Failure to discharge duty under the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, as amended.

[2019]GRC073

ROYAL COURT
FULL COURT

13th December 2019

Before: Richard James McMahon, Esq., Deputy Bailiff and:
Stephen Murray Jones OBE, Jonathan Grenfell Hooley,
Steven John Morris, David James Mortimer, Alan Stevenson Boyle,
David John Robilliard, Stuart Michael Crisp, Jurats.

THE LAW OFFICERS OF THE CROWN

- v -

FERRYSPEED GUERNSEY LIMITED

Advocate R J Calderwood appeared for the Crown

Advocate G S K Dawes appeared for the Defendant

DEPUTY BAILIFF:

Background

The defendant, Ferryspeed Guernsey Limited, appears this afternoon for sentence on an Indictment containing two Counts. Each is for failing to discharge a duty under the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, as amended. They relate to a single incident effectively, that took place on 12 May 2017 and the distinction is that the First Count deals with 'the failure to conduct the defendant's undertaking', namely the delivery of a heavy load, in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment who may be affected thereby, including Paul King and Brandon Smale, were not thereby exposed to risks to their health and safety. The Second Count relates to the failure of the defendant to ensure, insofar as was reasonably practicable, the health, safety and welfare at work of its employees, including Richard Sims, and, in particular, failed to provide a safe system of work and sufficient information, instruction, training and supervision for the delivery of a heavy load.

The maximum penalty in respect of each Count is an unlimited fine.

The Company has no previous convictions.

The facts of the matter have been dealt with in some detail, both during a *Newton* Hearing that took place and also summarized on behalf of the Crown by Advocate Calderwood. He made reference to a number of pieces of English legislation, including the Provision and Use of Work Equipment Regulations 1998, the Management of Health and Safety at Work Regulations 1999 and the Manual Handling Operations Regulations 1992. The Court is conscious that none of these regulations operates as a matter of law in Guernsey. However, although there is no equivalent subordinate legislation in this jurisdiction, because this defendant Company is part of a group that is obliged to follow those regulations elsewhere, the approach that it has taken has been to meet those standards, including in its Guernsey operation. They are common for the industry and, therefore to that extent, they are relevant when considering this delivery.

The delivery in question was a consignment of 285 kgs in weight. The Court has had the benefit of seeing CCTV footage, as well as photographs, to be able to ascertain what it was that was loaded onto the lorry to be driven by Richard Sims, one of the defendant's employees, to a property in Guernsey, St George, where the consignment would be off-loaded. They could see that there was some discussion with the supervisor, Leonel Dinis, and that we know, from the statements of those who were at St George, that when Mr Sims got there, he unclipped the side curtain to the vehicle and the entire pallet was moved across, ready to be manually handed off the side as one. Mr Dinis gave evidence to say that he had instructed Mr Sims to approach the unloading of the consignment in the same way as a previous delivery of a similar consignment to that address, namely to take the contents of the consignment, the strips of EverEdge, off, either one-by-one or in manageable amounts.

Sentencing Considerations

The approach that this Court takes to sentencing in Health and Safety cases, is to have regard to the principles that were set out in what was, at one stage, the leading English case, which is ***R v F Howe & Son (Engineers) Ltd*** [1999] 2 Cr App R (S) 37.

There are a number of factors that the Court therefore takes into account. It is worth mentioning that during the course of delivering judgment in that case, Scott Baker J on behalf of the court, indicated that the circumstances of individual cases will, of course, vary almost infinitely and very few cases have reached that court, the English Court of Appeal. Accordingly, it is difficult for Judges and Magistrates who only rarely deal with these cases to have an instinctive feel for the appropriate level of penalty. That applies equally in this jurisdiction where there have been comparatively few cases coming before this Court, or indeed the Magistrate's Court, for breaches of the Ordinance.

It is not within the scope on this particular hearing for the Court to attempt to set out any tariff, or arrangements that might apply in other cases, because each case turns on its own particular facts. There is now a Sentencing Council Definitive Guideline in respect of Health and Safety offences that operates in England and Wales. Of course, the statutory underpinning of that guideline is such that it is not directly applicable in this jurisdiction, but it does include some helpful aggravating and mitigating factors and the general approach to take is one that commends itself to this Court. The finer detail, however, is, in this Court's view, inapplicable.

Returning to how the Court has, as Advocate Dawes in mitigation explained, had regard to the various factors set out in ***Howe***, in particular in assessing the gravity of the breach, it is often helpful to look at how far short of the appropriate standard the defendant fell in failing to meet the reasonably practicable test found in the Ordinance. Particular aggravating features were highlighted as including a failure to heed warnings and where the defendant has deliberately profited financially from a failure to take necessary Health and Safety steps or specifically run a risk to save money. The Court is satisfied that those particular aggravating features are not present in this case, but particular mitigating features were said to include:

- prompt admission and responsibility in the timely plea of guilty;
- steps to remedy deficiencies after they were drawn to the defendant's attention, and
- a good safety record.

