

Employment & Industrial Case Note

April 2007

Paul Bradley Waltham & Transfield Services (Australia) Pty Ltd

WORKPLACE HEALTH & SAFETY

This is a decision of President Hall delivered on 13 March 2007 concerning a complaint of a breach of the *Workplace Health & Safety Act 1995 (Qld)*. It was alleged that Transfield failed to discharge a workplace health & safety obligation contrary to section 24 of the Act. The obligation was that contained in section 28 (3) – the obligation of employer to ensure that other persons are not exposed to risks to their health and safety in the conduct of the employer's business or undertaking.

The incident leading to the complaint was to an employee Mr Goulder. It was alleged the breach of the obligation caused grievous bodily harm to the employee.

Transfield entered a plea of guilty to the charge and the case dealt with what penalty should be imposed.

At first instance the industrial magistrate imposed a fine of \$18,000.00, awarded specific costs to the complainant and recorded no conviction.

The maximum penalty available is a fine up to \$375,000.00. On appeal the argument of the complainant was that the fine imposed was manifestly inadequate.

There were certain agreed facts placed before the industrial magistrate although it appeared to President Hall certain of those were not agreed and in particular paragraph 16 of the "agreed facts" document.

Those agreed facts are set out below:-

- "1. The defendant is an Australian propriety company carrying on business which includes the provision of plant, labour and technical expertise to other business. It operates throughout Australia from its principal place of business located in Kent Street, Sydney.
2. The defendant corporation was, on 2 December 2004, an employer as defined by s.10 of the *Workplace Health & Safety Act 1995*, as it had engaged one Andrew Scharkie under a contract of service as a scaffold supervisor on a permanent, full-time basis.
3. The defendant corporation was engaged by QNI to erect a scaffold around its roaster including the multiclone for break down work. The defendant had several standard scaffold plans for the roaster, and the multiclone roaster scaffold was erected to one of those plans.
4. The defendant had been requested to supply labour for the erection of the scaffold but was unable to do so, due to work backlogs.
5. Scaffolders were engaged for the work through a labour hire company. Those workers were directly supervised by the QNI roaster supervisor; however, the defendant remained responsible for inspection of the scaffold and the issue of "scafftags" for the scaffold once completed.
6. "Scafftagging" is a system of affixing tags to the scaffold, to indicate to workers that the scaffold had been inspected and certified a being safe for use.

7. Following its erection, the scaffold was inspected and scafftagged by Bligh Mallard, a scaffolding co-ordinator employed by the defendant. Mallard held an advanced scaffolding ticket.
8. Dennis Goulder was a labourer and employed by a contractor, CWG Insulation apply (sic) lagging to the roaster.
9. On 2 December 2004, Goulder had spent the morning transporting materials up the scaffold to apply the new lagging to the roaster stack. A column protruded into the scaffold, which Goulder had to work his way around. As he did, he stepped on a wooden plank which was covering a gap in the scaffold floor.
10. The plank moved and gave way beneath him. His left leg and his body fell through the gap. His right leg remained position on the scaffold floor. His fall was stopped at armpit level.
11. He managed to pull himself back up through the hole, but was immediately aware that his left leg was broken. He was assisted by co-workers and the well organised rescue was promptly affected by the defendant's workers.
12. The division of Workplace Health & Safety was notified of the incident on the day following the incident and an investigation was undertaken by Principal Inspector Dare.
13. The investigation identified the immediate cause of the incident as being that the scaffold kickboard was not correctly positioned, which allowed the metal planking to move. This allowed a gap to open up which exceeded the width of the overlaying wooden plank, which gave way under the weight of the worker.
14. A series of six photographs were taken. The first depicts the scene at the time of the rescue. Photograph 4 depicts the planning as it was prior to the incident. Photograph 5 depicts a re-enactment of the fall using another worker. Photograph 6 depicts the scaffold floor from below [the numbered photographs were before this Court on the appeal A].
15. The investigation of Inspector Dare further revealed that the gap in the flooring ought to have been covered using nailed plywood across the entire area. This would have reduced the tripping hazard presented by the wooden plank placed across the gap in the flooring as well as preventing a fall through the floor planking.
16. A defect in the scafftagging procedure was identified, as the defendant at the time did not follow a detailed checklist for inspection of the scaffold prior to this incident.
17. Section 23 of the *Workplace Health & Safety Act 1995* [WH&S Act] provides that certain persons including employers have obligations for workplace health and safety.
18. Section 28 (3) of the WH&S Act (as it stood at the time of this defence) provides that an employer has an obligation to ensure other persons are not exposed to risks to their health and safety arising out of the conduct of the employers business or undertaking."

An affidavit on behalf of the company was considered by the industrial magistrate. In that affidavit it was deposed a checklist – see agreed facts paragraph 16 – had been used. It was further deposed the checklist could not be found. President Hall commented he could only consider that the check was not inadequate given neither the deponent of the affidavit nor Mr Mallard the scaffolding co-ordinator had been required for cross examination.

President Hall made comments about the discretion in respect of the sentencing and referred to the principals set out in *House –v- The King [1936] 55 CLR 499 at 504 – 505*.

President Hall considered the objective of the *Workplace Health & Safety Act* and the obligations under section 28 (3) and commented those obligations are absolute obligations but also commented the Act is not about strict liability nor an Act about no fault liability. He commented – “the fault lies in failure to discharge the statutory obligation”. He then made various comments about the sentencing process underpinning the Act and what might “propel a sentencing Industrial Magistrate to the imposition of quite different fines where blameworthiness differs”.

President Hall stated – “I do not accept that this case was about hindsight. This is not a case of omission to identify and neutralise a hazard. The hazard was brought into existence. Somebody erected scaffolding with a gap in the floor. Somebody failed to fix the kickboard in a perpendicular position with the consequence that it was possible for the metal planking which constituted the floor to move. Somebody hid the hazard posed by the gap by covering it with what was in substance a painter’s plank, when the option of nailing plywood was available. Somebody scafftagged the scaffolding and thereby represented to workers that it was safe to use. I accept that there was but one global hazard, but reject the submission of counsel for the respondent that there was but one error. There was an error at every step along the way and each of those steps was by way of positive act.”

President Hall commented on significant mitigating factors. He noted the company had entered a plea of guilty at the earliest opportunity and also “co-operated fully with the investigating authority”. There were no previous convictions against the company. He found there was no reason to withhold leniency and that the breach should be treated as out of character.

President Hall then reviewed a number of cases in what he described as “in the case of lower level grievous bodily harm injuries, there is a cluster of cases with similar elements of blame and similar mitigating features, which fall in a range of \$30,000.00 to \$40,000.00”. He thought the fine therefore of \$18,000.00 was manifestly inadequate.

President Hall fixed the fine at \$37,500.00. Importantly, President Hall stated that “whilst the respondent has been a good corporate citizen and the conduct was out of character, the offence is objectively seriously. Continued occurrence of breaches of this gravity will inevitably lead to a complainant seeking reconsideration of sentencing levels to ensure that sentences deter.”

Lessons to be learned:

- That systems are in place to ensure obligations under the Workplace Health & Safety Act are complied with and in particular where incidents such as these can be avoided by proper and appropriate and careful assessment of risk.
- That if you are subject to such an incident co-operation with the investigation is undertaken from the beginning and advice is taken on the relevant plea at an early time.
- That if you are coming before the court regularly the fines will increase perhaps dramatically up to the level of \$375,000.00.

Should you require assistance concerning Workplace Health & Safety please do not hesitate to contact our employment and industrial team:

- Christopher Campbell
- Susan Anderson
- Shelley Clark
- Rebecca Nichols