5 Workplace health and safety

5.1 High Court increases total financial penalty: *WorkSafe New Zealand v Affco NZ Ltd*[1]

5.1.1 Introduction

This decision considers the appropriateness of the financial penalty set by the District Court in relation to a workplace accident. The High Court determined that both the reparation and the fine imposed on the employer in the District Court did not appropriately reflect the harm to the employee or the employer's culpability.

5.1.2 Factual background

AFFCO NZ Limited (AFFCO) is one of New Zealand's leading meat companies and operates processing plants throughout New Zealand. Jason Matahiki was employed as a night cleaner at AFFCO's processing plant in Rangiuru, near Te Puke. He was working his fifth season on the night cleaning gang, and therefore was familiar with the plant's premises, equipment and work practices.

Each night, at the end of the shift, the cleaning gang would do a final inspection of the mutton floor work areas and equipment. This would be undertaken with the chains moving so the cleaners could check that all hooks and shanks hanging off the chain were clean.

During final inspection on the evening of 19 August 2014, Mr Matahiki was standing between the chains on an elevated 'drip tray' to check the cleanliness of the tops of the hooks as they passed by. A hook prong came into contact with the left side of Mr Matahiki's head, pushing it forward into a flat 'scanner frame'. The resistance resulted in the hook prong penetrating his left ear and coming out beside his left eye.[2] For a short time Mr Matahiki was carried along the chain, suspended by the hook, until one of his colleagues heard his screams and hit the emergency stop button.

WorkSafe New Zealand (WorkSafe) charged AFFCO with failing to take all practicable steps to ensure that Mr Matahiki was not exposed to a hazard in the workplace, pursuant to sections 6 and 50(1)(a) of the former Health and Safety in Employment Act 1992 (the HSE Act).

5.1.3 District Court decision[3]

5.1.3.1 AFFCO's liability

AFFCO pleaded not guilty to the above charges on the basis that it was not responsible for Mr Matahiki's injuries.[4] The District Court accepted that AFFCO had taken appropriate steps to advise employees of its health and safety policies and procedures and provide training on hazards.[5] Nonetheless it found the accident occurred as a result of shortcomings in AFFCO's procedures to

[1] *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862.
[2] At [20].
[3] See the District Court's decision on liability: *WorkSafe New Zealand Ltd v Affco New Zealand Ltd* [2015] NZDC 22242. The District Court sentencing judgment is *WorkSafe New Zealand Ltd v Affco New Zealand Ltd* [2016] NZDC 8242.
[4] This defence was based on s 19 of the Health and Safety in Employment Act 1992 ('HSE Act'), which requires employees to take "all practicable steps to ensure (a) the employee's safety while at work...; and (b) that no action or inaction of the employee while at work causes hard to any other employee".
[5] *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862 at [18].

protect workers.[6] In particular, the Court found there was no *"actual proscription"* against staff standing on the drip tray[7] and AFFCO's *"own safety protocols unequivocally provided for the lock-out of machinery during cleaning"*.[8] It concluded that *"the company should have ensured, by on-going training and, most importantly, ongoing monitoring, that its health and safety protocols were being adequately adhered to by its relevant staff"*.[9]

5.1.3.2 Sentencing

The District Court followed the sentencing methodology set out in *Department of Labour v Hanham & Philp Contractors Ltd*,[10] which involves consideration of the amount of reparation, the size of the fine, and overall proportionality/appropriateness of the total figure.[11]

The Court determined that $25,000 reparation was appropriate. This figure took into account Mr Matahiki's financial losses (there was an $11,389.36 shortfall between his ACC payments and his wages prior to the accident) and the injury and harm Mr Matahiki had suffered, including the trauma of the accident, both at the time and ongoing.[12]

The Court reviewed the three bands for determining a starting point for a fine set out in *Department of Labour v Hanham & Philp Contractors Ltd*: low culpability, up to $50,000; medium culpability, $50,000-$100,000; and high culpability, $100,000-$175,000. It determined an appropriate starting point in this case was $40,000 (the upper end of the lowest band) on the basis that this was:[13]

