IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2021-010-000158
[2023] NZDC 1180

WORKSAFE NEW ZEALAND
Prosecutor

v

ICEPAK NEW ZEALAND LIMITED
Defendant

Hearing:	22 July 2022 and 13 October 2022
Appearances:	K Sagaga for the Prosecutor SJ Turner & P Leaupepe-Nickel for the Defendant
Judgment:	26 January 2023

DECISION OF JUDGE L C ROWE
AS TO SENTENCE

---

[1] Icepak NZ Ltd is for sentence having pleaded guilty to:

(a) Being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety of workers while working in the PCBUs business or undertaking, failed to comply with that duty which exposed workers to a risk of death or serious injury. HSWA, ss 48(1), (2)(c), 36 (1)(a) – maximum penalty $1.5m

(b) Being a PCBU, after becoming aware that a notifiable event arising out of the conduct of their business on 14 August 2020, failed to ensure

WorkSafe NZ was notified of the event as soon as possible. HSWA, ss 56(1), (6)(b) – maximum penalty $50,000.

The facts

[2] Icepak is a limited liability company and a PCBU. It supplies storage and logistics for producers and manufacturers in dairy, horticulture, pet food, meat products, honey and retail.

[3] Icepak operates three sites in New Zealand, one of which is at Oringi, near Dannevirke.

[4] Oringi is a cold storage facility storing mainly meat, pet food and dairy produce. The produce is loaded into refrigerated containers at Oringi for exporting.

[5] The victim, Jackson Hauraki-August was employed by Icepak at Oringi. He worked there for about five years, mainly as a forklift operator, but also to help load frozen produce into containers.

[6] Mobile conveyor belts are used to load produce into the containers. Usually, two staff work on the conveyors which are moved to the container which is to be loaded. One of the workers sits at one end of the conveyer to counterbalance it so the second staff member can move it.

[7] The conveyor belts are powered by electricity.

[8] The plug attached to the lead for the conveyor belts has four pins. Three of these are phase pins located at nine o'clock, 12 o'clock and 3 o'clock positions. The fourth is an earth pin at the 6 o'clock position.

[9] The pins of the plug are asymmetrical in that the phase pins are grouped more closely together towards the 12 o'clock position than to the 6 o'clock position where the earth pin is situated.

[10] The plug has a locking safety sleeve which is shaped to ensure it can only be inserted into a socket that matches the pin positions on the plug.

[11] The correct sockets for conveyors have a residual current device (RCD) which prevents the mobile conveyor from becoming live.

[12] If the safety sleeve is removed, the plug could be inserted the wrong way round into other sockets which do not have an RCD.

[13] When the plug was correctly inserted into a conveyor belt socket, with the safety sleeve attached, a locking ring meant the plug could not usually be removed from the socket without disengaging the locking ring by unscrewing it. This would ensure that the plug and sleeve both came away from the socket intact.

[14] On 14 August 2020, Mr Hauraki-August was working at Oringi in the loading team with two other staff. He and the other staff loaded a first shipping container using a mobile conveyor.

[15] After loading the first container, Mr Hauraki-August removed the plug, rolled up the electrical lead and placed it on the mobile conveyor.

[16] When Mr Hauraki-August removed the plug from the socket, the plug separated from the safety sleeve and locking ring, which remained behind in the socket.

[17] Mr Hauraki-August sat at the end of the conveyor to counterbalance it as one of the other staff moved the conveyor to a second container for loading.

[18] When the conveyor belt was in position for the second container, one of the staff members retrieved the plug from where Mr Hauraki-August had placed it and inserted it into one of the nearby sockets. The socket used by the staff member was not an appropriate one for the conveyor and was not fitted with an RCD. The pins in the socket were configured differently to a conveyor socket which meant that the earth pin from the plug went into one of the phase holes in the socket.