Again, in the Court's view, all of those are potentially applicable.

There is a paragraph within the judgment of Scott Baker J that resonates with this Court and reads as follows:

> *"The objective of prosecutions for health and safety offences in the workplace is to achieve a safe environment for those who work there and for other members of the public who may be*

affected. A fine needs to be large enough to bring that message home where the defendant is a company, not only to those who manage it but also to its shareholders."

The accident that occurred to Paul King in this case resulted from the slippage of a heavy load off the side of Mr Sims' vehicle. Looking at risk, the Court is satisfied that any attempt to move a consignment weighing 285 kgs manually presents a risk, not only of serious injury, but potentially of the loss of life. In this instance, Mr King was fortunate in some respects, but very unfortunate in others, because he only suffered a badly broken leg. If this load had fallen on his chest, or worse still his head, the consequences would have been, we think, more serious. But there was no death and death is regarded as an aggravating factor and, therefore, no real aggravating factor in that regard. The key, as far as the Court is concerned, is the absence of anything written down within the Company's framework for Health and Safety for dealing with unusual deliveries at that time. However, the Court does find that the failure to meet the required standards fell below the required standard, because the Company, back in 2017 was too reliant upon the giving of oral instructions, as opposed to having written materials available to its employees.

The Court accepts that this was an isolated incident, but regards the absence of clear instructions to which any employee could refer and the apparent regular use of inappropriate delivery methods, identifying that there are other ways in which that could have been done, as spelt out by Advocate Calderwood, in particular by reference to the desirability, if not the need, to have a forklift to remove something of that size or to use a different type of vehicle where it would be easier as matters to take into account.

The Court also regards the fact that Mr Dinis, as the supervisor, made no contact with those at St George prior to the delivery on 12 May 2017 and therefore it was not known whether those who were to receive it were those who knew what had happened previously as a factor to bear in mind.

There are two Counts relating to two separate groups of persons, but the Court is going to have regard to the totality principle in considering what penalty to impose on the defendant Company because there are really two parts, part-and-parcel of the same overall set of failings as they operated on the day. Bearing in mind all the factors to which I have just referred, if one were looking at the penalty after trial and before considering any mitigation, the overall type of offending in this case would, in the Court's view, be such as to attract a total fine for both Counts in the high five figures, but not into six figures. In other words, the totality would not mean that £100,000 or more was in the Court's mind.

Mitigation

Turning to what has been said on behalf of the defendant Company by Advocate Dawes, the Court has had regard to what it has heard during the course of the ***Newton*** Hearing and taken its answers to the questions posed into account. It also recognises that there is in this case an early guilty plea to both Counts in respect of which the Company will be entitled to full credit. The other particular points in mitigation, to which the Court has regard, is the fact that this Company has a long and distinguished history in this Island and has no previous convictions. The amount of work the Company has undertaken and particularly with the size of workforce that it apparently now has and the fact that this is the first time it has been before the Court is, this Court considers, a significant factor to its benefit. There was co-operation with the Health and Safety Executive Investigation, although the Court finds it surprising that Mr Dinis apparently was not volunteered to those who were investigating the matter, as it seems to this Court that he was somebody who could helpfully have been spoken to earlier than has actually occurred. Most importantly, however, the Court is satisfied that the steps that the Company has taken since the accident in May 2017 to improve its overall Health and Safety regime has been positive. In that regard, it notes that the way the Company operated was possibly better than some experiences that members of the Court have had in other circumstances previously, but there are steps that have been taken, including the preparation of a specific new policy on the procedure for delivering heavy or over-sized loads in Guernsey that was

prepared in the wake of this accident and the other steps that have been taken, particularly bringing health and safety responsibility in-house and making sure that there are steps that can be taken to get people qualified to higher levels than previously. Again, that all goes to the Company's credit.

Sentence

Taking all that into consideration, emphasizing that Health and Safety is not always the most popular topic to consider, but that it is there for a real reason and the statutory framework that Guernsey applies is designed to protect employees and those with whom companies' employees come into contact, all breaches are capable of covering a wide variety of situations and inevitably when an accident occurs, the response to it brings it into focus and is important. This Court believes that there has to be an element of deterrence in any penalty it imposes in respect of Health and Safety offending on the basis that the Court wants to send a message out to others that there are no shortcuts that can be taken in complying with Health and Safety requirements.

Taking all of that into account, particularly having regard to what this Court regards as strong mitigation in this case, and in the light of the guilty pleas, the fines that the Court impose, which is the total amount that it has in mind for the offending that took place back in May 2017 and then simply splitting that total amount between each Count, is that:

- in respect of Count 1 there will be a fine of £20,000;and
- in respect of Count 2 there will also be a fine of £20,000.

This means that the total fine imposed this afternoon is £40,000.

Richard McMahon
Deputy Bailiff

13th December 2019