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Health & Safety Newsletter

Corporate Manslaughter two years on

It came in with a blaze of glory… prosecution of companies and other organisations was going to be a whole lot easier. It is now approaching two years since the law of Corporate Manslaughter was supposedly revolutionised by the introduction of the Corporate Manslaughter and Corporate Homicide Act 2007. So, where are we now? The reality has not quite matched the hype. There has only been one successful prosecution and even that was tainted by the ill health of the company's Managing Director. In any event, it was fairly easy to spot that the particular company was a relatively easy organisation to pursue. And… there may be an appeal!

The Act permits prosecutions for deaths caused by a gross breach of relevant duty of care being owed by the organisation to the deceased person. A substantial element of that breach must be the way in which the activities of the organisation were managed or organised by senior management. The writer personally has been involved in three cases which have not come to fruition as prosecutions under the Act, but where ultimately, Health and Safety law has been fallen back on by prosecuting authorities.

Admittedly the penalty in the recent case, a fine of £385,000, was steep for the size of the organisation and relative to its finances. Sentencing guidance for courts suggests fines should be around £500,000 as a starting point.

But, two years on there is no real guidance as to how these prosecutions will work out. The difficulty even with the most recent case is that it was a jury verdict of guilty. All reports of that case suggest that it was factually straight forward, the health and safety guidance relating/relied upon being longstanding. Will there be a similar article in another two years… only time will tell. Nonetheless, all organisations need to ensure their health and safety practices and procedures are on a firm footing and reflect day to day reality of working there.

What's that bit of paper?

It is easy to miss things sometimes… but that bit of paper could be an Enforcement Notice issued by the Health and Safety Executive or the equivalent enforcing Authority that covers your organisation.

An Enforcement Notice can take two forms, an Improvement Notice which requires you within a period of time to alter and/or to improve your working practices, or alternatively, a Prohibition Notice which effectively requires you to stop, on safety grounds, carrying out your business at that time. Whilst both types of Notice can be appealed, the time within which an appeal must be lodged is 21 days.

In the case of an Improvement Notice, any appeal stays the Notice, but it is more complex if a Prohibition Notice is served. The 21 day period can easily pass by unnoticed and your, possibly perfectly good, right of appeal is lost.

Some things to bear in mind… It is an offence to breach an Enforcement Notice.

Whilst you may well have to accept a Notice is valid, it is very often the case that unnecessarily onerous requirements are agreed to or imposed by default. It is surprising how many organisations do not actually consider what the Enforcement Notice requires them to do. Often, organisations get themselves in quite a pickle and only seek advice when effectively it is too late. Tactically it is often better to appeal and then negotiate an outcome with which both you and the Enforcing Authority can live. The fact that you have not appealed automatically puts you at a disadvantage.

The Health and Safety Executive have a Public Register of Enforcement Notices and these Notices appear on their database for a period of 5 years. Even then, Notices served on companies are placed into the Notice History database. The HSE will normally prosecute in accordance with their enforcement policy those who fail to comply with a Prohibition or Improvement Notice. There are relatively few occasions when they will deem it inappropriate to prosecute or to take any further action.

If you feel an appeal against any Notice you receive is possibly appropriate then please speak without any obligation to one of our Health and Safety team. The answer may be straight forward. If you do appeal, the Tribunal can either uphold the Notice, quash the Notice or vary the terms of the Notice.

In this issue

- Corporate Manslaughter two years on
- What's that bit of paper?
- Interviews under caution
- Insurance
- Are you privileged?

Interviews under caution

Many organisations misunderstand the nature of a request to attend an Interview under Caution. It is not a friendly chat with your local Health and Safety Inspector. On the contrary, it is the potentially last piece in the Enforcing Authority's case against you. The Authority has to offer you an Interview under Caution even though the reality may be that it is unnecessary for them to undergo that because they have sufficient information in order to prosecute.

So, if you receive such an invite the reality in most cases is that the Authority are thinking seriously of prosecuting you. However, there are a good many situations where the Prosecuting Authorities do not in fact have enough information and they need to obtain more. The invitation is always a precursor to the Authority suspecting an offence may have been committed, but that does not necessarily equate to them having all the requisite information in order to proceed.

The Interview under Caution may be an attempt to obtain the last piece or pieces of information that have not been available through other means. You should always consider taking legal advice upon such invitations. We do not advise clients to attend interviews for the sake of attending. There has to be some practical or legal benefit.

It is important to realise that attending an Interview under Caution in a Health and Safety offence is voluntary. More damage can be done by attending an Interview under Caution and then refusing to answer questions than not attending at all.

Again, if you receive such a request, feel free to consult one of our team for initial guidance. If our advice is that you should attend, we will always deal with relevant disclosure of information and documents before the interview and apply pressure to ensure that disclosure is full and appropriate. We will always take you through the scope and format of the interview, thoroughly prepare you for the interview and attend it with you.

The seriousness or the potential of what might seem an innocuous invitation should never be underestimated.

Insurance

Health and Safety prosecutions are costly. If you are found guilty your finances will suffer significantly. Even the more straight forward cases which proceed and conclude in the Magistrates Court will hit you severely in the pocket. There is the fine, the inevitable order to pay the prosecution's costs and your own legal costs. Less easy to quantify is the time you have to devote to the process which frankly you could always use more profitably but you have no alternative. Even cases where a guilty plea is entered still require great input to present the organisation's case in its best light.

Whilst the fine has to be met by the organisation, insurance can help with costs… but only if you have the cover! It is self evidently helpful if an organisation has insurance cover it can call upon. Cover must exist at the time of any offence and generally would be included in an employers liability policy. It is important that the true extent of the organisation's insurance cover for such

costs is considered because many policies only cover defence costs within the Magistrates Court; namely after a prosecution has started and confined to that particular court. The vast majority of cases which involve a not guilty plea will proceed in the Crown Court and such procedures are lengthy. You might be unpleasantly surprised to find out you do not in fact have the cover you thought. It is also important to consider the extent of any insurance policy for any Directors or Officers of the company who might well be prosecuted as well as the organisation.

So when you have 5 minutes, ask your broker to confirm the extent of the cover you have!

Are you privileged?

If your organisation has an accident what can happen? Well anything ranging from nothing to either a claim or a prosecution. The chances of the last two are dramatically increased if the accident is reportable under regulation. If you are worried you should consider strongly instructing a lawyer so that any investigations you carry out are covered by legal privilege. This means that any report can still consider the facts, warts and all, but the results of the investigation are kept under wraps. This does not stop you acting on the findings of an Investigation Report but it does stop you having to release your report to the investigating authorities, and that might be important not just for the organisation but also for particular individuals who could also be investigated and possibly prosecuted. Without privilege attaching to a report, unfortunately the Health and Safety Executive, with their various intrusive powers, will have little difficulty in securing disclosure of any Investigation Report. For very modest cost, Rollits LLP can put in place what is required to ensure any such report is surrounded by legal privilege. This will stop potentially, any prosecution. Given that fines for the vast majority of offences in the Magistrates Court are £20,000, and even worse, unlimited in the Crown Court, this cost could be money extremely well spent. If you need any more guidance, or would like to talk this through, please speak to any member of our Health and Safety team.

Information

If you have any queries on any articles in this newsletter or regulatory matters in general please contact: Chris Platts on 01482 337361, email chris.platts@rollits.com

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

The law is stated as at 21 April 2011.

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