[19] When this staff member returned to the container, he saw Mr Hauraki-August lying on the container floor. Mr Hauraki-August had been sitting on or touching the conveyor and suffered an electric shock from the conveyor having been incorrectly plugged into an incorrect socket.

[20] Mr Hauraki-August could not feel his left side. He walked with some difficulty from the container and the Oringi site manager drove Mr Hauraki-August to a medical centre in Dannevirke.

[21] Mr Hauraki-August was then referred to the MidCentral Health Emergency Department in Palmerston North where he was assessed and placed under observation for three and a half hours.

[22] An on-site electrician identified:

(a) The locking ring and safety housing were not attached to the conveyor plug.

(b) The locking ring and safety housing were in another socket, other than the one used when Mr Hauraki-August was electrocuted.

(c) A lot of force is needed to pull a plug out of a socket without disengaging the locking ring.

(d) The person who removed the plug must have used some force to do so without unscrewing the locking ring.

(e) Workers had perhaps developed a habit of pulling the conveyor plug out without unscrewing the locking ring.

(f) The damage was likely sustained when Mr Hauraki-August pulled the plug out because, if there had been any damage previously, the workers would likely have raised it and the electrician would have been asked to fix it before it was used.

(g) The conveyor was plugged into a socket used for welding that does not have an RCD as this can cause "nuisance tripping".

(h) Because the safety housing was missing from the plug, the four pins could be inserted into the welding socket the wrong way round.

(i) The current from a three-phase plug is capable of killing someone.

(j) It is likely the earth pin was plugged into one of the phase holes in the welding socket.

(k) When plugged in incorrectly, the metal parts of the conveyor, and everything it touched, would have become live.

[23] The reasonably practicable steps Icepak failed to implement, to prevent risk of death or serious injury from electric shock included:

(a) Developing, implementing, monitoring and reviewing an effective risk assessment procedure that identified and managed controls necessary to protect workers from risks to their safety when working with the mobile conveyor.

(b) Developing, implementing and maintaining an effective safe system of work that ensured ongoing safe use of the mobile conveyor by workers, including prestart checks and a maintenance programme for the mobile conveyor.

(c) Ensuring the provision of effective information, training, instruction and supervision necessary to protect workers from risks to their safety when working with the mobile conveyor.

[24] In essence, while Icepak provided training for new staff, including plugging and unplugging the conveyor belt, it failed to ensure the health and safety of its workers by providing adequate training as to the safe use of the electrical plugs and

leads relating to the conveyor and the risk of electrical shock in the event they were incorrectly used.

[25] The 14 August incident with Mr Hauraki-August was a notifiable event in terms of s 56 of the HSWA, but WorkSafe was not notified of the event until 1 September when told by Mr Hauraki-August's uncle.

Victim impact

[26] In a victim impact statement, Mr Hauraki-August describes being terrified when electrocuted. He blacked out and fell to the ground.

[27] He had burns on his hands and legs and was assessed for damage to internal organs.

[28] Mr Hauraki-August found it too difficult to return to work and now lives on a supported living benefit from Work and Income. He is unable to pay rent and has had to move in with his mother. He has gone into debt and had to sell his car because he was unable to keep up repayments.

[29] Mr Hauraki-August has seen a psychologist and has been diagnosed with post-traumatic stress disorder.

[30] He finds himself feeling anxious and overwhelmed and is unable to socialise in the way he had before.

[31] He suffers night terrors and has lost his independence.

[32] Mr Hauraki-August says he suffers numbness in his arms and frequently feels as if he will pass out. He feels as if he is continuing to receive shocks. He does not understand what is happening to him and finds it very distressing.

Approach to sentencing

[33] In relation to the first charge, I adopt the four-step approach to sentencing established in the guideline decision, *Stumpmaster v WorkSafe New Zealand,*[1] being:

Step 1 – assess the amount of reparation to be paid to the victim.

Step 2 – fix the amount of a fine by reference to the guideline bands established in *Stumpmaster*, then apply adjustments having regard to aggravating and mitigating factors.

