EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT MANUKAU

CRI-2017-092-006659
[2017] NZDC 27252

WORKSAFE NEW ZEALAND
Prosecutor

v

STORAGE AND DISTRIBUTION SPECIALISTS LIMITED
Defendant

Hearing:	27 November 2017
Appearances:	A Longdill for the Prosecutor A Weal for the Defendant
Judgment:	27 November 2017

NOTES OF JUDGE G F HIKAKA ON SENTENCING

Preamble

[1] During the course of my oral decision, it was necessary to revise it on account of my misinterpretation of submissions with respect to culpability and sentencing tariffs, and in general terms, to tidy syntax, grammar and flow. I advised counsel that I would so amend the decision once it had been transcribed. I have done so. The reasons for my decision and the sentence have not changed. Counsel have been provided with a copy of the amended decision in case I have overlooked anything relevant and advise accordingly. The following decision was issued after counsel had that opportunity.

Decision

[2] Storage and Distribution Specialists Limited appear for sentence today following a guilty plea to a charge under s 34 Health and Safety at Work Act 2015. The charge is that the defendant had a duty in relation to its truck drivers, including one of them who was injured, and failed in that duty. The defendant had failed to, so far as reasonably practicable, consult, co-operate with and co-ordinate activities with Kuehne + Nagel Limited (K and N), an entity that also had a duty in relation to the same matter. The maximum penalty for this offence is a fine of $100,000.

[3] The summary of what occurred is that on 1 June 2016 [the victim], one of the defendant's truck drivers, arrived at the K and N site to collect freight for a company they had a contractual relationship with. The summary refers to the defendant being a regular attendee at the K and N site in order to collect items to be transported to their customers. It is accepted that the frequency of visits leading up to the incident was three times a week.

[4] On this occasion the defendant's driver was waiting in line with other trucks. He took his paperwork to the K and N office for processing, and moved his truck forward in the line until it was his turn to have his truck loaded. He interacted with the forklift driver from the site, opened his truck, and loading commenced. He waited beside his truck and checked the load as it was loaded. From the summary, that was the driver's usual practice.

[5] While the loading was still taking place, [the victim], the driver, noticed an empty space in front of his truck where another truck could park. He went to signal another truck driver to take up that space. Unfortunately he had done that from the rear of his truck, and when he started walking back towards the front of his truck the forklift driver, who initially had been aware of the truck driver's presence while loading but did not see him after he had gone to signal to the other truck, reversed his forklift onto him, pinning his leg and foot to the ground.

[6] [The victim] was freed by other workers and taken to hospital by ambulance, where he remained for six days. He suffered seven fractures to his left foot and required just under three months off work. WorkSafe was notified, an investigation conducted, failings identified, and the charge was filed with the Court.

[7] The summary refers to the failings of K and N Limited with respect to the worksite they were responsible for, and those failings appear greater than those of the defendant's. The defendant's failure was, as indicated at the beginning, to not consult with K and N about a safe system of work for loading trucks at K and N's site.

[8] The guilty plea and conviction were entered at an early stage. [The victim] continues to work for the defendant, and he declined to take part in a restorative justice process. There has been no issue raised with respect to him being looked after by the defendant. In that he has been given $2,000 to recognise the harm that he suffered. His ACC entitlements have been topped up by K and N. He is now back in full-time employment of the defendant. There is no victim impact statement.

[9] The approach that counsel agree is appropriate in these cases is set out in the two cases that have been provided to the Court. Those cases underpin prosecutions and sentences in these situations.

[10] The first is *Department of Labour v Hanham & Philp Contractors Limited*.[1] That case was determined under similar legislation, the Health and Safety in Employment Act 1992. That case has been followed by the case of *WorkSafe New Zealand v Rangiora Carpets Limited*,[2] but with one additional step to the approach recommended in *Hanham. Rangiora* is an early case decided under the new Health and Safety at Work Act 2015.

