

**REVIEW OF IMPROVEMENT NOTICES**  
**THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL**

**CITATION** : 2020 WAIRC 00290

**CORAM** : COMMISSIONER T B WALKINGTON

**HEARD** : TUESDAY, 16 JULY 2019 AND ON PAPERS TUESDAY,  
31 MARCH 2020

**DELIVERED** : MONDAY, 25 MAY 2020

**FILE NO.** : OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018,  
OSHT 3 OF 2019

**BETWEEN** : HANSSEN PTY LTD  
Applicant

AND

WORKSAFE WESTERN AUSTRALIA COMMISSIONER  
Respondent

**CatchWords** : Review of Improvement Notices - Application to review decision of the Worksafe Western Australia Commissioner to not grant an exemption from compliance with reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA) - Substantial compliance - Whether compliance is unnecessary - Hierarchy of hazard controls

**Legislation** : *Industrial Relations Act 1979* (WA)  
*Occupational Safety and Health Act 1984* (WA)  
*Occupational Safety and Health Regulations 1996* (WA)

**Result** : In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 Improvement Notices 40500117, 42500544 and 10600595 are revoked and exemption applications dismissed.

In OSHT 3 of 2019 Improvement Notice 39800134 is revoked and exemption application dismissed.

**Representation:**

Applicant : Mr L Swanson (of counsel)

Respondent : Mr D McDonnell (of counsel)

**Cases referred to in reasons:**

*Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* [1993] WAIRC 10026; (1993) 73 WAIG 26

*Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner* [2017] WAIRC 00823; (2017) 97 WAIG 1888

*Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries* (1994) 75 WAIG 9; (1994) 58 IR 22

*Supplementary Reasons for Decision*

- 1 On 28 February 2020, the Tribunal issued Reasons for Decision in OSHT 2 of 2018, OSHT 3 of 2018, OSHT 4 of 2018 and OSHT 3 of 2019 ([2020] WAIRC 00141) and a Minute of Proposed Order to the parties to these referrals. These Reasons set out the amendments necessary following subsequent submissions from the parties.
- 2 In addition, the Worksafe Western Australia Commissioner (**Worksafe Commissioner**) applied for costs relating to the engagement of an expert witness in these proceedings.

**Proposed Orders to be Issued**

- 3 On 28 February 2020, the parties were provided with a Minute of Proposed Order in the following terms:
  - 1) THAT Referrals in OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* and the applications to exempt each matter are dismissed pursuant to s 27 (1)(a)(ii) of the *Industrial Relations Act 1979* (WA) as further proceedings are not necessary;
  - 2) THAT at the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified;
  - 3) THAT the Tribunal affirms Improvement Notice 39800134 in OSHT 3 of 2019 with the following modification that Hanssen Pty Ltd is directed to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (OSH Regulations), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2) of the OSH Regulations, by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued; and
  - 4) THAT the Tribunal affirms the Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13 of the OSH Regulations.

**Orders to be Issued**

- 4 At the speaking to the minutes, conducted on the papers, the parties submitted that it was not practical to implement Order 3 as the construction on the relevant site was near completion. The orders to be issued will be amended to be in the following terms:
  - 1) THAT referrals in OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) and the applications to exempt each matter are dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) as further proceedings are not necessary;
  - 2) THAT at the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion of the construction and the passage of time should not infer that these notices were not appropriate nor justified;
  - 3) THAT referral in OSHT 3 of 2019 is revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) noting that site was operational and the revocation of the notice as a result of the completion the construction and the passage of time should not infer that the notice was not appropriate nor justified;

- 4) THAT the Tribunal affirms the Worksafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13 of the *Occupational Safety and Health Act 1984* (WA).

