NZLR

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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 177/96

BETWEEN **FAIRFAX INDUSTRIES LTD**

Appellant

A N D **DEPARTMENT OF LABOUR**

Respondent

Hearing: 11 October 1996

Counsel: J Burley for Appellant
Gina de Graaff for Respondent

Judgment: 15 October 1996

RESERVED JUDGMENT OF PATERSON J

Solicitors:
J Burley, Auckland Employers' Assn, Private Bag 92066, Auckland
Meredith Connell, DX CP 24063, Auckland

Fairfax Industries Ltd, (the Appellant), pleaded guilty in the Papakura District Court to a charge under ss6 and 50 of the Health and Safety in Employment Act 1992 in that it did fail to take all practical steps to ensure the safety of its employee, Michael Haupapa, while at work, in that it failed to ensure that the said Michael Haupapa was not exposed to the risk of injury while moving a side sheet mould. Although the Appellant pleaded guilty, agreement was not reached on a statement of fact and the Department of Labour (the Department) called Mr Haupapa as a witness and he was quite extensively cross-examined as to the circumstances surrounding the accident. The Appellant caused Mr Chung, a supervisor employed by it, to give the Appellant's position.

The District Court Judge imposed a fine of $20,000 on the Appellant and ordered it to pay costs of $95 and solicitor's costs of $5000. He further directed that the fine be paid to Mr Haupapa pursuant to the provisions of the Criminal Justices Act 1985. The Appellant has appealed against this sentence and in effect, seeks the following orders:

(a) That the order that the Appellant be required to pay a $20,000 fine be quashed; and

(b) That the order that the entirety of the fine be paid to Mr Haupapa be quashed; and

(c) That such sentence and order as warranted in law, of a less severe amount, be imposed on the Appellant.

Background Facts

The Appellant is in business as a fabricator of fibreglass structures and Mr Haupapa was employed by the Appellant as a fibreglass laminator. The accident which caused injuries to Mr Haupapa, arose from the shifting of two large moulds which were used to prepare linings for the installation in refrigerated trucks. This was not normally part of Mr Haupapa's duties and he had never undertaken such a task before. His supervisor, Mr Chung, had performed the task approximately five years earlier. The moulds were large and weighed approximately 440 kgs. They were normally positioned on low support structures and fastened to some railings on the wall by means of a safety chain that passed through rings or eyes on the moulds. It was only necessary to hoist the moulds a few inches off the floor in order to install some additional parts under them. The first mould

was moved successfully but there was a mishap in attempting to move the second mould with the result that it rolled on Mr Haupapa and caused him quite serious injuries.

Mr Chung, who had been with the company for 20 years and a supervisor for 14 years, had devised a method to move the moulds. His evidence was that he explained the method to Mr Haupapa on the Friday but unfortunately, Mr Chung became ill on that day. The task was to be undertaken on the Saturday morning and notwithstanding that he was ill, he did come into the premises to try and ensure that Mr Haupapa understood clearly the hazard of the operation as Mr Chung perceived them to be. There was a conflict between the evidence of Mr Chung and Mr Haupapa as to what instructions were given to Mr Haupapa and whether Mr Chung actually went in on the Saturday morning. What is clear is that Mr Haupapa adopted a method of lifting which was different in two material respects from what Mr Chung had in mind. First, he used wire strops and attached them to the ring bolts in the mould rather than using fabric strops which were to be secured by being passed right round and underneath the mould. Secondly, he detached the safety chains from the eyes on the moulds prior to the lifting which was something Mr Chung had not contemplated.

Counsel for the Appellant referred to these two differences and submitted that Mr Haupapa failed in these two respects and that if he had not done so, the accident would not have occurred. In particular, he said Mr Haupapa's disregard for the instructions he had received earlier from Mr Chung not to disconnect the safety chains at any time through the lifting procedure was an important factor. This submission is unfair to Mr Haupapa. While the District Court Judge did not resolve all the conflicts between Mr Haupapa and Mr Chung, he did find that Mr Chung did not warn Mr Haupapa that it was not appropriate to use the eyes to lift or support the moulds themselves; that Mr Chung did go into the premises on the Saturday morning and did his best to explain to Mr Haupapa what was to be done; that there was a basic misunderstanding between Mr Haupapa and Mr Chung as to what the fabric strops were to be used for; that Mr Haupapa quite sincerely considered that it would be necessary for him to release the safety chains in order to move the structure in the way he thought necessary; that Mr Haupapa formed the opinion that the ring bolts were provided for the purpose of supporting the

