WorkSafe New Zealand v Rangiora Carpets Ltd

District Court Christchurch
4 October 2017
Judge TJ Gilbert

CRI-2017-009-4861;
[2017] NZDC 22587

Sentencing — Health and safety — Workplace injury — Person conducting business — Breach of requirement to ensure health and safety of workers as far as reasonably practicable — Employee falling from mezzanine area — Reparation — Fine — New step in sentencing framework — Consideration of ancillary orders — Proportionality — Increase in fines — Further culpability bands — Ability of company to pay fine — Criminal Procedure Act 2011, s 202(a); Health and Safety at Work Act 2015, ss 36(1)(a), 48(1), 48(2)(c), 151, 151(2)(g) and 152 and Part 4 sub-Part 8; Health and Safety in Employment Act 1992, s 50; Sentencing Act 2002, ss 14, 14(2), 32(1)(b) and 40.

Rangiora Carpets Ltd (RCL) appeared for sentencing having pleaded guilty to one charge under s 48 of the Health and Safety at Work Act 2015 (the Act). In pleading guilty, RCL had acknowledged breaching the duty in s 36(1)(a) of the Act which imposed a requirement on all persons conducting a business or undertaking (a PCBU), to ensure the health and safety of their workers so far as was reasonably practicable.

RCL was a medium-sized business based in Rangiora. It supplied and installed floor coverings to the domestic and retail markets. RCL operated out of a two-story commercial building. There was a mezzanine area approximately 2.7 m high. Immediately adjacent to it was a false ceiling constructed primarily of plasterboard which sat above the first floor. That ceiling was not capable of bearing any significant weight. There was no balustrade or edge protection to partition the mezzanine from the false ceiling and stop workers falling onto, and then through, the ceiling to the first floor below. The mezzanine was constructed some years ago without a consent and at the time of the accident it was non-compliant with the Building Code by virtue of the lack of balustrade. The victim had boxed up paperwork and arranged for two co-workers to carry it up to the mezzanine because it was too heavy for her to lift. She went up to the mezzanine to create some space for the boxes. She identified a box containing old paperwork that was no longer required. It was too heavy for her to lift and so she bent down to push it along the carpet to the edge of the mezzanine. As she stood up, her foot slipped off the side of the

mezzanine and she overbalanced falling through the false ceiling to the floor 2.5 m below. As a result, the victim suffered a broken arm, broken right shoulder, broken right collarbone, fractures to the left side of her pelvis, and a laceration to her head. She had largely recovered from her injuries, although still experienced some residual symptoms.

Both counsel were agreed in general terms that the same broad approach undertaken with the Health and Safety in Employment Act 1992 was required under the new Act with one modification. Under the new Act, the Court now had the ability to make a variety of ancillary orders, such as "adverse publicity orders", "training orders", and orders to pay the regulator's costs in bringing a prosecution. Given these additional orders that were now available, the prosecution suggested that an additional step be inserted between steps two and three of the traditional sentencing framework. That additional step was to consider the making of any of the ancillary orders. The District Court adopted this approach and considered four steps in the sentencing of RCL.

Held: (ordering a total fine of $157,500, reparation of $20,000 and ancillary costs of $1,228)

(1) The enormous potential variation in corporate defendants needed to be capable of recognition when it came to sentencing. To allow for this, there needed to be a buffer at the top end of the available sentencing range for a wealthy defendant to have their otherwise appropriate fine increased to ensure the purposes and principles of sentencing were properly met in each case. The huge increase in maximum sentences meant further bands were appropriate. The inclusion of further bands, alongside modified penalty ranges, gave effect to Parliament's intention that fines should increase while also providing a workable framework. This should assist with consistency in sentencing which was important. Culpability in this case was near the cusp between the low/medium and the medium bands. The hazard should have been obvious and was easily and cheaply remedied. However, it was important to acknowledge that the mezzanine was a storage area only (see [33], [34], [36]).

