ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE DISTRICT COURT
AT PUKEKOHE

I TE KŌTI-Ā-ROHE
KI PUKEKOHE

CRI-2023-057-000619
[2023] NZDC 26102

WORKSAFE NEW ZEALAND
Prosecutor

v

JIVAN PRODUCE LIMITED
Defendant

Hearing:	21 November 2023
Appearances:	S Cossey for the Prosecutor B Harris for the Defendant
Judgment:	21 November 2023

NOTES OF JUDGE J D LARGE ON SENTENCING

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[1] Jivan Produce Limited appears today charged under ss 36(1)(a), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015. The company pleaded guilty at an early opportunity and both WorkSafe and Mr Harris, on behalf of the defendant, have filed substantial and, I say, very thorough and substantial submissions which have been helpful

[2] The background is that on 31 May 2022, FA, the victim, was working for the defendant as a packhouse worker at the defendant's packhouse located in Pukekohe.

[3] At about 1 pm the victim was levelling onions off a conveyor belt into a bin when he noticed an onion topper machine onsite had become blocked with waste parts of onions. The victim opened the access door to a hopper below the rollers of the onion topper machine to push down the onion waste he could see and observed onion shells stuck in the machine, the rollers. The victim has raised his left hand and attempted to clear the rollers while the onion topper machine was still operational.

[4] The moving rollers caught the victim's gloved hand and, as a result of being caught between the rollers, all four fingers on the victim's left-hand were amputated at the metacarpophalangeal joints where the fingerbones meet the hand bones.

[5] The subsequent WorkSafe investigation identified failures on part of the defendant, as a person conducting a business or undertaking, that is PCBU, to comply with its statutory duties under the Health and Safety at Work Act 2015. The maximum penalty for this is a fine of $1.5 million.

[6] The basis of the prosecution contained in the charging document was that being a PCBU, having a duty to ensure, as far as reasonably practicable, the health and safety of workers at work for the PCBU, including FA, while the workers were at work in the business, namely interacting with (including clearing a jam) an onion topping machine, did fail to comply with that duty and that failure exposed individuals, including FA, to a risk of serious injury arising from exposing to moving parts of machinery. It was reasonably practicable for the defendant to have:

(a) ensure there was an effective risk assessment of the onion topping machine, including risks arising from any modification from the machine;

(b) ensured that the onion topping machine was effectively, guarded in accordance with industry standards and guidance, including monitoring the ongoing effectiveness of this guarding; and

(c) developed, implemented, monitored and trained workers on a safe system of work for the operation of the onion topping machine

including an effective standard operating procedure that informed how to safely unjam the onion topping machine.

[7] The prosecution seeks reparation in the sum of $35,000 for the victim. Secondly, a finding that the defendant's culpability falls within the higher end of the medium culpability band and the starting point of a fine in the vicinity of $500,00. Prosecutor acknowledges that the defendant is entitled to mitigating factoring discounts of 40 per cent for previous good record, reparation five per cent, remedial steps taken five per cent, early guilty plea of five per cent together with co-operation with WorkSafe five per cent. The end fine sought by WorkSafe is an adjusted end fine of $300,000 together with an order for payment of the regulator's costs in the sum of $2,214.63.

[8] WorkSafe also sought an order that the summary of facts be released, if requested, with appropriate redactions made for any suppression orders. In relation to that topic, I now make an order supressing the name of the victim. There is no other application before me, so there are no other redactions to the summary to be made if it is to be released to any person in the future.

[9] WorkSafe set out fully the sentencing obligations under the Sentencing Act 2002 in terms of ss 7, 8 and 9, but in addition, I am obliged to have regard to the Health and Safety at Work Act 2015 provisions, ss 7 to 10 and the other criteria listed.

[10] The Sentencing Act criteria requires me to apply the principles of accountability, denunciation and deterrence, and s 151(2)(b) of the Health and Safety at Work Act provides that the Court should have particular regard to the main purposes of the Act, which include the provisions contained in s 3(1)(a) through to (g) and subs (2). I have not included those specifically because they can be accessed independently.