mould in the course of the lift and he could attach a strop to them as he did and lift the moulds from them as a strong point. The District Court Judge was not satisfied that Mr Chung adequately communicated to Mr Haupapa his instructions. He was impliedly critical of the manner in which Mr Chung did pass on those instructions and he commented on Mr Chung's command of the English language. He noted that Mr Haupapa may have been insufficiently attentive and that when he confronted difficulties, he should have contacted Mr Chung. On my reading of his Sentencing Notes, he did not make a finding that Mr Haupapa disregarded instructions. The only criticisms against Mr Haupapa were that he may have been inattentive and that he could have perhaps sought instructions when he got into difficulty.

At the end of the day this matter may not be particularly relevant in view of the fact that the Appellant accepted the Judge's finding of moderate culpability on the Appellant but it is appropriate to note that the criticism of Mr Haupapa was on the information before me, unfair and unjustified.

Judge's Reasons

The Judge, as has become customary in such cases, considered the criteria in ***Department of Labour v De Spa & Co. Ltd*** [1994] 1 ERNZ 339 and noted it was over to the employer to see that an employee is not asked to do things that are beyond his competence and which are dangerous and on that basis, he regarded the degree of culpability as being in the moderate category. He referred to the serious harm caused to Mr Haupapa; noted that the Appellant had taken a responsible and caring attitude towards its injured employee and it offered him such assistance as is reasonable in the circumstances and that the Appellant had put in place some in-house directions for the handling of heavy lifts in the future so that such an accident will not happen again; he was not persuaded that there was a need for there to be a deterrent sentence insofar as the Appellant was concerned but he appears to have correctly considered that there is usually a need for a deterrent so that the message gets to other employers; he was not of the view that the Appellant had been shown to be cavalier in its attitude; and he noted that there had been a marked increase in recent times in penalties for breaches of this particular act. The Judge bore in mind the seriousness of the injuries to Mr Haupapa but also had regard to his own role and then

fixed the fine at $20,000. This Court can only allow the appeal if the fine is clearly excessive or inappropriate - s121 (3) (b) Summary Proceedings Act 1957.

Principles for Consideration

In considering whether the District Court Judge imposed a fine which was clearly excessive or inappropriate, it is necessary to consider the various criteria referred to in the ***De Spa*** case and the submissions of counsel made in respect of those criteria.

(a) Culpability: In the District Court the Appellant contended that culpability was less than the middle range and was at the lower end of the range. The Judge found the degree of culpability as being in the moderate category and I note the Appellant does not challenge this finding on appeal. Three points need to be made. First, culpability is only one of the factors to be taken into account in assessing penalty, albeit that it is one of the more important factors. Thus, a matter which falls within the medium culpability range may justify a higher penalty than a case which falls in the higher culpability range if the other factors suggest accordingly. Secondly, a culpability category as referred to in the ***De Spa*** case is obviously a "range". A matter at the high end of the medium culpability range would obviously be just a little below a matter at the low end of the high culpability range. Thus, if a fine were to be based on culpability alone, there may not be very much difference between fines at the higher end of one range and fines at the lower end of the next range. Finally, counsel for the Appellant submitted that consideration should be given to Mr Haupapa failing to follow instructions and thus putting his own safety at risk. I do not accept this submission because there is nothing in the Judge's findings as I read them, to support this submission. He did find that Mr Haupapa may have been inattentive but did not find that he failed to follow instructions. His findings point more to a fault on the part of the Appellant than the inattention of Mr Haupapa. Further, this matter was probably taken into account by the Judge in his assessment of the culpability falling within the medium range. At the best a submission of this nature can only go to where the culpability fits within the medium range itself and as the District Court Judge heard evidence on this, and did not make a specific finding of failure to follow instructions, I do not see that he erred in determining that this matter fell in the medium range.

It is relevant to note that under s19 of the Act, Mr Haupapa did have an obligation to take all practical steps to ensure his safety while at work. The Judge no doubt took his actions into account in assessing culpability. I mention this because although the purpose of the Act is to ensure the employee's safety, s19 is in my view a statutory statement which somewhat restores the balance. While the health and safety of employees are of great importance, the penal provisions of the Act should not be applied in such a manner as to impose impossible standards on the employer. Section 19 enables a court to reduce culpability on the basis of the employee's actions.

