**IN THE DISTRICT COURT**
**AT WANGANUI**

**CRI-2014-083-000887**

**WORK SAFETY NEW ZEALAND**
Informant

v

**W. GOILE ROOFING LIMITED**
Defendant

Hearing: 29 September 2014

Appearances: L Moffitt for the Informant
C White for the Defendant

Judgment: 29 September 2014

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**NOTES OF JUDGE I D R CAMERON ON SENTENCING**

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[1] The company, W. Goile Roofing Limited appears for sentence having pleaded guilty to failing to take all practicable steps to ensure that its employee was not exposed to the hazard of a fall from heights while carrying out roofing work.

[2] The brief facts are these. The defendant company operated a roofing company. The company undertook new and re-roofing work on residential and commercial buildings. In 2014 the defendant had been engaged by a sub-contractor Outback Sheds Limited trading as Roofing Specialists Wanganui to provide labour to complete the roof work at the Mill Street Kindergarten at 48 Mill Street Marton. Shane Stone Builders Limited had been engaged by the operators at the kindergarten to complete an extension, re-fit and re-roof of the kindergarten building. Shane Stone Builders Limited engaged Taranaki Steelformers Limited trading as Wanganui Steelformers to provide the roofing material. Shane Stone Builders Limited also engaged Outback Sheds Limited to provide the labour which

organisation subsequently subcontracted with the defendant. The defendant employed a Corey Tui as a roofer. Mr Tui had been employed with the defendant since November 2013.

[3] On 26 February 2014 Mr Tui suffered serious harm while he was working on the roof of the building. He was working on that roof at approximately 3.30 pm along with Mr Warwick Goile, a director the defendant company. The roofing iron had been laid on the roof and Mr Tui and Mr Goile were screwing off the roof iron. Mr Tui stood up and stepped back to get more screws when he fell off the 2.5 metre roof to the ground. At the time of the accident Mr Tui and Mr Goile were wearing harnesses. However, neither harness had been secured to an anchor point. Edge protection had been delivered to the site, but it had not been installed by the defendant. The defendant stated that he did not install the edge protection because he believed the pitch of the roof to be flat. In this case the edge protection that had been delivered was scaffolding.

[4] At his interview with Work Safe New Zealand the defendant maintained that the amount of scaffolding available on site for edge protection would have been insufficient. It is not known whether this is factually correct because there was no attempt to install or erect such scaffolding. When asked why he did not ensure that the harnesses were attached to an anchor point the defendant replied "I just got too lazy."

[5] Mr Tui suffered harm, namely a severed tendon and lacerations to his right wrist as a result of coming into contact with a sheet of iron that had been cut and bent upwards for the attachments of roof flashings. He spent an initial two days in hospital and later had to undergo further surgery for a skin graft. Mr Tui was able to return to work approximately two and a half months after the accident.

[6] The kindergarten was a single storied building at a height of approximately 2.5 metres.

[7] Mr White appears for the defendant and has filed submissions and addressed the Court. Mrs Moffitt appears for the informant and has filed helpful submissions and addressed the Court.

[8] Given that the defendant is a company, the two available sentences are reparation and a fine.

[9] A procedure for determining what sum should be ordered by way of reparation and a fine was outlined in the Court of Appeal case *Department of Labour v Hanham & Philp Contractors Limited* [2009] 9 NZELC 93, 095.

[10] In terms of the purpose of each sentence, reparation is designed to compensate the victim for emotional loss and harm arising from the accident. A fine is to meet the sentencing principles of accountability, denunciation and deterrence.

[11] The process is to fix the amount of reparation, then the amount of the fine, and then there is a third step where there needs to be an overall assessment of the appropriate penalty to be imposed.

[12] Dealing first with reparation, in this case the injuries to the victim were serious, involving two operations and he being off work for some two and a half months. He would of course have been compensated by ACC in relation to his lost wages.

[13] Mrs Moffitt advised the Court that the victim has been unwilling to provide a victim impact statement. Nevertheless, she submits reparation in the region of $10,000 would be appropriate to reflect the physical and emotional harm to the victim.

[14] Mr Whyte, by contrast, submits that reparation in the sum of $3000 would be adequate.

[15] The absence of a victim impact statement means the Court has no material before it as to the extent of emotional harm caused by the accident and the subsequent surgical procedures. Further there is no information before the Court as

to whether there has been permanent impairment in relation to the function of the wrist. I have to assume for present purposes that there is no such permanent impairment.

[16] However, clearly it would have been a traumatic event for the victim resulting in two operations and a substantial period of time off work. I assess the appropriate sum in these circumstances at the level of $3000.

[17] I note that the company is insured for reparation though this is not a factor I have taken into account in assessing such a sum.

[18] As to the appropriate level of fine, this case involves a breach of s 6 of part 2 of the Health and Safety in Employment Act 1992 and the maximum fine under s 50 of the Act is $250,000.

