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

ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSONS/ALSO ANY REFERENCE TO DEFENDANT COMPANY'S FINANCIAL POSITION PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT QUEENSTOWN

CRI-2017-059-000529
[2018] NZDC 5948

WORKSAFE NEW ZEALAND
Prosecutor

v

MILLER FOODS LIMITED t/a
REMARKABLE TORTILLAS
Defendant

Hearing: 12 March 2018

Appearances: N L-L K Szeto for the Prosecutor
E L Keeble for the Defendant

Judgment: 27 March 2018

JUDGMENT OF JUDGE J J BRANDTS-GIESEN

Preliminary

[1] On 12 March 2018 I sentenced Miller Foods Limited, trading as Remarkable Tortillas, with respect to one charge of a breach of ss 36(1)(a), 48(1) and (2)(c) Health and Safety at Work Act 2015.

[2] Because of the shortage of Court time in the Queenstown District Court on that day I gave an abbreviated decision and indicated that I would be giving full reasons in due course.

[3] I adopted that course because not only the victim in these proceedings but also his family and supporters, as well as representatives of the defendant company which is no longer based in Queenstown, had come from considerable distances to attend the hearing.

[4] I now elaborate on my sentencing as I had undertaken to do.

[5] Miller Foods Limited (referred to "MFL") appeared for sentence on 12 March 2018 having pleaded guilty to one charge under the sections referred to above. In pleading guilty, it acknowledged breaching the duty in s 36(1)(a) which imposes a requirement on all persons conducting a business or undertaking (known as a PCBU) to ensure the health and safety of their works as far as is reasonably practicable. The maximum penalty for a corporate entity is a fine of $1.5 million.

The facts

[6] The summary of facts is agreed. MFL is a small to medium sized business based in Levin but at the time of this accident it had taken over a business operating in Queenstown. The business converts raw products into food products and distributes them, as I understand it, widely throughout New Zealand. It employed an approximately nine staff.

[7] The victim in this matter was [name deleted] (whom I shall for convenience refer to as "the victim.") The victim was a young man of 20 years who was employed as an oven operator. He had begun work in September 2015 for the previous owner of the business and continued when the defendant company acquired the business in September 2016.

[8] The machine is known as a Lenin Tortilla machine ("the machine") which is a duplex tortilla press and oven manufactured in Mexico. At the time of the accident the machine had a guard which could easily be lifted off by hand while the machine was operating. Tortillas would regularly get stuck in the machine. The operator would then lift off the guard and use a spatula to remove it back onto the conveyor or discard it if the tortilla was damaged.

[9] On 23 November 2016 the victim was at work. Two hours into his shift the machine jammed. The victim lifted off the guard and used a spatula to remove the jammed product. However, on this occasion, the spatula itself became stuck between the metal conveyor slats. The victim put on his heat-resistant glove and reached in to get the tortilla and the spatula out with his gloved hand. The glove also became stuck into the machine. The victim's gloved right hand and right arm were drawn into the machine.

[10] A co-worker assisted the victim, turned off the machine and poured cold water over the arm until emergency services arrived. The victim was trapped in the machine for about 25 minutes when he was freed by the Fire Service which had to dismantle the machine first.

Victim impact

[11] On the day of the accident it appeared that the victim had sustained soft tissue trauma, skin loss and below the elbow extreme burn injuries and a facture to the right radial head of the elbow. On receiving medical treatment it appeared the victim's injuries were more serious. The victim is right handed. It appeared that the victim's right arm was broken. He suffered extensive burning and crushing injuries and had to undergo at least three operations in the four weeks after the accident. There was a possibility that total amputation of three fingers would be required. Fortunately that damage could be reduced to the amputation of the tips of three fingers. The victim had to take painkillers and his fingers had to be re-dressed regularly. He still has permanent damage to his right arm. The burning and amputation of the fingertips restrict him in his activities.