> *slightly less than half the starting point for the fine in the Hanham & Philp case, where there was wilful and deliberate failure to (sic) by the company to prevent a known hazard. That is not the case in this instance.*

The Court did not consider the amount required uplift as a result of AFFCO's previous health and safety offences as they were *"of a different category"* and *"were dealt with at their respective times"*. However it awarded a 25 percent ($10,000) discount for mitigating factors in light of the steps AFFCO had taken to remedy the hazard, its cooperation with WorkSafe and the support given to Mr Matahiki.[14]

In respect of the total figure, the Court found no further adjustment was necessary. Accordingly, AFFCO was ordered to pay a total financial penalty of [redacted] $55,000 (plus court fees).

5.1.4 High Court decision – sentencing

WorkSafe appealed the District Court's sentencing decision to the High Court on the grounds that the total financial penalty imposed on AFFCO was *"manifestly inadequate"*. There was no appeal about liability. The primary issue before the High Court was *"whether the sentencing Judge pitched the financial penalties at a level that adequately reflected the seriousness of the offending, and AFFCO's culpability"*.[15]

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[6] At [19].
[7] At [22].
[8] At [23].
[9] At [25].
[10] (2008) 6 NZELR 79 (HC).
[11] *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862 at [26].
[12] At [28].
[13] At [29] citing *Worksafe New Zealand v Affco New Zealand Ltd* [2015] NZDC 22242 at [59].
[14] At [29] citing *Worksafe New Zealand v Affco New Zealand Ltd* [2015] NZDC 22242 at [60]-[62].
[15] *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862 at [5].

5.1.4.1 Reparation

The High Court considered whether the $25,000 reparation awarded in the District Court *"adequately reflected the very serious emotional and psychological harm suffered by Mr Matahiki."*[16] Having traversed the emotional harm suffered by Mr Matahiki, as set out in the District Court decision, the Court considered the analogous case of *WorkSafe New Zealand v Meycov Foods Ltd,*[17] where an employee was seriously harmed when her arm became trapped in a biscuit baking machine. In that case the business was ordered to pay the victim $45,000 in reparation, which was upheld by the High Court.[18] The High Court concluded that *"the amount of reparation ordered for emotional harm suffered by Mr Matahiki should have been more closely aligned to the award of $45,000 in Meycov"*[19] and went on to state that, *"given the nature of the emotional harm that has been suffered by Mr Matahiki, I have no doubt that the reparation ordered was inadequate."*[20] Accordingly, the Court increased Mr Matahiki's reparation from $25,000 to $40,000.

5.1.4.2 The fine

The High Court then considered whether the $30,000 fine set in the District Court was within the appropriate range. It clarified that *"whether that categorisation was appropriate must be assessed by reference to the conclusions that the Judge reached in his reasons for verdict".*[21] The Court found AFFCO's conduct should not have been assessed as falling within the category of *"low culpability"* (i.e. up to $50,000) but *"should have been assessed as at the lower end of 'medium culpability', dictating a starting point for a fine not less than $50,000".* The Court reset the starting point at $60,000.

On the issue of AFFCO's previous health and safety offences, the Court concluded that, contrary to the District Court decision, a 10 percent ($6000) uplift in reparation was appropriate *"to reflect the prior convictions".*[22] With the amount adjusted to $66,000, the 25 percent ($16,500) discount for mitigating factors was reapplied and the final figure rounded to $49,000.

5.1.4.3 Total financial penalty

The High Court found the total financial penalty (fine and reparation) of $89,000, rather than the $55,000 imposed by the District Court, was *"a proportionate response to the offending".* On that basis, the appeal was allowed and the District Court decision was set aside.

5.1.5 Commentary

This case was considered under the Health and Safety in Employment Act 1992, which had lower maximum penalties than the current Health and Safety at Work Act 2015. It will be interesting to see how the new legislation affects the courts' consideration of financial penalties in cases where an employee suffers a serious injury at work.

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16 At [34].
17 *WorkSafe New Zealand v Meycov Foods Ltd* [2015] NZHC 1180.
18 *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862 at [36].
19 At [38].
20 At [39].
21 At [41].
22 At [47].