

**IN THE DISTRICT COURT
AT WAITAKERE**

**I TE KŌTI-Ā-ROHE
KI WAITĀKERE**

**CRI-2021-090-004677
[2023] NZDC 5236**

WORKSAFE NEW ZEALAND
Prosecutor

v

BAKEWORKS LIMITED
Defendant

Hearing: 15 March 2023
Appearances: V Vaikune for the Prosecutor
B Harris for the Defendant
Judgment: 15 March 2023

NOTES OF JUDGE G A FRASER ON SENTENCING

[1] This is a sentencing in relation to a WorkSafe prosecution brought against a company Bakeworks Limited. There are two charges under the Health and Safety at Work Act 2015, both laid under s 36(1)(a), s 48(1) and s 48(2)(c) of the Act. The charges relate to two discrete events: one event on 8 January 2021 and the other event leading to the charge is an event occurring on 3 June 2021. I intend to proceed on the basis of dealing with the charge relating to Ms Sale first and then move on to deal with the charge relating to Ms Armesto. In saying that, the charge in relation to Ms Sale records that Bakeworks Limited had a duty to ensure so far as reasonably practicable the health and safety of workers who work for the PCBU while the workers are at work in the business operating in this case the grinder, did fail to comply with that duty in that that failure exposed individuals including Losa Sale to a risk of death or serious injury.

[2] In this case the particulars of the charge relate to whether it was reasonably practicable to have ensured that:

- (a) The grinder was adequately guarded;
- (b) That there was implemented an inspection and maintenance programme for the grinder to ensure that a competent person regularly inspected, tested and maintained the grinder's guard and safety control system and that there had been developed a safe operating procedure for the grinder including procedures for dealing with blockages during operation; and
- (c) The final particular relating to what is said to have been reasonably practical is ensuring that workers were adequately trained in the safe operating procedures for the grinder and were closely supervised until they demonstrated an adequate level of competence.

[3] The summary of facts in relation to Ms Sale records as follows and I am quoting directly from the prosecution's submission at page 4. It says as follows. The January 2021 incident referred to at page 3 of the prosecution submissions:

The grinder machine was used to grind seeds for baking products. The grinder had an oval-shaped opening in its feed tray where the seeds would drop into a funnel and be fed by a screw auger to a rotary knife at the end of the shaft. The grinder was fitted with a safety guard affixed over the opening to prevent access to the screw auger. A stomper was supplied with the grinder which was designed to push material through the holes in the safety guard. A few months following the purchase of the grinder in August 2018 the fixed guard completely broke off the grinder. From that point on the grinder was used in an unguarded state. On the 8th of January 2021 Ms Sale was asked to assist with grinding seeds using the grinder. Ms Sale had never previously used the grinder or received any training or information about the operation of the grinder. Ms Sale was shown how to tip buckets of seeds into the feed tray, sweep the seeds into the funnel with one hand and push the seeds down the funnel using the stomper held in the other hand. She was observed for a short period of time and then left to complete the task. After an hour Ms Sale was onto her last bucket of seeds. She was pushing the last seeds into the funnel using both her gloved left hand and the stomper. Her left hand was sucked into the unguarded auger and became entangled. All four fingers were severed through the knuckle including the top part of her palm. Ms Sale located the off button which was under the feed tray near her left hip and turned the grinder off. She managed to extract the remains of her hand from the funnel. Sale was driven by a co-worker to White Cross and from there taken by

ambulance the Middlemore Hospital. Her fingers were extracted from the grinder but were too badly damaged to re-attach. She has had seven surgeries on her hand since the incident and was in hospital for around three months and at the time of writing these submissions she remained off work.

