OSHI v Casela Ltd

2023 IND 11

CN11/2020

THE INDUSTRIAL COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Occupation Safety And Health Inspectorate

v/s

Casela Limited

JUDGMENT

The Accused Company stands charged with **one Count of Failing To Ensure The Safety, Health, And Welfare At Work of Its Employees, contrary to ss. 5(1) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act [Act No. 28 of 2005] (hereinafter referred to as OSHA) coupled with s. 44(2) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)**.

The Accused Company pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel.

The Prosecutor conducted the case for the Prosecution.

The Proceedings were held partly in English and partly in Creole.

The Prosecution Case

It was the case for the Prosecution that on or about 27-04-17, in the District of Black River, the Accused Company, being an employer, did unlawfully fail to ensure so far as was reasonably practicable the safety and health at work of one of its employees, to wit: one Devam Balgobin (hereinafter referred to as W2) sustained fracture of her distal end right radius while giving treatment to a Llama in the petting farm at her place of work at Cascavelle.

The Defence Case

The Accused Company denied the charge in its unchallenged out-of-Court statements (Docs. C and C1) and in Court under solemn Affirmation.

Analysis

Not in dispute

It was not disputed that W2 was employed by the Accused Company at the relevant time, and that W2 sustained injury at work on 27-04-17 at the Petting Farm, Casela, when the Llama was being directed by W2 and her colleagues towards a shelter for treatment to be administered to it, and when the Llama resisted, W2 fell down, and used her right arm to attenuate the fall, sustaining injury to her right hand in the process (Doc. C).

It was also not disputed that there was an inherent danger in working with animals.

Risk Assessment

W2 deponed as to the fact that the supervisor was the one to tell her and her colleagues how to position themselves in order to isolate the Llama for treatment to be administered, and agreed that the supervisor was in the said process doing a risk assessment.

W2 also stated that she was given training on the spot in relation to the Llama, which was a new animal at the Petting Farm.

In answer to questions put to her by the Court, W2 explained that the Llama had arrived at the Petting Farm in late 2016 or 2017, and that she had not handled the Llama for treatment purposes prior to the said incident.

It was put to W2 that she should not have grabbed the Llama by the neck when same was coming at her. But W2's version was to the effect that she was instructed to grab the Llama by the neck,

which was when the Llama resisted and came at her, as a result of which she fell down and got injured.

True it is that W2 admitted having grabbed the neck of the Llama, but she maintained that she was instructed to hold the Llama's neck.

Given it was not in dispute that the Llama, being an animal, could have unpredictable behaviour, it was unsafe for W2 to surround the Llama and grab its neck, the more so as there was no physical barrier between the Llama and W2.

Be that as it may, the fact remains that the Accused Company was under a duty to carry out a specific risk assessment as regards handling the Llama and treatment to be administered to it, in order to identify the risk/s, if any, to its employee/s, and mitigate same if needed and reasonably practicable.

W2 confirmed that the supervisor carried out a risk assessment when telling the employees where to place themselves in order to surround the Llama, but the Court is of the considered view that such type of risk assessment was not the one envisaged by the Legislator in relation to **s. 10 of the ERA**.

The Accused Company explained that a "generic risk assessment […] [was done] which mentioned the work for treatment of animals" (Folio 17/123 of Doc. C).

It stands to reason that if a "generic risk assessment" was done, no specific risk assessment was done as regard the treatment to be administered to a Llama.

The Accused Company could not therefore have known what risks, if any, there were:

1) in directing the animal to the shelter by surrounding it;
2) in workers still surrounding the animal and assisting the zookeeper to treat the animal; and
3) in the workers surrounding the animal, and leaving the enclosure after treatment (R3 at Folio 17/123 of Doc. C).

The Accused Company conceded that there was no mention of surrounding the animal for treatment to be administered in the risk assessment done on March 2017 (Doc. F), and as highlighted above, the Accused Company conceded that only a generic risk assessment was done, with no specific risk assessment being done as regard the treatment to be administered to a Llama.

And even if treatment was to be administered by experienced and trained handlers only, there was still an obligation on the Accused Company, as employer, to carry out a risk assessment as regards treatment to be administered to the Llama prior to the work being carried out.

The risk assessment (Doc. F) is clearly a generic one, and relates to the "Petting Farm Activity", and not to the specific task of administering treatment to the Llama, and applies to staff members of the Accused Company as well as to clients of the Accused Company.

It also stands to reason that clients would not be called upon to administer treatment to animals in the Accused Company.

It was incumbent on the Accused Company to carry out a specific risk assessment in relation to the Llama, whether in terms of care and/or treatment, the more so as it has not been challenged that the Llama was a new animal in the Petting Farm.

Such a risk assessment was the only means by which the Accused Company could identify, and mitigate, any risk/s to its employees.

It is clear that the Accused Company failed to do so, it having conceded the risk assessment was a generic one.

