IN THE DISTRICT COURT
AT ASHBURTON

CRI-2014-003-000129

WORK SAFE NEW ZEALAND
Informant

v

CANTERBURY DRIED FOODS LIMITED
Defendant

Hearing:	25 August 2014
Appearances:	R Savage for the Informant S Wilson for the Defendant
Judgment:	25 August 2014

NOTES OF JUDGE J E MAZE ON SENTENCING

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[1] Canterbury Dried Foods Limited faces one charge of failing to take all practicable steps to ensure the safety of the victim employee. By consent I make an order prohibiting publication of the name, address and any identifying details of the victim. The maximum penalty is a fine of $250,000.

[2] The defendant company is a food dehydration company and the victim was the shift production manager. One employee (not the victim) started to use a new piece of machinery; the victim was not engaged in that work but saw what the employee was doing, and as a volunteer intervened to help by attempting to insert something to prop up the machine. The machine was being lifted on a jack, only a short distance, but it then collapsed on to the victim's right hand, amputating the index finger. Mr Wilson has said that one might get the impression of this piece of machinery being some distance in the air, but that is not the case. It was only being raised a short distance.

[3] The hazard not adequately addressed was the risk that the machine would fall back down while it was being raised on this hydraulic jack. The best practice would be to prepare a plan for the lifting exercise to ensure the machine would be stable during the lifting exercise, to ensure an experienced employee would be involved in the task, and to ensure that anyone else had clear instructions, but only those authorised to do this would be involved in the process. The summary of facts identifies the practicable steps which could have been taken to ensure the safety of the ultimate victim.

[4] Both counsel agree on the legal authorities and the authorised approach towards this sentencing exercise; that is to fix the reparation, to fix the fine, to assess proportionality and appropriateness of the two, and then finally fix the figures. For offending in the low culpability range, fines of up to $50,000 would be the starting point; for medium culpability, fines would start at between $50,000 and $100,000 and for offending with high culpability, fines of $100,000 to $175,000 would be the starting point.

[5] When considering the question of reparation I have the victim impact statement as well as other material medical information supplied to assist me. There is no question from the defendant company that the victim has suffered both physically (irreparably) and emotionally. The physical loss and the emotional impact were the subject of proposed reparation and acceptance with no prevarication whatsoever. The parties discussed and agreed upon a figure of $15,000 for reparation through restorative justice assistance, and that is intended to be an acceptable amount to make amends. I do bear in mind that the physical loss is significant. The victim herself puts her physical loss at being able to do only about 50 percent of her pre-accident activities, and the impact of ongoing pain is a significant problem. But as the parties have agreed, and as is pointed out in the submissions, once the parties have agreed, that fixes the reparation level at $15,000.

[6] I now turn to consider the fine. The Crown submits that this is in the medium to high culpability range, given the readily available steps to address the risk and the obvious nature of the hazard. Also it is said the accident could be said to be far from trivial. I have been referred to a number of cases where there has been digital

amputation. *Affco New Zealand Limited v Muir* (2008) 6 NZELR 281 (HC), a decision from the High Court at Wellington, Gendall J, judgment of 17 September 2008, seems to be particularly on point. The Crown proposes a starting point for the fine at $75,000 and Mr Wilson takes no issue with that.

[7] The points of difference are as to whether there should be an uplift for personal aggravating factors, and the ability to recognise, and if so to what extent, the presence of personal mitigating factors over and above prompt plea.

[8] The personal aggravating factor is said to be that a director of the present defendant company was previously prosecuted and convicted for a similar offence in 1996. With the greatest of respect, that ignores the fact that that man is an entirely different person. He is now 71 years of age. Although he is a director of the defendant company, he is not actively involved in the management and administration of the company other than at an upper governance level, and the offence was in 1996, so close to nearly 20 years ago. In any event, it is not open to me to lightly lift the corporate veil and ignore the difference in personalities. I do not consider the link to be anything like enough for me to conclude that Canterbury Dried Foods Limited has in some way displayed relevant poor behaviour on a previous occasion which would merit an uplift from the starting point.

[9] I turn now to the second point of difference. The defence argument is that there should be an overall 30 percent discount to take into account extraordinary remorse, making of amends, co-operation with the prosecution to an extent greater than required, prompt remedial action, and previous good character. Both parties accept that there should be a quarter discount for plea under the rules in *R v Hessell* [2009] NZCA 450, [2010] 2 NZLR 298 and I do not intend at this stage to address that.

[10] The Department of Labour says that there should be no recognition for the co-operation to a greater than required level. This was merely doing what was required for compliance with the law and it cannot be a basis for additional credit. Mr Wilson has pointed out that this is not a case of systemic failure; he describes it

as a freak accident, and so in a sense greater value can be placed on the acts of supererogation, if I can frame it in that way.

[11] However it was not a freak accident; it was the result of a failure to address an obvious risk, but it was not systemic failure. In the circumstances I can accept that the extent of co-operation so as to ensure there is no repetition, is a factor to be taken into account, but it is not a factor which, overall, is going to attract very much credit.

[12] The question of whether previous good character is available as a personal mitigating factor is an interesting question, as it is the other side of the coin to the argument that there should be an uplift for a director of the defendant company having been previously convicted on a personal basis. I think it fair to say that a modest allowance can be afforded to the defendant company for the fact that it has operated in a more than insignificant way for a considerable period of time without having previously been convicted of a similar offence. It will, however, only be a very modest allowance.

[13] The real issue is discount for remorse and reparation. They are really two separate things. The discount for reparation is a recognition of the extent to which the defendant company has made amends with the victim. The Crown says that the reparation at $15,000 is not at the highest end of the scale and so does not call out for a high level of recognition, given that the cases would suggest that for similar harm done, awards could range between $5000 and $20,000 in reparation.

[14] However I accept that an award at $15,000 is a significant attempt to make amends. There is some argument back and forth about the extent to which the victim suffered further anxiety and distress from her own sense that she was unable to meet expectations from the employer. There are times when efforts to make amends do not achieve the intended end result. There were continuing offers of employment and it seems that in the end that was not able to be used. Nevertheless, there needs to be some recognition for the making of amends overall and the efforts which were made to facilitate that. And then finally and separately, there is a discount for remorse, and this is dealing with the personal effort, if I can put it that way, by the

defendant company. Successful or not, this discount is intended to recognise what the defendant company was trying to do in expressing the remorse for what had occurred.

[15] The correct way I think to approach it is with a global figure which recognises those various factors. Mr Wilson has sought 30 percent. I consider 30 percent to be disproportionately high. Recognising that there can be something in the region of 15 percent for the making of amends and five percent for previous good character, five percent for the other factors that I have referred to, I would conclude that a one-quarter discount would be appropriate.

[16] Finally, that would bring me to the amount of the discount for plea, and as both counsel agree, that is one-quarter; there is really nothing further to be said. Nobody has sought to argue that it should be anything other than a one-quarter from the net figure.

[17] That being the case, I take a starting point at $75,000. A one-quarter discount to reflect the general personal mitigating factors is $18,750, and a one-quarter discount from that net figure is $14,100. In the interests of achieving a rounded figure, I intend to impose a fine of $42,000 coupled with reparation at $15,000. There is no request for solicitor's costs.

[18] Accordingly the defendant company is convicted. It is ordered to pay reparation of $15,000 in full within 28 days. It is fined $42,000. I do not impose Court costs; I do not impose solicitor's fees. A final suppression of name and any identifying details of the victim is granted.

J E Maze
District Court Judge