[11] The *Hanham & Philp Contractors Limited* case had three steps. Health and Safety at Work Act 2015 added a provision vesting the court with a discretion to order regulatory costs in Part 4, subpart 8. Accordingly *Rangiora Carpets* added a fourth step.

---

[1] *Department of Labour v Hanham & Philp Contractors Limited* (2008) 6 NZELR 79.
[2] *WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587.

[12] In this case, prosecution seeks an order for payment of a contribution to the regulator's legal costs in bringing the prosecution.

[13] Accordingly it appears that the appropriate steps are;

(a) first, to assess the amount of reparation;

(b) second, to fix the fine;

(c) third, (the additional component), to make ancillary orders as allowable now under the new legislation (in this case contribution to regulator's legal costs); and

(d) fourth, to overall assess proportionality and determine the appropriate total of reparation, fine and costs.

First Step - Reparation

[14] Counsel agree that the steps the defendant has taken with respect to the injured employee have been appropriate. The $2,000 payment is thought to be reasonable in all the circumstances. It was agreed that there is no need to add to what has been paid by making a reparation order.

[15] I share counsels' view. I do not make a reparation order.

Second Step - Fine

[16] The second step, and this is where counsel part ways, is assessing the appropriate fine. Bands of fines have been provided in the submissions. Those bands make reference to the *Hanham & Philp Contractors Limited* case and the *Rangiora Carpets Limited* case. The *Rangiora Carpets Limited* case is the latter of the two cases referred to, and has a finely tuned series of bands - six as opposed to four from *Hanham & Philp Contractors Limited*.

[17] In the *Hanham & Philp Contractors Limited* the maximum fine for the relevant charge was $250,000.00, the four bands were;

(a) low culpability, up to $50,000 (about 20 percent of the maximum);

(b) medium culpability, $50,000 to $100,000 (up to about 40 percent of the maximum);

(c) high culpability, $100,000 to $175,000 (about 70 percent of the maximum); and

(d) extremely high culpability, $175,000 to the statutory maximum of $250,000 (from about 70 percent up to the maximum of $250,000).

[18] *Rangiora Carpets Limited,* the maximum fine for the relevant charge was $1.5 million, suggested the following bands:

(a) low culpability up to $150,000 (10 percent of the maximum);

(b) low-to-medium culpability $150,000 to $350,000 (10 percent to just over 23 percent of the maximum);

(c) medium culpability $350,000 to $600,000 (just over 23 percent to 40 percent of the maximum);

(d) medium-to-high culpability $600,000 to $850,000 (40 percent to just over 57 percent of the maximum);

(e) high culpability $850,000 to $1.1 million (just over 57 percent to about 74 percent of the maximum); and

(f) extremely high culpability over $1.1 million (over the 74-percent mark up to the maximum of $1.5 million).

[19] On the face of it, the provision breached by failure to meet the duty of consultation has the appearance of being strict liability, in that you either did consult or you did not. Both counsel have referred to aspects of the defendant's position which would enable a more nuanced approach than either performing or not performing the duty.

[20] The bands from *Rangiora Carpets Limited* are, in my respectful opinion, to be preferred to those of the *Hanham & Philp Contractors Limited.* They have been set under the 2015 Act with its higher penalties and they allow for finer assessment of culpability.

[21] Prosecution submit that culpability is in the medium band. Reasons are that first, no steps taken at all to meet the duty. Second, other things could have been done for the defendant's employees, for example, familiarising them with the worksites that they were going to visit in the course of their employment. In this case, the K and N worksite. Prosecution submit that there was no induction into that sort of process, no log kept of induction processes, and there appeared no awareness of what was involved at the K and N site and what has been referred to as an exclusion zone - which I take to mean a place where people on foot are not go.

[22] Submissions on behalf of the defendant are toward attributing low culpability. Reasons for that are the years that the defendant has been visiting this particular worksite, and that the drivers have been going backwards and forwards over those years without incident. Therefore it would be reasonable to expect the defendant's drivers were aware of safety expectations at the K and Nagel site. With the combination of no incidents and reasonable expectation of awareness, counsel for the defendant submitted that culpability is at the low end of the scale.

