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Duty of care owed by companies in the UK to its overseas or travelling workforce

CMS Cameron McKenna

All employers in the UK have a duty of care to their employees, and equally to those whom they do not employ, but who may be affected in some way by their business activities, such as contractors, agency staff, or indeed members of the general public.

Those duties are enshrined in employment legislation in the UK, common law and also health and safety legislation, which imposes general duties on all employers to do all that is reasonably practicable to ensure that those they employ, AND those they do not employ, but who are affected in some way by their business activities, from being exposed to risk of harm. Those general duties are contained in the Health and Safety at Work, etc Act 1974, ("HSAWA") and they are non-delegable, in the sense that an employer cannot contract out of, indemnify against or insure against their failure to comply with those duties. There is, however, a statutory defence (section 40 defence) of having done all that was reasonably practicable.

Geographical restrictions

The jurisdictional extent of the HSAWA is limited to UK territory and territorial waters, along with UK registered ships and aircrafts and offshore installations, and apparently has no application outside those areas – for example, in relation to sending employees overseas to work in potentially hazardous locations. However, with companies increasingly working (or sending personnel to) less stable parts of the world, both in terms of natural phenomena, health, civil unrest, road safety and occupational and personal safety and security, companies based in the UK are right to consider the following questions before deciding upon sending personnel to overseas locations:

— What are the local legal requirements for health, safety, employment and other regulatory matters such as environmental in the country to be visited, and what may the consequences/sanctions be for non-compliance?

— Could there be any possibility of consequences/sanctions in the UK – in the form of some kind of legal proceedings (civil or regulatory) as a result of an incident occurring overseas.

— What precautions should be put in place prior to sending personnel overseas to reduce the risk of an actual incident occurring, and any possible repercussions.

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Regulation of Health and Safety in the UK

As stated above, the principal piece of legislation for health and safety in the UK is the HSAWA, supported by numerous regulations which set out in some detail the requirement for health, safety and welfare in the environment. These are too numerous to describe in any detail, and for the purposes of considering those which could have implications for companies sending personnel overseas it is probably only necessary to consider a few.

The HSAWA imposes general duties to ensure that personnel are not exposed to risk of harm, and consequently, if the decision to send personnel into a clearly dangerous situation outside the UK was made by a company within the UK, then there may be a breach of those general duties at that point in time. More likely would be the scenario where the decision to send someone overseas was made in the UK, which should have been supported by a suitable and sufficient risk assessment of risks and hazards, as supported by the Management of Health and Safety at Work Act 1999. (Regulation 3 imposes a requirement on all employers to carry out suitable and sufficient risk assessments of all potentially hazardous activities.) The risk assessment obviously requires to be carried out prior to any departure from the UK and consequently the breach would have occurred in UK territory.

Consequences/penalties for such breaches are criminal. The regulator for health and safety (The Health and Safety Executive) will prosecute companies in the ordinary criminal courts of the UK – both the corporate body and individual managers and officers.

In addition to criminal sanctions, employees/personnel may well choose to raise a civil claim in the UK courts and would have no difficulty in at least founding jurisdiction for a court, if the principal employing entity was based in the UK, or their contract of employment provides for this. Their claim could be based on the above regulations, and the absence of a suitable and sufficient risk assessment prior to departure, or, more likely they would be based on a term in their employment contract, or, on common law.

It should be said that the substantive law relating to the circumstances of the incident would generally be the law of the country where the incident occurred (unless the contract of employment says otherwise), but claims relating to incidents/ accidents occurring overseas are not at all uncommon in UK courts. However, criminal prosecutions by the regulator, the HSE, are, as yet unknown for overseas incidents and there are no specific provisions in any of the regulations for working overseas – but watch this space! Sanctions for criminal breaches include an unlimited fine and, for individuals, up to 2 years in prison.

Corporate Manslaughter and Corporate Homicide Act 2007

To clarify any confusion, jurisdiction for this UK Act does require that the actual death occurred in UK territory, or territorial waters, or on a UK registered ship or aircraft or offshore installation, and therefore it would not be possible for a corporate entity to be prosecuted for a death overseas under this Act.

UK Regulation in General - Supplementary Regulations

Whilst not applying outside the UK – those companies considering coming to the UK and setting up in business should be mindful of the fairly stringent and robust approach to health and safety in the workplace in the UK.

The HSAWA is supplemented by approximately 180 regulations, many of which relate to specific work activities or risks, such as manual handling, lifting activities, working at height, provision and use or work equipment and working with electricity. In relation to office-based activities the most relevant regulations include the Management of Health and Safety at Work Regulations 1999 and the Workplace (Health, Safety and Welfare) regulations 1992, which relate to health and safety management and workplace standards respectively. The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 1995 is also relevant in relation to the reporting occurrence of workplace incidents. Some of the primary duties under these regulations include:-

Risk Assessment and Policy - Under the Management of Health and Safety at Work Regulations 1999, every employer must prepare a written health and safety policy (unless it employs less than 5 employees) and provide and maintain a safe system of work. A named responsible person should control and monitor the implementation of this policy. A company is also required to risk assess hazards, implement associated control measures and record the findings of all such risk assessments.

Employee Relations - Under the Management of Health and Safety at Work Regulations 1999, employees should be provided with adequate health and safety training at the point in time when they join an organisation, and otherwise where appropriate throughout their employment (e.g. where new duties give rise to new or increased risks), to allow them to carry out their duties in a safe manner.

The Health and Safety (Consultation with Employees) Regulations 1996 imposes an obligation on employers to consult with employees regarding their health, safety and welfare.

The Workplace - Minimum standards are specified in relation to the workplace under the Management of Health and Safety at Work Regulations 1999 and Workplace (Health, Safety & Welfare) Regulations 1992. These include duties to maintain a safe working environment and provide welfare facilities such as sanitary conveniences and drinking water.

The Law of the Overseas Country

Consideration must be given to the regulatory requirements in relation to matters such as health and safety of the overseas country BEFORE sending personnel there. An assumption that regulation will be much as it is in the home country simply is not sufficient. Many overseas jurisdictions may operate to very different laws, and have a very different approach to enforcement. For example, in many jurisdictions, it would not be possible to prosecute the corporate entity for breach of regulations, so the regulator will elect to arrest individuals (managers) and hold them in custody to answer for the perceived wrongs of the company. Detailed advice should be taken from those who have some knowledge of regulation in the company to be visited.

Precautionary Measures

In a word – risk assessment!
Understand the risks of travelling to the target country and ensure all types of risks have been considered and appropriate measures put in place – be they in the form of training for staff, medical support and screening, insurance, security, or whatever.

Be mindful of the changing situation in the target country – which may vary considerably from location to location and be aware that the risk assessment is a live document which must be constantly updated and acted upon. At the end of the day, the risk assessment may not only save lives but also be the main document to evidence the care that was taken by the employer – before the person was sent overseas!

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