



AWTORITÀ GHAS-SAĦHA U S-SIGURTÀ FUQ IL-POST TAX-XOGHOL
OCCUPATIONAL HEALTH & SAFETY AUTHORITY

Enforcement

Policy and Procedures

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OHSA'S ENFORCEMENT POLICY AND PROCEDURES

Introduction

The modern world of work is one of permanent change, with consequences for the way business is carried out, for industry and for work processes. The introduction of new technologies, agents, equipment or tools can also invariably affect the levels of occupational health and safety in general, as well as in any particular workplace, since new and emerging risks are continuously being identified. Thus concrete preventive and control measures, usually introduced in reaction to earlier changes, would only remain valid until the next change. The structure of local industry and workplaces in general, with their preponderance of micro to small enterprises, also has effects on the success or otherwise of the measures used, and no simple solution can be used universally. Traditional accident and ill health prevention methods, in particular those relying simply on policing or punitive enforcement, and their effectiveness in bringing about better and more suitable levels of occupational health and safety, are being placed under increasing scrutiny and queried.

The rapidity of change and innovation in the world of work creates new challenges for labour inspectorates everywhere, which must adapt to keep abreast of developments. Moreover, inspectorates are increasingly expected to improve productivity, increasing effectiveness and efficiency. It has been the experience in many countries that many inspectorates have still not realised their full potential in implementing new preventive strategies that embrace a comprehensive approach and which revise existing policies, strategies or intervention methods.

The overall scope of all occupational health and safety legislation is the safeguard of occupational health and safety, for all workers, at all places of work. This can only be achieved if all duty holders assume their legal responsibilities and control risks to acceptable levels. The Occupational Health and Safety Authority Act, 2000, provides for the appointment of Officers to ensure compliance with the legislation. This

notwithstanding, and as a means by which to solicit compliance, an Officer can exercise discretion in deciding the timing, the nature and the degree of the action to be taken; when applying discretion, the same Officer is not liable for his actions, and is protected by the same Act, so long as the actions are done in good faith¹. The decision on enforcement action therefore, remains ultimately a matter of judgement, and for the discretion of the Officer.

In the past, the centre of attention of OHS Officers has been the control of risks within any specific situation. This often resulted in corrective measures being recommended and instituted. The focus of an OHS Officer's attention should be the prevention and the anticipation of changes, rather than to try and solve already existing problems, while the same Officer looks for potentials for improvement.

With these factors in mind, the Occupational Health and Authority would like to stress that the thrust of all OHS Officers' enforcement action should be towards health and safety promotion at all levels of an enterprise, and towards seeking managerial commitment, to facilitate a shift in the behaviour of all duty holders. Poor standards of occupational health and safety are often the result of poor management practices, and soliciting compliance to achieve progress in improving these practices should be the overall goal of an OHS Officer.

Purpose of the policy

The overall purpose of this policy is to list a number of principles intended to guide decisions to be taken by OHS personnel when carrying out enforcement action permissible by law. These guiding principles will enhance transparency of OHSA's operations while ensuring fairness and equitability of application. Where deviations from this policy are considered necessary, the direction of the Chief Executive Officer shall be sought in writing, who may consider referring the matter to the Board for its deliberations and decision as to whether the policy should be amended.

¹ (Art.19, OHS Authority Act, 2000)

Enforcement

The purpose of enforcement is to ensure and bring about the effective control of risks at their place of work by duty holders. This can be achieved if the duty holders take action commensurate with the degree of risk. When no such action is taken, it is the duty of the enforcing authority to take legal action or any other action permitted by law.

The term 'enforcement' has a wide interpretation, but is often taken to include all interactions between the enforcing authority and duty holders including employers, employees and the self-employed, as well as interactions with other person who may have an important role in the safeguard of OHS including appointed competent persons, construction site project supervisors as well as workers' health and safety representatives. The term 'enforcement' should not necessarily be taken to mean exclusively punitive action, as for example through prosecution or the issue of an administrative fine, but can also mean the provision of advice or information, or the issue of a warning or an order by an OHS Officer. In any case, enforcement action should only be undertaken if an OHS Officer has fully investigated all the prevailing circumstances. Enforcement is thus taken to mean all actions taken by the enforcement authority (OHSA) to place a duty holder in a position to fulfil duties assigned by law.

