IN THE DISTRICT COURT
AT PAPAKURA

CRI-2015-055-002676
[2016] NZDC 15833

WORKSAFE NEW ZEALAND
Prosecutor

v

TIMBERSHADE BLINDS LIMITED
Defendant

Hearing:	16 August 2016
Appearances:	C O'Brien and C Pille for the Prosecutor S Bonnar QC for the Defendant
Judgment:	16 August 2016

NOTES OF JUDGE S PATEL ON SENTENCING

---

[1] I would like to preface my sentencing decision by making some observations. Firstly I acknowledge the presence of Mr Esekia and his wife in Court this afternoon. Thank you for attending. I also acknowledge the presence of the representatives from the defendant company Timbershade Blinds. Again thank you for attending Court this afternoon.

[2] I also make the following comments. This file was made available to me yesterday just prior to me undertaking a full day in Court. I was not able to give this file any consideration until early today. I have also been required to read and prepare five other sentencing matters which commenced at 11.45 today. Accordingly I have not had as much time as I would have liked to prepare this file. I am, however, mindful of the passage of time since this accident occurred and the need for Mr Esekia to have closure on this issue as well as the representatives of

Timbershade Blinds to have closure. Accordingly I am going to give an oral decision. I thank counsel for their fulsome and focused written submissions and their oral submissions today.

[3] Given that this is an oral decision I reserve the right to perfect the judgment once it has been transcribed.

[4] The defendant company, Timbershade Blinds Limited, has pleaded guilty to one charge of failing to take all practicable steps to ensure the safety of an employee while at work pursuant to s 6 and s 51A Health and Safety and Employment Act 1992. The maximum penalty is a fine not exceeding $250,000. The relevant facts are set out in an agreed summary and I will have the summary of facts attached to my sentencing notes. Accordingly I will not recite the facts in any great detail. However, the salient points are as follows.

[5] Mr Esekia is employed as a process worker for the defendant and has been for over 20 years. The defendant company operated a Weinig hydro mat four sider timber moulding machine since 2010. The machine was fitted with a safety interlock switch on the hinged hood of the machine that covered the rotating blades of the machine. This machine was used for the first stage in the preparation of timber into straps for the production of wooden blinds. At the time of the incident the interlock needed to be replaced as the componetary inside the switch was broken. This meant that when the hood was open the blades of the machine continued to operate. The interlock device had not been working for some time and this was known to an employee of the company, Mr Grgurinovich, who did not bring the fault to the attention of management. There was no system in place to ensure that the machine was inspected and maintained and to ensure the safety mechanisms of the machine were in working order.

[6] On 3 June 2016 Mr Esekia went to work. His life would never be the same again. At work he was operating the machine. A piece of timber became jammed in the machine. Mr Esekia opened the hinged guard. Due to the faulty interlock device the blades continued to rotate. Mr Esekia's right index finger and middle fingers made contact with the blades. This caused a significant injury which ultimately

resulted in the amputation of his middle and index fingers at the first joint. This is a very significant injury.

[7] In considering an appropriate sentence I have had regard to a number of documents. Firstly the impact victim statement, the report from the restorative justice co-ordinator and as I have indicated earlier counsel's written submissions.

[8] I turn first to the victim impact statement. Mr Sooletaa Esekia is aged 55. As I have said he was employed by the defendant company for about 20 years. Half of the index and middle fingers on his right hand have been amputated. He is right hand dominant. He experiences considerable pain when he tries to straighten his fingers. This has caused, obviously an impact at work. I understand during the course of submissions that he returned for a short time to work following the injury. However, that was on limited duties and due to other health issues whilst he is still technically in the employment of the defendant company he is not undertaking any duties.

[9] The impact generally has had profound effects on his life in matters domestic. He cannot cook or assist in the kitchen at home. This appeared to be a source of enjoyment for him. His wife is now solely responsible for these duties and other household chores. It has had a personal impact. He cannot hold a knife and fork properly any more. He has had to learn to hold cups in his left hand. He is embarrassed about going out to dinner given that he cannot hold utensils such as a knife and fork. There have been other personal impacts in terms of his carrying out his ablutions. He cannot dress himself properly. His wife has to assist in certain aspects of this. He has to shake hands using his left hand.

[10] He held the position of secretary at his local church for three years. He has had to give this up as he is now unable to write and to take notes. He cannot grip things firmly in his hand. He was unable to hold his one year old grandson at the time of the injury. The impact of the injury has caused him considerable frustration and he gets angry a lot more than he used to. As a result of the injury he is unable to take simple day-to-day tasks that many of us take for granted. The impact of the injury has been very far reaching for him both physically and emotionally, and as I

have said all of the relevant impacts have been set out in the very thorough victim impact statement.

