

DIRECTOR OF PUBLIC PROSECUTIONS

v

TRANSDEV MELBOURNE PTY LTD

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JUDGE: Her Honour Judge Davis  
WHERE HELD: Melbourne  
DATE OF HEARING: 2 August 2022  
DATE OF SENTENCE: 25 August 2022  
CASE MAY BE CITED AS: DPP v Transdev Melbourne Pty Ltd  
MEDIUM NEUTRAL CITATION: [2022] VCC 1370

**REASONS FOR SENTENCE**

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Subject: CRIMINAL LAW  
Catchwords: Sentence after trial by jury – corporate offender – one count of discrimination against an employee – low-level offending – isolated incident – delay – discretion whether or not to record conviction  
Legislation Cited: *Occupational Health and Safety Act 2004* (Vic); *Sentencing Act 1991* (Vic)  
Cases Cited: *DPP v Patrick Stevedores Holdings Pty Ltd* [2018] VCC 2282; *DPP v St Vincent's Care Services Ltd* [2021] VCC 1315; *DPP v Woods Auto Shop* [2014] VCC 167; *Patrick v Stevedoring Pty Ltd v Chasser (Victorian WorkCover Authority)* [2011] VSC 597; *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321  
Sentence: Fine of \$30,000 without conviction

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr D Gurvich QC Mr A Kapitaniak	Office of Public Prosecutions
For the Accused	Dr D Neal SC Mr O'Neil	Madgwicks Lawyers

HER HONOUR:

- 1 On 8 April 2022, Transdev Melbourne Pty Ltd (A.C.N. 161 620 480) ('Transdev'), was found guilty after trial by jury of one count of discrimination against an employee under section 76 of the *Occupational Health and Safety Act 2004* (Vic) ('the Act') (Charge 1). The jury found Transdev not guilty of a second count of discrimination against an employee, which was also under section 76 of the Act (Charge 2). The offence of discrimination against an employee has a maximum penalty of a fine of 2,500 penalty units. A penalty unit at the time was \$161.19. Therefore, the maximum fine for the offence is \$402,975.
- 2 Charge 1 concerned the alteration of the position of an employee (Jens Buche) to his detriment because he had raised an issue or concern about health and safety to his employer or the Victorian WorkCover Authority ('VWA'). The particulars of the offending were to the following effect: Moazzam Mohammed, in his capacity as manager and within his authority, issued a first and final warning to Mr Buche on 3 September 2018, because Mr Buche had raised:
  - A number of issues or concerns about health or safety with the Authority in the years prior to 16 August 2018; and/or
  - An issue or concern with the accused about a missing door safety indication panel on a bus on 16 August 2018; and/or
  - Issues or concerns with the accused about 4 buses he was to drive on 21 August 2018.
- 3 The circumstances of the offence were set out in the Summary of Prosecution Opening and were the subject of evidence at trial. The evidence was to the effect that Mr Buche was given the opportunity to attend a meeting and respond to the relevant allegations that his approach to safety issues had been ill-considered. He did not receive formal notice of the purpose of the meeting or that the issues he raised in the years prior to 16 August 2018 would be discussed. In relation to his

broader history of referring matters to WorkSafe Victoria ('WorkSafe'), there was evidence to the effect that there was an established pattern of Mr Buche pursuing minor matters to a degree which was, in the view of a number of WorkSafe inspectors, unnecessary, and that could have been dealt with internally by following Transdev's established Issue Resolution Procedure. In relation to the door indicator panel issue, there was evidence that the Operations Control Centre ('OCC') told Mr Buche that the bus defect was a category two defect and that the bus could be kept in service and swapped at the earliest convenient location. However, Mr Buche refused to continue driving the bus.

- 4 In sentencing Transdev, I have interpreted the facts in a manner consistent with the jury's verdict.<sup>1</sup> In other words, in spite of Mr Mohammed's evidence as to the reason for his decision, the jury was not persuaded that Transdev issued the warning for a reason other than because Mr Buche had raised an issue or concern about health and safety.
- 5 I note that Mr Buche provided a Victim Impact Statement dated 25 July 2022 in which he indicated that he loved driving buses but now mistrusted management and felt unable to take on the role of a health and safety representative again. He was upset at the way Transdev used his record of raising issues against him, and stated that his colleagues were unsure whether he was right or wrong. However, he was able to return to employment in the aviation industry for a short time, where he felt confident reporting safety concerns.
- 6 Transdev, which was established in Australia since 1998, is a member of a group of companies which provides public transport services, including bus services, in Brisbane, Perth, Sydney and Wellington. I note that Transdev has no prior history of contravention of health and safety legislation or any other offending.
- 7 From 2013 to 2022, Transdev operated a bus network which provided one-third of Melbourne's bus services. It no longer operates that service, which has been taken

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<sup>1</sup> *Cheung v The Queen* [2001] HCA 67.

over by Kinetic Melbourne. However, Transdev continues in existence with a view to obtaining future contracts to operate public transport networks in Victoria; in particular, the Melbourne tram network. It does so by responding to public tenders issued by Public Transport Authorities.