[19] Sentencing criteria are outlined in s 51A of the Act, directing the Court to apply the Sentencing Act 2002 and to have particular regard to the matters there set out.

[20] In fixing a fine, the culpability of the offender has to be assessed based on the degree of blameworthiness for the offending. As confirmed in the *Hanham* case the Court is required to apply the *R v Taueki* [2005] 3 NZLR 372 (CA) approach to sentencing so as to ensure that the fine imposed reflects the true level of culpability of the offender.

[21] The culpability assessment factors are summarised in *Hanham's* case and I will deal with each of them in turn. First, there needs to be identification of the operative acts or omissions at issue. This involves the Court identifying the "practicable steps" that were reasonable for the offender to have taken. In this case the omissions are obvious, namely the failure to install edge protection by way of the erection of scaffolding or if that was insufficient then the failure to secure the harnesses which were being worn to an anchor point. It is accepted that had those harnesses been so anchored then the accident would have been avoided.

[22] Secondly, an assessment of the nature and seriousness of the risk of harm is required as well as an assessment of the degree of harm which has occurred. In this case the absence of the preventative measures created an inherently dangerous work setting with the attendant risk of serious injury if a fall occurred, as it did here. The injuries sustained to the victim were serious as described and were of a type which ought reasonably to have been anticipated with such a fall.

[23] Thirdly, the degree of departure from standards prevailing in the relevant industry needs to be assessed. It is accepted that the Ministry of Business, Innovation and Employment's publication "Best Practice Guidelines for Working at Height in New Zealand" and "Best Practice Guidelines for Working on Roofs" are widely accepted as the industry standard for work of this nature, providing guidance for people working at height. Section 7 of the material provides guidance on edge protection and fall arrest systems. In this case there has been a total departure from the prevailing standards.

[24] Fourthly, the obviousness of the hazard is self-evident.

[25] Fifthly, as to the availability, cost and effectiveness of the means necessary to avoid that hazard, it is accepted that some form of scaffolding had been delivered to the site and was available for installation at no cost to the defendant. Even if that would have been insufficient both Mr Goile and Mr Tui were wearing harnesses and it is accepted that an anchor for those harnesses was readily available.

[26] Sixthly, as to the state of knowledge of the risks and of the nature and severity of the harm which could result, the risks were obvious and the harm which resulted ought reasonably to have been anticipated.

[27] Seventhly, as to the state of knowledge of the means available to avoid the hazard, the means were readily available, as described, at no cost to the defendant and the director of the defendant, Mr Goile, is on record as stating that he was too lazy to require the harnesses to be anchored.

[28] In assessing the level of the fine I have had regard to various authorities. In *Department of Labour v Eziform Roofing Limited* [2013] NZHC 1526, involving an employee falling 5.5 metres off a roof while installing guttering, the High Court increased the starting point of the fine from $60,000 as fixed by the District Court to $100,000. There though the injuries suffered by the employee were significantly more serious than in this case.

[29] In *Hanham*, involving a fall of an employee of approximately 2.4 metres from a wooden scaffold structure which had been badly constructed by the site foreman the High Court increased the starting point for the fine from $23,000 to $125,000. The final sentence including reparation of $12,000 was fixed at $50,000. In *Health and Safety Inspector v KLS Roofing Limited* CRN13004504856, North Shore District Court, 28 May 2014, involving an employee falling from a roof a starting point of a $100,000 by way of fine was adopted. There the injuries to the victim were significantly more serious than the current case. In *Ministry of Business, Innovation and Employment v Greenway Developments Ltd* [2014] NHSE 1 the starting point of $55,000 was fixed for the fine where a contractor fell three metres to the ground while erecting a truss on a residential house. He suffered a fractured jaw and a fractured wrist and the defendant was charged as a principal.

[30] In *Department of Labour v City Aerials Limited* [2011] NZHSE 20 involving an employee of a contractor falling approximately six metres from a roof while installing a satellite dish, a starting point of $60,000 for the fine was fixed. There the defendant was charged as a principal. The injuries sustained to that employee were significantly more serious than in the present case.

[31] In *Department of Labour v Blackhead Quarries Limited* CRI-2011-012-000795, DC Dunedin, 29 June 2011 a starting point of $50,000 was adopted for a fine, the case involving a fall by an employee from the top of a crusher, that crusher having full protection on three sides but the employee slipping off it on the unprotected side and suffering severe injury.

[32] In the circumstances I consider that the appropriate band for a fine is that of medium culpability being fine of between $50,000 and $100,000. The breach was

flagrant, but against that in relative terms the injuries were only moderately serious. That is, it was fortunate that there was not significant further injury. In all the circumstances I fix the starting point for the fine at $75,000.

[33] In terms of aggravating features the prosecutor, Mrs Moffitt, advises that the director of the defendant company has been formally warned on a number of occasions, in 2012 and 2013, about working on a roof without edge protection. These warnings were apparently from Work Safe's predecessor. The prosecutor also advised that the defendant has some ten years' roofing experience and would have been well aware of industry standards and guidelines.

