

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2022-092-009965
[2024] NZDC 5479**

WORKSAFE NEW ZEALAND
Prosecutor

v

MOMMAS FOODS GROUP LIMITED
Defendant

Hearing: 21 February 2024

Appearances: Ms Simpson for the Prosecutor
Ms Smith and Ms Tumi for the Defendant

Judgment: 22 March 2024

RESERVED DECISION OF JUDGE D BELL

[1] On 6 December 2021 Mr Ashneel Narayan, an employee of Mommas Foods Group Limited (Mommas Foods) sustained serious injuries after his right hand was caught in the exposed transmission chain of the dough extruder machine while attempting to remove overflow dough by the bottom of the machine. At the outset I want to express my appreciation for the presence of Mr Narayan and his family in court.

[2] The subsequent WorkSafe New Zealand (WorkSafe) investigation identified failures on the part of Mommas Foods to comply with its statutory duties under the Health and Safety at Work Act 2015 (HSWA).

[3] Mommas Foods appears for sentence having pleaded guilty to one charge of contravening ss 36(1)(a), 48(1) and 48(2)(c) of HSWA.¹

[4] The allegation to which it has plead guilty is as follows:

Being a person conducting a business or undertaking, having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for it, including Ashneel Narayan, while the workers were at work in the business or undertaking, namely operating the dough extruder machine, did fail to comply with that duty, and that failure exposed workers, including Ashneel Narayan to a risk of serious injury.

[5] The particulars of the charge are that:

It was reasonably practicable for Mommas Foods Group Limited to have:

- (a) Ensured a competent person conducted an effective hazard and risk assessment of the dough extruder machine, including the transmission chain, to determine its compliance with the standard described in AS/NZS 4024 or better.
- (b) Ensured the dough extruder machine was adequately safeguarded to the standard described in AS/NZS 4024 or better.
- (c) Ensured its workers had adequate training, supervision, and experience necessary to safely use the dough extruder machine.

Factual Background

3. FACTS

- 3.1 The defendant is a food manufacturer and distributor, supplying pizzas to supermarkets throughout New Zealand.
- 3.3 The machine involved in the incident is a Pizza Line Rademaker machine (the machine). The dough extruder machine (the dough extruder) involved in the incident is part of the machine.
- 3.4 The summary of facts at paragraphs 6 and 7 outline how the machine is operated. There is a fixed enclosing guard on the side of the dough extruder (the transmission guard). The purpose of the transmission guard is to fully enclose the transmission chain and sprockets of the dough extruder. The transmission guard is not intended to be removed by workers and is only dealt with by third party service technicians and engineers employed by the defendant when servicing or carrying out maintenance and repairs on the machine.

¹ The maximum penalty not exceeding \$1.5 million.

- 3.5 At some point prior to the incident the transmission guard dislodged and was not adequately fixed to the machine.
- 3.6 On 6 December 2021, the victim was tasked with working on the baseline with two other workers. The victim was operating the machine by feeding the dough into the hopper when required.
- 3.7 The victim mixed the dough and filled the hopper with dough. The machine was switched off by a co-worker so that the victim and the workers could attend a meeting. The meeting finished at approximately 8.45 am and the machine was subsequently switched back on.
- 3.8 The victim noticed dough had overflowed over the top of the hopper and onto the outfeed side of the extruder next to the exposed transmission chain and sprocket (refer to figure 2 in the summary of facts). The supervisor noticed the overflow dough had fallen by the bottom of the machine and instructed the victim to pick it up.
- 3.9 While the dough extruder was still running, the victim walked to the rear of the dough extruder and reached towards the transmission chain with his right hand. As he reached towards the back of the extruder closest to the wall, his hand was caught in the exposed transmission chain.
- 3.10 The victim was taken to hospital. As a result of the incident, his right thumb, index finger, ring finger and middle fingers were amputated.

[6] The WorkSafe investigation uncovered the following health and safety failings on the part of the defendant:

1. Lack of guarding on the dough extruder machine; and
2. Non-compliance with guarding and other areas of the production line machines.

As a result of the failures to adequately guard the dough extruder machine the defendant exposed the victim to the risk of serious injury arising from exposure to the exposed running nip-point between the chain and power transmission sprocket of the dough extruder.

