IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2018-092-000521
[2019] NZDC 1851

WORKSAFE NEW ZEALAND
Prosecutor

v

COTTONSOFT LIMITED
Defendant

Hearing: 18 December 2018

Appearances: E Jeffs for the Prosecutor
S Bonnar QC for the Defendant

Judgment: 11 February 2019

DECISION OF JUDGE R McILRAITH ON SENTENCING

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[1] The defendant, Cottonsoft Limited, has entered a guilty plea to a charge of contravening ss 36(1)(a) and 48 Health and Safety At Work Act 2015: specially, that being a PCBU, it failed to ensure, so far as was reasonably practicable, the health and safety of workers who worked for the PCBU, including Inosesio Pereira, while the workers were at work in the business and that failure exposed Mr Pereira to a risk of serious injury.

[2] The particulars of the charge: it was reasonably practicable for Cottonsoft Limited to have:

(a) Installed adequate guarding arrangements on the 101B Rewinder;

(b) Installed effective emergency stop mechanisms;

(c) Made interim arrangements to effectively manage the risks associated with access to the embossing rollers until permanent guarding arrangements were installed by developing, documenting, implementing, communicating and monitoring the effectiveness of a safe system of work for the operation of the 101B Rewinder.

[3] The maximum penalty for the offence is a fine not exceeding $1.5 million.

Background facts

[4] With respect to the background facts, I refer to the summary of facts provided and, in particular, the summary provided by WorkSafe.

[5] Cottonsoft manufactures and distributes toilet and tissue paper products throughout New Zealand. It installed a Chan Li 101B Rewinder at its manufacturing plant in Auckland in 2010. It assessed the hazards associated with that Rewinder and identified the need to fit an interlock guard and fence the area around the machine. This action was not implemented due to management and staffing changes.

[6] An incident occurred in relation to this Rewinder in February 2016. This was referred to WorkSafe's duty holder review process. As part of that process, Cottonsoft submitted a report to WorkSafe stating that it would install fencing, with interlocking gates, around this Rewinder. The expected completion date was 1 May 2016.

[7] Cottonsoft did not complete the proposed fencing and interlocking gates. While discussions and contact with suppliers took place in 2016, the need to adequately guard the machine in accordance with AS/NZ4024 was not given sufficient urgency and Cottonsoft had not formally engaged anyone to complete the work as at January 2017. Nor had Cottonsoft adequately assessed interim arrangements to effectively manage the risks associated with access to the moving rollers on this Rewinder.

[8] Mr Pereira was working the night shift on 24 January 2017. At around 1.49 am, he was on the walkway between the printer and the embossing rollers on the 101B Rewinder. The Rewinder had no fencing or interlocking gates, isolating the walkway between the print unit and the embossing rollers. While Cottonsoft had arranged a NIP guard for the rollers in 2012/2013, this guard was not in place. The machine was operating at the time.

[9] Mr Pereira's arms became caught in the unguarded print rollers. He managed to pull his right arm free but, in doing so, his left arm became trapped and it required the intervention of the fire service to release him at 2.15 am. Mr Pereira was unable to stop the machine himself as the emergency stop buttons were positioned on the side of the 101B Rewinder and were not accessible from the area in which he was positioned.

[10] Mr Pereira sustained massive crush injuries to both arms and hands. His right arm was degloved from the elbow to the wrist, and he also had degloving on parts of his hand. His left arm had lacerations, wounds to the bone, and damage to the palm of his hand. Mr Pereira also suffered rib fractures. The long term physical effects of the injury include an unstable thumb requiring surgery.

[11] While Cottonsoft accepted that the essential facts were as set out in the summary of facts, additional information was provided by an affidavit sworn by Kim Calvert. In that affidavit, Mr Calvert set out additional background and, of course, recorded most importantly that the company accepted that in this situation it had failed to properly ensure the safety of Mr Pereira and that it recognised the significance of the injury to him in both physical and emotional terms. It recorded the very genuine remorse of both management and the company generally.

[12] Cottonsoft has operated for 30 years in New Zealand. It is presently wholly owned by Sopphire Enterprises, a Malaysia-based company, which acquired Cottonsoft in 2007. Most importantly, Mr Calvert explains in his affidavit the health and safety processes at Cottonsoft, the steps that have been taken by Cottonsoft since the accident to improve safety in its workplace, the costs and losses associated with the accident and its post-accident steps, and its support of Mr Pereira at the time of the

accident and following it. That assistance included providing immediate assistance and first aid, accompanying Mr Pereira to hospital and appropriate visiting, topping up of ACC entitlements to 100% (to a gross value of $12,200 at December 2018), paying of compensation to Mr Pereira's partner of $2000 for lost wages, and reimbursement of hospital parking and travel costs.

