IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2023-090-003736
[2024] NZDC 7990

WORKSAFE NEW ZEALAND
Prosecutor

v

FLEXICON PLASTICS LIMITED
Defendant

Hearing:	21 March 2024
Appearances:	S Cossey for the Prosecutor K McDonald for the Defendant
Judgment:	21 March 2024

NOTES OF JUDGE M PECOTIC ON SENTENCING

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[1] Thank you Mr Hayes, for being here today. I know that you have experienced a significant amount of emotional, mental, and physical pain since this incident has happened. It is pleasing to see you can go back to work and it is pleasing to see that the company, Flexicon Plastics Limited, are happy to work with you and are working with you.

[2] Today Flexicon Plastics Limited ("Flexicon") appear for sentencing. Flexicon is the defendant in the proceedings and they have pleaded guilty to and are for sentence on one charge of:

> Being a PCBU having a duty to ensure, as far as is reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business undertaking, namely cleaning a granulator machine

identified as "machine one" did fail to comply with that duty and that failure exposed individuals, including Keith Hayes, to a risk of serious injury.

[3] The particulars are:

It was reasonably practicable for Flexicon Plastics Limited to have
(a) Ensured an effective risk assessment of the machine was completed by a competent person;
(b) Ensured the machine guarding on the machine met the requirements of AS/NZS 4024 or higher standard; and
(c) Ensured a system of work was in place for the machine including a standard operating procedure, pre-start check and a monitoring and maintenance procedure.

[4] The maximum penalty for this offence is a fine not exceeding $1.5 million.

Summary of facts

[5] There is an agreed summary of facts before the Court. I do not propose to read the entirety of the document out in Court, rather I summarise the document as follows.

[6] The defendant, Flexicon Plastics Limited, is a limited liability company which was incorporated in 1993. The company operates a plastic packaging business producing a range of blow moulded bottles, injection moulded jars, caps, and other plastic items from its factory located in Avondale.

[7] In October 2020, Mr Keith Hayes, who is the victim in this matter, was employed by the defendant as a plastics technician and die setter. His responsibilities included ensuring the facilities at the factory ran efficiently. This role included managing breakdowns and preventative maintenance of the machinery in the factory. "Machine one" is commonly known as a granulator or re-grinding machine. It is used to recycle off-cut plastic pieces from the manufacture of plastic bottles.

[8] An infeed hopper consists of a shallow steel tray in which waste plastic is placed, this is located at the top of the front of the machine. An opening at the back of the tray lets the plastic pass into a chute which leads down into the cutting chamber of the machine. The infeed hopper includes a small, welded cleat on the right-hand side which engages a roller plunger limit switch which causes it to recess into the body of the machine. The infeed hopper is connected to the main body of the machine by

way of a hinge at the rear of the machine. This enables the hopper and the chute to be opened to allow access to the cutting chamber.

[9] On 26 August 2022, Mr Hayes arrived at the workshop around 6.30 am to start work. Part of Mr Hayes' work involved cleaning and pre-heating machines. Mr Hayes went to clean "machine one". He was wearing gloves. He did not unplug the machine from the electricity before cleaning it. This was the first step in the safety process that Flexicon had in place for cleaning any of the machines. With the hopper lid open, Mr Hayes put his hand inside the machine to clean it with the vacuum. While doing this, he accidently lent on the start button to the right of the rotor compartment. The machine started, the spinning rotor blade caught Mr Hayes' left hand pulling it into the cutting section of the machine, resulting in his left index and middle fingers being amputated. The third finger was degloved. First aid was administered by other staff members who recovered the amputated fingers and placed them in ice. The attachment of the fingers unfortunately was not successful.

[10] Following the incident, Mr Hayes, has returned to work with Flexicon. The hazards in this case were the serious injury from being caught in the moving parts of "machine one". The consequence was the severe injury. On the same day as the incident, WorkSafe was notified and commenced an investigation. This investigation identified that Flexicon did not have an effective operational health and safety system in place at the time of the incident, nor were there any formal records of cleaning, maintenance, or safety checks of the machinery at the factory. The company had documents relating to health and safety systems, however, these were incomplete, and they did not outline how to implement or integrate actions in response to identified risks. There was no evaluation of the effectiveness of implemented controls that were carried out. Flexicon had not engaged a suitable person to undertake a risk assessment of "machine one". While Flexicon had trained staff to use, clean and maintain "machine one", these processes were not written down and were also inadequate.

