IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2018-092-009841
[2020] NZDC 2955

WORKSAFE NEW ZEALAND

v

GURU NZ LIMITED

Hearing:	17 February 2020
Appearances:	C Pille and Ms Kirtlan for Worksafe G Gallaway and A Shaw for the Defendant
Judgment:	17 February 2020

NOTES OF JUDGE R J EARWAKER ON SENTENCING

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[1] On 11 September 2017, a worker for the defendant company, Guru NZ Limited, Mr Leslie Laing, was crushed by the grapple on a hydraulic excavator while the excavator was used to assist the Mr Laing with closing of the non-aligned doors of a shipping container which was situated at the company's leased premises in Favona. Mr Laing tragically received fatal injuries as a result.

[2] Guru NZ Limited have pleaded guilty and been convicted of an offence pursuant to ss 36(1)(a), 48(1) and 48 (2)(c) of the Health and Safety at Work Act 2015, namely, it being a company conducting a business, failed to comply with its duty to ensure, as far as reasonably practicable, the health and safety of its workers. That failure exposed workers to a risk of death or serious injury and tragically that happened in this case.

[3] The maximum penalty for this offending is a $1.5 million fine which shows how seriously the Courts take this type of offence. Guru NZ Limited do not have any previous convictions.

[4] Before I deal with the facts of the offending, I just wish to acknowledge the presence of the deceased's family, his partner Ms Atkins, and those who have chosen to speak today and read their victim impact statements. I could see and hear your grief and understand how difficult that was. I also want to acknowledge the presence of Mr Singh and Mr McCulloch from the company here today.

[5] A detailed agreed summary of facts has been prepared and filed in Court. It is available for the media and I do not intend to read that document, as it runs to some 21 pages, but I do need to give a brief summary, an overview, so everybody understands the position relating to the facts.

[6] In brief, the defendant's business is exporting logs, the company had been operating since 2015 and employed approximately 10 staff, as I understand it. The company sources logs from around the wider Auckland area. Upon arrival at the premises the logs are offloaded from the logging trucks, fumigated and packed into shipping containers for export.

[7] Once loaded the container doors have to be bolted closed. The containers are lifted onto trucks and then transferred to the port for export. These containers weighed approximately 30 tonne once loaded. The containers used were delivered empty to the defendant company and the containers were D grade containers which meant they were in a used condition.

[8] At the time of the incident the containers were placed on soft terrain at the premises awaiting loading. The majority of the containers were closed manually. However, in some cases the containers had become distorted and no longer square in shape which made it difficult to close the container doors. This could be due to the containers sinking slightly on the soft ground or on other occasions the condition of the container was such that it made it difficult to close the doors.

[9] When this occurred the defendant company had developed a practice of using an excavator to assist workers on the ground to close the non-aligned doors when required. The excavator would be positioned close to the doors of the container and the push plate on the boom of the excavator was used to push against the corner of the container to re-align it.

[10] The operator would then engage an immobiliser to immobilise the excavator and then, once the doors were aligned, it could be closed manually by the worker on the ground. Usually both the excavator operator and the worker had radios to communicate during this task. During the immobilisation the engine of the excavator still runs, however, the hydraulics and pump that cause the digger boom and arm to operate are disengaged.

[11] When using the excavator in this way, the excavator operator had to tuck the grapple clamp out of the way under the boom where it was to be held in place by the grapple holding T-bracket. No secondary safety measure such as a security chain was used to secure the grapple against inadvertent movement during this process.

[12] On the day of this incident, 11 September 2017, this process was not followed. The victim, Mr Laing, and a colleague, the excavator driver, were attempting to close the doors of the loaded container. Mr Laing was on the ground assisting to close the container that was filled with logs. His colleague was operating the excavator. The excavator push plate was being used to push against the container to assist to close the container doors.

[13] As indicated Mr Laing was on foot trying to close the container doors. The immobiliser in the excavator had not been activated and suddenly the grapple on the excavator, weighing about a tonne, was released. It swung down and struck Mr Laing crushing him against the container. All efforts were made to assist Mr Laing but he later died at Middlemore Hospital.

[14] WorkSafe's inquiry disclosed a number of concerns and failings regarding the operation of the defendant's business, namely;

(a) The defendant failed to undertake a comprehensive risk assessment in relation to the operation of the excavator in closing container doors and in close proximity to workers.

(b) The defendant failed to ensure that in relation to the operation of the excavator a Safe System of Work was developed, implemented, communicated, monitored, documented, enforced and regularly reviewed.

(c) The defendant failed to ensure the shipping containers being loaded were placed on a firm, level surface.

