

Health and Safety

Court troubled by ease with which “huge” penalty discounts applied in WorkSafe cases

WorkSafe New Zealand v Total Access Ltd and Perry Metal Protection Ltd November 2020

A recent WorkSafe New Zealand sentencing decision highlights the high cost of mismanaging health and safety when having work done.

WorkSafe NZ Decision

In *WorkSafe New Zealand v Total Access Ltd and Perry Metal Protection Ltd*, Total Access Ltd (Total Access) had been contracted by Perry Metal Protection (PMP) to provide scaffolding above a tank containing caustic soda used in PMP’s hot dip galvanising operations. An employee of Total Access suffered severe chemical burn injuries to his hands in the course of disassembling the scaffolding without gloves or other protective equipment. The injuries required surgery, three days in hospital and ongoing treatment.

Both Total Access and PMP admitted charges that they had failed to eliminate or minimise the risks associated with the handling of scaffolding equipment, with the case being about the fines and reparations they should pay.

In the case, the health and safety procedures of both PMP and Total Access were under scrutiny.

PMP did have safety data sheets for all of the chemicals used in its operation, including for the handling of caustic soda. This chemical, and other chemicals within the workplace, were classified as hazardous and harmful if in contact with skin, and safety data sheets did identify fumes, mist and vapour as substances that must not be breathed. In the context of earlier scaffolding work some months before the incident, the production manager for PMP had inducted some of the Total Access workers, including the victim’s supervisor, onto the galvanising facility worksite. However, the induction did not include the victim.

The victim’s supervisor knew from carrying out previous work in the facility that the environment contained hazardous chemicals, although neither he nor other Total Access workers were informed of the specific nature of the chemicals contained in the tanks. On this previous occasion, PMP’s production manager had provided a copy of the site hazards. However, the risk of chemical burns was not explained to the Total Access supervisor at that time.

Total Access expected the victim’s supervisor to carry out a risk assessment of the worksite and to use Total Access hazard identification forms for this purpose. From the case it appears that the Total Access supervisor did not fully complete the documentation, which did include a prompt for the supervisor to identify job specific hazard details. The court found that Total Access had not ensured that the victim’s supervisor had completed its documentation.

Before the installation of the scaffolding, the victim’s supervisor had visited the PMP site to scope what equipment was required for the current job and to discuss the work with PMP’s production supervisor. In that discussion there was no talk about the specific risks arising from the tanks or the chemicals they contained.

When the job commenced, no induction was undertaken by PMP, nor did anyone talk the victim through the workplace hazards. Although there had been a discussion between the victim’s supervisor and PMP’s production manager to discuss what was needed for the job, this did not include discussion about the specific risks arising from the tanks or the substances they contained. During the work, the victim was only provided with PPE that was usually given for scaffolding work, namely boots, hi viz top, scaffolding

KEY JACKSON RUSSELL CONTACTS

Glenn Finnigan PARTNER

EMPLOYMENT AND DISPUTE RESOLUTION
TEAM

DDI +64 9-300 6932

E glenn.finnigan@jacksonrussell.co.nz

Jeremy Ansell SENIOR LAWYER

EMPLOYMENT AND DISPUTE RESOLUTION
TEAM

DDI +64 9-300 6936

E jeremy.ansell@jacksonrussell.co.nz



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gloves, glasses and a hardhat. He was not provided with overalls.

The victim’s injuries occurred when the Total Access crew were disassembling the scaffolding. The victim joined the crew after they had already commenced the work. The PMP supervisors were focused on their own workers rather than the Total Access staff, and no toolbox meeting occurred prior to the disassembly work commencing.

The Total Access group had formed a human chain to disassemble and move the pieces of scaffolding from site. Each piece of scaffolding passed through the victim’s hands. Initially the victim was not wearing gloves. When he started the work, the victim experienced a slippery residue on the scaffolding he was handling. He then started wearing scaffolding gloves to deal with the problem.

Sometime into the work, the victim noticed his hands starting to sting and swell. By the time the job was complete the victim’s hands were swollen, shaking and throbbing and they had developed black marks on them. Some of the victim’s workmates also working on the job reported minor burns.

The victim’s injuries were the result of exposure to caustic soda that had condensed on the scaffolding having been transferred through evaporation from the tank below. Following the victim’s exposure to the chemical residue, he saw his doctor and when his hands failed to heal, he was initially treated as an outpatient and then later required to undergo surgery and was hospitalised for a period.

