IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-009371
[2019] NZDC 2327

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

PBT TRANSPORT LIMITED
Defendant

Hearing:	30 November 2018
Appearances:	E Jeffs for the Prosecutor S Moore for the Defendant
Judgment:	30 November 2018

NOTES OF JUDGE D J SHARP ON SENTENCING

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[1] This is a sentencing with regard to PBT Transport Limited. The company is for sentence on one charge of failing to ensure the safety of Mr Asiata, who was one of its employees. The charge being under ss 36(1)(a), 48(1) and 2(c) of the Health and Safety at Work At 2015, referred to as The Act. The maximum penalty under the act is a fine of $1.5 million and the company has pleaded guilty to the charge.

[2] The circumstances of the offence are as follows: by way of background, PBT Transport Limited is a national freight forwarding and transportation service provider. The defendant collects small to medium consignments, consolidated them at its branches before line hauling them to destinations throughout New Zealand. It has 16 branches and two hubs including a main branch in Mt Wellington, Auckland.

[3] Edward Asiata, the victim in this matter, was employed by Essential Workforce. He was placed with the defendant as a forklift driver. He commenced work with the defendant on 7 September 2016.

[4] A freight cage is a method of unloading freight used by the defendant company. The freight cage involved in this incident was owned by the defendant and used for lifting freight and workers. The freight cage was two metres long and 1.73 metres wide. It had mesh guards around all four sides, with an opening at the front and back with a metal chain that could be strung across it.

[5] The freight cage had two pockets underneath the frame for the forklift forks to be inserted into. The pockets opened to the back of the frame. There was also a metal chain attached to the back of the cage that could be attached around the forklift mast to prevent it sliding from the forks.

[6] There were no instructions attached to the freight cage explaining how it was to be used.

The Incident

[7] Mr Asiata commenced work at 0100 on 14 September 2016. Mr Asiata was operating a forklift and helping to unload the line haul trucks at the defendant's Mt Wellington branch. At around 0500 hours Mr Asiata was unloading a truck with a deck and a mezzanine floor. Mr Asiata noticed that there were some loose items on the mezzanine floor of the truck that required a freight cage to remove them. Mr Ah-Ling, who was working as a storeman and team leader, told Mr Asiata to go and get the freight cage.

[8] Mr Asiata drove his forklift to where the freight cages were and picked up a small freight cage. He tried to put the forklift forks into the pockets and was not successful so moved the forks inwards and put them on the inside of each of the pockets. Mr Asiata told Worksafe this was his first time fitting a freight cage to a forklift at the defendant's branch and he had *"No idea that there was a chain that needed to be attached to the mast of the fork hoist."*

[9] Mr Asiata took the freight cage back to the truck that was being unloaded. He got out of the forklift and got into the freight cage before asking Mr Ah-Ling to lift him up.

[10] Mr Ah-Ling got out of his forklift, however, before he could get back into Mr Asiata's forklift one of PBT Limited's truck drivers, a Mr Wright, offered to lift Mr Asiata. Mr Wright did not have a forklift licence and had not been authorised to operate a forklift by the defendant. Mr Wright got into Mr Asiata's forklift and Mr Ah-Ling returned to his own forklift. Mr Ah-Ling did not stop Mr Wright from operating the forklift.

[11] Mr Wright lifted the freight cage around three metres off the ground. Mr Asiata moved to the side of the cage. As he did so, the cage tipped and slid off the forklift forks onto the ground below. Mr Asiata suffered a burst fracture of his L1 vertebrae with a seven millimetre retropulsion of the super posterior corner, causing mild vertebral canal narrowing. He was admitted to hospital on 14 September 2016 and discharged on 17 September 2016.

Exposure to risk of serious injury or death

[12] The relevant risk in this case was a fall from a height of approximately three metres as a result of the freight cage sliding off the forklift's forks.

[13] A fall from height is a serious hazard and falls of less than three metres can cause serious injuries including fractures and open wounds, and can be fatal.

[14] The risk created by freight cages has been identified by the defendant in its hazards/risk register. The defendant had had two previous incidents, on 18 December 2009 and 5 August 2016 involving freight cages falling off the forklift forks while a freight cage was being used to lift the workers.

