**IN THE DISTRICT COURT**
**AT NORTH SHORE**

**CRI-2013-004-013914**
**[2014] NZDC 9**

**MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT**
Informant

v

**KLS ROOFING LIMITED**
Defendant

Hearing: 28 May 2014

Appearances: C McDiarmid for the Informant
P Syddall for the Defendant

Judgment: 28 May 2014

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**NOTES OF JUDGE P SINCLAIR ON SENTENCING**

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[1] KLS Roofing Limited is before the Court today for sentence having pleaded guilty to one charge under sections 6 and 50 Health and Safety in Employment Act 1992, specifically that it failed to take all practicable steps to ensure that Kevin Curtis while at work was not exposed to the risk of a fall from height while carrying out roofing work. The charge carries a maximum penalty of $250,000 fine.

[2] The facts are that Mr Curtis, an employee of KLS was harmed while working when he was fitting roofing on a residential house. Mr Curtis was working on the roof at the rear side of the house. The height of the roof of this area varied between 2.4 metres and three metres at a pitch of 31 degrees. The roof was wet due to rain earlier that morning. There was no fall protection in place at the time of the accident. Scaffolding in place prior had been dismantled and Mr Curtis was instructed by the defendant to proceed by use of a ladder for access and standing on

screws or a timber perch. Mr Curtis fell from the roof. As a result he sustained injuries namely a fractured collarbone, right shoulder blade, right wrist and two ribs on his right side. He spent six days in hospital.

[3] Both the informant and defendant have filed comprehensive submissions and I have also heard oral submissions from both parties today. The informant submits a reparation order of between five and $10,000 would be appropriate. The informant submits a starting point of $120,000 would take into account the defendant's culpability and the realised and potential harm. It acknowledges the defendant is entitled to a discount for mitigatory factors and a guilty plea. It submits a total discount of no more than about 50 percent of the starting point should be entertained. So the informant proposes an end fine of $60,000 would reflect the culpability and harm factors discussed in the leading decision of *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93, 095; (2008) 6 NZELR 79 (HC) balanced against the mitigatory factors relevant to the offending.

[4] KLS accept a reparation order of $5000 to Mr Curtis would be appropriate. KLS submits a starting point of sixty to $70,000 would be appropriate for the fine and a total combined discount of 55 percent of the starting point would reflect the mitigatory factors relevant to KLS in this incident, arriving at a proposed fine of just under $27,000. KLS submits its financial capacity is limited, stating any further financial pressure on its already restrictive cash flow would place it in a real distinct position of insolvency. Therefore, it proposes an end fine of $20,000 and reparation of $5000.

[5] So there is significant disparity between the informant and defendant's starting point and end point of sentence.

[6] The leading case on the approach required for sentencing for these types of charges is the *Department of Labour v Hanham & Philp Contractors Ltd.* The Court in *Department of Labour v Hanham & Philp Contractors Ltd* recognised that a substantial uplift on existing levels of fines was needed, to reflect the increase in maximum fines legislated in 2003, the effects of inflation and the seriousness of workplace accidents and the need for deterrence.

[7] I must firstly assess the amount of reparation, then fix the amount of fine and then make an overall assessment of the proportionality and appropriateness of the total imposition. I consider a sentence of reparation to Mr Curtis, as the victim of this offending, is a primary consideration. There are no tariffs regarding reparation. Qualifying emotional harm is a difficult task for the Court. I need to view all relevant circumstances of this case to determine the appropriate figure.

[8] Mr Curtis suffered serious harm as a result of the accident. Mr Curtis stated that his wrist was in a cast for six weeks and his arm in a sling for two months to allow his shoulder blade and collarbone to heal. He states he was in hospital for six days. He says his injuries have healed, although his collarbone is deformed and will stay that way. He still gets some pain from it and from his wrist when he lifts things. He said he was off work for five months but has now been able to return to work as a roofer and has recently been able to return to the gym.