[11] I now turn to the restorative justice conference report. The restorative justice conference was attended by various members of Mr Esekia's family including his wife and children and by Henry Winstone and Jenny McDonald on behalf of the company. Responsibility for the accident was taken on behalf of the company by Mr Winstone and Mrs McDonald. They both expressed their sorrow and their regret at what happened and they extended their fulsome apologies to Mr Esekia. For his part Mr Esekia accepted the apology. He expressed his gratitude to the company for being a good employer. He outlined the impact of the injury on himself and his family.

[12] I now turn to the statutory criteria in terms of the purposes and principles of sentencing. The leading case in relation to the approach to be taken in sentencing is *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC). The following three purposes of sentence are required to be given significant weight. Firstly to hold the offender accountable for harm done to the victim and the community by the offending, to denounce the conduct in which the offender was involved and to deter the offender or other persons from committing the same or similar offence. I also consider that the following purposes are relevant, to provide reparation for harm done by the offending and to provide for the interests of the victim of the offence.

[13] In terms of the s 8 considerations, namely the principles of sentencing, I consider that the following principles are relevant in this case. I must take into account the gravity of the offending in the particular case including the degree of culpability of the defendant. I must take into account the seriousness of the type of the offence in comparison with other types of offences, and as indicated by the maximum penalties prescribed for the offences. I must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences in similar circumstances. I must take into account any information provided to the Court concerning the effect of the offending on the victim, and in this regard I have had regard to the victim impact

statement. I must impose the least restrictive outcome that is appropriate in the circumstances having regard to the hierarchy of sentencing.

[14] As I have said the leading case in the approach to sentencing is the *Hanham & Philp Contractors Ltd.* This sets out a principled approach to sentencing under the Act. It is a three step process. It requires an assessment of the amount of reparation, the fixing of the amount of a fine and making an assessment of the proportionality and the appropriateness of the total imposition of a reparation and fine.

[15] I turn first to the assessment of the quantum of reparation. I summarise the submissions on behalf of Worksafe New Zealand, the prosecutor. They submit that a reparation figure of $25,000 ought to be imposed. On behalf of the defendant Mr Bonnar submits that reparation in the range of $15,000 to $20,000 ought to be imposed. I wish to discuss first the principles in relation to reparation. Reparation is compensatory in nature. It is designed to recompense an individual for loss resulting from the offending. Assessment of reparation must be made taking into account s 32 Sentencing Act 2002 which empowers the Court to order reparation if an offender has through an offence caused a person to suffer loss or emotional harm or loss or damage consequential on any emotional physical harm.

[16] I refer to the comments of Harrison J in *Big Tough Pallets Limited v Department of Labour* (2009) 7 NZELR 322. Fixing an award for emotional harm is an intuitive exercise. Its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering, or incapacity with a short term or long term assistance as to an appropriate award of reparation can be gained by comparison of the injury in question and awards in other similar cases.

[17] A number of authorities have been cited by both counsel in assisting me in determining the appropriate level of reparation. I consider that the decisions of *Worksafe New Zealand v Prepared Produce Ltd* [2016] NZDC 3446, and *Worksafe New Zealand v Grove Hardware Ltd* DC North Shore CRI-2014-044-003282, 11

November 2014 are the most helpful authorities cited. In *Worksafe New Zealand v Prepared Produce Ltd* there were three victims. The first victim suffered serious harm while operating a belt slicer. He was attempting to clear a blockage on the slicer when his hand was caught on the rollers and pulled into rotating blades. He suffered an amputation of his right middle finger at the first joint and the tip of his ring finger. The reparation award was $18,500.

[18] The second victim suffered a partial amputation of his right ring, middle and index fingers when he was attempting to unblock a jam on the same belt slicer machine. A reparation award of $20,000 was made in that case. The third victim the injury caused the amputation of the tip of his right index finger and middle finger after clearing a jam on a new belt slicing machine. The reparation award in that case was $18,500.

[19] In relation to *Worksafe New Zealand v Grove Hardware Ltd* a 17 year old victim suffered a partial amputation of his left middle and index fingers at the middle joint and severed a nerve on his left ring finger. This was caused by the faulty installation of a guard on radial arm saw. The Court awarded $20,000 reparation.

[20] The impact on Mr Esekia of the offending has already been discussed by me. I summarise the same by emphasising that the physical and emotional impact of the offending on him has been significant. I consider that an appropriate award of reparation, given the physical and emotional impact of the injury, is one of $20,000.