[13] Cottonsoft was willing to participate in restorative justice. That did not, however, take place.

Sentencing methodology

[14] The leading case on the approach to sentencing in health and safety prosecutions is the full bench decision of the High Court in *Stumpmaster v WorkSafe New Zealand.*[1] In that decision, the Court confirmed a four step process as follows:

(a) Assessing the amount of reparation;

(b) Fixing the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) Determining whether further orders under ss 152 – 158 of the Act are required;

(d) Making an overall assessment of the proportionality and appropriateness of the total imposition of sanctions under the first three steps.

Reparation

[15] I was provided with a victim impact statement from Mr Pereira. Mr Pereira and his partner were also present in Court. Mr Pereira has clearly sustained massive crush injuries to both arms and hands. He has undergone over 10 surgeries and is

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020

awaiting further operations to his back and right arm/hand. He has not returned to work since the incident.

[16] The accident has had a real effect on Mr Pereira's personal life. He has set out in considerable detail in his victim impact statement how it has affected him both emotionally and physically including, of course, the understandable impact on his social life. A victim impact statement was also provided by Mr Pereira's partner.

[17] WorkSafe submitted that an appropriate amount of reparation for emotional harm in this case is in the vicinity of $60-70,000. It referenced a number of prior decisions in support of this submission. WorkSafe acknowledges that there is no financial shortfall to be covered, given the responsible step taken by Cottonsoft to cover the ACC shortfall. The issue is, accordingly, how much emotional harm reparation ought to be awarded.

[18] For its part, Cottonsoft submits that an order in the sum of $45,000 should be made.

[19] I have reviewed the cases referred to by both counsel. After doing so, I consider that an award of $45,000 emotional harm reparation is appropriate.

Fine

[20] In *Stumpmaster* the High Court set out four guideline bands for culpability. Those were:

(a) Low culpability, up to $250,000;

(b) Medium culpability, $250,000 to $600,000;

(c) High culpability, $600,000 to $1 million;

(d) Very high culpability, $1 million plus.

[21] The relevant considerations for assessing culpability were established in the *Department of Labour v Hanham and Philp Contractors Limited* decision.[2]

[22] The first factor, identification of the operative acts or omissions (what was reasonably practicable), was a key part of WorkSafe submissions in this case. WorkSafe submitted that the fundamental failure here was Cottonsoft's failure, over a seven year period, to sufficiently prioritise arranging fencing and interlock guarding around the 101B Rewinder. This was despite first identifying the need to guard the machine in 2010, three unrelated slow speed incidents where workers suffered injuries on the Rewinder, and engagement with WorkSafe around the need to install adequate guarding.

[23] WorkSafe acknowledged that discussions and contact with suppliers had taken place in 2016, however it submitted that Cottonsoft did not give this matter sufficient urgency. It noted that Cottonsoft had not formally engaged anyone to complete the work at the time of the incident concerning Mr Pereira, nor had it adequately assessed interim arrangements to effectively manage the risks associated with access to the print rollers.

[24] Cottonsoft acknowledged that it had failed to take the practicable steps identified by WorkSafe. However, it noted that in relation to guarding arrangements steps were underway to install interlocked guarding on the 101B Rewinder. It accepted that it had not adequately prioritised that guarding on the B line. That was because of extensive other work that Cottonsoft was undertaking on health and safety issues and which involved higher levels of risk, the fact that the B line was a secondary production line and that technical difficulties had been encountered attempting to find a solution which would allow electronically interlocked guards to interface with the machine electronics, and the conflicting advice that it had received in relation to a solution to that issue. The circumstances regarding those matters were well set out in Mr Calvert's affidavit.

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[2] *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79.

[25] As Mr Bonnar submitted, Cottonsoft was acting in a positive and proactive way to improve its processes on this B line. It is not a case, in his submission of a PCBU attempting to shirk or avoid its responsibilities.

[26] The second factor to consider is the nature and seriousness of the risk of harm. There was no dispute here, of course, that there was a risk of serious harm to workers if machinery is inadequately guarded and, of course, serious harm did occur here.

[27] WorkSafe considered an aggravating feature of this case to be the fact that Cottonsoft was well aware of the seriousness of the risk posed by the moving rollers. That was accepted by Cottonsoft.

[28] The next factor, significant departure from industry standards. Cottonsoft acknowledged that it had departed from industry standards and that there were standards and guidelines identified by WorkSafe which were applicable. It was aware, in particular, of AS/NZS4024 and had not complied with these standards. In WorkSafe's submission, that significantly aggravated culpability.