[7] I have received a victim impact statement from Mr Narayan and Ms Reshman Lata (Mr Narayan's mother). The effect of this incident on Mr Narayan and his family has been made very clear to me. I do not propose to go into detail of what is disclosed in the victim impact statements, suffice to say that reading it left me feeling affected and concerned for Mr Narayan with the future he foresees. The impact of the incident has been horrific for him and his family.

[8] It is well understood by the Courts, by both parties present in Court today and by me in undertaking the task of sentencing, that any amount of emotional harm in order to be paid to you, Mr Narayan cannot in any way compensate for the injuries you have suffered. We all understand that it is simply the task I must undertake, following guidance from higher Courts.

Sentencing Approach

[9] The approach to sentencing in workplace accident situations is now well established. It is set out in the *Stumpmaster* decision of the High Court.²

[10] There are four steps in the sentencing process which I must undertake. Firstly, I must assess the amount of reparation to be paid to the victim. Secondly, I must fix the amount of the fines to be paid by reference first to the guideline bands and then having regard to aggravating and mitigating factors. Thirdly, I determine whether ancillary orders are required. Fourthly, I must make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Reparations

[11] Reparations can be imposed in relation to loss or damage to property, but also for emotional harm. Pursuant to s 32(1)(b) of the Sentencing Act 2002, the Court may impose a sentence of reparation if an offender has, through or by means of offence, caused a person to suffer emotional harm.

[12] I have been referred to several decisions where emotional harm reparation has been awarded in cases involving injury. It is widely acknowledged that emotional harm is difficult to quantify financially. In the circumstances of this matter however both parties agree that an award of \$35,000 for the emotional harm that Mr Narayan has suffered because of Mommas Foods offending, is appropriate.

² *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881, [2019] DCR 19, and (2018) 15 NZELR 1100.

[13] I make the order for emotional harm reparations in the sum of \$35,000.

Consequential Loss (ACC “Top Up”)

[14] Pursuant to s 32(1)(c) of the Sentencing Act a Court may impose a sentence of reparation if an offender has through or by means of an offence of which the offender is convicted, caused a person to suffer loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[15] Section 32(5) of the Sentencing Act allows the Court to impose a sentence of reparation in respect of consequential loss not covered by entitlements under the ACC scheme. Therefore, a Court may “top up” the 80 per cent of a victim’s weekly income paid under the ACC scheme to 100 per cent of the victim’s weekly income.

[16] The victim’s ACC entitlements have been reviewed by Mr Jay Shaw, an independent third-party accountant. Mr Shaw has calculated the victim’s consequential loss to cover the ACC shortfall of \$11,284, which is not challenged by Mommas Foods.

[17] I make an order for consequential loss in the sum of \$11,284.00.

Amount of Fine

[18] Fixing the amount of a fine under HSWA begins by reference to the four guideline bands set out in *Stumpmaster*:³

- (a) Low culpability: up to \$250,000.
- (b) Medium culpability: \$250,000 to \$600,000.
- (c) High culpability: \$600,000 to \$1,000,000.
- (d) Very high culpability: \$1,000,000 plus.

³ *Stumpmaster* at [3(b)], [35(b)] and [53].

[19] *Stumpmaster* confirmed that the following factors, as set out in *Hanham*, remain relevant to determining the culpability of an offender to be sentenced under the HSWA:⁴ There are further considerations set out in s 151 of the Act.

A. *The identification of the operative acts or omissions at issue (the “practicable steps”)*

The defendant has pleaded guilty and accepted that it failed to take the following reasonably practicable actions:⁵

- (i) Ensured a competent person conducted an effective hazard and risk assessment of the dough extruder machine, including the transmission chain, to determine its compliance with the standard described in AS/NZS 4024 or better. In explanation Mommas Foods advise that it did not engage a competent person to conduct a complete and detailed risk assessment because it was not aware of the need to do so, relying on advice of previous owners that the dough machine was fit for purpose and the expertise of the specialist technicians who serviced the machines.
- (ii) Ensured the dough extruder machine was adequately safeguarded to the standard described in AS/NZS 4024 or better. Mommas Foods accepts the dough extruder machine at the time of the accident was not guarded to the standard described.
- (iii) Ensured its workers had adequate training, supervision, and experience necessary to safely use the dough extruder machine. Mommas Foods accept it omitted to identify the task of cleaning overflow dough from the dough extruder as part of the cleaning procedure in which workers were trained.

