IN THE DISTRICT COURT
AT KAITAIA

I TE KŌTI-Ā-ROHE
KI KAITAIA

CRI-2018-029-000743
[2019] NZDC 3596

WORKSAFE NEW ZEALAND
Prosecutor

v

JUKEN NEW ZEALAND LIMITED
Defendant

Hearing:	27 February 2019
Appearances:	C O'Brien for the Prosecutor S Corlett for the Defendant
Judgment:	27 February 2019

NOTES OF JUDGE G L DAVIS ON SENTENCING

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[1] Juken New Zealand Limited is before the Court today having pleaded guilty to one charge of committing an offence against the provisions of s 48 and s 36 Health and Safety at Work Act 2015 ("HASWA"). It is one of those cases which is generally described as failing to comply with a duty and as a result of that exposed workers, in this case a Mr McLeod, to risk of serious injury or death. That is the general narration to the charge.

[2] The particulars are also of a rather general, but I will go through them in some detail. That is because today an application has been made to amend the particulars and an agreed summary of fact has been furnished to the Court. That application is not opposed by the defendant company and it is appropriate that the Court record

formally notes today that the particulars are that it was reasonably practical for Juken New Zealand Limited to:

(a) Provide appropriate controls to ensure the press was prevented from start-up while work was being carried out inside the enclosed press, such as an interlocked guard; and

(b) implement effective interim controls to protect workers from the risk until a permanent solution could be implemented; and

(c) to ensure the provision of information, training and instruction to protect workers from the risk until a permanent solution could be implemented; and

(d) ensure systems and procedures were adequate, communicated to workers and complied with; and

(e) develop and implement a system to ensure that risks identified were addressed appropriately and regularly reviewed.

The facts

[3] The facts that give rise to the offending are taken from the agreed summary of facts, that was handed to me today.

[4] Juken is a wood processing company that makes wood products in Northland and in other regions around New Zealand, it employs approximately 800 people. Mr McLeod was employed by Juken from about October 2016 and worked as a maintenance electrician at one of the mills in Kaitaia. He has been a certified electrician for about 40 years or more.

[5] In respect of the plant itself. The plant at Kaitaia produces a number of wood products, including Triboard, which is, I am told, a three layered panel for use in structural walls, floors, bench tops and shelving. Within the mill there are what is described as two manufacturing lines which manufacture the Triboard, Board Line

One and Board Line Two. At the end of Board Line One is an enclosed steam press. That is a large press enclosed in a single confined room made of two levels.

[6] The summary records that Triboard enters the lower level and steam is injected into the room to heat the boards. The room becomes engulfed in steam and formaldehyde. The steam and formaldehyde then pass through the upper level of the press where it is extracted through the roof into a scrubber and admitted into the atmosphere. Because of the steam and dangerous submissions the enclosed steam press is a restricted area. It is important to note formaldehyde was not being used at the time. Workers frequently access the lower level of the press during their shift and doors to the lower level have locks and warning signs of the dangers of the press and that it is a restricted area.

[7] The upper level of the press is accessed less often, Juken says once or twice a year. However I note in an affidavit from Mr Black, one of the directors of the company, that the area may be accessed more than once or twice a year but not significantly more. Access to the upper level was via a wooden door. The door used to be secured by a padlock and a key that workers were to obtain from the press operator, the padlock went missing approximately three years ago and was not replaced. It is agreed that there were no signs on the wooden door to warn workers of the dangers of the press or that it was a restricted area. Workers stated that they had either never seen signs on the door or that there used to be signs but they had been missing for the three years.

[8] Shortly after Mr McLeod began working at Juken he was tasked by the electrical engineering manager with replacing a heat probe on the upper level of the enclosed steam press. The heat probe senses a heat level within the press and alerts the press operator in the control room of a potential fire.

[9] On the day in question, 17 July, Board Line One had been shut down for some unplanned maintenance. Earlier that morning Mr McLeod told Mr Walker he would take the opportunity to replace the heat probe. He continued to Board Line One where he spoke briefly with the workers carrying out maintenance on the press. He continued to the control room to ask the press operator how much time he had before the press

would be activated. Nobody was there. He then entered the upper level of the press and began installing the heat probe. He had almost completed the installation when he was called away to assist elsewhere in the mill. He left his tools inside the enclosure and left the door open about five minutes before returning to complete the installation.

