

Managers' H&S liability

With the implementation of the Corporate Manslaughter Act and the enforcing authority's focus on H&S management, a number of calls have been received by Croner's Health, Safety and Environment Helpline asking the question: "Does having 'manager' in a job title infer personal health and safety liabilities?" Health, Safety and Environment Advisor Mubin Chowdhury discusses.

The role of directors, managers, employees and other individuals can be considered in criminal investigations by the Health and Safety Executive (HSE) and other enforcement authorities. It depends on factors such as the presence of evidence which provides a realistic prospect of conviction (known as the evidential stage) and the public interest. So it is important to understand some of the legislation, factors and principles that govern the prosecution of individuals.

Section 7 duties

Under ss.7(a) and 7(b) of the Health and Safety at Work etc. Act (HSWA) any individual employee, irrespective of the employer's obligations, can be prosecuted if they contravene their general duties to either¹:

- take reasonable care of their own health and safety at work or anyone else affected by their acts or omissions at work, or
- co-operate with their employer so far as was necessary to enable their employer to comply with a relevant statutory duty or requirement.

So for s.7 prosecutions, the HSE will consider factors such as whether the employer has taken all reasonably practicable steps to ensure compliance, the employee is solely to blame, has been flagrant in his or her breach of duty, is not following the alleged safe systems of work put in place, has received previous warnings and so on.

Whether the employee is titled manager or not does not matter for s.7. For example, in 2007, for breach of s.7(a) resulting in a fatality, Maidstone Crown Court fined two employees £1000 and £2500. The first employee was an unqualified driver of a dumper truck and the second was his supervisor.

Section 37 prosecutions

Section 37 of HSWA must also be considered. This section concerns offences committed by consent or connivance or attributable to the neglect of directors, managers, secretaries or similar officers. This section allows such individuals to be prosecuted, as well as the company/body corporate.

To prosecute someone under s.37, the HSE must prove that²:

- a body corporate has committed an offence under a relevant statutory provision, and
- a person is a "director, manager, secretary or other similar office holder" within the terms of s.37

and that either:

- the person was aware of what was going on and agreed to it (consent)
- the person was aware of what was going on (connivance)
- what was going on was attributable to the neglect of the person.

Meaning of manager, etc and other laws

Each case must be decided on the facts. In general, for a person to be convicted under s.37, it must be shown that he or she has some real strategic responsibility for the making of company-wide management decisions and policies and be in a position of real responsibility. This can be established, for example, through evidence demonstrating the position of the individual in the management structure. For example, the safety policy or otherwise could show that the individual ought to have been aware of the circumstances leading to the breach by the company.

Case 1ⁱⁱⁱ

For example, in *R v Boal*, a case under the now repealed **Fire Precautions Act 1971**, the assistant manager of a bookshop was punished with three months' imprisonment, suspended for 12 months. But he appealed against the conviction on the ground that he was not a "... manager or other similar officer..." within the meaning of the Act. The conviction was set aside on appeal. This was on the basis that he was responsible only for the day-to-day running of the premises.

The Court of Appeal (Criminal Division) comments included:

A person was "a manager" if he or she had power of "...the management of the whole of the affairs of the company..."

or was "...entrusted with power to transact the whole of the affairs of the company..." or was "managing in a governing role the affairs of the company itself". The court further thought that the intended scope of s.23 of the Fire Precautions Act was "...to fix with criminal liability only those who are in a position of real authority, the decision makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at underlings."

Case 2^{iv}

In the well-known case of *Armour v Skeen*, the Director of Roads for Strathclyde Regional Council was successfully prosecuted under s.37(1) of HSWA, on the grounds that the offences committed by the council were attributable to his neglect. He had failed to produce a written safety policy for his department, though the council had required him to. The court held that although the Director of Roads was not a "director" in the sense of the word as used in s.37, it was clear that he came within the category of "manager, secretary or other similar officer of the body corporate".

Corporate manslaughter

More recently, although the **Corporate Manslaughter and Corporate Homicide Act 2007** does not allow for the prosecution of individuals, it defines senior management as^v:

"...in relation to an organisation, means the persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities."

In conclusion, all employees are subject to the general duties placed on them at work by s.7 of HSWA. Section 37 refers to persons with real authority and power to make corporate policy and strategy decisions. It is not the name or title attached to any person in a company that determines liability but more the authority and responsibility the person has within the company.

