IN THE DISTRICT COURT
AT MORRINSVILLE

CRI-2014-039-000379
[2015] NZDC 4520

WORKSAFE NEW ZEALAND
Informant

v

ECOWISE NEW ZEALAND LIMITED PARTNERSHIP
Defendant

Hearing: 16 March 2015

Appearances: E Jeffs for the Informant
S Rawcliffe for the Defendant

Judgment: 16 March 2015

NOTES OF JUDGE D C CLARK ON SENTENCING

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[1] The defendant has pleaded guilty to a charge of failing to take practicable steps to ensure the safety of an employee while at work contrary to s 6 and s 50(1)(a) Health and Safety in Employment Act 1992. The maximum penalty is a fine not exceeding $250,000.

[2] There is an agreed summary of facts attached to the submissions filed by the informant.

[3] In brief the defendant's employee, the victim in this case, suffered serious harm while the wing packing conveyor she was cleaning inadvertently started as she reached between the flexible intralock style belts to remove a piece of meat. This is a case where the defendant and the victim have attended a restorative justice conference. That took place in March of this year. The incident which brings the defendant before the Court took place on 23 January 2013.

[4] This is a case where it is clear that the defendant took steps from the point in time that the victim was hospitalised to make enquiries about her well-being and has maintained contact for a period of time up until the point in time when a restorative justice conference took place. So from the perspective of maintaining contact and trying to do what it could to make amends in my view the defendant company has done as much as it possibly could have.

[5] The incident itself was a serious matter and resulted in the victim being trapped in the machinery for some time after the actual accident and then was transported to hospital where the victim impact statement tells me that the victim required hospitalisation for about four days but then was unable to work for about seven months afterwards.

[6] The victim impact statement in particular outlines the injuries that were sustained by the victim which included a broken bone in the victim's forearm and a loss of muscle tissue and tendon from her wrist and forearm. That wound has left deep scarring and a hollow in her forearm and the victim impact statement outlines that the victim's arm is now weaker than it was and on days that she works the arm gives or causes her pain to the extent that she must take painkillers. This is distinct from the days when she does not work and painkillers are not required.

[7] The victim impact statement outlines then that this has been a long and difficult process for the victim to get to a point where she is able to return to work. She was able to return to work on light duties which occurred for a short period of time but is now doing the same job that she did before although she finds it more difficult because she favours one arm and it takes her longer to do the same work.

[8] One of the things that I have also noted from the pre-sentence report is that while there has been further training implemented and further supervision and I will talk about the remedial steps in a moment, the victim feels some upset because in the workplace while there is certainly an endeavour to improve the safety of workers the victim is often referred to by name when new workers are being trained and that is something which also causes her ongoing concern. That is something which is probably unnecessary. I am sure that it is not used in a way to upset the victim but

the effect of that is that it does and it may be that the incident can be referred to without the victim's name having to be attached to that training.

[9] In terms of the way that sentencing is to be approached there is an issue around the level of reparation to be paid and also the level of financial penalty to be imposed and I have had an opportunity to hear both from the informant and the defendant. There is some distance between the two about how each of those matters may be addressed appropriately.

[10] The informant and the defendant in terms of reparation, how fines are to be looked at and also the overall assessment of proportionality and appropriateness of the total imposition of reparation and fine agree that the principles in the *Department of Labour v Hanham & Philp Contractors Ltd and Ors* (2008) 6 NZELR 79 are applicable here.

[11] The informant's position around reparation is this, that reparation is a matter that is compensatory and makes mention of the fact that it is now the position that Courts can impose reparation that takes into account financial loss when the previous provisions did not allow the additional loss over and above what ACC would pay for. In this case financial loss has been agreed between the victim and the defendant and that came about as the helpful restorative justice report shows. The financial loss I think was just over $6000 and the defendant was willing immediately to make good those losses once the amounts could be confirmed. In addition to that the defendant has made a voluntary payment to the victim of $10,000 and that has been put forward both as loss and also emotional harm reparation.

[12] The informant's view about reparation is that the Court can consider imposing reparation over and above the amount that has been paid on a voluntary basis and in the written submissions it was submitted that $20,000 to $25,000 was available to the Court.

[13] The defendant's position is, having regard to cases that are outlined in the defendant's submissions, that that was a sum that was outside the range that was applicable to cases where injuries similar to the victim's were sustained and made a

submission that the offer that had been put forward may well be appropriate but that in total not in excess of $15,000 would be appropriate.