[12] There have also been significant psychological and physical effects, which continue to this day. They have affected the victim's ability to do many forms of a physical nature including the use of computers, musical instruments and the ability to touch without pain.

[13] As the victim has put it himself:

> This event has changed my life forever, I have gone from a fit, young guy with a focus on study and a career to being severely limited by a disability that will haunt me for the rest of my life. (See victim impact statement)

Approach to sentencing

[14] The Act replaced the Health and Safety in Employment Act 1992 (HSEA). The approach to sentencing under s 50 of that Act is well known having been established by the High Court in the leading case *Department of Labour v Hanham & Philp Contractors Limited*[1].

[15] The approach to sentencing under the old regime indicated the following three steps:

(a) To assess the amount of reparation.

(b) Fixing the amount of the fine.

(c) Making an overall assessment of the apportionality and appropriateness between the reparation and the fine.

[16] Under the 2015 Act, which came into effect on 6 April 2016 (ie, less than eight months before this offence took place), the Court can make a variety of ancillary orders, inter alia, adverse publicity orders, training orders, orders to pay the regulator's costs in bringing a prosecution, in addition to the orders for reparation previously allowed.

[17] As a result of that WorkSafe has suggested, and it is now generally accepted by the Courts, that an additional step be inserted between steps 2 and 3 of the framework set in the *Hanham & Philp* case. That relates to the making of ancillary orders.

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[1] *Department of Labour v Hanham & Philp Contractors Limited* (2008) 6 NZELR 79 (HC).

[18] I will now consider the four steps in the sentencing process.

Step 1 – Assessing the quantum of reparation

[19] Reparation is the principal focus in the sentencing process as distinct from the fine.

[20] Section 32(1)(b) Sentencing Act 2002 provides that the Court may impose reparation if the offender has, "through or by means of its offending caused a person to suffer emotional harm or loss consequential on any physical harm."

[21] The victim has suffered substantially as a result of this accident. That is quite clear from the victim impact statement which was read by the prosecutor in open Court at the request of and in the presence of the victim. The prosecution here has submitted that an emotional harm reparation award of between $40,000-$45,000 is appropriate in the current circumstances.

[22] Counsel for MFL submits that the emotional harm payment should be significantly less at $30,000-$35,000.

[23] Examples from other cases have been given. While some of the other injuries have been superficially greater, I cannot under estimate the emotional harm suffered by a young man who was working in a factory before embarking on a university career. The victim here has known talent as a musician (including keyboard). He has lost the tips of three of his fingers on his right hand. Not only is that disfiguring, it is debilitating and will severely challenge him throughout his life. I consider that reparation of $45,000 is appropriate because it has affected this victim in many areas of his life.

[24] This is a case not just where significant injuries were suffered at the time but where the victim recovers. Here the effect of those injuries are permanent. The capacity of young people to deal with life's adversities is often less robust than that of older people. Employers and the Courts have, in my view, a need to protect inexperienced and young workers in a special way.

Step 2 – Assessing the quantum of the fine

[25] WorkSafe advocates a four-band approach to culpability and the appropriate penalty in dollar terms.

[26] In the case of *WorkSafe v Rangiora Carpets Limited*[2], His Honour Judge Gilbert adopted a six-band approach which I prefer as it provides a more measured approach to sentencing which should lead to more commentary. Having said that, every case turns on its own facts.

Culpability Band	**Fine**
Low	$0 to $100,00
Low/Medium	$100,000 to $300,000
Medium	$300,000 to $500,000
Medium/High	$500,000 to $700,000
High	$700,000 to $1,000,000
Extremely High	$1,000,000 to $1,500,000

[27] MFL's counsel submits that the culpability in this case is in the medium band but at low level.

[28] WorkSafe, on the other hand, considers the liability is medium/high with a starting point of $700,000. The defendant puts forward a starting point of $400,000.