¹ <http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying-employees.htm> ² <http://www.hse.gov.uk/foi/internalops/fod/oc/100-199/130-8.htm> ³ <http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying-directors.htm> ⁴ <http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying-directors.htm> ⁵ http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en_1

Duty calls

Employees have the statutory right to request unpaid time off to carry out functions connected with public duties. Additionally, they have the right to request paid time off for a variety of reasons. While employees have the right to request time off, it is not an absolute right to take time off when the individual sees fit. However, where an employer unreasonably refuses a request for time off, the employee can issue a claim in the tribunal. How should employers manage such requests?

Employers must permit employees to take unpaid time off to perform public duties, attend jury service or where they are required to appear at court or tribunal as a witness, to participate in trade union activities or to deal with emergencies involving dependents. They must permit paid time off for the employee to carry out duties of an official or a recognised trade union, as an elected safety representative, to act as a companion during the course of disciplinary, grievance, flexible working request or duty to consider meetings. Similarly, employees are entitled to take paid time off to attend antenatal appointments, to undertake study or training if aged between 16 and 18, and to look for alternative employment during their notice period, when the reason for dismissal is redundancy.

The amount of time off an employee is allowed to take must be "reasonable". What is reasonable will, of course, depend on the circumstances of the individual case. In determining this, it is necessary for the employer to consider how much time off is required, how much time off has already been permitted and what effect the individual's absence will have on the employer's business.

It should be noted that if an employee exercises his or her right to request time off for one of the statutory reasons, it is insufficient for the employer to simply rearrange the employee's work so that the time is made up at a later date.

If the employee's attendance is genuinely essential to the business, then it may be reasonable for an employer to refuse time off. However, in such circumstances, employers would be well advised to explain the position to the employee so he or she is aware of the reasons why the request is not being permitted.

In order to avoid disputes, and to preserve good employee relations, employers are advised to have a clear policy on statutory time off. The policy should require that the employee give the employer reasonable notice of the dates on which time off is required and the amount of time needed. Any time off should be agreed in advance and recorded. This will avoid situations where an employee simply takes time off and later records it as time off for a statutory reason. It would be sensible, when dealing with employees requesting time off to perform public duties or duties connected with a position they hold, eg trade union official, to agree in advance what constitutes a reasonable amount of time.

Employers must also ensure that, where applicable, they follow the relevant statutory procedures for dealing with requests for time off, eg time off to train.



Customers exposed to carbon monoxide

A building company and one of its directors was recently fined a total of £15,000 after leaving its customers at risk of death or serious illness from exposure to carbon monoxide fumes.

Between 3 September and 8 December 2009, the company was building an extension to a home in Westwood Drive, Little Chalfont, in Buckinghamshire. Part of the extension was built around the flue outlet of a gas boiler, but an investigation by the Health and Safety Executive (HSE) revealed that no Gas Safe registered engineer had been involved in the gas fitting work.

The owner and director of the company had tried to use a sewage pipe and a washing machine vent hose to extend the flue outlet across the new room and out a window, without success. This meant that harmful carbon monoxide gases were being released in the house, exposing the homeowners to potentially deadly fumes.

The company, based in Wembley, Brent, pleaded guilty to breaching s.3(1) of the **Health and Safety at Work, etc Act 1974** which covers the duty of the employer to ensure, so far as is reasonably practicable, the health and safety of affected non-employees, and regulations 4 and 8(1) of the Gas Safety (Installation and Use) Regulations 1998. The company was fined £12,000 and ordered to pay costs of £1000.

The company's director, also of Wembley, pleaded guilty to breaching s.3(1) of the 1974 Act and regulations 4 and 8(1) of the Gas Safety (Installation and Use) Regulations 1998. He was fined £3000 and ordered to pay costs of £731.

Interim cap on immigration

The Points-Based System of immigration to the UK from outside the European Economic Area and Switzerland, with its five-tier system for work and study, came into operation in February 2008.

In July this year, the Coalition Government announced an "interim cap" on the number of workers entering the UK under the Point-Based System (PBS). There will be a limit on the number of visas issued to skilled workers applying to enter the country under Tier 1 (General) and those entering the UK or switching to a new employer under Tier 2 (General).

The aim of this cap or limit is to achieve an overall reduction of 5% in the number of applicants compared with those in 2009. The interim limit runs from 19 July 2010 to 31 March 2011. Further details of the limits under Tiers 1 and 2 and the effect on sponsorship certificates are set out below.

Interim cap on Tier 1 (General)

If the worker is applying for a visa from outside the UK, he or she will need to score 100 points (formerly 95) to make an application. This is intended to limit the number of inbound immigrants to 5400.