[10] About 10 minutes later the maintenance work on the press was completed, the press was ready to start up and the press had been down for several hours. A blow steam programme was completed as start of the start-up process. It is standard operating procedure which requires three bursts of steam to be pushed through the press to remove any condensation. Nobody was aware that Mr McLeod was working in the upper level of the press and the press operator commenced the blow steam programme. Mr McLeod heard a "woosh" sound, He had not realised the start-up process had been activated. He saw steam rise up from the press. Before he took his next breath he felt the steam burning his throat. He managed to make his way out of the room and the steam continued to engulf it. His colleagues saw that he was injured and put him in the shower before the ambulance arrived. Those are the facts that I have to proceed on today.

[11] I want to signal that I have today, in Court with me, both Mr McLeod and his wife Ms McLeod. I thank them both for coming into Court today. I appreciate that whatever decision the Court arrives at today will go no way even close to restoring the quality of life for each of you that has occurred as a result of the injuries that you have suffered. No amount of fine imposed on the company, which everybody accepts is appropriate, and no amount of reparation is going to be able, regrettably, to return you to the physical and I imagine the mental condition that preceded the injuries that you have sustained. I wish from a purely human perspective that I was able to do more and regret that will not be the case.

[12] Equally, I want to acknowledge the presence today in Court of a number of members of the Juken New Zealand company. Mr Black has sworn an affidavit, which I will refer to shortly, but there are other members of the company here which I thank them also for their presence in Court and it signals to me the seriousness with which this incident and the company's response to the prosecution is taken. So, I thank everybody for coming into Court here today.

The sentencing process

[13] The Courts task in coming to sentence has been discussed thoroughly in written submissions that have been filed by both WorkSafe New Zealand and by the company and I want to signal my thanks to all of the parties for the assistance that they have provided to the Court in that regard.

[14] One of the factors that the Court has to take into account is the provisions that are set out in the Sentencing Act 2002. It also has to take into account recent case law that has discussed the Health and Safety at Work Act 2015 and the changes that have occurred as a consequence of the repealing of the Health and Safety in Employment Act 1992. So there are a number of technical matters, if I can describe them in those terms, that the Court has to address today. It, regrettably for everybody, will not be a short process in that regard.

[15] It appears to be accepted by all of the parties involved that there are a number of factors that the Court has to take into account and to weigh up in arriving at the appropriate sentence today. All of the parties agree that the approach to sentencing under the Health and Safety at Work Act is a four step process. The Court has to:

(a) assess the amount of reparation that is to be paid to Mr McLeod; and

(b) fix the amount of a fine by reference to the bands that have set out in a case *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020[1]; and

(c) to determine whether further orders under ss 152–158 of HASWA are required; and

(d) make an overall assessment as to the appropriateness of the combined packet of extensions that the Court has to impose, including considering Juken's ability to pay.

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

[16] All the parties agree that the *Stumpmaster* case was significant because it set out four bands of culpability. The first of those bands is where an incident is described as having low culpability - fines of up to $250,000 are imposed. Where there is medium culpability fines of between $250,000 and $600,000 are imposed. Where there is high culpability fines of between $600,000 and $1,000,000 are imposed and very high culpability fines of $1,000,000 and over are imposed.

[17] Those are the bands that the Court has to weigh up. However, what is also accepted by the parties involved is that there are two other aspects that the Court has to bear in mind, that are the provisions of the Sentencing Act 2002 and specific provisions of the HASWA. In particular, the provisions of the Sentencing Act that are relevant include that the Court must arrive at a sentence that holds Juken New Zealand to account for what it has done in the first instance. It also must arrive at a sentence that denounces and deters this sort of behaviour. It must arrive at a sentence that promotes in the defendant company a sense of responsibility for the harm that it has caused the victims of the offending and, equally, it has to arrive at a sentence that protects workers in this case, and the public in general from this type of behaviour.

[18] At the same time the Court has to have regard to the provisions of s 151 of the HASWA, including:

(a) Ensuring that the risk of, and the potential for illness, injury and death that could have occurred;

(b) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred;

(c) the safety record of the company;

(d) it has to consider the degree of departure from prevailing standards; and

(e) the company's financial ability to meet any fines that are imposed.

[19] I am also minded of the purposes set out in the HASWA. It is a new piece of legislation and to that extent there are a limited number of prosecutions that have been

taken and decisions that have flowed from those prosecutions. However, s 3 of the HASWA says the main purpose of the Act is to provide a balanced framework to secure the health and safety of workers in the workplace:

> (a) Protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
>
> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
>
> (c) more significantly in my view, to ensure appropriate scrutiny and review of actions taken by persons performing functions or exercising power under the Act; and
>
> (d) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
>
> (e) securing compliance of the Act through the effective and appropriate compliance enforcement measures.

