IN THE DISTRICT COURT
AT WELLINGTON

CRI-2015-085-009971
[2016] NZDC 5425

WORKSAFE NEW ZEALAND
Prosecutor

v

ENVIRO WASTE SERVICES LIMITED
Defendant

Hearing: 23 March 2016

Appearances: D Brabant for the Prosecutor
S S Cook and H A Hedley for the Defendant

Judgment: 23 March 2016

NOTES OF JUDGE I G MILL ON SENTENCING

---

[1] This is my sentencing decision in the prosecution by Worksafe New Zealand against Enviro Waste Services Limited.

[2] The defendant company has been charged with being a principal and failed to take all reasonable steps to ensure that Junior Hunt, an employee of a contractor, namely Enterprise Recruitment Wellington Limited, was not harmed while doing any work that he was engaged to do, namely operating a recycle glass collection truck.

[3] The prosecution arises from events on 3 March of last year when Junior Hunt was crushed while at work and subsequently died of his injuries. During the course of the proceedings today, I have heard from members of the family and also from Maggie White, and her statement has been read by her brother and father to the Court. I have read all the victim impact statements and my comments to the family

and others during the course of this sentencing should really be part of this sentencing decision.

[4] What I want to first do is just outline the summary of facts that have been given concerning this accident. The summary of facts is a very long document and there are many technical issues dealt within it. I will not read all of those issues. I will try and catch the essence of what happened and resulted in the death of young Junior.

[5] Enviro Waste Services Limited is a large company that operates in numerous locations in New Zealand and it handles refuse and recycling collections. Its Wellington Branch at the time of the accident had about 30 or 40 employees and had been engaged through Wellington City Council to collect refuse and recycling in the Wellington Region.

[6] The trucks that are used in recycling glass collection had been designed over a period of time by the defendant company in consultation with two specialist companies and a private engineer. A lot of information in the summary of facts relates to the development of the prototype trucks which were developed during 2010 and 2011 and finally a final design was come up with. The final design included a semi-automatic operation and a manual two-handed hold to run the function of the lifting of the pod to the top of the truck. The semi-automatic function was originally designed to allow the operator to get in the cab and drive to the next stop while the bin cycle completed. The function was semi-automatic because it required a two-handed control to initiate the function for the first two seconds of a lifting cycle. After the first phase, the bin would then enter an automatic cycle. The initial two second delay was built in to ensure the operator made a conscious decision to engage the semi-automatic cycle. The semi-automatic mode was governed by a speed which was paused at the top of the cycle for the recycling to empty. The process was timed at approximately 26 seconds and would not stop unless an emergency stop or tripcord was triggered. It was engineered so the bin moved at a slower pace in the first lifting phase, increased in speed as it moved up and the descent cycle was replicated with those speeds. Since this accident, this semi-automatic mode has been disengaged from all of the trucks.

[7] There were two e-stops; one was located in the cab and the other to the left of the bin lifter. A tripcord stretched across the front of the bin lifter and if either e-stop was activated, they required to be reset. After the reset had been activated, the bin lifter would only run on the two-handed hold operation until the bin was returned to the lower starting position. The bin lifter had three compartments or pods to separate the glass according to colour.

[8] The manufacturer of the truck did a hazard and risk assessment and this identified the obvious risks to an operator and also referred to the fitting of a cable operated as a tripwire across the entrance to the danger zone and that would act as an emergency stop.

[9] At the time of the incident on 3 March 2015, both Junior's father and brother were employed by the company also. Junior Hunt had commenced employment there in November 2014, but he was employed at that stage as a runner. Junior commenced driving trucks on 24 December after he had obtained a full class 2 licence. On 3 March, he began his collection on a recycled glass collection truck. This was his second week on the truck, but the first time that he had collected glass on this particular run. Shortly after 10.00 am, he entered Upton Terrace from Tinakori Road. He parked the truck up hill on a right-hand camber. Shortly after this, a resident, Mr Rainbow, heard the truck idling and thought he heard a voice. When he went to investigate, he discovered that Junior was trapped between the glass lifter and the centre pod of the truck. Junior was conscious at the time and he tried to give Mr Rainbow directions to operate the glass lifter, but as the tripcord had been triggered, the controls would not work and so tragically he had to remain there crushed as he was waiting for emergency services to arrive. He was taken to hospital, but he died the following evening.