Step 3 – determine whether alternative orders under ss 152-158 of HSWA are justified or required.

Step 4 – make an overall assessment of the proportionality and appropriateness of the combined sanctions imposed under the preceding three steps including consideration of a defendant's ability to pay.

[34] The second charge requires an assessment of usual sentencing principles entailing an assessment of culpability, aggravating and mitigating factors, totality in relation to sanctions applied under the first charge and the purposes of HSWA set out in s 3.

[35] The key issue to be resolved is whether a Court ordered enforceable undertaking (COEU) in terms of s 156 HSWA is the most appropriate outcome in this case instead of a financial penalty. Icepak proposes that a COEU is the appropriate response, WorkSafe disagrees.

[36] The parties also disagree as to whether reparation is required in this case, or the quantum if reparation is ordered.

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

Reparation

[37] Fixing an award of reparation for emotional harm is an intuitive exercise. The Court must identify a figure which is just in all of the circumstances that compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering, and having regard to the extent to which the injury may cause ongoing physical or mental suffering or incapacity.[2]

[38] WorkSafe noted in its original submissions that the Court may impose reparation for consequential loss under s 32(1)(c) of the Sentencing Act. WorkSafe has since conceded it is unable to obtain enough information from ACC to sustain an assessment of consequential loss for Mr Hauraki-August and therefore does not seek such an award.

[39] WorkSafe refers to a range of authorities to guide assessment of an appropriate award for emotional harm reparation where a victim has been electrocuted. These are:

(a) *WorkSafe New Zealand v Broad Spectrum (New Zealand) Ltd*,[3] being an award of $17,000 where the physical injuries were minor, but the psychological impact was significant.

(b) *WorkSafe New Zealand v Fall Stop Scaffolding Ltd and QJB Roofing Ltd*[4] - where the victim suffered serious electrical burns, required two months hospitalisation and multiple surgeries, endured ongoing emotional suffering and required ongoing rehabilitation. The Court ordered $33,000 emotional harm reparation.

(c) *WorkSafe v Electrix Ltd*[5] - where the victim came into contact with high voltage powerlines suffering burns to 22% of his body, facial burns, internal injuries to muscle and acute kidney injury necessitating dialysis. The victim required long-term hospitalisation and recovery

[2] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 at [19].
[3] *WorkSafe New Zealand v Broad Spectrum (New Zealand) Ltd* [2017] NZDC 25499.
[4] *WorkSafe New Zealand v Fall Stop Scaffolding Ltd and QJB Roofing Ltd* [2020] NZDC 3629.
[5] *WorkSafe v Electrix Ltd* [2017] NZDC 20855.

and his cognitive functions were seriously impaired. The reparation order was $60,000.

[40] The present case is most similar, in terms of victim harm and ongoing psychological impact, to *WorkSafe NZ v Broad Spectrum*, bearing in mind that decision is five years old and assessment of reparation cannot simply compare the suffering of a victim in one case with the suffering of a victim in another case. It requires individual assessment.

[41] Mr Hauraki-August has, luckily, escaped serious or lasting physical harm. The electric shock he received has however caused him serious psychological harm for which he requires ongoing help. Amongst other things, the incident seriously impacted Mr Hauraki-August's ability to work, socialise and has caused him ongoing sleep disturbance.

[42] Both WorkSafe and Icepak separately arrived at a reparation figure of $25,000. This accords with the above case analysis but could be light given Mr Hauraki-August continues to suffer these effects some two years after the incident. A reparation figure of $30,000 would be appropriate.

[43] Icepak however has made substantial payments to Mr Hauraki-August already comprising:

(a) Ex gratia payments (which I take to be net of tax) of $31,000

(b) Medical and psychological support and counselling costs of $4,789.34

(c) Supplementary payments to top up any shortfall while on ACC of $28,094.83

[44] WorkSafe submits that $25,000 reparation ought to be paid in addition to these payments.