[21] I now move to stage two which is an assessment of the appropriate fine. *Hanham & Philp Contractors* at paragraph 80 refers to the assessment of the starting point as involving an assessment of the culpability and a placement of a starting point within a scale of low, medium or high culpability. Paragraph [54] sets out the factors relevant in assessing culpability. They are an identification of the operative acts or omissions at issue, secondly an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk, thirdly the degree of departure from standards prevailing in the relevant industry, fourthly the obviousness of the hazard, fifthly the availability, cost and effectiveness of the means necessary to avoid the hazard, sixthly the current state of knowledge of the risk and the nature and

severity of the harm which could result and lastly the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[22] The Court held that fixing the amount of the fines should follow the methodology established by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372, namely fixing a starting point on the basis of the culpability of the defendant, then making adjustments for personal, aggravating and mitigating features. I note that the *Taueki* approach was modified by the Court of Appeal in *R v Clifford* [2012] 1 NZLR 23 (CA).

[23] I turn now to the prosecution's submissions on an appropriate fine. In terms of assessing the culpability in the present case the prosecution submits, in terms of the identification of the operative acts, that three practicable steps should have been taken. Firstly, to have adequately maintained the guard so that employees were isolated from the hazard of contact with the rotating cutting blades on the timber moulding machine. Secondly, to ensure that there was an adequate system in place to inspect, document and track and close out any faults on the safety system of the machine, and to ensure that this system was regularly reviewed for effectiveness, and lastly to ensure that this system was being complied with.

[24] In terms of the nature and the seriousness of the risk of harm occurring as well as the realised risk the prosecution submits that the risk of harm occurring from an inadequately guarded machine is significant. In terms of the realised risk, that is clear. This resulted in amputation of parts of the fingers of Mr Esekia's right hand. In terms of the degree of departure from industry standards the prosecution submits that the defendant did not follow industry guidelines and standards, or follow the operational guidelines of the machine itself. In terms of the obviousness of the hazard the prosecution submits that the need to guard moving parts is obvious. In terms of the availability, cost and effectiveness of the means necessary to avoid the hazard the prosecution submits that a new switch for the interlock machine was sourced soon after the incident. The prosecution submits that step could have been taken prior to the accident occurring, and it would have been relatively simple to have a system in place to inspect, track and repair the fault.

[25] The prosecution argues that the culpability of the defendant is increased given that Mr Grgurinovich had knowledge of the fault for some time. However, as discussed with counsel in the course of oral submissions the difficulty I have is that the summary of facts did not indicate the length of time the fault was known by Mr Grgurinovich. The prosecution submits that the culpability falls in the medium category and that an appropriate starting point is at least $80,000.

[26] In terms of mitigating features the prosecution submits that I should allow a deduction of 25 percent in terms of payment of reparation, remedial action, a favourable safety record and the full co-operation of the defendant company with the Worksafe investigation. In terms of a guilty plea the prosecution submits that a further discount of 25 percent ought to be allowed.

[27] I turn now to the submissions of Mr Bonnar for the defendant company on an appropriate fine. The defence submits that culpability lies between the end of the lowest band and the lower end of the middle band. It is submitted that an appropriate starting point of a fine is in the region of $50,000. I turn to the factors to be considered in the assessment of culpability as set out in *Hanham & Philp Contractors Ltd.* In relation to the identification of the operative acts there is an acceptance that the machine should not have been operating with a faulty interlock switch. The hazard had been identified but however for inexplicable reasons the person responsible for reporting and rectifying the fault, Mr Grgurinovich, failed to do so despite queries being made by management of him to provide a maintenance schedule. The company accepts, however, that the management should have asked more specific questions of Mr Grgurinovich.

[28] In relation to the other matters relevant to the assessment of culpability the defendant accepts firstly that serious harm was suffered, that the hazard was obvious, that the operation of the machine was a departure from industry standards, and that a sufficiently robust system was not in place to check Mr Grgurinovich's actions. In oral submissions Mr Bonnar submitted that the lack of obviousness of the hazard meant that the culpability in this case was less than those in cited cases where, for example, guards had not been used and the potential danger of machinery being operated was far more obvious. In terms of the means available to mitigate the risk

it is submitted that the culpability of the company is reduced by way of what is described as an unpredictable conduct by Mr Grgurinovich in not reporting or rectifying the fault. At the very least Mr Bonnar submits that there ought not to be an uplift as submitted by the prosecution of this point.

