

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2015-009-001901
[2015] NZDC 26139**

WORKSAFE NEW ZEALAND
Prosecutor

v

PEGASUS ENGINEERING LIMITED
Defendant(s)

Hearing: 29 October 2015
Appearances: S H Backhouse for the Prosecutor
G N Gallaway for the Defendant
Judgment: 29 October 2015

NOTES OF JUDGE A A COUCH ON SENTENCING

[1] The defendant in this matter, Pegasus Engineering Limited, is for sentence today on one charge under s 18 Health and Safety in Employment Act 1992, that of failing to take all practicable steps to ensure that a contractor was not harmed while working on a site controlled by the defendant company.

[2] The charge arises out of an incident which occurred on 29 August 2014 on a work site in Christchurch where a new building was being constructed for the Christchurch Polytechnic Institute of Technology.

[3] Part of the design was a steel plate walkway which was up in the air. The defendant company is a large commercial structural steel fabricator and erector. In this case, the company was engaged by the head contractor for the project to supply

and erect this steel walkway. The completed walkway was to be 34 metres long and located four metres above the ground.

[4] The incident occurred in the course of placing and fastening steel plates in position on site. This involved working at height, manoeuvring individual steel plates into position and fastening them to the supporting structure.

[5] One of the workers on site was Mr Subramani. He was employed by another company, Cover Staff, who provided his services to Pegasus as a welder. It is accepted, however, on behalf of the defendant that it was in control of the site and therefore responsible for the health and safety of all persons working on the site.

[6] On 29 August last year, Mr Subramani had completed his welding work by mid afternoon and was then assigned to assist in placing and fastening the steel plates of the walkway in conjunction with other workers. While doing this work, Mr Subramani fell from the leading edge of the partly completed walkway to the ground, a distance of some four metres. He suffered considerable injury. The observations and diagnosis at the time were that he had fractures of both wrists, a broken bone in his arm, a fractured cheek bone, cuts to his chin and extensive bleeding from his nose. I return to this later because it appears that the injuries in fact were more extensive than that.

[7] The defendant company accepts that it was responsible for ensuring Mr Subramani's safety on site and that it failed to take all practicable steps to do so. The charge is based on the company's failure to take five specific steps.

[8] Firstly, there was a failure to properly plan the work so that workers were isolated from falling hazards. As the work progressed, the methodology changed and appropriate safety precautions were not properly considered or implemented to meet changed circumstances.

[9] Secondly, the company's chose to rely on individual safety harnesses for workers rather than a safety net or crash deck below the particular work site which would ensure the safety of any person who fell.

[10] Third, there was a failure to ensure that the safety harnesses used were adequately and suitably installed. In particular the safety harness and lanyard system issued to Mr Subramani and used by him was not fit for the purpose and the method of securing the lanyard was inadequate.

[11] Fourthly, workers were not provided with adequate induction, instructions and directions. In particular Mr Subramani was not given suitable induction regarding steel placement before being assigned to this work. The fact that English was his second language was perhaps a significant factor here also.

[12] Finally, the company failed to stop work when unsafe practices were being employed on site. The foreman on site saw that Mr Subramani was working at height without his safety harness being properly secured. He repeatedly gave Mr Subramani directions but he did not stop work when those directions were not observed. Indeed, he directed Mr Subramani to assist with installing the steel plates notwithstanding the lack of appropriate safety harness arrangements.

[13] The approach the Court must take in sentencing matters such as this is very well known and established. It is derived from the decision of the full Court of the High Court in the *Department of Labour v Hanham and Philp Contractors Ltd*.¹ I adopt the three-step process set out in that decision. Firstly, I must assess the amount of reparation which should be paid to the victim Mr Subramani for emotional harm. Then I should fix the amount of the fine which is to be imposed upon the defendant. Finally I must make an overall assessment of the proportionality and appropriateness of the combination of reparation and fine in relation to the gravity of the offending.

[14] I turn firstly to reparation for emotional harm. I have been provided with a good deal of information in this regard. In addition to the summary of fact, I have considered the extensive victim impact statement which has recently been up-dated. I have also considered what was said at the restorative justice conference which was held on 19 October.

¹ *Department of Labour v Hanham and Philp Contractors Ltd* (2009) 9 NZELC 93, 095; (2008) 6 NZELR 79 (HC)

[15] Mr Subramani is an Indian national aged 27, or maybe 28 by now. He had been working in Singapore before coming to New Zealand last year. At that time he had recently married and his wife was still in India at the time of the incident. It appears that the physical harm suffered by Mr Subramani was more extensive than the fractures and bleeding originally observed. He speaks in his victim impact statement of injuries to his back and knees as well as to his wrists, arm and head. He also details the treatment he received for a broken jaw. Following the incident Mr Subramani was in hospital for four weeks or so during which time he had surgery to insert plates and screws into the fractures to assist healing. He has since had to have further surgery to remove those devices.

[16] Mr Subramani has suffered serious ongoing effects of his injuries, including pain in many parts of his body, poor sleep and blurred vision. He has also had difficulty eating as a result of the injury to his jaw. For more than a year after the incident, Mr Subramani was unable to resume his work as a welder and there was doubt for some time about his ability to ever do so in the future. He has, however, recently been assessed as able to return to welding and it appears he has done so, albeit with some discomfort.