[20] That is a summary of the purposes that are set out in the Act.

Assess the amount of reparation

[21] The first step therefore, is to assess the amount of reparation. In signalling the assessment that is required to be undertaken it is really the two critical factors of the amount of reparation and the amount of the fine that should be imposed that really divide the informant WorkSafe and Juken in their approach. In all other respects it appears to me there is much common ground as to how the sentencing should proceed. Where the parties differ, is the numbers that should be attributable to each of the steps.

[22] Reparation may be imposed not only in relation to any physical damage to property but also as a result of physical harm that may have occurred to an individual

or individuals and any emotional harm that may have occurred. In that respect it is accepted that Mr McLeod suffered significant physical injuries. There were burn injuries to both the external parts of his body and also internal injuries as a result of breathing in the steam. From a medical perspective they are described as being bilateral full thickness burns to both sides of his left and right hands which required full grafts to his wrists and to the underside and full grafts from the nail beds back to the midway of the top of his hands, internal steam burns to his lungs and stomach lining, steam burns to his face, neck and ears, a burn to his leg at the top of the sock line.

[23] The injuries that I have described required significant treatment. He was transported to Kaitaia Hospital and then he was taken to the critical care unit at Middlemore Hospital. He was placed in an induced coma as I understand it, for somewhere in the order of a day and a half. A number of skin grafts to his hands and other parts of his body were required.

[24] Mr McLeod describes having hallucinations, he was put on methadone and required a number of drugs which methadone was needed to bring him "down" from. His hands were bandaged in splints, he had to have everything done for him. His food was pureed and liquidised as his throat and swallowing reflexes were damaged.

[25] On his release from hospital some of the grafts became infected and he needed further attention in Kaitaia Hospital for a period of about four weeks, although it is not clear to me whether that was as an inpatient or as an outpatient. He required additional therapy to be undertaken for a period of about six months after the skin grafts were completed and I am told today that there are other operations likely to be required because not all of the skin grafts have remained or have taken properly to the point that there may need to be additional surgeries to repair grafts that have not properly healed.

[26] He has undergone therapy both at an emotional level and in a physical level. He has undertaken back to work coaching. He has lost the ability to use his hands for a large number of functions. He cannot now, it is said, hold tools or pick up screws. His hands need exercising each morning to free them up and to begin working. He

carries rubber gloves with him for eating and for toileting purposes. He is not able to wash his hands. He is not able to complete day-to-day grooming exercises and day-to-day chores. As a result of the injuries, he now has incidents of reflux from lesions in his stomach which arise as a consequence of the burns.

[27] At a recreational level I am told today that Mr McLeod has, for a long period of time, been a motorbike rider, a yachtie or a boatie of some description, he is not able to continue with those activities. He is not able to go out into the sun for long periods of time because of the impact, as I understand it, of the sunlight on his burns. In his victim impact statement, he is unable to enjoy intimate activities in the way that he did prior to this incident occurred. He has spoken of both financial loss that he has suffered as a result of this accident, having to effectively retire from work one year earlier than he would have otherwise done so.

[28] I also have a victim impact statement from Ms McLeod. Her victim impact statement at one level speaks largely of the injuries that her husband suffered. However, she also speaks of the emotional trauma that she suffered as she heard of the injuries that her husband suffered in the process of rehabilitation and the anxieties that she has suffered as a result of all of that. She describes life for both her and her husband has never been the same, they are mindful when they go out in the sun. They used to go fishing. Now literally everything has to be covered up, which is uncomfortable on a hot day. She too has had some medical issues which Mr McLeod is not able to assist in her broader rehabilitation as a result of his injuries.

[29] I am satisfied here that the injuries that have been sustained by Mr McLeod are significant. In my view those injuries were also foreseeable. The informant suggests that an emotional harm reparation payment somewhere in the order of $60,000 is appropriate. The defendant says a reparation payment somewhere in the order of $45,000 is appropriate.

[30] The defendant notes that in the period since the incident has occurred Mr McLeod was placed on ACC. That resulted in ACC paying 80 percent of the wage that Mr McLeod otherwise would have been paid. Juken New Zealand of its own volition, topped up his wage by the additional 20 percent that he would otherwise have

been paid. Further to that Juken have contributed to Mr McLeod's recovery through counselling and other associated rehabilitative moves or measures that they have paid for. I do not have any evidence before me as to what amounts they may amount to but it is not disputed that that 20 percent ACC top up and the effectively, occupational health and safety type payments have also been made.