If the worker is in the UK in any other category, eg Tier 1 (Post Study Work), then he or she will need to score 100 points to apply to switch into Tier 1 (General). If, however, the workers in the Highly-skilled Migrant Programme, writers, composers and artists and self-employed lawyers wish to extend their stay under Tier 1 (General), then the 95 total points will continue to apply.

The cap does not apply to any "Investor", "Entrepreneur" or Post-Study Work applications under Tier 1.

Workers applying for a Tier 1 visa when no such

visas are available will have to wait for the next month to be considered under a new visa allocation — applications will be held in a queue, in strict order of application and will be processed when the next month's limit is opened — treated on a "first-come, first-served" basis.

Limits on Tier 2 (General)

The Government intends to introduce an annual limit on applications to Tier 2 in April 2011. Until this time, an interim cap limits the number of sponsorship certificates to immigrants entering the UK or switching to a new employer while they are in the UK under Tier 2 (General) to 18,700 — a 5% reduction.

Tier 2 (intra-company transfers), Ministers of Religion and sportspersons (eg professional footballers) are not affected by the cap.

Certificates of sponsorship

As explained above, the interim cap limits the allocation of sponsorship certificates for the interim period — a 5% reduction.

If sponsors have used very few or no certificates at all, they will be given zero allocation. New sponsors will automatically be issued with a zero allocation for Tier 2 (General) and will need to submit new forms. An employer may apply for a new certificate of sponsorship but these will only be issued by the UK Border Agency in "exceptional circumstances". Indeed, the employer would have to show a "pressing need" for such migrant labour.

Consultation

The Home Secretary, Theresa May, has announced a consultation on the annual cap (expected to be launched in April 2011) on immigration by skilled workers and how it should work in practice. The consultation period ends on 17 September 2010. The Migration Advisory Committee has been commissioned to prepare the report.

Comment

The interim cap reduces the number of Tier 1 inbound migrants to 5400. And these applicants will now have to score an additional five points (with a new total of 100) to make an application. Business leaders have expressed some concern at these limitations and their potential effect on important and vital overseas labour: indeed, Prime Minister David Cameron received some criticism of the proposals on his recent visit to India.

The number of incoming migrants to the UK or switching to a new employer under Tier 2 (General) is limited to 18,700; this may be less of a pressing issue for employers as intra-company transfers are excluded.

The full potential impact of the cap on immigration will not be seen until the Government issues the final proposals, following the report from the migration committee at the end of September this year. In the meantime, employers should adjust their manpower planning accordingly.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in August.

Tax & VAT	Employment	Legal	Health & Safety
1. Capital Gains Tax — strategies for realising a gain in light of potential changes to rate of capital gains tax.	1. Conduct.	1. Contract.	1. Accident recording and reporting.
2. Capital allowances — annual investment allowance calculations following change of AIA maximum claim.	2. Absence/sickness.	2. Company.	2. Risk assessment.
3. Land and property — conversion of commercial property to dwellings (in particular, pubs).	3. Disciplinary procedures.	3. Property and leases.	3. Policy implementation.

Event diary

Legislation timetable



For more information or to book please contact:

Employment on
01455 897193

or Health & Safety on
01455 897192

Fax: **01455 897026**

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

Event diary — Open Course Schedule 2010

Health & Safety			
Course title	Duration	Date	Location
CIEH Food Safety Level 2	1 day	6 October	Croner Consulting, Hinckley, Leicestershire
Manual Handling Training for the Trainer	1 day	7 October	Beechlawn Hotel Belfast
Health & Safety in the Workplace Level 2	2 days	12–13 October	Felbridge Hotel & Spa, East Grinstead
Health & Safety in the Workplace Level 2	2 days	26–27 October	Beardmore Hotel, Glasgow
Health & Safety in the Workplace Level 2	2 days	2–3 November	Holiday Inn, Swindon
Manual Handling Training for the Trainer	2 days	9–10 November	York Pavillion

Employment			
Course title	Duration	Date	Location
Dealing with Discipline	½ day	5 October	The Garfield House Hotel, Glasgow
Positive Absence Management	½ day	12 October	The Dunsilly Hotel, Antrim
Essential Employment Law	1 day	14 October	Holiday Inn Heathrow Ariel Hotel, Heathrow
Essential Employment Law	1 day	19 October	The Marriott Hotel, Portsmouth
Role of the Supervisor	1 day	21 October	The Radisson Blu, Liverpool
Sensitive Workplace Issues	1 day	4 November	Bedford Lodge Hotel, Newmarket

IOSH Managing Safely Croner Consulting also offer 4-day IOSH Managing Safely courses. 18–21 October 2010 at Croner Consulting at Hinckley. The 4-day course costs £600.00 plus VAT, and fills up quickly, so please book soon to ensure your place!
For further details on this IOSH course, please contact Emma Newman on Tel: 01455 897192.