[10] There is an inference to be drawn in this case that Junior had a problem with the truck in that the pod or bin had stalled at the top of the cycle and that he had taken some steps himself to enter into the danger area to try and free it. The problem is that once it was free, the automatic cycle would continue and that is probably how he came to be crushed in this machinery.

[11] It is admitted by the company in this case that he did not have a pre-employment driving assessment as initially, of course, he was employed as a runner. He did not begin driving until he had obtained his full class 2 driver's licence on 23 December 2014 and then he drove for several months after that.

[12] It is clear in this case that although there were procedures for training, he did not receive the training and was considered to be assessed as able to drive by him getting the particular licence that I mentioned. He was signed off as such on 12 January 2015 and a Mr Harmer, one of the Wellington Branch Operation Managers, said to the investigator that he talked to Junior while he was beside the truck how to deal with any bin stalling issue should it occur and emphasised the importance of not climbing up onto the truck at any point. That tells me that on 12 January, almost two months before the accident, an operational manager knew of the problem with the bin stalling and had given a warning to Junior not to climb up onto the truck.

[13] As I said, there were faults with his training and these are not really disputed in this case. Concerns about Junior's knowledge of operating procedures were identified by a fellow driver. This was just Friday before the accident. At that time, the driver decided to check the bin and found that he had been sorting the colours incorrectly and said that he wanted to touch base with Junior later on about that but he never got round to doing so. It seems to me that the evidence here is that Junior was inexperienced, but he was trying to do his best.

[14] The run that he was doing at this particular time was that of another driver usually, who was on leave. Previously, the company had determined that this route should be undertaken by a lane truck as opposed to a recycled glass collection truck. A lane truck is smaller. The previous driver usually drove the recycled glass collection truck up Upton Terrace. Given that, Junior was expected to have experience beyond his means on this particular day.

[15] The bin lifting operation was not identified well enough by the company as a hazard although, of course, they identified the possibility of crushing between

moving parts and that the driver should be aware of the mechanics of the operation and how to stop it, and that the public itself could be at risk if things were not done properly.

[16] The semi-automatic function allowed the operator to leave the vicinity, so there was a potential for danger not only to the operator but to the public. So the problem here was that the bin lifters were operating according to plan most of the time apparently but they were stalling. The operation managers in Wellington understood this and they understood it was due to the camber of the road, and had directed drivers to manoeuvre the truck onto an even camber to get the bin lifter down. One of the operation managers recalled explaining that technique to Junior as part of his glass truck training. If that was training, it is hard to see how that was sufficient in the circumstances. Some of the drivers interviewed by the investigating officers had various ways of coping with the stalling of the bin and these are detailed in the summary of facts.

[17] So the breach which is acknowledged, in fact, by the company in not taking all practicable steps to address the hazard is that they had not ensured that the bin lifting mechanism on the trucks could only be operated throughout the entire cycle by using a two-handed hold function. Secondly, that Junior Hunt was not fully trained in accordance with their own procedures or competent to drive such a truck and they did not assess him as such properly before assigning him to that role, and that they had not taken steps to eliminate the bin lifter stalling at the top of its lift.

[18] The company has a good previous record having no convictions, so there are no aggravating circumstances as far as its previous behaviour are concerned. I have had very detailed submissions both in writing and orally by both the prosecution and the defence. In fact, there are significant differences in the way that the submissions were put, but the scope so far as reparation and a fine is concerned, they are within a fairly narrow compass.