[11] The approach to sentencing is set out in the league case of *Stumpmaster v WorkSafe New Zealand Limited*.[1] That requires the Court to have the four-step approach:

(a) assessing the amount of reparation;

(b) fixing the amount of the fine by reference first to the guideline bands and then having regards to the aggravating and mitigating factors;

(c) determine whether further orders under ss 152 to 158 of the Act are required; and finally

(d) make an overall assessment of the proportionality and appropriateness of the sanctions imposed by the first three steps.

[12] I mentioned at the outset that WorkSafe submitted that the amount of reparation of $35,000 is appropriate and that is not disputed by the defendant through Mr Harris. In due course, the defendant will receive credit for that acknowledgment but, having regard to that amount being common between both WorkSafe and the defendant I will make an order of $35,000 reparation to the victim.

[13] I should mention, at this stage, that I have received and read a victim impact statement from FA. That statement showed, very clearly, the effects of that accident upon his life. Occasionally, victims come to court and had FA been at court I would have said to him that no amount of money will replace his fingers; no amount of money will compensate him for the loss of enjoyment of life; no account of money will enable him to undertake the sports and other activities, particularly with his grandchildren, that he had done prior to the accident.

[14] The defendant has continued to employ FA throughout and FA is currently working as a forklift operator. That has its challenges, as mentioned in the victim impact statement, but there is something positive, at least, despite the physical difficulties that he occasionally suffers when operating the forklift.

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[1] *Stumpmaster v WorkSafe New Zealand Limited* [2018] NZHC 2020.

[15] I make mention of that at this stage because the defendant has been a good employer, has acted responsibly and really is here because of non-compliance with a strict liability issue, namely, to ensure the safety of workers at work.

[16] In a perfect world the legislation would not be necessary. Sadly, the world is not perfect and employers have responsibilities to workers and that responsibility is met by a Court imposing the appropriate fine, reparation and other orders in terms of this legislation.

[17] The other issue to consider under the heading of "reparation" is consequential loss. That is not a matter that I need trouble myself with in that because the employer has, very responsibly, topped up and made payments to the victim throughout his time in hospital and subsequently, on his release from hospital, his recovery period and then, as I say, continuing his employment, although in a different role.

[18] The usual order under consequential loses occurs when there is no top up to the ACC payment received by a victim but here, the schedule produced and attached to counsel's submissions and is accepted by WorkSafe, clearly shows that that top up has occurred and there is no consequential loss. There has, however, been payments made which might otherwise be deducted from emotional harm, namely what one could call ex gratia payments totalling some $10,300.

[19] I noted in the schedule that $300 of that was paid immediately while the victim was in hospital. That indicates to me a very responsible employer, not just sitting back and waiting for things to happen but proactively doing something for the benefit of his ex-employee. I intend to give credit for that in the latter part of my decision.

[20] So, the award for reparation is $35,000.

[21] Going to the next step in the procedure of fixing the amount of the fine. It is common ground that the appropriate guideline band set out in *Stumpmaster* is that of medium culpability, which sets a range from $250,000 to $600,000. Here, the three factors that the defendant has pleaded guilty to mentioned earlier but failing to take

those reasonably practicable actions come to the fore. The defendant accepted those failures by its entry of the guilty plea and by accepting the summary of facts.

[22] In this case, looking at the Hanham factors I have to look at the assessment of and nature of the seriousness of the risk of harm occurring as well as the realised risk here. The defendant's workers, including the victim, were exposed to the risk of the inadequately guarded onion topper machine and here, the realised harm to the victim was serious.

[23] The next Hanham factor I consider is the degree of departure from standards prevailing in the industry. WorkSafe highlighted that factor is effectively, almost same wording as s 151(2)(f).

[24] There was a significant departure from industry standards in the operation of the onion topper machine without adequate guarding or ensuring that the machine was risk assessed. It may have been because it was not within the victim's specific job description to clear any blockage in the onion topping machine but, as a responsible employee, he would, no doubt, just done what he saw was needing to be done when he endeavoured to clear the blockage to enable the work to proceed or the machine to continue its work. There was no adequate guard nor locking device nor any signage to warn any person of the dangers of the machine.

