Safety, Health and Welfare at Work Act 2005

What is “reasonably practicable”?
The 2005 Act imposes liability on an employer who is found not to have done everything reasonably practicable to satisfy the general duty under the 2005 Act to ensure, so far as reasonably practicable, the safety health and welfare of employees at work. In order to pass this test, a number of new steps must be demonstrated. Not only must hazards be identified, risks assessed and necessary measures be put in place to eliminate or minimize a risk, an employer must also demonstrate that further measures would be grossly disproportionate on the basis that the incident giving rise to the claim was unusual, unforeseeable and exceptional.

Principle of Prevention
Schedule 3 to the 2005 Act sets out general principles of prevention but enumerates them in sufficient detail to give useful practical guidelines. They range from adapting the place of work to technical progress to providing ongoing appropriate training and instructions as well as evaluating unavoidable risks.

Employee’s Statutory Duties
A Section 13 of the 2005 Act places a general duty on employees to comply with the obligation to take reasonable care to ensure their own safety and that of others (co-workers) who may be affected by their acts or omissions. Schedule 3 to the 2005 Act expands on this duty in helpful practical detail.

Testing for Intoxicants - The Statutory Provision
Section 13(1)(c) of the 2005 Act provides as follows:

“S. 13(1) An Employee shall, while at work -
(c) if reasonably required by his or her employer, submit to any appropriate, reasonable and proportionate tests for intoxicants by, or under the supervision of, a registered medical practitioner who is a competent person, as may be prescribed.”

An “intoxicant” is defined as “alcohol and drugs and any combination of drugs or of drugs and alcohol”. There is no distinction between prescription and non-prescription drugs in the definition nor does it provide any guidance on what constitutes an acceptable quantity of drugs or alcohol. The acceptable quality will depend upon the activities which an employee
is required to undertake – there would be a clear distinction between a pilot and a receptionist for example. Where an employee carries out a safety critical, then the acceptable quantity is likely to be nil.

Before an employee is subjected to testing under section 13(1)(c) of the 2005 Act it must be shown that the testing is: (1) appropriate; (2) reasonable; and (3) proportionate. A number of concerns have been raised in relation to this provision. It may amount to a possible violation of an employee’s constitutional right to liberty, under Article 40.1.4 of the Constitution. The Irish courts are now also required by the European Convention on Human Rights Act, 2003 to interpret Irish law, including the Act, so that it is in general conformity with the European Convention on Human Rights (the “ECHR”).

No regulations have been made as of yet and such regulation do not appear to be on the legislative agenda anytime in the immediate future. As there is currently no statutory right for employers to test employees for intoxicants, employers may carry out drug and alcohol testing where it is provided for in: (a) an employee’s contract of employment; (b) a drugs and alcohol policy; or (c) with the express consent of the employee.

Personal Liability of Managers and Directors

Section 80 of the 2005 Act provides that where an offence has been committed by the company and the act that constituted the offence has been authorised, or consented to by, or is attributable to connivance or neglect of a person, being a director, manager or similar officer of an undertaking or a person who purports to act in any such capacity, that person shall as well as the undertaking be guilty of an offence and liable to prosecution.

The penalties for breach of Section 80 can be severe - a person who is convicted under this section on summary prosecution, can pay a maximum fine of €5,000.00 per charge and/or a term of imprisonment of up to six months. On indictment, a person can be fined up to €3 million per charge and/or be sent to prison for up to two years.

Reversal of Burden of Proof

It is now an obligation at law on a person charged to prove his innocence. Section 8t of the 2005 Act provides “in any proceedings for an offence...it shall be for the accused to prove that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement”.

Section 80 Prosecutions

**HSA v Technical Engineering and Tooling Services Limited, John Hunt, Tommy Kelly and Eugene Sheil (May 2011)**

The case arose following the death of a toolmaker who was hit on the left side of the head by an extended bar and drill which came from a tool milling machine at a high velocity. The fatal accident occurred in March 2006, some months after an incident in 2005 which should, the judge said, have acted as a warning. The worker died in hospital two days after the accident.