[29] In support of that submission he cites a case of *Gough Gough & Hamhan Contractors Ltd v New Zealand Police* (2009) 7 NZELR 151 (HC). It is submitted the key failure in this case is that the company did not have a formalised system in place to ensure that Mr Grgurinovich was ensuring that all the machinery was properly maintained and operating correctly. Overall it is submitted that an appropriate starting point is a fine in the region of $50,000.

[30] In terms of mitigating factors Mr Bonnar quite rightly points out the co-operation and remedial action on the part of the company. There was full co-operation with the Worksafe investigation and full remedial action in terms of the repair of the moulding machine was taken. He submits that there is genuine remorse. There is the fact that the representatives of the defendant attended the restorative justice conference. There has been topping up of ACC payments by the defendant company. The company has a good previous safety record and insurance was in place to cover payment of reparation. He also cites that there has been a guilty plea at the earliest stage. There was a short discussion on the financial means of the company. I took the end point of Mr Bonnar's submission was that it ought to be taken into account in the assessment of a fine that this is a small company, but the company does have the means to pay a fine albeit probably in instalments.

[31] I turn now to my assessment of the quantum of a fine. I will address each of the factors relevant in the assessment of culpability in turn. Firstly, identification of the operative act or omission at issue. I find that the three practicable steps that ought to have been taken as submitted by the prosecution, namely the adequate maintenance of the guard, ensuring that there was an adequate system in place to inspect, document and repair faults and to ensure that the system was being complied with were steps that ought to have been in place. The nature and seriousness of the risk of harm; I find that the risk of harm from an inadequately guarded machine is significant. The degree of departure from industry standards; I find that there has

been a significant departure from industry guidance and standards, notably the ASNZ4024, which deals with the assessment of risk of harm present in operations involving machinery and a departure from the operating manual for the timber moulding machine itself, which notes that all safety mechanisms are required to be checked daily before the starting of the machine.

[32] I note that the industry standard states that immovable guards shall be associated with an interlock or an interlock with guard locking. I find that the hazard was obvious, perhaps not as obvious as those in some cases, but in the end this was a fault which entailed significant danger, which unfortunately was realised. In terms of availability, cost effectiveness of the means necessary to avoid the hazard; following the accident a new switch for the interlock was located and the machinery repaired and back in operation in a matter of weeks. I therefore find that there were readily available and cost effective steps that ought to have been taken.

[33] I also find that a further cost effective step would have been the implementation of a system to monitor, record and maintain faults on the machine. It is an utter shame that Mr Esekia's life has been irreparably altered for want of relatively simple steps being put in place. I find that the acknowledged fault by Mr Grgurinovich could potentially have increased culpability. However, given no period of time was articulated in the summary of facts I see that as a neutral factor, neither increasing or reducing culpability. The current state of knowledge of the risks, nature and severity of the harm and the means available to avoid the hazard or mitigate risks of its occurrence; this issue is covered in my comments that I have noted above.

[34] In terms of case law I have considered the various cases submitted by both counsel in relation to the assessment of an appropriate fine. I find that culpability in this case is above that submitted by the defence in *Department of Labour v Griffiths Foods Ltd* DC Papakura CRI-2009-055-002437, 29 June 2010. In that case the employee's actions of clearing a machine of biscuit dough were in breach of his training and the defendant was unaware that the lifting of the guard had been taking place regularly. In that case the starting point was assessed at $45,000. I consider the most helpful case cited was *Proform Plastics Ltd v Department of Labour* [2013]

NZHC 583. In that case an injury was occasioned to the employee due to a failure to install a guard and interlock device so that power to the machine in question would not disconnect if the guard were open. On appeal the starting point was reduced to $67,500. However, the injury in this case is far more serious than that in *Proform Plastics Ltd v Department of Labour.*

[35] I find in this case the culpability of the defendant falls at around the middle point of the medium range of culpability, and that an appropriate starting point is one of $70,000. In assessing that starting point I have factored in the relatively small size of the company involved, namely at this point it is of some 16 employees.

[36] In terms of mitigating factors I make allowance for the following aspects; payment of reparation, co-operation with the Worksafe investigation, remorse, which I find is genuine, the company's previous good safety record, the assistance given to Mr Esekia after the accident including topping up of ACC payments and facilitating his return to work. I commend the management of the defendant company for taking such steps.

[37] For all those matters I consider that a 25 percent discount is available. I also find a deduction of an additional 25 percent is available for the entry of a early guilty plea. In accordance with that assessment the total fine payable is one of $39,375[1].

S Patel
District Court Judge

[1] I do not consider an adjustment ought to be made for totality. It was not argued on behalf of the defendant that an adjustment should be made.