(2) Society had a strong interest in businesses operating. RCL was a good case in point. There were 16 families in Rangiora which relied on it for their livelihood. Whilst it had breached its obligations, and as a result, one of its employees had been injured, that breach was not intentional. RCL was otherwise a responsible corporate citizen. It was nonsense to suggest that because of this single unfortunate accident, it should effectively be put to the sword if the appropriate fine was out of its reach. Instead, RCL needed to be brought back into compliance with the health and safety regime (that had been achieved through remedial steps already taken) and then fined to acknowledge what had occurred. It would only be in quite exceptional cases, likely involving repeat offending and/or the most egregious of breaches, that the Court would impose a sentence knowing it would force a business to close its doors (see [51], [52], [53]).

Cases mentioned in judgment

Department of Labour v Hanham & Philp Contractors Ltd (2008) 6 NZELR 79, (2008) 9 NZELC 93,095 (HC).

Department of Labour v Pike River Coal Ltd [2014] DCR 32 (DC).

Charge

The defendant appeared for sentencing having pleaded guilty to a charge under s 48 of the Health and Safety at Work Act 2015.

E Jeffs and *L Moffitt* for the prosecutor.
TJ Mackenzie for the defendant.

JUDGE GILBERT. [1] Rangiora Carpets Ltd (RCL) is for sentence having pleaded guilty to one charge under ss 2(c) and 48(1) of the Health and Safety at Work Act 2015 (the Act). In pleading guilty, it has acknowledged breaching the duty in s 36(1)(a) which imposes a requirement on all persons conducting a business or undertaking, or PCBU as they are known, to ensure the health and safety of their workers so far as is reasonably practicable. The maximum penalty for a corporate entity is a fine of $1.5 million. The maximum for an individual offender is a fine of $300,000.

Facts

[2] The summary of facts is agreed.

[3] RCL is a medium-sized business based in Rangiora. It supplies and installs floor coverings to the domestic and retail markets. It employs approximately 16 staff and engages other contractors as required.

[4] The victim in this matter is [the victim]. She has been employed with RCL since [year deleted].

[5] RCL operates out of a rented two-story commercial building. There is a showroom on the ground floor and office space on the first floor. There is also a mezzanine above the office area accessible by stairs from the first floor.

[6] The mezzanine is approximately 2.7 m high and 7.4 m wide. Immediately adjacent to it is a false ceiling constructed primarily of plasterboard which sits above the first floor. That ceiling is not capable of bearing any significant weight. There was no balustrade or edge protection to partition the mezzanine from the false ceiling and stop workers falling onto, and then through, the ceiling to the first floor, about two-and-a-half m below. That mezzanine was constructed some years ago without a consent and at the time of the accident central to this matter it was non-compliant with the Building Code by virtue of the lack of balustrade.

[7] The mezzanine was used as a storage area for paperwork and flooring samples. It was accessible to all workers, although it was not part of the shop floor as such. Workers would generally only go up there to store or retrieve flooring samples and paperwork.

[8] The incident itself occurred on 2 June 2016. [The victim] had boxed up [details deleted] paperwork and arranged for two co-workers to carry it up to the mezzanine because it was too heavy for her to lift. She went up to the mezzanine to create some space for the box because the floor was cluttered with other boxes, loose files, and flooring samples.

[9] [The victim] identified a box containing old paperwork that was no longer required. It was too heavy for her to lift and so she bent down

to push it along the carpet to the edge of the mezzanine. As she stood up, her foot slipped off the side of the mezzanine and she overbalanced falling through the false ceiling to the floor two-and-a-half m below.

Victim impact

[10] I have received a victim impact statement from [the victim]. As a result of the accident, she suffered a broken arm, broken right shoulder, broken right collarbone, fractures to the left side of her pelvis, and a laceration to her head. Happily, she has largely recovered from her injuries, although still experiences some residual symptoms.

[11] It is clear that the months following the accident were very difficult. She was hospitalised for eight days before being discharged into the care of her husband who had to take eight weeks off work to look after her. She was unable to move and so required assistance for even the basics in life such as going to the toilet.

