

New H&S Duty for Directors?

The TUC have renewed their call for a positive duty on directors to look after the health & safety of their employees and members of the public.

Simon Joyston-Bechal from Turnstone Law considers whether there is merit behind the proposal and explains how to stay on the right side of the present law.

What do the TUC say?

The TUC published a paper in January 2014 entitled "Directors Duties – the need for action" as part of their "time for change" campaign. The paper points out that it is individuals rather than companies that make decisions. Directors are only prosecuted and/or disqualified from acting in a managerial capacity in a minority of cases, with the norm being a prosecution of the organisation. In 35% of companies, health & safety ("H&S") is never on the agenda at board meetings and the TUC argue that nothing can be done to punish directors in the minority of companies where the only concern of the board members is the bottom line.

The TUC argue that the main problem is the lack of a positive duty for directors under the Health and Safety at Work etc Act 1974 ("HSWA 1974"). They point out correctly that HSWA 1974, s 37, which deals with personal criminal prosecution of directors and other senior officers (including company secretaries), applies only if an offence committed by the company "is proved to have been committed with the *consent* or *connivance* of, or to have been attributable to any *neglect* on the part of any director, manager, secretary or other similar officer of the body corporate" (emphasis added).

The TUC say this means business leaders can't be prosecuted unless they actually do something wrong (this would be "*consent* or *connivance*") or they have *neglected* to perform a duty that has been expressly given to them (e.g. the organisation has given them responsibility for H&S or part of their role has specific duties that relate to safety). The crux of the

TUC's analysis is that directors who choose to take on no responsibility cannot be prosecuted if they haven't actually done something wrong:

"If a board of directors refuses to have any involvement in health and safety, however bad the record of the company, there is almost nothing that can be done to force them to take responsibility beyond disqualification."

Accordingly, the paper calls for a new general duty on directors, backed up with an Approved Code of Practice that spells out exactly what directors should do. The TUC say this new duty "would be the biggest driver yet in changing boardroom attitudes towards health and safety".

Is there already a duty?

There is no express law making plain a director's positive duty for H&S. However, the law arrives at a very similar position indirectly.

- ◆ First, as explained above, HSWA 1974, s 37 means that a director has committed a criminal offence if an H&S offence is committed by the company and this is "attributable to any neglect" on the director's part.
- ◆ Second, case law makes clear that when looking at "neglect", even if a director doesn't know about a safety issue, he can be liable if "he should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place" (*R v P Limited and anor* [2008] ICR 96).
- ◆ Third, there is specific guidance (entitled "Leading Health and Safety at

Work") which was produced by the Institute of Directors together with the HSE ("the IoD Guidance"); this IoD Guidance sets out expectations for proactive H&S leadership from the board.

The combined effect of these three factors can be interpreted as follows: If a director has failed to do something that he ought to have done, he can be guilty of "neglect" and HSWA 1974, s 37 can apply. The spectre raised by the TUC is that the director can escape conviction by refusing to have any involvement with H&S. However, the director will only escape the law if it would not be reasonably practicable in all the circumstances for someone in his position to do more. Looking at it from the other side, if the director ought reasonably practicably to do more or be more proactive, then his failure can amount to a criminal offence.

It would seem, therefore, that the current state of the law is sufficient to catch a business leader who inappropriately abrogates responsibility for H&S.

Merit behind the proposal?

Assuming the law fairly establishes a duty on directors that addresses the TUC's main concern, the picture is nonetheless confusing to everyone except seasoned observers. If the law isn't clear it will fail one of its main purposes, which is to set out expectations in order to prevent breaches. The merit of the TUC's proposal is that clarity would have a greater chance of impacting behaviour.

The right side of the law

In practice, in order to stay on the right side of the law company leaders should:

- ◆ be aware of the IoD Guidance and seek to follow it; and
- ◆ be as proactive as someone in their position ought reasonably to be, taking into account the IoD Guidance and all other relevant circumstances.

For most operational senior management roles, such compliance requires plenty more than ignoring H&S. This underlines the need for director training that ideally applies these principles to the specific circumstances of the business.

*Simon Joyston-Bechal
Solicitor and Director, Turnstone Law
www.turnstonelaw.com*