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## EMPLOYMENT

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## FORMULATING FAIR PENALTIES FOR WORKPLACE ACCIDENTS

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When accidents occur in the workplace, it is up to the courts to impose penalties on the employer. But because organisations can insure against reparation awards, are fines at their current level a big enough stick to encourage safer workplace practices?

Ever since the maximum fines under the Health and Safety in Employment Act were increased in 2003, the Department of Labour has been advocating for this to be reflected in the actual fines imposed.

In a recent case, the department was successful in its High Court appeal of a sentence that it believed was “manifestly inadequate” (*Department of Labour v Street Smart Limited*).

### **The Street Smart case**

Street Smart collects rubbish and recycling. It had recently purchased a truck that was loaded from the side and lacked the safety features to protect employees should they stumble or fall while loading the truck. Street Smart planned to modify the truck, but during the Christmas/New Year rush the unmodified truck was used. During this period it also came to Street Smart’s attention that the driver of the truck was being accompanied on his rounds by his teenage son. Street Smart advised the driver that this was unacceptable, however the boy accompanied his father again, this time with

fatal results. While trying to help the truck runners with the rubbish collection, he slipped, fell from the truck and was run over.

### **Fines and reparations**

Street Smart attended a restorative justice conference with the boy’s family and agreed to pay them \$60,000 in reparations - its insurers picked up this cost. Street Smart also pleaded guilty in the District Court to charges under the Health and Safety in Employment Act.

The District Court Judge decided Street Smart’s culpability was seven out of a possible 10 and therefore set the maximum fine appropriate in the circumstances as \$175,000. Street Smart was given a discount of \$60,000 for its guilty plea, and a further \$60,000 for the reparations it had already agreed to pay, arriving at a figure of \$55,000. While the total penalty was \$115,000, because Street Smart had insurance to cover the cost of the reparations, its financial exposure was limited to the \$55,000 fine.

### **The appeal**

The Department of Labour appealed the fine on the basis that it was too low, arguing that when setting the fine the court should consider Street Smart’s insurance coverage of the reparations.

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When setting a fine the courts need to consider whether a defendant has the financial ability to pay it on top of any reparations. In the past this was done by fixing the amount of reparations and then deciding whether any additional penalty by way of a fine was appropriate; in effect the fine was used to “top up” the total penalty.

In *Street Smart*, the High Court took a different approach. When an insurance company pays for the reparations the financial impact of the reparations order is reduced. Rather than using a fine to “top up” the total penalty, it found that the amount of the fine should be assessed in light of the offender’s ability to pay. On the basis of this approach, where there is insurance to cover the cost of reparations, it seems logical that the ability to pay a fine will be greater, and therefore the amount of the fine will be greater.

The High Court found that the District Court should not have given a dollar for dollar discount for the reparations. The court looked at *Street Smart*’s culpability, and found that a 50 percent discount from the \$175,000 starting point set by the District Court was appropriate – a fine of \$87,500. Combined with the reparations of \$60,000 (paid by *Street Smart*’s insurer), the total penalty was \$147,500.

### Impact of the High Court’s decision

One of the benefits of insuring against reparations was that any reparations award you offered or were ordered to pay would be set off against the fine, reducing your total financial exposure. Now it appears that if you have insurance your ability to pay a fine will be greater and therefore the total fine may be higher. Some businesses may decide that insurance coverage is no longer economical, particularly where the actual risk of a workplace accident is low. Alternatively, were the courts to allow dollar for dollar reductions for reparation

awards, it could lead to a situation where insurers pick up most of the cost for workplace accidents. This would be passed on to all businesses insured against the cost of workplace accidents through higher premiums. Without the possibility of meaningful fines, there is also a risk that some organisations may become blasé about workplace safety.

There are currently other appeals on sentencing before the High Court so it remains to be seen whether the reasoning in *Street Smart* will be adopted as the new rationale for sentencing in health and safety prosecutions.

### Update on recent legislative developments

In our August 2008 Update “[Employment law approaching the election](#)” we detailed certain employment-related legislation likely to be passed before the upcoming election.

As predicted, the KiwiSaver amendment to address “Total Remuneration” arrangements has been passed. Legislation requiring an employer to provide rest and meal breaks for employees, and breaks and facilities for employees who are breast-feeding has also been passed without significant change from discussion in our August 2008 Update. These requirements will come into force on 1 April 2009.

Another recent amendment is to the Holidays Act - specifically the situation where a shift is worked over two days and crosses into a public holiday. The amendment now provides that when a shift spans two days (i.e. crosses midnight) where at least one of which is a public holiday, an agreement can be reached for the public holiday to be transferred to cover one whole shift. For more information, see the [August](#) and [September](#) Employment Law Updates.