[45] This issue has been addressed in previous decisions. For example, in *WorkSafe NZ v Let's Bale Limited Judge* Crayton identified an appropriate reparation figure,

deducted the ex gratia payments that had been made and ordered reparation for the difference.[6] His Honour suggested that, in principle, a business should not be penalised for having promptly made payments to compensate a victim.

[46] As a matter of principle, the Court ought to encourage businesses to take responsibility at an early stage for acknowledged wrongdoing by voluntarily compensating a victim for harm suffered. These are the actions of a good corporate citizen or employer. Imposing a further reparation order above what would have been otherwise ordered may discourage timely financial assistance for an injured employee.

[47] Here Mr Hauraki-August received appropriate reparation, and he received it far more quickly than if Icepak had waited for a Court order first. Icepak should not be penalised for taking responsibility for early reparation payments.

[48] Section 10 of the Sentencing Act also requires me to take into account any offer of financial amends.

[49] I consider no further reparation ought to be ordered in this case given the compensation Icepak has voluntarily paid to Mr Hauraki-August, which includes covering the costs of a psychologist to address the most significant harm he has suffered.

Assessment of fine

[50] Counsel for WorkSafe and Icepak agree that the appropriate sentencing band from *Stumpmaster* is band 2 relating to medium culpability, with a starting point fine ranging between $250,000 at the lower end to $600,000 at the upper end.[7]

[51] Counsel, however, differ as to where Icepak's culpability lies within that band. WorkSafe say Icepak's culpability is at the higher end. Icepak says culpability lies at the lower end.

[52] The relevant factors when assessing culpability include:

---

[6] *WorkSafe NZ v Let's Bale Limited* [2020] NZDC 4538 at [32] and [35].
[7] *Stumpmaster* at [53].

(a) The effects of this incident on Mr Hauraki-August were substantial, including long term psychological harm.

(b) It is a matter of luck that the incident did not result in fatality given the electrical currents involved for operating commercial machinery such as the conveyors used in this case.

(c) The hazard in this case, however, was not obvious given Icepak had taken responsible precautions including using a plug that contained a safety locking ring and having available specific power points for conveyors that have built-in RCDs. It had not occurred to anyone, including the plug manufacturer, that it was possible to pull the plug out of a socket without disengaging the locking ring, far less that the safety sleeve could become separated from the plug.[8]

(d) Such a hazard, as occurred in this case, would also not be obvious because of the asymmetrical grouping of the pins of the plug. It has not been sufficiently explained how the pins of the conveyor plug could be inserted the wrong way around into plug holes without the person who did this noticing.

(e) While Icepak's training and monitoring of electrical hazards was substandard, it at least had conducted training with all staff as to the proper use of mobile conveyor belts, including the plugging and unplugging of the belts. The emphasis may not have been on electrical safety but would have included the method of locking and unlocking the safety sleeve.

[53] I also take into account that Icepak instituted immediate regular toolbox meetings with staff and further training about electrical safety, including identifying plugs that had been separated from their safety sleeves. Icepak has also installed RCDs on its mobile conveyors to ensure there is a second line of defence in case a similar

[8] The plug manufacturer, Schneider, forwarded a report in which it said: "When the plug and socket is connected and the locking ring done up, it would be virtually impossible for a grown man to pull it apart as in the photo".

incident arises in the future. I understand the latter step exceeds industry standards for conveyors.

[54] In summary, while the incident was undoubtedly serious, and could have been far more serious, the hazard that materialised in this case was not obvious and required safety mechanisms that had been adopted by Icepak to be, unexpectedly, overcome.

[55] I consider therefore that Icepak's culpability falls towards the bottom of the medium band of culpability identified in *Stumpmaster* and would fix a starting point fine at $300,000.

[56] The mitigating factors which would reduce the fine from the starting point include:

(a) An early guilty plea attracting a 25 per cent discount ($75,000).