[12] [The victim] returned to full-time work with RCL in October last year. She records in her victim impact statement that RCL has been supportive but that the ongoing investigation by WorkSafe has taken a toll on her relationship with her employer and her co-workers.

Approach to sentencing

[13] The Act replaced the Health and Safety in Employment Act 1992 (the HSEA). The approach to sentencing under s 50 of that Act is well-known having been set out by the High Court in the leading case of *Department of Labour v Hanham & Philp Contractors Ltd*.[1] The approach to sentencing under the old regime included the following steps:

- Step one: assessing the amount of reparation;
- Step two: fixing the amount of the fine; and
- Step three: making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

[14] Both counsel are agreed in general terms that the same broad approach is required under the new regime with one modification. Under the new Act, the Court now has the ability to make a variety of ancillary orders outlined in Part 4, sub-Part 8 of the Act. Among other things, these cover a variety of matters such as "adverse publicity orders", "training orders", and orders to pay the regulator's costs in bringing a prosecution.

[15] Given these additional orders that are now available, the prosecution has suggested that an additional step be inserted between steps two and three of the traditional sentencing framework. That additional step is to consider the making of any of the ancillary orders to which I have just referred. That seems a sensible suggestion and it is one that I will adopt.

[16] I turn now to consider the four steps in the sentencing process.

Step one: Assessing the quantum of reparation

[17] There have been no material changes in the way in which the Court should go about assessing reparation under the new Act. Reparation

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

is a principal focus in the sentencing process and serves a distinct purpose to a fine.

[18] Section 32(1)(b) of the Sentencing Act 2002 provides that the Court may impose a sentence of 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.

[19] In this case, as I have noted, [the victim] suffered substantially as a result of the accident. The prosecution has referred to several cases which are factually similar in terms of injury and submitted that an emotional harm reparation award of between $15,000 and $20,000 is appropriate in the current circumstances. Mr Mackenzie, on behalf of RCL, agrees with that assessment, as do I.

[20] In my view, $18,000 in emotional harm reparation is justified. In addition, I award reparation of $2,000 to compensate [the victim] for the travel insurance excess she had to pay when cancelling a trip to [location deleted] necessitated by the accident, and the difference between her wages and the amount ACC paid her during the period she was off work. The total reparation figure is therefore $20,000.

Step two: Assessing the quantum of the fine

Starting point

[21] Under *Hanham and Philp*, setting the starting point for a fine involved assessment of culpability within the following scale:[2]

- low culpability: fine of up to $50,000;
- medium culpability: fine of between $50,000 and $100,000; and
- high culpability: fine between $100,000 and $175,000.

[22] The Court, however, commented that fines in excess of $175,000 up to the statutory maximum of $250,000 may be required in cases of extremely high culpability.[3] This created a de-facto fourth band, although it seems that there was only ever one case where the starting point exceeded $175,000. That involved the Pike River tragedy in which 29 men lost their lives.[4] A $200,000 starting point was adopted alongside large reparation orders.

[23] Given the recent increase in maximum penalty to $1.5 million—a six-fold increase—WorkSafe initially submitted that new bands are appropriate as follows:

- low culpability: fine of up to $500,000;
- medium culpability: fine between $500,000 and $1,000,000; and
- high culpability: fine between $1,000,000 and $1,500,000.

[24] WorkSafe submitted that RCL's culpability lies in the middle range with reference to the traditional culpability assessment factors in *Hanham and Philp*[5] which are largely replicated in s 151 of the new Act.

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2 Above note 1, at [57].
3 Above note 1, at [58].
4 *Department of Labour v Pike River Coal Ltd* [2014] DCR 32 (DC).
5 Above, note 2, at [54]

[25] WorkSafe notes that a proper hazard identification assessment would have picked up the risk created by the lack of balustrade on the mezzanine floor. It further notes that addressing the risk would have been relatively easy and inexpensive. It submits that the substantial risks associated with potential falls from height are well-known and crystallised in this case with [the victim] suffering moderately serious injuries. WorkSafe initially submitted that a starting point for the fine of $700,000 was warranted.