[29] The next factor to consider is the obviousness of the hazard. Unsurprisingly there was no dispute that the hazard was obvious.

[30] The next factor, the means necessary to avoid the hazard were available and cost effective. WorkSafe acknowledged that Cottonsoft had received conflicting advice from suppliers concerning the installation of electronically interlocked guarding.

[31] WorkSafe submitted that taking into account these culpability factors, Cottonsoft's culpability was high. It considered an appropriate starting point for a fine to be $700,000, being at the lower end of the high culpability band identified in *Stumpmaster*.

[32] For its part, Cottonsoft submitted that culpability was appropriately placed at the top end of the medium band of culpability. It submitted that an appropriate starting point was a fine of no more than $580,000.

[33] A number of cases were referred to me by counsel. These included *Stumpmaster* itself, *WorkSafe New Zealand v Carter Holt Harvey Limited* and *Worksafe New Zealand v Alliance Group Limited.*[3][4]

[34] The key issue to be determined in my view is whether Cottonsoft's failure when on notice of the need to urgently address the risks associated with the 101B Rewinder, places its culpability in the high culpability band. Mr Bonnar submitted that particular care had to be taken to ensure consistency in sentencing in this case. He referred to the *Carter Holt Harvey Limited* decision at some length. In that case, serious and life threatening crush injuries to upper chest and shoulder had occurred due to multiple failures, including a lack of effective guarding, a failure to implement effective interim controls, a failure to secure against inadvertent movement or to have effective systems and procedures in place, a failure to develop and implement procedures including task analysis. Culpability in that case was assessed to be at the top end of the medium band/bottom end of the high band and a start point of $600,000 was taken.

[35] In my view, taking into account the overall circumstances, including the details set out in Mr Calvert's affidavit, this culpability falls right on the cusp of the medium and high bands. A start point of $600,000, the same as in *Carter Holt Harvey Limited*, is, accordingly, in my view appropriate.

Aggravating and mitigating factors

[36] There are no aggravating factors. There are, of course, mitigating factors and WorkSafe accepted that Cottonsoft was entitled to a reduction to the starting point to reflect those features. Those features included willingness to pay reparation (WorkSafe submitted that 10 percent may be appropriate), co-operation with the investigation (WorkSafe submitted five percent), remorse (WorkSafe submitted five percent), and the taking of remedial steps (WorkSafe submitted five percent). Accordingly, the total discounts in WorkSafe's submission amounted to 25 percent.

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[3] *WorkSafe New Zealand v Carter Holt Harvey Limited* [2018] NZDC 22605.
[4] *WorkSafe New Zealand v Alliance Group Limited* [2018] NZDC 20916.

[37] Cottonsoft submitted that a 30 percent discount should be available. The difference between the respective positions is due to the different perspective taken of Cottonsoft's prior health and safety record. WorkSafe noted that Cottonsoft had received three improvement notices by a Dunedin WorkSafe inspector in relation to inadequately guarded machinery at its Dunedin site and in addition, three of Cottonsoft's workers had sustained crush injuries in unrelated slow speed incidents on the 101B Rewinder and that the February 2016 incident proceeded to WorkSafe's duty holder review process.

[38] Mr Bonnar noted that despite the company's long history of operation in New Zealand it had not previously been prosecuted. He therefore maintained that a discrete discount was due for that factor. I accept that submission. While the points made by WorkSafe are, of course, appropriate and relevant, Mr Bonnar is correct that there have been no previous prosecutions and I have no doubt after hearing from Mr Bonnar and reading Mr Calvert's affidavit that the company does and has always taken its health and safety responsibilities to heart.

[39] The total discount available is, accordingly, 30 percent. That represents a reduction of $180,000 from the starting point, reducing the level of fine to $420,000.

[40] There was no dispute that a guilty plea discount of 25 percent is then available. That represents a deduction of $105,000 from the $420,000 figure, taking the final level of fine to $315,000.

[41] There was some discussion in submissions regarding potential adjustment of this level of fine for the financial circumstances of Cottonsoft. However, after oral argument it was acknowledged that there is no requirement for such an adjustment.

Prosecutor's costs

[42] WorkSafe seeks a contribution to its costs of $10,300.23. That order is made.

Overall assessment

[43] I am satisfied that a final outcome of a payment of emotional harm reparation of $45,000, a fine of $315,000 and a contribution to WorkSafe's costs of $10,300.23, is an appropriate outcome.

R McIlraith
District Court Judge