a contractor for ATE. He was a scrap metal dealer and had been since he was 26 years old. His association with ATE went back over many years. In the 1990s, Mr Price was trading and would collect and sell scrap which was generated through ATE’s activity of refurbishing and repairing vehicle trailers.
2. In 1998, ATE began to export flat-bedded trailers to customers abroad, entailing removing the roof and stanchions from curtain-sided trailers and selling the resulting flatbed. An arrangement was made with Mr Price that he would remove the superstructure from the trailers. He could retain the metal superstructure and sell it as scrap. The arrangement benefited both parties.
3. Over the next few years, ATE’s operations expanded with the result that there was no longer room for Mr Price to conduct his activities on its premises. Accordingly, in about 2007, Mr Price went into business with two partners (who had an existing scrap metal business) and operated from premises elsewhere in Wolverhampton. His work for ATE continued from those premises for about 5 years, until, in late 2012, his partners decided that they no longer wished to carry on this business.
4. Thereafter, Mr Price came to an agreement with Mr James Jenkins, the Managing Director of ATE that Mr Price could occupy part of some other ATE premises and he would carry on doing what he had always done for ATE.
5. These premises (“the premises”) consisted of an 8 acre open yard, where ATE stored its stock of trailers. There were no offices at this site but ATE’s employees would visit the site quite frequently to show customers around or deliver or collect the trailers. Mr Price would provide his own equipment and his own forklift truck. He was not assisted by ATE staff. He paid £50 per superstructure in lieu of rent and continued carrying out the work he had always done. This mode of working commenced in January 2013 and, during that month, he removed the superstructure from about 20 trailers.
6. Mr Price would do about 1 a day. His method was to remove the curtain sides, shut and lock the rear doors and then take them off by cutting through their hinges. A forklift truck would be placed – with its fork fully raised at the front of the trailer – to support the front of the roof. Then the stanchions at the front of the trailer, supporting the roof, would be cut through, using an oxy-acetylene torch, leaving the forklift truck to take the weight. The rear post would be cut at the base, leaving a little to prevent the superstructure toppling immediately. The forks of the forklift truck would be raised and would tip the roof and the stanchions on to the ground.
7. ATE also conducted this activity through its own employees but using a different method. The ATE method involved removing the curtains, cutting off the rear doors and then using a crane to support the roof while the stanchions were cut through. A forklift truck would be used for additional stability in supporting the roof. The flatbed trailer would then be pulled out of the way and the crane would be used to lower the roof to the floor.
8. On the 21st February, 2013, an ATE employee (a Mr Harvey) visited the premises to show a customer around and, thereafter, spoke to Mr Price who was in the process of dismantling a trailer. Shortly after 14.00, when Mr Harvey was elsewhere on the site, he saw that the roof of the lorry on which Mr Price had been working was lying next to the trailer on its side. Mr Harvey approached the area where Mr Price had been working and saw Mr Price lying on the floor between the trailer and the roof. He had sustained head injuries and was killed instantaneously or near instantaneously.
9. It would appear that in the course of Mr Price’s dismantling activity, the detached roof section fell to the floor and struck him as it did so. Although the precise mechanism was not clear, it seems that, at the time when it fell, the forklift truck was not being used to the support the roof and no means of suspending the roof had been employed.
10. Subsequent to the incident, the specialist inspector engaged by the Health and Safety Executive (“HSE”) concluded that Mr Price’s method of work was unsafe.
11. ATE had various safety procedures and systems; it employed health and safety consultants and maintained a significant number of risk assessments. There were, however, no written risk assessments for the activity of dismantling curtain-sided trailers, when conducted by ATE’s own employees.
12. ATE genuinely believed it had no responsibility for Mr Price’s activities. There had been no effort to advise Mr Price of the method adopted by ATE. So far as ATE was concerned, Mr Price had a defined area on the premises. ATE itself had no expertise in respect of this work and had contracted it out from the late 1990s; Mr Price had always done the job for them.

