IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2009-009-008770

DEPARTMENT OF LABOUR
Informant

v

HAWKINS CONSTRUCTION LIMITED
Defendant

Appearances: S Houliston for the Informant
M Borcoski for the Defendant

Judgment: 15 October 2009

NOTES OF JUDGE DJL SAUNDERS ON SENTENCING

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[1] On 17 December of last year Mr Lee an employee of Libor Limited was contracted to the defendant company to work on a construction site in Hornby Christchurch.

[2] In the course of his employment, the victim, as I will refer to him as, a 46 year old carpenter fell through a service hole on the first floor of the Dressmart car park site. This resulted in a broken right arm which required surgery but perhaps more significantly a frontal skull fracture with concussion. While the bone has mended, it is the longer term effects of the skull injury which has caused Mr Lee an amount of discomfort, he has been at Hillmorton Hospital for a period of time for medication assessment. His assessment has included looking at depression arising

from the inability of himself to return to full time physical work and no doubt the worry and concern about providing for his family.

[3] Mr Lee we are told has now resigned from Libor Limited and is likely to try and seek less arduous work than construction site work on commercial developments.

[4] Of particular significance in this case is that a restorative justice meeting took place on 5 October and I have received a report from Restorative Justice Services detailing the steps that occurred and the very significant payment of $20,000 to Mr Lee by way of recognising the emotional harm that flowed from the accident that occurred.

[5] The informant has filed submissions which I have read in advance of coming into Court today. I have certainly taken on board the significance of the case which is now effectively regarded as a tariff case in this area, namely the case involving Department of Labour, Philip Hanham, Hanham & Philip Contractors Limited, Cookie Time Limited and Black Reef Mine Limited.

[6] I have also had the opportunity of reading counsel for the defendant company's submissions and the affidavit filed in support of this by a person who was instrumental in the development of safety procedures for the company.

[7] The informant's case briefly is that the shutter box covering a cavity that Mr Lee fell through should have either been permanently fixed or indeed guard rails around it with appropriate signage so that it would have managed the risk of somebody like Mr Lee moving it aside or falling through it.

[8] The summary of facts therefore records that not all practicable steps had been taken and the steps are very simply set out in the summary. The company has previous convictions, one under the Construction Act and one under the Employment Safety Act and there is reference to warnings having been given in the past.

[9] On the other side of the ledger, this is a large construction company, has some 450 employees and carries out a wide range of building contracts particularly in the commercial area. The company had prior to this developed a policy around work sites and it is clear that this is not a company that has been completely oblivious to its obligations in this regard or who only developed a policy after the incident occurred. It is no doubt very much regretted by the company that a senior employee chose not to take the steps that would have been in accordance with company policy when he dealt with the shutter box slightly before this unfortunate incident occurred.

[10] I record that I agree that the task for the Court today is to adopt the three stage approach that is suggested by Justices Randerson and Panckhurst in the decision already mentioned.

[11] The first step of course is set out as being assessment of reparation. Effectively that has been done. I acknowledge that economic harm by way of loss of wages is now under the Supreme Court decision not available, but that the emotional harm is able to be recognised in matters of this kind. I have read the victim impact statement, I have read counsel's submissions, I have read the Restorative Justice report and agree that the $20,000 tended at the time of the conference and accepted is a full recognition of the emotional harm suffered by the victim in this matter.

[12] The second step is quite clearly set out as being to look at the culpability of the company and to assess the fine that is appropriate followed by a third step of stepping back and looking at the combination of fine and reparation to ensure that the overall penalty imposed is appropriate.

[13] In relation to the second step I have regard to the purposes of sentencing, that must of course involve a denouncement of conduct, deterrence which involves not only general deterrence but specific deterrence and promoting a sense of responsibility in the company.

[14] The principles of sentencing under the Sentencing Act also apply which involves the gravity of the offending, the seriousness of the offence and the effect on the victim.

[15] I agree that comment is made that it is often fraught with difficulty to try and compare cases because in each particular occasion there are matters that are unique to that particular work site or defendant be it individual or a company.

[16] The banding of offences has been dealt with in the tariff case that I have referred to and it is agreed by both counsel that this falls within what is called the second band of responsibility. Counsel for the informant urges me to consider that it is on the cusp of the higher band and to adopt a starting point close to the $100,000 mark before any of the necessary adjustments are made.

[17] Counsel for the defendant while agreeing that it is in the medium band, suggests that it is not at the top end of that band but rather a lesser or more medium culpability within that band.

[18] I have had regard to the submissions that are filed in relation to the steps the company had taken prior to this incident and of course after the matter came to their attention with regard to the fact that this company is a major employer and has a well developed work site policy. I take on board what counsel for the informant has said about the fact that it is not a blameless record but of course there are many large companies that would have a worse record than this.

[19] In respect of this matter, I have given weight to the fact that the company had prior to this incident identified work site hazards and had put in place policies. I have already commented that it is regrettable that the senior employee had not perhaps adhered to that at the time and that is of course why we are here today.

[20] The view that I have taken is that a starting point of $75,000 would be an appropriate starting point to reflect the factors that I have taken into account. I take the view that while there would be argument for uplift around earlier warnings and convictions that have been recorded under this and an earlier act, that that is largely

offset by way of the uplift against the factors that the company took in respect of acknowledging their responsibility after the matter and at this stage I do not place the discount on the guilty plea but rather to their responsibilities to a person who was working on the site, preparedness to ensure that further education was done around the work sites in New Zealand and that those matters effectively balance out the uplift.

[21] I therefore then apply to the $75,000 the 33 percent discount mentioned in *R v Hessell* for guilty pleas at the earliest available opportunity. This was a guilty plea at the earliest available opportunity and the full one third discount should be allowed for.

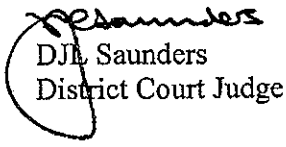
[22] The end point is that I come to a fine of $50,000 which would have had the payment not been made at Restorative Justice been accompanied by a $20,000 emotional harm payment. I have stepped back and looked at the overall impact of that against the ability of the company to financially meet this penalty and whether it sufficiently signals the deterrence needed in matters of this kind.

[23] I am satisfied that the messages that are required to be delivered to this company have in fact already been taken on board, that a fine of $50,000 is a responsible end point and indeed by sheer coincidence it appears that that is the midway between what counsel for the informant and counsel for the defendant had in fact suggested. That had not equated in my original methodology in assessing this matter.

[24] Accordingly the end result is that I have fixed a fine of $50,000 for the company to pay in respect of this matter. Court costs of $130 will be payable. Normally counsel for the informant does not seek solicitor's fees in this Court. That is not awarded and I have taken into account that there is receipted payment for $20,000 to the victim already made and as commented on earlier it stands to the company's credit that they were firstly prepared to engage in restorative justice and secondly to have tended that in full recognition irrespective of knowing what the liability was going to be at Court hearing today and counsel for the defendant

company and the company itself are to be congratulated in being proactive in seeing that that took place.

[25] Accordingly the fine is as announced $50,000, Court costs $130. No other orders are required.



DJL Saunders
District Court Judge