IN THE DISTRICT COURT
AT NAPIER

CRI-2013-016-000629

MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT
Informant

v

HARVESTPRO NZ LIMITED
Defendant

Hearing: 13 June 2014

Appearances: S B Manning for the Informant
A Lloyd for the Defendant

Judgment: 13 June 2014

NOTES OF JUDGE A J ADEANE ON SENTENCING

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[1] Harvestpro NZ Limited, a limited liability company, has been found guilty at a defended hearing on one charge of failing to take all practical steps to ensure the safety of a worker.

[2] The circumstances in which the prosecution arises were outlined in my oral decision delivered earlier and they can be much abbreviated for the purposes of sentencing. In the absence of an adequate system of communication and warnings the victim was allowed to work below while a co-worker moved logs on a narrow landing above. When control of the log was lost it plunged downwards striking the victim causing substantial injuries as set out in the sentencing material and victim impact statement. Given that the log was 20 metres long and approaching two tonnes in weight the worker is fortunate, indeed, in these circumstances to have escaped with his life.

[3] The case has been characterised by the ongoing refusal of the defendant company to acknowledge its wrongdoing in appropriate fashion. After hearing the evidence I found the informant's summation was entirely apt when it was said, "This was an obvious and serious hazard with an obvious and simple solution."

[4] Consonant with the same attitude the defendant has attempted to justify its conduct by the evidence of a selected employee and an expert witness, the evidence of both of whom became markedly less persuasive the further it was tested. First Mr Alan Poulson, who I note is not in Court today but who is the Regional Manager of the defendant, prepared an initial accident investigation report in which he identified as a contributing factor that, "Mr Ashford should not have attempted to move logs in such close proximity to where Mr Henare was working below him without communicating whether it was safe to do so." Matters of grammar aside the sentiment of that finding is perfectly clear.

[5] Mr Poulson went on in his report to conclude that there had been, "A major lapse in concentration on Mr Ashford's behalf by moving logs in a dangerous manner above where Mr Henare was working."

[6] In the context of a continued denial that concise appraisal of matters by Mr Poulson, which went directly to the heart of the matters which the informant was seeking to prove, became a serious inconvenience to the defendant. It therefore set out to minimise or extinguish the damaging admissions by calling their maker to explain them further. To this end Mr Poulson was called as a defence witness. He explained that his report represented a third iteration of two earlier drafts which had identified quite different contributing factors. These changes, he claimed, were at the request of the OSH inspectorate and he did not stand by them in evidence.

[7] In light of this claim it became highly regrettable that Mr Poulson could not produce copies of either of those earlier draft reports nor could he remember what were the contributing factors identified in those. Over a defence objection it was put to Mr Poulson that he was, "Taking one for team." To my mind that suggestion was a charitable one in the circumstances which had unfolded.

[8] Apparently on the strength of expert advice from Associate Professor Visser the defendant then maintained that there may have been a culpable failure if the culprit log had escaped from the shute but not if it had escaped from an adjacent overhanging surge pile.

[9] Associate Professor Visser's brief initially maintained, "With regard to safety it was also his (Mr Ashford's) duty to be aware of the location of the choker setters, i.e. the breakers out, especially when they were working below the landing."

[10] It emerged in evidence, however, that the log had not escaped in either of those ways but instead escaped from the grip of a loader while in transit between the shoot and the surge pile. The expert evidence of Mr Prebble for the informant was, "That whether it is the shute or surge pile doesn't really matter. They're both extremely hazardous situations. The loader should not have been working in or around the surge pile while the breaker out was down there."

[11] Up to that point it might have been thought that there was a broad measure of agreement between the two experts. At trial, however, when that passage of evidence from Mr Prebble was put to Associate Professor Visser he declined to agree with it. He then went onto qualify his evidence as briefed so that its effect was, "All the upper worker needs to know is that the lower worker is somewhere below" but not his specific location. That, with respect, is a significantly different and lesser standard than the one adopted by Associate Professor Visser in his brief.

[12] If the defendant's position today remains that workers above need to know of the presence of workers below but not of their location then little has been learnt from this accident or, indeed, the forensic journey which has followed it.