[11] WorkSafe engaged Mr Scott Jackson, an expert, to assess "machine one". Mr Jackson identified the primary mechanical hazard on "machine one" was the belt transmission and the rotor. There were also issues with the rear hatch of the machine and the guard around the machine's engine. An inspection of the roller plunger limit

switch showed it was defective. This defect meant the roller plunger limit switch and interlock were not functioning correctly. Therefore, the machine could be started when the chute was in the open position or if the machine was operating, the chute could be opened, and a rotor would continue to spin.

[12] The risks associated with moving machinery are well known in the subject of significant industry guidance. *WorkSafe Best Practice Guidelines for Safe Use of Machinery* was released in May 2014. It outlines hazards of machinery in the workplace, potential injuries, and how best to control these hazards. The assembly of "machine one" was found to be non-compliant with the interlocking guard requirements of the *WorkSafe Best Practice Guidelines*.

[13] As the limit switch was not operational, it could not be tested to ensure the interlock compliance with the guidelines, however, even if the machine's limit switch was functioning as it was intended to, it would not have been compliant with the requirements. In this case, the interlocking, if it were in working condition, could have been easily defeated by pressing and holding down the roller plunger limit switch.

[14] There was also no emergency stop button fitted to the machine which was contrary to the guidelines. In conclusion, the number of non-compliances, with respect of "machine one", allowed the victim to come in close proximity with the rotor while it remained capable of starting. Had the roller plunger limit switch that was installed been operational at the time of the incident, it would likely have prevented the incident from occurring. However, even had this switch been functional, the machine would still have had a number of significant non-compliances with the guidelines and standards, presenting an unacceptable risk to operators and maintainers.

The failure

[15] The defendant was a person conducting a business or undertaking or PCBU as defined by the Health and Safety at Work Act 2015. As a PCBU, the defendant was obliged to ensure, so far as was reasonably practicable, the health and safety of workers who worked for it while they were at work, this included the victim.

[16] The defendant failed to:

(a) Ensure the health and safety of Keith Hayes in that it failed to ensure an effective risk assessment of the machine was completed by a competent person;

(b) Ensure the machine guard on the machine met the requirements of AS/NZS 4024, or higher standard; and

(c) Ensure a safe system of work was in place for the machine including a standard operating procedure, pre-start check and, a monitoring and maintenance procedure.

[17] Flexicon has not previously appeared before the Courts. I am reminded by Mr Cossey that in 2013, Flexicon was issued with a prohibition notice relating to machine guarding of a different machine in its factory and was also issued an improvement notice in relation to cleaning and maintenance.

Victim Impact statement

[18] I now turn to consider the victim impact statement which is dated 6 March 2024. Mr Hayes lives with his partner and two daughters. The injury to his left hand resulted in the loss of his index and middle fingers and he has nerve damage. This causes both a loss of sensation as well as sensitivity to sensation. Flexicon has paid for Mr Hayes' transport to appointments and made up the ACC payments in terms of his wage. The injury to his hand severely impacted on his relationship with his partner. She could not look at his hand and considers him to be changed forever.

[19] Mr Hayes has lost the ability to use his hand properly, for example, Mr Hayes would enjoy fishing with his friends but the task of reeling in a fishing line is something he cannot do now, so he stays home. He struggles using the weed eater and the mower when maintaining his property due to shooting pains that travel up and down his arm when he uses this type of equipment. He cannot maintain his car like he used to or tinker on things in his shed as he simply cannot hold things anymore. Everyday things like draining a pot of water he cannot do as he cannot hold two things

at once. He has had to re-learn to use a knife and fork to be able to eat because of the gap between his thumb and fingers. He has had to re-learn a lot of things. He has become aware of people staring at him when he goes out, so he prefers to stay at home. He is angry about what has happened and he is worried that if he seeks a job elsewhere, he will not get one because of his disability.

