EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WAIHI

CRI-2015-079-000434
[2016] NZDC 5099

WORKSAFE NEW ZEALAND
Prosecutor

v

DUANE PETER HURST
Defendant

Hearing: 21 March 2016

Appearances: A Longdill for the Prosecutor
D Weaver for the Defendant

Judgment: 21 March 2016

NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING

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[1] The defendant has now pleaded guilty to one charge pursuant to ss 19B and 51A Health and Safety in Employment Act 1992. The maximum penalty available to the Court is a fine of up to $250,000 and probably at the outset it pays to consider that there is new legislation coming in on 4 April which is going to up the available fines in a dramatic way and extend the requirements under the health and safety legislation.

[2] Ms Longdill has presented written submissions and she has presented a number of cases and she has, I acknowledge, supplied me with the well known and now definitive case of *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC) and that has set out an approach to sentencing and, as with such approaches, the Court however does have to take into

account the particular circumstances of each case before it and make a decision based on the facts of that case.

[3] In the prosecutor's submissions they note first that the victim in this matter has declined to provide a victim impact statement, is not seeking reparation but reminds the Court that it is in the Court's hands as to whether reparation is awarded.

[4] The summary of facts has been added to her submissions and what that states is that the defendant, Mr Hurst, had been employed by a company as head breaker-out since 31 March of last year and prior to that he had experience in other forestry operations. The victim in this matter was aged only 17 and had come to the company in the preceding days straight out of high school.

[5] The factors of the incident are then set out and Mr Hurst was responsible for supervising Mr Rudolph and prior to starting work on that day both of them had signed a daily safe retreat position plan which sets out, amongst other things, the minimum break-out zones identified and agreed, the safe retreat position as discussed and agreed and the acknowledgement of identified hazards. Throughout that morning when Mr Hurst was supervising Mr Rudolph and was following procedures in regard to safe retreat position, which were namely measuring the appropriate distance using the calibrated range finder, marking the safe retreat position with blue spray paint, ensuring that he and Mr Rudolph were behind the line prior to giving the signal to the hauler operator to move the log, unfortunately, when they moved to a steeper gully this was when the incident occurred.

[6] Regarding the injuries suffered, both of them received injuries. The log swung in the direction of Mr Hurst and Mr Rudolph, hitting Mr Rudolph in the hip resulting in a hairline fracture. Mr Hurst threw Mr Rudolph out of the way, resulting in Mr Hurst hitting the ground, losing consciousness and fracturing an eye socket. Mr Rudolph was taken to hospital, later discharged and required eight days off work.

[7] Mr Hurst had an obligation under the Act to take all practicable steps to ensure that no action or inaction of his whilst at work caused harm to any person and the prosecutor states there were two obvious practicable steps that he could and

should have taken and they are set out in paragraph 12 of the submissions and they were checking the positioning of the strop attached to Mr Rudolph to ensure it was correct for the type of operation and it was incumbent on the defendant, as supervisor and an experienced worker, to give clear instructions and to check and ensure that they had been understood and followed. The second obvious practicable step was to follow the known published and accepted procedures with regards to setting and observing a safe retreat position, 20 metres away.

[8] Mr Hurst has cooperated fully with the investigation and frankly accepted, in interview with the inspector, that he had done two things wrong.

[9] The method of dealing with this matter is set out in the prosecutor's approach to sentencing in paragraph 4 of her submissions and quoting from the case of *Department of Labour v Hanham & Philp Contractors Ltd* the prosecutor submits that the following needs to be done by the Court. There are three main steps.

[10] Firstly, assessing the amount of reparation. Secondly, fixing the amount of fine. Thirdly, making an overall assessment of the proportionately and appropriateness of the total imposition of reparation and a fine.

[11] The fact of reparation of fine it is submitted serve discrete, that is separate statutory purposes, and both should ordinarily be imposed but where lack of financial capacity does not permit both the payment of the appropriate reparation and a fine the former is to receive priority.

[12] So the Court must firstly fix the amount of reparation, if it considers that appropriate, taking into account the financial capacity of the offender and any offers to make amends. Then the Court should fix the amount of the fine which should follow the Court of Appeal's setting out of penalties in the well known case of *R v Taueki* [2005] 3 NZLR 372 (CA). That is, start point on the basis of the culpability of the offending, adjusting upwards or downwards for aggravating or mitigating circumstances relating to the offending or the offender.

[13] In the prosecutor's submission and looking at *Department of Labour v Hanham & Philp Contractors Ltd* case low culpability means a fine of up to $50,000, medium culpability is between $50,000 and $100,000. So the prosecutor's submission is that here, whilst the victim does not seek recompense for financial loss or emotional harm the Court is nonetheless entitled to infer emotional harm from the circumstances and the prosecutor also notes that the defendant here was the employee but sets out what the victim suffered, that is, hairline fracture of the hip and loss of consciousness and off work for eight days.

[14] Looking then at the factors, I accept the two matters that the prosecutor has said were appropriate and should have been done and that the practicable steps were obvious and known to the defendant and he was well aware of those steps. The risk of harm of course was high because the log involved was a 21 metre moving log which can cause very serious or fatal injuries. The realised risk was serious. The safe retreat position is a well known forestry standard and the defendant did not observe it and the hazard was obvious and the means to avoid the hazard were available, effective and not expensive and the defendant has been doing what was required all morning but failed to do the same thing when they moved to the steeper gully.