### Costs Application

- 5 On 6 March 2020, the Worksafe Commissioner applied pursuant to s 27(1)(c) of the *Industrial Relations Act 1979* (WA) (**IR Act**) for an order that Hansen Pty Ltd pay \$14,192.75, the costs for the preparation of reports and attendance at the hearing of an expert witness, for the Worksafe Commissioner. Hanssen Pty Ltd opposes the costs order.
- 6 Both the Worksafe Commissioner and Hanssen Pty Ltd agreed that the application for costs be dealt with by way of written submissions.
- 7 Worksafe Commissioner submits that costs ought be determined in accordance with s 26 of the IR Act which provides the Tribunal to act according to equity and good conscience and cites the case of *Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* [1993] WAIRC 10026; (1993) 73 WAIG 26 (*Brailey*), as an example of the test to be applied where the Commission considered whether or not 'proceedings have been instituted without reasonable cause'.
- 8 Worksafe Commissioner contend that the applications brought by Hanssen Pty Ltd in these matters were at all times without merit and were instituted without reasonable cause on the basis of the following:
- (a) there was no dispute between the parties that it was practicable for the wire mesh to imbedded into penetrations;
  - (b) the "substantially complies" issue was already determined in an earlier Tribunal matter;
  - (c) the applicant's contention that edge protection in the HPS resulted in an overall safety of the HPS being superior was a nonsensical assertion;
  - (d) there was no dispute that the classification of the wire mesh requirement was an engineering control measure; and
  - (e) the applicant's categorisation of the ProLok screws as an additional safety measure equivalent to the embedded wire mesh was untenable.
- 9 Hanssen Pty Ltd submits that costs ought to be awarded only where the Tribunal is satisfied that to do so would be consistent with overriding duty to act in accordance with equity and good conscience.
- 10 In response to the Worksafe Commissioner's contention that the referrals to the Tribunal were instituted without reasonable cause, Hanssen Pty Ltd says that;
- (a) Prior to the hearing they had advised the Worksafe Commissioner that it no longer pressed the impracticability application and that their case was confined to the exemption applications;
  - (b) There were two issues to be determined which required the consideration of both expert and lay evidence from both parties. Hanssen Pty Ltd contends that if the referrals were fundamentally flawed the Worksafe Commissioner had the opportunity to make an application to dismiss the amended notices of referral. Given that the Worksafe Commissioner did not make such an application it would now be inconsistent with s 26 of the IR Act to rely on this ground for an order for costs. In addition, Hanssen Pty Ltd submit that the subsequent programming orders, providing for the parties' experts to prepare a joint statement, were made by consent and on issues that required an

assessment of expert evidence. Hanssen Pty Ltd submit that following the Tribunal's decision in *Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner* [2017] WAIRC 00823; (2017) 97 WAIG 1888 (*Concerto*) they had made improvements to the Hanssen Penetration System (HPS) which given Kenner's C's statements at [60] and [61] meant it was open for the Tribunal to determine that the improved system did not fall 'far short of full compliance' and substantially complied with the Regulations;

- (c) They argued the edge protection is one of several measures included in the HPS which when considered as a whole mitigates against fall risks and that Worksafe Commissioner's submissions misrepresent their contentions;
- (d) There is a difference of view with the Worksafe Commissioner concerning whether the complete HPS system incorporating the ProLock screws, when fully administered provided an equivalent measure to the wire mesh or whether embedded wire mesh is a superior safety control. The determination in favour of one contention does not mean there was no dispute and it does not entitle the party to costs; and
- (e) Joint views of the parties' experts, it was open for the Tribunal to conclude that the improved HPS meant that compliance with the requirement to install wire mesh was unnecessary.

### **The Principles Concerning Costs**

- 11 Pursuant to s 27(1)(c) of the IR Act the Tribunal is empowered to make an order for costs. In *Brailey*, the Full Bench of the Commission established the principles to be applied (27) finding it is well settled in industrial law that an order for costs ought not be made except in extreme cases, such as when proceedings are instituted without reasonable cause.
- 12 Costs may also be awarded against a party where an application has no merit and is 'manifestly groundless' as per *Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries* (1994) 75 WAIG 9 (11); (1994) IR 22 (26).

### **Were the Referrals Instituted by Hanssen Pty Ltd Without Reasonable Cause?**

- 13 I am not persuaded that there are extreme circumstances in the conduct of the applicant in bringing the referral nor that the referral was manifestly groundless. The issues to be determined required the assessment of expert evidence and the preparation of a joint statement by the expert witnesses engaged by each party. The conduct of this process was by consent of both parties.
- 14 As observed in *Concerto* the situations where an exemption may be granted on the basis that compliance is unnecessary could be variable [60]. In particular, the issue of whether an exemption ought to be granted because the HPS provides a system that is safer than that provided in the regulations required the consideration of evidence from a number of witnesses, including expert witnesses. Ultimately the contentions and evidence of the Worksafe Commissioner were favoured, however this does not mean the referrals on this occasion were instituted without reasonable cause or were manifestly groundless.
- 15 Hanssen Pty Ltd submit that the Worksafe Commissioner ought not be awarded costs as the Worksafe Commissioner did not take the early opportunity to apply for the matter to be dismissed. An application for the dismissal of OSHT 2 of 2018 and OSHT 3 of 2018 had been made by the Worksafe Commissioner on 11 September 2018. On 1 November 2018 the Tribunal, as then constituted, issued an Order that included an order that the application to

dismiss the notices of referral dated 11 September 2018 be adjourned to the final hearing of this proceeding. A further Order that on or before 16 November 2018 the Worksafe Commissioner did not make any application to dismiss the amended notices of referral (second application to dismiss); and a further Order that the second application to dismiss, if made, be listed for hearing at the final hearing of this proceeding. Given these Orders the application to dismiss the referrals was ultimately incorporated into the hearing and determination of the four referrals joined together. It therefore cannot be said that the Worksafe Commissioner did not make such an application. However, the making of such an application does not change my overall assessment that the conduct of this matter is not an extreme circumstance nor one in which the referrals were manifestly groundless.

### **Conclusion**

16 For the foregoing reasons the application for costs is dismissed.