IN THE HIGH COURT OF NEW ZEALAND 27/5 AP.24/94
DUNEDIN REGISTRY

6274

BETWEEN DEPARTMENT OF LABOUR

Appellant

A N D OTAGO POWER LIMITED

Respondent

Hearing: 13 May 1994

Counsel: W J Wright for Appellant
C J Doherty for Respondent

Judgment: 17 MAY 1994

JUDGMENT OF FRASER, J.

This is an appeal against sentence by the Crown in respect of a fine of $1,500 and costs imposed on the respondent for a breach of s 6(c) of the Health and Safety in Employment Act 1992.

On 22 June 1993 employees of the respondent were laying softwood power poles in preparation for the rebuilding of a power line. One of the employees, Mr E M Patrick, was operating a truck mounted crane which accidentally came into contact with an overhead live 11,000 volt power line. As a result Mr Patrick received a severe electric shock; he was rendered unconscious and suffered burns to his right hand and left foot; his hand was stuck to the controls until he was knocked clear by a fellow worker; he was admitted to the public hospital's intensive care unit from which he was discharged some days later on 28 June 1993. The truck on which the crane was mounted was not fitted with a metal plate or screen bonded to the frame of the

truck for the protection of the operator. If Mr Patrick had been standing on such a screen he would not have been injured.

It is submitted for the Crown that seen against the maximum penalty of $50,000 and the circumstances of this particular case the penalty imposed was manifestly inadequate.

Since the Act was passed in 1992 there have been a number of prosecutions in various parts of the country and, as is usual, with such new legislation there have been varying levels of penalty.

In *Department of Labour v De Spa & Co Ltd & Ors*(Christchurch, 31 May 1994, Ap.377/93, 12/93 & 58/94) three appeals in respect of such penalties were brought together before a full Court (Tipping J and myself) to enable the issue of the proper level of fines under this legislation to be considered. In that judgment the nature and purpose of the legislation, the relevance of the significant increase in penalties and other general matters are discussed and a list of criteria to be considered when assessing penalty is suggested. Both counsel accepted the approach in *Department of Labour v De Spa & Ors* and analysed the present case in terms of those criteria.

It should be noted that this judgment of the full Court was given on 31 March 1994 some three weeks after the present case was dealt with in the District Court in Dunedin, so the District Court Judge whose sentence is under appeal did not have the benefit of the review in that judgment.

Factors to be considered

I turn now to the matters requiring consideration in the instant case.

Culpability

I accept Mr Wright's submission that the level of culpability is high. The respondent is a major public utility with special expertise in this very field and the provision of an appropriate metal plate or screen was a simple

precaution which ought to have been taken. No explanation was offered to the Court as to why it was not in fact provided in this particular instance.

Degree of harm

The degree of harm was serious but fortunately not fatal. Mr Patrick is said to be back at work full time with no permanent effect except for the consequence of the skin graft on his hand.

Financial circumstances of the respondent

No relevant considerations arise here. There is no reason why respondent cannot pay an appropriate fine.

Attitude of respondent

As noted by the District Court Judge the respondent is a responsible employer. Its management was naturaliy concerned at the accident which had occurred. There was full co-operation with the department and the omission has been remedied.

Plea of guilty

Consistent with its approach to the investigation of the accident and the remedial action taken, the company pleaded guilty at the earliest opportunity.

Deterrence

I accept Mr Wright's submission that this is an important aspect. Unlike earlier legislation where enforcement generally depended on inspection by officials and compliance by employers with specific requirements, the approach under this Act is that positive duties are cast on employers. They are required to seek out and eliminate or mitigate as far as possible hazards in the work place. One way in which this statutory policy and approach is reinforced is by the imposition of appropriate penalties by the Court when breaches occur.

Payment to injured party

A statutory provision for payment of the whole or part of the fine to the injured party exists in s 28(1) of the Criminal Justice Act 1985 and, as noted, that power was exercised by the District Court Judge in this case. In *Department of Labour v De Spa* we expressed the view that the capacity to award a lump sum to a victim under this section might be thought to sit uneasily with the philosophy behind our accident compensation legislation. Nevertheless the provision in the Criminal Justice Act stands and was acted on in this case. It is not under challenge except that, in the Crown's submission, the amount awarded to the injured party was too low.

Comparative features of other cases

In the case of *De Spa & Co Ltd* the fine imposed in the District Court following a defended hearing in respect of a fatal accident was $6,500. The employer's culpability was described as medium. The relevant machinery had been in operation for some 17 years without incident or complaint. Nevertheless even allowing for that and the various factors in the employer's favour the Court considered that the lowest fine that could reasonably have been imposed was one of $15,000 and that had it been one of $20,000 it could not have been challenged as being too high.

In *Westland Funeral Services Ltd* the injured worker lost two segments of a finger in the course of using a circular saw. It had been in use for many years but for one particular and occasional operation the usual guard could not be used. Just prior to the accident the question of a different type of guard for that particular use was under consideration, including by an inspector, and the employer was waiting further information to enable the saw to be modified. The employee did not observe the employer's standard safety procedures. Culpability was seen as low. The fine of $2,000 imposed in the District Court was described in the Court's judgment as being on the low side but not outside the range of a properly exercised sentencing discretion.

In *Gordons Wool & Skins Ltd* the employer was fined $5,000 following a fatal accident. The employee concerned had failed to make use of two protective measures which the company had installed and was seen as, to a large extent, the author of his own misfortune. Just prior to the accident the employer's principal shareholder had died, the company was being operated by his widow and family and was shortly afterwards sold. The Court regarded the circumstances of that case as being at the lower end of the range of culpability and said that while the fine of $5,000 could reasonably be regarded as quite lenient there were factors in the case which justified a degree of leniency. The Court was not brought to the view that the fine was manifestly inadequate.

Application to this case

Weighing and considering the various factors in this case in the light of the approach in *Department of Labour v De Spa & Others* I am persuaded that the fine imposed here was manifestly inadequate. In increasing it, however, on an appeal by the Crown, it is necessary to bear in mind that the sentence is to be increased only to the extent necessary to remedy the manifest inadequacy: see *Wihapi* [1976] 1 NZLR 422 CA and *Hunter* [1985] 1 NZLR 115, 121 CA.

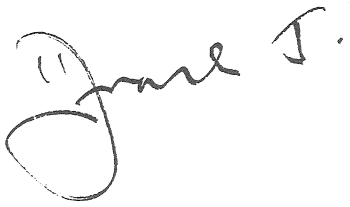
While the relevant mitigating factors require to be kept in mind the major factor in this case seems to me to be that a simple protective device which could and ought to have been fitted was not provided and that the employee concerned suffered quite serious harm because of the employer's breach of duty.

It is my opinion that to remedy the manifest inadequacy the fine should be increased to $10,000. The appeal is allowed accordingly. The order as to costs pronounced in the District Court remains.

That leaves the question of payment of part of the fine to the employee. The general position in regard to such payments has been discussed above. It is obviously a field in which there is a good deal of room for the

exercise of the sentencing judge's discretion. Here the District Court Judge took the view that half of the find should be awarded.

I can see no reason to depart from that general approach and accordingly direct that half of the increased fine be paid to the injured employee.



Solicitors:

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