Woeful failure and sham paperwork were among the words used by Judge Anthony Kennedy when he imposed one year suspended prison sentences on three directors of an engineering company and fined the company, of which two of the three are still directors, €50,000.

Commenting on counsel’s submission, in a plea of mitigation, that the company had a good safety record Judge Kennedy agreed there were “no previous convictions”, but spoke of the “woeful failure to learn from an incident in 2005” and said “on the contrary their record was deplorable”. He stated the “deceased was killed by the accused like being shot in the head by a bullet”.

Judge Kennedy imposed a fine of €50,000 on the company and ordered it to pay the DPP’s costs of €14,000 and the HSA’s costs of €7,383. He imposed a one year prison sentence on each of the directors, which he suspended without conditions.

Penalisation

**What is penalisation?**

Penalisation is described in the Safety, Health and Welfare at Work Act 2005 (the “Act”) as any act or omission by an employer that affects, to his or her detriment, an employee with respect to any term or condition of employment.

Acts of penalisation include suspension, lay-off or dismissal, demotion, loss of opportunity for promotion, transfer of duties, change of location of place of work, reduction in wages or change in working hours, imposition of a penalty and coercion or intimidation.

**HSA v Clare County Council and Michael Scully (17 February 2010)**

A retired local authority senior executive engineer, who pleaded guilty to failing to identify work place hazards and assess risks, was given a 12 month jail sentence on each of the two charges, which the Judge then suspended for two years. The case involved a fatal injury to a dump truck driver who was not wearing a safety belt whilst tipping materials over an embankment. The facts on the day after the event exacerbated the guilty finding. The HSA closed down the site.

The employer, Clare County Council, was fined a total of €50,000 having pleaded guilty to failing to manage work activities to ensure the safety of employees. Judge Gerard Griffin considered the employer to be grossly negligent and in dereliction of duty. It was clear to the Judge that from the top down, Clare County Council officials only paid lip service to health and safety issues.

The crux of the case was that both Clare County Council and its retired Senior Engineer could have prevented a foreseeable fatality.

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An employer is prohibited from penalising an employee for being a safety representative, complying with health and safety legislation (carrying out any duty or asserting any right), making a complaint about health and safety, giving evidence in enforcement proceedings; and leaving, or while the danger persisted, refusing to return to his or her work in the face of serious or imminent danger (collectively “protected acts”).

When is liability imposed?
Liability will be imposed on an employer for penalisation, if the employee proves:

(a) that the employee acted in accordance with the Act;
(b) that as a sole and direct result of this, the employer penalised the employee; and
(c) that as a result of an action by the employer, the employee suffered a detriment to their terms and conditions of employment.

The Labour Court recently held in Margaret Bailey t/a Finesse Beauty Salon –v- Lisa Farrell HSD104 that the circumstances in which liability will be imposed are "very limited and circumscribed". The Court went on to state that the Act "only applies where an employer penalises or threatens penalisation against an employee for making a complaint or representation to their employer as regards any matter relating to safety, health and welfare at work. Penalisation of an employee for other reasons does not come within the scope of the [Act]".

Compensation
There is no statutory limit on the amount of compensation that can be awarded in respect of a claim for penalisation. The Rights Commissioner and the Labour Court are given considerable discretion in awarding compensation. Where a claim for penalisation is upheld the employer is required to pay such compensation “as is just and equitable having regard to all of the circumstances”.

Burden of Proof
The Act is silent on where the burden of proof lies in a claim for penalisation.

The Labour Court have recently considered this question in Toni & Guy Blackrock Limited –v- Paul O’Neill HSD09. The Court held that in the absence of any statutory provision to the contrary, the burden of proof lies on the person who is making the claim (i.e. to prove the claim to be true). The Court went on to say that there is an exception to this rule known as the peculiar knowledge rule. This rule of evidence provides that where it is shown that a particular fact in issue is peculiarly within a defendant’s knowledge the onus of proving that fact rests with the defendant.

