GIBSON: WHAT **DOES IT MEAN?**

What should chief executives make of the HSW Act conviction of former Ports of Auckland CEO Tony Gibson? **GARTH GALLAWAY** elucidates the key takeaways.

On the morning of 30 August 2020, Pala'amo Kalati, a lasher at Port of Auckland (POAL), was working the night shift. He and a fellow lasher were re-lashing containers on the MV Constantinos P. A crane operator, who was not able to see the lashers, began lifting two containers. A twist lock mechanism caught a third container before failing. As a result, the third container fell and fatally crushed Mr Kalati.

POAL pleaded guilty to two charges laid by Maritime New Zealand (MNZ) arising from this tragedy. By way of decision dated 26 November 2024 Tony Gibson, the former CEO of POAL, was found guilty of a charge under the HSW Act in relation to his role as an officer under that legislation. He awaits sentence.

The case represents the first time that an officer of a large organisation has been found guilty in Aotearoa since the legislation came into force on 4 April 2016.

The decision of the Court highlights that the determination of whether an officer has met their obligations is not a '*one size fits all*' consideration. Rather, '*the circumstances*' (s44(2) HSWA) in which the duties are being discharged are critical. The decision will send a collective shiver down the spine of CEOs throughout Aotearoa, who may find it difficult to discern what the right balance is in their particular circumstances.

Further, it seems that the onus on CEOs is undoubtedly greater than on individual directors. Again, this is a reflection of the fact that the duty is measured having regard to what a reasonable officer would do in '*the circumstances*' which prevailed.

WHILE THE CASE PROVIDES SOME CLARITY IN RELATION TO THE COURT'S VIEWS OF THE DUE DILIGENCE OBLIGATIONS, **IT IS ALSO LIKELY TO CAUSE GENUINE CONCERN FOR CEOs OF LARGE ORGANISATIONS.**

THE ALLEGATIONS

MNZ alleged that Mr Gibson failed to exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances:

(1) To take reasonable steps to ensure that POAL had available for use, and used, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, including by having:

(a) clearly documented, effectively implemented, and appropriate exclusion zones around operating cranes;

(b) clearly documented, effectively implemented, and appropriate processes for ensuring coordination between lashers and crane operators;

(2) to take reasonable steps to verify the provision and use of those resources and processes.

In relation to the first particular (1), the Court concluded that:

- Mr Gibson was aware of the critical risks associated with handling suspended loads.
- He was aware, or ought to have been aware, of the lack of timely progression of bow-tie analysis of critical risks.
- He was, ultimately, responsible for health and safety and was tasked with a number of key health and safety responsibilities.
- He was responsible for monitoring and reviewing the performance of his subordinates and POAL's systems. He was required to exercise systems leadership.
- He was "hands on" in relation to health and safety issues.
- He was aware of POAL's lack of timely response to health and safety recommendations and ongoing issues in monitoring and reporting work practices, including reporting of incidents, near misses and non-compliance.
- He was on notice of POAL's on-going difficulties in adequately monitoring work as done and of the need for improvement of the monitoring of the night shift.

BREACHES: 2 OUT OF 3

The Court found that a reasonable CEO would have recognised the shortfalls in POAL's management of exclusion zones and would have ensured POAL utilised appropriate resources and processes to address those shortfalls. Mr Gibson did not do so.

The Court was satisfied beyond reasonable doubt that Mr Gibson's breach of his s44 duty in relation to particulars 1(a) and 2 of the charge made it materially more likely that POAL would breach its duty of care to ensure that stevedores were not exposed to the risk of death or serious harm. His failure therefore exposed the stevedores to the risk of death or serious harm by being struck by objects falling from operating cranes.

(In relation to particular 1(b), the Court was not satisfied beyond reasonable doubt that Mr Gibson had not acted as a reasonable CEO would. The relevant circumstances that related to this particular included the Covid-19 crisis response and the approach adopted in those circumstances. While MNZ alleged the changes to the lashing crew structure were not properly risk assessed, the Court was not satisfied that any due diligence failing on Mr Gibson's part was established.)

SETTING A HIGH STANDARD

The case highlights the need for great care to be taken by officers, particularly CEOs, when considering the obligations they may have; and how a particular organisational structure may impact their obligations. While the due diligence obligations in s44 of the HSWA have a generic feel about them, the reality is that an officer must do what a reasonable officer would do '*in the same circumstances*', taking into account the nature of the

business, the position of the officer and the nature of the responsibilities undertaken by the officer (s44(2) HSWA).

The Court also made it clear that the standard of what a reasonable officer will do is not to be measured against peers or the industry standard. Instead, an objective standard of what a reasonable CEO should be doing needs to be reached. This means officers, including CEOs, need to be carefully considering what they are doing, and they should not be satisfied simply by doing the same as others in their industry. As with other HSWA duties, the standard the Court has set is high.

THE NATURE OF 'HANDS-ON'

It is difficult to escape the conclusion that because Mr Gibson was a 'hands-on' CEO, he has been held to a higher standard than a CEO who may have been less 'hands-on'. Again, this reflects the Court's analysis of the particular circumstances in which Mr Gibson was acting.

An example of this is found in the Court's discussion around the fact that a safety initiative was undertaken for lashers after Mr Gibson observed them working under suspended loads. The fact that Mr Gibson's observation led to the creation of lash platforms was, in the Court's view, a '*double-edged sword*'. POAL had not identified the risk and Mr Gibson was '*personally aware of the risks to stevedores in working under suspended loads and the need, in that case, for additional controls to be put in place*'. Interestingly, s44(4)(b) requires an officer to gain an understanding 'generally of the hazards and risks associated with' the business.

The Court made the following observations;

- An officer must personally gain and maintain enough knowledge to ensure the PCBU is complying with its duties under the Act.
- An officer must ensure that those with health and safety obligations have the necessary skills and monitor their performance. The performance of POAL's health and safety managers was carefully scrutinised.
- An officer needs sufficient knowledge of PCBU operations, and the work carried out "on the shop floor" to identify workplace hazards and risks.
- an officer does not satisfy due diligence duty by putting in place policies or procedures on how work is to be carried out; systemic processes must be in place.
- An officer must ensure that there are effective reporting lines and systems in place within a PCBU to ensure that necessary information in relation to health and safety, workplace risks, hazards and controls flows to the officer and others in the organisation with governance and supervisory functions.

DEMANDING ACCOUNTABILITY

While the case provides some clarity in relation to the Court's views of the due diligence obligations, it is also likely to cause genuine concern for CEOs of large organisations. The Court said that in the case of large, hierarchical organisations the duty to exercise due diligence is '*not limited to governance of directorial oversight functions*'. In other words, something more is required.

However, the Court also said that an officer in a large PCBU doesn't need to be involved in day-to-day operations; but they cannot solely rely on others who are assigned health and safety obligations. This leads to the conclusion that CEOs should be driving the performance of, and demanding accountability from, their health and safety leaders.

All CEOs of large organisations should give careful consideration as to how the structure of the organisation and the health and safety components impact on their potential liability; and, necessarily, whether they are doing enough to discharge their obligations in the circumstances that prevail.

Further, they should also consider whether they are putting themselves at unnecessary risk through the organisational structure and by engaging too much in the operational activities of the organisation. The balancing exercise is not an easy one.

For directors, the case is perhaps less useful. MNZ did not seek to interview any of POAL's directors as part of its investigation. Its focus was on POAL itself and Mr Gibson. The main point for directors is that if they are investigated, their conduct will be measured against what a reasonable director would have done in the same circumstances. Directors should take great care to understand how their obligations can be discharged in an optimal manner.

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