IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2018-075-000748
[2020] NZDC 23854

WORKSAFE NEW ZEALAND
Prosecutor

v

WASTE MANAGEMENT NZ LIMITED
Defendant

Hearing:	16 November 2020
Appearances:	A Longdill and N Self for the Prosecutor P White for the Defendant
Judgment:	16 November 2020

NOTES OF JUDGE D M WILSON QC ON SENTENCING

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[1] In a reserved judgment which I delivered on 20 August 2020, I have entered a verdict of guilty against Waste Management New Zealand Limited on a charge of contravening various sections of the Health and Safety at Work Act 2015.

[2] The charge was brought following an investigation into a workplace accident in which Mr Kanui Ramanui sustained injuries, including circumferential degloving and fractures to his left arm, at the defendant's tyre processing site at Kerepehi while he was attempting to clear an obstruction to a conveyer belt on the site's only tyre shredder.

[3] Various particulars were alleged, and with the exception of the allegation that they had failed to get suitable guarding verified by a competent person, I found each of those particulars established. Waste Management at the hearing responsibly filed admissions under s 9 of the Evidence Act 2006, and these admissions professionally offered and accepted made for a more efficient running of the hearing.

[4] The main purpose of the Health and Safety at Work Act 2015 is to provide for a balanced framework to secure the health and safety of workers and workplaces by protecting the workers and other persons against harm to their health, safety and welfare, by eliminating or minimising risks arising from work or from prescribed high-risk plant; securing compliance with the Act through effective and appropriate compliance and enforcement procedures; and providing a framework for continuous improvement and progressively higher standards for work and safety.

[5] Regard must be had to 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 arising from work or from specified types of plant, as is reasonably practicable.

[6] In this case, the approach to sentencing is well understood, and in fact both counsel have adopted similar approaches to their submissions. The first point to consider is a reparation order for emotional harm. Here, I have had the advantage of reading the restorative justice conference report. I have heard Mr Ramanui read out his victim impact statement in court at the commencement of sentencing. I have had regard to the actual harm he suffered, and to the photos which were annexed to the victim impact statement, and to the authorities which are mentioned in the prosecution submissions at paragraph [5], where a series of authorities were brought to my attention where reparation had been ordered for various forms of broadly similar injuries, pain, dislocation and downstream emotional trauma.

Emotional Harm

[7] I am satisfied by reference to those authorities, including *Worksafe New Zealand Ltd v John Austin Ltd*, *Worksafe New Zealand v Miller Foods Ltd*, and

Worksafe New Zealand v Cropp Logging Ltd, that the proposition of the prosecutor, and indeed of Mr White, that the sum of $50,000 should be allowed for emotional harm .[1] It is of relevance to reflect that that sum was being offered at the restorative justice conference before the position of the prosecutor was known. I am satisfied that in terms of the Act and the authorities that have been cited under it, that that figure is appropriate, and I order that accordingly[2].

[8] There is also jurisdiction under s 152(1) of the Health and Safety at Work Act 2015 to make an award of a sum which is just and reasonable towards the cost of prosecution. In that case, Ms Longdill submitted that an appropriate sum was $26,628.92. There is no dispute from Mr White as to the appropriateness of that sum, and accordingly that sum is awarded.

[9] The sentencing criteria are agreed. They include the criteria that are set out in the Act under s 151, so that the usual sentencing criteria under the Sentencing Act 2002 in ss 7 to 10 inclusive apply; as do the purpose of the Act, the risk of and potential for illness, the fact of serious injury actually occurring, and regard must be had to the safety record of Waste Management Limited as well. In that regard, there are two historic prosecutions many years ago in the early 1990s, and Ms Longdill did not suggest that those matters should aggravate or be added to any penalty that was imposed. Mr White submitted that given the history of involvement by Waste Management in what may be regarded as occasionally hazardous occupations such that the safety record is a factor that they are entitled to call on. There is no financial capacity issue here.

[10] What are those factors? Under the Sentencing Act, the defendant must be held accountable for harm. It is important to promote responsibility and acknowledgment of that harm, and to provide for deterrence, general and specific. The s 8 principles direct my attention to gravity and culpability, seriousness in comparison to other offences, consistency with decisions that are broadly similar, the effect on the victim, which I have referred to, and indeed the outcomes of restorative justice.

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[1] *Worksafe New Zealand Ltd v John Austin Ltd* [2016] NZDC 6797; *Worksafe New Zealand v Miller Foods Ltd (t/a Remarkable Tortillas)* [2018] NZDC 5948; *Worksafe New Zealand v Cropp Logging Ltd* [2018] NZDC 20232.

[2] To Mr. Kanui Ramanui.

[11] Aggravating features under s 9 include loss, damage and harm, victim vulnerability.

[12] In regard to mitigation, while the first apology of which there is any record occurred in the context of the restorative justice conference on 3 November just earlier this month and the injury date was 21 November 2017, it is also to be acknowledged that that apology was open and genuine and accepted; and that since, Waste Management has tried to assist Mr Ramanui with ACC claims, arranging counselling services for him specific to his needs, including budgeting and financial planning, physiotherapy, and one of their people was going to investigate claimants from ACC. There is in this case no claim for direct financial recompense to Mr Ramanui apart from the emotional harm payment that I have mentioned.

[13] Importantly, of course, the main purpose of the Act, the one that I have mentioned, and the furtherance of that, is the purpose that must take predominant place in weighing up responsibility. Mr White has pointed to a number of measures that Waste Management has undertaken to make amends. Apart from the co-operation with the original prosecution and the offers that were made in the context of the restorative justice conference, there is also the offer of reparation that I have mentioned, some top up of wages in the sum of $2,510.06, offers of ongoing employment, and those matters are entitled to be considered.

