

Employment & Industrial Case Note

June 2007

Workplace Health & Safety Act 1995 - breach and penalty

Kevin John Huey and South Burnett Beef Pty Ltd Paul Bradley Waltham and Cairns Synergy Electrical Pty Ltd

These are two recent decisions of President Hall of the Industrial Court of Queensland dealing with appeals from decisions of Industrial Magistrates concerning penalties imposed under the *Workplace Health & Safety Act 1995*.

In the first decision the appeal by the relevant officer of the Department was not successful on penalty. In the second the appeal by the relevant officer of the Department was successful.

At the conclusion of each case we have set out a recommendation on principle that we recommend be followed by companies on prosecution. All employers must make every effort to ensure compliance with the *Workplace Health & Safety Act* given the dire consequences of breach of the Legislation. Clearly the Act is structured, in a prosecution sense, so that if the Act is breached almost certainly prosecution will follow and fines at the very least imposed. We recommend that businesses and corporations consult us at an early date so that an assessment of risk for workplace health and safety breach can take place. We undertake a system of RED modelling, which we can explore with individual businesses and corporations.

Kevin John Huey and South Burnett Beef Pty Ltd (C/2006/78)

This is a decision of President Hall of the Industrial Court of Queensland delivered on 18 May 2007.

The employer entered a plea of guilty to a breach of section 28(1). Section 28(1) provides an obligation on the employer to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking.

The Industrial Magistrate did not record a conviction; fined the employer \$22,500.00 and added investigation and professional costs and outlays. The appeal was on the basis of a penalty. The maximum fine that could have been imposed was \$375,000.00.

The breach of the legislation was such that it was asserted that the employee suffered grievous bodily harm.

The decision released by President Hall contains an agreed statement of facts supplied to the Industrial Magistrate. In brief the employee suffered an injury when the knife which he was using in his dominant left hand sliced into his right arm with such knife not being protected from such cutting action by the steel mesh arm guard worn by the employee as it did not cover the whole of the lower arm between the right elbow and wrist. The employee was a boner removing the neck bone from a side of beef – in this case a very large bull.

The evidence put before the Industrial Magistrate was that except in one isolated case it was standard practice in the industry to use the chain mail mesh guard as used by the employee boner in this case. Subsequent to the injury the employer did investigate what other protective equipment may be available and a system was implemented from the example of this one other isolated employer of a chain mail mesh guard that covered the entire arm and then was placed over the shoulder and back of the worker affixed with strapping. The difficulty with this protective

equipment was that it was heavy and may very well cause injury through stress on the shoulder and spine because of its weight. Interestingly at the time of prosecution the employer had left the industry and the purchaser of the employer's business had developed a titanium guard which covered the whole arm but there was some debate about being expensive and perhaps of hygiene risk.

Quoting from President Hall's decision:

I can understand why the Industrial Magistrate would have loath to impose a penalty directly to influencing the Respondent's former competitors to shift to one of the alternative systems. There can be no question that the Industrial Magistrate was obliged to impose a penalty which in a generalised way would encourage observance of the obligations imposed by the Act rather than systemic breach. But that, I assume, is what the fine of \$22,500.00 was about. The very purpose of fines imposed under the Act is to encourage observance.

The appellant representative of the Department appealed on the basis that the fine was inadequate and should have been in a range of \$30,000.00 to \$40,000.00.

President Hall dismissed the appeal and stated:

- The case is quite singular;
- It was a first offence;
- There was a timely plea;
- There was co-operation with the authorities;
- Blameworthiness was too low to *warrant shrill denunciation*;
- The risk was low;
- Deterrence is not an issue.

Interestingly President Hall commented that perhaps the employer should have explored further section 27 as it may have had a defence to the breach.

Recommendation

It is not often that there are singular cases as described by President Hall but if such evidence does come into existence early advice from a lawyer is necessary to assess potential fines but also potential defence.

Importantly early co-operation and timely entering of a plea is necessary if a breach will be proved.

Prevention is important as more offences are committed the greater the fine that can be imposed.

Paul Bradley Waltham and Cairns Synergy Electrical Pty Ltd (C/2006/52)

This is a decision of President Hall of the Industrial Court of Queensland delivered on 24 May 2007.

The representative of the Department brought an appeal against the penalty decision imposed by the Industrial Magistrate.

A plea of guilty was entered and a breach of section 28(1) involved an injury to the employee where he suffered fracture injuries to the left elbow and left wrist requiring surgical intervention.

The Industrial Magistrate did not record a conviction and a fine of \$25,000.00 was imposed plus costs.

President Hall upheld the appeal and made comments upon section 24 and section 28.

Again an “outline of facts” was provided to the Court.

The difficulty in this case for the Industrial Magistrate was that he formed the view that the employee had not taken care for his own safety. Upon completing one part of his job he decided that he needed to access the roof area to assess the second part of the job. Walking upon the roof he did not follow the line of the screw or nail lines and stepped upon light covered sheeting which he had observed. He then fell through that sheeting. The employee fell five metres.

President Hall commented that the Industrial Magistrate had turned the objective and the scheme of the Legislation upon their head.

Quoting from President Hall’s decision:

The obligation imposed upon the employer by section 28(1) requires the employer to ensure that his employees are free from, inter alia, injury or the risk of injury arising out of the conduct of the employer’s business or undertaking. Workers are to be protected whether they are fit or fatigued, careful or careless, experienced or inexperienced, over-confident of their skills or simply foolish. The obligation is not discharged by engaging experienced staff and trusting them to care for themselves and given that the purpose of sentencing is to underpin rather than to undermine the Act, an employer is not entitled to seize the great mitigating advantage of an early guilty plea coupled with the co-operation with the Authority, and then to explain away the objective gravity of the failure to discharge the obligation by attributing blame to the hapless employee. I accept that blameworthiness is always a factor. But the blameworthiness with which one is concerned is the blameworthiness of the (defendant) employer.

President Hall went on to comment about an employee deliberately causing injury to himself or herself which may become a relevant factor against these statements. However in this case there was no such factor to take into account. The Act had been breached – the employee had been given no formal instruction or training about working at heights, had received no formal induction and was not provided with safety equipment additional to a ladder – perhaps planks would have been of assistance.

Again the employer was a first offender and entered a plea of guilty and had early co-operation. Nevertheless the fine imposed by President Hall was that of \$38,000.00 as opposed to the \$25,000.00 imposed by the Industrial Magistrate. Interestingly the representative of the Department had argued for a fine in the region of \$33,000.00 to \$38,000.00. President Hall commented that he very well could have considered a fine in the region of \$40,000.00 to \$50,000.00 – but accepted the Industrial Magistrate had considered the fine and the appellant had argued for a fine in a lesser range.

Recommendation

When arguing on a fine the structure of the Legislation must be known. That is if a breach is proved and there is a plea of guilty then if the matter comes before President Hall be very careful about what was argued about what the employee should have done where clearly steps were not done by the employer to prevent the injury occurring. As Hall P commented he was dealing with the blameworthiness of the employer.

Again early co-operation and an early plea, if applicable, are necessary. Again repeat offenders will be punished by much greater fines.

For further information about workplace health and safety issues and advice that can be provided to businesses and corporations prior to incidents occurring and subsequent to incidents occurring please do not hesitate to contact our Employment & Industrial Team on 07 32236400.