IN THE DISTRICT COURT
AT WELLINGTON

CRI-2015-096-002812
[2016] NZDC 6089

WORKSAFE NEW ZEALAND

v

TOKYO FOOD COMPANY LIMITED

Hearing: 22 December 2015

Appearances: D Brabant for the Crown
A Darroch for the Defendant

Judgment: 22 December 2015

NOTES OF JUDGE B DAVIDSON ON SENTENCING

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[1] The defendant company appears for sentence on a charge of failing to ensure employee safety.

[2] On the morning of 9 March 2015 one of its valued employees was crushed to death while operating a forklift at its Lower Hutt premises. The investigation revealed that the employee concerned, and indeed most of the other staff at the business, had little if any forklift training or appropriate forklift certification.

[3] The employee was operating a forklift which is not fully guarded to its rear. The inspector concerned has explained today its operation and how this accident in all likelihood unfolded.

[4] The employee has essentially reversed into some bracing and shelving, become jammed and crushed. He was unable to release the pedal which operated both as an accelerator and brake.

[5] I have to say, although it really does not make any particular difference in this sentencing, that the forklift type carries a sense of inherent risk with it, if only because of its un-guarding to the rear of an operator. Nevertheless the essence of the charge, of course, is the failure to ensure employee safety by not having in place adequate training and forklift operator certification.

[6] The deceased's family, who live in Japan, have been quite significantly affected, financially and emotionally. Obviously two parents have lost a son and two siblings have lost a brother. The defendant company acted responsibly assisting the family with travel and funeral costs. The defendant company intends to assist them in March next year on the anniversary of its employee's death.

[7] The victim impact statement, in particular, to my mind is a reflection of the goodwill, the courtesy extended by the defendant company to the deceased's family, reciprocated by the deceased's family. I think they all are to be congratulated for the mature and courteous fashion with which they have dealt with an obvious tragedy.

[8] The defendant company is a food importer and distributor. It has no previous convictions. Apart from the attitude towards the tragic death, which I have mentioned, it has taken appropriate remedial action. It carries insurance, another feature, of course, which speaks to the responsible attitude they have towards workplace safety.

[9] The aggravating features, those which affect the degree of culpability, are fairly obvious. Any forklift operation is hazardous and any failure to meet requisite training and certification is an obvious measure to address that risk, which employers should acknowledge, encourage and require. By having no proper training or certification process there must have been a fairly significant departure from industry standards. The material about such standards now is easily accessible and readily available.

[10] By way of mitigation the defendant company can point to its prompt plea of guilty, its remorse and responsible action after the tragedy, the remedial action

undertaken by a workplace hazard assessment, their attitudes towards the deceased's family.

[11] As between the prosecution and the defence there is no real dispute about the level of reparation. Both agree that it sits at around $70,000. There is an important feature of consistency and cases of crush injury and death have generally resulted in reparation figures in that range. I see no reason to go behind the submissions on the reparation issue made by both counsel.

[12] The area of tension lies largely in the starting point for the fine. The prosecution submit that any fine should attract a starting point of at least $90,000. Ms Brabant submits that such a starting point would be necessary to reflect the degree of culpability and the departure from industry standards. Mr Darroch submitted that a lower starting point would be appropriate. He submits that some of the higher fines imposed reflect cases where there is not only a lack of, or inadequate, training but also associated mechanical shortcomings or shortcomings in regular maintenance.

[13] The sentencing approach to such cases is well known. It involves initially an assessment of the level of reparation then an assessment of the level of fine based on the defendant company's degree of culpability and then some overall assessment of both in combination.

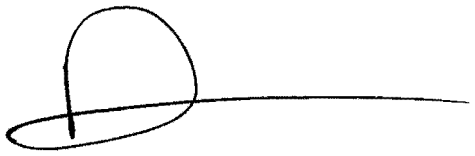
[14] I firstly fix the reparation at $70,000. I also acknowledge because it is important for the defendant company's insurers, that it has met incidental costs of the employee's family of $6,994.68.

[15] As to the fine in my view the starting point is a fine of $100,000. Some cold hard facts are inescapable. The hazard is obvious. The failure to meet requisite standards by a lack of training and a lack of certification is equally obvious. I have to see this as a fairly significant departure from industry standards. In my view, this must place the degree of culpability somewhere on the cusp between medium to high. I fix the starting point for the fine therefore at $100,000.

[16] There was no dispute as between counsel as to the various discounts, the payment of reparation, the defendant company's remedial actions, its responsible attitude by insurance, its co-operation, its remorse and its prior good record all would result in an initial discount of some 30% to be followed, of course, by a full discount for its plea of guilty.

[17] The fine would sit at $52,000. I need to view both in combination. I see nothing about the two in combination which would suggest this would be a disproportionate sentence in response.

[18] Accordingly there will be an order for reparation of $70,000 and a fine of $52,000.



D Davidson
District Court Judge