Fixing the fine

[14] The issue then comes down to assessing the quantum of the fine. Here, I adopt, as indeed Ms Longdill did, the orthodox sentencing approach set out in *R v Taueki*: fixing a starting point based on culpability, and then adjusting upwards or downwards for aggravating or mitigating circumstances.[3] That approach has been adopted in *Stumpmaster v Worksafe New Zealand*.[4]

[15] There are four bands for culpability. Low culpability, and no one suggests that is this case. Medium culpability, where the range starting point in the region of

[3] *R v Taueki* [2005] 3 NZLR 372 (CA).
[4] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

$250,000 to $600,000, and then there are progressions for high culpability, starting from $600,000, and very high culpability, starting at a million and more. The real issue here is both sides accept that the culpability here falls into the medium range, and then counsel have both referred to a number of cases in which the quantum of the fine has been considered.

[16] In the course of my reserved judgment I made findings about the reasonably practicable steps that Waste Management could have taken and reflected on the risk of harm that flowed from those. The Court in *Stumpmaster* noted that although necessarily the risk under s 48 prosecutions will always be at least of causing harm or illness, it is still important to have regard to exactly what the risk was, how many people did it involve, for example, and might a worker have been killed.

[17] In this case, of course, there were a number of workers exposed to the unguarded tyre shredder: not only Mr Ramanui, but the two other men who were working with him. This departure from industry standards was a significant one: that was the ongoing operation of the tyre shredder without the guard being in place. It is an obvious hazard, and the defendant could have ensured that the tyre shredder was locked out and not operated, but did not do so. There is plenty of industry guidance on these issues.

[18] The cases that I have been referred to are of broadly similar circumstances. There are cases in the High Court including an appeal by Niagara Sawmilling Co Ltd, *Worksafe New Zealand v Alliance Group Ltd*, *Worksafe New Zealand v Allflex Packaging Ltd*, *Worksafe New Zealand v Furntech Plastics Ltd*, and others, including *Worksafe New Zealand v Alto Packaging Ltd*.[5]

[19] Both counsel, however, focussed particularly on *Worksafe New Zealand v Let's Bale Ltd*.[6] In that case, the victim was operating an Equifibre machine and attempted to clear residual product that had built up near to the chain when her gloved

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[5] *Worksafe New Zealand v Niagara Sawmilling Co Ltd* [2018] NZDC 3667; *Worksafe New Zealand v Alliance Group Ltd* [2018] NZDC 20916; *Worksafe New Zealand v Allflex Packaging Ltd* DC Manukau CRI-2017-092-014520, 15 October 2018; *Worksafe New Zealand v Furntech Plastics Ltd* [2018] NZDC 18150; *Worksafe New Zealand v Alto Packaging Ltd* [2019] NZDC 14809.

[6] *Worksafe New Zealand v Let's Bale Ltd* [2020] NZDC 4538.

right hand became trapped between the moving cog and the stationary chain, suffering injuries to her hand which required two weeks in hospital. No guard was in place, because a new bracket had been fabricated days earlier, so the earlier guard was no longer suitable. The defendant had engaged an engineer to fabricate a new guard, and advised workers that no guard was in place, instructing them to keep their hands well clear of the machine and to be particularly careful. There were aspects of that case which led to a fine starting point of $425,000. The other cases I referred to had respectively fine starting points of $500,000, $550,000, $480,000, $500,000 in both the *Furntech* and *Alto* cases.

[20] This submission by Mr White that that is the appropriate one, and furthermore, that the situation here was less serious, with respect, ignores my specific finding that there was no direction to workers not to use the unguarded machine. I remember Mr Ramanui's statement: "monkey see, monkey do." What he was doing in reaching into the machine was simply what he had seen others do.

[21] There is no factual basis for a submission, according to my findings, that Mr Linthwaite gave any instruction to the on-site supervisor. It is particularly so that Mr Harwood accepted no responsibility to safety matters, including guards. He saw those as Mr Linthwaite's responsibility and not his. I refer to this in paragraph [66] and following of the reserved judgment. I pointed out then too that it was never his responsibility to make sure that guarding was on the machine when it was operating, and that there was nothing in the employment contract between Waste Management and Mr Harwood's company which placed any responsibility for compliance with the Act on Mr Harwood and his company, and he most certainly never accepted such responsibility.

[22] As a further point, the injury in the present case was more serious than *Let's Bale Ltd*. There, the victim was appropriately experienced, inducted and trained, and, as I found in the context of the reserved judgment, the induction and training of Mr Ramanui, who was brought in to work on the tyre shredder when driving work was not available to him, was inadequate, and the documentary record of it showed that it was inadequate.

[23] For those reasons, the appropriate fine here I find to be $500,000. I should acknowledge that in the course of his submissions before me in court, Mr White submitted that the figure starting point should be $450,000. That is not significantly below the appropriate figure, in my view.

[24] There are matters of mitigation that need to be taken into account. There are no aggravating matters that need to add to that. There is the fact that Waste Management took part in the restorative justice conference, and co-operated with prosecution. Those are acknowledged by Ms Longdill for Worksafe as entitling a deduction of 10 per cent and then five per cent, a total of 15 per cent.

[25] In addition to that, Mr White points to the significant remedial steps that have been taken and the overall good safety record. He asks for a further deduction of five per cent on each account. He points out that Waste Management closed the Kerepehi site. It had intended to relocate, but that relocation was awaiting a time when the new site would be ready. Waste Management closed it early, it seems in response the situation with the tyre shredder. That is entitled to a degree of further deduction.

[26] In my view, the overall deduction from the starting point of $500,000 should be a deduction of 20 per cent. Accordingly, I fix the fine as one of $400,000.

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Judge DM Wilson QC
District Court Judge

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