[15] I am then referred to the case of *R v Burr* [2015] NZHC 2675 which the prosecutor submits is a case that has some similarities here and that is a decision of Brown J in 2015 in the High Court. In that case the High Court adopted a starting point of $85,000 but that was a situation where a forestry worker had been killed, although of course the prosecutor has pointed out it is the omissions or the failure to take all practicable steps that the Court must take into account as well as the outcome.

[16] I have also been referred to *HarvestPro New Zealand Ltd v R* (2015) 12 NZELR 611 (HC) and a starting point of some $80,000 was taken in that case. Therefore in this case the prosecutor submits that $75,000 should be the start point here.

[17] Looking at an adjustment for aggravating and mitigating factors, the prosecutor submits there is no aggravating factors requiring an adjustment from the start point and as far as the mitigating factors I accept that there was full cooperation, that the defendant has had no other health and safety issues, he has made amends with the victim, he has entered a guilty plea at an early opportunity which entitles him to a full 25 percent, is available. Then there should be a 15 percent discount for cooperation, previous record and making amends and applying that a provisional final sentence of $47,812.

[18] Then considering the further matters, such as his personal financial circumstances, and he has made a declaration, the prosecutor submits to the Court that although the victim has not sought emotional harm they refer to their earlier submissions that the Court can infer that emotional harm, they submit that a figure of some $3000 may well be appropriate for emotional harm and that ultimately taking into account the defendant's financial position that the addition of a fine in terms of the same figure, (ie, $3000) making a total payment should be then imposed and he has agreed to make payments at $50 per week. So the reparation could take place over one year and then the fine one year after that.

[19] The defence submissions to me have referred me to a case of *Department of Labour v Oakes* DC Tauranga CRI-2007-070-3671, 26 September 2007 a decision of Judge Harding on sentence which Ms Longdill has pointed out was decided prior to the *Department of Labour v Hanham & Philp Contractors Ltd* case. What Mr Weaver submits on behalf of the defendant is that this is a single charge. He then looks at the circumstances of the offending and notes that the defendant accepts he failed to take all practicable steps. The Court is then referred of course to ss 7 and 8 Sentencing Act 2002 and that the prosecution has referred the Court to the appropriate case of *Department of Labour v Hanham & Philp Contractors Ltd* but highlights the fact that the defendant is an employee rather than, as that case was, dealing with an employer.

[20] As far as reparation is concerned the defence submission is that the defendant apologised to the victim immediately. He himself suffered injury as well as loss of employment relating to the incident and fully cooperated with WorkSafe. He

submits that the injuries sustained by the victim had fortunately not been long-term in the sense that he was able to return to work with the same company, that is, the victim, and that he and the victim have continued to be in contact with one another. He is however willing to pay reparation despite the fact that it is not sought from his current unemployment benefit.

[21] So as far as the quantum of the fine is concerned, accepting that all practicable steps were not taken and accepting that he was aware of the minimum safe distance, that that was 20 metres away and that they did not retreat to that minimum safe distance and that he did not ensure that he and the victim retreated to that distance, there was a departure from the proper and appropriate and well known standards in that the risk was obvious. It is not a case where no steps however were taken it is submitted.

[22] So looking at the *Department of Labour v Oakes* case the defence submit that it is not dissimilar to the present circumstances and that the start point of the fine should be some $20,000 and then reduce this matter for mitigating factors and personal circumstances before setting the appropriate fine and reparation.

[23] So therefore in terms of what the Court must do today I am of the view that I should approach the matter in this way. First of all I thoroughly accept that denunciation and deterrence is very important in this situation and that the forestry industry is an industry of high risk and of course that there have been a number of very serious accidents which have occurred in that industry in the last few years. However, as I said at the start, the Court has to take into account the facts of this particular case. It has been accepted what the risks were. They were obvious, and what should have been done and the two factors that were not done.

[24] Looking at whether first of all there should be some emotional harm reparation, although it has not been sought I am of the view that I can confer emotional harm reparation and in considering the submissions made by Ms Longdill I am of the view that her submission to me that a figure of $3000 would be appropriate as a correct one and I accept it.

[25] Then, looking at the factors which I need to under *Department of Labour v Hanham & Philp Contractors Ltd*, quite clearly the culpability which is involved here is certainly in the moderate range. Looking at the case, although it is fair to say I consider it is difficult to deal with cases in the way that the Court sets out and then arrive at a figure which is appropriate in the circumstances, I accept that having decided its moderate culpability that the fine starting point has got to be in the range that the prosecutor suggests of $75,000.

[26] The defendant has pleaded guilty at an early opportunity. He is allowed then a 25 percent reduction of that start point of fine. He has made amends as well and shown remorse. Those are other factors that I can take into account along with his cooperation.

[27] Then applying reductions for those factors I am of the view that it is difficult to set out numerical deductions for those factors in the particular circumstances here, especially where he is an employee and he has lost his job, is now impecunious and is going to have to pay the amount off from an unemployment benefit.

[28] Accordingly, I am of the view that I have to take into account his financial circumstances when assessing what the final outcome of the fine is. That cannot be done in some numerical fashion and I am of the view that the prosecutor's suggestion to me that the ultimate of $3000 as a fine will then be appropriate so that the effective total he has to pay is $6000, at $50 per week.

[29] So the fine is $3000 and the emotional harm reparation is $3000.

A-M J Bouchier
District Court Judge