[25] The next factor is the obviousness of the hazard. It probably goes without saying, any machinery with moving parts is hazardous. It may well be that the machine was a product of a number of adaptions over the years. Counsel, in his submissions, referred to a number 8 wire factor and while that is probably true, any adaptions to any machines still require foreseeable risks to be assessed and considered.

[26] WorkSafe submits that the starting points should be set at $500,000, having regard to the four cases listed in submission 6.29, that of *WorkSafe New Zealand v Niagara Sawmilling Co Limited*, a start point of $500,000 where the victim's glove there was caught in a wood graded trimming machine, amputating two fingers.[2] That machine was partially guarded but inadequately so. They are an external consultant

[2] *WorkSafe New Zealand v Niagara Sawmilling Co Limited* [2018] NZDC 3667.

had recommended changes but the defendant's health and safety adviser disagreed, considering it would cause other risks. That starting point of $500,000 was upheld in the High Court.

[27] The second case relied upon by WorkSafe is the *Alliance Group* case.[3] There the victim was operating a screw conveyor and opened the sliding cover to access and clear blockages from the box section, in doing so his hand came into contact with a rotating screw and his hand was amputated. There the Court found that there was a fundamental breach not to adequately guard the machine even though it may not have been anticipated by the defendant that a worker would have wanted to put his hand into the machinery. In that case the Court was also influenced by the fact that the victim had only been employed with the defendant five days with little or inadequate training in respect of the machine. There the Court considered to be more serious than *Niagara* and a starting point at $550,000 was adopted.

[28] The third case referred to by WorkSafe is *WorkSafe New Zealand v Alto Packaging Limited,* where the victim's fingers got caught in the rollers of an extrusion coating line machine when trying to feed material through.[4] The tips of the right hand middle and ring fingers were amputated. The defendant's failures were in installing suitable guarding; developing and implementing a safe system of work and engaging a competent person to undertake a systematic risk assessment of the extrusion coating line machine. The Court there adopted a starting point of $500,000.

[29] WorkSafe argues that this case is similar to *Alto Packaging.* The other case really could be distinguished because there was a new, relatively inexperienced operator.

[30] In these cases I note that the victim was an operator of the machine whereas, in the current case, the victim was not an operator of the machine but was employed in the packhouse. Nonetheless, he did undertake the action of clearing the onion topping machine. Had it been guarded then it is unlikely the accident would have occurred.

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[3] *WorkSafe New Zealand v Alliance Group Limited* [2018] NZDC 20916.
[4] *WorkSafe New Zealand v Alto Packaging Limited* [2022] NZDC 6148.

[31] In Mr Harris' submissions he broadly agrees with the categorisation of the matter being in the medium category in terms of the *Stumpmaster* sentencing bands with that starting point of $500,000.

[32] As I mentioned before, Mr Harris argues that there is a material difference where there is a young, new or inexperienced worker being asked to use a machine or undertake a process where ethe risk of harm has been identified or ought to have been identified earlier. He highlights that in the *Alliance Group* case the new worker with only five days of experience was operating that screw conveyancer when he attempted to clear blockages in the meat work resulting in his hand coming into contact with a rotating screw or the subsequent amputation of his hand.

[33] Mr Harris refers me to three cases, *WorkSafe New Zealand v Locker Group Limited*, where there is an eight-finger amputation across both hands with some fingers re-attached after a foot pedal was depressed accidentally.[5] Light guarding was not as easily achievable in manual mode, as suggested by WorkSafe, and there had been Australian experts regularly inspecting and maintaining the machine. There, the starting point was $450,000.

[34] In the second case, *Worksafe New Zealand v Donovan Group Limited* where a pedal brake accident resulted in the left-hand finger amputations with an inadequately unguarded and older press brake pedal and also where the worker dropped the workpiece accidentally.[6] In that case the Court adopted a starting point of $400,000.