Legislation timetable

Area	Legislation	Details	Date
Discrimination	Equality Act 2010	The aim of the Act is to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups; make it unlawful to prevent employees from discussing their pay; extend discrimination by association to all aspects of discrimination; prohibit employers asking questions to job applicants about their health; enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013); introduce wider powers for employment tribunals to make recommendations in discrimination claims; create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief; and extend age discrimination law to the provision of goods and services.	The majority of provisions are due to come into force in October 2010
Additional Paternity Leave	The Additional Paternity Leave Regulations 2010	Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father.	The Regulations are expected to benefit parents of babies due on or after 3 April 2011 or children matched for adoption on or after 3 April 2011
Agency Workers	Agency Workers Regulations 2010	Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay.	1 October 2011
Pensions	Pensions Act 2008	The Government is proposing to provide access to a private pension to all employees aged between 22 and state retirement age, who are earning more than £5000 a year and are not currently enrolled in a workplace pension scheme.	2012
National Minimum Wage	The National Minimum Wage Regulations 1999 (Amendment) Regulations 2010	The new rates of the National Minimum Wage, which will come into force on 1 October 2010, will be: £5.93 per hour for low paid workers aged 21 and over; £4.92 per hour for 18 to 20-year-olds; and £3.64 per hour for 16- and 17-year-olds. Until October 2010, the adult rate applies from a worker's 22nd birthday. After October 2010, the adult rate applies from a worker's 21st birthday. An apprentice minimum wage of £2.50 per hour will also be introduced. The new rate will apply to those apprentices who are under 19 or those that are aged 19 and over but in the first year of their apprenticeship. The accommodation offset will rise from £4.51 to £4.61 per day.	1 October 2010

Health hazards in cold environments

Many businesses operate in cold environments, from cold storage to outdoor working. This article serves to discuss the hazards to health when working in the cold.

Physiology

Humans are homeotherms. Our survival is dependent on maintaining our body temperature within a narrow range, usually above that of our surroundings despite large variations in environmental temperature.

Our response to cold is to become more active to warm up, to put on more layers, or to move indoors. If exposure to the cold continues, our body's automatic defence system will try to prevent any further heat loss by:

- shivering to generate heat and help make sure that major organs stay at normal temperature
- restricting blood flow to the skin
- releasing hormones to generate heat.

Loss of body heat can lead to severe health problems such as frostbite and hypothermia, and, ultimately, death.

Frostbite is the result of freezing of the skin and underlying tissues. Usually seen in the extremities (toes, fingers, ears, nose), prolonged or untreated exposure can lead to the loss of the extremities affected and possible complications due to dying tissue (ie gangrene).

Hypothermia is a condition where the normal body temperature of 37°C (98.6°F) drops below 35° (95°F). It should always be treated as a medical emergency as the body's energy reserves are drained in trying to maintain body temperature. It can be aggravated by fatigue or exhaustion, inadequate food intake, smoking and alcohol consumption.

Symptoms of hypothermia

Symptoms progress as the person's temperature drops and they can be divided into three stages.

1. Mild.
2. Moderate.
3. Severe or immediately life-threatening.

The effects of hypothermia are generally reversible. However, unless the person is removed from the cold environment and provided with suitable medical treatment, the symptoms will progress through these stages until death occurs.

In mild cases of hypothermia, symptoms include shivering, feeling cold and low energy. Moderate hypothermia can include:

- violent, uncontrollable shivering
- inability to think, confusion, loss of judgment and reasoning
- difficulty moving around or stumbling and fumbling hands
- drowsiness and slurred speech.

The symptoms of severe hypothermia include:

- loss of control of hands, feet, and limbs
- shivering stops
- unconsciousness
- shallow or no breathing
- weak, irregular or no pulse.

Non-work-related medical conditions such as heart disease and asthma may also be adversely affected by cold environments. The body's reaction to a cold environment puts strain on the cardiovascular



system and can increase blood pressure. Inhaling cold air may trigger asthmatic reactions. Raynaud's disease (commonly associated with hand arm vibration) may also be worsened by exposure to cold. Pre-employment medical questionnaires should identify incoming employees with these conditions. Furthermore if employees report these conditions to management then advice from their GP, specialist or an occupational health professional should be sought.

A BSI standard released in 2008 can help employers to assess the needs of their employees working in cold environments: ISO 15743:2008, Ergonomics of the thermal environment — Cold workplaces — Risk assessment and management.



