The New Perils of Being Unsafe

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Case Note: *WorkSafe New Zealand v Budget Plastics (NZ) Ltd*

The recent decision of WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd was the first prosecution to be under the Health and Safety at Work Act (HASWA) 2015. The case was brought in the Palmerston North District Court. The Court said that the sentencing principles in Department of Labour v Hanham & Philp Contractors Ltd were still to be applied under the HASWA 2015, but with higher corresponding bands to set the amount of the fines. However, in a significant departure from previous criminal cases under health and safety laws, the Court indicated that, if the circumstances of the offending are egregious enough, it may be willing to disregard pecuniosity as a factor when setting the amount of the fine. Even if the consequence of the fine spells the death of the business.

Introduction

Poor workplace safety has well-known associated costs: the cost of compensation; the loss of amenity and diminished quality of life for the injured persons and their families, and the cost of lowered productivity and high turnover (Department of Labour and the Accident Compensation Corporation, 2002).

Enter the Health and Safety at Work Act (HASWA) 2015 and an open-minded view of on deterrence by Large J, and the cost of poor workplace safety now includes the possibility of bankruptcy through the imposition of a fine for breaching the duties in the HASWA 2015 (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [51]-[55]).

Facts of the Case

A worker of Budget Plastics Ltd ("Budget") was operating a plastic extrusion machine that had been manufactured in and imported from China. He was feeding plastic pellets into the machine when the bag containing the pellets got caught in the machinery and was dragged into the machine. The worker tripped on the bag and was also dragged into the machine. Another worker noticed the incident as it happened and pushed the emergency stop button. By then, unfortunately, the operator of the extrusion machine had lost four forefingers down to the wrist and half of his index finger (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [6]-[10]).

Large J referred to the relevant safety codes on guarding machinery already in existence and the factsheets and guidelines published by WorkSafe. The fact that the extrusion machine was not guarded, that the minimum safety distance between the operator and the moving parts of

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the machine was not maintained, and that the emergency stop button was not within reach of the operator, all contributed to the accident. The list of sins does not end there. Budget did not have systems for identifying hazards, did not have safe operating procedures for operating the extrusion machine, and did not have proper training plans for operators.

The director of the company also had had little involvement of the safety issues in his company until six weeks before the accident. Six weeks before the accident was when a safety audit of the company had pointed several safety issues. The report following the audit had placed emphasis on the problems with the extrusions machine. The company was in the process of improving its safety processes when the accident occurred (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [11]-[15]).

WorkSafe charged the company under s 48 of the HASWA 2015. Section 48 says that it is an offence for a person who has a duty under subpart 2 or 3 the HASWA 2015 to fail to comply with that duty, and that failure exposes any individual to a risk of death or serious injury. A fine for a PCBU (person conducting a business or undertaking, here Budget is the PCBU) of up to $1.5 million is possible. The judge found Budget guilty of failing to meet its primary duty of care, under s 36 of the HASWA 2015, to ensure, as far as is reasonably practicable, the safety of the injured operator (HASWA 2015, s 36; *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [2],[18]).

Sentencing Principles

Large J confirmed that the principles in *Department of Labour v Hanham & Philp Contractors Ltd* (HC Christchurch CRI 2008-409-000002, 25 August 2008) were still applicable. Namely that there were three steps to be followed. The first is to assess the amount of reparation, the second is to fix the amount of the fine, and the third is to make an "overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine".

Assessment of the Reparation

On the facts, the amount of reparation was fixed at $37,500 based on the precedents with similar facts quoted by WorkSafe (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [25]-[26]).

Fixing the Amount of the Fine

The case of *Hanham* had set out "culpability bands" to set the amount of the fine. WorkSafe proposed setting bands at levels almost tenfold to those under *Hanham* to reflect the higher penalties under the HASWA 2015 (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [27]-[30]).

Culpability Band	**Previous Band Boundaries under the Health and Safety in Employment Act 1992**	**New Band Boundaries Proposed by WorkSafe under the Health and Safety at Work Act 2015**
Low culpability	A fine up to $50,000	A fine up to $500,000
Medium culpability	A fine between $50,000 and $100,000	A fine between $500,000 and $1,000,000
High culpability	A fine between $100,000 and $170,000	A fine between $1,000, 000 and $1, 500,000

Table 1: A comparison of the culpability bands under the Health and Safety in Employment Act 1992 and the bands proposed by WorkSafe under the Health and Safety at Work Act 2015.

