IN THE DISTRICT COURT
AT MASTERTON

I TE KŌTI-Ā-ROHE
KI WHAKAORIORI

CRI-2022-035-000082
[2024] NZDC 22106

WORKSAFE NEW ZEALAND
Prosecutor

v

EGMONT LOGGING LIMITED (IN LIQUIDATION)
First Defendant

FARMAN TURKINGTON FORESTRY LIMITED
Second Defendant

Hearing:	3 September 2024
Appearances:	A Everett for the Prosecutor G Nicholson for the First Defendant R Woods for the Second Defendant
Judgment:	13 September 2024

SENTENCING DECISION OF JUDGE B A MORRIS

Introduction

[1] Mr Stephen Whare tragically died when a tree fell on him during a tree felling operation in the small rural area of Tinui, Masterton.

[2] At the outset, the Court notes his whanau attended both the original trial held in Auckland, and at the sentencing in Whakaoriori Masterton. I acknowledge them. I acknowledge their grief. I acknowledge their patience and understanding throughout these proceedings.

[3] I have found Mr Whare's employer, Egmont Logging Limited (in Liquidation) ("Egmont") guilty of an offence against s 48(1) and (2)(c) of the Safety at Work Act 2015.

[4] Farman Turkington Forestry Limited ("FTFL") was the forest harvest manager contracted by the owners of the forest to arrange the harvesting and the marketing of the logs, and they in turn contracted with Egmont to physically harvest the trees. They have pleaded guilty to that same offence.

[5] Both companies are now before the Court for sentencing. The maximum penalty is a fine of $1,500,000 in respect of each company. The issues in relation to both companies that I have to determine are:

(a) What is the appropriate level of reparation to be awarded for the emotional harm caused to Mr Whare's whanau?

(b) What is an appropriate fine?

(c) What costs or other orders are appropriate?

(d) Having assessed all of that, are the overall sanctions appropriate or disproportionate?[1]

(e) In addition, in relation to FTFL only, should I impose a fine or should I sanction a Court ordered enforceable undertaking ("Enforceable Undertaking")?

(f) If I do impose an Enforceable Undertaking, should there be a conviction entered?[2]

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[1] That approach of four steps is sanctioned by *Stumpmaster v Worksafe New Zealand* [2018] NZ High Court 2020

[2] I note FTFL submitted if I impose an Enforceable Undertaking, then a conviction should not be entered. It was not argued before me that if I did not adopt that option, that a conviction should not follow.

[6] Worksafe accepts Egmont, [redacted] Worksafe also agrees that in respect of FTFL the Court should adopt an alternative approach of an Enforceable Undertaking under s 156 of the Act, rather than a fine. I agree, for reasons to be given later. Accordingly, the calculation of a fine that would otherwise have been paid is largely academic. However, it can provide assistance in other cases and the cases are clear that the level of fine should be calculated before making a determination about whether an undertaking is appropriate, given one of the issues will be proportionality of the cost of implementing the undertaking versus the level of fine.

Facts

[7] FTFL had a contract to manage the harvesting of macrocarpa trees in a farm forest block in Tinui, Masterton. FTFL, as the forest harvest manager, would organise the harvesting, the transport and the marketing of the trees. It in turn contracted with Egmont to do the actual harvesting on the ground. The trees in this forest were tall, some were leaning, some were beside a stream, and all were planted close together with many tops of trees interlocked. Macrocarpa is also potentially more brittle than other species. All of this made for difficult harvesting and made an entirely machine-operated harvest impossible. A determination was made that fellers would be used, with a system known as "machine-assisted felling".

[8] That involved the feller, here Mr Whare, making a cut in one side of the tree and then retreating while the machine operator takes hold of the tree with a grapple, The feller then returns and makes another cut on the other side and again retreats to a distance described in Worksafe guidance as "safe", being at least five metres away from the tree. The feller and the machine operator are supposed to agree on the retreat path before this process and be in radio communication with each other, so the machine operator knows when they are at that pre-determined spot and therefore safe to fell the tree.

