RECENT DECISIONS

Safety is always the employer's responsibility

Williams v Metcash Trading Limited [2017] NSWDC 154 (23 June 2017)

Link to decision

Summary

The worker was employed by a labour hire company. That company provided the worker's services to a third party, Metcash Trading Limited ('Metcash').

The worker was injured whilst working at Metcash's premises. The worker made a claim against Metcash, alleging that Metcash was responsible for his injury.

Metcash denied that it was liable for the worker's injury. Metcash further argued that the worker's employer was liable for the worker's injury.

The District Court held that Metcash was partially responsible for the worker's injury. However, the Court also held that both the worker's employer and the worker himself contributed to the injury.

Background

The worker was employed by 'JW'. That company provided the services of the worker to a third party, Metcash.

The worker performed picker/packer duties at Metcash's distribution centre. The distribution centre stored goods that would eventually be collected and delivered to retail outlets, such as grocery stores. The goods were stored in areas referred to as 'pick slots' and would be 'picked' from slots within the distribution centre and placed on a pallet. The pallet would then be wrapped in plastic before being delivered to the relevant store.

As a 'picker/packer', the worker would receive instructions via a headset to collect goods from various pick slots in the distribution centre and place them on a pallet. On 1 June 2012 the worker lifted two 16kg boxes of dog food that were located in a pick slot that had a height clearance of 1.4 metres. The worker was over 1.8 metres tall. This meant that the worker had to bend down and stretch to reach the boxes within the pick slot so that he could transfer them to his pallet. In doing so, he sustained an injury to his back.

The worker alleged that Metcash was responsible for his injury. This was on the basis that Metcash directed the system of picking/packing (including what items were to be picked) and was responsible for determining where the boxes of dog food were stored. The worker argued that, amongst other things, Metcash should have ensured that the boxes of dog food were not located in a 'cramped' space.

Metcash argued that it was not responsible for the worker's injury. In the alternative, Metcash argued that the worker's employer was responsible for the worker's injury, and that the worker's own negligence in lifting two boxes at once contributed to his injury.

Decision

In determining who (if anyone) was responsible for the worker's injury, the District Court had to consider the liability of 3 different parties: Metcash, JW, and the worker.

In considering Metcash's liability, the District Court noted that although Metcash was not the worker's *actual* employer, it acted as a 'host employer'. This was because Metcash controlled the type of work the worker was to perform; where it was to be performed, and how it was to be performed. In those circumstances, it was held that Metcash 'owed a duty of care to the [worker] either corresponding with, or very similar to, an employer's duty of care.' The District Court held that this meant that Metcash owed a duty to:

> ...take reasonable care to avoid the risk [of injury] by devising a method of operation for the performance of the task that eliminates the risk, or provides adequate safeguards.

The District Court held that a reasonable person in Metcash's position would have made simple changes, such as locating dog food in a 'pick slot' where there was at least a 1.8 metre clearance, as a safeguard to the risk of injury.

The District Court then considered if the worker's actual employer, JW, was in any way liable for the worker's injury. It held that it was. This was because, amongst other things, it was considered that:

> …the risk to workers from picking boxes of heavy dog food from the confined slot underneath a 1.4 metre shelf was apparent…A reasonable person in the position of the [worker's] employer would have raised the issue with [Metcash].

It was further held that a reasonable employer:

> …would have not made its employees available [to Metcash] until steps were taken to remedy the placement of the dog food in either a 1.8 or 2 metre pick slot or in an open area to allow easy access to the heavier goods and clear supervision in relation to the number of boxes picked at any one time.

Accordingly, even though Metcash had day-to-day control over the worker's duties (including how those duties were performed) it was held that the worker's employer was still 20% liable for the worker's injury by allowing him to work within a system that was unsafe. This was despite the fact that the employer was not responsible for that system.

It was further held that the worker's own negligence contributed to his injury, because he lifted two boxes of dog food at a time, rather than just one. The District Court considered the worker's contributory negligence to be in the order of 20%.

Implications

Employers need to be aware that in situations where they provide the services of their workers to third parties, they must ensure that they regularly review the system of work that is put in place by those third parties. If the employer has any safety concerns, it is essential that these be raised with the third party. In this case, the District Court held that the safety issues should have been of such concern to the employer that the employer should have declined to provide the services of its employees to the third party until the issues were fixed.

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