

N.B. Copyright in this transcript is the property of the Crown. If this transcript is copied without the authority of the Attorney-General of the Northern Territory, proceedings for infringement will be taken.

NORTHERN TERRITORY OF AUSTRALIA

WORK HEALTH COURT

No: 2024-02346-LC (22314676)

WORK HEALTH AUTHORITY

and

AUSTRALIAN ILMENITE
RESOURCES PTY LIMITED

JUDGE OPIE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 14 NOVEMBER 2024

Transcribed by:
EPIQ

MS CHEONG: Good morning, your Honour. I think you have the Work Health Authority v Australian Ilmenite Resources Pty Ltd this morning.

HER HONOUR: Thank you.

MS CHEONG: I appear for the prosecution, your Honour. Cheong.

MR STUCHBERY: And your Honour, I appear for Australian Ilmenite Resources.

HER HONOUR: Thank you, Mr Stuchbery.

MS CHEONG: Your Honour, my friend has just, at 9:20 am, sent through to the court agreed facts and his submissions, and he's suggested it may be useful for your Honour to consider those which would, I think, deal with the plea relatively quickly.

HER HONOUR: You want to resolve it today?

MS CHEONG: Yes. Yes.

MR STUCHBERY: Absolutely. I can just indicate, though, I didn't intend to embarrass my learned friend with the provision of submissions. It was really more of a matter of that is all I have to say, so - - -

MS CHEONG: And I have very little to say in addition to that, your Honour.

HER HONOUR: All right. And so should I have received anything? Because I don't seem to - I have a complaint.

MR STUCHBERY: I've got spare copies, just in case, of all of the documents I sent through this morning, your Honour. So that includes the statement of agreed facts, my outline of submissions - I say outline of submissions; really it should be my submissions on sentence; and the one comparative authority that I refer to in that - in those submissions.

HER HONOUR: Thank you, Mr Stuchbery. And so is it a plea to all counts?

MR STUCHBERY: No, your Honour. So it's a plea to the Category 3 offence; the s 33 offence. And I understand that that's been accepted in full satisfaction.

HER HONOUR: So that's count 2, is it?

MS CHEONG: That's right, your Honour. There's count 2 and on that plea, count 1 of the charge will be withdrawn.

MR STUCHBERY: And by formality, your Honour, I can indicate I understand my learned friend takes no issue with the plea being entered through counsel - - -

MS CHEONG: No.

MR STUCHBERY: - - - and I can confirm I'm instructed to enter a plea on my client's behalf.

HER HONOUR: Excellent. All right.

MS CHEONG: And your Honour, the only submissions that prosecution - I have no - I don't quibble with my friend's submissions in terms of (inaudible) factors and how you should consider sentencing in these circumstances. The only thing that the Authority wishes to emphasise is that it is a risk that could have easily been controlled.

HER HONOUR: Yes.

MS CHEONG: And that it was lucky that the person who received the shock didn't sustain any major injuries. So that really is the sum of the prosecution wanting to highlight to yourself; and we agree that the only authority in the NT is the one that my friend has handed up, a decision of Judge Borchers in the Supreme Court in Alice Springs in October 2021. So we're about as ad idem as we possibly can be on opposing side of the Bar table, your Honour.

HER HONOUR: That certainly helps these matters don't come routinely before the court.

MS CHEONG: No. No.

HER HONOUR: So I'll take some time to read the allegations - well, the facts - and Mr Stuchbery's submissions.

MS CHEONG: Yes. Thank you. Thank you, your Honour.

HER HONOUR: So is this a self-report? How did the - how did the Authority come to know of it?

MS CHEONG: I think it was reported by the - by - by the PCBU, your Honour, as a requirement because it - it qualifies as a notifiable incident under the legislation because of the shock (inaudible).

HER HONOUR: Okay.

MR STUCHBERY: That's - that's correct, your Honour.

HER HONOUR: Thank you for those submissions. They're very helpful.

MR STUCHBERY: May it please the court. And your Honour's - I don't think your Honour is really required to read in full the - the sentencing remarks of his Honour Judge Borchers. It was provided, really, only to indicate the perhaps

startlingly similar factual circumstances of this case as to the one that your Honour is sentencing my client for.

What occurred there were that the three defendants had - were various entities, including an individual. And the conduct that gave rise to the breach was in fact an employee of one of the defendants opening the mechanical services switchboard, which was unlocked; it did have a locking mechanism, but it was not routinely locked for whatever reason. That person touched something within there which was a live component and received a shock for which she did receive medical treatment.

So in some aspects, a slightly more serious example given that there was actual harm caused to a person as a result of the breach; and I'd just highlight for your Honour's benefit that the defendants in that were actually being sentenced for a Category 2 and Category 3 offence. I assume that the sentence imposed, although it's not explicitly stated by his Honour in his sentencing remarks, that the fines imposed were aggregate penalties imposed across two offences.

That's the only conclusion I can draw. But relevantly, your Honour, the corporate defendant, Springs Opco(?), was fined \$15,000 with no conviction being recorded against them. Similarly, the perhaps less culpable party - the other corporate entity, NT Estate Ptd Ltd, was fined \$5,000 and no conviction was recorded.

So your Honour can have regard, obviously, to that as an example of a sentence that's been imposed for a similar type of offence, obviously, with the usual caveat that attaches to the relevance of comparative sentencing, especially given that the maximum penalties have actually increased just by virtue of the increase in penalty units, and so on and so forth, since that sentence was imposed.

But as I said, the countervailing consideration is that it was a Category 2 offence which carries a - three times the maximum penalty of a Category 3 offence, which your Honour is sentencing today. So all of those things obviously need to be balanced out. Your Honour, I rely on those written submissions, and I don't propose to go through them in full, subject to anything my learned friend wishes to emphasise and any reply I wish - may wish to make.