Budget argued that the starting point for the fine should be set at $200,000, based on Australian authorities. The imposition of maximum penalties has been rejected in Australia. Large J rejected the use of the Australian precedents in setting the amount of the fine. While Parliament may have intended that the courts in New Zealand should be able to draw on Australian jurisprudence, the HASWA 2015 was not enacted with the intention of harmonising our laws with Australia's. Nor was it Parliament's intention to model the HASWA 2015 on the Model Work Health and Safety Act (Cth, Australia) 2011. Indeed, the HASWA 2015 had been modified to suit the New Zealand context (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [31]-[33]).

One major difference between New Zealand and Australia is that New Zealand offers all injured workers full compensation under the Accident Compensation Corporation (ACC) Scheme, while Australia does not have a pure no-fault compensation system. Large J explained that, thus, sentencing occurred on "different 'playing fields'". Section 151 of the HASWA 2015 requires the courts to apply the principles of the Sentencing Act 2002; there is no equivalent provision in the Australian legislation (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [33]-[36]).

While Australia had rejected the imposition of maximum fines, the court was guided by the report of the Independent Taskforce on Workplace Health and Safety (Independent Taskforce on Workplace Health and Safety, 2013, at [390]). The Taskforce had recommended higher penalties with graduated levels of fines depending on the level of offending with the aim of improving compliance. The Court here concluded that the aim of the HASWA 2015 was to improve compliance and that courts in New Zealand should not shy away from imposing the maximum penalties (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [34]-[36]).

The court did shy away, however, from making new sentencing guidelines explaining that this was not the role of the District Court. Nonetheless, a starting point for setting the fine amount had to be set following counsel's submissions. The court considered both aggravating and mitigating factors. The Court ruled that the "culpability factors" in *Hanham* are now largely subsumed into s 151 of the HASWA 2015. The risk of and potential for injury or death and whether death or serious injury could have been reasonably expected to occur are two culpability factors in s 151 of the HASWA 2015.

The District Court set the starting point for the fine as being between $400,000 and $600,00 to reflect the defendant's moderate level of culpability (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [32] -[46]).

Overall Assessment
The safety record of the PCBU, and the degree of departure from the existing standards are aggravating factors (HASWA 2015, s 151 (e), (f)). As explained above, Budget had known of the problems with the extrusion machines and did not have proper hazard management processes and training processes in place. A 25 per cent discount was given for the Budget's guilty plea (*WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* CRI-2016-054-003694, [2017] NZDC 17395, at [47]).

Both the HASWA 2015 (s 151(g))) and the Sentencing Act 2002 (s 35) require the financial capacity of the offender to be taken into account when setting the fine. Budget submitted, through an affidavit sworn by an accountant, that a fine above $100,000 would cause the business significant difficulties. WorkSafe accepted that evidence but also argued that the law must "bite" and that a fine should not be seen as a "licence fee". WorkSafe also quoted from the Taskforce Report which says that it may be "best… if some firms are put out of business. Profit gained …[by] causing reasonably preventable harm … is ill-gotten gain" (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [47] -[54]).

The Court finally concluded that there was nothing so severe in this case to justify "a departure from the need to impose a fine within the offender's ability to pay". The fine was reduced from the starting point of $275,000, to the maximum that Budget could pay, which is $100,000 (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [55]-[56]).

Costs

Costs of $1,000 were also awarded to WorkSafe. WorkSafe referred, again, to the findings of the Taskforce and noted that cost recovery from a defendant would "strengthen the system", that is, the "system" would not be "supporting" offenders financially. In other words, WorkSafe could recover some of, or all, the cost of running the case in Court. Budget referred to the factors in the case of *Balfour v R* ([2013] NZCA 429) which lists which factors are relevant to determining a 'just and reasonable' award of costs to the prosecution. The relevant factors are: "the nature of the charges; the complexity of the trial; the time spent on the case; the conduct of the parties; the extent of the success of the prosecution; the sentence imposed; the defendant's financial position; and whether the defendant was legally aided" (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [57]-[62]).

Because Budget had pleaded guilty, WorkSafe did not have to prove their case beyond all reasonable doubt. Budget had also been cooperative throughout. Large J also took into account Budget's financial position at set the sum for costs at $1,000 (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [63]-[65]).

Commentary

Overall, one has the impression that this was well researched and well-planned prosecution by WorkSafe.

Did WorkSafe Take the Right Approach?
On the one hand, WorkSafe may have been too conservative. In addition to a prosecution under s 48 of the HASWA 2015, it could have considered a prosecution for reckless conduct under s 47 of HASWA 2015. Budget had been aware that there was a fault with the machine but had not yet fixed the problems and had allowed a worker to operate the machine before ensuring the machine could be operated safely. Large J clearly stated that the "incident as foreseeable" (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [45).