(b) Icepak has an otherwise good safety record. It has no convictions for prior health and safety breaches. This would allow a discount of five per cent ($15,000).

(c) Icepak has taken immediate steps to not only establish what occurred and how it occurred, but to ensure that such hazards do not materialise in the future. Icepak cooperated with WorkSafe and took early steps to compensate Mr Hauraki-August. These are all tangible demonstrations of remorse and acceptance of responsibility, which together allow a further discount of 15 per cent ($45,000).

[57] I assess an end point fine, in all of the circumstances, would be $165,000.

Further or alternative orders

[58] As noted, the key issue to be resolved on this sentencing is whether a Court Ordered Enforceable Undertaking (COEU) under s 156 of the HSWA is the most appropriate sentencing outcome instead of a fine.

[59] The starting point is s 151 of the HSWA which requires the Court, when determining how to sentence or otherwise deal with an offender, to have particular regard to:

(a) The purposes and principles of sentencing under the Sentencing Act 2002.

(b) The purpose of the HSWA.

(c) The risk of injury or death from the offence.

(d) Whether death or serious injury could reasonably have been expected to have occurred.

(e) The safety record of the offender.

(f) The degree of departure from prevailing industry standards.

(g) The offender's financial capacity.

[60] Previous cases have considered that COEU's are more appropriate where the level of culpability is low and/or the offending PCBU has no prior convictions for health and safety breaches.[9]

[61] More recent decisions have suggested that s 156 of the HSWA does not need to be read down in this way and that COEU's may be appropriate in cases besides those where culpability is low, there are exceptional circumstances or when the PCBU has no previous convictions.[10]

[62] I tend to the latter view. The point of s 151 is to achieve an outcome that best meets relevant purposes and principles of sentencing (which may be different from

---

[9] *WorkSafe New Zealand v Niagra Sawmilling Co Limited* [2018] NZDC 3667 at [59] and [60]; and *WorkSafe New Zealand v Discoveries Educare Limited* [2019] NZDC 13056.

[10] *WorkSafe New Zealand v Otago Polytechnic* [2020] DCR 264 at [68], [69] and [86]; and *WorkSafe New Zealand v ISO Limited* [2021] NZDC 1980 where, at [22] the Court observed an appropriate COEU was not a soft option and may benefit others, particularly where it provided improved safety throughout the country.

one case to the next) and will best achieve the purposes of the Act expressed in s 3, including:

(a) To protect workers against harm to their health and safety by eliminating or minimising risks.

(b) Promoting advice, information, education and training in relation to work health and safety.

(c) Securing compliance with the Act through appropriate compliance and enforcement measures.

(d) Ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under the Act.

(e) Providing a framework for continuous improvement in progressively higher standards of work health and safety.

What COEU does Icepak propose?

[63] Icepak proposes a COEU that delivers the following:

(a) Activity 1 – A health and safety upskilling and positive health and wellbeing programme called the "Amanaki Workers' Programme" comprising:

(i) Engagement with the Tararua Rural Activities Education Programme (REAP) and the Tararua District Council to identify at-risk workers in the community who would benefit from specialist Health & Safety training.

(ii) Providing Health & Safety training with an emphasis on Māori, Pacific and migrant workers, taking cultural values, literacy levels and customs into account to ensure effective delivery and

retention of health and safety information. This training would be undertaken by a qualified Health and Safety trainer.

(iii) Icepak would provide 50 at risk workers in the community with access to a positive health and wellbeing programme called "Project Me". The programme uses the holistic Te Whare Tapa Whā approach to wellbeing. Workers selected for this project would be identified by Tararua REAP and local iwi.

(b) Activity 2 – RCD installation comprising:

(i) Engagement with Tararua District Council to identify the most frequently used community facilities where safety would be improved by installation of RCDs. It is estimated that 10-15 RCDs would be installed across council identified facilities.

