

# **Barbados Employers' Confederation**

## **The Safety and Health at Work Act 2005 - An Overview**

### **Introduction**

I have already spoken on this soon to be Act, while it was still in the form of a draft Bill, on two occasions to the BEC. The first was a general overview with particular emphasis on the criminal liability of employers; while the second related to the liability of an employer for the harm suffered by the employees of its independent contractor. Now, the legislation has gone through both Houses of Parliament, albeit with a change of name along the way, and awaits proclamation. There has been no substantial change, however, which makes my job today somewhat easier. I propose to discuss some selected legal issues; some of the more practical steps for employers to take, an examination of some current issues, and to answer, to the best of my ability, any further questions that you may have at this time.

### **A. Selected Legal Issues**

#### *(i) The General Duties of the Employer*

These are to be found at sections 6, 7 and 8 of the Act. Under these sections the employer is mandated to ensure the safety at work of all his employees, persons in the workplace and those, not in his employment but, who may be affected by the carrying on of the business.

The employer may be also liable as an importer of articles for use in the workplace to the extent that he does not arrange to have research carried out so as to discover and eliminate or minimise any risk to health and safety that might arise through the use of such articles.

Moreover, the employer has to carry out a risk assessment of probable danger in the workplace, before any work can be carried on or equipment, materials, articles or substances put into use, and care must also be taken to ensure that the method of installation of any article for use in a workplace does not make it unsafe or a risk to health when properly used.

Apart from these duties, which may be satisfied by doing what is reasonably practicable under the circumstances - i.e. whether, given the likelihood of harm and the seriousness of such harm (the risk) a reasonable employer would have done nothing, taking into account the trouble it would take to put things right (the running) - there is also a general duty in section 6(5) to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all employees - essentially providing a safe place of work - section 6(6),(b)(d)(e)(f), a safe system of working - (a), (b), (c), (f); adequate plant and equipment - (a), (f) and a competent staff of men - (c). As we have already noted, special provision is made for the pregnant employee.

But the employer's duties may be owed to persons other than employees, once they are in the workplace, and to those who are not in his employment but who may be affected by the conduct of the undertaking. It is these duties which explains the possible liability of the employer as true occupier, neither the state of the premises nor the activities carried out on it should pose a threat to the health or safety of others whom the employer ought to have foreseen could have been so affected.

There is a plethora of case law on these duties from which we may glean certain principles:

- (a) The onus is on the employer to prove that it was not reasonably practicable to do what it is alleged should have been done in order to escape liability.
- (b) The duty to provide safe plant may be breached even though the unsafe plant provided is not in use or has not been used.
- (c) Employers should instruct and train workmen in a safe system of working.
- (d) Employers may be liable to independent contractor's employees where the employer retains control of the work environment.

(e) *The Employee's Duties*

The employee must also take reasonable care for her own health and safety and that of other persons, (co-workers or otherwise) who may be affected by her carelessness. To this end, she must co-operate with the employer to enable the employer's duty to be performed (e.g. to wear protective equipment provided) and should report any contravention of the Act etc. of which she is aware to her employer. A breach of any of these duties is a criminal offence, as is interference with and the unauthorised use of any appliance etc. provided under the Act for securing the health, safety and welfare of employees.

Apart from this, the carelessness or breach of duty by an employee may be used by the employer either to negate his civil liability or to reduce its extent through contributory negligence. There may even be a lawful dismissal of the employee for breach of contract.

Beyond these duties however, the workforce is given a significant role to play under the Act. There is provision for communication with individual members of the workforce - sections 6(6)(c); 7(1)(c), 7(1)(4) - and there is also a duty to consult with “workers or their representatives - section 103.

Injured employees and trade unions may also be given information respecting a workplace by labour inspectors, even though such information is usually confidential - section 101.

Most important, there is substantial provision for the employee’s job security in the context of health and safety. By s. 102, it would be a wrongful dismissal to terminate an employee for her requesting an inspection of the workplace, and by s. 104, an employee has the right to refuse to carry out assigned tasks pending consultation with various relevant entities if there is sufficient evidence to indicate that her health and safety are in imminent danger. This differs somewhat from the English provision in that there the employer would be entitled to dismiss such an employee if the employee’s response was so negligent that a reasonable employer might have dismissed her for taking it.