[9] Where trees are spindly and break more easily, as macrocarpas potentially do, and where there are interlocked tree tops, there is a danger that the falling tree will

break off the top of the interlocked tree and fall to the ground. Using a machine to pull over the tree creates additional energy and therefore greater hazard than would occur when the tree falls naturally through gravity.

[10] The experts were of the view, and I agreed, that the minimum of five metres was inadequate in these circumstances. A feller and the machine operator should have made a specific risk assessment relating to the additional hazards involved here and gone further than the minimum five metres to at least 10 to 15 metres away from the tree being felled and 10 metres away from the adjacent tree, which was the one that lost its top and fell on Mr Whare. Mr Whare, from where he was standing, could not see the top of the tree that ultimately fell on him. The machine operator, Mr Timoti, did not know exactly where Mr Whare was when Mr Whare, on the radio, gave the direction to pull the tree over.

[11] Mr Whare had gone five metres away from the tree to be felled. The top of the adjacent interlocked tree broke off and came to the ground, landing on him, and sadly he died soon after.

Monitoring

[12] Egmont had no system of monitoring the way its workers conducted MAF felling. FTFL regularly monitored the work of Egmont, but did not specifically ensure, given the infrequency of MAF felling, that employees would observe Egmont's employees undertaking that more dangerous task.

Breaches

FTFL

[13] FTFL pleaded guilty to failing to comply with its duty under the Act to ensure the health and safety of Egmont's harvest workers as far as was reasonably practicable, and in that, exposed them to the risk of death or serious injury.

[14] The breaches were two-fold:

(a) It failed to verify Egmont workers who undertook and supervised MAF held appropriate qualifications or, after appropriate and documented training and assessments, were found to be competent by their employer.

(b) It failed to ensure Egmont had a system with MAF that ensured fellers undertook, and documented, a specific risk assessment that took into account the hazards associated with the specific trees being felled. Then and only then, should the workers determine appropriate control measures, including importantly the retreat distance and whether it should be greater than the minimum recommended.

Egmont

[15] I found Egmont guilty of two breaches of that same duty in that:

(a) It failed, as FTFL had, to ensure fellers undertook and documented a risk assessment that took into account the specific hazards of this felling.

(b) It had an inadequate system of monitoring the method of conducting MAF work to ensure the system was not only designed to be safe, but to ensure the design menu reached the day to day operating plate.

Issue 1: What is the appropriate level of reparation to be awarded for the emotional harm caused to Mr Whare's whanau?[3]

[16] I have heard and read of the pain, grief and harrowing loss experienced by Mr Whare's partner, Ms Rimine, his brothers, sisters and children. The pain was pulpable. Mr Whare's whanau have been here throughout this process. They all cared deeply for him and for some the loss was that of lost opportunity to reconnect or

[3] Section 12(1) of the Sentencing Act 2002 directs me that I must impose reparation unless exceptions apply, and it is agreed they do not apply here. Section 32(1) of that Act indicates I may also impose reparation for emotional harm to victims and that is a relevant reparation here.

connect with a father. That pain is felt no less. It is an unenticing task to have to put a monetary value, a financial measure, on such an intensely personal emotion. However, I must do my best with the information that I have. It is trite to say any financial compensation is a wholly inadequate measure. Worksafe have calculated the emotional harm reparation sought by reference to similar cases, and by reference to the number of whanau involved. On that basis, Worksafe submits the emotional harm reparation should be calculated as follows:

(a)	Ms Rimine, Mr Whare's partner	$40,000.00
(b)	Mr Whare's four brothers and sisters	$5,000.00 each
(c)	Mr Whare's ten children	$10,000.00 each
		$160,000.00

[17] As to how that is to be apportioned between Egmont and FTFL, Worksafe's submission is that that should be 60/40 respectively. FTFL, for its part, makes no submissions about the global amount of reparation, but submits given relative culpability and the steps it has taken to minimise the harm after the accident, that the appropriate apportionment should be 70/30, with Egmont taking the lion share.

[18] The liquidators for Egmont disagree with both the global figure and the apportionment. They refer me to the most helpful case involving reparation under this Act of *Ocean Fisheries*[4]. In that case, the Court reviewed the cases where there has been reparation awarded for death, noting that most of recent times have been between $100,000 to $130,000. Egmont also cites two other cases of *Worksafe NZ v Sullivan Contractors (2005) Limited*[5] where an award of a forestry death was made of $110,000 and *Worksafe NZ v Pakiri Logging Limited*[6] where the award for a forestry death was $130,000.