[34] There is no documentation before the Court as to those warnings or any evidence about them. There is no reference to any previous warnings in the summary of facts to which the defendant has pleaded guilty. Given this lack of detail I do not uplift the starting point of the fine on this ground.

[35] As to the fact that reparation has been ordered I am prepared to reduce the starting point in relation to the fine by 10 percent to reflect the reparation to be paid. That discount includes a recognition that the company responsibly maintained insurance for contingent reparation payments and also recognises that the defendant, though its director, assisted the victim in offering him further employment and then in locating other employment.

[36] I am also prepared to reduce the starting point by a further 10 percent to recognise the immediate co-operation of the defendant's director Mr Goile with authorities and the obvious remorse expressed by Mr Goile. So a 20 percent reduction reduces the fine to $60,000. It is then accepted that a full 25 percent discount for the early guilty plea is available which I apply. Accordingly, the level of fine is reduced to $45,000.

[37] Mr White for the defendant submits that this fine ought to be reduced to $5000 given the alleged impecuniosity of the defendant company. In this respect Mr White advises that the company owes the bank some $17,000 and has an overdraft facility of $20,000 enabling it pay only a small fine which he submits

ought to be around the $5000 mark. In support of the parlous state of the company Mr Warwick Goile, one of the directors of the defendant, has filed an affidavit dated 23 September 2014. In that affidavit he deposes that the company has close to $70,000 in debt and has no means of paying that debt and indeed is not trading. Mr White advised the Court today that his instructions are that the directors and shareholders of the company have passed a resolution for the winding up of the company. Mr Goile deposes that the company does not intend to trade any longer and that he has now taken on paid employment elsewhere.

[38] Annexed to the affidavit are some financial statements for the year ended 31 March 2014, said by Mr Goile to be "externally prepared accounts". It is not apparent who prepared those accounts. The accounts record the total salary paid to Mr Goile and his wife for the year ended 31 March 2014 at $27,174.

[39] Section 51A(2)(b) Health and Safety in Employment Act requires the Court to have regard to the financial capacity of the offender to pay any fine or reparation. Clearly the company has the capacity to pay the reparation because it is insured.

[40] As to the fine, Mr Goile's affidavit raises some doubt as to the company's capacity to pay a significant fine, at least in one lump sum. It is apparent that currently the company would be unable to do so from its own means.

[41] I have regard to the provisions of the Sentencing Act in regard to fines and in particular s 40 requiring the Court to take into account the financial capacity of the offender. At the same time, the Court must have regard to the provisions of ss 7 to 10 of the Sentencing Act including the need for the offender to be held accountable for its conduct, for its conduct to be denounced, and for a necessary message of deterrence to be sent to others in the industry.

[42] If the reality is that the defendant company is going out of business anyway, which are Mr White's instructions and as Mr Warwick Goile implies from his affidavit, then a substantial fine will have no impact on creditors given that a fine is not a provable debt in a company liquidation.

[43] While the company appears to have no current means to pay a substantial fine, its imposition will provide Mr Warwick Goile with the choice of either providing shareholder funds so as to meets its obligations including the fine or to allow the company to go into liquidation, voluntarily or otherwise. I note that while Mr Goile deposes that currently there is some $70,000 owed to creditors, there is no reference to whether and to what extent such debts are backed by personal guarantees from Mr Goile and any other director. If there are personal guarantees for significant sums, then that may provide Mr Goile with the incentive to maintain the existence of the company by injecting some of his own funds.

[44] I note from the copies of the company's bank statements annexed to Mr Goile's affidavit that over the period 1 April to 31 August 2014 Mr Goile has received by way of salary from the company a total of $24,000. I am advised by Mr White that the salary payments are in respect of Mr Goile and his wife. This can be contrasted though with Mr Goile's statement that the total salary for he and his wife for the year ended 31 March 2014 was $27,174. The company bank statements show that last month Mr Goile received a total of $5000 in wages, the last payment being $1000 debited against the company's account on 27 August 2014. In my view this required explanation by way of a sworn affidavit from Mr Goile, given his assertions in his affidavit of 23 September 2014 that the company is essentially defunct.

[45] In the result I am not persuaded that the fine ought to be reduced having regard to the financial circumstances of the defendant.

[46] An overall sentence of $3000 reparation and $45,000 by way of fine are the appropriate levels and anything less would fail to hold the defendant sufficiently accountable, and would be inadequate to denounce the blatant conduct and to deter others from adopting unsafe work practices.

[47] Accordingly, the defendant is convicted and ordered to pay reparation in the sum of $3000 to the victim payable immediately and is fined $45,000.

**ADDENDUM:**

[48] The $3000 reparation is to be paid within seven days of receipt by the defendant company of the requisite fines notice.

I D R Cameron
District Court Judge