[29] I consider that in this case the level of culpability lies in the middle range of medium to high. That is substantially higher than my starting point in *WorkSafe v Kaye's Bakery Limited*[3] because in the latter case there was a very experienced machine operator who made a fundamental error. In this case we have a 20-year-old with only one year's experience (at most) with this machine, and indeed working life itself. The injuries in the case before me are also more serious and more

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[2] *WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587.
[3] *WorkSafe New Zealand v Kaye's Bakery Limited* [2018] NZDC 5427.

permanent than in *Kaye's Bakery* case, where the staff member was back, at least on light duties, a fortnight later and where his long-term loss was a loss of sensitivity in one repaired finger only.

[30] Here we had a hazard which was known and was easily and cheaply remedied (a cost of approximately $5000) after the event and within a matter of days. In *Kaye's Bakery* the remediation of danger was above $25,000. The machine in the instant case played up regularly (the victim says sometimes several times an hour) and hence we were faced not (as in the *Rangiora Carpets* case) with an occasional risk but a regular risk. In effect, the operator of this machine was almost always at risk. I consider the youth of the worker as an exacerbating feature. New staff require not just extra training but also closer supervision than this young man had. With the problem arising so regularly his supervisors should have been more attentive to supervising him.

[31] Hence I have adopted the starting point of $600,000.

[32] WorkSafe acknowledges that there are a number of mitigating factors applying to MFL. These include its co-operation with the investigation, remedial steps being taken to prevent such an accident again, remorse, its willingness to attend restorative justice and pay reparation and taking out insurance to pay such reparation. While restorative justice has not taken place for practical reasons, it is noted that after the accident various visits were paid by senior management and the director of the defendant company to the victim. That shows not just the remorse referred to but also a sense of responsibility which is typical (but not always found) in a small company accident.

[33] I do not accept there should be any discount for a good safety record because this company had only started business two months before the accident and this dangerous machine had been operated during most of the company's short time as an employer.

[34] I allow a discount of 25 percent to recognise the mitigating features I have referred to. From that I deduct a further 25 percent in recognition of MFL's plea of

guilty at its first appearance. That brings the fine to $337,500 as an appropriate penalty, subject to what follows in step 4 below.

Step 3 – Ancillary orders

[35] The Act enables the Court to make various ancillary orders.

[36] The question of costs arises. Apart from instructing outside counsel on a brief matter, which I suspect may have been an adjournment, all these costs have been incurred by WorkSafe on an in-house basis. For that reason, and particularly for the reasons of affordability, I do not make an order for costs in this case.

Step 4 – Overall assessment

[37] In this case there has been extensive evidence provided by the defendant as to the finances of the company [details deleted].

[38] As I have said on 12 March, the "coat has to be cut according to the cloth." The company's liability to pay a fine is agreed in this case, both by the prosecution and the defence. That is unusual. [Details deleted]. This is a company that produces a valuable product of value to the community. It employs nine staff. It has centralised its activities in Levin to allow its director to be more closely involved. Some staff have relocated from Queenstown. The reparation payable (even if insured) provides plenty of incentive for this company to ensure that it will be far more careful than it was up until the time of the accident. This is a small company in the early stages of its operation. It is not a public company where a fine is often simply regarded as "an expense of doing business."

[39] I have been greatly helped in this regard in coming to this conclusion by the evidence of Mark John Greer, on behalf of the defendant company, who is an independent chartered accountant, and [a senior accountant] engaged by WorkSafe New Zealand.

[40] The shortcomings and general conduct of the company were not so egregious as to require it to be closed down. The company's conduct immediately after the

accident and, I understand, to this day, has shown not just the remorse of being caught but a sense of responsibility towards its employees and a desire to protect them, as well as to remain within the law and [details deleted].

[41] Summary: I record the penalties I imposed on 12 March, ie, reparation $45,000 plus physiotherapist fees of $541 and a shortfall in wages of $6741.97. Those amounts taken together amount to $52,282.97. I do not impose a fine for the reasons I have given.

[42] The name of the victim is suppressed as are details of the company's financial position.

J J Brandts-Giesen
District Court Judge