- 8 It was submitted that during its period of operation in Melbourne, Transdev is accredited against a range of international standards; had an appropriate health and safety governance structure (with a Health and Safety Committee for each of its six depots); appropriate procedures for internal resolution of safety issues and for referral to OHS committees and, if necessary, to WorkSafe; a Code of Conduct and Safety Charter; workshops manned 24 hours per day; and an Operations Control Centre to direct responses to specific faults. In addition, Transdev spent almost \$40 million on training, maintenance and repair of buses between January 2018 and December 2019. Finally, Transdev has programs or systems in place to reduce emissions, support inclusion and reconciliation, and has worked in partnership with the Smith Family and the Asylum Seeker Resource Centre.
- 9 It was submitted that the evidence during the trial was to the effect that each of the issues raised by Mr Buche was properly assessed, investigated and addressed.
- 10 It was accepted on behalf of Transdev that general deterrence is an important sentencing consideration for this offence. It was submitted that specific deterrence has been achieved already because this matter has been hanging over its head since 2018, and its involvement in the criminal justice system has been expensive. Moreover, a finding of guilt will impact on Transdev's future prospects of obtaining contracts to operate such networks. None of those involved in the offending works for Transdev any longer.
- 11 It was submitted that the detriment to Mr Buche was minimal as he did not lose any work or pay and would still have had to commit some other misconduct to lose his employment. Moreover, the process by which he received the warning was a

fair one in that he was given the opportunity to attend a meeting and respond to the allegations.

- 12 Finally, on the question of whether or not to record a conviction, counsel referred me to *DPP v Woods Auto Shop*<sup>2</sup> and *DPP v St Vincent's Care Services Ltd*<sup>3</sup> where no convictions were recorded against the accused. It was submitted that because of the low level of Transdev's offending and the matters canvassed above, a financial penalty without conviction was the appropriate disposition.
- 13 The prosecution conceded that there has been a delay in proceedings due to the disruption to the Courts occasioned by the COVID-19 pandemic. The prosecution emphasised the importance of section 76 in the scheme of the Act, the importance of general deterrence and the need for the sentence to reflect the importance of workplace safety. The prosecution acknowledged that there is limited guidance available as to current sentencing practices, but referred me to two cases: *Patrick v Stevedoring Pty Ltd v Chasser (Victorian WorkCover Authority)*<sup>4</sup> and *DPP v Patrick Stevedores Holdings Pty Ltd*<sup>5</sup>. In those cases, which each concerned multiple offences against section 76 of the Act and conduct including threats to dismiss, standing down without pay, and the sending of a formal and final warning letter, the accused were convicted and fined. It was conceded that specific deterrence had less of a role to play in this case. Finally, the prosecution emphasised the need for the quantum of the fine to have a meaningful impact on Transdev.
- 14 In relation to my assessment of the impact of a conviction of Transdev, the prosecution also referred me to *R v Commercial Industrial Construction Group Pty Ltd*<sup>6</sup> (a case under section 21 of the previous 1985 Act) where the Court held that

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<sup>2</sup> [2014] VCC 167.  
<sup>3</sup> [2021] VCC 1315.  
<sup>4</sup> [2011] VSC 597.  
<sup>5</sup> [2018] VCC 2282.  
<sup>6</sup> (2006) 14 VR 321.

it was necessary to consider any adverse economic consequences to the offender which might flow from a conviction.

- 15 In exercising my discretion whether or not to record a conviction, I must have regard to all the circumstances of the case, including the nature of the offence, the character and past history of the offender, and the impact of the recording of a conviction on the offender's economic or social well-being.<sup>7</sup>
- 16 I consider that this is a low-level example of this kind of offending. It is a single incident in otherwise unblemished conduct by a corporate entity operating on a large scale. The matter has been hanging over the company's head since 2018. Transdev is planning to tender for public transport contracts in September 2022 and apprehends that the imposition of a conviction will prejudice those efforts. I consider it appropriate in all the circumstances to impose a fine, in the sum of \$30,000, without conviction, on charge 1.

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<sup>7</sup> *Sentencing Act 1991* s 8.