(b) Degree of Harm Resulting: This is obviously another very important factor. An employer's default could lead to two accidents in similar or identical circumstances where in one case, the employee suffered death and in the other, he is more fortunate and survived. In the former case the maximum penalty is twice as high as it is in the latter case and this is a statutory statement of the difference in the maximum fine resulting from similar circumstances but two different consequences. It follows in my view that, other factors being equal, a fine is likely to be higher in the case of serious harm than it is to be in another case of similar culpability but with only minor harm. The Appellant does not dispute that there was serious harm in this case but did submit that the victim's injuries were not sufficiently serious to justify a fine of $20,000 in the absence of any medical diagnosis or prognosis evidence being put before the court when combined with the speculative nature of comments recorded in the Victim Impact Report presented by the Department at the hearing. I note that the submissions of counsel were recorded at the end of the Notes of Evidence and the Appellant's counsel at that time said:

> *"In terms of degree of harm, sir, it is serious as defined in the Act. There is no dispute about that. The Victim Impact Report sir implies some sort of long term detrimental effect in terms of returning to employment either with this company or any other company."*

The Appellant did not challenge the Victim Impact Report at the time and indeed, impliedly accepted it. The District Court Judge was entitled to make the findings he did on the serious harm suffered by Mr Haupapa. The Department produced an up to date Victim Impact Statement at the appeal hearing but on my view of this appeal, it is not appropriate to take this into account. I have to determine whether the Judge imposed a clearly excessive or inappropriate fine at the time on the basis of the information he had

before him. Although I do not take the latest Victim Impact Statement into account, I note that the serious harm to Mr Haupapa may have in effect been greater than the Judge contemplated.

(c) The Financial Circumstances of the Offender: This is a matter that cannot assist the Appellant. The notes of counsel's submissions referred to above state that at the District Court, counsel for the Appellant stated:

> *"In terms of financial circumstances, the company, it is like most companies of its size employing the number of people it does employ, its position is not critical as I understand it, but clearly an imposition of a large fine or even a medium one will be of some consequence to the company particularly in view of some of the steps or investments it wishes to make in the future in the area of health and safety . It would be making those anyway but there might be some delay in terms of payments of fines. It is not a company that is about to close its doors. I understand that but that ultimately will be just one of the matters Your Honour will need to take into account."*

As noted in ***De Spa***, a fine at a particular level will obviously bear differently upon a small impecunious employer as opposed to a large financially strong employer. If an employer wishes to have a fine reduced because of its impecuniosity or its size, it behoves that employer to produce the necessary evidence. This was not done in this case and indeed, the submission of counsel on its behalf suggests it may not have been able to produce such information. I note that it employed between 90 and 95 workers and had 3 sites. The Judge was entitled to sentence the Appellant on the basis that it could pay whatever fine was appropriate in the circumstances and that there was no need to reduce it. The assumption referred to in counsel's submissions in this appeal that it should be assumed that the Appellant had the ability to pay a modest fine is not accepted.

(d) The Offender's Attitude (including remorse and co-operation in taking remedial action): It was conceded at the District Court that the Appellant had shown remorse and had taken the appropriate steps to ensure that such an accident did not occur again. This is clearly in the Appellant's favour. It was submitted at this hearing that the Appellant's remorse may have been somewhat short lived and that its actions since the District Court hearing do not reflect well on it. I make no finding on this matter for the reason already stated, namely that I intend to determine the appeal on the basis of

whether the not the District Court Judge in the circumstances presented to him and on the information before him, imposed either an excessive or an inappropriate fine.

(e) Any guilty plea: The Appellant seeks to obtain a reduction because the guilty plea was made at the first practical moment. He says that the Judge did not take this factor into account. While a plea of guilty is not specifically mentioned in the Judge's Sentencing Notes, there are comments which suggest he did not overlook that matter. However, the Judge in my view did not have to give the usual credit for a guilty plea in this case. As was noted in ***Curtis v Police*** 10 CRNZ 28, an offender may forfeit any advantage obtained from pleading guilty if he disputes the facts thereby causing the victims to be called to give evidence and those facts are ultimately established against him. In this case, Mr Haupapa was not cross-examined as to his injuries but he was extensively cross-examined as to the cause of the accident. It is clear from the Judge's Sentencing Notes that although he was assisted by the cross-examination and did accept that Mr Chung came into the premises on the Saturday morning, he also made findings which went to the Appellant's culpability. In the circumstances, any credit for the plea of guilty should in my view be minimal.

