

Supermarket Fined £7.56 Million For Selling Food Past Its Use-By Date – A New Era in Food Safety Fines?

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The fine of £7.56 million, following a guilty plea in respect of 22 charges under the Food Safety and Hygiene (England) Regulations 2013, has been [reported](#) by the national press and by [food safety publications](#). The offences date back to 2016 and 2017, when an investigation by Birmingham City Council identified a number of items that were past the marked use-by date on the relevant products at three stores in Birmingham. Products included meat slices, desserts, pasties and some soup – some of which should have been removed 17 days earlier.

The defendant accepted that the items were displayed for sale past their use-by dates, but had previously argued that the items were not “unsafe” within the meaning of the Food Safety & Hygiene Regulations 2013 because the food had not sufficiently deteriorated to such an extent that it was, in fact, unsafe. The defendant sought to rely expert evidence from a food microbiologist, to demonstrate that the food was not “highly perishable” and would, therefore, have been safe to eat.

In preliminary proceedings, Birmingham Magistrates’ Court directed that there is an automatic presumption that food past its use-by date is unsafe. The expert evidence could not, therefore, be adduced to rebut this presumption. As we [reported](#) in June last year, an application for judicial review of the decision of the District Judge that this expert evidence as to whether the food was, in fact, safe, was inadmissible, was refused by the High Court. The supermarket subsequently pleaded guilty in Birmingham Magistrates’ Court, as summarised above. We do not know whether the fine will be appealed.

The relevant legislation in this case is the Food Safety and Hygiene (England) Regulations 2013, under which it is an offence to fail to comply with certain obligations in EU law, including general principles of food safety and food labelling. In particular, EU general food law prevents unsafe food being placed on the market; and EU food information/labelling law provides that after the use-by date, food shall be deemed unsafe.

EU law also makes it mandatory to label food with a “best before” or use-by date, albeit with certain exceptions (for example, best before dates are not required for unpeeled/ uncut fresh fruit and vegetables, wines, vinegar or cooking salt). Unlike the use-by date, the best before date is connected to the minimum durability of the product, being the date up to which food retains its expected quality when it comes to flavour and texture, under proper storage and use. However, a use-by date (rather than a best before date) is mandatory for food (and drinks) that, from a microbiological point of view, are highly perishable and are, therefore, likely after a short period to constitute an immediate danger to human health.

It is worth noting that failure to comply with labelling requirements may lead to an improvement notice in the first instance under the Food Information Regulations 2014 (and separate but similar regulations in Wales and Northern Ireland). It is a criminal offence to fail to comply with such a notice.

In Scotland, the failure to comply with labelling requirements can be charged as an offence in the first instance.

The case perhaps puts to bed the long-running argument that food past its use-by date is not necessarily unsafe because it is still consumable, but it is perhaps likely to have wider ramifications than that.

Firstly, it may lead to pressure on producers to ensure that use-by dates and best before dates are used appropriately and with a proper assessment of whether a product is highly perishable and likely after a short period to constitute an immediate danger to public health (and, if so, what the appropriate date might be).

Secondly, the fine imposed clearly demonstrates the [Sentencing Guidelines](#) for food safety and hygiene offences (such guidelines also governing health and safety and corporate manslaughter) can result in a very significant fine, particularly for organisations that will be classified as large, or very large, within the meaning of the guidelines. An organisation is classified as “large” if its turnover or equivalent is £50 million or more (and “very large” if its turnover “very greatly” exceeds this threshold). In this category, the starting point for an offence in Harm Category 1, which many food safety offences will be, is £1.2 million, with a range for the sentencing judge to consider between £500,000 and £3 million. An offence will be committed for each product sold that breaches requirements. Usually, there will be multiple products involved and a sample will be charged to reflect that there is more than one breach.

The fine imposed in this case is the largest reported fine imposed for food safety offences and in fact the fine is much higher than typical health and safety prosecution fines, even where there is a fatal accident involved, notwithstanding that no individual was harmed on these facts. As such, it is probable that we will see similar fines on other facts for large organisations in the future. For example, the sale of food with undeclared or undeclared allergens, or the sale of food containing foreign bodies due to a manufacturing fault, could both be charged under the same legislation and the same Sentencing Guidelines will apply.

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