[23] The Health and Safety at Work Act 2015 set out it purposes in s 3 including, protecting workers, minimising risk or even eliminate it if possible, fair and effective workplace representation, encouraging unions and employer organisations to take instructive roles, promoting advice, training and education on work health and safety, in addition to securing compliance, ensuring scrutiny and providing a framework for continuous improvement.

[24] The Act recognises overlapping duties. The defendant is one of many companies that visit the K and N site. The defendant has a sole director, eight drivers, about 20 staff, and provides third-party logistics, warehousing and transport services in the Auckland area.

[25] K and N is a worldwide logistics and transport business employing more than 70,000 people at 1300 locations in 100 countries. They operate a distribution and transition site in Māngere where the incident occurred.

[26] In this case, it was submitted that K and N have greater responsibility being "top of the chain", as has been referred in counsel's submissions, and therefore, primary responsibility for organising its own site to ensure compliance with safe work systems.

[27] In order to assess the defendant's culpability, I have taken into account the defendant's usual work practices before the incident and the steps the defendant has taken since this incident. I have done that to assess whether the defendant takes employment responsibilities seriously or not.

[28] Before the incident, on 7 March 2016, the defendant employed someone with health and safety experience because of the need to give more focus in that area, and that the defendant had monthly health and safety meetings. The defendant had no previous involvement with the law with respect to work safety.

[29] After the incident, the defendant set in place standard operating procedures for loading and unloading heavy vehicles; a report for near-miss incidents and accident events; monthly health and safety meeting records; a first aider's register and post-emergency review documents and staff training records. The defendant has taken whatever steps WorkSafe recommended. The health and safety management systems were audited by WorkSafe as recently as October 2017 and found to be sufficient.

[30] I am satisfied that the defendant had a level of awareness and commitment to the safety of their employees before the incident but that has been greatly enhanced since the incident.

[31] I am of the view that the defendant's culpability is in the low to medium band. The defendant is not an irresponsible or reckless employer. In many respects the incident could fairly be described as an accident through momentary inattention by both the defendant's driver and K and N's worksite forklift driver.

[32] In line with the low to medium culpability assessment, I set the fine at $15,000.00 (fifteen percent of the maximum).

[33] That assessment is not to be taken as any indication of K and N's culpability.

Step Three - Costs

[34] Prosecution submitted that it is appropriate for the defendant to make a contribution toward legal costs incurred in the prosecution, specifically, $3,750.00 being half the cost for engaging external legal counsel.

[35] Counsel for the defendant submitted that there is no evidence of costs incurred, and even if there was, this an incident at the lower end of seriousness, therefore there should have been no need to instruct counsel from outside the prosecuting agency. Therefore, a costs order should not be made.

[36] The only case that I am aware of that considered this issue under the 2015 Act was *Rangiora Carpets Limited* decision. The Judge there thought the costs sought were very modest and made the order as sought. It appeared from his decision that he was able to make that assessment from a schedule of how the costs had been calculated.

[37] I have not been provided with a foundation from which to make such an assessment.

[38] Accordingly, I do not order regulator legal costs.

Fourth Step - Overall Assessment

[39] The fourth step is to make an overall assessment of proportionality and determine the appropriate total of reparation, fine and costs. Included in this assessment is the defendant's financial capacity. The defendant is able to pay but requests payment by monthly instalment.

[40] The defendant has co-operated at every step of the investigation and prosecution. The defendant had a good safety record and workplace safety awareness prior to the incident and took all the recommended remedial action after the incident.

[41] A reasonable sum has been tendered to the victim already so no reparation is ordered.

[42] The factors in [40] combine to a 30% discount from the $15,000 fine to arrive at $10,500.00. A further discount of 25% is available for early guilty plea to arrive the final amount of $7,825.00.

Sentence

[43] Fine of $7,825.00 payable at $1,000.00 per month beginning 15 December 2017.

G F Hikaka
District Court Judge