(f) The need for deterrence: The Judge accepted that there was no specific need for deterrence in respect of the Appellant but obviously accepted the normal rule that one aspect of deterrence is to deter other employers from committing offences under the Act. The Judge did not err in applying this factor.

(g) Compensation to the Victim under s38 of the Criminal Justices Act 1985: It was submitted on behalf of the Appellant that the Judge erred in ordering payment of the entirety of the $20,000 fine to Mr Haupapa. There were two reasons for this. Firstly, there is the risk that injured persons will prompt the Department to prosecute employers to ensure that they are compensated and it was noted that private prosecutions are expressly prohibited by the Accident Compensation legislation. Secondly, there was a risk that injured workers will exaggerate their reports to the Department with the knowledge that it may increase the level of fines ordered against the defendant and consequently, the proportion of that fine payable to the "victim." There would be

something in this submission if it appeared as though the needs of the victim have been assessed and then the fine set accordingly. There is no such suggestion that this occurred in this case. The Judge appears to have set the fine at the figure he thought to be appropriate. He then, as he is entitled to do under the Criminal Justices Act, determined that all the fine was to go to Mr Haupapa. He could have determined that only portion of it would go to him. The Judge did not err in this respect.

(h) The Appellant's Safety Record: It was conceded by the Department at the hearing that the Appellant did not have a bad safety record.

Overview

Although a Judge is required to consider all the above criteria, some would appear to have greater effect than others. In a case such as this where the Appellant's financial circumstances are not in issue, and where there are no other factors aggravating the offence, the two most important factors are the degree of culpability and degree of harm resulting. As noted above, a Judge's assessment on the degree of harm may mean that a fine in a case of medium culpability and extreme serious harm may be the same as or even higher than in the case of high culpability and a lesser degree of harm. There are many variations to this suggested example. In this case, the Judge had the added benefit, which I do not have, of having heard Mr Haupapa and Mr Chung give their conflicting views of what instructions were given. Having heard this evidence, and having determined that Mr Haupapa may have been inattentive, he still found medium culpability and imposed a fine equivalent to 40% of the maximum fine which he could impose. I find nothing inappropriate in assessing the fee on such basis.

The Prevailing Range of Sentences

Mr Burley on behalf of the Appellant, submitted that this fine was not within the prevailing range of sentences. If he is correct, the fine may be clearly excessive. I take the same view as did the judges in the ***De Spa*** case when they said that the expression "starting point" is potentially misleading. Cases under the Act are really not susceptible to a status starting point to be adjusted upwards or downwards according to the balance of aggravating and mitigating factors. There are several factors which need to be taken

into account and it is necessary in my view for the District Court Judge to weigh all such factors and then to fix the fine accordingly. Ms De Graaff, on behalf of the Department, submitted that the scale in this case was at the top end of the fine which could have been imposed for this particular offence but that it was not a fine which was clearly excessive or inappropriate. The fine in the circumstances of this case was on the high side and on my reading of the Notes of Evidence, it is higher than I would have personally imposed. However, I did not hear that evidence and obviously do not have the same "flavour" of what actually happened between Mr Chung and Mr Haupapa which could well have influenced the final penalty imposed.

It is noted, as has been noted in more than one case recently, that the honeymoon period under this Act is over. When it first came into force, fines were on the low side but more recently they have become more realistic to recognise the purpose of the Act.

Conclusion

In the circumstances, I have come to the view that the District Court Judge took into account all relevant factors and notwithstanding that the fine appears to be on the high side, I cannot say that it was clearly excessive or inappropriate. In these circumstances, the appeal is disallowed and the sentence is confirmed. There is also no reason to interfere with the Judge's decision to award the full fine to Mr Haupapa which he was entitled to do and this finding is also confirmed.

The Respondent is entitled to costs on the appeal which I fix at $750 inclusive of disbursements.

B J Paterson J