[4] The victim impact statements importantly should be read into this narrative at this point as well. Ms Sale is a 28-year-old woman said to be before this happily living with her partner and her nine-year-old son along with some step-siblings as a blended family. She said that she was young, active, healthy and an independent mother. She references how hard she worked to hold down a job and says: “October the 5th 2020 I finally got a place to start our life together.” It was their first rented home. Roughly three months later she references the severe injury that she sustained, saying that she lost her fingers on January 8, 2021, and she has not worked a day since. She described her injury as resulted in a traumatic amputation of all fingers proximal to the metacarpal head level. That means all four fingers of the left hand had been amputated and the top level of her palm was also gone, she said after they got turned to mincemeat in the seed grinder. Then she says: “On the day of my injury I left work with one and a half hands.” She then references the fact that after the accident she spent roughly three painful, horrifying, lonely months in hospital. Reference of fact, she had never been so far away from family. Things kept getting worse: “And I had four surgeries done within the first month.” She said: “It didn’t stop there, I also had three more surgeries after that,” and then says:

Since I was released from hospital I've lost count of doctor’s appointments, nurse visits to change dressings and check-ups for infection in the skin grafts and remove the stitches. Managing simple tasks is not easy.

[5] Referencing the fact that her partner or a family member has to drive her anywhere at the moment and she says: “I’m trying to get a prosthesis for my left hand,” said that ACC have accepted her request and she is currently waiting on the limb centre for the next steps, says her recovery has been long and agonising and she may or may not get full function in time. She references the delay with ACC accepting her claim. She references the responsible position of the company in providing her with reparation. She said: “It felt wrong knowing they added that extra money of the reimbursement,” so she is obviously grateful for the assistance that has been provided to her by the company. She says: “With the payment from Bakeworks it has helped

me out with bills, paying things off for home et cetera,” and then almost at the conclusion she says:

I really don't know how to express or even begin to describe the trauma I suffered on the day of the accident, the loss and hurt were unbearable. I could barely think, I was scared and all alone replaying the violent scene over and over in my head.

[6] Then she said: “I go for days lying in bed crying, I was feeling destroyed and weak, a useless mother and partner,” she said it took weeks to face her own hand, she said: “Every day I grieved for my hand, closing my eyes me horrifying images, experience flashbacks, nightmares, hearing my own screams and the sounds of my bones breaking,” she said: “I find it now difficult to find employment with a disability,” said: “It worries me every day not having that financial support for myself and family.” Finally she says: “The injury has affected my whole life and family,” says: “I hope to have children one day and not sure how you can even cope with a baby when you only have one hand. Everything is more difficult,” and concludes: “I picture my life or future being a burden to others financially and physically, I've suffered a great loss and I'm not the same person anymore.”

[7] Turning to the Prosecution submissions, comprehensive submissions have been filed. Prosecution reference the fact that the Sentencing Act 2002 has to apply in terms of matters set out in ss 7 - 10, I acknowledge that. The prosecution submission references s 151(2)(b) of the Health and Safety at Work Act in regard to the purpose of the Act and also regard 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. The submission references the authority or guideline judgment as it is referred in *Stumpmaster v WorkSafe New Zealand*.¹ It sets out the four steps which I will reference in a moment, step 1 being an assessment in relation to the amount of reparation and in that sense with reference to various authorities the prosecution submit that the appropriate amount of reparation for emotional harm in this case is in the vicinity of \$50,000, citing the authorities that are there. In relation to Ms Sale, that is the amount that the prosecutor submits. In relation to Ms Armesto

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

reparation is said to be in the vicinity of 15,000 to \$20,000 and again there is reference to the various authorities. The prosecution acknowledge the payments made both to Ms Sale and Ms Armesto and conclude given that, and this is where this prosecution submission differs to what is set out in the financial report, it says that the amount paid to Ms Sale has been a sum of \$95,114 and hearing Mr Harris' submission to me today the company intends, has no obligation, but intends to continue to support as best it can financially both Ms Sale and Ms Armesto going forward.

[8] The prosecution concludes the defendant has already made payments to Ms Sale to cover emotional harm and consequential loss and as such orders for emotional harm and consequential loss are not necessary. In relation to Ms Armesto it is recorded that the amount paid as well regarding emotional harm and consequential loss are not necessary, an amount has been paid to Ms Armesto in the sum of \$34,330. In fact, when you factor all of that in, adding up the amounts the company has paid it is a significantly greater amount than it would have been ordered to pay today based on the figures that had been supplied and any appropriate emotional harm awards that would have been made.

[9] Prosecution sets out step 2 which follows the assessment of culpability in terms of *Stumpmaster*, reference to the various grades of culpability and the start point fines that would follow the determination of culpability and quotes the decision in *Stumpmaster* which says: "We consider it likely that under the new band a starting point of \$500,000 to \$600,000 will be common."