Enforcement should focus on those work activities that give rise to the greatest risk or where the hazards are less well managed. It should target those responsible for creating the hazards and risks since they would be in the best position to control them. When formal enforcement action is needed Officers will take action against the relevant duty holder and where there is more than one duty holder sharing responsibility, against the duty holder, or duty holders, who can be regarded as primarily in breach of the law.

The Principles of Enforcement

An Officer shall at all times act in a **firm, proportionate, consistent and fair manner**, and to be **accountable** for all decisions taken.

Acting in a proportionate manner means that an Officer shall take actions that are commensurate with the risks involved and with the seriousness of any breaches of the law. Some occupational health and safety duties are absolute; in such instances, the

principle of proportionality should still apply, keeping in mind that some irreducible risks may be so serious that they cannot be permitted irrespective of the consequences.

The term consistent, on the other hand, means that duty holders managing similar risks can expect a similar approach from Officers and that they can expect to receive similar treatment with regards to advice, the issue of orders by Officers, the imposition of an administrative fine, prosecution and overall response to incidents. 'Consistent' does not mean uniform and the Authority recognises that achieving consistency in practice is not an easy matter – OHS Officers are often faced with a range of hazards and risks, of managerial competence and approach, and accident histories that may vary considerably between employers.

Officers may also encounter problems in determining what is reasonably practicable in applying a number of legal provisions. This should be a matter of judgement for the duty holder and the Officer, although an Officer's judgement in any particular case will be guided by what is current and relevant best practice. When a duty holder and an Officer cannot reach agreement, final determination in particular cases becomes a matter for the courts.

An OHS Officer may be required to give advice with regards to what is a legal requirement or about what is desirable but not mandatory, and in such instances, the OHS Officer will be guided by published Codes of Practice.

OHS Officers are generally accountable to the Authority for their actions. This means that any acts of commission or omission, as the case may be, shall be open to scrutiny and the justification for the course of action taken shall be liable to be queried or judged. OHS Officers are thus requested to keep suitable and updated records of the whole process involved in deciding the nature of the action to be taken. These records shall also be used when an appeal or a complaint is made against any action taken by an OHS Officer.

Means of Redress

The legislation provides a right of appeal for a duty holder to the Courts or the appeal system as provided for by the principal Act, as well as by the Occupational Health and Safety Appeals Board (Procedural) Regulations, 2002. If however a duty holder believes

that an Officer has given wrong advice, or if there is enough reason to suspect that an action taken by an Officer was not in good faith, then the person may also wish to raise the matter, **in writing**, with the Chief Executive Officer of the Occupational Health and Safety Authority. The Chief Executive undertakes to investigate the matter in confidence and in full, and to give a written reply to the complainant as soon as the complaint has been investigated.

Administrative Fines

When an offence against the Act or regulations made under the Act is committed, the Authority may intimate the wrongdoer that there has been a breach of the legislation and that a pecuniary fine is being imposed instead of instituting criminal proceedings.

The law does not require the Authority to exhaust the administrative remedy before resorting to criminal procedures, but establishes a discretionary power. Thus it is up to the Authority to decide as to whether the circumstances of a case warrant the imposition of an administrative fine or the institution of criminal proceedings or to take any other action as contemplated by the law.

For the sake of objectivity, fairness and equity of application, OHSA has developed a set of procedures governing the behaviour of OHS officers in such situations have been established and included in the Authority's Standard Operating Procedure document entitled "*Administrative Fines: The introduction of pecuniary penalties within a broader enforcement framework.*" These procedures establish the general criteria upon which such decisions shall be based

OHS Officers are also advised to take note of the requirements of Legal Notice 36 of 2012, the Occupational Health and Safety (Payment of Penalties) Regulations.