THE GUIDELINE

1. The Guideline, together with the relevant principles in this area have been considered on a number of occasions recently: see, *R v Thames Water* [2015] EWCA Crim 960; [2015] 1 WLR 4411; *R v Tata Steel UK Ltd* [[2017] EWCA Crim 704; [2017] 2 Cr App R (S) 29; *R v Diamond Box Limited*  [2017] EWCA Crim 1904; *Whirlpool UK Appliances Ltd* v *R* [[2017] EWCA Crim 2186. It is unnecessary to retrace here the discussion of the law contained in those authorities; instead, for present purposes, a brief summary of the structure of the Guideline suffices.
2. At *Step One* the Court is required to determine the offence category in terms of *culpability* and *harm.* There are four levels of culpability: very high; high; medium and low. These levels reflect “deliberate breach or flagrant disregard of the law” (very high), “Offender fell far short of the appropriate standard” (high), “Offender fell short of the appropriate standard in a manner that falls between descriptions in ‘high’ and ‘low’ category” (medium), “Offender did not fall far short of the appropriate standard…” (low).
3. Next, harm must be considered, bearing in mind that the “offence is in creating a risk of harm” – i.e., the offence does not require proof that any actual harm was caused, though (see below) it is an aggravating factor if it was. The combination of both the seriousness of the harm risked by the offender’s breach (A, B or C) and the likelihood of that harm arising (high, medium or low), yields various initial harm categories (1, 2 and 3, set out in table form).
4. The Court must then go on to consider, under paragraph 2 of the Guideline, whether the offence exposed a number of workers or members of the public to the risk of harm (“factor 2 i)”) and/or whether the offence was “a significant cause of actual harm” (“factor 2 ii)”). As expressed in the Guideline:

“If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf….”

1. At *Step Two*, the level of culpability considered together with the relevant harm category is applied to tables, depending on and reflecting the organisation’s turnover (for examples, very large, large or medium organisations). This exercise produces a starting point for the fine which could be adjusted upwards or downwards for aggravating or mitigating factors.
2. At *Step Three,* the Court is required to stand back and check whether the fine based on turnover is proportionate to the means of the offender, in accordance with s.164 of the *Criminal Justice Act 2003* (“the CJA 2003”) and to be “sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation”.
3. *Step Six* deals with the potential reduction for a guilty plea in accordance with s.144 of the CJA 2003 and the relevant guideline.
4. We would additionally underline two matters highlighted by Lord Burnett CJ, giving the judgment of the Court in *Whirlpool:*
	1. First, at [12], there is the reminder that:

“ In this area, as much as any, the court should not lose sight of the fact that it is engaged in an exercise of judgment appropriately structured by the Guideline but….not straitjacketed by it.”

* 1. Secondly, at [31], that a “consistent feature of sentencing policy in recent years….has been to treat the fact of death as something that substantially increases the sentence…”.
1. Essentially, this case concerns the application of the steps in the Guideline, as explained in the authorities, to the facts of this case - somewhat complicated by the basis of plea - rather than any more general consideration of the law in this area.

THE ATE BASIS OF PLEA

1. As already noted, ATE pleaded Not Guilty to an offence under s.3(1) of the Act. On the 19th April, 2017, the prosecution (“the HSE”) invited ATE to consider pleading Guilty to an offence amounting to a breach of Regulation 3(1)(a) of the Regulations and ATE subsequently did so.
2. In the course of discussions between the parties, leading up to ATE’s Guilty Plea, it was agreed between ATE and the HSE that, in Guideline terms:
	1. The case fell within the category of Low Culpability;
	2. The Seriousness of Harm risked fell into Level A;
	3. As to causation (factor 2 ii), on p. 5 of the Guideline), the offence was to be regarded “as having more than minimal, negligible or trivial connection with the accident leading to Mr Price’s death but that it was not a major cause”.
3. The parties did not agree as to the likelihood of harm. ATE contended that there was a low likelihood, whereas the HSE submitted that there was a medium likelihood of harm.
4. Further, ATE accepted that it had been obliged to record a “suitable and sufficient Risk Assessment” relating to the health and safety of *its* employees in relation to the occasions upon which they were required to strip down flat-bed lorries. For its part, the HSE made no criticism as such of the dismantling method adopted by ATE’s employees, other than the absence of a written risk assessment which itself created the risk that the method would not be followed correctly or taught properly. ATE contended that the failing in respect of a written risk assessment was a matter of form only; the HSE disagreed.
5. We return below to the significance of these points of agreement and disagreement. For the moment, it suffices to underline that the basis of ATE’s Guilty Plea was via its failure to have a written risk assessment in respect of the dismantling conducted by its own employees. Thus, as ATE expressed it:

“ Even though Mr Price had the primary expertise in the activity he was undertaking and was extremely unlikely to pay any attention to the Defendant’s own Risk Assessment, the Defendant agrees it is possible he would have done so and adjusted his practices accordingly. Thus it is possible for the Defendant to accept for the purposes of sentence that the failure to have a recorded Risk Assessment in relation to its **own** activity for its own employees can be regarded as having a connection…with Mr Price’s accident.”

As already noted, that connection was accepted to be “more than minimal, negligible or trivial” but was not accepted to be a “major” cause of the accident.

SENTENCING OBSERVATIONS

1. In his careful sentencing observations, HHJ Berlin recorded ATE’s concession that its breach of the Regulations significantly contributed to Mr Price’s tragic death. Mr Price had been a fit and healthy man, well-loved by his family and had died well before his time.
2. The Judge had understandable concerns (a matter to which we return below) as to the basis of plea, accepting ATE’s guilt in respect of Mr Price *via* its breach of duty to its own employees. The Judge was ultimately persuaded that he could proceed to sentence ATE for the breach of the Regulations “…on a proper basis, which includes causation” for Mr Price’s death and went on to say this:

“ Where therefore, as here, the defendant has accepted that the failure in its duty to provide a suitable and sufficient risk assessment for this work for its own employees is linked causally to the death of a non-employee by its concomitant failure to communicate such a risk assessment to him, it would be wrong…to ignore that concession even where I believe, and I do, that there were more appropriate and relevant changes that could have been laid against the company and which would have required the jury directly to consider the existence of any recognised legal duty of care towards Mr Price.”

1. ATE was a reputable company with, hitherto, a good safety record. It began trading in 1995 and was described as the United Kingdom’s leading used truck and trailer specialist. It had over 8,000 vehicles in stock and exported globally.
2. True to the agreement with ATE, the HSE had put culpability as “low”, with the level of harm risked at level A. ATE agreed to low culpability and level A risk of harm. The parties did not agree as to the likelihood of harm; as already noted, the HSE contended for medium likelihood, while ATE argued for low likelihood.
3. As to Step One of the Guideline, the Judge disagreed with ATE that what was actually being done was safe or that the failure to record a risk assessment was a matter of form rather than substance. Absent a risk assessment, there were no suitable control measures in place. This was inherently hazardous and regular work, where a suitable and sufficient risk assessment was plainly necessary. Many accidents were waiting to happen; the “absence of accident” could not therefore be seen as confirmation of safety. The Judge viewed the methods used by Mr Price to be wholly inadequate for such a potentially dangerous operation.
4. The Judge (disagreeing with both parties) assessed culpability as high. ATE had failed to put in place measures “that are recognised standards in the industry”. There were obvious dangers here and “the industry would have expected a risk assessment, and indeed a method statement….”.
5. Furthermore, ATE had failed to ensure that its own employees kept clear of Mr Price’s working area. Still further, ATE had allowed “the breach to subsist over a long period of time”. The Judge had been told that the events began in 2002/2003 on various sites.
6. This was a level A case, in that seriousness of harm risked by ATE’s breach was death. Disagreeing again with both parties, the Judge concluded that this was a high likelihood of harm case. Mr Price’s work had been a substantial part of his working life and he was at risk every time he conducted the activity. It was “a high-risk exercise”. The offence had created a high risk of harm to all involved in the work “…and by its admitted causative link a high risk of harm to Mr Price in particular”.
7. Turning to Step two of the Guideline, ATE’s 2016 accounts showed turnover of £17 million. Gross profit was in the region of £2.5 million in 2015 and £2.8 million in 2014, with an operating loss before tax of some £213,677 and £117,759 respectively. ATE made pre-tax profits of £346,197 in 2013 and £299,804 in 2012. The net book value of its assets amounted to £1.1 million in 2015. It had £58,789 in cash in the bank but also had an overdraft of £837,000.
8. ATE’s profit and loss account showed a profit of £1.5 million despite the net loss of £294,289 in 2015 and its balance sheet showed a positive figure of £1.6 million. In 2014, the profit and loss account showed £1.88 million and no dividends were paid in 2015. The company therefore fell to be dealt with on the basis of high culpability and within harm category 1 but as a medium organisation.
9. As to Step three of the Guideline, the fine had to be sufficiently substantial to have a real economic impact which would bring home to both management and shareholders the need to comply with health and safety legislation.
10. ATE pleaded guilty at the first reasonable opportunity and had generally a good safety record and systems in place. It was a reputable company and all these matters were taken into account.
11. In mitigation, ATE had taken immediate steps to remedy the problem. It had cooperated with the authorities and had no previous convictions. It was contrite. It had a full-time site and compliance manager and had engaged external health and safety consultants since 2013. It had training courses and more than £100,000 had been spent on health and safety since 2012.
12. ATE fell – if only just – in the medium organisation category, stretching from £10 million to £50 million turnover. The starting point taking account of proportionality and totality was £625,000 but that was increased to £750,000 for paragraph 2 issues. Fixing the amount of the fine, the Judge reduced that figure to £475,000, to take account of the plea and mitigation.