[10] In regard to the fine with respect to the charge relating to the company and Ms Sale there is reference to identifying the operative acts or omissions at issue and the practical steps reasonable for Bakeworks to have taken into terms of s 22 of the Health and Safety at Work Act in terms of what was reasonably practicable. I do not intend to work through all of those, they are all set out in reality there and captured by the particulars in any event. There is reference to the practicable steps not taken set out and they are also recorded in s 6.8 of the submission.

[11] In conclusion on that point the prosecution say in short physical guarding of the grinder ought to have been properly maintained or otherwise replaced following

the fixed safety guard breaking off, a competent person should have undertaken regular inspections of the grinder's guard and safety control system to ensure the grinder was adequately guarded, workers should have received training, instruction and supervision on the use of the grinder supported by an effective safe operating procedure.

[12] The second part of the assessment needed is assessing the nature and seriousness of the risk of harm occurring as well as the realised risk. The hazard obviously was Ms Sale's hand being caught in the grinder while operating, the risk was serious injury and eventuated. Degree of departure from standards prevailing in the relevant industry prosecution say that the defendant's conduct departed significantly from industry standards and guidelines for the safe use of machinery. In terms of the obviousness of the hazards, prosecution say the hazard was extremely obvious to the defendant and action should have been taken to mitigate the hazard. In terms of the availability, costs and effectiveness of the means necessary to avoid the hazard prosecution submit the cost of re-installing guarding on the grinder is not prohibitive particularly given the risks involved. They then reference authorities in terms of a start point fine and conclude based on those authorities the Bakeworks' culpability for the January incident sits at the low end of the high-culpability band, it is submitted a start point of 650,000 is appropriate. As I say, the various authorities for reaching that conclusion are set out and I do not intend to cite those.

[13] In conclusion it says that with respect to fines that the defendant's culpability sits at the low end of the high culpability band, \$650,000 as an appropriate starting point. No uplift for aggravating factors is warranted and the prosecution submit that the discounts available are five per cent for remorse, 10 per cent for reparation, five per cent cooperation with the investigation. It is accepted that the Bakeworks entered a prompt guilty plea in the circumstances, a discount of 25 per cent is appropriate.

[14] With respect to the same analysis with regards to Ms Armesto in terms of the identification of the operative acts or omissions in practicable steps, summary is that in short physical guarding of the machine ought to have been properly maintained and inspected, a competent person should have undertaken regular inspections of the

machine's guard and safety control system to ensure that the machine was adequately guarded, that workers should have received training, instruction and supervision on the use of the machine supported by an effective safe operating procedure. The hazard was inadequately guarded, machine allowing access to a pneumatic guillotine, the risk was one of serious injury, the degree of departure from the standards providing the relevant industry are set out and it says the departures from well-known industry guidance increases a defendant's culpability especially given the nature of the defendant business, the obviousness of the hazard, the existence of an earlier incident on the machine demonstrates how obvious the hazard was and the defendant should have turned their mind to mitigating this hazard. Then in terms of the availability, cost and effectiveness of means necessary prosecution submit following the incident Bakeworks complied with the prohibition notice issued by replacing the old guard with a new guard.

[15] Taking all of that into account for the Armesto charge, a starting point of \$550,000 is said to be appropriate. Aggravating factors an uplift of five per cent is appropriate to reflect the fact that only five months prior to the June 2021 incident occurring a similar incident occurred at Bakeworks in January 2021. For the Armesto charge remorse five per cent, reparation 10 per cent, cooperation five, discount for guilty plea 25 per cent. It is probably appropriate in recognition of that that I go into the Armesto charge just to catch that up. The charge was that being a PCBU having a duty to ensure so far as reasonably practicable the health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking namely operating the filler dough portioner did fail to comply with that duty and that failure exposed workers including Cristiane Armesto to a risk of serious injury. The particulars in terms of what was reasonably practicable was to ensure the machine was adequately guarded, implement inspection and maintenance programmes on the machine to ensure that a competent person regularly inspected, tested and maintained the dough portioner's guarding and safety control system, develop safe operating procedures for the machine including procedures for dealing with end of production, stopping, isolating, cleaning machine, post-production and ensuring that the workers were adequately trained in the safe operating procedures for the machine.