[20] There are things he looked forward to in his retirement which due to his disability he will not be able to do. When I first read the victim impact statement, Mr Hayes said in that statement that he had received a letter from Flexicon saying that they are restructuring his job as senior moulding technician and that that position is no longer required. He expressed anxiety about having to apply for other jobs in other companies and being declined for those positions because of his disability.

[21] Mr Hayes has 35 years' experience in the industry. He is due to retire in five years and with his difficulty in reading and writing he would struggle to try new things. He also financially supports his daughter through her education and, at the time that I read his victim impact statement, he was worried about losing his job and the hardship this would cause to his partner, his daughter, and himself.

[22] There has been discussion in Court today about that. It seems that the letter was improperly worded, and that in actual fact, Mr Hayes' job remains available to him and that he has not been restructured out of his role and will be able to continue to work with the company.

[23] This matter was referred for restorative justice, however, it was unable to proceed. I note that the defendant was willing to participate in the restorative justice conference.

Submissions of Counsel

[24] I now turn to consider the submissions of counsel. I have received extensive written submissions from both counsel and I have also heard from counsel in Court today.

Worksafe

[25] Mr Cossey makes submissions on behalf of WorkSafe and submits as follows. I am referred to the relevant provisions of the Health and Safety at Work Act 2015 as well as the Sentencing Act 2002. Mr Cossey refers to the guideline judgment of the full High Court in the well-known case of *Stumpmaster v WorkSafe New Zealand* and adopts the four-step approach to sentencing.[1]

[26] In relation to reparation, I am referred to the decisions of *WorkSafe New Zealand v Marshall Industries Limited, WorkSafe New Zealand v Claymark Limited, WorkSafe New Zealand v Alto Packaging Limited, WorkSafe New Zealand v Alliance Group Limited.*[2]

[27] These cases involved either amputation or partial amputation of fingers or hands. Starting points in terms of reparation in those cases ranged from $28,000 through to $35,000. On behalf of WorkSafe, it is submitted that reparation of $35,000 for the emotional harm caused to Mr Hayes is appropriate. Consequential loss has already been paid by Flexicon.

[28] In relation to step 2, the prosecution refers to the guideline bands as set out in *Stumpmaster v WorkSafe New Zealand* and the relevant factors listed in the case of *Department of Labour v Hanham & Philp Contractors Limited.*[3] It is submitted that the defendant failed in the three ways as particularised by the charge. It is submitted the risk was to one worker and the harm to the victim was serious. It is submitted that there was a significant departure from industry standards in the operation of the granulator machine, especially when considering the AS/NZS 4024 standards.

[29] It is submitted that the relevant paragraphs in the summary of facts are important and those are contained at paragraphs [23] to [35]. It is submitted the risks and hazards associated with exposure to moving parts is well known and obvious and it was not cost prohibitive for the defendant to ensure that the granulator machine had

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1 *Stumpmaster v WorkSafe* [2018] NZHC 2020.
2 *WorkSafe New Zealand v Marshall Industries Ltd* [2018] NZDC 4489; *WorkSafe New Zealand v Claymark Ltd* [2019] NZDC 1977; *WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148; and *WorkSafe New Zealand v Alliance Group Ltd* [2018] NZDC 20916.
3 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.

been properly risk assessed and systems put in place to ensure compliance. It is submitted with reference to the case law, that the culpability in this case falls towards the higher end of the medium culpability band and that a starting point of $500,000 is appropriate. Because of the special features in this particular case, Mr Cossey emphasises that the high level of culpability pushes this case up to that higher region and that the starting point of $500,000 is appropriate. Mr Cossey, on behalf of WorkSafe, accepts that the defendant is entitled to a discount of 25 per cent to reflect the plea of guilty. In terms of reparation, five per cent is accepted as appropriate.