[19] The submission by the liquidators for Egmont is that the appropriate global sum for reparation, which will be covered by insurance, is $130,000. As for

[4] *Ocean Fisheries v Marine NZ* [2021] NZHC 2082.
[5] *Worksafe NZ v Sullivan Contractors (2005) Limited* 2020 NZDC 2068.881.
[6] *Worksafe NZ v Pakiri Logging Limited* [2020] NZDC 14158 881

apportionment, Egmont submits the 60/40 calculation is in error and the 70/30 calculation is even more in error. The appropriate apportionment should be 50/50, given the two practicable steps involved for each company are quantitively the same and qualitatively similar. What FTFL is asking the Court to do, Egmont submits, is to give them a discount twice in relation to the fine and reparation. That, Egmont submits, is the wrong approach.

Decision on Reparation

Global Amount

[20] I have considered the cases cited and I have considered the level of emotional harm here. There is something of an eggshell skull principle operating, where an offender takes their victim as they find them. Mr Whare had a large whanau. In relation to those that I have heard from, they were deeply affected. While I consider there is a need to ensure some consistency, in my view an award of $150,000 is well warranted here, in light of what I have heard and seen kanohi ki te kanohi.

Proportion

[21] As to proportionality, I do not agree with the liquidators of Egmont that the split should be 50/50. Egmont was the employer on the forest floor. They were the ones who had the first obligation to protect their own. They had a greater opportunity to do so. Particularly, I accept that two directors of FTFL have done all they can to reduce further emotional harm after the fact of Mr Whare's death. They have pleaded guilty early on and the delay was in no way of their making, and that delay did cause increased emotional distress. They made some up-front payments to Mr Whare's whanau for the tangi and other expenses. A well-timed payment is of extra value to a grieving whanau and helps them through that process.

[22] In contrast, Mr Stewart, who is the one-man-band behind the corporate veil of Egmont did none of that. He refused to engage with the liquidators, so they could not take instructions. There was no evidence that he did anything to assist with whanau.

[23] Whilst conscious of the need to avoid double-counting, one goes to award fines and the other is an evaluative exercise of the actual harm caused, which is effected by the company's responses.

[24] On the other hand, I consider 70/30 tilts too far the other way. FTFL's culpability for the accident is not insignificant. It was the one with considerable expertise, and it would seem Egmont relied on it considerably to provide oversight in this area of health and safety. In my view, the proportion proposed by Worksafe is the appropriate one of 60/40 vis-à-vis Egmont and FTFL respectively.

Distribution

[25] The submission by Worksafe is that the distribution should follow the approach in paragraph 16. The defendant companies are neutral about that, though Egmont noted the benefits of a global award to a whanau, leaving them to make the distribution, rather than having it imposed from on high.

[26] During the hearing, I made enquiries of Counsel for Worksafe as to whether it was possible for the whanau to come to some agreement about apportionment, and Mr Everett indicated from his discussions that was not likely.

[27] I have given this much thought and have been troubled by it. I would much prefer for the whanau to come to some agreement themselves, rather than have it imposed by the Court, but on the other hand, I do not want to cause friction and factions in the whanau over money.

[28] I have decided on a hybrid approach. The interests of Ms Rimine as a partner are sufficiently different from Mr Whare's own whanau, to the point I think that apportionment can be dealt with by the Court. I would award Ms Rimine the amount of $35,000, allowing for the fact of course the global figure is less than what was put forward by Worksafe.

[29] As to the remainder however, what I intend to do is this. I would ask whanau members to have a hui and determine whether they are able to agree on the apportionment of the balance. If they are, that is the end of the matter and the Court

need not know how that is to be distributed, although obviously the insurers will. If they are not able to do that, then it can come back to me and I will make the decision.