[26] However, in supplementary submissions which I first read yesterday, WorkSafe submitted that a fourth band might be included with revised penalty bands as follows:

- low culpability: fine of up to $400,000;
- medium culpability: fine between $400,000 and $800,000;
- high culpability: fine between $800,000 and $1,200,000; and
- very high culpability: fine between $1,200,000 and $1,500,000.

[27] If a fourth band is included, WorkSafe submits that the appropriate starting point ought to be $560,000.

[28] Mr Mackenzie agrees that the recent increase in maximum penalty clearly signifies Parliament's intention that fines for breaches of workplace health and safety obligations should increase from the former regime. That is inarguable. However, Mr Mackenzie takes issue with WorkSafe's suggested approach and suggests six bands as follows:

Culpability Band	**Fine**
Low	$0–$100,000
Low/medium	$100,000–$300,000
Medium	$300,000–$500,000
Medium/high	$500,000–$700,000
High	$700,000–$1,000,000
Extremely high	$1,000,000–$1,500,000

[29] Mr Mackenzie agrees that RCL's culpability is in the medium band, but he says at the lower reaches. He emphasises that the mezzanine was not part of the shop floor but essentially, a storage area. Further, it is clear that a consultant was retained by RCL to look at workplace health and safety issues prior to the accident but because of the out of the way nature of the mezzanine, it attracted no attention. That attention was directed towards operational areas with more obvious daily hazards such as forklift work areas and the shop floor.

[30] Mr Mackenzie has suggested that a starting point of $300,000 is appropriate. He notes, and this mirrors WorkSafe's assessment, that under the former regime, a starting point of about $70,000 would have been appropriate and, thus, his suggested starting point, he submits, more than acknowledges the legislative intention that financial penalties should significantly increase.

[31] In my view, the approach advocated by WorkSafe with only three or possibly four bands is not a desirable one for several reasons.

First, it results in enormous potential variation in levels of fine within each band. This will make the task of achieving consistency within the sentencing process very difficult. I think further stratification is required in order to assist with meaningful placement of offending within the available sentencing range of $0–$1,500,000. Second, WorkSafe's first approach with only three bands ignored that the previous regime under *Hanham v Philp* had a de-facto fourth band for cases involving "extremely high culpability". Third, sentence starting points are just that, a start. The Sentencing Act, and indeed now the Act[6] both specifically envisage adjustment from a starting point for personal factors including financial capacity.

[32] Arguments around financial capacity can cut both ways. A sentence can either be increased or decreased depending on the wealth of the defendant. The purpose of this is to ensure that the deterrent and penal effect of any fine is maintained relative to the individual entity before the Court. It is self-evident that a fine of $50,000 is very significant to a small one or two-person business such as a corner dairy but is pocket change unlikely to even rate a mention in the annual reports of our largest companies.

[33] The enormous potential variation in corporate defendants needs to be capable of recognition when it comes to sentencing. To allow for this, in my view, there ought to be a buffer at the top end of the available sentencing range for a wealthy defendant to have their otherwise appropriate fine increased to ensure the purposes and principles of sentencing are properly met in each case.

[34] In any event, I agree with Mr Mackenzie that with the huge increase in maximum sentence, further bands are appropriate. The bands he has suggested appear sensible, albeit it with some adjustment to the proposed fine levels. I would modify them slightly as follows:

Culpability Band	**Fine**
Low	$0–$150,000
Low/Medium	$150,000–$350,000
Medium	$350,000–$600,000
Medium/High	$600,000–$850,000
High	$850,000–$1,100,000
Extremely High	$1,100,000 +

[35] The reality is that at some point, appellate guidance will need to be provided on these matters. At the moment, however, I simply need to do the best that I can given the almost total absence of guidance which is available. In doing so, I acknowledge that the bands and sentencing levels I have proposed are, to some extent, instinctive. However, the inclusion of further bands, alongside modified penalty ranges, seems to me to give effect to Parliament's intention that fines should increase while also

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6 See ss 14 and 40 of the Sentencing Act and s 151(2)(g) of the HSWA.

providing a more workable framework than that suggested by WorkSafe. This should assist with consistency in sentencing which is important.