[14] I consider that reparation is compensatory. The cases that have been referred to are helpful. They are not always determinative of the issues. I have read the victim impact statement carefully with also the additional comments about the position in the workplace and the other matters that have caused distress for the victim and in my view reparation should be imposed in this way. The offer of $10,000 which was a voluntary offer is to be part of the overall assessment of reparation but in that there is the loss of $6180 which could not be previously adequately reflected. There is then on top of that an emotional harm reparation amount. In my view there should be in addition to the $10,000 that has been offered a further sum of emotional harm reparation in the figure of $11,180. My view is that emotional harm reparation of $15,000 was appropriate in these circumstances and that is taking into account what has been made as an offer but on top of the financial loss of $6000. So in addition to the offer that was made voluntarily I impose a further $11,180 as emotional harm reparation.

[15] The next issue is to the quantum of fine and again there is a difference between the informant and the defendant about where the culpability of the defendant lies. The position submitted as being appropriate from the informant is that the defendant's culpability lies in the medium range and has submitted that that may be in the region of around $75,000.

[16] The informant's position is this. I acknowledged that there were no steps needed that included putting up guards or safety barriers in respect of this equipment. The informant's submission around that is that because guards were not suitable for this equipment that there was then a higher culpability in respect of an employer for this type of equipment.

[17] The defendant has made a submission in respect of how the fines should be assessed that the figure that the informant relied on was excessive and submitted that a more appropriate starting point was in the region of $30,000. The defendant relied on a number of matters, that there were no prior health and safety charges or formal

warnings for the defendant partnership, that the defendant co-operated and that remedial measures were taken. The remedial measures taken by the defendant company included that the lockout-tagout policy has been amended so that each operator has a photo ID card and a lock that they sign in and out at the start and end of a shift, that there is a team briefing daily about what is happening around the plant, the team leader or supervisor checks all personal protective equipment is on correctly and that staff have everything they need at the start of the shift, that three more supervisors have been added to each shift to check personal protective equipment and the lockout-tagout procedure is being used correctly. The informant also submits that other steps have been taken, remorse amends and that there are not any aggravating features and also refers to the fact that there was an early acceptance of responsibility.

[18] The defendant's submission is that when looking at the relevant matters and assessment of the financial quantum that the culpability is in the lower range and that is the reason for submitting $30,000.

[19] When I look at the summary of facts that has been referred to and the matters that the defendant also refers to, my view is that this is a case which does not fit easily into the mid range as the informant has indicated may be appropriate and my view is that this is a case where the appropriate place for this is at the higher end of the lower culpability range. I consider that a $40,000 penalty is appropriate as a starting point. I am mindful that the informant has in its summary of facts indicated that in terms of s 6 that the defendant was obliged to take all practicable steps and identified these steps: to have ensured that the training provided was adequately translated and understood by its employees, to have effectively monitored its employees to ensure that the isolation procedure was being adhered to and to have ensured those personal padlocks were regularly checked, maintained and replaced when inoperable where necessary.

[20] Those are the identified matters under s 6 and there have been in my view remedial steps taken which address those concerns. I do not necessarily agree with the submission by the defendant that any steps taken would not have prevented the accident in this case because it does appear to me that while the victim had been

provided with training she was working in a different part of the premises at this particular time and indicated a lack of familiarity with that particular part of the work area and in my view the remedial steps that the defendant has now taken may have led to a different outcome in this case although I could not say that that would necessarily have been the case. It may have led to a different outcome, but I am satisfied that this is a case where a $40,000 starting point is the appropriate place to start. I do not think there is any disagreement about the credits that must be considered in relation to the quantum of fine once it has been ascertained and in this case those matters have been identified by the defendant in its submissions and they are acknowledged as being appropriate by the case law so there is a 25 percent credit for a guilty plea.

[21] There has been an offer to make amends and reparation and I acknowledge that by way of a 15 percent credit there has been co-operation by the defendant partnership and again I recognise that by way of a 10 percent credit. There has been remorse shown and remedial action taken, five percent each in respect of those matters, and along with then the credit for the early guilty plea I consider that the appropriate financial penalty is $20,000. Now in respect of the last consideration when looking at the quantum of reparation and also fine in my view there is nothing to suggest that there should be any adjustments to either and so I impose the reparation order that I have already indicated is appropriate and also the financial penalty of $20,000.

[22] I just want to add again that it is really heartening to see a very positive restorative justice process and it is clear that the defendant and the victim were in a very positive way willing to engage in that process and the outcome has led to I think some very positive remedial steps being taken by the defendant partnership but also as best as it could do it has sought to try and deal with the significant harm caused by this accident to the victim.

[23] Ms Jeffs, I have made a mistake in my maths which you may have picked up. I said that the fine was a starting point of $40,000, that the credits that are referred to

in fact come to a sum where the fine would be $16,000, so that is the 35 percent that I read out plus the 25 percent for the guilty plea.

D C Clark
District Court Judge