[31] The question here for the Court is at what point does the amount of reparation that the Court has to consider link itself to the culpability? At what point does it link itself to the nature of the injuries and in that sense it is somewhat of a difficult task for the Court to sit here independently of both the prosecution and the defence to place a figure on somebody's suffering. In many respects it is a somewhat distasteful exercise for everybody involved, particularly for Mr McLeod.

[32] When one looks at these issues one can adopt the approach, as was suggested today, that Mr McLeod is not a young man so his working life, so to speak, has not been hampered or diminished to the extent that was referred to in some of the cases that came before me today. That, in my view, is overlooking the obvious, that Mr McLeod will have the injuries for the rest of his life whatever length of time that may be and we are, effectively, asking the Court to place a dollar figure on that.

[33] I am of the view that when one looks at it from this perspective - the hazard was obvious, there were very few, if any, systems that were in place and operative at the time to protect Mr McLeod. That there were other workers around that were aware Mr McLeod was working in a high risk area. As a result of the breakdowns of the systems there were significant injuries that he suffered. There is no dispute about that. The burns to his hands are described as third degree burns. One can endeavour to place a percentage on it and measure that against other cases but like every case they are case specific.

[34] Mr McLeod suffered internal injuries which others did not. He is getting on in life, I do not mean that disrespectfully but I imagine when one gets on in life every single amount of movement, every single amount of ability to move around is cherished more necessarily than a younger person. It is for those reasons that I think in this case reparation at the amount sought by the prosecution of $60,000 is

appropriate and I make an order to that effect, that reparation is to be paid in the amount of $60,000 to Mr McLeod.

Imposition of a fine

[35] In terms of the second stage of the enquiry, as that has been identified in the *Stumpmaster* case, the Court must assess a fine with regard to the aggravating and mitigating factors of the offence itself. In this case, in my view, the aggravating features of the offending are this, and I have touched on them already, the offending was obvious. What we are talking about is a piece of equipment, and I signal I do not understand, to be perfectly fair, how the machine physically works but it is one where steam is injected through it to clean it and then as part of the broader Triboard construction process. The fact that steam is used is of itself signals a risk. The fact that the steam that is used is coupled with formaldehyde (but in this case I accept that if formaldehyde was not being used signals), in my view, a greater risk.

[36] What I am told today is that workers who were operating the press were aware that Mr McLeod was working in the area. Whether they were aware that he was in the press at the time I think is overlooking the obvious, systems ought to have been in place to ensure that somebody who was working in the press was safe. The fact that those systems were not in place is, in part, led to what has occurred today. Further to that, from what I have heard, to put those systems in place would have been relatively speaking, inexpensive.

[37] Previously there were signs on the wooden door and there was a padlock on the wooden door. Those signs and that padlock have gone missing and have been missing for as much as three years. I am told that an interlock type device could have been installed relatively inexpensively. An interlock device or guard would have ensured that if anybody was in the press they would have been required to unlock the door, take the key from the press, which would have stopped the press being operative and used that same key to unlock the door to enter the press. At that point in time there would have been little or no risk of the press starting until that person was out of the press and relocked the door. The key would then be placed back in the press itself. All of that, I am told, would have been relatively inexpensive.

[38] What however, seems to me to be the most inexpensive system in place here it was missing, was communication. Mr McLeod signalled to his supervisor that he would be doing some work in the press while the shutdown was on. They have told the press operator, that work would be done. The press operator has come to Mr McLeod and told him they were ready to start the press up again but it does not seem to me that the simplest of systems, somebody checking that the room was empty, was implemented. That would have been relatively simple and relatively inexpensive in my view.

[39] When one looks at those factors as the aggravating features of the offending, on the one hand the Court would take the view that this could have all been very easily and very inexpensively avoided. In terms of the mitigating features of the offending the Court accepts, and it does not appear to be challenged, that in the period after the offending a number of steps were taken by the defendant company to ensure that the systems, the press, were made safe. To that extent it appears that a process of reviewing the restricted areas had already been started and as recently as April 2017 that was accelerated. It appears that process is to eliminate this as it were put in place and quickly.

[40] The affidavit from Mr Black speaks of $1.5 million being spent on health and safety measures across the company. A large portion of that, I have to say, appears to be on consultancy work but there appears also to be significant other sums are being paid including training, project management, health and safety systems and machine risk assessments. I also note that in the affidavit significant time and effort has been spent on training to staff, 84 permit to work user training persons have been trained, receiver training 198 persons have been trained, safety analysis training 223 have been trained and working in confined space training 204 persons have been trained. That is out of a workforce of approximately 800 personnel across four sites. What is not clear to me is that whether this is health and safety training that would have been completed anyway or whether this is money over and above what was already part of the budgeted programmes.