THE RIVAL CASES

1. In brief outline, Mr Leonard, for ATE, submitted that the Judge had departed from the agreed basis of plea – reflecting agreement between ATE and the specialist prosecutor – without any or adequate justification. Furthermore, the Judge had fallen into error in a number of factual respects. Thus and *inter alia:* ATE had not performed this work on many occasions; the duration of the offending was limited to the period on the indictment (1st January 2010 – 22 February 2013) and not some longer period; there were no industry standards, apart from the requirement of a risk assessment – and double counting was to be avoided in that regard. Importantly, the only element of unsafety in the method used by ATE employees was that lack of a risk assessment. Further, as to factor 2 i), there had been no unrestricted access for ATE employees to the area used by Mr Price. The correct categorisation was low culpability, as agreed by the HSE with the benefit of expert advice. Given a long period without accident, there was also a low likelihood of harm. This was a case initially within low culpability harm category 3, albeit Mr Leonard accepted that it could or would go up to harm category 2, given that factor 2 ii) was engaged. Having gone up to low culpability harm category 2, mitigating factors (ATE’s overall safety record and its guilty plea) needed to be taken into account. The fine imposed by the Judge reflected erroneous categorisation and was manifestly excessive.
2. For the HSE, Mr Puzey submitted that the Judge was entitled to reach the conclusions to which he came but, very fairly, stated in terms that he stood by and did not disown the agreement reached between ATE and the HSE. As to the dismantling method adopted by ATE’s employees, the HSE made no criticism save that the absence of a written risk assessment was itself a matter which created the risk that the method would not be followed correctly or taught properly. So far as concerned industry standards, the real point went, again, to the absence of a thorough and comprehensive risk assessment.
3. In Guideline terms:
	1. The incident was one of low culpability because: (1) it was not an operation habitually undertaken; (2) ATE otherwise had good safe systems of work; (3) ATE genuinely, though mistakenly, believed that it had no responsibility for the way Mr Price did his work; (4) there had been no prior warning.
	2. The seriousness of harm was at level A.
	3. There was a medium likelihood of the risk of harm materialising; the work was inherently dangerous with a hidden lurking danger; it was undertaken without a risk assessment.
	4. Factor 2 ii) was engaged so an uplift was to be considered.
	5. The conclusion was that the case fell within low culpability, harm category 1, with the starting point and category range appearing from the table at p.7 of the Guideline.