[30] In relation to remedial steps, it is accepted that five per cent is appropriate. It is also accepted that cooperation with the investigation did exist in this case. There has been discussion this afternoon in relation to that aspect. Mr Cossey does not strongly advocate for cooperation as being an available discount, however, does recognise that there is a difference between those companies that assist WorkSafe with their investigation and those that do not.

[31] It is accepted that remorse does apply in relation to the present case and that a discount to reflect that would be appropriate. However, in relation to previous good character, it is submitted that this does not apply in this case because of the fact that prohibition and an improvement notice had been served on the company. It is recognised however that the company has not previously appeared in Court.

[32] The prosecution seeks half of the prosecution legal costs which is $2,200.66.

[33] Step four, the proportionality test. Counsel has filed a lengthy document and financial records from an expert engaged by WorkSafe, Mr Taylor. In response to that, the defence have filed an affidavit from the accountant to Flexicon Plastics Limited. There have been discussions in Court this afternoon in relation to the ability of the company to be able to afford to pay a fine. Ms McDonald has filed an updated table that was prepared by the company's accountant. The proposal put forward by the defendant is that a fine of $74,392 be payable over a three-year time period.

[34] Mr Cossey submitted that a higher fine could be imposed if that could be stretched to a four-year time payment option. However, after discussions in Court this

afternoon, there is general agreement that given the company's ability to pay, coupled with the financial status of the country at the present time (with there being lower consumer purchases, as reflected in the material that has been provided by the accountants), a three-year period is more appropriate. Based on discussions, WorkSafe do not strongly oppose the three-year period. Therefore, it is accepted that the amount of a fine could be reduced to $74,392.

Defence

[35] I turn now to the defence submissions. The defence agrees with the purposes and principles of sentencing as set out by the prosecution and submits that the Court must also impose the least restrictive outcome that is appropriate in the circumstances of the case and one which is consistent with other similar sentencing decisions. The defence refers to the four-step approach as described in the lead decision of *Stumpmaster v WorkSafe New Zealand.*

[36] In relation to step one, based on the cases of *WorkSafe New Zealand v Locker Group NZ Ltd*, *WorkSafe New Zealand v Niagara Sawmilling Company Ltd*, *WorkSafe v ITW NZ Ltd*, *WorkSafe v Alto Packaging Ltd*[4] it is submitted that $32,500 is appropriate in relation to reparation.

[37] In assessing the reparation, the defence submit the following matters are relevant:

(a) the good relationship between the company and Mr Hayes,

(b) the company's provision of transport to medical appointments,

(c) the company providing financial support in the form of goodwill payments to alleviate the burden of medical and other sundry expenses when Mr Hayes was recovering,

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4 *WorkSafe New Zealand v Locker Group NZ Ltd* [2018] NZDC 26802*; WorkSafe New Zealand v Niagara Sawmilling Company Ltd* [2018] NZDC 3667; *WorkSafe New Zealand v ITW New Zealand* [2017] NZDC 27830*; and Worksafe New Zealand v Alto Packaging Ltd* [2019] NZDC 14809.

(d) the top-up payments throughout to ensure there were no consequential losses and

(e) supporting Mr Hayes in the workplace where a full-time position is maintained for him.

[38] The defence agree with the prosecution position with respect to consequential loss. In relation to step two, fixing the fine, the defendant refers to the Court of Appeal comments in *Moses v R,* and *R v Taueki,* in relation to the aggravating and mitigating factors of the offending as well as those concerning the defendant.[5] Counsel also refer to the four guideline bands in the lead decision of *Stumpmaster v Worksafe New Zealand* and the factors as set out in s 151 of the Act and the factors as set out in the case of *Department of Labour v Hanham & Philp Contractors Limited* in setting a fine.

[39] The defence acknowledge the deficiencies and accept there were practical steps which could have been taken but were not. It is submitted that the company had undertaken risk assessments of its machines and each new employee was thoroughly trained in respect of health and safety processes that related to them. This submission is based on the affidavit of Pierre Peeters. It is acknowledged that while there were health and safety procedures that did exist, and the machines did have safety features, that these were inadequate in the present case. Counsel submits that this is not a case where the company simply ignored its health and safety obligations. Since the incident, it is submitted that Flexicon has worked with WorkSafe to remedy the deficiencies that existed.