[9] I note that after the accident the defendant offered Mr Curtis reparation and negotiated an apprenticeship for his return to work. Those offers were in fact declined because Mr Curtis chose not to return to work for KLS. I accept from company records provided from KLS that it is not in a strong financial position. However, when I review the decisions on reparation relating to these types of incidents, particularly the decision of *Department of Labour v Bernard Matthews NZ Ltd* DC Gisborne CRN-09016500510, 15 January 2010 (wherein the Court ordered $15,000 reparation award to an employee whose arm had become trapped in an unguarded nip pinch point of a conveyer), and the decision of *Cookie Time*, (again involving an employee whose arm was caught in the mechanism of a ground conveyer belt and wherein the Court commented the reparation award of $5000 was barely adequate), I consider a figure of $10,000 reparation is appropriate for this matter.

[10] So I now move to fixing a fine. I need to bear in mind the purposes and principles of sentencing when fixing an appropriate fine. The principles of deterrence and denunciation feature heavily in fixing the starting point. In *Department of Labour v Hanham & Philp Contractors Ltd* the Court of Appeal accepted that a broad assessment is involved and that sentencing is not a

mathematical exercise. The Court stated that a starting point should generally be fixed according to the following scale: low culpability a fine of up to $50,000, medium culpability a fine between $50,000 and $100,000 and high culpability a fine between $100,000 and $175,000. Culpability refers to factors of intent, motive, foreseeability and circumstances - the defendant's blameworthiness. The Court then referred to seven criteria to assess culpability.

[11] With regard to these culpability factors, KLS submits that it did not depart far from the industry standards, that the defendant was engaged by the homeowner to carry out roofing requirements on the house and the home owner was responsible for providing scaffolding and fall protection on site. KLS said that Mr Curtis was aware it was the home owner's responsibility to provide scaffolding and fall protection.

[12] The defendant places emphasis on its full training to its employees, including Mr Curtis, identifying hazards and training. The defendant says it has robust practices in place to train employees and workplace practices and safety training and refers to its safety plan. The defendant says that Mr Curtis had been fully inducted into safety training for roofing and hazard identification and that it provided its employees safety cards, and submits that had these cards been referred to and followed, it is highly unlikely this unfortunate accident would have occurred.

[13] Finally, the defendant submits that fall protection was available on site by means of a mobile scaffold tower. KLS said that although the scaffold tower would have covered one third of the area required, Mr Curtis was told that the scaffold tower would be erected by the builder to provide him with fall protection and that when he completed his work on each section he could reposition the scaffold tower to cover his work.

[14] I concur with the informant that KLS should have taken the following steps.

- Firstly, to have undertaken a further hazard assessment on the site and safety work plan when conditions of the workplace changed, namely when the scaffolding at the rear end of the house was dismantled.

- Secondly, to have instructed its employee to stop work until a further hazard assessment and safe work plan was completed.

- Thirdly, to have effectively communicated its safe work plan to its employees, and

- Fourthly, to have ensured that an effective means of fall protection was in place and used by the employees while carrying out work on the roof.

  If KLS had done this, it would have removed the risk. The scaffolding provided by the home owner to provide access and fall protection had been dismantled two days prior to the incident to allow further work to be undertaken on the house, but in any event it was not the home owner's responsibility. It was the employer's, that is, the defendant's, responsibility,

[15] Although KLS says it was under the impression that alternative work fall protection was to be provided, when advised by Mr Curtis on the morning of the accident that the scaffolding had been dismantled and that the roof unworkable when wet, KLS instructed the victim to use ladders for access and stand on screws or put a piece of timber on screws to form a perch. So it did not satisfy itself that an adequate alternative fall protection was provided. So, in other words, Mr Curtis was instructed to continue his work without any means of fall protection.

[16] The use of mobile scaffold tower was not sufficient to control the hazard associated with Mr Curtis' work at heights as Mr Curtis was still required to work on the roof. He could not reach the required work area by standing on the platform of a mobile scaffold tower and was therefore still exposed to the risk of a fall. The pitch of the roof and slippery conditions on the roof further aggravated the potential risk of a fall and the scaffold tower itself was required to be moved along.