One can only speculate as to why a prosecution under s 47 was not brought. The evidential difficulty of proving recklessness and causation beyond all reasonable doubt may have been a barrier. A prosecution under s 48 only requires the prosecution proving, beyond all reasonable doubt, that a breach of duty created a risk of death or serious injury. Certainly, one can imagine that the guilty plea and co-operative attitude of the defendant in this case would have been favourable to them. Further orders could also have been sought. The court has the power to issue training orders (s 158, HASWA 2015) and adverse publicity orders (s 153, HASWA 2015).

The director had failed in his due diligence duties. He did hot have awareness of or involvement in health and safety until six weeks before the accident. He had not ensured that the company had proper processes to ensure the safety of workers while at work. This is a breach of sections 44(4)(a),(b) and (c). Nonetheless, at the time of the accident, he had carried out a safety audit and was making changes to improve processes (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [14(f)]). Again, one can only speculate as to why the director was not prosecuted. Perhaps, prosecuting a director who is in the process of ensuring his company is in compliance would have sent shock waves of panic throughout the country?

On the other hand, WorkSafe may have been too aggressive in its approach. Budget was a company clearly trying to improve its OHS. An enforceable undertaking (ss 123- 129, HASWA 2015) would have had the benefit of putting the company on notice that it had done wrong, with the benefit of the $100,000 being spent on improving OHS rather than on paying a fine. Reparation could still have been paid the injured worker. Budget, after all, has put forward evidence that was accepted by WorkSafe that it has limited resources.

In the end, balancing punishment for wrong-doing with the need to educate duty-holders to ensure compliance is not easy. To be able to make the right decision in every case would require divining powers. Overall, in this particular case, a prosecution of the PCBU under s 48 of the HASWA 2015 seems a fair and balanced approach.

Sentencing Principles
The sentencing principles and the culpability principles under *Hanham* continue to apply until an appellate Court chooses to overturn the case. But the amounts of the fines are likely to be higher under the HASWA 2015 as the HASWA 2015 allows for higher fines to be imposed.

Was the court right in setting the fine at $100,000?
For the company, this was the worst possible outcome in terms of a fine as that was the maximum they could afford to pay. Does this mean that courts will impose the highest amount a company can pay, rather than lowering the "bands" to reflect the ability of the company to pay? For example, in Budget's case, the bands could have been lowered thus. A band of $100,000 to $150,000 for serious offending, even if that means possibly bankrupting the company. A possible $50,000 to $100,000 for medium-level offending and, a possible fine of less than $50,000 for low-level offending.

It seems very unlikely that the bands will be shifted in relation to the PCBU's financial position. Even though this means that the same fine will punish a smaller business more severely than a bigger one. A bigger, richer corporation could more easily afford even a $ 275,000 fine (which was the starting point of the fine in this case). This is not in line with trying to get away from the fine being just a "licence fee" that companies can pay for being unsafe (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [51]).

Was the court right in saying fines could be imposed that could potentially bankrupt businesses?
The court's reasoning is correct if we accept the Taskforce's argument that it is best that some firms be put out of business if they are chronically unsafe (Independent Taskforce on Workplace Health and Safety, 2013, at [389]). The threat of being put out of business by a fine for egregious breaches of the HASWA 2015 should act as a strong deterrent to encourage companies to comply.

Although the Court said that such a fine would only be imposed when the breach is egregious (*WorkSafe New Zealand v Budget Plastics (New Zealand)* Ltd CRI-2016-054-003694, [2017] NZDC 17395, at [55]), this decision means that directors now have to consider the safety of their company's operation as a factor that could possibly lead to the company's bankruptcy. If a director knows that there is a possibility that an unaffordable fine could be imposed on the company because of poor safety standards, then the director could be guilty of reckless trading under s 135 of the Companies act 1993, if the director allows the company to carry on operating with poor safety standards.

Conclusion

The principles under the Health and Safety in Employment Act 1992 continue to be applicable but will be refined to be in line with the HASWA 2015. The District Court in this case referred constantly to the findings by the Taskforce, so it may well be well worth it for Counsel to be familiar with the Taskforce Report.

This case sends a strong message that WorkSafe will not hesitate to prosecute, but will do so in a measured way. The Courts will impose the maximum fine they possibly can give the offender's level of offending and their financial means. But they will not refrain from imposing the highest fine possible in egregious cases, even if it means the business going bankrupt as a result of the fine.

References

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