[30] I do not want this to go on, given the delays and given extra time carries a greater risk of generating more heat than light. Accordingly, if I have not heard from Mr Everett, from Worksafe, on behalf of whanau, within 14 days, then I will formally make the order that it is a global amount to whanau. If Mr Everett indicates within that timeframe that the whanau are not able to agree on that, then I will issue a decision on distribution. It is possible that whanau get close to be able to make that decision within 14 days, but not quite, and in which case I would countenance an application to extend that timeframe a little.

Conclusion

[31] Accordingly, in relation to reparation Egmont is to pay 60 per cent, FTFL 40 per cent, and I set the figure at $150,000 with $35,000 of that to go to Ms Rimine. The balance is to be globally awarded to the whanau unless Mr Everett, by memorandum, indicates within 14 days that that is not possible due to disagreement.

Issue 2: What is an appropriate fine?

[32] As indicated, this is largely an academic exercise and whilst I do need to formulate a view on the level, the extent of the reasons reflects the reality that nothing will be paid.

Approach to Setting the Fine

[33] *Stumpmaster*[7] confirmed the Court must first fix the amount of fine by reference to guideline bands set out in that decision. The Court used the factors listed in the decision of *Department of Labour v Hanham and Philip Contractors Limited*[8]. Those factors are:

(a) The practicable steps that have been omitted;

[7] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020
[8] *Department of Labour v Hanham and Philip Contractors Limited* [2008] 6 NZELR 79.

(b) The nature and seriousness of the risk of harm, as well as what harm actually eventuated;

(c) The degree of departure from standards prevailing in the industry and the obviousness of the hazard, together with the availability, cost and effectiveness of the means necessary to avoid the hazard.

[34] I take all those factors into account as I do the factors and purposes set out in this Act, together with the purposes and principles in the Sentencing Act 2002.

[35] There is agreement by all parties that the appropriate band is the second band of medium culpability. That goes between a $250,000 to $600,000 fine. Worksafe say that Egmont's starting point should be a fine of $500,000, whereas Egmont says it should be $400,000. Worksafe says FTFL's culpability is less than Egmont's and should have a starting point of $400,000, whereas FTFL says it should be $300,000 to $330,000.

[36] Turning to the factors present in this case, the risk here was being struck by a dislodged tree head and the consequences were likely to be death or severe injury. The degree of risk in this case was moderate, given the type of trees and that they were using MAF. That hazard in felling trees, which is inherently dangerous, is an obvious one and it would not have been difficult or costly to avoid that hazard. However, I accept that there was little guidance from Worksafe or industry guidance to assist. Mr Whare complied with the system of MAF provided in the Worksafe guidance documentation and went to the minimum required of five metres. I found Worksafe and the industry could have been of greater assistance to operators.

[37] I also take into account that both of these companies fell short in this particular area of MAF, but each were companies that took their responsibilities seriously and had done much. That is particularly so with FTFL. As Ms Woods submitted, this was an isolated gap in an otherwise robust and well-resourced safety system.

[38] In those circumstances, I assess the starting point for a fine appropriate for Egmont as $450,000 and FTFL at $350,000 .

Discounts

Egmont

[39] Both Worksafe and the liquidators for Egmont submit that it is appropriate that the company get five per cent discount for co-operation with Worksafe after this accident and they both have submitted that Egmont should receive a five per cent discount for remorse. Given Worksafe has submitted the company should get that discount, it knows more about it and its response than the Court. I must say, I was surprised, given the company pleaded not-guilty and it is unusual, if not unique, for a company to receive any discount for remorse when it tests the prosecution case.

[40] The difference in mitigating factors between Worksafe and Egmont however is that Egmont is of the view that they should get a 15 per cent discount for reparation, whereas Worksafe submits five per cent is appropriate.

[41] I do note Egmont's submission is that it should be paying reparation of $65,000 and a 15 per cent discount for reparation on a starting point of a fine of $400,000, would be $60,000. That does not seem appropriate or proportionate. Whilst there is one case where the discount for reparation was as high as that, most cases that were referred to me gave a discount of five per cent and I think that is adequate, particularly where Egmont did not take any steps to ensure that reparation was paid early on.

[42] Egmont also submits the company should be given ten per cent for previous good record and again whilst there have been cases where such a discount has been imposed, many, if not most, are in the order of five per cent. Again, I consider that is adequate.