[16] In terms of the summary of facts for Ms Armesto it is referred to as the June 2021 incident, the dough portioner machine was used to portion dough for loaves of bread, pizza and buns. Dough is placed in the hopper in the top and passes through the machine, producing individual dough portions of a programmable weight which are collected by workers in tins and then fed into ovens on racks to produce the baked goods. After the dough is portioned by the machine it drops into a worker's hand which is placed below the open bottom tunnel guard. The worker then places apportioned dough into a bread tin to be baked, process is repeated until the hopper is clear of dough. 3 June 2021 Ms Armesto was making keto bread using the machine to portion the dough for baking. She processed five or six dough mix hopper loads through the machine. At around 6.10 am a noise indicated that the hopper was empty, there was a loss of vacuum in the hopper. Ms Armesto took the last portion of dough when it dropped out of the machine and weighed it manually at 400 grams. The dough needed to weigh 550 grams to make up a full loaf because dough sometimes gets stuck inside the machine. She paused the machine by pressing the stop guard. There is no visual indication for the operator of the machine that the machine is paused. Unfortunately the machine was not paused. Ms Armesto reached under through the acrylic guard to the feed pipe where the guillotine is positioned. Whilst her hand was reaching into the feed pipe the pneumatic guillotine went through a cycle, slicing off the tip of her middle finger of her left hand. Colleagues provided her with first aid after the incident. Her finger was retrieved and packed in ice. Colleague took her to Waitakere Hospital and she was then transferred to Middlemore for surgery. She was admitted to Middlemore Hospital at 8.25 am on 3 June, discharged later that day at 1425. The hospital could not re-attach the severed portion of the finger.

[17] Her victim impact statement is also comprehensive. It says that she is 40 years of age, has a limited understanding of the English language and is Portuguese. She references the fact that after the incident Bakeworks continued to pay her \$738.22, I assume that is each week. She was also receiving payments from ACC and received counselling and some follow-up treatment. She said: "In the seconds I heard the noise of the guillotine going down and taking my hand it was in that second that my world collapsed," she references further on in relation to her finger that: "I decided not to re-attach it as my fear was that the re-plantation could be rejected resulting in necrosis and I'd lose more parts of my hand." She references days without access to the finger

with dressing, local pain, pain in her arm, pain when sleeping, seeing a physiotherapist when on the first time she said she could not even look at her finger, that the physiotherapist helped her a lot emotionally as ACC wanted her to go back to work in 30 days. She references the opportunity for psychological follow-up provided by ACC, she is taking medication for anxiety and says: “There's not a second that I do not remember the accident, my finger and the strength in my hands will never be the same,” she says: “I tried to put on a ring and the hand will not be pretty, try every time I change my manicure or someone notices I have to tell what happened,” said: “I do not feel comfortable to work for a company,” she is not saying Bakeworks: “For a company at the moment.” She feels that her emotions have receded 10 years. Then she says:

Why did I not know about the delay of the guillotine, why were there no more trainings, alarms, signs to not put the hand. No money will erase the pain, disappointment, suffering, medication, therapy, low self-esteem that I have and that I feel.

[18] Then references again: “The baker kept my wages until the day I decided to leave and turn the page,” and then finally concludes:

It's a sad, it's sad suffering solitary painful and same to know that we're susceptible and vulnerable to this, how much the anger (inaudible 15:21:37) inside me, I just want my finger back.

[19] In terms of the generic factors here relating to the ancillary orders that are sought by the prosecution, legal costs, expert costs in the sum of \$15,629.74 broken up by way of legal costs of \$7,144.24 and an expert assessment \$8,452.50 and cites a case where it says that the prosecutor's claim for the cost of expert's fees was well justified and the court in that case, *WorkSafe v Pakiri Logging*, ordered the full amount to be paid.²

[20] Then the issue comes down to the proportionality assessment for the imposition of reparation or fine and other orders and it is said and it is accepted that the total must be proportionate to the circumstances of the offending including the defendant's ability to pay and whether an increase is needed to reflect the financial capacity of the defendant.

² *WorkSafe v Pakiri Logging* [2021] NZDC 14158.