[35] The third case, *Worksafe New Zealand v Bakeworks Limited* was a very significant left hand injury to all of the fingers on the left hand of a meat grinding machine and there was a second accident for another worker with a finger amputation from a dough cutting machine.[7] Putting aside the emotional harm payments calculated in respect of those two victims and turning to the level of fines the Court adopted $550,000 in respect of one and uplift of five per cent for the second case and so adopted $577,500.

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[5] *WorkSafe New Zealand v Locker Group Limited (NZ)* [2018] NZDC 26802.
[6] *Worksafe New Zealand Ltd v Donovan Group Limited* [2022] NZDC 223982.
[7] *Worksafe New Zealand v Bakeworks Limited* [2023] NZDC 5236.

[36] Mr Harris argues that the first accident, as in the *Bakeworks Limited* is again where the worker was instructed very shortly before the accident and the injury and taught to use the protective plastic stomper to sweep the seeds into the grinder mouth with the right hand and, quite wrongly, trying to use her unprotected hand where the stomper should have been used to push seeds into the now exposed grinder mouth. There, the Court found that $550,000 was the appropriate.

[37] In the end Mr Harris argues that a starting point between $400,000 and $450,000 is appropriate, taking into account those factors referred to above.

[38] In my view, looking at those cases, I do not see that this case is on a footing with the *Bakeworks* nor *Alto Packaging* but it was very close to it, particularly to *Alto Packaging*. In my view, the starting point, the appropriate starting point is a fine of $475,000.

[39] I distinguish those other cases because in those cases the employees were the machine operators and the employer's obligations were not met by an adequate training to those operators.

[40] I turn now to the third step, that of addressing the mitigating factors, all of the aggravating factors having been included in my assessments of the fine. It is common ground that there is a credit of 25 per cent for the guilty plea. It is common ground that there is five per cent credit for co-operation. It is common ground that the credit of five per cent available for the employer's previous good record. The issues that are not common relate to a credit for reparation and credit for remedial action.

[41] In respect of reparation and early payments Mr Harris seeks between five and 10 per cent, WorkSafe argue that five per cent is appropriate credit there.

[42] In my view, the appropriate start point for credits for that is five per cent but, having regard to the early payments and the ex-gratia payments I referred to above, I increase that credit by 2.5 per cent, which I then allow 7.5 per cent credit under the heading of reparation and early payments.

[43] In respect of the final credit available remedial action, here there was an obligation to bring the machine up to standard and that was complied with at a cost to the company. So, I give a little credit for that because I am a little troubled in that it was the employers obligation to remedy the default, in any event, but I do take onboard their action in causing publication to the wider industry of the article in the *New Zealand Grower Magazine* published in October this year. That article clearly highlighted the defendant's situation and this clear headline was "Safeguard your dangerous machinery". That article, the efforts made by the defendant, combined with the little credit I referred to before about remedying the machine, warrants a total further credit of five per cent.

[44] Those credits total, by my calculation, 47.5 per cent. Applying that to the fine of $475,000 I set the fine at $249,375. Counsel are invited and are able to check my calculations but I think I am right, if I am wrong Counsel tell me.

[45] So, I set the fine at $249,375.

[46] The next issue is whether further orders are required I note that there is an order sought for costs of $2,214.63. That is acknowledged by Mr Harris on behalf of the defendant to be a modest amount and is not disputed. So, I make an order for costs in favour of WorkSafe of $2,214.63.

[47] The final matter for determination is the proportionality assessment. Attached to Mr Harris' submissions was a letter, amongst other things, a letter from Campbell Tyson Chartered Accountants, who assist the defendant with their financial matters.

[48] I do not intend to embark on analysis of the financial structure of the company because I think that would be inappropriate in the circumstances but if I look to the submissions of Mr Harris and the contents of that letter there is no suggestion that the defendant is financially unable to meet the penalties to be imposed and it is not submitted that the fine or other orders will affect the solvency or insolvency of the business.

[49] The issue is whether the fine should be ordered in one lump sum or spread over a period of three years. Mr Harris argued for a payment over three years; that submission was not opposed by WorkSafe and having regard to the financial matters referred to in that accountant's report I make an order that the fine be paid over a three year period.

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Judge J D Large
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 28/11/2023