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NORTHERN TERRITORY OF AUSTRALIA

LOCAL COURT

No: 22001949

WORK HEALTH AUTHORITY

and

WHITTENS PTY LTD

DEPUTY CHIEF FONG LIM

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 3 APRIL 2023

Transcribed by:
EPIQ

HER HONOUR: Mr McConnel, it's Judge Fong Lim here in the Local Court in Darwin in relation to the *Work Health Authority v Whittens*.

MR MCCONNEL SC: Yes, (inaudible) for the Authority.

HER HONOUR: Thank you. We're just trying to get Mr Livermore. We're having some technical difficulties. We've just got to get Mr Livermore on the phone as well.

MR MCCONNEL: I think I sent through to Ms Brebner (inaudible).

HER HONOUR: I beg your pardon?

MR MCCONNEL: I think I've sent through Ms Brebner's and Mr Livermore's contacts.

HER HONOUR: Yes, we're just going to –

We need to get that diary into court 2.

MR LIVERMORE SC: Garry speaking.

HER HONOUR: Mr Livermore, it's Judge Fong Lim here in the Local Court in Darwin. We've had some difficulties with our Teams link, so I've now got you and Mr McConnel on the phone.

MR LIVERMORE: Okay, good morning, thank you.

HER HONOUR: Just for the record, I am handing down my decision in 22001949 and the sentence, *Work Health Authority v Whittens Pty Ltd*, and I will proceed with that now, the sentencing remarks.

Nothing can compensate the friends and family of the loss of Carl Delaney. He tragically died in an accident at work, which accident was a possible consequence of the defendant's failure to comply with its health and safety duty, which exposed its workers to a risk of serious injury or death. Mr Delaney's death was a sombre reminder of how and why the legislature has found it necessary to regulate in this area.

The defendant pleaded guilty to one count of failure to comply with a health and safety duty, category 2, pursuant to s 32 of the *Work Health and Safety (National Uniform Legislation) Act*. The maximum penalty for that offending is $1.5m. The question is where in the range of offending does this particular matter fit, whether it be in the mid to high range, as contended by the Authority, or in the lower range, as contended by the defendant.

To consider where it sits, I have to consider the objective seriousness of the offending; the reasonable foreseeability of the death; the actual death; the

knowledge of the risk; and not having a supervisor there, enforcing the safety procedures at all times.

The death of Mr Delaney is a stark demonstration that the risk involved in the present case was at its highest. But it must also be remembered that there were other workers present on the day who were also put at risk of serious injury or harm because of the failure of the defendant to comply with its duty to require a leading hand to be present at all times, either on the deck or in the confined work space, when others were there working.

The facts agreed are that the nominated leading hand supervisor was outside of the area when he was required to be when the accident occurred. Not only during that time of his absence, he left his buddy, Riley, working alone in the space and both Delaney and Barriguard(?) were, at one stage, working alone in the confined space, and it is not known how Delaney became unhooked.

It is clear the defendant had comprehensively assessed and identified the risk involved in the project and developed comprehensive SWMS for activities involved. They were mindful of the high risk in this work and the need to guard against that risk. The steps they took and continue to take once the project commenced, indicated that the defendant recognised the risk and their duty to guard against it.

But what the defendant did not do after gaining knowledge that workers were not complying with safety procedures, they did not adjust their procedures to enforce the constant presence and supervision of the workers to ensure further non-compliance did not occur. The Authority correctly submitted that it would have been a simple step to provide continuous supervision.

The defendant submitted that there was not a simple step and even impossible, giving the leading hand was part of the crew and physically could not actually observe all workers at the same time. The defendant's submission, in my view, is flawed. Even if their supervisor was part of a crew, he could have provided a constant reminder, to ensure the workers were not alone and hooked up when working.

In the event, the defendant gained knowledge that workers were not complying and it was incumbent upon the defendant to address the non-compliance and to consider tightening its supervision of the workers by having a competent supervisor on the deck or in the space.

The defendant argued that it made little difference to the minimisation of the risk and I disagree. Had the supervisor been where he ought to have been, his buddy would not have been working alone. His presence would not have – he could have deterred others in the practise of working alone and working unhooked, particularly, if he had observed the non-compliance.

I am of the view that the breach falls within the lower end of mid-range offending. The plea was negotiated over a lengthy time and was agreed to after

there had been a hearing before this court, as to the adequacy of the complaint, as originally pleaded.

The matter then went to the Supreme Court, in an appeal from my decision on the adequacy of the complaint, then remitted back to this court for completion. There was a directions hearing in November of last year, when the court was advised that the matter had resolved to a plea.

The affidavit of Erica Tweiss(?) sets out the history of the matter and it is of note that, before resolution, there had been a lot of work towards a contested hearing, including identification of witnesses and distillation of their evidence. While I accept there is some utilitarian value to the plea, I do not accept it as an early plea and, therefore, I do not grant a full 25 percent discount. There will be a 15 percent discount.