Standards and Guidelines

[15] The Ministry of Business, Innovation and Employment's best practice guidelines for working at height in New Zealand (issued in April 2012) provides health and safety guidance to all people working at height. There is also an approved code

of practice for training operators and instructors of power industrial lift trucks (forklifts). These should be complied with in order to avoid known risks.

[16] Worksafe New Zealand's investigation established the freight cage involved in this incident did not meet the requirement of the best practice guidelines for working at height in New Zealand or meet the Australia/New Zealand standard NZS/AS 2359.1:1995 in a number of respects. The investigation followed from Worksafe attending the scene on 14 September. There was an investigation and a number of identified failures in relation to the use of the forklift and the freight cage were recorded.

Failure to Ensure Health and Safety

[17] The defendant was obliged to ensure as far as reasonably practice the health and safety of workers who worked for the defendant, while workers were at work in the defendant's business.

[18] It was reasonably practical for the defendant to have ensured the health and safety of its workers by (a) ensuring the freight cage complied with the relevant industry standards and guidelines (b) ensuring only trained, competent and authorised workers used the freight cage and operated the forklift (c) ensuring the safe work method using freight cages was adequately communicated to workers using the freight cage. As a result of those failures Mr Asiata suffered the serious harm which is detailed above.

[19] This sentencing was due to proceed on 29 May but was delayed until today as a guideline decision, Stumpmaster and Worksafe New Zealand HC (2018 2020), was released on 29 August 2018. It is clear that a four-stage process is required for sentencing:

Firstly, to assess the amount of reparation

Secondly, to fix the amount of a fine by reference first, to the guidelines bands that have been established and then having regard to the aggravating and mitigating factors that are present.

Thirdly, to determine whether further orders under ss 152 to 158 of The Act are required.

Fourthly, to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This will include consideration of the defendant's means to pay and also if an increase is required to reflect financial capacity of the defendant.

[20] In the case of *Department of Labour and Hannan and Phillip Contractors* (2008 6 NZELR 79 (HC) relevant considerations were listed. These were:

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practical steps" which the Court finds were reasonable for the offender to have taken and that is in terms of s 22 of the Act.

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and the nature of severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[21] The list in part reflects the then statutory scheme and in particular s 51(a) Health Safety and Employment Act. To an extent that section survives in s 151 of the Act. All of the s 151 factors are covered by one or more of the existing Hannah considerations.

[22] In *Stumpmaster v Worksafe New Zealand* the following culpability bands were set: Band 1 where low culpability exists, fines up to $250,000 are called for. In Band 2 with medium culpability fines from $250,000 to $600,000 are called for. In Band 3 where culpability is present fines of $600,000 to $1 million are called for and in Band 4 where very high culpability is found fines of more than $1 million are required.

[23] The Sentencing Act 2002 has considerations which apply to all sentencing and in this case I need to take into account the interests of the victim of offending. Reparation which will be ordered is an attempt at providing the victim with support. I note, to the defendant company's credit, it has provided support in a financial sense but also it has provided emotional support for the victim and his wife. An affidavit has been provided to the Court from Mr Armstrong, the defendant company's Health and Safety Manager. Amongst other things it details the steps which the company took as far as Mr Asiata is concerned. These included attendance at a restorative justice meeting, the topping up of ACC payment to his full wages, the offers of counselling, support, care packages were delivered to the hospital and there was daily communication with Mr Asiata's spouse.

[24] I am required to denounce the offending. People in their employment should be kept safe from harm. I must try to deter the defendant and, to some extent, the actions post the incident show that the defendant has taken on board the matters that would be properly considered as deterring further failures and has taken steps to ensure there is no repetition of these events but employers in general need to be aware that events of this kind are not to be repeated and general deterrence is a factor in the sentencing. I must try to ensure the defendant company is accountable. It has, with a guilty plea and the other steps I have referred to and in modification of its work

practices, it appears to me to have been accountable and is taking a responsible approach. The requirement to impose the least restrictive outcome consistent with the principles and purposes of sentencing is of course considered through the lens of the bands of culpability that have been set by the High Court in the Stumpmaster case.

[25] The first step in relation to sentencing will be in fixing reparation. Section 32 Sentencing Act provides a Court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender has been convicted, caused a person to suffer (a) loss or damaged property or (b) emotional harm or (c) loss or damage consequential on any emotional or physical harm or loss of or damage to property.