The only thing I would say is this, your Honour, and it's accepted by the defendant that putting a locking mechanism on this electrical box and putting a sign up was a really simple and practical safety measure that it should have imposed. There is no argument with that. The countervailing consideration in this case is, as I've referred to in my submissions, that the risk of interfering with electrical components is an obvious one.

A worker under the Act also has a commensurate duty to take reasonable and appropriate measures to protect their own health and safety while at work. This particular worker in the incident that gave rise to the breach acted contrary to company policy, and really, contrary to, in my submission, common sense. He was aware that he shouldn't have gone in there. He knew what the company policy was; he told investigators he could have called and should have called the on-call

electricians to come and fix the problem if there was one; and instead, he's gone in and - - -

HER HONOUR: DIY.

MR STUCHBERY: DIY MacGyvered the electrical cabinet. In my submission, I don't want to be too critical of the worker, but I think your Honour understand the submission that I'm - I'm trying to make here.

HER HONOUR: I do understand.

MR STUCHBERY: So to the extent to which the risk is preventable, the foreseeability in relation to an employee acting in the fashion that the employee did, in my submission, is not quite there. So while it could have been prevented by simple measures, really, to have somebody go and act in the manner in which they did, in my submission, is something that puts this case in a slightly unusual category.

I've submitted there that that is a factor that your Honour could take into account in determining whether or not to exercise your discretion under s 8. I don't put it any higher than that. My client obviously comes before the court as a corporate entity of prior good character. It enjoys the benefit of good character.

Your Honour can also draw conclusions, in my submission, from the way in which they have reacted to the offending, or the incident, and draw conclusions in relation to that, insofar as your Honour's consideration of character and antecedence is concerned, relevant to the question of s 8.

I don't submit that it's trivial offending. No offence under the *Work Health and Safety Act* could be properly characterised as trivial. In terms of extenuating circumstances, I can't put it any higher than I have, that although it was easy enough for my client to prevent this from occurring, really, a large deal of responsibility or ownership needs to be placed on the worker who acted contrary to the specific instructions that they had been given, and to company policy.

Thank you, your Honour.

HER HONOUR: Ms Cheong.

MS CHEONG: Thank you, your Honour. In relation to the authorities for submissions, the fact of the worker's conduct doesn't, we say, undermine the breach by the company because had they had it locked or had the signage, it may have prevented or reminded perhaps what a DYI worker to say, "Stop. No. I won't do it."

So while I appreciate my friend's submissions that this worker ought not have done it, a simple locking mechanism would have meant he couldn't do it. So I note my friend says it's not trivial; electrical safety risk is a concern in terms of work health and safety generally.

And I understand my friend to be asking for a no conviction; we would be asking for a conviction to be recorded despite the no prior or good conduct, because it is something that is so easily fixed, that, you know, is for general deterrence as well as specific deterrence. We accept that the company has done what it can do to now not fall into error again.

But from the Authority's point of view, not to make this an example, but it is another highlight of conduct that leads to risk that could have easily been avoided. So the penalty aside, I leave that to your Honour's discretion, but I - we do strongly argue that a conviction should be recorded, noting notwithstanding 2000 and - in the other matter, and I accept it as a ss 32 and 33 charge, that no conviction is recorded.

Clearly the message hasn't gotten through in 2021, and we really need, we say, as the Authority, by not making an example of this PCBU, this sort of conduct is not tolerated and should not, I suppose, be excused by non-conviction by the court in the work health and safety arena.

HER HONOUR: Thank you.

All right. All right. In this matter, the defendant has pleaded guilty to count 2. The facts have been admitted, and I found that count 2 is proved, and count 1 is withdrawn and dismissed. In this matter, the defendant is entering a plea at an early opportunity. The offending is not the most serious example of offending; in fact, I would go so far as to say it is a low-level example of a breach of work health and safety.

The electrical cabinet was not locked, but the employee took it upon him or herself to interfere with the mechanism in a way that was contrary to company policy because whilst electricians were on site, they were not on duty. Fortunately, the - despite the electrical cabinet not being locked and signage not being in place, the cabinet was fitted with a residual current device to protect from electrical shock, and so the employment - the employee, whilst he or she received a shock, was not harmed by it and did not require medical attention.

After the incident, the defendant took immediate steps to investigate the deficiencies in its work health and safety policies and procedures. A report was obtained, and an independent electrical safety audit was done, and I accept that the workplace has improved and taken the matter very seriously. I note, also, that the employee accessed the cabinet notwithstanding a specific instruction that they should not.

I note that the defendant has no prior convictions, that the defendant cooperated fully with investigating officials, that the defendant indicated its acceptance of responsibility at an early opportunity and has taken steps to rectify the breach.

I therefore impose a modest fine of \$5000.

I then turn to the question of whether it is appropriate to record a conviction. I have heard submissions that a conviction should be imposed for the purpose of general deterrence.

But having regard to the fact that the defendant is of prior good character and has demonstrated to the court that it is behaving in a way that is responsible since the event; and in circumstances where the breach arose on account of the employee acting in contravention of the policy of which he was aware, I find extenuating circumstances and do not record a conviction.

Anything further, parties?

MS CHEONG: There's usually a victim's levy that goes with that - - -

HER HONOUR: And how much is that?

MS CHEONG: \$1000 for a body corporate.

MR STUCHBERY: That's correct.

HER HONOUR: Anything further?

MR STUCHBERY: Nothing further, your Honour. Thank you.

MS CHEONG: No, your Honour. Thank you, your Honour.

HER HONOUR: Thank you.

ADJOURNED