[40] Flexicon accepts unequivocally the risk of serious harm to workers if machinery is not guarded adequately and that there was foreseeability of risk on this basis. It is accepted that while there were some guarding features and other safety features in place, Flexicon failed to meet the required standards in respect of machine guarding. It is accepted that the risks arising from exposure to moving parts or machinery are well known.

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[5] *Moses v R* [2020] NZCA 296; and *R v Taueki* [2005] 3 NZLR 372 (CA).

[41] Flexicon acknowledges its error in placing too much reliance on its policy of ensuring that the machine was switched off or unplugged prior to cleaning or maintenance. It is also accepted that this was not a case where costs were a factor. Counsel emphasises that Flexicon has remedied the identified failings at a cost to it of $60,000. It is submitted that Flexicon's liability falls towards the low to middle end of the medium culpability band and a starting point of $400,000 is appropriate.

[42] In terms of mitigating factors, it is submitted that credit should be allowed for the plea of guilty, previous good character, co-operation with the investigation, remorse, reparation, the remedial steps undertaken since the incident which would equate to a combined discount of 50 per cent. It is submitted that a further reduction of the fine should be permitted to take into account the defendant's financial incapacity.

Analysis

[43] In sentencing I consider the purposes as set out in s 7 of the Sentencing Act. The purposes which I consider as part of this sentence are to hold the defendant accountable for the harm that has been caused and to promote responsibility and acknowledgment of that harm. I also consider the interests of the victim which includes reparation.

[44] In terms of principles as set out in s 8 of the Sentencing Act, I consider the gravity of this offending and the seriousness of this type of offence in comparison to other cases of a similar kind. I also consider the effects that this offending has had on the victim and the steps taken by the defendant in terms of remedying systems.

[45] I also have regard to the purposes of the Health and Safety at Work Act 2015, and particularly s 151 of the Act which caters for the need to protect workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work. Ensuring compliance with the Act through effective and appropriate compliance and reinforcement measures.

[46] I acknowledge the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks, that arise from work as is reasonably practical.

[47] The lead decision in cases of this sort is the case of *Stumpmaster v WorkSafe New Zealand,* a four-step approach is taken to sentencing as follows:

(a) Step one: assessing the amount of reparation;

(b) Step two: fixing the amount of the fine by reference to guideline bands and then having regard to aggravating and mitigating factors;

(c) Step three: determining whether further orders under ss 152 to 158 of the Health and Safety at Work Act 2015 are required; and

(d) Step four: make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.

[48] I now address the four steps.

Step one - Assessing the amount of reparation.

[49] Sections 32 to 38 of the Sentencing Act 2002 provide guidance on matters that need to be considered when imposing a reparation order. Reparation is compensatory in nature and is designed to recompense an individual or family for loss, harm or damage, resulting from the offending. In the present case, I have carefully considered all the cases referred to me by counsel. As I said at the start of the case today, I note that some of those cases now are between six to eight years old.

[50] The following factors I consider are relevant when setting a reparation figure in this case are

(a) the impact on the victim and the injuries sustained by him. He has suffered a permanent injury which will continue to cause ongoing harm and suffering for him. Mr Hayes has set out in his victim impact statement the difficulties he has experienced so far and the harm he has experienced is not just physical but also emotional and mental.

(b) Secondly, Mr Hayes is presently working for the company. He has about five years of working life remaining and hopes to continue to work in the company and the company have offered him a continuation of his job with them.

(c) Thirdly, while Mr Hayes was on ACC, the company paid a top-up amount to ensure that he still received his usual wage and,

(d) Fourthly, the company assisted with transport to and from medical appointments and made goodwill payments.

[51] There is very little difference between the prosecution and the defence submissions in terms of reparation. In my view, taking into account the factors I have set out and looking at the cases before me, I consider the appropriate figure of reparation to be $33,000 in the present case. I agree with the submission of both counsel that no award is required in relation to consequential loss as this has already been covered by Flexicon.

