Safe work (nsw) v wga pty ltd [2017] nswdc 91

Introduction

During the years between 2014-2016, 112 people were hospitalised with an electrical injury due to exposure to electrical transmission lines. Industrial and construction work accounted for 106 of these injuries. (M Alder, 2018)

These types of injuries are preventable if employers manage activities on their sites correctly and abide by all safety requirements as required by law. Failure to adhere to such safety measures and requirements may these days attract criminal culpability.

In a landmark decision rendered in the case of *Safe Work (NSW) v WGA Pty Ltd [2017] NSWDC 91 (SafeWork v WGA)* , a NSW construction company was fined $1 million for offences related to the *Workplace Health and Safety Act 2011* (WHS Act). The incident involved a sub-contractor who was electrocuted whilst undertaking construction activities near high voltage power lines. Judge AC Scotting fined WGA Pty Ltd $1 million out of the possible maximum of $1. 5 million. This was a record in NSW to date for an offence under the WHS Act. The defendant company attributed the injuries sustained by the sub-contractor to the blatant disregard of the safety obligations.

The case presents the issue of criminal culpability, where employers are subjected to criminal prosecution for a breach of the provisions under the WHS Act. Accordingly, it also placed a duty of care to persons undertaking business upon their employers to protect them from risk of death or serious injury.

Relevant Facts

The case involved a criminal matter presided over by Judge AC Scotting in the New South Wales District Court. It was brought before the court against WGA Pty Ltd for the contravention of the provisions of section 32 as read with 19(1) of the WHS Act. Once WGA Pty Ltd pleaded not guilty to the charges on the 27 th of September 2016, the matter was set for hearing on the 3 rd of April 2017. WGA Pty Ltd were not represented in the matter, as the company's solicitor on the record had informed the court that the firm did not retain him.

The matter was heard without WGA Pty Ltd tendering their defense to the criminal allegations leveled against them. The trial culminated in a guilty verdict, where WGA Pty Ltd was convicted and fined accordingly. As a result the judge fined WGA Pty Ltd a record $1 million, out of the possible $1. 5 million for this type of offence. WGA Pty Ltd was also ordered to pay the court costs of $50, 460.

The particulars of the case were that WGA Pty Ltd acted in breach of the " duty of care" owed to its employees, contrary to section 19(1) of the WHS Act. The breach exposed Christopher Cullen a sub-contractor to the risk of serious injury or death. Mr Cullen had suffered a serious electric shock while on site on the 19 th of June 2014. The victim was working on a residential building under construction at 823-829 King Georges Rd, South Hurstville by the defendant company WGA Pty Ltd.

While working on a window ledge, the victim experienced an electric shock from the nearby power lines. The construction was being undertaken in close proximity with the power lines running across King Georges Road. The building was near the upper and lower power lines. Both power lines were live; the lower, which was owned by Ausgrid, had a voltage of 415V whilst the upper line owned by Rail Corp had a voltage of 33kV. Both of these power lines were supported by different posts and therefore independent of each other. The window ledge on which the victim was working on was close to the upper power lines. Mr Cullen came into contact with the power lines whilst completing work for the defendant, causing an electric shock in which he suffered burns to 30 percent of his body.

A site visit made on the 6 th of March 2014 by Inspector Newton highlighted the safety concerns of the close proximity of the power lines and hazards posed to workers on site. There were no necessary controls in place to help control these safety concerns. The Inspector formed the opinion that the entire setting presented an immediate risk to the safety of the workers on site. In essence, the Inspector cited the lack of hoarding for the prevention of workers and/or objects coming into contact with the power lines. It was also noted that there were no warning signs to inform and warn people of the possible danger such as barrier tape and/or signage. There was also no exclusion zone set aside for the prevention of people getting within the confines of the 3m distances to the power lines.

Once the concerns were raised, the person in charge reiterated that it presented no problem, as he did not see the sense as to why someone would reach out to touch the power lines. The Inspector gave a prohibition notice in

line with section 195 of the WHS Act, preventing workers from being exposed to danger by being required to work close to the live power lines.

Mr Leishman from Sydney Trains had advised the defendant that the Safe Approach Distance (SAD) to the high voltage power lines was 4 metres, as opposed to the 1. 2 metres the contractor had maintained. The victim was formally engaged to fix the windows when he experienced the electric shock.

Legal Argument

The only arguments advanced in the case were those of the prosecution in attempting to prove their case. The fact that the defendants did not enter an appearance implies that they did not defend the case against them or attempt to mitigate the penalty imposed on them.

The prosecution raised various legal arguments and backed them accordingly to meet the legal threshold and discharge the burden of proof beyond reasonable doubt. The arguments were pegged on the provisions of section 32 of the WHS Act, that the defendant had committed a category 2 offence. The offence tags along with three elements:

- The defendant was conducting a business or undertaking
- The defendant owed health and safety duty to ensure health and safety of workers in the business undertaking, the defendant failed to adhere to health and safety duty, and finally
- The defendant exposed the worker to a risk of death or serious injury.

Section 19 of the WHS Act makes it clear that a health and safety duty is owed to workers. The legal argument was that the conduct of the defendant

fulfilled the respective elements, and thus the prosecution proved its case against the defendant beyond reasonable doubt. In essence, the prosecution tried to prove that the defendant was engaged in a business or undertaking and owed a duty of care to the victim who was a worker and the failure to observe the health and safety duty exposed the worker to a risk of death or serious injury.

Reasons or Rule or Principle Applied

The court applied the provisions of section 32 in conjunction with 19(1) of the WHS Act, based on the view that the circumstances and set of facts out rightly satisfied all the elements set out in the matter.