(c) Activity 3 – Community funding for skill shortages and social services comprising:

(i) A donation, in consultation with the Tararua District Council's chief executive of $70,000 to the Te Awa Community Foundation for local initiatives such as skills training, social services and at-risk youth.

(d) Activity 4 – Conveyor design and standards comprising:

(i) Engagement with a suitable designer to redesign conveyor belts with input from an ergonomist, electrician and safety engineer.

(ii) Distribution of the preliminary design to relevant industries for feedback before being finalised.

(iii) Making the design publicly available with an associated good practice guide to improve conveyor belt safety across industries where they are used.

(e) Activity 5 – Improvement of large freezer access comprising:

(i) Creating a large freezer access guideline for meat and cool store warehousing industries.

(ii) Promoting and supporting the United Kingdom standard for safe operation of large freezer facilities.

(iii) Engaging an occupational physician and occupational hygienist in creation of New Zealand guidelines.

(iv) Engaging in discussions with industry groups regarding the proposed guidance documents.

(v) Engaging with WorkSafe to seek feedback about a proposed good practice guide.

(f) Activity 6 – Bowtie risk assessment comprising:

(i) Development of publicly available, editable, critical risk bowties that allow other businesses to assess risks arising from refrigeration, traffic, mobile plants and heavy vehicles.

(ii) The bowties would be formatted via the Bowtie XP programme to encourage customised use by specific users based on their own hazards and risks.[11]

(g) Activity 7 – Fork hoist training module, comprising:

(i) Developing a training module that covers risks specifically associated with operating fork hoists in cold environments in consultation with major forklift suppliers in New Zealand, and

[11] A "bowtie" is an editable sign or display for identifying new or enhanced controls to address identified risks so that threats, hazards, prevention barriers and mitigation barriers can be seen at a glance on the chart or display placed prominently or near a hazard.

in consultation with WorkSafe and the New Zealand Forklift Industry Association.

(h) Activity 8 – Traffic management, comprising:

(i) Consultation with Vanguard Group NZ to formulate traffic management standards that go beyond mere compliance including wall protection, installation of windows into rapid roller doors to allow identification of hazards before raising a door, wearing devices that would alert workers of proximate hazards.

(i) Activity 9 – Freezer access system development, comprising:

(i) Development of specific SonaSafe wearable devices for staff entering freezer environments which would alert workers to proximate hazards and send details of incidents to a cloud system for prompt review.

(j) Activity 10 – Health and Wellbeing programme, comprising:

(i) Development of a specific Project Me programme for a minimum of 125 Icepak workers targeting fatigue induced errors and managing risks associated with fatigue.

[64] Icepak proposes that the COEU be independently monitored, and a report provided to the Court, as to ongoing compliance.

[65] Icepak estimates the total cost of providing these programmes to be $240,000 not including independent monitoring and reporting.

[66] WorkSafe supports the first two activities but is critical of the others.

[67] WorkSafe's criticisms include:

(a) That the proposed community fund (Activity 3) is not targeted towards a health and safety outcome.

(b) The proposed conveyor design and standard (Activity 4) is likely to be of limited benefit when conveyers and their requirements are almost always site specific, and industry stakeholders would be unlikely to replace existing conveyers rather than retrofit them as needed.

(c) Improvement of large freezer access (Activity 5) – the prosecutor questions whether there is a gap in existing knowledge in relation to large freezer access or safety that requires separate review.

(d) Bowtie risk assessment (Activity 6) – the prosecutor questions whether there is industry support for this initiative, that the benefit of generic bowtie assessments has not been established nor has Icepak said how the bowtie risk assessment would be disseminated to industry stakeholders.

(e) Fork hoist training module (Activity 7) – the prosecutor has not been provided with evidence of industry support for this initiative nor who the industry body or expert would be that would develop the training.

(f) Traffic management (Activity 8) – the prosecutor questions the rationale for this activity and whether it brings Icepak or any other PCBU above standard compliance with the HSWA.