⁴ *Stumpmaster* at [37].

⁵ Reasonably practicable as defined at s 22 of HSWA.

[20] In the Court's assessment the essential factors in this case are that the machine was inadequately guarded and had not been risk assessed. There was also insufficient training and supervision. Had the machine been effectively risked assessed, it would have been identified that the transmission guard was not in place. An adequate risk assessment would have picked up safety critical issues with the machine.⁶

B. *An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk*⁷

- (i) The risks of working with the unguarded machinery, notably unguarded nip-points, are significant and well-known. Any person who operated the machine was exposed to the hazard and risked serious injury. This was clearly foreseeable, given food manufacturing is the defendant's core business.
- (ii) The risk was realised when Mr Narayan reached in towards the exposed transmission chain and his right hand was caught in the transmission chain, as a result, his thumb, index finger, ring finger and middle finger were amputated.

C. *The degree of departure from standards prevailing in the relevant industry*

- (i) The defendant's conduct departed significantly from industry guidelines, in particular those set out at paragraphs [47]– [57] of the agreed summary of facts.
- (ii) The requirement for machines to be effectively guarded is paramount and well known in the food manufacturing industry. The guidance is clear that persons operating machinery must be trained and aware of potential hazards.

⁶ At para 42(d) of the Summary of Facts.

⁷ Section 151(2)(f) of HSWA has near identical wording.

D. The obviousness of the hazard

- (i) The hazard presented by the unguarded machine was obvious. Mommas Foods accepts this but nevertheless submits the requirement to clean the machine and clear the overflow dough was infrequent. When looking at the guard it would not have been apparent that the guard was not securely fixed nor compliant.

E. The availability, cost and effectiveness of the means necessary to avoid the hazard

- (i) Ensuring adequate guarding was present was not cost prohibitive to the defendant's business. Conducting an adequate risk assessment, guarding machinery and providing effective training and supervision, are core to enabling manufacturers to effectively operate. The means to avoid the hazard are widely available and would have been effective in avoiding the hazard. Mommas Foods acknowledges that it would have been reasonably practicable in order to ensure the safety of its workers to engage a competent person to carry out the risk despite it not being a straightforward or inexpensive task.

[21] In assessing Mommas Foods culpability numerous cases were provided and discussed by counsel in their submissions. I have considered the cases and do not intend to analyse them here. It is always both unhelpful and helpful frankly to look at cases as they provide some reassurance, but they are always able to be chosen so as to support a particular proposition. Nevertheless, they provide a very clear framework within which to assess culpability and of course take guidance from higher Courts.

[22] WorkSafe have submitted that the offending here sits within the medium band under the *Stumpmaster* decision and submits that an appropriate starting point of \$500,000 is appropriate. On the other hand, Mommas Foods suggests that this falls at a slightly lower level within the medium culpability range and a starting point of \$400,000 is appropriate.

[23] Considering the actual injury caused together with the failure to ensure a competent person conducted an effective hazard and risk assessment of the dough extruder machine only visual checks were conducted, and the submissions raised, I find that the starting point for the fine falls in the middle of the medium band of culpability. The starting point is \$450,000.00.

[24] There are no aggravating factors with respect to the defendant that would justify an uplift in the starting point.

[25] I turn now to the discounts or mitigating factors that are applicable. The parties agree that the following discounts apply; Mommas Foods pleaded guilty at an early opportunity, a discount for good character, cooperation with the investigation and reparation. I also accept Mommas Foods submission that it is entitled to a discount for their willingness to attend restorative justice, although no restorative justice conference has yet to take place. I apply a discount of 45 per cent to the starting point of \$450,000.00 which reduces the fine to \$247,500.00.

Ancillary Orders

[26] Section 152(1) of HSWA provides:

On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable towards the cost of the prosecution (including the costs of investigating the offending and any associated costs).

