WORKCOVER SENTENCING

Workcover Authority of NSW (Inspector Hopkins) v Profab Industries Pty Ltd

NSWIRC
Wright, Walton & Hungerford JJ

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The *Occupational Health and Safety Act 2000* contains provisions requiring employers to ensure that employees and others are not exposed to risks to their health and safety. *Workcover v Profab* was a prosecution under the Act in relation to the death of an employee at work. The employee had been carrying out welding to a steel truss in a workshop. The truss was standing upright on its base. While attempting to attach a chain to the truss, so that it could be craned away, the truss toppled causing the employee to fall and strike his head, incurring injuries which proved fatal. The employer was prosecuted by Workcover, and pleaded guilty. The trial judge, Justice Peterson found:

- That the system of work adopted by the employer was safe. The employer had required the welding of trusses to be carried out whilst laid flat. If the employee wished, the work could be done with the truss vertical, provided that the truss was already secured by a chain or by steel supports welded on.

- The employee had created the risk, by working on the truss when it was in a vertical position and unsecured.

- The employee had been with the employer for eight years, had been involved in the fabrication of many similar trusses and knew the procedures.

- On the day of the incident, two fellow employees noticed that the vertical truss was not braced or supported and had warned the employee about the dangers. The employee agreed that it was unsafe yet did nothing.

His Honour said:

It is true that the employee was not under supervision but ... constant supervision of a properly qualified employee, who has adequate training in the context of a system which is designed to be and is accepted to be, if properly applied, a safe system, cannot be constant.

His Honour noted that the employer was in a relatively dangerous industry yet had no prior convictions and generally a meticulous approach to safety. In relation to the incident its co-operation with authorities and care for employees who were emotionally effected (through time off and counselling) was commendable. His Honour found the offence proved, but on the question of penalty said:

There is, in my view, no subjective element of this case which would warrant the imposition of a penalty. The only objective feature which requires consideration is the notion of an imposition of a penalty to act as a general deterrent ... There seems to be little justification for applying that consideration alone to the defendant in this case. The defendant's performance has in general been an exemplar of the sort of approach which employers, particularly in the building industry, should take to employee safety.

His Honour discharged the employer without conviction pursuant to s.556A of the Crimes Act. Where a punishable offence is proven, but the court thinks that it is inexpedient to inflict punishment due to matters such as the character or antecedents of the defendant, the trivial nature of the offence or extenuating circumstances, section 556A of the *Crimes Act* empowers the court to dismiss the charge without proceeding to conviction. Workcover appealed against the application of s.556A. When the appeal was heard before a full bench of the Industrial Relations Commission, the Attorney General and Minister for Industrial Relations also appeared and made submissions. The Attorney General argued:

- That the legislation is not limited to punishment with respect to accidents. It requires employers to look ahead and foresee dangers.

- That the imposition of a penalty gives effect to the legislation by deterring others from failing to provide sufficient resources for the protection of employees.

- In assessing the seriousness of an offence the court should have regard to the extent to which the risk was foreseeable, the potential consequences (i.e. the seriousness of the injury) and the steps or measures that could have been taken to avoid the risk.

- That a foreseeable incident that lead to a death could not be characterised as trivial.

It was also submitted that the increases in penalties in recent years reflected community attitudes as to the seriousness of the relevant offences. The appeal court noted that the size of the maximum penalty reflected community standards as to the seriousness of the offence.

On behalf of Workcover, it was submitted that the employer had not taken appropriate safety measures, particularly with respect to supervision. There were no written welding procedures, and a production supervisor had seen that the truss was vertical but not checked that it was secured. The employer has an obligation to be pro-active not re-active, and should be on the offensive to search for, detect and eliminate any possible unsafe practices.

Whilst noting that there have been cases where s.556A has been applied in the past, the appeal court found that the circumstances for its application were rare indeed. In this instance the trial judge's reasoning had not had proper regard to the seriousness of the offence by reference to the very large maximum penalty, and gave little or no weight to the strict liability nature of the offence. Further, the judge had erred in findings with respect to the adequacy of the supervision. There should have been greater alertness to the hazard. Also the trial judge had not taken the deterrence factor into account sufficiently.

The appeal court convicted the employer of the offence and imposed a fine of $50,000.

Tony Earls' article first appeared in Colin Biggers & Paisley's *News* bulletin (July 2001). It appears here with permission.