(g) Freezer access system (Activity 9) – the prosecutor submits this is another traffic management initiative covered in Activity 8.

(h) Health and wellbeing/fatigue programme (Activity 10) – the prosecutor questions the rationale for fatigue training as it was not an identified factor in the incident where Mr Hauraki-August was harmed.

[68] WorkSafe has asked that, if a COEU is adopted, it more transparently meets industry standards with guidance and delivery from persons who are qualified and

independent. To that end, WorkSafe has proposed some amendments to the activities proposed by Icepak.

[69] WorkSafe has also expressed some reservations about who would provide independent monitoring and reporting in connection with the proposed COEU. The parties have however agreed that, if I decide a COEU is appropriate, a suitable auditor would be Robyn Bennett who is a recognised health and safety professional registered by the Health and Safety Association New Zealand. She is also president of the New Zealand Institute of Safety Management. She would be provided with appropriate advice by legal advisors who have been nominated by Icepak but whom WorkSafe considers are not impartial. The parties invite me to propose who the auditor's legal advisors would be for reporting purposes.

Does the proposed COEU meet appropriate purposes and principles of sentencing and the HSWA?

[70] Some of WorkSafe's concerns about the proposed COEU are valid.

[71] Activity 8 (traffic management) and Activity 9 (freezer access) are both concerned with the same thing, namely the safe management of persons in and around environments where workers may be at risk from hazards such as forklifts, and other traffic hazards where SonaSafe wearable devices would provide appropriate alarms and recording systems. Activities 8 and 9 could be amalgamated.

[72] The final activity being a health and wellbeing programme associated with fatigue does not go far enough to address an associated issue which probably arose here, namely complacency. In this case, Icepak had a safety mechanism in place to prevent injury but workers may have developed a habit that bypassed this safety mechanism which was not foreseen by the manufacturer of that safety system or Icepak. Activity 10 should be expanded to address this.

[73] Other criticisms however are matters where, to some extent, Icepak is offering to take the lead and enhance hazard awareness and safety within not only cold store and storage industries but wider industries. That would be a matter for monitoring and reporting by the independent auditor. The auditor will be concerned with all of the

matters WorkSafe raises including that Icepak has engaged suitably qualified, independent persons to assess risks, design solutions and deliver appropriate programmes that meet the requirements of the HSWA and ensure stated outcomes are achieved.

[74] Provided Activity 10 is expanded to address the issue of complacency, I consider the proposed COEU addresses purposes and principles of sentencing in terms of ss 7 and 8 of the Sentencing Act in the following ways:

(a) It holds Icepak accountable for harm done to Mr Hauraki-August and the community.

(b) It promotes in Icepak a sense of responsibility for, and an acknowledgement of harm.

(c) It enhances elements of protection of the community generally.

(d) It addresses issues of rehabilitation in a wider context.

(e) It takes into account the gravity of the offending and Icepak's culpability.

(f) It takes into account the seriousness of the offence in comparison with similar offending and the maximum penalty.

(g) The outcome, including the cost of implementing the COEU compared with an appropriate fine, would be consistent with appropriate sentencing levels and other means of dealing with similar offenders in similar circumstances.

[75] The proposed COEU also meets important purposes in terms of s 3 of the HSWA, including:

(a) The COEU promotes protection of workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks.

(b) The COEU promotes the provision of advice, information, education and training in relation to work, health and safety.

(c) With appropriate auditing and judicial monitoring, the COEU ensures appropriate scrutiny and review of actions taken by Icepak and WorkSafe.

(d) The COEU provides a framework for continuous improvement and progressively higher standards of work, health and safety.

[76] If Activity 10 is expanded to include the issue of complacency, I consider the COEU is a more appropriate sentencing outcome than a fine in relation to the first charge having regard to relevant purposes and principles of the Sentencing Act and the purposes of the HSWA.