Prosecution

Prosecution shall always be undertaken when it is in the public interest to prosecute. Prosecution is an essential part of enforcement, but it should be undertaken only as the last resort. However, if there are valid and substantial reasons for so doing, an OHS Officer may decide to initiate prosecution without prior warning and without having carried

out any other prior and alternative enforcement actions. In any case, the OHS Authority expects OHS Officers to prosecute, without fail, whenever:

- I. there are repeated breaches of the law, which give rise to significant risk, especially when a duty holder ignores previous enforcement action especially disregard to Orders issued in terms of the law;
- II. an administrative fine remains unpaid or when a fine is paid but no action is taken by that duty holder to rectify shortcomings that merited the fine to be issued; there is reckless disregard of occupational health and safety requirements giving rise to a serious potential to cause harm;
- III. there is a generally bad record of poor occupational health and safety standards;
- IV. OHS Officers are intentionally obstructed or hindered in the lawful course of their duties and whenever false information has been wilfully given; likewise whenever a person refuses to give information as requested by an OHS Officer.
- V. A person deceives, produces, furnishes, sends or otherwise makes use of any document which is false in a material particular; or willfully refuses or without lawful excuse, the proof whereof shall lie on that person, withholds any material information;
- VI. A person knowingly or recklessly makes any incorrect statement or entry in any record or return or on any document kept or furnished under this Act or under any regulations made there under;
- VII. A person unlawfully refuses or fails to answer to the best of that person's knowledge any question made to him/her by an officer in the exercise of that officer's functions; or fails to co-operate fully with an officer in the pursuance of that officer's duties and / or;
- VIII. A person unlawfully refuses or fails to comply with any requirement duly provided under this Act or under any regulations made by virtue of this Act.

OHSA action following Magisterial Inquiries

Whereas Article 9 (2) (j) of the OHSA Act, 2000 empowers OHSA to "carry out any investigation on any matter concerning occupational health and safety", there will often

be times when such investigations are carried out concurrently with, and independently of, other investigations, as for example Magisterial Inquiries. There may be times when the conclusions of OHSA's investigations differ from those of such inquiries.

In such instances, the findings of the Magisterial Inquiry shall prevail, except in such instances where (i) OHSA's investigations bring to light shortcomings which are not identified in the Magisterial Inquiry and which merit the initiation of judicial proceedings, or (ii) where the Inquiry arrives at a conclusion, which in the opinion of OHSA is based on an erroneous interpretation of OHS legislation. In these situations, OHSA shall inform in writing the Police authorities and the Office of the Attorney General with the results of OHSA's investigation and the reasons why OHS disagrees with the results of the Inquiry.

In all other cases, including in those situations when a Magisterial Inquiry recommends the commencement of judicial action against any person, when OHSA's investigation does not identify any breaches of OHS legislation in respect of that person, OHSA shall refrain from taking any other action.

Publicity

The OHS Authority shall give publicity to any convictions in such a manner as would serve to draw attention to the need to comply with occupational health and safety requirements, and to deter anyone from disregarding their statutory duties.

Civil claims

A distinction must be made between enforcement and civil claims for compensation. Whereas assistance shall be given to the courts of law when determining such claims, it must be stressed that enforcement is neither carried out in all circumstances where civil claims may arise, nor is enforcement to be used to assist such claims.

Obstruction and Assaults on OHS Officers

In every case, the Authority will prosecute those who seek to obstruct, threaten or assault its Officers as well as on any of its members during their course of duties. In doing so it will use to the fullest extent its powers under the Occupational Health and Safety Act 2000

and it will also support prosecutions under the criminal law brought by the Executive Police. Thus, the Authority requests any OHS Officer to immediately notify the immediate superior of any incident, so that legal action can commence immediately. This action will be without prejudice to any other action, legal or otherwise that may be taken.