[21] In summary the prosecution say the defendant's position is that it could not pay two fines starting at about \$600,000 or more. The prosecution submission is dated 17 February. Further information compromises what the prosecution submit in relation to final capacity to pay a fine by instalments or a capacity to pay a lump sum. In the end the submission that has been filed dated 17 February does not cover off on that and was awaiting financial information to found a view as to where matters would finish up.

[22] Defence likewise have filed particularly helpful submissions and I apologise for the fact that this is a lengthy process but there is no way to short circuit it and it is somewhat repetitive but that is just the nature of this prosecution. Defence submissions reference the fact that the company started in one of the director's parents' health food shops in Glen Eden and has grown organically from there into a specialist baking business supplying into all of New Zealand's leading supermarkets, says that the business grew rapidly until 2020 where for a few reasons the business faced a significant trading dip: COVID-19 challenges with domestic supply chain and changes in domestic consumer markets. Submitted that the incidents before the court have shaken the business and profoundly shaken both directors and I simply put on the record that the responsible way that this company through its directors have attempted to look after both Ms Sale and Ms Armesto is immensely credible. As I say, I am not surprised that the events have profoundly shaken both directors and I repeat that their response has been one of absolute responsibility and providing assistance beyond what might be seen as required. Says directors and company are deeply remorseful for the accidents and long-term consequences, relation to the first incident guarding review was undertaken and recommendations for improvements were made. After the second incident remedial efforts were also made and interestingly the company applied to be eligible for what is described as enforceable undertakings but with complications, the original enforceable undertaking proposal was declined. Despite that and again responsibly in my view the company says it remains keen to engage with the industry. The submission for defence is that the financial position and financial capacity of the business may influence the sentencing process and potentially the continued viability of the business. It is acknowledged that the risk management of certain tasks and certain machines was inadequate despite the real aims and efforts of the business and directors, *Stumpmaster* is referred to providing the four-step process for the

sentencing. In relation to reparation. Defence say that the primary reparation concerns for the two working victims in this case may be less of an issue than they might be in other cases because of the considerable efforts that have been made by the directors and the owners both in a business capacity and their own personal capacities to ensure that the workers have not only avoided any ACC shortfall losses but in fact the support has potentially exceeded the level of reparation order that may be imposed for these types of offences and says the defendants have proactively provided evidence of the financial payments made to the workers and that the business has been more concerned about the emotional and physical recovery of the workers than the financial position.

[23] Relation to Ms Sale defendant accepts that it failed to ensure that Ms Sale was adequately trained in the safe operating procedures and closely supervised until she had demonstrated an adequate level of competence. Equally and again responsibly the defendant accepts that the guarding of this particular machine and the ongoing reviews of the machinery were inadequate and this inadvertently exposed all workers to risk of harm. Submitted it is important to note for the defendant that it did engage external engineers to carry out regular maintenance checks and also related safety checks on the machinery at the bakery and it would appear that the absence of the guard and the increased risk of harm was not identified by engineers, supervisors or businesses.

[24] Relation to Ms Sale in this respect it concludes the victim impact statement does positively reflect positive efforts from the defendant to and Ms (spelling 15:29:27) continues to work with Ms Sale towards an ACC-approved prosthetic. Defendant has maintained a great deal of contact with Ms Sale, continues to support her as much as possible with her rehabilitation and potentially with a return to work at the business if and when Ms Sale is able to return. Concludes this part of the submission that there has been considerable financial payment made since the accident as an attempt to minimise the impact of the accident as much as possible.

[25] Regards to Ms Armesto it is said that the original conveyor system was changed, a new conveyor was designed to get around the problem. It was still underway. In any event it was still possible for workers to reach up to the cutter area by reaching up underneath the acrylic guard and the slotted guard. Risk management

