

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

CITATION : 2020 WAIRC 00164

CORAM : COMMISSIONER T B WALKINGTON

HEARD : FRIDAY, 6 DECEMBER 2019

DELIVERED : FRIDAY, 6 MARCH 2020

FILE NO. : OSHT 8 OF 2019

BETWEEN : HALIFAX CRANE HIRE PTY LTD
Applicant
AND
WORKSAFE
Respondent

CatchWords : Improvement Notice - reg 3.23(2) of the *Occupational Safety and Health Regulations 1996 (WA)* - Powers of the Occupational Safety and Health Tribunal (WA) - Employer obligations

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

Result : Improvement Notice revoked

Representation:

Applicant : Mr N De Marte

Respondent : Ms F Reading (of counsel)

Case referred to in reasons:

The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd
[2007] WAIRC 01273; (2008) 88 WAIG 22

Reasons for Decision

- 1 This matter concerns the referral to the Occupational Safety and Health Tribunal (**Tribunal**) for review of an improvement notice issued to Halifax Crane Hire Pty Ltd for contravening reg 3.23(2) of the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) in that there was no system of traffic management in place. Halifax Crane Hire Pty Ltd submit that the crane driver dispatched to the site decided to park the crane on the road, resulting in a major road into Bunbury CBD being closed down. The directors of Halifax Crane Hire Pty Ltd contend that they ought not be held totally responsible for the actions of the crane driver and the management of traffic on the site.
- 2 On 4 September 2019 a Worksafe Inspector issued Improvement Notice 46800287 in relation to a breach of reg 3.23(2) of the OSH Regulations at Lot 64 Austral Parade East Bunbury. The improvement notice sets out that Halifax Crane Hire Pty Ltd was the employer of the crane driver who had set up the crane from the verge to the white centre line of the road. He required a system of preventing traffic entering the work area to be set up and that no traffic management system was in place. The improvement notice required the situation to be remedied by 1700 hours on 13 September 2019.
- 3 On 6 September 2019 Halifax Crane Hire Pty Ltd applied to the Worksafe Commissioner (**Commissioner**) for a review of the improvement notice under s 51 of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). On 25 October 2019 the Commissioner affirmed the improvement notice and modified the time to comply with the notice to 5:00 pm on Friday, 1 November 2019.
- 4 On 29 October 2019, Halifax Crane Hire Pty Ltd referred a request for a review of the improvement notice by the Tribunal under s 51A of the OSH Act.
- 5 Worksafe submits that proceedings before the Tribunal concerning improvement notices are limited to three possible outcomes: affirmation, affirmation with modification or revocation of the improvement notice. Worksafe submit that the improvement notice ought to be revoked on the basis that neither it's affirmation nor affirmation with modification can be given effect.
- 6 Halifax Crane Hire Pty Ltd sought the continuation of the proceedings so that the Tribunal may determine the requirements of the OSH regulations and the obligations of them as employers should a similar situation occur in the future.

Questions to be Answered

- 7 The first question to be determined is whether the improvement notice issued ought be affirmed, modified or revoked?
- 8 The second question to be determined is whether the Tribunal ought proceed to further hear and determine the general obligations of the respondent in similar situations in the future?

Improvement Notices – Principles

- 9 In respect of the application for review of the improvement notice, s 51A of the OSH Act provides:

51A. Review of notices by Tribunal

- (1) A person issued with a notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.

- (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
- (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
- (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
- (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may –
 - (a) affirm the decision of the Commissioner; or
 - (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
 - (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,

and the notice shall have effect or, as the case may be, cease to have effect accordingly.

[(6) *deleted*]

- (7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall –
 - (a) in the case of an improvement notice, be suspended; and
 - (b) in the case of a prohibition notice, continue, subject to any decision of the contrary made by the Tribunal.

10 The Full Bench of the Western Australian Industrial Relations Commission in *The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273 [93]; (2008) 88 WAIG 22, held that s 51A(5) of the OSH Act requires that the Tribunal inquire into the circumstances relating to the improvement notice. Having inquired into the circumstances the Tribunal may affirm the decision of the Commissioner, affirm the decision of the Commissioner with such modifications as are appropriate, or revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit.

11 Regulation 3.23(2) of the OSH Regulations require:

- (2) If an area of a construction site where any material or gear is being lifted, lowered or otherwise moved from or onto the area is open to the public or if an inspector so requires it then a person who, at the site, is the main contractor, an employer, or a self-employed person must ensure that there is either in place or available in the area a system or device that would prevent persons or vehicles entering the area when the material or gear is being lifted, lowered or otherwise moved.

12 Regulation 1.4(a) of the OSH Regulations states the employer's duty:

- (a) relates only to a matter over which, and the extent to which, the employer has control or can reasonably be expected to have control having regard to the workplace and the work done or caused to be done by the employer or his or her employee.

13 Section 27(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) provides:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

- (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be.

Improvement Notices - Consideration

- 14 Worksafe submit that the improvement notice issued required Halifax Crane Hire Pty Ltd to ensure that a system of traffic management be set up at the site by 1 November 2019. It is not possible to give effect to affirm or modify the requirements of the improvement notice as the site for which the improvement notice concerned no longer exists. Worksafe submit that the improvement notice ought to be revoked on the basis that neither it's affirmation nor affirmation with modification can be given effect.
- 15 The legislative power to review improvement notices set out in s 51A of the OSH Act clearly references the specific improvement notices subject of referral applications. It does not confer on the Tribunal a power to inquire generally into similar circumstances that may arise in the future. The directors of Halifax Crane Hire Pty Ltd may benefit from the advice of persons with a good knowledge of the OSH Act and the obligations of employers. The continuation of these proceedings would not result in a determination of the nature sought by Halifax Crane Hire Pty Ltd. I am of the view that pursuant to s 27(1)(a)(iv) of the IR Act the Tribunal ought to refrain from further hearing and determining this matter and the hearing be discontinued.
- 16 I am of the view that the improvement notice ought to be revoked as neither affirmation nor affirmation with modification can be given effect.