Deterrence: the death of Delaney, the effect of his death on his co-workers, and the possibility of a company creating safety procedures and turning a blind eye to non-compliance makes deterrence a major factor in my consideration of sentence. Aggravating factors also are the same, in relation to the death that had occurred, and the death was seriously – how it had seriously affected the co-workers.

Mitigating factors, however, have since – the company has since reviewed its procedures and adjusted accordingly. There have been no other breaches in their history and their development of the safety SWMS has been of great detail and a lot of work has been put into those procedures.

The company clearly has the ability to pay a fine. There was some suggestion that there should be no conviction entered against this company. I adopt the views expressed by our Supreme Court and Court of Appeal, that the regulatory nature of this legislation and the dire consequences which may happen, should the companies not comply with their duties and keep their workers safe, there is a real possibility of other companies paying lip service to safety standards.

A breach of this kind warrants a conviction. While the defendant had a history of prior good character regarding this type of offending, general deterrence weighs heavily, when the risk of death is high and has actually eventuated and could have been avoided had the breach not occurred.

I do not accept the fact that there was a higher-level duty holder involved in these processes and extenuating circumstance, and that the co-duty holder did not direct the safety measures. They were worked out in concert with the defendant and the defendant still had the duty.

I consider the authorities put to me in relation to comparative cases, which, of course, none of these cases involved the same factual matrix as the present case, the analysis placed on whether each of those cases were worse or less than worse of the present case in objective seriousness, was helpful. The most instructive, in my view, was the Court of Criminal Appeal in *AG v McMahon* [2019] NSWCCA(?).

Taking all those things into account, it is my view that the appropriate sentence here is a conviction, with a fine of $425,000.

In relation to costs, Mr McConnel? Mr McConnel?

MR MCCONNEL: Sorry, your Honour. I was on mute.

There will be an application for costs to be paid on a departure from the prescribed scale. I have been in contact with my learned colleague, opposing (inaudible) about that. We would seek a timetable, if it pleases your Honour, for the entry of written submissions on (inaudible).

HER HONOUR: So, you want a timetable for written submissions and then another date before me to hand down my decision on costs? Is that what you're asking me?

MR MCCONNEL: Yes, and (inaudible).

HER HONOUR: And what is the suggested timetable, Mr McConnel?

MR MCCONNEL: (inaudible).

HER HONOUR: Sorry?

MR MCCONNEL: I've had an opportunity to discuss that with my learned friend and I'd be asking to provide - - -

HER HONOUR: Mr Livermore?

MR LIVERMORE: Your Honour, I am having a bit of trouble hearing my learned friend, but what I did hear was accurate, from our perspective. Perhaps our practice could have two weeks for their written submissions and we could have two weeks to respond, we'd be content for your Honour to deal with the matter on the papers, rather than requiring another appearance, your Honour, if that's suitable to your Honour.

HER HONOUR: All right.

Mr McConnel, are you happy with that suggestion?

MR MCCONNEL: Yes, I am, your Honour.

HER HONOUR: So, was that a yes?

MR MCCONNEL: Yes, that was.

HER HONOUR: Okay. So - - -

MR LIVERMORE: That was a yes, your Honour.

HER HONOUR: I think that's a yes. Authority to serve to written submissions on costs by close of business – we do have Easter in the middle – on 17 April. Defendant to serve – sorry, file written submissions on costs by close of business on 2 May.

MR LIVERMORE: Thank you, your Honour. So, can I just confirm, in relation to the fine, at $425,000 – does that include the 15 percent discount or not?

HER HONOUR: Yes, it does. Yes, it does.

MR LIVERMORE: Thank you, your Honour.

HER HONOUR: I will adjourn the matter before myself, only because we – I don't like to adjourn matters sine die, but I will adjourn it to a further date, so that we can ensure that it's dealt with, but I will make sure that – okay.

So, I will adjourn the matter to 9:30 on 19 May for decision on costs to be handed down. Is email to the clients – email to the parties going to be sufficient?

MR LIVERMORE: Yes, thank you, your Honour.

HER HONOUR: Email to parties. Okay.

Thank you, gentlemen.

MR MCCONNEL: Thank you, your Honour.

MR LIVERMORE: Thank you, your Honour.

A PERSON UNKNOWN: Can I just quickly interject? Your Honour, may I just indicate that this matter was formerly adjourned until 9 June. Has that date - - -

HER HONOUR: Yes, 9 June has been vacated.

A PERSON UNKNOWN: Thank you, your Honour.

HER HONOUR: Just to be clear, 9 June is vacated.

MR LIVERMORE: Thank you, your Honour.

HER HONOUR: Thank you.

MR MCCONNEL: Thank you, your Honour.

ADJOURNED