The Court considered that both PMP and Total Access had breached their obligations under the Health and Safety at Work Act 2015 (Act). So far as PMP were concerned, it had breached the Act in instructing Total

Access and its workers (including the victim) to assemble and disassemble scaffolding in circumstances exposing Total Access workers to a risk of serious injury from exposure to hazardous substances. The Court considered the risk of handling scaffolding exposed to caustic soda vapours condensing upon it ought to have been identified as a hazard and that PMP’s failures contributed directly to the victim’s injuries. The Court considered that PMP was aware of ways to eliminate or minimise the risk of exposure to chemical residue on equipment in the facility and the cost of eliminating or minimising this risk was not grossly disproportionate.

So far as Total Access was concerned, the Court held that the company had not undertaken an effective risk assessment to identify and manage the risks. Also it had not developed and implemented a safe system of work or provided suitable PPE to its workers. The Court held that Totally Access should have ensured the chemical tanks in the near vicinity of the work were covered and that information, training and instruction and supervision had not been provided to its workers.

Of interest was the Court’s finding that Total Access should have been aware of the specific risk arising from the caustic soda exposure, i.e. to have identified and managed the hazard of chemical transfer to the scaffolding.

In the case of PMP, the finding that it should have been aware of the specific risk, was supported by a number of factors. The use of the chemicals and conduct of operations around hazardous substances was a core part of PMP’s work. Furthermore PMP’s risk register specifically noted that chains above the chemical tanks might have residue traces of caustic soda on them and that PPE, including gloves, should be worn when handling them, that appropriate training

KEY JACKSON RUSSELL CONTACTS

Glenn Finnigan PARTNER

EMPLOYMENT AND DISPUTE RESOLUTION
TEAM

DDI +64 9-300 6932

E glenn.finnigan@jacksonrussell.co.nz

Jeremy Ansell SENIOR LAWYER

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should be given and that staff were to be aware of the hazard.

Also, some years earlier PMP had tried to remove a white residue on dismantled scaffolding that had been installed in the galvanising facility by a different scaffolding company and at that time the previous scaffolding company had mentioned that three of its workers had suffered burns to the hands and in one case in an eye. Although an analysis of the residue showed that it would not have caused the injuries, the Court considered that PMP was on notice as to the risks of residual deposit of chemicals in equipment situated above its tanks.

Although PMP had this prior knowledge, none of this was passed on to Total Access, so it is unclear how Total Access ought to have been aware of the specific risk here unless the Court considered that it was reasonable for a scaffolding company to have this level of knowledge.

Penalties

This case is of particular interest for the approach the Court took in respect of the level of discount to the starting point fines to be applied because of matters in mitigation of sentence.

PMP submitted that a combination of mitigating factors should give rise to a “generous” discount of 30%, relying on the remedial measures that PMP had put in place, its remorse and reparation paid, and its cooperation with the authorities. Total Access also sought a significant discount for certain mitigating factors involving its remorse, the reparations provided, and its previous good record and cooperation.

The Court said: “On the subject of mitigation, I am troubled by the apparent ease with which huge discounts are applied in WorkSafe cases, almost as a

matter of course. I am satisfied, by reference to the guideline case of *Stumpmaster*, that a sentencing court should think long and hard before concluding that a case justifies such significant discounts”

The Court concluded that on the facts of the case and the effect of the accident on the victim, culpability was within the medium-range. The Court found that PMP had a greater degree of culpability.

The Court ordered:

- reparation to be paid by each of the defendants of \$17,000;
- Total Access to pay a fine of \$165,000. To get to this amount, the Court applied a 25% discount on a starting point amount of \$300,000 for the guilty pleas, and 20% in respect of the mitigating factors;
- PMP to pay a fine of \$227,500 from a starting point of \$350,000, uplifted by 5% due to two previous convictions for health and safety matters, and applying a discount of 15% for mitigating factors and 25% for the guilty pleas.

This case is a reminder of the increase in penalties introduced by the Act and the severe implications for both victims and their employers where procedures designed to ensure safe work have not been put in place or are not followed.

Conclusion

The Court’s concluding remarks are worth noting - that the significant financial cost to both companies could have been simply avoided by the enforcement and provision of appropriate PPE and overalls. These would have been easy and straightforward steps to be taken by either defendant in a situation which the court concluded cried out for the basic exercise of great care.

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EMPLOYMENT AND DISPUTE RESOLUTION
TEAM

DDI +64 9-300 6932

E glenn.finnigan@jacksonrussell.co.nz

Jeremy Ansell SENIOR LAWYER

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If you require advice and assistance on any issue involving health and safety in your workplace, please contact Glenn Finnigan (09 300 6932) or Jeremy Ansell (09 300 6936).

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Glenn Finnigan PARTNER

EMPLOYMENT AND DISPUTE RESOLUTION
TEAM

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E glenn.finnigan@jacksonrussell.co.nz

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