[26] Mr Asiata has suffered serious spinal injuries. From that physical harm a number of emotional harm responses have been derived. He has provided a victim impact report. The physical and emotional impacts of the incident have had a significant effect on Mr Asiata. He refers to his limitations in lifting items, the stress of reliving the accident when attending health and safety meetings or when putting on his seat belt. Some of the intrusions into Mr Asiata's life are of a very personal nature but it is clear, reading his victim impact statement, that he has suffered and is continuing to suffer serious emotional effects as well as the physical impact of the injuries.

[27] Making an assessment of the appropriate level of emotional harm reparation is a difficult task and *Big Tuff Pallets Limited v Department of Labour* HC AK CRI 2008-404-00032 (5 February 2009) 19, Justice Harrison said:

> Fixing an award for emotional harm is an intuitive exercise. Its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which in this context compensated for actual harm arising from the offence in the form of anguish, stress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity whether short term or long term.

[28] The prosecution submit that an emotional harm reparation award of $20,000 to $25,000 is appropriate. The defence refer to s 32(6) Sentencing Act which requires the Court to take into account offers, agreements, responses, measures or actions to make amends as described in s 10 Sentencing Act. The defendant has topped up Mr Asiata's ACC payments, provided support and attended the restorative justice meeting. These are all factors which are to assist Mr Asiata and are of the type of approach which is to be encouraged.

[29] The defence have cited a number of cases in support of submissions on reparation. *Worksafe New Zealand v Benchmark Homes Canterbury Limited* 2016 NZDC Reports 7093, *Worksafe New Zealand v Waikato Institute of Technology,* DC Hamilton 10 November 2014 and *Worksafe New Zealand v Rangiora Carpets Limited* 2017 NZDC Reports 2287. These cases show a range of awards. It is difficult to be precise in finding the right award given the range of circumstances that are presented. The injury here is a spinal injury. Without any detailed evidence it is easy to see how such injuries can impact on so many areas of a person's life. In this case, considering the losses which Mr Asiata has had to adjust to and taking into account what he said in the victim impact statement, but considering the other authorities and the range that is present, I consider that $20,000 is the level of reparation which is called for.

[30] I must then move to assess the quantum of fine. This involves identifying the failure or failures which led to the incident when assessing the gravity of the offending to identify the correct starting point. The risks presented by the freight cage and forklift that were used here were present due to a failure to apply New Zealand and Australian standards and best practice guidelines for working at height in New Zealand. The particular type of machinery that is used and the known risks of working at height mean that although the best practice guidelines are but guidelines the departure from them will always be regarded as serious because the capacity for persons to be injured, if not correctly secured when working at height, is manifest.

[31] While the defendant maintains an induction had been carried out, no written record of this is present. Mr Asiata told Worksafe he had not seen a copy of the hazard/risk register or the safe operating procedure for using freight cars. He did not know that a chain was needed, despite that being what seems, in retrospect, to have

been a critical factor to ensure safety. A truck driver without a forklift licence operated the forklift, he was unauthorised to do so and he did so in the presence of a supervisor. There were prior incidents in August 2016 and notwithstanding this no training had been given to the supervisor or the victim in using the freight cage. Two prior incidents involving freight cages should have alerted the defendant to the need for risks posed to be managed effectively. The defendant says the freight cages were listed as hazards, the company invests heavily in training and health and safety. It has 26 health and safety representatives employed and has many areas of investment and commitment to employee safety. Now, a safe work method has been applied to limit risks posed by the use of the forklifts and freight cages. New and better freight cages have been purchased and there has been work done to alter the cages that are present.

Factors in Assessing Culpability

[32] What in the circumstances were the risks or potential for injury or death in the circumstances? Could these reasonably be expected to occur? In this case the defendant sensibly agrees that there is an obvious risk of working at height. What was the degree of departure from prevailing standards? The departure appears relatively clear although the defendant company did meet some requirements and had some safety characteristics built into the system. There were some serious departures. These I have referred to in relation to the presence of a supervisor who did not intervene, the presence of a chain which was required to secure the cage and that the person using the item was not conscious of the need to use the chain.