As per **Sinassamy v Navitas Holdings Ltd [2021 SCJ 424]** "[t]he term "reasonably practicable", which also appears in various similarly-worded English enactments on occupational health and safety, has been explained in **Halsbury's Laws of England (5th Edition) (2020), Vol 52: Health and Safety at Work** at **paragraph 382** as follows–

> ""Reasonably practicable" is a narrower term than "physically possible" and implies that a computation must be made, before the breach complained of, in which the quantum of

> risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other and that, if it be shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the obligation is imposed discharges the onus which is upon him. The unforeseeability of a risk may be relevant in deciding what is "reasonably practicable"".

In all the circumstances of the present matter, the Court is of the considered view that the risk of W2 sustaining injury when surrounding the Llama for treatment, was foreseeable, the more so as Llamas are animals, and that animals can have unpredictable behaviour.

Further, the Accused Company having put in place a crush bar system (Doc. E) to direct, isolate, and give treatment to the animals, as remedial action immediately after the present accident [1], shows that it was reasonably practicable for the Accused Company to do so before the accident, and that it had hence not done all that was reasonably practicable to ensure the safety and health of its employee, W2, and that it has therefore not proven on the balance of probabilities that it was not reasonably practicable to do more than was in fact done to satisfy its duty, pursuant to **s. 96(6) of the OSHA.**

In light of all the above, the Court finds that the Accused Company failed in its duty to ensure the safety and health at work of W2, when it failed to carry out a specific risk assessment prior to treatment being administered to the Llama, so far as was reasonably practicable.

Specific Training

W2 deponed to the effect that she had been given no specific training in relation to the Llama, which was a new animal in the Petting Farm, and that she was given training on the spot with the animals.

Desire Denis Evans Gopal (hereinafter referred to as W3) deponed *inter alia* to the effect that employees were given training on the job, and were also given presentations on how to do their job with the Llama.

[1] Folio 17/124 of Doc. C

W3 also confirmed that W2 had received trainings on animal handling.

The Accused Company explained that specific training was given to W2 for such type of work prior to the accident (Folio 17/123 of Doc. C), and that W2 was given training in Captive Husbandry Management Course (Folio 17/3864 of Doc. C1).

The Court has noted the Training Attendance Sheet and Attendance List collectively marked as (Doc. D), and observes the following:

1) The name of W2 as per the Information is Devam Balgobin, whereas the name mentioned on the said pages (Doc. D) is Sindy Balgobin. No evidence has been adduced that the said name relates to W2, but since Identity was not put in issue, the Court acts on the basis that the said names and documents relate to W2. It also appears that the two pages of (Doc. D) are the same as the pages found at Folios 40a and 40b of (Doc. G);
2) W2 was a zookeeper, in the Bird Park of the Zoology Department, as per the first page of (Doc. D). There is no indication that W2 was specifically trained as regards the Llama; and
3) W2 was a zookeeper in the Zoology Department as per the second page of (Doc. D), and there is no indication that W2 was given any specific training in relation to Llamas.

That being said, the Court has duly considered the Training Content (Folios 40c to 40f of Doc. G), and is of the considered view that the said training does not assist the Court in the determination of the present matter given the said training took place in 2016, between April and July, that is before the Llama joined the Petting Farm, and given the said training did not touch at all on the handling and/or treatment to be administered to Llamas.

The Accused Company explained *inter alia* that PAAZA [2] Audits were carried out, that continuous training was given to its team to ensure tasks were carried out smoothly and safely, and that specific training was given to W2 (Folios 17/122-3 of Doc. C).

[2] PAAZA stands for Pan-African Association of Zoos and Aquaria, which has as mission to guide and accredit all African Zoos and Aquaria to become effective and credible centres of animal welfare, conservation, education and research. - https://www.paaza.org/evolvingzoos.html

Bearing in mind the principles set out in **Sinassamy (supra)**, the Court is of the considered view that it was foreseeable that W2 would need to be given specific training in relation to the Llama, the more so as the Llama was a new animal in the Petting Farm as from late 2016 or 2017, and as W2 had never handled the Llama before the relevant day.

And at no stage was it advanced by the Accused Company that it could not give specific training to W2 in relation to the Llama, and there is therefore no evidence on Record to establish it was not reasonably practicable for the Accused Company to do more than was in fact before the accident, and that it had hence done all that was reasonably practicable to ensure the safety and health of its employee, W2. The Court therefore finds that the Accused Company has not proven on the balance of probabilities that it was not reasonably practicable to do more than was in fact done to satisfy its duty, pursuant to **s. 96(6) of the OSHA.**

Be that as it may, although training was given to W2 (Docs. D and G) by the Accused Company, the fact remains that there is no evidence on Record to establish that it had given specific training to W2 in relation to the handling and treatment of the Llama, and hence the Court is of the considered view that the Accused failed to ensure, so far as was reasonably practicable, the safety and health at work of W2.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court finds that the Prosecution has proven its case against the Accused Company beyond reasonable doubt, and the Accused Company is therefore found Guilty as charged.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 27 February 2023]