[36] With that in mind, I fix culpability in this case near the cusp between the low/medium and the medium bands. In doing so, it seems to me that the hazard should have been obvious and was easily and cheaply remedied. The hazard involved a potential fall from at least a moderate height with the prospect of significant resulting injuries. However, I also think it important to acknowledge that the mezzanine was a storage area. This case is distinct, for example, from a roofing company whose workers are routinely operating at height and, therefore, always at risk.

[37] I adopt a starting point of $300,000.

Personal aggravating and mitigating features

[38] WorkSafe has responsibly acknowledged that there are a number of mitigating features that apply to RCL. These include its cooperation with the investigation; its blemish-free safety record prior to this accident; remedial steps it has undertaken to prevent such an incident occurring again; remorse and its willingness to attend restorative justice and pay reparation.

[39] With those factors in mind, WorkSafe submits that an overall discount of about 30 per cent is appropriate. That is in line with various authorities. Mr Mackenzie accepts that is appropriate, as do I.

[40] A 30 per cent discount from a starting point of $300,000 reduces the nominal fine to $210,000. From that, a further discount of 25 per cent is appropriate given RCL's plea of guilty at its first appearance.

[41] That reduces the end fine to $157,500, subject to any adjustment necessary in light of its financial capacity. I will return to this at step four of the sentencing process which involves stepping back and making an overall assessment of what might be termed the sentencing package.

Step three: Ancillary orders

[42] As noted above, the Act enables the Court to make various ancillary orders as outlined in Part 4, sub-Part 8. The potential orders are quite wide. However, in this case, WorkSafe simply seeks an order that RCL pay $1228 in costs under s 152 of the Act. That section allows the Court to order an offender to pay the regulator (in this case WorkSafe) a sum that is just and reasonable towards the cost of prosecution, including the investigation. If the Court makes such an order, additional costs under the Costs in Criminal Cases Act 1967 cannot be ordered.

[43] WorkSafe has suggested that a similar approach be adopted to that which is common in professional disciplinary proceedings. In such proceedings, it is routine for recalcitrant practitioners to meet some portion of the costs. This ensures that it is them, rather than compliant members of the profession or trade concerned, who meet the costs of disciplinary action. Those costs can be very significant because they incorporate the costs of convening the disciplinary tribunal as well as instruction of private counsel to represent the profession.

[44] I do not consider the practices relating to costs in professional disciplinary regimes to be of any real assistance. The context and considerations are just so different. What is clear is that Parliament intended that offenders coming before the Court under the Act be liable for at least some costs to defray the expenses that otherwise accrue to the taxpayer.

[45] The $1,228 WorkSafe seeks in this case represents 50 per cent of its internal legal team's time spent on this matter up to the point of filing its first submissions. That time is calculated at very modest rates.[7] No recompense is sought for the investigation costs. In my view, the costs sought are, in fact, very modest and I will make an order in the amount that is sought.

Step four: Overall assessment

[46] The final step in the sentencing process is an overall assessment, a part of which requires consideration of the financial capacity of the defendant. The total of the fine, the reparation imposed, and costs, must be proportionate to the circumstances of the offending and appropriate to achieve the sentencing principles of accountability, denunciation and deterrence.

[47] The fines, in conjunction with reparation and costs total $180,000 in round terms. When I stand back and review matters, particularly in light of the clear Parliamentary intention to increase penalties, I think that is appropriate in this case prior to considering financial capacity.

Financial capacity

[48] As I have noted above, RCL's ability to meet the financial obligations imposed as part of the broader sentencing package need to be considered. Where impecuniosity means a defendant is unable to meet both a fine and reparation, reparation is to be given primacy.[8]

[49] WorkSafe's submissions on the reduction of fine to take account of lack of ability to pay are robust. They note that any fine must "bite" which, of course, is correct. Fines ought not be licence fees. They need to operate to deter the individual offender concerned but also to send the message to the wider community that a failure to comply with workplace health and safety obligations will be met with stern penalties.