[27] It is agreed by the parties that a just and reasonable sum towards the cost of the prosecution of \$2,276.12 together with experts costs of \$5,526.00 is reasonable.

[28] I make an order for costs in the sum of \$7802.12.

Mommas Foods Position Regarding Financial Capacity

[29] In determining Mommas Foods financial capacity, I observe the comments of his Honour Judge Phillips in *WorkSafe New Zealand v Wilson Contractors (2003) Ltd*. His Honour commented that the Court's assessment of financial capacity to pay a fine

under the Act requires a robust and common-sense approach to the accounting information adduced.⁸

[30] The relatively recent High Court decision of *YSB Group Limited v WorkSafe New Zealand*⁹ set out important principles in assessing the effect of financial capacity upon the level of fine that should ultimately be imposed:

- (a) It is important to determine a provisional fine or starting point before adjustment to reflect financial capacity.
- (b) Fines may be paid in instalments but should not be ordered for any undue length of time and 12 months is normally an appropriate lengthy maximum period.
- (c) A fine ought not to place a company at risk.
- (d) A fine should be large enough to bring home the message to directors and shareholders of corporates.
- (e) One must avoid a risk of overlap in a small company the directors are likely to be the shareholders and therefore remain losers if a severe sanction is imposed on a company.

[31] The Court must also be alert to ensuring that it is not in effect imposing a double punishment.

[32] I have regard to the affidavit filed by WorkSafe of 17 November 2023 in which Mr Shaw, reports on the ability of Mommas Foods to pay a fine, either by lump sum or by instalment. Mr Shaw concluded that it does not appear Mommas Foods has a realistic ability to pay a fine by instalment, at least over the next one to two years. Beyond that it is not possible to say on the available information, assuming Mommas Foods continues to trade.

⁸ *WorkSafe New Zealand v Wilson Contractors (2003) Ltd* [2020] NZDC 17784.

⁹ *YSB Group Ltd v WorkSafe New Zealand* [2019] NZHC 2570, (2019) 16 NZELR 493.

[33] On 7 November 2023 Mommas Foods was served with a Notice of Proceeding placing the company into liquidation. It appears Mr Shaw may have not been aware of that Notice of Proceeding at the time his affidavit was sworn.

[34] Given that information and bearing in mind the principles relevant to assessing the effect of financial capacity referred to above, I am not prepared to adopt the suggestion by WorkSafe to impose a nominal fine to be paid after two years.¹⁰

[35] It follows from *YSB Group Ltd* that to impose a fine on Mommas Foods on top of the residual reparation and costs that I am going to order would:

- (a) Be beyond their capacity to service; and
- (b) Would require perhaps an end to the business (which may occur regardless of the orders I impose).

[36] I do not accept that this is a case that would send a signal to others in the industry that a fine can be avoided. That is because each case must be looked at on its own facts, considering the financial circumstances of the individual. I am satisfied that Mommas Foods are unable to pay a fine.

[37] In the circumstances of this particular case I order that no fine is to be paid by Mommas Foods.

Proportionality Assessment

[38] The last step requires an assessment of the proportionality and appropriateness of the sanctions imposed by the first three steps. The total sentence imposed must be proportionate to the circumstances of the offending and the offender. This involves assessing the defendant's ability to pay and whether an adjustment is required reflecting the defendant's financial capacity.

¹⁰ Section 86(1)(b) of the Summary Proceedings Act 1957 which permits an arrangement with a defendant for a fine to be paid by way of instalment and for arrangements to extend for up to five years.

[39] At this stage I stand back and ask myself whether the overall combination of an award of an emotional harm reparation, consequential loss and contribution to investigation costs a proportionate sentence is given the seriousness of the offending.

[40] I am satisfied that the overall combination of the contribution of emotional harm reparation of \$35,000 and consequential loss reparation in the order of \$11,284, together with the regulator's costs in the sum of \$7,802.12 is an appropriate overall outcome.

[41] I am grateful for the tremendous amount of work that counsel have put into these submissions and for the changes that have been implemented by the defendant.

[42] I acknowledge how difficult this has been for Mr Narayan and his family. I wish you well for your future.

Signed at Auckland this 22nd day of March 2024 at 11.30 am

Judge DA Bell

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 22/03/2024