(d) The defendant failed to ensure that workers maintained a safe distance (of at least seven metres) from the excavator when it was in operation

(e) The training of workers was inadequate.

[15] The defendant told WorkSafe that prior to the incident on 11 September, the main safeguard against the crushing event that occurred was to ensure that the operator of the excavator took the following steps:

(a) he positioned the 'push plate' of the excavator against the container so that the doors could be closed;

(b) he pushed down the control lock-out system lever / pilot lever to immobilise the hydraulics; and

(c) only when the hydraulics were immobilised would workers on the ground be allowed to approach the container to close the doors.

[16] However, nothing about this procedure was written down.

[17] The defendant, as charged, had failed to comply with its primary duty of care to its workers including Mr Laing and in so doing exposed the workers, as I have said, to risk of death or serious injury.

[16] The defendant should have eliminated or minimised the risk by taking the following reasonable practicable steps:

(a) Installed a firm level surface (such as a concrete or tarmac pad) for containers to be placed on to be loaded, minimising them being deformed when loaded and minimising the need to use the excavator to close the container doors.

(b) Undertaken a comprehensive, detailed risk assessment to identify the risk and consider alternative methods for undertaking the work to eliminate or minimise the risk associated with using the excavators.

(c) Ensured that a safe system of work was developed, implemented, communicated, monitored, documented, enforced and regularly reviewed, that included

(i) an appropriate exclusion zone, that was monitored and enforced, and was in place separating the workers from operational of a mobile plant;

(ii) a safe operating procedure for container closing,

(iii) a secondary safety device such as a security chain in place to secure the grapple of any excavator used in this process.

[18] The summary records that the cost of taking such measures was not grossly disproportionate to the risk.

[17] As I have said, the defendant company has no criminal record and it had no prior history of breaching health and safety laws. It has co-operated fully with the WorkSafe inquiry and since the incident the defendant company has complied with improvement notices issued by WorkSafe and it has taken steps such as;

(a) Laid a concrete pad on which containers are now placed to be loaded. The cost of that was in excess of $230,000.

(b) Prepared a safe operating system.

(c) Required the excavator operator to first immobilise the excavator (using the control lock-out system lever on the excavator), before getting out of the cab and closing the container doors himself. That is, no second worker is required to assist him.

[18] Section 151(2) Health and Safety at Work Act seeks out specific sentencing criteria to be applied, including the purposes and principles of sentencing set out in the Sentencing Act 2002 and the purposes of the Health and Safety at Work Act is set out in s 3 of that Act.

[19] In the guideline judgment of *Stumpmaster v WorkSafe New Zealand*, the High Court confirmed that there are four steps in a sentencing of this type:[1]

(a) First, to assess the amount of reparation to be paid to the family.

(b) Secondly, fix the amount of the fine with reference to the culpability bands, adjusting for aggravating and mitigating factors.

(c) Thirdly, determine whether any other orders are required; and

(d) Finally, make an overall assessment of the totality of the orders to be imposed. This will include an assessment of the financial capacity of the defendant company.

[20] I deal first with fixing the amount of the reparation. In doing so, I want to first refer to the restorative justice conference that was held on 7 February 2020 which involved a company director Mr Singh, the operations manager, the company foreman and members of the victim's family, being his mother, father, partner and siblings.

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

[21] The conference records the defendant company's apology and the acknowledgement on the company's part that the systems in place were not only not followed but they should have been more robust to keep Mr Laing safe.

[22] In response, the company was commended for showing remorse and the company accepted the family's suggestion that it work with other companies as a way to improve health and safety systems. There was also a discussion about a trust set up for the children and contributions the company could make. Clearly this has had a tremendous impact on Mr Laing's family and children, and that is acknowledged today.

[23] In terms of the emotional harm reparation to be paid, I am greatly assisted and informed by the victim impact statements that were read out today in Court, and as we know Mr Laing leaves behind a partner and five children. He also leaves behind a large close family, many of who are present here in Court. The statements do describe the loss and grief suffered by the family and the ongoing impact that the death and loss will have on Mr Laing's partner, family and children.

[24] There are a number of authorities referred to by both WorkSafe and Mr Gallaway for the defendant company, but in this case there is really no disagreement on the appropriate amount to be paid in terms of reparation. I do want to acknowledge what the then Chief District Court Judge said in this area in the case of *WorkSafe New Zealand v Department of Corrections*.[2]

[25] The Chief had this to say in that decision:

> Determining reparation for loss of life is by no means an easy task. It involves placing a monetary value on that loss which can only ever fall short of truly reflecting the grief felt. Reparation gives a measure of recognition to the loss in the best way Courts are capable of doing. We are never capable of doing it to the extent that the family feels is necessary.