[41] I accept, on the evidence that I have before me, and it has not been challenged, it is a significant sum. Looking at those factors I would assess here in accordance with

the four bands as set out in the *Stumpfast* decision that this fits somewhere, in my view, at the upper end of the medium culpability, the lower end of the high culpability band. I would assess the starting point on the fine here at $600,000. What is to be reduced in this case, or there are a number of reductions to the fine that I have been invited to consider. I have also been invited to consider an increase to the fine to take into account a previous record of failures to comply with various health and safety legislation.

[42] Juken has a number of previous convictions for failures to comply with health and safety regime, the most recent being in 2014 of a fine of $57,000 was imposed and reparation of $12,000 was imposed by Her Honour Judge Morris at Masterton District Court. That was a fine and it was imposed under the old regime with a maximum penalty of $250,000 was imposed, an end fine of $50,000 or representing over 20 percent of the total fine available signals to me that it was a significant incident. I am of the view that the fine needs to be increased to take into account the previous history of failures but it need only be increased by 10 percent.

[43] There are recent and relevant convictions which should leave a preliminary end fine of $660,000. However, it is also agreed that there are a number of factors that would warrant the fine that I have spoken of being reduced.

[44] The first of those factors is, in my view, the co-operation that has been undertaken by Juken New Zealand with WorkSafe New Zealand. Nothing before me has suggested that Juken were in any way obstructive, in fact quite the reverse.

[45] The defence suggest that 15 percent is available for co-operation. I am of the view that the fine should be reduced by 10 percent or $60,000 to take into account the co-operation that Juken has made with the prosecution. In my view it has been conducted that in a way that one would expect of a company. Further to that it is, in my view, evidence of the remorse that the company and the directors have for the offending that has occurred today, the best measure, in my view, is two things, the guilty plea and the co-operation and it is appropriate, in my view, that the fine be reduced to reflect the remorse that the company has demonstrated. They have, in the affidavits, suggested that an apology to Mr McLeod is to be made. That has not been

made in Court today, I do not see that as being an oversight by the prosecutor the evidence is here. I trust that that apology will be made at some point in the near future. I am going to reduce the fine by further $50,000 to record the remorse that has been, in my view, demonstrated.

[46] The next factor is the reparation. I have directed that $60,000 is to be paid to Mr McLeod. The High Court in the *Stumpmaster* case were critical of the percentages being given to take into account the reparation amounts, particularly if those percentages meant that the amount of the discount exceeded the amount of the reparation that was being paid. In my view it is appropriate that the fine be reduced by $60,000 to take into account the reparation that is being paid. That leaves a preliminary end point of $490,000. A guilty plea has been entered at an early opportunity in accordance with the Court of Appeal authority in *Hessell v R*[2] a further 25 percent discount is available to Juken. With rounding that as most favourable to them, that amounts to a further reduction of $125,000 which, in my view, would leave an end point there of a fine of $365,000. That is the fine I intend to impose on the company today.

[47] In addition to that costs arising from the prosecution of $1100.29 that is sought, that is agreed to be paid and I am making an order to that effect today.

[48] To summarise the penalties both in terms of fines, costs and the additional reparation amount I am making the following orders:

(a) A conviction will be entered today in respect of this matter.

(b) I am directing reparation in the amount of $60,000 is to be paid to Robin McLeod. That is to be paid in 10 working days.

(c) Secondly, a fine of $365,000 is to be paid.

(d) Thirdly, costs to the prosecution in the amount of $1100.29 is to be paid also.

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[2] *Hessell v R* [2010] NZSC 135

[49] My final remarks. Again I return to everybody today, in particular to Mr and Ms McLeod. Thank you for coming into Court today. As I signalled at the outset nothing that the Court has said today, regrettably, is going to restore you to your physical state, if I can use that description, as you were prior to these injuries. My wish is that it could be the case, unfortunately it cannot. I apologise also for having to discuss reparation amounts in a rather cold and perhaps callous way but that is what the law requires.

[50] Equally, I thank Juken for their attendance today. It may not be necessarily the result that you were seeking but I am grateful for your attendance and the efforts that you have made today. I thank counsel also for their efforts in helping me to understand what may or may not have occurred on the day. I am grateful for your efforts.

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Judge GL Davis
District Court Judge

Date of authentication: 22/03/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.