[43] Accordingly, Egmont is entitled to a 20 per cent reduction in the fine, leaving the balance of a fine of $320,000. The remaining issue is whether that fine should actually be imposed. Worksafe says it should be, because it is a message to those that go into liquidation that will not prevent a fine actually being imposed. I agree, however, with Counsel for Egmont that that would be an exercise in futility, not utility. This company has absolutely no means to pay a fine and it is a farcical exercise to require it to do so. That has ramifications in that the fines section of the Ministry of

Justice will then have to take steps to try and collect those fines. They will have to go to the liquidators and inspect reports and records to determine whether a fine can be paid. That is unnecessary taxpayer expense with no gain.

[44] On the other hand, deterrence is met by the starting point and the indication of what the fine would otherwise be. I do not consider there is any benefit in a company with a disastrous financial future knowing that fines will be imposed if it goes into liquidation. They will only go into liquidation as an extreme last measure step and the knowledge that fines may nevertheless be imposed will not prevent them from taking that step and will not deter them from committing offences. Accordingly, whilst it is helpful in other cases to have a comparator, I do not impose the fine.

FTFL

[45] FTFL and Worksafe are agreed on the discounts of five per cent for a good safety record, ten per cent for remorse, given the guilty plea at the earliest opportunity, and the significant steps this company has taken since Mr Whare's unfortunate death. They have been supportive of whanau, they have made a contribution towards the tangi expenses and other expenses and I have read the affidavit of Mr Farman, one of the two directors. This company is truly sorry about this horrible event and they have suffered, though clearly not as much as Mr Whare's whanau, as a result of that loss. This company deserves to have a discount of remorse far more than Egmont.

[46] There is agreement that there is a five per cent discount for reparation and a further five per cent for the steps taken. This is not just box ticking. The company has taken many steps and gone above and beyond to change its systems to ensure this never happens again. It is well deserving of that discount. It is also well deserving of the maximum discount of 25 per cent for plea which was entered at the earliest reasonable opportunity. That brings the total discounts to 50 per cent. Accordingly, the total fine that FTFL would pay, but for an order for an enforceable undertaking, would be $175,000.

Issue 3: What costs or other orders are appropriate?

[47] Section 152(1) of the Act provides that the Court may order an offender to pay a sum that it thinks just and reasonable towards the cost of the prosecution. The prosecutor seeks a modest order of $9,683.98, which is half the prosecutor's legal costs, which again seem modest, of $19,365.95. They seek that 70 per cent of those costs be paid by Egmont, given the extra cost of preparation and attendances for a trial, and that 30 per cent be paid for by FTFL.

Decision on Costs

[48] Egmont's insurers do not cover costs. But for that, I would have awarded the very reasonable claim to offset costs to the taxpayer. Given that position, however, I do not make an academic award of costs against Egmont.

[49] In so far as FTFL are concerned, they do not quibble with again the reasonable amount of $2,905.19 and I make that order.

Issue 4: Having assessed all of that, are the overall sanctions appropriate or disproportionate, similar to the totality principle?

[50] While again this is academic, I would not have seen any need in respect of either Egmont or FTFL to make any adjustment on a totality or proportionality basis, the total award of reparation and fines are left the same.

Issue 5: In addition, in relation to FTFL only, should I impose a fine or should I sanction a Court ordered enforceable undertaking ("Enforceable Undertaking")?

[51] Section 156 of the Act provides:

> (1) The court may (with or without recording a conviction) adjourn a proceeding for up to 2 years and make an order for the release of the offender if the offender gives an undertaking with specified conditions (a court-ordered enforceable undertaking).
>
> …
>
> (5) If the court is satisfied at the time to which a further hearing of a proceeding is adjourned that the offender has observed the conditions of the court-ordered enforceable undertaking, it must discharge the offender without any further hearing of the proceeding.
>
> …

[52] FTFL seeks an alternative sentence approach by way of such an enforceable undertaking under that provision, rather than a conviction and fine. The issue of conviction, I will come back to.

[53] The proposal put forward by this company is an extensive one. It would, with its considerable resources and expertise through its employees and outsiders, provide the following:

(a) Engage an independent auditor to monitor compliance and report to the Court on progress in respect of its proposal.