[77] While the incident undoubtedly carried a risk of more serious injury or death, Icepak has a good safety record and the degree of departure from prevailing health and safety standards in this case was not high. I am particularly influenced by the extent to which the proposed COEU promotes and enhances health and safety for Icepak's workers, in industries where Icepak is involved generally but also in the community by for example providing RCD devices to the Tararua District Council and district generally.

[78] The proposed community fund (Activity 3), while not targeted towards a health and safety outcome, is nevertheless an important measure to hold Icepak accountable to its community generally.

Should a conviction be entered?

[79] In terms of s 156(1) of the HSWA, I may adjourn this proceeding for up to two years and make an order for release of Icepak if they give a COEU, with or without recording a conviction.

[80] Icepak suggests this is an appropriate case where no conviction should be recorded if the COEU is adopted and performed.

[81] I consider that, while Icepak's culpability is in the lower end of the medium range, entry of a conviction in this case is not out of proportion to the gravity of the offending and is consistent with important sentencing purposes including denunciation and deterrence that are not necessarily covered under the COEU. It also reflects that part of the gravity of this offence is that both Mr Hauraki-August and Icepak were fortunate that Mr Hauraki-August's physical injuries were not significantly worse or resulted in Mr Hauraki-August's death.

Outcome on Charge 1

[82] For the first charge, failing to comply with its duty to ensure the safety of its workers, I enter a conviction and, instead of imposing a fine, I adjourn that charge for 18 months for Icepak to give and comply with the COEU it has filed, provided Activity 10 is expanded to include the issue of complacency.

[83] An adjournment of 2 years, provided for in s156, is not needed. 18 months is enough time to perform the COEU, and is a period that adequately reflects Icepak's culpability, and the circumstances of this case.

[84] I direct Icepak to refile the COEU in the same terms presented to the Court with an amendment to Activity 10 addressing the issue of worker complacency.

[85] The COEU must contain conditions that comply with s 156(2) of the HSWA:

(a) That Icepak appears before the Court if called on to do so during the period of the adjournment and, if the Court so specifies, at the time to which the further hearing is adjourned.

(b) That Icepak does not commit, during the period of the adjournment, any offence against the HSWA or regulations.

(c) That Icepak observes the following special conditions:

(i) Icepak will comply with and give effect to the activities specified in the COEU.

(ii) Icepak will engage Robyn Bennett to conduct an audit of Icepak's compliance with the terms of the COEU and provide reports to the Court and WorkSafe no later than 24 October 2023 and 12 July 2024 as to Icepak's progress and compliance with the COEU. Ms Bennett may engage the services of a legal advisor to assist with providing her report, as she sees fit.

[86] This order comes into effect on the day Icepak files the COEU in the above terms.

[87] On filing the COEU, Icepak will be otherwise released on the first charge subject to their compliance with the COEU and the Court's power to require Icepak to appear under s 156.

Outcome on Charge 2

[88] For the second charge, failing to ensure WorkSafe was notified of this event as soon as possible, I impose a fine.

[89] The maximum fine is $50,000.

[90] This was an instance where Icepak may have initially underestimated the effect of this incident on Mr Hauraki-August and therefore underestimated the seriousness of this incident.

[91] Nevertheless, this was a notifiable event and it should not have been for Mr Hauraki-August's uncle to notify WorkSafe.

[92] The delay was some two weeks, no evidence was lost as a result of the delay and I am satisfied Icepak has put procedures in place to ensure there will be no future delay should a notifiable event occur.

[93] An appropriate fine, taking into account the totality of the penalty or outcome across both charges and all of the circumstances is $8,000, which I now impose.

Costs

[94] I order Icepak to pay WorkSafe costs of $6,243.56, being half of the prosecutor's costs.

Further directions

[95] If either party considers further directions are needed to give effect to any part of this judgment, or address any matter I have overlooked, they have leave to file memoranda addressing such matters within 7 days.

_____

Judge L C Rowe
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 26/01/2023