The court also relied on some established principles based on legal precedents that illustrated various matters on the issue at hand. In a nutshell, it was argued that the defendant conducted business or undertaking as was admitted in the notices issued to the defendant company by the inspector. Mr Hassan, acting for WGA made admissions that the company was in business or undertaking at the given site as the builder and hence was responsible for the safety on the site.

It was also argued that the defendant company owed the victim a health and safety duty as an employee. Mr Cullen was hired to work on the site after negotiations with Mr Hassan, the company’s representative. This qualified Mr Cullen as the employee of the company, which automatically entitled him to the health and safety duty by the employer.

The court applied the provisions of the WHS Act in which a person to be held liable for a category 2 offence must have acted in breach of health and safety duty owed to the worker. The court was of the view that the defendant failed to comply with the various health and safety duties or requirements through their blatant failure to abide by the steps and recommendations made in the various summons issued by the inspector. For instance, they should have prevented the victim from working in the area or allowed the work to progress once the power lines were isolated or de-energised. Further, they should have enforced a no-go zone near the power line, which would have prevented the victim from working near the power lines.

The failure to install and maintain physical barriers to prevent access to the external area, as well as failure to install signs was also a key breach. Having satisfied all elements, it was apparent that the actions amounted to exposure to risk of death or serious injury from the imminent electric shock. The case of *Slivak v Lurgi (Aust) Pty Ltd (2001)* was used to buttress the applicability of the WHS Act to matters that can be controlled, supervised and managed by the defendant as was evident in the case.

In exonerating the victim from any liability, the court relied on the reasoning in the case of *Dunlop Rubber Australia Ltd v Buckley (1952)* that the defendant must put into consideration the ideal, careless and inattentive worker. (Friend and Kohn, 2018)

Analysis

The penalty given by the court in the form of the fine was relatively high. It falls among some of the highest fines imposed by the Australian courts in relation to health and safety of workers. The court was of the view that the offender did not take appropriate precautions to prevent the risk and hazard, which caused the injury. As a result, the penalty imposed was to serve as general deterrence. The decision also mirrors the commitment of the courts to promote and enforce the provisions of the WHS Act by ensuring that employers prioritise the health and safety of employees.

Previously, the highest amount of fine associated with a breach of the Work Health and Safety Act in NSW stood at $500 000. This was imposed on Ulta Group Pty Ltd in 2014 for a breach that exposed a worker to a similar injury caused by electric shock (Bluff, Johnstone, McNamara, and Quinlan 2012). However, the variation visible in this case may be attributed to the aggravating circumstances, particularly the view that the defendant failed to adhere to recommendations given even after the inspector gave summons in relation to the same.

High fines under the WHS Act are not new in Australia. On July 2001 the Victorian Supreme Court convicted Esso Australia Pty Ltd of 11 breaches of s. 21 of the Occupational Health and Safety Act after the Longford Royal Commission found that Esso “ failed to provide and maintain so far as practicable a working environment that was safe and without risk to health” The fine was a record $2 million. (J Nicol, 2001)

The trend towards higher penalties continues as in 2015 a construction company Kenoss Contractors in Canberra ACT, was fined $1. 1 million for a

similar electric shock incident in which a tip truck driver touched low hanging power lines. This was similar to the *SafeWork v WGA* case in which even after being issued with a prohibition notice regarding working near power lines, the company failed to erect signs or even limiting access. (A Titterlton & L Bocheneck, and M Nguyen 2017)

The decision, including the penalty tendered towards WGA Pty Ltd draws various remarks and lessons seemingly for employees and employers. However, the employers are more targeted as a duty of care in relation to health and safety is imposed upon them by statute. In essence, an employer should embrace a proactive approach in addressing safety issues. (Ross 2018)

The defendant in this case did not act in a proactive manner but rather reactively. Most of the concerns raised by the inspector were triggered by different actors, such as Ausgrid and Sydney Trains, who were critical in informing Safe Work NSW of the potential breaches of health and safety on the construction site.

Based on the fines being issued these days it has come apparent that courts are looking at punishing employers who do not abide by safety requirements for its employees. It is only the plausible measure that can be used to tame rogue employers who enjoy a high bargaining power compared to the workers and thus are more likely to overlook their health and safety.

References

- Friend, M. A., and Kohn, J. P., 2018. *Fundamentals of occupational safety and health* . Rowman & Littlefield.
- Bluff, E., Johnstone, R., McNamara, M. and Quinlan, M., 2012. Enforcing upstream: Australian health and safety inspectors and upstream duty holders. *Australian Journal of Labour Law* , *25* (1), pp. 23-42.
- Friend, M. A., and Kohn, J. P., 2018. *Fundamentals of occupational safety and health* . Rowman & Littlefield.
- James Nicol, 2001 Have Australia’s Major Hazard Facilities Learnt From The Longford Disaster? An evaluation of the impact of the 1998 ESSO Longford explosion on major hazard facilities in 2001. The Institution of Engineers, Australia
- A Titterton, L Bochenek and M Nguyen, 2017. Construction Company receives record NSW fine for electric shock, Clyde &Co.
- Safe Work (NSW) v WGA Pty Ltd [2017] NSWDC 92 (5 May 2017)
- Safe Work (NSW) v WGA Pty Ltd [2017] NSWDC 91 (10 April 2017)
- Ross, A., 2018. Workplace law: Indemnification of personal penalties: A golden ticket out of legal obligations? *The Proctor, 38* (1), p. 36.