In this case, the Court held that the motive or reason for the employee’s dismissal “is to be found in the thought process of the decision maker at the time the decision was made to dismiss the [employee]”. In these circumstances the Court found that it was “perfectly reasonable to require the [employer] to establish that the reasons for dismissal were unrelated to [the employee’s] complaints under the Act”.

Corporate Manslaughter

Irish Position
The Law Reform Commission (LRC) published its Report on Corporate Killing in October 2005 and appended to its Report a Draft Corporate Manslaughter Bill (“the Draft Bill”) which is based on the recommendations contained in the LRC report. A company can currently be prosecuted of the common law offence of gross negligence manslaughter. There has never been a prosecutions to date in the Irish courts in respect of corporate manslaughter.

In order to successfully prosecute a company of corporate manslaughter, as the law currently stands, is must be proved that one senior manager or director of the corporate entity was the so-called “controlling mind” and hence responsible for the entity’s policies which brought about or facilitated the fatality.

A company acts through its directors, management and staff. In order to convict a corporate entity of manslaughter it must be shown that a causal link existed between a grossly negligent act or omission by a person who is the “controlling mind” of the corporate entity and the immediate cause of death. In most companies, where a number of people are involved in the decision making processes within the company, it is very difficult therefore to secure a conviction and the reason why there has been no such conviction in Ireland. Indeed, the LRC’s analysis of recent British manslaughter cases bears testament to this difficulty with securing a conviction as each of the relevant cases were.

UK Position

In England and Wales and Northern Ireland, the offence is called corporate manslaughter. The offence is called corporate homicide in Scotland. Under a new approach, courts will look at management systems and practices across the organisation, providing a more effective means for prosecuting the worst corporate failures to manage health and safety properly.

An organisation will be guilty of the offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a duty of care to the deceased.
**The Test**
The offences will be tried by jury. The jury will consider how the fatal activity was managed or organised throughout the organisation. A substantial part of the failure within the organisation must have been at a **senior management level**.

“**Senior management**” is defined as a person who plays a significant role 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.

An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.

**Gross breach**
The organisation's conduct must have fallen far below what could have been reasonably expected. A jury will have to take into account any health and safety breaches by the organisation – and how serious and dangerous those failures were.

**Duty of care**
A duty of care exists for example in respect of the systems of work and equipment used by employees, the condition of worksites and other premises occupied by an organisation and in relation to products or services supplied to customers. The Act does not create new duties – they are already owed in the civil law of negligence and the new offence is based on these.

**Penalties**
A duty of care e An organisation guilty of the offence is liable to an **unlimited fine**. The Act also provides for courts to impose a **publicity order**, requiring the organisation to publicise details of its conviction and fine. They Court may also make a remedial order requiring an organisation to take steps to address the failure that amounted as the death.

**First Corporate Manslaughter Conviction February 2011**
A geologist from Cheltenham died in September 2008 when a 12.6ft deep unsupported trial pit that he was working in alone caved in at a development site.

Cotswold Geotechnical was found guilty of corporate manslaughter relating to the geologist’s death. Mr Justice Field, said the gross breach of the company’s duty to the employee was a “grave offence”. He said the company, which was described in court as in a parlous financial state, could pay the money back over 10 years at a rate of £38,500 per annum. The Judge explained the fine marked the gravity of the offence and the deterrent effect it would have on companies to strongly adhere to health and safety guidance. But he added the company was on a small scale and a larger fine would cause it to be liquidated, and four people presently employed would lose their jobs.

“It may well be that the fine in the terms of its payment will put this company into liquidation. If that is the case it’s unfortunate but unavoidable. But it’s a consequence of the serious breach,” the Judge said.