[17] I concur with the informant that regardless of who was providing the fall protection control, the defendant had a duty under the Act to ensure the safety of its employee while he was at work, particularly given it had been notified of the hazard and potential for harm. With regard to the realised harm to the victim, Mr Curtis' fall

was broken by the builder who managed to reach out and catch Mr Curtis around his head and shoulder thereby reducing the physical impact of the fall. However, as a result of the fall Mr Curtis' sustained fractures to his collarbone, shoulder, wrist and ribs.

[18] The risk of greater harm occurring as a result of falling from a height of 2.4 metres was further fractures and/or a head injury and it is always possible death could have occurred in those instances. Fortunately, there do not appear to be any significant permanent injuries sustained by Mr Curtis except for an indication that his collarbone is slightly deformed and that he is still getting some ongoing pain.

[19] In my view the hazard was obvious. KLS was aware that the employee was involved in hazardous work at heights and, furthermore, KLS was made aware of the lack of fall protection in place. In my view KLS's failure to ensure that industry standards for working on roofs were followed marks a significant departure from industry standards. I accept KLS had its roofing safety plan in operation and Mr Curtis had received training. However, there was no reason why KLS should not have instructed Mr Curtis to stop work until adequate safety arrangements had properly been put in place.

[20] In my view, KLS's failure to ensure the industry guidelines were followed marks a significant departure from industry standards. There would have been minimal cost involved for KLS to carry out an on-site hazard assessment and a subsequent safe work plan when the conditions of the site changed. Costs involved in the erection of proper scaffolding and fall protection would have been part of normal operating cost, and in fact this cost was being covered by the homeowner, so there would have been no additional cost.

[21] Taking these factors into account I consider the factors of blame worthiness puts KLS on the cusp of medium to high range of culpability. Inevitably there is no case that sits on all fours for this type of incident. However, I consider that the decision of *Department of Labour v Hanham & Philp Contractors Ltd* - the leading case - and also the decision of *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526; (2013) 11 NZELR 1 (HC) provides some assistance

although the realised harm in both *Department of Labour v Eziform Roofing Products Ltd* and *Department of Labour v Hanham & Philp Contractors Ltd* was greater and in *Department of Labour v Eziform Roofing Products Ltd* the roof was higher and there were two victims.

[22] So bearing all of those factors in mind I conclude that an appropriate starting point for a fine is in the sum of $100,000.

[23] There were no aggravating features of the offending, so I move to the mitigating features. KLS has an unblemished record. It has no previous relevant convictions or warnings. KLS was co-operative throughout the investigation. I accept KLS has shown considerable remorse for this offending and offered Mr Curtis reparation before this hearing and negotiated an apprenticeship for his return to work. I accept KLS has carried out a full review of the accident and has, from the submissions and exhibits provided, put robust practices and policies in place to ensure safety practices are reinforced. That is certainly not challenged by the informant.

[24] In my view, this combination of factors warrants a discount of 10 percent. A further 15 percent discount is warranted for the payment of reparation. A guilty plea was entered at an early opportunity warranting a full credit discount of 25 percent. So effectively I have provided a total discount of 50 percent from the starting point.

[25] There is no direct ruling on the issue as to whether the mitigatory factors should be deducted point by point or whether they should be deducted in total. There is no ruling on this issue in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607. It is possibly contemplated that the guilty plea is taken from a net figure but I am guided by the decision of *Cookie Time* wherein the Court of Appeal provided a global discount to provide an end fine.

[26] So I provide a global discount of 50 percent, producing an end point of $50,000.

[27] KLS submit I must take into account its ability to pay a fine. The requirement on clear evidence of financial circumstances was endorsed by the High Court in *Department of Labour v Eziform Roofing Products Ltd.* There is no suggestion that KLS would go into liquidation. I am not satisfied there is any suggestion of that from the records provided in submissions.

[28] However, I accept that KLS is not in a particularly profitable state, and I accept a payment of a fine will create some significant hardship given its financial viability provided in the accounts. Therefore, I reduce the fine to $46,000 taking into account those financial aspects.

[29] I reach the final stage, which is the overall assessment, and consider reparation to the victim of $10,000 for the harm sustained and a fine of $46,000 is appropriate given all the circumstances.

P Sinclair
District Court Judge