[19] The prosecution submits and this is again in the written submision that my job is that I must first assess the amount of reparation that would be payable to the family or others. I must then fix the fine that is payable by the company and make

an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine. In this case, the third step is not necessary. The company being a responsible company has the ability to pay reparation and the fine whatever it is that I order. When I reach a reparation figure, which I will, it in no way compensates for the life of Junior Hunt. Nothing could do that and nothing in monetary terms could. It is simply a recognition of the harm done and I do not want the family to feel that I am quantifying his life by setting a figure in reparation. I am guided in that practice by other cases, High Court cases, as to the appropriate amount of reparation.

[20] In this case, it is accepted that $85,000 is the starting point and that that amount should be awarded overall as reparation, but the defence in this case suggests that I should subtract from that money already paid by the company to the family. The company paid around about a quarter of the funeral expenses, around $3000 and, again, in excess of $3000 matching dollar for dollar the contribution made by other employees in the company. I think the figure was about $6800 and also included some groceries purchased. While I acknowledge that the company has made those payments, in my view, that contribution is modest to say the least in the circumstances and I do not accept for a moment that that sum should be deducted from the reparation figure.

[21] The fine is to be assessed in accordance with the leading case, *The Department of Labour v Hanham & Philp Contractors Ltd & Ors* (2008) 9 NZELC 93, 095 (2008) 6 NZELR 79 and there are three bands of culpability or blameworthiness; low culpability, a fine up to $50,000, medium culpability, $50,000 to $100,000 and high culpability, $100,000 to $175,000. The maximum penalty in this case is $250,000 as a fine. As I said, the company has the financial ability to pay the fine, I just have to determine the starting point.

[22] The prosecution submissions, and I will not go through these exhaustively, is that reparation should be $85,000 and no less and that as far as culpability is concerned, this case falls into the high-medium or low-high culpability range and a fine of around $100,000 would be appropriate. These matters are always a matter of discretion or judgment as far as the Judge is concerned and the defence submit the

culpability is lower; it is in the medium band around the medium level. A figure of $60,000 has been mentioned in their submissions as an appropriate fine, although it is accepted it could be a little more than that.

[23] Mr Saunders has sworn an affidavit, which I have had the benefit of reading, and he is the Managing Director in New Zealand of the company. In his affidavit, he has gone through the steps that the company take as far as health and safety are concerned. More importantly, he has gone through the steps that the company has taken since the accident all of which are appropriate and those steps include almost immediately acting upon the most obvious one and that is to take away the semi-automatic operation. Another important step is the appointment of several people as responsible throughout the country for health and safety. Mr Saunders has admitted that the operation of the Wellington Branch was very independent from the Head Office and that the decisions made were well below the standard that he would have expected and believed were being applied. The steps that he has taken and the company has taken to try and avoid anything like this happening again are significant and I take those into account. However, the company cannot get away from the fact that the conduct of the company in Wellington fell well below the level to be expected and directly and obviously contributed in a major if not the only way to Junior's death. Although he may have climbed up into the machinery to try and solve the problem, he cannot be blamed for that.

[24] So, the defence submissions, as I said, really in the end boil down to what should be the reparation figure and how blameworthy was the company in the circumstances that I have outlined, and I have considered those submissions. It is heartening to see that the company accept the three failures that have been outlined in the summary of facts and that they have taken steps to address those. These failings, however, were significant. This machine was allowed to operate in a dangerous way for a period of time. Junior Hunt was an inexperienced operator and basically untrained. This was a fatal combination and was avoidable at little expense or trouble by a few practical steps that could have been taken. There was a relatively simple mechanical fix, that is, the removal of the semi-automatic phase, there was the appropriate training that should have been available and by removing the semi-automatic function, it would be very difficult to become trapped as of course

Junior did. It is not sufficient, in these circumstances, to lay the blame at a local management level. There were people in that company who knew enough and realised enough about the risk to the drivers who had brought it to the attention of their immediate managers to do something about it or to escalate the issue to a higher level.