[26] But as I said, today there is agreement on the amount and how it is to be apportioned which is to the company's credit. Having looked at the decisions and all

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[2] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.

of the material, I am satisfied that an appropriate emotional harm reparation order in the sum of $110,000 be made.

[27] That will be apportioned in the following way:

(a) $40,000 to Ms Atkins, Mr Laing's partner.

(b) $30,000 to Mr Laing's partner for their children.

(c) $15,000 each to each of Mr Laing's two other children; and

(d) $10,000 to Mr Doug Laing to be used in respect of the remaining family.

[28] I now deal with consequential loss. I have submissions about that from both counsel in this regard, and I am satisfied that there is no order required for any consequential loss. In that regard I do note that the defendant company has made regular payments per month to support Ms Aitkens and those payments have now totalled $37,500.00. They exceed the amount of any potential shortfall from other payments from ACC entitlements. So I accept, as does WorkSafe, that there is no consequential loss based on the family's loss of pecuniary benefit in Mr Laing's income.

[29] I now turn to consideration of the fine. I need to fix a starting point based on the culpability for the offending and then adjust the starting point for aggravating and mitigating circumstances relating to the offending. This was the approach set out in the High Court again in *Stumpmaster v WorkSafe New Zealand* which set out four guideline bands for culpability.

(a) Low culpability with a starting point of up to $250,000,

(b) Medium culpability with a starting point of between $250,000 and $600,000,

(c) High culpability a starting point of $600,000 to $1 million,

(d) Very high culpability a starting point of $1 million-plus.

[30] In determining the level of the fine, a number of relevant factors need to be considered, again as set out in that decision and s 151 of the Act.

[31] The first is the identification of the operative acts or omissions. So what was reasonably practicable?

[32] Turning to WorkSafe's submissions, WorkSafe submit that, in respect of the company's failure to ensure its workers were not exposed to a risk of serious illness, injury or death arising from close proximity to mobile plant, it was reasonably practicable for the defendant to have;

(a) Installed, a firm level surface for placement of the containers. (The defendant has subsequently laid a concrete pad on which the containers were placed prior to loading).

(b) To have undertaken a comprehensive and detailed risk assessment to identify the risks and consider alternative methods for undertaking the work to eliminate or minimise the risk associated with using the excavators. It is noted;

(i) The defendant had not undertaken a comprehensive and detailed risk assessment in respect of the use of the excavators in this capacity.

(ii) It had identified the hazard of "loading/unloading operations" in its Risk Register, however, this was in respect of truck loading and unloading operators and in respect of the digger work. No mention of the use of excavators in this capacity was identified or assessed.

(c) Ensure a safe system of work was developed, implemented, communicated, monitored, documented, enforced and regularly reviewed, that included;

(i) an appropriate exclusion zone that was monitored and enforced and was in place separating workers from operational mobile plant,

(ii) a safe operating procedure for container closing,

(iii) a secondary safety device such as a security chain was in place to secure the grapple of an excavator used in this process.

[32] The practice that was operated did not allow for human inadvertence, error, misuse, spontaneity, panic, fatigue or stress when the workers were carrying out this task. Nor did the practice take into consideration the potential failings of the control system, such as the immobilizer, nor the potential interaction between multiple risks, here being the muddy ground conditions and misaligned doors. WorkSafe note that even if an immobiliser had been used, a secondary safety device such as a security chain to prevent the grapple from inadvertently being released should have also been used.

[33] The defendant company has accepted those failures through the entry of a guilty plea and acceptance of the agreed summary of facts.

[34] The defendant company do note though that at the time of the incident the its Risk Register did identify the closing the of the container doors as a hazard. The company also carried out inductions for new staff on a range of matters including health and safety. The excavator operator at the time of the incident had received an induction when he began employment approximately four months prior to the incident and there is a record of the operator receiving training around the operation of the excavator.

[35] What is also pointed out in the submissions on behalf of the company is the practice around using the excavator to assist with closing the container doors, developed over time as a workaround for closing the doors of misaligned containers. The informal procedure was followed, the risk of harm to workers on the ground was likely to be limited to scenarios involving unlikely mechanical failure.

[36] The company does acknowledge, through its plea, that the risk of an excavator operator not engaging the lock-out lever was reasonably foreseeable. The defendant company, as I have said, have recognised that the systems and procedures in place for closing the container doors were not sufficient to ensure the safety of its staff.

[37] WorkSafe points out that there was also a departure from the prevailing industry standards which is something that is also accepted by the company.

