COMPLIANCE WITH OCCUPATIONAL HEALTH AND SAFETY REGULATIONS MAY NOT BE GOOD ENOUGH:

SO SAYS COURT OF APPEAL FOR ONTARIO

BY LISA BOLTON

In a recent decision[1], the Court of Appeal for Ontario held it is possible to comply with all relevant regulations under the *Occupational Health and Safety Act* (*OHSA*), and at the same time violate the general duty under the *OHSA* to take "every precaution reasonable in the circumstances for the protection of a worker." In other words, despite there being a regulation that specifically addresses a particular workplace risk (such as fall protection), there may be cases in which more is required from an employer than compliance with the regulation. Exactly how much more will be determined on a case-by-case basis depending on the nature of the workplace and work being done.

The decision is important because it creates uncertainty around workplace health and safety standards, and raises the bar for employers seeking to become or remain compliant with the *OHSA*.

WHAT HAPPENED?

Martin Vryenhoek died when he fell from a temporary welding platform while working at the factory of his employer, Quinton Steel. The employer was charged under s.25(2)(a) of the *OHSA* with failing to inform, instruct and supervise a worker to protect the health or safety of the worker, and under section 25(2)(h) of the *OHSA* with failing to take "every precaution reasonable in the circumstances for the protection of a worker" (in this case, the installation of guardrails).

Both charges were dismissed following trial and the Crown did not appeal the first charge. However, it did appeal the second charge, ultimately to the Court of Appeal for Ontario.

In essence, the employer argued it had met its legal obligation to protect its workers by having complied with the fall hazard regulations under the *OHSA*. Under the *OHSA* there are detailed regulations that specifically address the hazard of falling, including when guardrails are required. In the circumstances of Mr. Vryenhoek's work, the regulations did not require guardrails. The employer maintained that by exhaustively determining the circumstances in which guardrails must be installed, the regulations "occupied the field" (fully addressed the regulatory standard to be met).

The Crown did not dispute that the regulations did not require the installation of guardrails, nor that the employer had complied with the regulations. The Crown argued section 25(2)(h) of the *OHSA* imposes a statutory duty to protect workers higher than and in addition to the regulations, and that, in some cases, the duty may include taking precautions beyond what is required in the regulations. In the case of Mr. Vryenhoek, the Crown argued, that duty included the installation of a guardrail.

The employer argued the Crown's interpretation and application of the statutory duty under section 25(2)(h) would lead to intolerable uncertainty for employers. If the specific and detailed language of a regulation could be, in effect, over-ridden by the general and imprecise language of the *OHSA*, how would employers know the standard to be met? Compliance would become a moving target and the regulations of limited use. This could not possibly be a desired result, particularly when safety is an issue.

The court rejected the employer's argument, for the reasons outlined below, and the matter was remitted back to the trial court to be tried again.

THE COURT'S REASONS

Essentially, the court's reasons are four-fold:

1. The *OHSA* is public welfare legislation designed to protect workers and, as such, must be interpreted generously; not narrowly or technically.

2. Compliance with health and safety regulations does not exhaust an employer's statutory duties under the *OHSA*. It is possible to comply with the regulations under the *OHSA* while at the same time violate the broader statutory duty to take all reasonable precautions to protect the health and safety of a worker. The statutory duty in section 25(2)(h) is more sweeping than any regulation. This is because the regulations cannot reasonably anticipate and provide for all of the needs and circumstances of the many and varied workplaces in Ontario. Were it not the case, once regulations were made governing a hazard in the workplace, the general duty in section 25(2)(h) would have no role to play. As such, regulations do not "occupy the field."

1 2017 ONCA 1006

3. It is not necessary for the Crown to prove the violation of any regulation. The Crown is not required to establish a failure to comply with any of the regulations in order to prove that section 25(2)(h) has been violated. Instead, the Crown is required only to prove that the installation of guardrails was a reasonable precaution in the circumstances, and the employer failed to take such a precaution.

4. The trial justice did not consider the relevant facts. Section 25(2)(h) establishes a standard – it is not a rule – the requirements of which are to be tailored to the particular circumstances. To determine whether guardrails were reasonable in the circumstances, the trial justice ought to have considered all of the relevant circumstances including the nature of the workplace, the work being done, and the equipment used, etc. The trial justice did not do this. Instead, he concluded section 25(2)(h) had not been violated because the employer had not violated any provision of the regulations. This was an error of fact and law:

   "It may not be possible for all risk to be eliminated from a workplace… but it does not follow that employers need do only as little as is specifically prescribed in the regulations. There may be cases in which more is required – in which additional safety precautions tailored to fit the distinctive nature of a workplace are reasonably required by s. 25(2)(h) in order to protect workers. The trial justice's erroneous conception of the relationship between s.25(2)(h) and the regulations resulted in his failure to adjudicate the s.25(2)(h) charges as laid."

IMPACT ON EMPLOYERS

The short story is that life for employers will likely become more difficult as a result of this decision[2], which creates uncertainty around workplace health and safety standards, and raises the bar for employers seeking to become or remain compliant with the *OHSA*. The decision is also likely to increase the rate of successful prosecutions under the *OHSA*, not necessarily to the betterment of the workplace parties.

On the one hand, while there is some rationale to the argument a statutory duty may be more sweeping than a regulatory rule, it seems unfair and unrealistic the Ontario government – through its regulations – is not expected to anticipate every hazard in Ontario workplaces, but individual employers are expected to anticipate every hazard, and also to know when compliance with the regulations will not be sufficient. Of course, the Crown would argue it is *precisely* the employer that is in the best position to be knowledgeable and familiar with its own workplace and to reasonably anticipate hazards.

Either way, if establishing compliance with the regulations may no longer be accepted as proof that reasonable precautions were taken by an employer, what is the purpose of the regulations, and where is an employer to obtain reliable guidance regarding the standards for workplace health and safety?

2 As of the writing of this article, the employer had not sought leave to appeal to the Supreme Court of Canada.

Finally, if the regulations will henceforth be of limited use, and compliance a moving target determined by a court only after an accident has occurred, what are the realistic chances an employer in that situation will be found to have taken reasonable precautions to protect its (now injured or worse) worker? The answer is: those chances have just become a lot slimmer.

We will continue to monitor this important decision and keep our readers apprised.

If you have questions, or would like assistance addressing occupational health and safety matters in your workplace, contact your Sherrard Kuzz LLP lawyer, or reach us through info@sherrardkuzz.com.

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