Quarry company fined after digger death

An Aberdeen-based quarrying company has been fined £96,000 after a man was crushed to death while working beneath a mechanical digger.

On 21 November 2008, a 58-year-old mobile plant fitter, from Keith, Banffshire, was working beneath the digger at Parkmore Quarry, Dufftown, Aberlour. He was fixing a transmission leak on the five-and-a-half tonne digger. The vehicle was raised on a ramp, but its rear wheels were inadequately secured and the vehicle rolled backwards off the ramp, crushing him. He was suffocated as a result of a wheel compressing his chest.

His employer, a company specialising in quarrying operations, general construction activities and civil engineering, was prosecuted under health and safety legislation over the incident.

The company, based in Aberdeen, pleaded guilty to breaching s.2(1) of the **Health and Safety at Work, etc Act 1974** which covers the duty of the employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all the employees. The company was ordered to pay £96,000.



Heaven Whitbread Group Plc

On 29 August 2009, the claimant sent a letter to his employer headed "Conditional Resignation Letter". In the letter, the claimant used the words "I tender my resignation" but went on to state that it was dependent on two factors, namely him receiving an assurance that he would be paid in lieu of notice and be given a glowing reference.

On 31 August, the employer replied to the employee stating that no action had been taken in respect of the conditional resignation and confirmed they were happy to facilitate the employee's return to work. The letter concluded by requesting that the claimant clarify his intention as to whether or not his resignation was to be effective from 29 August or, if not, what his intention was as the employer could not action a conditional resignation. The claimant replied on 3

September confirming his resignation was effective from 29 August.

The claimant subsequently brought tribunal proceedings complaining that he had been unfairly dismissed. However, as the tribunal decided that the effective date of termination was 29 August, the claim was ruled to be out of time. The claimant appealed against this decision.

The Employment Appeal Tribunal (EAT) upheld the claimant's appeal on the grounds that the tribunal's decision was fundamentally flawed. In accordance with section 111 of the **Employment Rights Act 1996**, a tribunal does not have jurisdiction to hear an unfair dismissal claim unless it is presented within a three-month period beginning with the effective date of termination (unless the tribunal is satisfied that it was not practicable for the claim to

be brought within three months and it was brought within a reasonable time thereafter).

The EAT found that the letter of 29 August was not an equivocal letter of resignation, as it was expressed to be conditional. The tribunal erred when it thought that, as a result of the claimant's letter of 3 September, it was bound to find the letter of 29 August to be a resignation effective from that date. The EAT held that a contract of employment cannot be brought to an end by an equivocal conditional letter. However, what did bring the contract to an end was the claimant's letter of 3 September stating that he was resigning and had resigned. This was the date of resignation (and therefore the effective date of termination) which could not be backdated either by the employee or by agreement.

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to croner@wolterskluwer.co.uk

Q: We are considering purchasing a company that is currently subject to insolvency proceedings, but we are concerned that, in doing so, we may be taking on too much. The current employees are on very favourable terms and conditions which we will struggle to maintain. Is there any way we can change their terms and conditions?

A: If you go ahead with the purchase then you will be required to take on the current employees under the rules of the Transfer of Undertakings (Protection of Employment) Regulations 2006. This includes permitting the employees to transfer across to your employment on the same terms and conditions.

However, there are provisions which allow for permitted variations to an employee's contract of employment when there are "relevant insolvency proceedings" at the time of the transfer. Relevant insolvency proceedings are proceedings which have been opened in relation to the transferor (old employer) not with a view to liquidation of

the assets of the transferor and which are under the supervision of an insolvency practitioner.

The transferor, the insolvency practitioner or you as the transferee (new employer), can agree to permit variations to the current terms and conditions with the employee or, where appropriate, trade union representatives. If consulting through employee representatives, they will need to be secretly elected by their colleagues and be able to represent all employees affected if there are not already representatives in place.

For the variation to be permitted, it has to be connected to the transfer and must be designed to safeguard employment opportunities by ensuring the survival of the business. Changes to terms and conditions could include reduction in employees' pay, reduction or removal of company benefits or reduced hours or overtime provisions.

Where the variations are agreed by employee representatives, additional safeguards can be put in place. The agreement recording the permitted variation must be made in writing and signed by each of the representatives who have made it. In advance of any agreement being made, a copy of the agreement together with guidance enabling them to understand the impact of the variation must be given to all the affected employees.

Contact us

If you have any questions about the topics covered in Solutions please call **0800 634 1700**, or e-mail croner@wolterskluwer.co.uk

Alternatively, call the number on your advice line card to speak to a consultant, or if you are not currently a client, call **0800 634 1700** for further information on how Croner can help your business.

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