failed to ensure that the changes to the machine made it impossible for a worker to access the hazardous area of the cutter. Following the accident prohibition notice was issued and was eventually re-assessed about a month later as being safe for use and the prohibition notice was lifted on 7 July 2021. Defendant accepts that the additional guarding failed to ensure that workers were unable to reach into the hazardous area where the dough cutter operated and also acknowledge that there was no specific inspection, no written inspection and maintenance programme for the inspection and testing of this machine including the guarding. Reparation assessments are covered off and the total set out as being a reparation payment already made to Ms Sale seems to differ from prosecution but in any event the amount is sufficiently in advance of anything that the court would award either by way of reparation or shortfall. This submission says \$131,938.95 has been a payment made to Ms Sale and interestingly the tabulation references the fact that there is an amount held in account for later payment of \$10,080 and that I am told will continue. With respect to Ms Armesto the sum of \$34,330 has been paid. The reparation sum defence submits would be between \$45 and \$50,000 for Ms Sale and in fact she has received a total sum of around \$121,000 and the \$10,000 which is said to be in reserve. There is therefore no shortfall or emotional harm award that should be required. With respect to Ms Armesto it is said that an appropriate emotional harm award would be in the sum of \$15 to \$20,000, she has received \$34,330.47 beyond any ACC payments and any shortfall is clearly exceeded. Likewise defence submit there is no need for an order for reparation for either victim and the prosecution clearly concur with that. In terms of the fines for the defence perspective, \$500,000 for the grinder incident and \$450,000 for the second incident in June with a 10 per cent uplift or a \$10,000 increase.

[26] There is reference to various authorities, as the prosecution have set out, the defence have also set out authorities that would assist me to establish start points for this offending. There is reference to what is described as comparable cases in the food production area. Fact that there is no direct reference to true industry practice in the baking industry itself and the alleged failures here all relate to risk management and training associated with the grinder. With respect to the Sale charge fine not exceeding \$550,000 is the start point and in relation to the Armesto charge a starting point of \$450,000 with the uplift that I have referenced.

[REDACTED]

[30] I guess drawing that to a conclusion I have formed a view based on all the financial information that no lump sum is payable or can be paid by Bakeworks Limited at this point in time and my assessment is that the maximum that the company can be exposed to is as set out by Mr Shaw and that would be an amount of \$12,000 per annum for a period of three years. That still has potential to compromise the company but with prudent management I am satisfied that the company does have an ability to meet a fine at that level and I will articulate how that works in a moment.

[31] In terms of sentencing it is acknowledged that the four steps set out in the guideline judgment of *Stumpmaster* is the formula to be applied and I do not intend to work through all of those in any detail, they are well set out and well known not just by prosecution and defence but also by the court. In summary, they are assessing the amount of reparation, fixing the amount of fine, determining ancillary orders and making an overall assessment of proportionality and appropriateness of imposing sanctions including the defendant's financial ability to pay or capacity. It is agreed for Ms Sale that reparation in the vicinity of \$50,000 is the sum that I would have awarded and I accept from the authorities that it could have been between the sum of \$40 to \$60,000, although I do accept that the *Hellers* (citation 15:46:24) case at \$60,000 is perhaps an analogous case.⁴ In any event it is academic because the sum paid is well in excess. In any event, as I say, Ms Sale has already received a sum well in excess of the ACC shortfall and reparation, a much higher amount than the prosecution is asking for or has submitted. Therefore there will be no orders for emotional harm or consequential loss made in this case for Ms Sale. In terms of the fine to be imposed I accept unreservedly that the physical guarding of the grinder ought to have been properly maintained or otherwise replaced following the fixed safety guard breaking off and that a competent person should have taken regular inspections of the grinder's guard and the safety control system to ensure the grinder was adequately guarded. Also Ms Sale should have received training, instruction and supervision on the use of the grinder supported by an effective safe operating procedure. The practicable steps reasonable for the defendant to have taken are as I have just articulated.

[32] In assessing the nature and seriousness of the risk of harm occurring as well as the realised risk, Ms Sale's hand was caught in the grinder. Serious injury eventuated. Resulted from inadequate guarding of the grinder with the resultant injury and loss to Ms Sale. In terms of degree of departure from standards prevailing in the relevant industry I concur with the prosecution submissions in that regard as set out in paragraphs 6.14 to 6.22 of their submission. In terms of obviousness of the hazard the hazard was obvious to the defendants and action should have been taken to mitigate the hazard. The availability, cost and effectiveness of the means necessary to avoid the hazard, the cost of re-installing guarding on the grinder, was not prohibitive particularly given the risks involved. Reviewing the various authorities I have concluded in this case that the culpability is at the high end of the medium culpability band and that is a band which ranges from \$250,000 to \$600,000. In recognising that I consider a fine of \$550,000 should be imposed. In terms of discounts available, remorse 10 per cent, reparation 10 per cent, cooperation five per cent, guilty plea 45 per cent. For the charge for Ms Sale the end fine would be \$302,500.

