

## The first sentencing decision under the Health and Safety at Work Act 2015

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It has taken over 16 months, but the first sentencing decision under the Health and Safety at Work Act 2015 (HSWA) was released last week. The decision has confirmed the six-fold increase in fines for health and safety breaches but interestingly, the employer avoided this based on an inability to pay the full amount.

On 6 April 2016, only two days after the HSWA came into force, a worker at Budget Plastics (New Zealand) Limited (Budget) who was loading waste plastic into an unguarded machine, became entangled in a bag caught in the machinery. His left hand was dragged into the machine, which amputated his hand from his forefingers down to his wrist. Budget was charged for failing to take all reasonably practicable steps to protect the health and safety of the worker from known risks. Budget pleaded guilty.

When approaching sentencing, the District Court followed the three-step approach developed under the previous legislation and applied it as follows.

### Step 1 - Reparation

The quantum of reparation to be paid to victims has not been affected by the introduction of the HSWA. The Court assessed the impact of the injury on the worker against previous authorities and fixed reparation at \$37,500.

### Step 2 - Fine

The Court determined that Budget had a moderate level of culpability on the basis that there was an obvious risk of amputation for workers using machinery that was not properly guarded. The risk was known by Budget as it was identified in a health and safety assessment six weeks prior to the incident. The Court did not accept that the moderate cost to remedy the issue was an excuse for Budget's failure to do so. The worker had partially severed his hand and there was a potential for a more severe injury to have occurred.

Under the previous legislation, moderate culpability would have had a starting point for a fine of between \$50,000 to \$100,000. The Court determined that under the HSWA, with its six-fold increase in fines, the starting point for Budget's level of culpability would now range between \$400,000 to \$600,000.

The fine starting point was discounted by a further 55 percent (to between \$210,000 and \$315,000) due to a number of mitigating factors, including Budget's lack of a prior record, cooperation with WorkSafe, remorse, remedial steps and a guilty plea.

### Step 3 - Proportionality and appropriateness of fine

The HSWA requires the Court when setting a fine, to have regard to a defendant's financial capacity to pay. Budget provided expert accounting evidence that anything above a \$100,000 fine would cause significant difficulties for its business. There was no evidence before the Court to justify a departure from the financial capacity requirement, which would have allowed it to set the fine at a higher amount. As a result, the fine was reduced to \$100,000.

### Judicial guidance on sentencing under the HSWA

The judgment provides direction on how the HSWA will be applied by the Courts. It confirms that:

- The quantum of fines imposed under the HSWA are a significant increase on the previous legislation
- The reparation payable to victims remains unchanged by the HSWA
- The sentencing principles developed under the previous legislation will continue to be applied in New Zealand, albeit within the context of the HSWA and its increased level of fines
- The financial capacity of a defendant to pay a fine continues to be an important part of the sentencing process, and only in severe cases will the courts depart from the requirement to impose a fine within an offender's ability to pay.

## What businesses can take away from this judgment?

This sentencing decision confirms that the HSWA has teeth. Businesses need to ensure that their health and safety systems are up to scratch and regularly re-assess this. If risks are identified, steps must be taken to immediately manage them. In this case, if Budget had adopted the recommendations of its health and safety assessment, the injury to its worker could have been avoided (as well as the stress of a WorkSafe prosecution, the exposure to significant penalties and a public conviction).

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