(b) Develop and draft a comprehensive industry best practice guide for MAF and minor species.

(c) Develop a draft modification of the existing unit standard for felling trees using MAF via both machine pushing assistance and back pulling machine assistance.

(d) Develop a draft new unit standard for MAF specifically targeted toward the machine operator.

(e) Develop in draft suggested modifications to Worksafe's approved code of practice for safety and health in forest operations as it relates to MAF.

(f) Produce a training/best practice video for MAF titled, for example, "How to Machine Assist Trees". In this, the company proposes that a video is produced using external expertise designed to make relevant information easily and widely accessible in an industry where there can be on occasions low literacy. The company has already approached Rainwater Pictures to undertake this project.

(g) Present FTFL's learnings and recommendations/changes to the next Wood Council and FIFC or the bi-annual Safety Forestry Conference.

(h) Conduct a "Roadshow" for forestry crews in the lower North Island to raise awareness of the incident and the risks involved with MAF to provide training and demonstrations and to disseminate information.

[54] The company has liaised with Worksafe[9], Muka Tangata (the forestry industry's workforce development council) and the Forestry Industry Safety Council (FISC). It has the support of all and the FISC are prepared to work together with FTFL in the delivery of this undertaking.

Decision on an Enforceable Undertaking

[55] I consider this company is motivated by a genuine desire to improve safety throughout the industry in the area of MAF; to honour Mr Whare; and to ensure this tragedy does not happen again. It is worth quoting from Mr Farman's affidavit, in which he stated this:

> I want to express my heartfelt condolences to Steve's whanau for this incident. It has been really tough for everyone involved to process what happened. I considered Steve a mate – we had worked with him and his crew for a long time and I had a lot of respect for him.
>
> For the past three and a half years I thought about this incident nearly every day. Nobody sets out for anyone to be hurt at a worksite, and it is an enormously difficult thing to come to terms with. The delays for this case to make its way through the Court have also been touch, as each time it comes up it drags all the feelings back up. FTF would have much preferred to have this matter resolved sooner for the sake of Steve's whanau, as I am sure whatever stress we have felt pales in comparison to what they are going through.
>
> From my point of view the key thing is to take whatever learnings you can from it so that it never happens again. FTFL strongly believes that we have an obligation to try and make something positive come from this and if the industry can adopt the learnings and changes that we have taken from Steve's death we think that will be a hugely positive step.

[56] And further, he said:

> FTFL ask the Court to consider making an order for Court enforceable undertaking rather than a fine because we believe that this incident has exposed the need for very significant industry-wide improvements that will ensure the health and safety of all forestry workers. We think it is preferable that any money be directed toward that goal rather than the payment of a fine which we do not believe is going to make any meaningful difference in preventing another tragedy.

[9] FTFL proposed this as an alternative to prosecution under s 123 of the Act, which provides that Worksafe may accept Enforceable Undertakings, however at that point Worksafe declined that offer. It has now been accepted, by this stage of course, under s 156 of the Act.

> In particular, when investigating the incident FTFL became concerned at aspects of MAF operations are not the subject of specific training and that there were gaps in the available MAF guidance.
>
> In particular, we found it remarkable that there were no qualifications for machine operators who are undertaking MAF operations together with the faller.
>
> …
>
> FTL therefore formed the view that there is a urgent need for improved guidance and training in relation to MAF operations and we consider that significant safety improvements could be achieved through an enforceable undertaking addressing deficiencies in this area. Accordingly, FTF has identified actions which it proposes to take to address some of the key safety issues identified in this case.

[57] I am satisfied this is not a cynically designed proposal to avoid the force of the law. Indeed the cost of putting it into effect is almost identical to the fine, but of course there will be much opportunity cost for the expert employees that will be otherwise engaged in these tasks. The company has offered to make a donation to a charity that Mr Whare would have supported if there was any difference between the cost of its proposal and the fine.

[58] I have no hesitation in allowing this Court Enforced Undertaking to take the place of a fine. I make an order for a Court Enforced Undertaking under that provision, as outlined in the Schedule attached to this judgment. I agree with FTFL that this is far more likely to enhance the safety of workers engaged in this type of work than any fine could hope to achieve.