Step two

[52] Fixing the starting point of a fine under the Health and Safety at Work Act 2015 is provided for by the four guideline bands in *Stumpmaster v Worksafe New Zealand* which I set out as follows:

(a) Low culpability up to $250,000;

(b) Medium culpability, $250,000 to $600,000;

(c) High culpability, $600,000 to 1 million; and

(d) Very high culpability, 1 million plus.

[53] In assessing culpability, I address the *Department of Labour v Hanham & Philp Contractors Limited* factors as referred to by the Court in *Stumpmaster v Worksafe New Zealand.* The first step is to identify the operative acts and omissions. I have already addressed the three failings on the part of the company, there is no need to repeat these again. By its plea of guilty, the company accepts these failings. These failings are also described in the summary of facts which I have referred to.

[54] Secondly, the severity of the risk of harm occurring as well as the realised risk. The risk of harm was the risk of injury from exposure to an inadequately guarded granulator machine. The actual harm to the victim was serious and permanent. There is no dispute that there was a risk of serious harm to workers if machinery is not guarded adequately and that there was foreseeability of risk on this basis.

[55] Thirdly, the degree of departure from standards prevailing in the industry. It is not disputed that Flexicon failed to meet the required industry standards as set out in the AS/NZS 4024 *Safety of machinery: General principles for design – risk assessment and risk reduction*. In the present case, the granulator machine switch did not comply with the standards. It was in a position likely to be lent on or accidently depressed. It did not have any form of shroud or raised edge to prevent accidental depression of the switch. The very small activation distance meant it was particularly susceptible to accidental operation.

[56] In his affidavit, Mr Peeters, refers to the ethos behind the lack of documented health and safety procedures as well as the procedures that did exist. The practical training was a philosophy his father developed and passed on to Mr Peeters. This involved training of new employees which he oversaw during the first three months of employment and checking to ensure the employees were confident with what they were doing. The emphasis was on verbally and practically instilling safety roles into the employees rather than providing these rules and processes in written documents.

[57] Mr Hayes had over 35 years' experience in plastic industries when he was employed by Flexicon. Mr Hayes was provided with training. Mr Peeters says he supervised and witnessed Mr Hayes' compliance from time to time. Mr Peeters has gone into some detail in his affidavit about what he did when he returned to the company, as well as the other processes that the company had in place, some of which were documented, and others were not. While Flexicon referred to the safety features in place on the machine, it also recognises and accepts that these were inadequate especially as the limit switch on "machine one" was not working properly and improvements were required to ensure the machine was safe.

[58] Fourth, the obviousness of the hazard. The risk arising from exposure to moving parts of machinery are well known and obvious in the manufacturing industry. Flexicon's internal policy of ensuring that the machine must be switched off and unplugged prior to cleaning or maintenance was inadequate.

[59] Fifth, the availability cost and effectiveness of the means necessary to avoid the hazard. It is agreed between the parties that the costs were not a factor in relation to this point.

[60] In fixing the fine, I am assisted by the cases of *WorkSafe v Eurocell Wood Products Limited* and *WorkSafe v Skyline Buildings Limited*.[6] This case is slightly different to the case of *WorkSafe New Zealand v Richard Stodart Building Limited*, in that case the victim had only been at the job for one day.[7] The case of *WorkSafe New Zealand v Marshall Industries Limited* is a decision which pre-dates *Stumpmaster v Worksafe New Zealand* although I recognise it factually bears very strong similarities to the present case.

[61] When I stand back and consider all matters, I consider this case falls within the middle range of the medium band in terms of culpability. When I consider all the cases that have been referred to me and their various different factors, in my view an

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6 *WorkSafe v Eurocell Wood Products Limited* [2018] NZDC 21568; and *WorkSafe v Skyline Buildings Ltd* [2020] NZDC 10681.

7 *WorkSafe v Richard Stodart Building Limited* [2019] NZDC 4119.

appropriate starting point, taking into account the matters I have referred to already, is a fine of $420,000.