What Were the Costs Associated with Eliminating or Minimising the Risk

[33] The costs of requisite training and provision of equipment that is safer are moderate. The defendant company has spent some $14,000 on repairing and modifying cages and it has bought new cages, spending $14,766. This is together with spending $8000 on retraining supervisors and staff. The defence rely upon *Worksafe New Zealand v McCready Building Supplies* 2017 NZDC Reports 1760 where a customer was struck by a pallet falling, which caused fracture of the customer's vertebrae. This injury resulted not from a lack of awareness of hazards and did not have the aspect of a failure in terms of the training of persons involved but was a

deficiency in work systems that occurred in the Christmas period. Culpability was assessed in this case at midway in the middle band. *Worksafe New Zealand v New Zealand Forest Logistics* 2017 NZDC Reports 2463 and *Worksafe New Zealand v Gordan Developments Limited* 2016 NZDC 5535 both were assessed as in the medium culpability band.

[34] The prosecution relies upon *Department of Labour v Eziform Roofing Products Limited* 2013 11 NZELR 1 and *Worksafe New Zealand v Rangiora Carpets Limited*, cited earlier, these being cases employees working at height with falling occurring. The comment of Judge Gilbert in relation to *Rangiora Carpets* was that that was a case distinct from that in which a roofing company might be involved where workers are routinely at height and therefore always at risk. The prosecution's submission is that in these circumstances, taking into account the aspects of culpability, this puts the incident here into the upper parts of medium culpability. The submission is a starting point of $500,000 to $550,000 is appropriate. The defence submit that this is medium culpability and suggest the lower starting point of $300,000. I assess this offending in the medium to upper medium in its gravity, the reason being the clear presence of the danger to employees, the moderate expense of greatly reducing the potential for such injuries and the absence of effective supervision in a situation where supervision could have prevented the risk. This seems to me to be a more culpable case than those relied upon by the defence and, in my view, a starting point of $500,000 is necessary.

[35] Turning to the aggravating and mitigating factors, the defendant has some prior convictions but no uplift is sought by the prosecutor. The offences are somewhat historical, offences being in 1993 and 2001. There have been subsequent incidents with forklifts but that is a factor that has been taken into account in assessing the culpability, in assessing a starting point so it would not seem correct to double count those in relation to being a matter of an aggravating nature. The defence regards the scale of the defendant's operation, the significant work that it does as far as health and safety is concerned as justifying a 10 percent discount notwithstanding the previous convictions.

[36] In reviewing the affidavit which has been filed on behalf of the defendant company and the steps that they have taken in relation to the incident here I am

prepared to allow some discount for the character and nature of the company but, as a matter of sentencing principle, I am required to sentence as consistently as I can. I cannot allow 10 percent where that is applied to those who have no previous convictions. I will allow 5 percent mitigation for the company's previous conduct and history as far as health and safety is concerned.

[37] As regards remorse, I accept the defendant company has done all it could in trying to help Mr Asiata. It has attended restorative justice, it has apologise to Mr Asiata, the apology was accepted as genuine. The company has undertaken remedial work, which I have referred to, the company has also co-operated with the prosecution.

[38] Discounts that I will allow will be as follows: 5 percent in relation to previous health and safety records and character and nature of the company's performance; 5 percent for remorse; 10 percent in respect of reparation; 10 percent in respect of remedial action. I do consider that the assistance to the prosecution and, to an extent, remorse, are partly encapsulated within the 25 percent which I will allow as to plea. I understand the prosecutor also agrees that 25 percent is appropriate, given the early plea from the defendant company. As far as other orders under the Act are required, the prosecutor's application for costs in the sum of $1083.98 appears reasonable and is not opposed by the defence.

[39] In conclusion, having reached the above figures, I must have regard to proportionality. I have considered the fact that this is a major company. It is able to meet the monetary penalties that have been assessed. I take into account the detailed and carefully prepared submissions by counsel for both sides, which I thank counsel for.

[40] My decision is that the proportional response is in accordance with the Act and the requirement of the Sentencing Act also takes me to the same position. There will be a reparation order in the sum of $20,000. The starting point is $500,000. There will be 30% discounts, taking the figure to $350,000. There will be 25 percent allowed for plea discount which reduces the figure to the sum of $262,500. From that I consider the proportionality overall and in relation to other cases I take that figure to

the sum of $250,000 as the fine. Accordingly, there will be reparation ordered in the sum of $20,000; a fine of $250,000; costs ordered in the sum of $1083.98.

D J Sharp
District Court Judge