[59] It also ensures Mr Whare's death was not in vain, but rather leaves a legacy of improved safety for those that follow his footsteps in the forest.

[60] The provision states I can adjourn the proceedings for up to two years. That enables the Court to monitor what the company is doing, and also provides a two year period to ensure that there is no further offending. This company has never breached this Act in the many years it has been operating, nor has it in the three years since this accident. I do not consider the Court needs an additional two years to monitor that aspect, however the adjournment of the proceedings will enable the mahi to be completed before the proceedings come to an end.

[61] I have not heard submissions on what the period of adjournment should be, but under the section, I can monitor the mahi being done by the company. What I propose is that the proceedings are adjourned for six months for Worksafe and the company to provide a joint memorandum as to how far the company has got with the undertaking.

[62] If it has been completed earlier, then there is leave to provide that joint memorandum at that time and I will discharge the company then. In accordance with the requirements of s 156, I also make this order:

(1) The company must appear before the Court if called upon to do so during the period of the adjournment and if the Court so specifies at the time to which the proceeding is adjourned.

(2) The company does not commit, during the period of adjournment, any offence against this Act or Regulations.

(3) That the company observes any special conditions imposed by the Court which, in this case, is simply the condition that it comply with implementing the proposal contained in the appendix to this judgment.

[63] I note that subs 5 provides that if the Court is satisfied at the time at which the hearing is adjourned, that the company has observed the conditions of the Court Ordered Enforceable Undertaking, it must discharge the company without any further hearing of the proceeding and that is what will occur.

Issue 6: If I do impose an Enforceable Undertaking, should there be a conviction entered?

[64] Section 156 provides that "The Court may (with or without recording a conviction) adjourn the proceeding …" for the purpose of the Court Ordered Enforceable Undertaking to be completed.

[65] FTFL submissions were premised on the basis that the Court's ability to exercise a discretion to avoid conviction is contained within s 156(1), given that wording.

[66] Worksafe did not make any submissions about the legal source of that discretion, however it does submit that a conviction should be entered, given the offending is categorised within the medium culpability band and that a conviction would assist the sentencing purposes of accountability and responsibility by the company, as well as deterrence to others.

[67] I raised the issue at the hearing as to whether the source of the power to avoid a conviction is contained in s 156, or whether s 106 and 107 of the Sentencing Act is where the power lies.

[68] Subpart 8 of the Health and Safety at Work Act provides the sentencing for offences. Section 150 provides:

> This subpart applies if a court convicts a person (an offender) or finds an offender guilty of an offence under this Act.

[69] Section 151 sets out the sentencing criteria and states:

> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section … 48 …
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> …

[70] The Sentencing Act 2002 provides a hierarchy of sentencings, with the first step in that hierarchy being a discharge without conviction.

[71] Section 106 of the Act provides:

> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction …
>
> (2) A discharge under this section is deemed to be an acquittal.

[72] Section 107 provides this test:

> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[73] Accordingly, the issue arises as to whether there is a separate and parallel jurisdiction contained within s 156 of the Health and Safety at Work Act that provides an unfettered discretion not to convict, or whether in light of the fact that the Court must apply the Sentencing Act, this company must meet the high threshold of disproportionality.

FTFL Submissions

[74] Ms Woods gallantly and competently made helpful submissions on this issue, notwithstanding it was only raised by me a short time before she stood to her feet. I had expressed the view that the test would be in s 107 during Worksafe's submissions.

[75] What Ms Woods submitted was that s 156 is a parallel unfettered discretion and the enforceable undertaking is an alternative process to sentencing in the standard way. A section allows a Judge to go along that alternative path and provides the Judge may enter a conviction or may not. She gained support for this submission from the fact that ss 123 and 129 of the Act do not require a conviction, yet provides that prior to prosecution, Worksafe can accept an Enforceable Undertaking and no proceedings can be brought against the person or company that has completely discharged that undertaking.

Decision

[76] The position is not clear, given s 151 is unhelpful by stating the Court must apply the Sentencing Act, "when the Court is determining how to sentence an offender convicted of an offence".

[77] If it intended the provisions of ss 106 and 107 to apply, it should have just stated when the Court is sentencing a person who has pleaded guilty or who has been found guilty of an offence.