[25] A restorative justice conference proceeded and I am grateful to everyone who attended that. It was useful, it was important and should not be underestimated, but not all of the questions of the family were answered at that conference. Not all of the parties who had the answers to the questions were there. It was a brave thing for everyone to do, all the participants to do and it was not easy but it has not resolved things as much as one would have wished to be resolved.

[26] I find in this case that the company's blameworthiness or culpability is high. I categorise it as the prosecution do as high-medium culpability or low-high culpability. One of the cases referred to by the defence is the *Tally's*. I had the advantage of hearing that case in a defended hearing and whereas it could be compared to this case in some ways, there the hazard was far more concealed and the culpability of the company less in that case. Given the nature of the problem and that is the stalling of the bin and the fact that drivers had experienced this problem and operational managers were aware of it, and nothing was done to remedy it in a practical or proper way and given that training should have been carried out, in my view, it falls, as I said, in the high-medium to low-high category.

[27] As I said, I acknowledge the contribution to the family of the $6875 paid. It was modest in the circumstances but, again, it was pretty minimal. The company, as I said, has capacity to pay.

[28] I do not agree with the defence submission that this was not an obvious hazard. The hazard was obvious to those who were operating the trucks and those in charge of them. It is said that it was perhaps a freak accident insofar it relied on three things happening; the stalling of the bin, the climbing up to the area and the semi-automatic cycle which would be retriggered once it started again. Well, perhaps all those three things did had to occur, but given that this was a hazard

known for some time, they should not have occurred and it should have been obvious. It was not properly identified or reported.

[29] So, the first thing is that as far as reparation is concerned, in my view, the sum of $85,000 is the appropriate figure and no deduction should be made from that. As far as culpability is concerned, in my view, the starting point of the fine is one of $100,000. The defence has submitted to me that a deduction of 35 percent should be made for mitigating circumstances and there are mitigating circumstances. There is, of course, the fact that reparation can be paid by the company. There is the co-operation with the investigation. There are also the steps that the company have taken and the responsible attitude that the company have taken to those since the accident.

[30] The crunch point here is the factor of remorse and the family I think collectively feel that although remorse has been expressed and I am sure that Mr Saunders' remorse is genuine, it is too little too late. In that respect, I have noted the attitude towards the family at the time.

[31] Firstly, and this may have been a mistake or a miscalculation by someone, many of them learned through social media that Junior had died.

[32] There is also the attitude to Maggie and her request for financial assistance from the company and because it did not fit some procedure or category, she was denied assistance that she needed at the time. That could almost be described as callous.

[33] Then there is the issue of Junior's father and brother returning to work. There does not seem to be any documented evidence that they were required to return to work, but why would they return to work so soon if they did not feel that they were required to do so?

[34] Then there is the rather modest financial help given in the circumstances of this case. Now, whatever the rights and wrongs of the prosecution were and whether the company were going to defend it or not, they should have got beside the family

and given them not just financial support but emotional support. No emotional support was offered, in my view, and there can be no deduction for remorse.

[35] So, whilst the company has done a lot since and while the present representatives are remorseful and I do not doubt for a moment that they are, the way it was handled at least on a local level showed little feeling for the family and their plight.

[36] The defence seek a deduction of up to 35 percent. In my view, 25 percent is the appropriate figure.

[37] The result is as follows. The company is convicted and ordered to pay reparation of $85,000 within 28 days.

[38] Seventy-five thousand dollars is to be paid to Mr and Mrs McGregor for the benefit of the family as they see fit.

[39] Ten thousand dollars is to be paid to Maggie White.

[40] As far as the fine is concerned, from $100,000 I deduct 25 percent which makes $75,000 and from that I deduct 25 percent for the plea of guilty. The company is fined $66,000 with Court costs of $130 to pay and a solicitor's fee of $650.

I G Mill
District Court Judge

Amendment.
Fine calculated incorrectly. i.e.
25% deduction results in fine of
$56,250

DCJ