[33] With respect to Ms Armesto in terms of reparation prosecution would have been seeking an emotional harm consequential loss in the sum of around 15 to \$20,000. I agree based on the authorities submitted that that acknowledges similar amounts awarded in analogous cases as cited. In any event, Ms Armesto has already received a sum of \$34,330 which is clearly a higher amount than the prosecution is asking for and therefore no order for emotional harm or consequential loss is made in this case. In terms of fine to be imposed, same considerations apply here. As for Ms Sale, physical guarding of the machine should have been properly maintained in respect that a competent person should have undertaken regular inspections to the machine's guard and safety control system to ensure the machine was adequately guarded and also Ms Armesto should have also received training, instruction and supervision on the use of the machine supported by an effective safe operating procedure. The hazard was an inadequately-guarded machine with a risk of serious injury which eventuated. The degree of departure from standards prevailing in the industry in the Armesto charge, clearly here there was a significant departure with the resultant injury to Ms Armesto, the obviousness of the hazard, unguarded or inadequately-guarded machinery should be obvious, the victim had reported an earlier incident which should have turned the defendant's mind to mitigating the hazard. The

cost of ensuring the safety of the machine was not prohibitive. Reviewing the various authorities and considering the previous incident. For me this also sits at the high end of the medium culpability band that is between \$250 and \$600,000. Recognising that, I see the start point at \$550,000 with an uplift of five per cent which sees a fine of \$577,500. Applying the relevant discounts: remorse, reparation, cooperation, guilty plea 45 per cent discount end point fine \$317,625.

[34] In terms of how that works out looking at the generics, in terms of the ancillary orders themselves the legal costs at \$7,144.24, that is not disputed by the defence. Expert costs I agree with the defence submission in terms of a quote that the statutory purposes of the regulator funded by the public expect a balanced approach to these investigations and hopefully an objective approach to workplace investigations free of any suggestion that those investigating alleged offending may also ultimately receive something from the investigation process. In the circumstances here I will award a modest contribution towards those costs, also recognising the ability of the defendant to pay. In this instance \$3,000 is awarded in terms of expert costs.

[35] Terms of financial capacity to pay a fine, as I have said other than the level of the fine the essential issue between the parties is the defendant's ability to pay the fine. It has already met the reparation costs and I determine it does have capacity to meet the ancillary orders made as well.

[36] As to the ability to pay the fines in a total sum of \$620,125 made up of 302,500 for Ms Sale, 317,625 for Ms Armesto. I acknowledge the comment by the High Court in *Mobile Refrigeration Specialists Limited v Department of Labour* (citation 15:53:51) in relation to financial capacity and I say that in this case there is clear evidence of financial incapacity supported by appropriate disclosure of all material facts and I reference the evidence of Mr Shaw in his letters of 22 December and 6 March and I also acknowledge the affidavits from Mr Shaw and the accountant for the prosecution.⁵ [REDACTED]

⁵

[REDACTED]

[37] I acknowledge s 14(1) of the Sentencing Act which says even if it would be appropriate in accordance with s 13 to impose a fine the court may nevertheless decide not to impose a fine if it is satisfied that the offender does not have or will not have the means to pay it. Accordingly a fine is imposed in relation to each charge, it is a fine of \$18,000, a total of \$36,000. That fine is payable over a period of three years.

[38] In terms of costs, I make the costs award on one charge. The sum involved is \$7,144.20 legal costs and \$3,000 is a proportion of the expert assessment costs. Those two amounts will be borne on the first charging document, which is 0931. That concludes a lengthy exercise and I thank both counsel for, as I say, helpful submissions. I conclude by hoping that the victims can secure a full life for themselves and again repeat despite the deficiencies in terms of practice that the employer has gone to extraordinary lengths to support and assist both parties and that is laudable.

[39] I do not need to repeat the order for suppression in relation to any financial details.

Judge GA Fraser
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 28/03/2023