[62] I turn now to consider the mitigating factors. First is the plea of guilty which I accept merits a discount of 25 per cent. I do consider the company expresses remorse, this is reflected in the support offered to Mr Hayes as well as what Mr Peeters says in his affidavit. In allowing this discount, I am mindful of the additional steps the company took in keeping Mr Hayes informed about the updates and additional safety features that were being put in place to ensure that the machine was safe going forward and to give comfort to Mr Hayes. I allow five per cent for this factor.

[63] In my view, the cooperation with WorkSafe and their investigation merits a discount of five per cent. It is important that when WorkSafe investigate cases such as this, that companies are encouraged to cooperate and work with them efficiently and effectively so that the process is not delayed, for this reason, I allow a discount of five per cent.

[64] I have thought carefully about whether to allow a discount for previous good character. It is correct that the company has not previously appeared in Court. I also take into account the submission advanced by WorkSafe, namely that the company has been put on notice previously by way, as I have already described, with the prohibition and improvement notices. But weighing against that is the fact that at the time that the company or the defendant was operating, it was under the directorship of a different person to who is presently the director now and, secondly, the period of time that has passed since, it being about a decade ago.

[65] Because of those two factors, I am prepared to allow a five per cent discount for previous good character. I also allow five per cent to reflect the remedial costs undertaken by the company. This is a case, where through a tragic accident, the company realised there were gaps in its systems and fixed these at a considerable cost to the company.

[66] There has been cooperation with WorkSafe to ensure that the safety processes are more thorough and reliable and that all safety policies and procedures are now in

writing. I also consider it appropriate to allow a discount of five per cent to cover reparation. That reduces the fine down to one of $210,000.

Step three

[67] Step three is to determine whether further orders under ss 152 to 158 of the Health and Safety at Work Act 2015 are required. In this case, the defence do not oppose the imposition of costs. The submission advanced by the prosecution is reasonable and, accordingly, I make an order for costs as sought by the prosecution of $2,200.66.

Step four

[68] Lastly, I stand back to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant. Most of the argument today has really been focused on this issue and a substantial amount of material has been provided prior to sentencing today. That takes the form of affidavits from Pierre Peeters, Todrik Taylor, and two affidavits from Mr Atkar.

[69] Flexicon was established by Mr Peeters' father in 1993. Mr Peeters worked alongside his father and his brother. At the time, Mr Peeters, was a machine setter. He continued in this role until his father's health deteriorated at which point his brother took over the company and Mr Peeters left. In 2017, after Mr Peeters' father passed away, he returned to the company and took over as director. Mr Peeters' brother remained as a director. Flexicon employs a total of 19 employees which includes both directors.

[70] According to the financial material before me, it is clear that there have been difficulty sustained by the company during the COVID-19 pandemic. The income that the company generates has been subject to much discussion this afternoon. As I have already indicated earlier when discussing the prosecution submissions, prosecution and defence have had an opportunity to discuss the latest quarterly forecast report which was prepared by Mr Atkar.

[71] This report suggests that the company would be able to make a payment of a fine of $74,392 over a three-year period. There is an option for a five-year period, however, Ms McDonald, this afternoon, submitted that the three-year period is stretching matters for the company which does not bode well for the five-year figure as set out in the report.

[72] I had also discussed with counsel my concerns with respect to the financial climate that exists at present. When I look at the figures that have been presented to me and heard what counsel have said, in my view the fair outcome for all parties would be to reduce the fine to a figure that the company is able to cover over a three-year period. This would not result in the loss of work for the 17 employees plus the two directors. On that basis, I reduce the fine down to $74,392 which can be paid off over a three-year period. The setting of that payment plan can be made with the registrar.

[73] Just to summarise:

(a) Reparation of $33,000 to Mr Hayes;

(b) The fine of $74,392 to be paid over three years. The payment instalments to be arranged with the registrar; and

(c) The costs of prosecution which is $2,200.66.

[74] The summary of facts can be released to counsel. If there is any other person that wants to see the summary of facts, they have to file an application in the usual way.

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Judge M Pecotic
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/07/2024