[38] Both counsel have referred me to case law where this issue has been dealt with before and while I accept that no two cases are alike, the cases do provide some assistance to me when I am considering the level of the fine to be imposed. At this stage, I simply note the cases that have been referred to me that I have read and considered. These are *WorkSafe New Zealand v Toll Networks (NZ) Ltd*[3], *WorkSafe New Zealand v Coda Operations and Hammer New Zealand Limited*[4], and *WorkSafe New Zealand v Hydrotech Ltd*[5]. I have also been referred to the same cases in the company's submissions.

[39] Looking at that case law and looking at the guidelines provided in *Stumpmaster v WorkSafe New Zealand,* I accept the submissions that the offending sits on the cusp of the medium and high bands, slightly over that cusp. Accordingly, I fix the level of the fine at $630,000.

[40] I now deal with the mitigating factors. There was a difference in the approach adopted by WorkSafe in their submissions to those adopted by the company. WorkSafe submit that there were discounts available but not on the level that were suggested by the company, but that discounts should be available for co-operation with the investigation. The defendant did fully co-operate.

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[3] *WorkSafe New Zealand v Toll Networks (NZ) Ltd* [2018] NZDC 11132.
[4] *WorkSafe New Zealand v Coda Operations LP Ltd and Hammer NZ Ltd*, DC Nelson, CRI 2010-042- 001094, 24 September 2010.
[5] *WorkSafe New Zealand v Hydrotech Ltd* [2017] NZDC 11920.

[41] Clearly the company has done a lot in terms of demonstrating that the remorse is genuine. Looking at the restorative justice conference, I take from that the family accept that the remorse is genuine in terms of how the defendant company have gone about the process. There should also be a discount allowed for the reparation.

[42] In my view, looking at those three factors, co-operation, remorse and the reparation, a total discount of 30 percent is appropriate and I accept the submission of the company in that regard. Although not strictly necessary, it is apportioned in this way:

(a) An allowance for reparation of 15 percent.

(b) Remorse of 10 percent; and

(c) For the reasons I have already stated, the co-operation of 5 percent.

[43] Those discounts are proper and appropriate in these sorts of situations and taking that into account there would be a total discount of $189,000 reaching a figure of $441,000.

[44] Then there will be the allowance for the plea, 25 percent, which is a further $110,250 which gets me to an end sentence, in terms of the fine, of $330,750.

[45] That figure has taken into account all of the factors that I am required to take into account including the purposes and principles of sentencing, the purpose of the health and safety legislation and the other factors referred to in the case law.

[46] With the discounts which total 30 percent for those factors I have mentioned and the 25 percent discount for plea, the end fine is $330,750.

[47] The next step is to consider whether any other orders are required. The only order sought by WorkSafe is costs, which is a portion of their legal costs which I do consider is appropriate. I make that order for $1581.70.

[48] The final step is to consider the overall assessment, reparation, the fine and other Court orders. The total imposed must be proportionate to the circumstances of the offending and the offender. I accept the submission of the defendant company that, in light of the amounts already paid in the sum of $45,000, the level of the fine, the amount of the reparation, which I have now fixed, there are clear messages sent regarding the seriousness of this offending and it is a proportionate response to that offending.

[49] WorkSafe agree that no further adjustment needs to be made. I will just record here that, although the company is accepting that it has the ability to pay the amounts ordered, I have considered and taken into account the impact of the current economic situation arising from the Coronavirus. This has meant that, in practical terms, logs are now not going to China where a large proportion of the defendant company's logs are sent. Something like 70 percent of the supply is not being sent as the Chinese ports are not working.

[50] While that may have been a factor that I could take into account, I have not because I simply do not have enough information at this stage. In my view, it is to the company's credit that they have elected to proceed with the sentencing today knowing that potentially over the next short-term, it's economic viability may be seriously threatened. It has elected to proceed with the sentencing knowing the sorts of reparation and fines that were going to be imposed today. I think it is to the company's credit and is indicative of how its management have conducted themselves after this tragedy occurred. I am assured by Mr Gallaway that certainly the reparation payments will be given a priority and if any other further matters are required to be considered then that will be dealt with through WorkSafe and if necessary recourse back to the Court.

[51] So accordingly, the sentence will be a reparation order emotional harm in the sum of $110,000 apportioned in the way that I have already indicated, a fine in the sum of $330,750, and a contribution to WorkSafe's legal costs in the sum of $1581.70.

[52] Again, I just want to acknowledge the family that are here. I acknowledge your grief, acknowledge how difficult it is being here and I acknowledge the courage

of those who have read the victim impact statements. Now this matter is at an end you can begin to rebuild your lives. I know it has taken a long time to get to this space but the matter is now resolved, as far as the sentencing process is concerned in any event.

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Judge R J Earwaker
District Court Judge

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