

Business of Law

Companies Failing to Tackle Boardroom Gender Imbalance

LNB News 05/09/2011 89

Published Date

5 September 2011

Jurisdiction

UK

Related Legislation

Equal Pay Act 1970; Sex Discrimination Act 1975; Equality Act 2010

Related Digests

UK Firms Look Set to Fail to Meet Board Gender Targets, LNB News 24/08/2011 2; Report: Women on Boards, LNB News 24/02/2011 20; Financial Reporting Council Consults on Boardroom Diversity, LNB News 05/05/2011 68; Boardroom Diversity--Are Targets the Solution? LNB News 17/05/2011 18; Target Failure for Women on Boards, LNB News 02/09/2011 13

Abstract

Although Anna Birtwistle, associate at CM Murray, welcomes Lord Davies' guidance to address gender imbalance at board level, she tells Kate Beaumont that legislative changes are necessary to bring about real cultural change within UK companies

Analysis

In February, Lord Davies called on FTSE 350 companies to focus on "urgent change" regarding the composition of boards to include more female members (25 per cent by 2015). Despite Davies' call for companies to announce aspirational goals within six months, firms outside the main blue chip index appear resistant to change.

Anna Birtwistle is an associate at specialist employment and partnership law firm CM Murray LLP, London. She works on a range of contentious and non-contentious matters and has a particular interest in discrimination issues. So does Birtwistle believe that guidance (such as that given by Lord Davies) is the best way to try and ensure change--or would some sort of legislative requirements, such as quotas, be a more effective way of ensuring gender diversity at senior management and board level? She responds, "The review undertaken by Lord Davies is certainly a welcome step towards addressing the problem of under-representation of women on the boards of UK companies. It is, however, only one piece in the complex puzzle of gender equality in the workplace that to date (some four decades after the Equal Pay Act 1970 and 36 years after the Sex Discrimination Act 1975 (now replaced with the Equality Act 2010)) continues to elude us.

"The Davies review and other similar guidance seeks to make practical recommendations to address gender imbalance and is undoubtedly positive in setting aspirational goals for companies, as well as providing businesses with concrete reasons to promote gender diverse boards," she says. "Notwithstanding the importance of guidance some would argue, given the snail's pace with which things are changing (the percentage of female board members of FTSE 100 companies only having increased from 9.4 per cent in 2004 to 12.5 per cent in 2010), that guidance alone is self-evidently insufficient and, perhaps unsurprisingly being a lawyer, I favour the argument that legislative changes are necessary to bring about real cultural

change within UK companies."

One frequently debated option in this regard is the imposition of quotas. However, Birtwistle highlights there may be difficulties with this approach. "The concept of quotas, however, is one with which I struggle," she says. "Although figures in Norway, for example, certainly suggest the application of quotas has been successful (44.2 per cent of directors in Norwegian companies now being female) this only paints half the picture. In Norway only two per cent of CEOs are female and it is understood the majority of companies achieved the government imposed target of having 40 per cent female boards by appointing female non-executive directors and increasing board size. What appears not to have improved then is the number of women progressing through organisations to board level.

"While in the short-term imposition of quotas might therefore bring about results that look good on paper, they do not tackle the complex underlying reasons for inequality at board level. Whilst perhaps having slower results than quotas, it would seem that the key to real change can only be made through increased legislative protection in the context of maternity and family-friendly rights, including a cultural shift towards flexible working at the senior level. Encouraging female board membership is not, however, only about having stringent employment law protections for women; fundamental to gender equality in the workplace will be greater employment rights for fathers which will therein allow parents together to determine how child care responsibilities will be shared and balanced against their careers."

On the question of the extent to which existing employment law provisions encourage gender diversity on boards Birtwistle observes, "Protection against discrimination in hiring and promotion on grounds of sex, maternity rights, flexible working and parental leave all play a part in encouraging, albeit indirectly, gender diversity on boards. Given the current statistics, however, the extent to which such employment law protections actually encourage diversity at the board level is questionable.

"In addition to the aforementioned protections, the new Equality Act 2010 contains two new positive action provisions: (1) the general positive action provision; and (2) positive action in relation to recruitment and promotion. These new provisions potentially provide a tool for companies to increase the gender diversity of their boards.

"The second provision relating to recruitment and promotion is, however, limited so as to only allow employers to take action to treat a person with a protected characteristic, eg sex, more favourably than others for recruitment or promotion purposes where the individual with the protected characteristic is 'as qualified' as those others. Further, the employer must 'reasonably' think the person with that protected characteristic suffers a disadvantage connected with the protected characteristic or be under-represented in their workforce and be taking action with the aim of overcoming or minimising the disadvantage or under-representation. It would seem that for most companies it will, generally speaking, be easy to demonstrate the under-representation of women should they wish to take positive action when making appointments to boards.

"While the Equality Act 2010 is a long way off adopting anything like the affirmative action provisions of the US, it does appear to at least open the door to employers who might wish to address under-representation of female board members, without putting to one side the issue of merit."

So, to what extent do current laws protect women should they find or believe their career development has been hampered on the grounds of gender? Birtwistle points out, "Current laws protect women in respect of discrimination on grounds of their sex in most aspects of the employment cycle; recruitment, appointment, training, promotion, transfers and dismissal. In addition, women have special rights in respect of maternity (for example to be given preferential treatment in redundancy situations)."

She continues, "Interestingly, Employment Tribunal and Employment Appeal Tribunal statistics for the last three years show that sex discrimination and equal pay complaints account for far greater a proportion of the cases heard by tribunals than any other form of discrimination. Last year 18,200 cases of sex discrimination were heard in comparison to 5,700 claims of race discrimination and 710 claims for sexual orientation discrimination. A staggering 37,400 claims for equal pay were brought in 2010." She adds, "While on the one

hand these figures may seem to point to the prevalence of sex discrimination in the workplace, they also illustrate that sex discrimination protections are being relied upon by female employees and in turn this may have an impact on the treatment of women in the workforce. But the law can only go so far, and in reality gender equality in the workplace will only happen through a change in societal attitudes. With women accounting for six out of every ten university graduates in Europe and the USA change would, however, in time seem to be inevitable."

Birtwistle spells out what the latest figures mean for practitioners and their clients. "The statistics of female board membership of FTSE 350 companies may potentially strengthen the claims of female senior employees who seek to bring sex discrimination claims where they are overlooked for promotion or fail to be appointed by majority male boards. Clearly for practitioners this is a risk companies should be made aware of in the context of advice given in relation to equal opportunities and diversity in the workplace.

"Where a female employee seeks to bring a sex discrimination claim and, for example, submits a statutory sex discrimination questionnaire (which may, for example, include questions about the statistical make up of senior employees in terms of gender, as well as questions about what steps the company has taken to encourage gender diversity such as policies on flexible working/training etc), negative answers from the company will certainly be used as evidence of a sex discriminatory environment and support a claim for discrimination."

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