[17] The incident has had extensive and ongoing effects on Mr Subramani's emotional and spiritual wellbeing. He has lost confidence and feels humiliated and ashamed. He cannot show the skills that he has acquired over years of work. He has experienced day-to-day frustration in caring for himself and these difficulties appear still to persist to an extent.

[18] The emotional and psychological effects of the incident have impacted on Mr Subramani's marriage. Mr Subramani came to New Zealand one week after his marriage while his wife remained in India. His wife joined him in New Zealand shortly after the incident and, understandably, Mr Subramani has found it difficult to communicate with his new wife and to relate to her as he might otherwise have done had he not suffered these injuries.

[19] The effects of the incident have spread to Mr Subramani's wider family whom he was supporting in India. Uncertainty about his future earning ability has

caused tension within the family which has distressed Mr Subramani. He also has concerns about his ability to repay debt he incurred to come to New Zealand and to support his wife who is unemployed and who wishes to study.

[20] In his victim impact statement, Mr Subramani also speaks of how the incident has impacted on his spiritual life. He says his Hindu faith has been seriously compromised and that this faith was previously central to his life. This, it appears, has led to a loss of respect within his family and feelings of shame on his behalf.

[21] The final factor I mention is that uncertainty about his future ability to work has led Mr Subramani to be worried about his immigration status. It may well be that the recent assessment of Mr Subramani as able to resume most of his usual duties may have alleviated some of those issues but it remains the case that he has been subject to those concerns and pressures for some 14 months now.

[22] Counsel for both parties have drawn my attention to other decisions of the Court involving victims who suffered injuries from falling. Drawing certain parallels in terms of physical injuries Mr Gallaway submits that reparation of \$20,000 would be appropriate. For Worksafe, counsel submits that an appropriate figure would be \$35,000.

[23] In deciding this issue it is important to focus on emotional harm rather than physical injury. While physical injury will almost inevitably lead to emotional harm, reparation is not, and under the Sentencing Act 2002 cannot be awarded for the physical harm itself. That is the function of Accident Compensation. Mr Subramani has received accident compensation and will continue to do so to the extent he is entitled. My focus must be on other matters and principally emotional harm. In this case, Mr Subramani's personal circumstances have led to the emotional harm he has suffered as a result of the incident being greater and broader than might have been suffered by another worker involved in a similar incident. In my view an appropriate amount of reparation for emotional harm is \$35,000.

[24] I turn then to the fine which ought to be imposed on the defendant. In *Hanham v Philp* the High Court established three bands based on culpability.

Having regard to the admitted failures to ensure workers' safety and all the information provided, together with the submissions of counsel, I regard the culpability of the defendant in this case to be at the upper end of the medium band. I therefore take a starting point for a fine of \$90,000.

[25] In forming this view, I have considered the previous cases referred to in the submissions of counsel for both parties. In addition I have considered the factors set out in paragraph [25] of Mr Gallaway's submissions describing the steps which the company did take to promote safety on site or which put the company's admitted failures into context. I have taken those matters into account and they have been a factor in my decision that culpability be towards the top of the middle band rather than in the high band.

[26] I turn then to the aggravating and mitigating factors. I agree with counsel there are no statutory aggravating factors. On the other hand there are a number of mitigating factors. This is the company's first prosecution for breach of the Health and Safety in Employment Act. The company has co-operated fully in the investigation of the incident. From the outset the company has shown what I accept is genuine remorse. This was demonstrated in the restorative justice conference recently held at which senior management of the company freely acknowledged the company's fault and apologised in person to Mr Subramani and his wife.

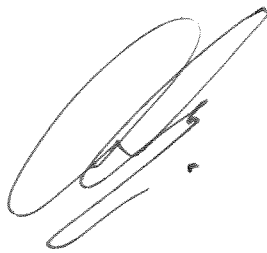
[27] The company has also done what it can to support Mr Subramani since the incident. I understand this to have included topping up the earnings related compensation which he has been receiving. These matters are very much to the company's credit. For these factors I would reduce the fine by 10 percent. There is no doubt that the reparation I will order will be paid. That is a significant mitigating factor in terms of the Sentencing Act and I reduce the fine by a further 15 percent on that account.

[28] Another significant factor is that the company has taken appropriate steps to avoid the repetition of an incident such as this one. I take Mr Gallaway's point that this incident, tragic though it was, does not appear to have been part of a systemic failure. Rather, it has been a consequence of a series of failures which were to a

large extent limited to this event. For the steps that the company has taken since, I would reduce the fine by a further five percent. In total then I would reduce the fine by 30 percent which would suggest a fine of \$63,000. I then take into account that the company has entered a guilty plea and freely acknowledged its fault. That should be reflected in a further reduction of 25 percent. That would lead me to a fine of \$47,250.

[29] The final step in this process is that I must step back and assess whether the total of reparation and fine are appropriate and in proportion to the circumstances of the case and in particular the culpability of the defendant company. In my view a total penalty of \$80,000 is appropriate. I therefore reduce the fine to \$45,000.

[30] Pegasus Engineering Limited is ordered to pay reparation for emotional harm to Mr Subramani of \$35,000. The company will also be fined \$45,000.

A handwritten signature in black ink, appearing to be 'A A Couch', written in a cursive style.

A A Couch
District Court Judge