There is also some case law in this area from which I have extracted the following principles:

- (a) Employers are under an obligation to act reasonably in dealing with matters of safety or complaints of lack of safety which are drawn to their attention by employees. Unless the complaint is not bona fide or is frivolous, it is only by investigating promptly and sensibly an individual complaint that they can

discharge their general obligation to take reasonable care for the health, safety and welfare of their employees. In the absence of this, the employee may leave and claim constructive dismissal.

(b) It is for the employer, who dismisses an employee for refusal to work in what she considers an unsafe situation, to establish that such a dismissal was justifiable (if this is in issue) by the fact that there was not sufficient evidence that the employee's health and safety were in imminent danger. It is however for the employee to provide some evidence of this - *Pigott Bros. Ltd. v. Jackson et al* (1991).

(c) An employer may be under a duty to dismiss an employee for her own good if the employee is at known risk of injury. The fact that the employee wants to stay on in the face of such a risk will not suffice to discharge the employer's duty - *Coxhall v. Goodyear GB Ltd.* (2002).

#### A. **Some Practical Issues**

The relevant principles of law in this area are not especially difficult to state. However it is less easy to apply them. Essentially, liability will depend on whether what the employer did was reasonably practicable in the circumstances, but this is a matter for the court, not the employer's subjective opinion. In order to escape the lottery that court action may become therefore, the employer should seek to take practical steps to reduce the possibility of workplace accidents and probable liability. Such practical steps would include, but are not limited to, an effective safety and health at work

organisation structure; a corporate policy on S & HAW; an implementation of that policy including safety and health information and training and a continuous monitoring of the organisation which would encompass workplace inspection and safety audits. We can look at some of these in greater detail.

1. *Organisation*

An effective workplace safety and health system is one where everyone has clearly defined responsibilities in respect of each facet. These should include for example:

- (c) keeping up to date with the relevant laws and regulations
- (d) developing a health and safety policy
- (e) developing safe work procedures
- (f) following up on the decisions of H & S Committees
- (g) conducting training and education in H & S
- (h) doing preventive maintenance
- (i) monitoring the purchasing process
- (j) compiling hazard information
- (k) conducting workplace inspections; and
- (l) preparing safety audits.

- An integral part of occupational health and safety organisation is **the corporate policy**. This is essentially a statement in writing of an employer's commitment to

protect the health, safety and welfare of employees at work. Such a policy is required in Barbados by section 7(4) and must be brought to the notice of all employees. It is only required to be in writing if 10 or more persons are employed. - section 7(5). There is no special formula for drafting a policy. It should:

- (a) state management's commitment to protecting employees' health and safety;
- (b) specify areas of responsibility;
- (c) explain how the system works;
- (d) indicate who is accountable; and
- (e) incorporate by reference all relevant laws and regulations as minimum standards.

- The operation of H & S committees is part of the process of consultation imposed on an employer by section 103 of the Act. Provision is also made for one or more safety delegates appointed by the employees where these number less than 25. The legislation stipulates among other things, the frequency of meetings of the Committee, its composition, the rights of employee representatives and the treatment of its recommendations. Some consideration should also be given to:

- (i) records of meetings;
- (ii) operational procedures;

- (iii) terms of reference;
- (iv) an Annual Report; and
- (v) exemption from liability of members of Committee in their official capacity.

## 2. *Implementation*

(a) A critical aspect of the implementation of an H & S programme is the provision of H & S information and training - The statutory obligations in this regard have already been referred to, and it may be the subject matter of future regulations as to what training should involve - but some critical elements should be:

- (ii) the handling of hazardous substances;
- (iii) the proper use of protective equipment;
- (iv) the use of firefighting equipment;
- (v) manual lifting and carrying; and
- (vi) emergency and first aid procedures

(b) Similarly important in this context is workplace health monitoring by way of medical examinations and the provision of health services which would help identify conditions in the workplace which may adversely affect the health of workers. This would necessitate the institution of a system to identify and assess health hazards to employees and to carry out health monitoring of employees.

### 3. *Monitoring*

After the H & S programme has been devised and implemented, it becomes necessary to monitor it periodically for effectiveness. In essence, this will entail the keeping of the relevant records and reports and the conduct of the safety audit - a critical review of all the elements of workplace health and safety. It includes an assessment of workplace conditions and work procedures in addition to policies and their implementation. The key elements of a safety audit are itemised below:

Items	Questions
<b>Health and Safety Policy</b>	<ul style="list-style-type: none"> <li>• Is one clearly written?</li> <li>• Is it posted?</li> <li>• Does management support it?</li> </ul>
Accountability for Health and Safety	<ul style="list-style-type: none"> <li>• Is responsibility defined in writing?</li> <li>• Do all levels understand it?</li> <li>• Does performance evaluation show support?</li> </ul>
Health and Safety Organization and Committee	<ul style="list-style-type: none"> <li>• Is there an OHS committee or representative?</li> <li>• Does management support the committee/representative?</li> </ul>
OSH Education and Training	<ul style="list-style-type: none"> <li>• Is there a health and safety training program?</li> <li>• Are safety rules posted?</li> </ul>
Safety Inspection System	<ul style="list-style-type: none"> <li>• Is a regular planned program in effect?</li> <li>• Who are inspection results reported to?</li> </ul>

<p>Accident investigations, Reporting and Statistics</p>	<ul style="list-style-type: none"> <li>• What accidents are investigated?</li> <li>• who investigates them?</li> <li>• Are all accidents/illnesses reported?</li> </ul>
<p>Safe Work Procedures</p>	<ul style="list-style-type: none"> <li>• What regulatory violations were noted?</li> <li>• Were there written work procedures for hazardous jobs?</li> <li>• Were work orders and lockout systems in effect?</li> </ul>

Finally, I want to examine a current H & S-at-work issue, that of what is known as occupational stress. This is usually manifested in a myriad of ways including anxiety, snappiness, tearfulness, headaches, sore shoulders, stomach upset, high blood pressure and indigestion.

In *Walker v. Northumberland C.C.* (1995), a social worker employed by D suffered a mental breakdown in 1986, prior to which he had been subjected to significant overwork. The system of working was not changed on his return and he suffered a second breakdown.

- Held (i) a psychiatric injury was within the scope of an employer's duty to provide a safe system of working.
- (ii) an employer has to act to protect the employee in relation to a risk of harm of which he knows or ought to know.
- (iii) the practicability of taking precautions is important. The employer should have taken measures to reduce the workload by additional assistance or restructuring.

## **Elements of Liability**

### **(a) *Foreseeability***

First, the employer must have foreseen or ought to have foreseen the risk of psychiatric injury to the employee. This is essentially a matter of knowledge, but an employer cannot shut his eyes to the reality that psychiatric injury could result from stressful workplace situations. Further, the liability is to the individual employee; if he/she has a known special weakness, that must be taken into account. Relevant factors include:

- (i) The nature and extent of the work being done by the employee. Is unreasonable pressure being placed on her? Do other employees similarly suffer stress?
- (ii) Are there any symptoms of illness such as prolonged uncharacteristic absences from work?

All in all, the indicators must be plain enough for any reasonable employer to realise that he should do something about it.

### **(b) *Breach of Duty***

This turns on the likelihood of the harm, how severe it is likely to be and whether such a risk should be run. Where psychiatric harm is foreseeable, its severity may be assumed. Many studies point to “how life shattering psychiatric illness can be and how, in many instances, it can be more debilitating than physical illness ...” The area of concern is whether the employer has taken all reasonably practicable precautions to prevent the harm. This will depend on the size

and scope of the employer's operation, including its resources, ability to rearrange the work of the employee and the issue of whether the employee should be kept on or dismissed. But note that the employee must also act reasonably to protect her own interests, to that seeking counselling, and even resigning could be pursued.

(c) *Causation*

Once the breach of duty by the employer was a material contributor to the injury this will suffice for liability, though the extent of such liability will have to be assessed. Even so, the employer might be obliged to dismiss.

(d) *Contributory Negligence*

This would be fairly rare except perhaps in the case where the employee insists on continuing the same system of work in spite of knowledge of the risk of harm.

### **The Medical Perspective**

(a) *Risk factors for Stress - Stress Triggers*

These may be physical, mental or individual. Physical stressors include extremes of temperature, noise, vibration, exposure to fumes, chemical, biological or radiation hazards, physical fatigue and poor lighting. Mental stressors could include an expected promotion that

does not materialise, monotonous unfulfilling work, workplace interpersonal conflict, inflexible work schedules, fear, loss of support systems and a work culture that does permit signs of weakness. Individual factors are integral to determining the effects of stress. Factors such as lifestyle, personality and psychological profiles as well as personal losses such as divorce or bereavement all affect an employee's reactions to stressful situations.

(b) *Risk Management*

- ▶ Provide information (courses, etc.) to the employee which would allow her to recognise when something is wrong.
- ▶ Employee surveys to identify areas of concern.
- ▶ Pre-employment assessment to identify psychological competence for a job.
- ▶ Counselling services.
- ▶ Psychological or psychiatric treatment.