DISCUSSION

1. *(1) The Basis of Plea, the agreement between the parties and the role of the Court:* It is plain that there was a considered measure of agreement between the parties, underpinning the basis of ATE’s plea, in particular as to the level of culpability. In some respects (for example, the likelihood of harm arising), ATE and the HSE were not in agreement. It is equally plain that the Judge departed significantly from the agreement and views of the parties, notably as to the level of culpability and the likelihood of harm arising.
2. There is much to be said in an area such as this – with a specialist prosecution agency – for sensible agreement between the parties, not least saving resources and court time and permitting a focus on remedial measures. Such sensible agreement is to be encouraged and it is to be expected will be weighed carefully by any Court before departing from it. However and ultimately, no such agreement can bind the Court; as a matter of constitutional principle (and save in certain minor manners, irrelevant here) the imposition of a sentence is a matter for the Judiciary: *R v Innospec* [2010] Crim LR 665. Principles of transparent and open justice point to the same conclusion. A private agreement between prosecution and defence will doubtless inform the Court but, helpful though it may well be, cannot be determinative of sentence.
3. Agreement between the parties apart, bases of plea tendered in this area are to be considered and dealt with as they are elsewhere in the criminal law and do not require separate comment.
4. It follows that, *as a matter of principle*, the Judge was entitled not to concur in the agreement reached between the HSE and ATE. We return presently to the separate question, whether, as a matter of fact, his decision to depart from that agreement was well-founded.
5. *(2) The basis of plea – analysis and causation:*  In his sentencing observations, the Judge voiced understandable concerns as to the basis of plea. As already foreshadowed, ATE’s plea accepted guilt in respect of Mr Price *via* its breach of duty to its own employees, pursuant to Regulation 3(1)(a) of the Regulations and s.33(1)(c) of the Act. It pleaded Not Guilty to the offence under s.3(1) of the Act, dealing with a duty owed directly to non-employees (including Mr Price) and maintained that plea. In the event, the HSE offered no evidence in respect of that Count and a Not Guilty verdict was entered.
6. The upshot was that the causal link to Mr Price’s death essential to ATE’s Guilty plea involved a concession that ATE’s failure to provide a suitable and sufficient risk assessment for its own employees resulted in a concomitant failure to communicate that risk assessment to Mr Price, so comprising a “more than minimal, negligible or trivial” connection with Mr Price’s accident. This was so, despite (as ATE expressed it) Mr Price – who had the “primary expertise in the activity he was undertaking” – being “extremely unlikely to pay any attention” to ATE’s risk assessment.
7. Like the Judge, we cannot avoid expressing some concern as to an air of artificiality surrounding this plea but, again in agreement with the Judge, we are not minded to ignore ATE’s concession. Moreover, we cannot see that any practical benefit would result from declining to proceed on the basis thus far followed, so requiring the parties to begin again, at significant and unnecessary cost to all concerned. We caution, however, that this case stands as a further reminder of the need for care when tendering and accepting a basis of plea.
8. At all events, it follows that, when sentencing, the Judge was obliged to concentrate on the method of work followed and the frequency of the work undertaken by ATE’s own employees, as distinct from the method of work adopted by Mr Price and the regularity with which he performed his task. This occasioned the Judge no little difficulty but is an unavoidable consequence of proceeding on the basis of the indirect route to liability via ATE’s breach of duty to its own employees. In our view, such complexity as there is in the present case has flowed from this feature of the basis of plea. Be that as it may, we must now turn to apply the Guideline to the facts, following its structure but not “straitjacketed” by it (*Whirlpool,* at [12]*)*.
9. *(3) Applying the Guideline to the facts: Culpability:* Our starting point is an assessment of culpability, where we at once part company with the Judge. First, his consideration strayed to the method used by Mr Price, which (as already discussed) was not in accordance with the basis of plea – and thus strayed into the Count on which no evidence was offered. Secondly, there were no recognised industry standards, save for the expectation of a risk assessment. While the absence of a risk assessment for its own employees was a failure on ATE’s part – and, contrary to ATE’s submission, not a matter of form only – we underline that no other criticism of the method followed by ATE employees was advanced by the HSE. Thirdly, insofar as the Judge had regard to the breach subsisting “over a long period of time”, he went outside the period of the indictment – again, as it seems to us, focusing on the work done by Mr Price rather than that done by ATE’s employees.
10. For the reasons given by Mr Puzey, recorded above and which need not be repeated here, the parties agreed “low culpability” on a proper basis and, with respect, there was no or no sufficient justification for the Judge categorising this case as one of “high culpability”.
11. *Harm:* As agreed by the parties and found by the Judge, the seriousness of harm risked was death and, therefore, Level A.
12. As to the likelihood of that harm arising, ATE contended for a low likelihood, the HSE for a medium likelihood and the Judge held that there was a high likelihood. We respectfully disagree with both the Judge and ATE. We agree with the HSE that this was a case of medium likelihood.
13. While the work was inherently hazardous, the *only* criticism of the method adopted by ATE employees was the absence of a risk assessment. However, that factor alone (as contended by Mr Puzey) points, on the facts here, to something other than a low likelihood of harm. Moreover, staying true to the indictment period and the small number of occasions on which ATE employees conducted this work, we cannot treat the “absence of accident” as persuasively telling in favour of a low likelihood. In this regard, we agree with Hickinbottom LJ’s observation in *Diamond Box,* at [17] – [18], that an “accident-free” period did not, *of itself*, mean that the likelihood of the risk materialising was not high – and that *Tata Steel* did not hold otherwise; it all depends on the circumstances of the case. All that said, we are unable to agree with the Judge that the facts warrant classification of this case as one of high likelihood and think that, here too, he was influenced by a consideration of Mr Price’s, rather than ATE’s, method of work.
14. *Paragraph 2 factors:* We turn next to the paragraph 2 factors (Guideline, at p.5). Overall, we are persuaded by ATE that factor 2 i) does not apply and that the Judge was in error in holding that it did. First, the Judge’s focus was, again, on the work undertaken by Mr Price. However, the relevant activity was not Mr Price’s work but the work done by ATE employees. Accordingly, with respect, the Judge’s focus was misplaced. Secondly and even if that is wrong, although Mr Price may have had no clearly delineated part of ATE’s premises on which to conduct his work, the evidence falls well short of showing that his activity exposed a number of workers or members of the public to the risk of harm.
15. As to factor 2 ii), there was, tragically, a death and, on ATE’s basis of plea, the offence was a more than minimal, negligible or trivial cause of it. As observed by Lord Burnett CJ in *Whirlpool* at [31], the fact of death is itself a significant aggravating factor; he went on to say this:

“ Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range…..”

1. *Turnover:* Turning to the categorisation of ATE in terms of turnover, it comes within the description of “Medium” – if, as the Judge correctly held, its turnover is very much towards the bottom end of the £10 million – £50 million bracket which covers Medium organisations.
2. *Conclusion:* Pulling the threads together in terms of the Table at p.7 of the Guideline and in the light of the conclusions thus far, our initial categorisation is that ATE is a Medium organisation and this is a low culpability case falling within harm category 2 (a medium likelihood of harm). The starting point is thus £40,000, with a category range of £14,000 - £100,000.
3. However, as we have also held, factor 2 ii) is applicable. To reflect that factor and to have a real economic impact, so bringing home the appropriate message to ATE (*Thames Water,* at [38]), the right course is to move up to harm category 1 and indeed to the top of the category range for harm category 1 – i.e., £300,000.
4. Given the approach we have adopted to the categorisation of the case generally, the various mitigating factors advanced on behalf of ATE have already been taken into account and so do not warrant a reduction of this figure. However, it remains necessary to reduce the amount of £300,000 by one third, to allow (as the Judge did) ATE full credit for its guilty plea.
5. In the result, we conclude that the appropriate fine is £200,000. Accordingly, we quash the fine of £475,000 and substitute a fine of £200,000 in its place.
6. Furthermore, as helpfully pointed out by the Criminal Appeal Office, the Victim Surcharge should be reduced from £120 to £15.
7. To such extent, this appeal is allowed.