[13] In those circumstances, in my view, the defendant is hardly entitled at this point to claim effective remedial action to prevent a recurrence if its view remains the one to which Associate Professor Visser's opinion eventually subsided. On the contrary one is left with a clear impression of a defendant more interested in conjuring up defences for the indefensible rather than with taking remedial measures.

[14] Likewise the defendant was anxious to point out aspects of compliance with codes of practice and industry standards but in doing so, in my view, lost sight of the bigger picture.

[15] Forest safety is an evolving and these days rapidly evolving subject. Even in the cruel workplace conditions of the late 1800's when breach of employers' responsibilities first became actionable, this system of work would have been found unsafe and injurious consequences would have been judged reasonably foreseeable.

[16] Various cases have been cited in relation to the issue of reparation. They raise the sort of difficulties inherent in any comparison of cases. To my mind there should be no presumption that death awards necessarily transcend injury awards. At a real risk of flippancy to explain the point. At least in death cases the pain does not continue.

[17] In my view, the awards which have been referred to, some of greater age than others, are now due for substantial upward revision. For reasons soon to be stated, in my view, Mr Henare should be made an award higher than those to which reference has been made. He is a 30 year old family man who has suffered multiple fractures and weeks of hospitalisation. His victim statement refers in this regard. Despite six discrete surgical procedures he remains deprived of employment, sport and much of the enjoyment of life generally. Fortunately he is multi-talented but his options nevertheless are considerably narrowed.

[18] The mood of the community toward this type of happening is rapidly changing and focusing on the need for a balance between the economic interests of the forestry industry and the interests of the community in workplace safety.

[19] As I say comparison with other cases in most areas leads to difficulties. Levels of fine and reparation will obviously alter both as time moves on and the objects of sentencing evolve. What the authorities have repeatedly emphasised is that awards in this class of case, whether by way of fine or reparation, should be fixed at more than what is referred to as "licence level" and should not be regarded as another unfortunate business expense.

[20] The award I am about to make recognises the lifelong consequences of this event, so far as Mr Henare is concerned. It recognises also the changing value of money now and in the future. I have no doubt that if Mr Henare had a choice between his previous health and the proposed award he would choose the former without hesitation. The award still remains little more than a token reparation for the harm that has been done and I fix compensation in this case at $40,000.

[21] By comparison the fixing of a fine is comparatively straightforward. Guided by *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,098; (2008) 6 NZELR 79 (HC) I consider that the offending lies in the upper end of the middle band of culpability and I accept that a starting point of an $80,000 fine properly reflects the various *Department of Labour v Hanham & Philp Contractors Ltd* factors identified.

[22] So far as mitigating factors are concerned, I detect none of sufficient significant to require an adjustment. There has been no guilty plea. Any claim to co-operation with the authorities throughout the proceedings is seriously compromised by the use which the defendant has made of its employee Mr Poulson in evidence. The same can be said for any claim to remorse. To the extent that there has been remedial action it does no more than respond to what was an obvious hazard and any claim to a strong safety record is nullified by evidence of previous mishaps fortunately inconsequential.

[23] I decline to make the minor discount contemplated by the informant. Offers of amends when placed under the microscope are not what they might appear to be in the defendant's sentencing submissions. It seems that the proposed voluntary contribution to compensation first saw the light of day somewhere between the entry of a conviction and the defendant's sentencing memorandum dated just three days ago. Such an offer would have been considerably more persuasive if it was tendered together with a guilty plea at an early stage.

[24] The only remaining matter is one of costs of prosecution. There have obviously been witnesses' travel and accommodation expenses together with remuneration. To some extent the prosecution has relied on its in-house resources

but for the hearing it has also engaged independent counsel. This matter has been contested in a commercial environment and it is possible after submissions that an award exceeding scale may be made.

[25] The informant is invited to file a cost memorandum within the next 14 days and serve the same upon the defendant. The defendant to respond in writing within a further 14 days. The matter will then be determined in chambers without further hearing.

[26] In summary, the defendant is fined $80,000 and is ordered to pay reparation of $40,000 to Mr Henare.

A J Adeane
District Court Judge