

BREAKING LAW

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LABOUR HIRE COMPANY'S DUTY OF CARE

PARLIN PTY LTD v CHOICEONE PTY LTD [2012] WASCA 19

On 31 January 2012 the Western Australian Court of Appeal delivered a decision in relation to the liability of a recruitment and employment agency which had provided a worker to work as a driller's offsider on a drill rig at the Plutonic mine site, approximately 200kms north of Meekatharra.

Background

ChoiceOne Pty Ltd (**ChoiceOne**) was a recruitment and employment agency which provided staff for clients around Australia and overseas although the majority of its clients were located in Western Australia.

ChoiceOne was primarily involved in recruiting employees who were on hired to clients. When contacted by a client concerning a position the client wished to fill, ChoiceOne would identify potential candidates, conduct face-to-face interviews and, when a suitable candidate had been identified and their skills and qualifications verified, recommend that candidate to its client. If the client accepted the recommendation, ChoiceOne would engage the candidate as its employee and place the candidate with the client on a temporary basis for a period of up to three months. After the expiration of that period, if it was satisfied with the candidate's performance, the client would be able to employ the candidate as its own employee without the payment of any further fee to ChoiceOne. When that occurred, the placement was described as a "*permanent placement*".

Barrick Gold of Australia Ltd (**Barrick**) operated the Plutonic mine, approximately 200kms north of Meekatharra. Parlin Pty Ltd which traded as Drill Power, tendered to carry out drilling work for Barrick using a rotary air blast (RAB) drilling rig to carry out the work.

Drill Power's tender was accepted by Barrick and Drill Power commenced work at Plutonic on or about 9 July 2003. Whenever a new drilling contractor came on site, Barrick required the equipment to undergo a safety check audit at the BGC Contracting onsite workshop. That audit was undertaken and no objection raised in relation to Drill Power commencing work.

ChoiceOne's recruitment consultant, who arranged the placement of Mr Barns, had worked in the mining industry and had seen RAB drilling rigs in operation. He understood the nature of the work and knew it to be dangerous.

He also knew of Barrick's requirement that all contractors comply with Barrick's safety requirements and that Barrick attached great importance to safety.

Barns responded to a newspaper advertisement for the position of a driller's offsider, was interviewed by ChoiceOne and signed a casual employment contract with ChoiceOne on 30 September 2003. He then commenced work at Plutonic on 5 October 2003 on a three month temporary placement.

As a temporary placement, Barns was paid weekly by ChoiceOne based on invoices rendered by Drill Power.

The Drilling Rig

The drilling rig contained a number of hydraulic hoses, one of which was a high pressure hose carrying a mixture of inflammable hydraulic fluid and air between the compressor and the air receiver. Drill Power had modified the hose by wrapping half of its length in fibreglass lagging held in place by chicken wire. The purpose of the fibreglass lagging was to protect the hose from the heat of the turbo. However, whilst in place, the fibreglass lagging concealed the condition of that part of the hose and concealed the fact that the hose was lacerated and corroded. No one had ever removed the fibreglass lagging to inspect the condition of the hose underneath it.

On 5 December 2003, approximately eight weeks after Barns had commenced with Drill Power, the hose failed resulting in hydraulic fluid being sprayed in the vicinity of the engine and turbo. The engine and turbo reached very high temperatures when the drilling rig was operating and the hydraulic fluid ignited, causing a fireball which engulfed the drilling rig and caused Barns to suffer burns to 60% of his body.

Settlement of Barn's Claim

Barns sued Drill Power, ChoiceOne and Barrick. In February 2007 Drill Power settled Barn's claim for the sum of \$1,013,498.50 plus \$30,000 costs. It then continued with its contribution claim against Barrick and ChoiceOne. In due course, Drill Power accepted a \$190,000 contribution from Barrick.

Issue

The only outstanding issue was whether or not ChoiceOne, as the recruitment and placement agency and employer of Barns, owed any duty to him such that it was liable to contribute to the settlement of Barns' claim.

Drill Power claimed that ChoiceOne was negligent in sending Barns to work on the rig and that it:

- (a) failed to conduct a proper safety inspection of the drilling rig or to ensure that such an inspection was conducted;
- (b) failed to detect that the hose had been modified by the addition of the fibreglass and chicken wire, and that the hose was heavily gouged and lacerated and the internal steel braiding had corroded; and
- (c) permitted the worker to work on a dangerous drilling rig.

ChoiceOne pleaded that from the day Barns commenced on site, his services had been completely transferred to Drill Power which had the sole and exclusive direction, control and supervision. ChoiceOne's only role remained in relation to the payment of Barns.

District Court Trial

The District Court Judge found that if the fibreglass lagging and chicken wire had been removed prior to the accident for the purpose of inspecting the hose, gouges and lacerations in the hose would have been visible and the hose would have been replaced. The Judge concluded the accident was caused by the failure to remove the fibreglass lagging and chicken wire to inspect the condition of the hose.

The Judge found that ChoiceOne had a duty of care to Barns and could not delegate the discharge of that duty to Drill Power.

The Judge further found that ChoiceOne breached its duty of care by sending Barns to work on the drilling rig without requiring a complete safety inspection of the rig and without satisfying itself that Drill Power had appropriate safety procedures in place.

Notwithstanding the Judge's earlier finding that ChoiceOne's breach of duty was causative of Barns' injuries, when it came to considering contribution, she applied the reasoning of a New South Wales decision (*Hodge v CSR Ltd* [2010] NSWSC 27) and decided that ChoiceOne's failure to require a complete safety inspection of the rig was not causally related to Barns' injuries.

Accordingly ChoiceOne, although it was found to owe a duty to Barns and to have breached that duty, was not required to contribute to the settlement of Barns' claim because its breach of duty did not cause the accident.

The Appeal

Drill Power appealed the decision of the District Court Judge.

The Court of Appeal unanimously determined that ChoiceOne's breach of duty did contribute to Barns' accident and injuries.

The Court of Appeal found that there must at least have been a “*real prospect*” that any proper inspection required by ChoiceOne would have identified the defective and dangerous section of hose.

This was not a case, contrary to ChoiceOne’s submissions, where it could be said that, in substance, ChoiceOne’s liability to Barns only arose in circumstances after “*de facto control...had passed to*” Drill Power.

To the contrary, ChoiceOne’s negligence occurred at or around the time of Barns’ placement, prior to Drill Power exercising any control over him i.e. failing to conduct any inspections of the work site and equipment prior to placing Barns on site.

Level of Contribution

The Western Australian Court of Appeal unanimously determined that there is no standard percentage figure for apportionment between labour hire companies and “*host employers*” and contributions must be assessed by reference to the particular facts and circumstances of each case.

In this case, that level of contribution was assessed at 20%.

Comment

It is not sufficient for labour hire companies or recruitment and placement agencies to place workers with clients without taking any steps to ensure that they discharge their duties of care. Notwithstanding that de facto control of workers may pass to the “*host employers*”, the labour hire companies and recruitment and placement agencies owe non-delegable duties of care to their employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must also provide employees with suitable equipment to carry out their work safely and ensure that equipment used by their employees is safe for use.

Labour hire companies and recruitment and placement agencies which do not take any action to ensure their employees, even temporary employees, are not exposed to risk of injury when placed with “host employers’ can expect a finding of liability in the vicinity of 20% of the employee’s claim.

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