[78] The wording of s 156 provides "The court may (with or without recording a conviction) adjourn a proceeding for up to two years …" to enable the undertaking to take place. Between brackets is an unusual place to find jurisdiction as important as this. My initial reading of this provision, which prompted the question during

submissions, was simply that it was an acknowledgement that even if a Court had discharged a company without conviction, it could still go along the alternative course of a Court Ordered Enforceable Undertaking, and that the Court could also do that if it chose to enter a conviction. Given s 151(2) states the Court must apply the Sentencing Act, I considered the power to discharge was contained in s 106, with the very fettered discretion and high threshold test contained in s 107. However, given s 151 provides the Court must apply the Sentencing Act only where an offender is convicted of an offence, that does give an out. I do agree with Ms Woods that s 156 provides for a wholly different approach, an alternative approach and an otherwise unusual approach in criminal law.

[79] The cases have made it clear that the Court needs to assess where the fine sits before turning to whether an undertaking is appropriate or not. If the fine runs to hundreds of thousands of dollars, as is common, then the Court can expect an undertaking and the mahi associated with that undertaking to be expansive and expensive before it could be seen as serving the purposes of the Sentencing Act, such as deterrence, denunciation and consistency. If the discretion to not convict is confined by the test in s 107, there will be virtually no cases under this Act where it would be found that the consequences are out of all proportion to the culpability. That is a test for relatively low level offending. It is difficult to characterise offending that warrants hundreds of thousands of dollars in fines in a way that would enable the disproportionality test to be met. And yet, clearly that is what is envisaged in s 156, that the Court can have a situation where there is considerable culpability reflected and considerable fines, yet matched with equally considerable expense associated with the undertaking. If s 107 is the test, then the portion within the brackets in s 156, (with or without a conviction), would be rendered virtually nugatory, because there would be very few situations where there could be "without a conviction".

[80] That fact does lend support to Ms Woods' argument that this is a parallel jurisdiction, not fettered by the stringent test and not seen as the first step in the sentencing ladder under the Sentencing Act. I find it is an alternative ladder that sits elsewhere.

[81] Applying the test of an unfettered discretion, fettered only by the general purposes of the Sentencing Act and the Health and Safety at Work Act, I consider there are many factors why a conviction need not be entered with the result still doing justice to those sentencing principles and the purposes of the Act.

[82] The extent of the work, the effort and the expense involved in the proposal put forward here is all that is needed for both individual and general deterrence. The financial cost ensures that the "penalty" paid by this company is similar to others who face a fine. Requiring the company to do this ensures its conduct is denounced. Requiring the company to do this is consistent with the purposes in the Health and Safety Act of: protecting workers from harm at work; encouraging employers such as this company to take a constructive role in promoting improvements in workplace safety practices; and providing a framework for improvement and progressively higher standards of safety.

[83] This company was horrified at what happened. It is a good company with a good safety record, that did all it could to change its practices swiftly to ensure this did not happen again. I do not consider in the exercise of my discretion in this case that a conviction is required.

[84] If I am wrong about the test to be applied, very unusually I accept, in this case I would find that the commercial damage and lowering of mana to this company by having a conviction entered is out of all proportion to its culpability when I take into account on the culpability side of the equation all the steps that this company is going to undertake and therefore at the conclusion of that mahi, I would discharge the company without conviction. At that point the consequences would be out of all proportion to its culpability.

Conclusion

- Reparation of $150,000.00 is awarded with a split of 60/40 between Egmont and FTFL, distributed as per paragraph 31 above.

- The Fine for Egmont would have been $320,000 had it had the means to pay it. The fine for FTFL would have been $175,000 had there not been an Enforcable Undertaking ordered.

- A Court imposed Enforceable Undertaking is ordered in respect of FTFL in accordance with FTFL's proposal.

- At the conclusion of the Undertaking a conviction will not be entered.

- Costs of $2,905.19 are to be paid by FTFL.

[85] Finally, I would like to thank each counsel for all their careful and competent submissions. I would also like to thank them, the parties and Mr Whare's whanau for their patience.

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B A Morris
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/09/2024