[50] WorkSafe goes on to cite the Independent Taskforce on Workplace Health and Safety's report which was drafted prior to the promulgation of the Act. The report opines that the Courts have traditionally extended leniency to small businesses on the basis that they are important to their communities and ought not to be fined to the point of extinction. The Task Force further opines that, in fact, it might be the best result if such businesses were fined to such an extent that they had no option but to fold.

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7 $104 per hour for the Principal Legal Advisor who spent three hours and 45 minutes on this matter, and $78.20 per hour for a solicitor who spent 26 hours and 25 minutes.

8 Section 14(2) of the Sentencing Act.

[51] Society has a strong interest in businesses operating. RCL is a good case in point. There are 16 families in Rangiora which rely on it for their livelihood. While it has breached its obligations, and as a result, one of its employees has been injured, that breach was not intentional. RCL is otherwise a responsible corporate citizen. It is nonsense to suggest that because of this single unfortunate accident, it should effectively be put to the sword if the appropriate fine is out of its reach, and I do not understand WorkSafe to advocate such a view.

[52] Instead, RCL needs to be brought back into compliance with the health and safety regime (that has been achieved through remedial steps already taken) and then fined to acknowledge what has occurred. The fine will serve to mark its transgression, deter it from further offending in the future, and encourage other businesses to comply in the knowledge that if they do not, they will be bitten by the regulator with the backing of the Courts. In my view, it would only be in quite exceptional cases, likely involving repeat offending and/or the most egregious of breaches, that the Court would impose a sentence knowing it would force a business to close its doors.

[53] The real question for me is what level of fine will "bite" for RCL and serve the purposes that I have just noted. Is the otherwise appropriate sentencing package of approximately $180,000 beyond its realistic capacity to pay?

[54] RCL has filed three affidavits attesting to its financial position. The first two are from its Managing Director, Jamie Lumber. The second is from its accountant, Dawn Belcher. Included in that material is the annual report for RCL as at 31 March 2017. [Financial details deleted]

[55] [Financial details deleted]

[56] [Financial details deleted]

[57] Fines can be paid off over time via instalment arrangements. There is nothing unusual in defendants paying fines over the course of three years and sometimes more. On the strength of the information provided to me, RCL can pay reparation in addition to approximately $50,000 in fines within 28 days. I see no reason why it cannot continue to meet the balance of any fine by regular instalments at about $1,000 per week. That would take RCL about two years to complete.

[58] I am quite sure that fine will "bite," but on the figures provided to me, the business will certainly remain viable should it choose to do so. It is likely that, as a result, there will be a reduced shareholder dividend for the next two years but that is because the company, which is owned by its shareholders, has broken the law in a way that has resulted in one of its employees being badly injured.

Conclusion and suppression orders

[59] Accordingly, I make the following orders:

(a) reparation in the sum of $20,000 is to be paid within 28 days;
(b) prosecution costs of $1228 are to be paid within 28 days; and
(c) the total fine is $157,500. $50,000 of that is to be paid within 28 days. The balance of that is to be paid by arrangement with the

registry. I would suggest, based on the information furnished to me, a rate of $1,000 per week is appropriate over the next two years.

[60] Finally, I make an order for suppression of [the victim's] name and the role she filled at RCL under s 202(a) of the Criminal Procedure Act 2011 based on undue hardship. That is on the express proviso that RCL's name can be published. That will provide her with a measure of protection but balanced against that, allow the media to properly report on this case. Both counsel suggested this suppression order is appropriate.
[61] There will also be suppression of details about RCL's financial circumstances. That is commercially sensitive information and WorkSafe does not oppose such suppression. For clarity, [55] and [56] are suppressed.

Reported by: Rachel Marr, *Barrister and Solicitor*