IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2017-092-007807
[2019] NZDC 12202

WORKSAFE NEW ZEALAND
Prosecutor

v

BULLDOG HAULAGE LIMITED
Defendant

Hearing: 9 May 2019

Appearances: E Boshier for the Prosecutor
A Simpson for the Defendant Company

Judgment: 9 May 2019

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] On 13 July 2016, Mr Colin Campbell, a truck driver employed by Bulldog Haulage Limited ("Bulldog"), sustained serious lower leg injuries after being hit by a reversing forklift at a distribution centre operated and controlled by The Supplychain Limited in Mangere. A subsequent WorkSafe investigation identified failures on the part of Bulldog to comply with its statutory duties under the Health and Safety at Work Act 2015.

[2] Bulldog appears for sentence having pleaded guilty to one charge of contravening s 34(1) and 34(2)(b) of the Act. Specifically, that being a PCBU, it had a duty in relation to its truck driver workers, including Mr Campbell, and had failed to, so far as was reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter, namely

Linfox Logistics (NZ) Limited, The Supplychain Limited and Progressive Enterprises Limited. The particulars of the charge being that Bulldog failed to consult with Linfox Logistics (NZ) Limited, The Supplychain Limited and Progressive Enterprises Limited about a safe system of work for truck drivers and forklift operators to follow at the Auckland Regional Distribution Centre when loading curtainsider trucks.

[3] The maximum penalty for this offence is a fine not exceeding $100,000.

[4] It is accepted that there is no guideline judgment for sentencing under s 34 of the Act. It is agreed that the decision in *Stumpmaster v WorkSafe New Zealand* provides applicable guidance on the sentencing approach general in these matters.[1]

[5] Turning to the facts, I adopt the WorkSafe summary with which I understand there to be no disagreement.

[6] Bulldog operated a transportation business for freight and palletised goods. I say "operated" because it no longer does so. A significant part of its work involved providing cartage services pursuant to a contract with Linfox. In 2013, Linfox had entered into a contract with Progressive Enterprises for the collection, transportation and distribution of goods between various load points and delivery points.

[7] One such load point was the Auckland Regional Distribution Centre. That centre is operated and controlled by The Supplychain Limited. That entity employs more than 400 employees who work at the distribution centre, including forklift operators, Mr Terekia and Mr Awhetu. There were also Linfox employees on this site. Bulldog employees, including Mr Campbell, collected goods from the distribution centre using curtainsider trucks for delivery to supermarkets on an almost daily basis from June 2014. When at the distribution centre they were under the influence or direction of The Supplychain for the loading of their trucks.

[8] On 13 July 2016 Mr Campbell was at the distribution centre using a Bulldog curtainsider truck to pick up a load of goods for transport to Countdown supermarkets. He arrived in the loading bay for curtainsider trucks and communicated with

[1] *Stumpmaster v WorkSafe New Zealand* [2018] 3 NZLR 881 (HC).

The Supplychain forklift operator, Mr Terekia, about the loading and was advised that Mr Terekia would be loading his curtainsider truck.

[9] Mr Campbell proceeded to open the curtains on both sides of the curtainsider truck and then moved to open the curtains on the trailer unit. While he was in the process of doing so, he was hit by a reversing forklift operated by Mr Awhetu, which ran over his left ankle. Unbeknown to Mr Campbell, Mr Awhetu had decided to assist Mr Terekia with the loading of the truck. He had picked up a pallet from the loading bay, reversed around the back of the curtainsider truck and then come into contact with Mr Campbell.

[10] Mr Campbell suffered multiple fractures in his left lower leg, ankle and foot and required multiple surgeries. He spent six months off work as a result of his injuries, ultimately returning to work in January 2017.

[11] WorkSafe's investigation of the incident established the following:

(a) That Bulldog had failed to consult, co-operate or coordinate with Linfox, Progressive and The Supplychain about a safe system of work for truck drivers and forklift drivers to follow at the distribution centre when loading curtainsider trucks.

(b) That Bulldog was aware there were no driver safe zones at the distribution centre for truck drivers to remain in whilst their curtainsider trucks were being loaded by forklift. Bulldog did not raise any concerns with the other PCBUs about the lack of identifiable driver safe zones. While Bulldog did instruct its truck drivers to follow the approach taken at other sites, which is standing at the front of the cab or at the rear of the trailer, it failed to check with Linfox, Progressive or The Supplychain as to whether this was consistent with the rules at the distribution centre. Bulldog also failed to raise any concerns regarding the sufficiency of the site inductions given by Linfox to its drivers at the distribution centre.

(c) Bulldog was also aware that curtainsider trucks were being dual loaded, (that is, loaded by two forklifts at the same time) on some occasions at the distribution centre. It did not take any steps to raise this as an issue that needed to be discussed with the other PCBUs.

(d) Whilst the defendant did fail to consult on a safe system of work and the particular issue of dual loading by forklifts, it had been proactive on the issue of reporting concerns about Mr Awhetu's forklift driving, both to Linfox and to The Supplychain, directly in the months just prior to the incident.

[12] Turning to the approach to sentencing. There is no disagreement that the purposes and principles of sentencing that are relevant to this matter have been accurately summarised by WorkSafe. A particular aspect though that requires some comment is that, although Bulldog is the only party before the Court for sentencing in relation to the incident, the two other parties involved – Linfox and The Supplychain (which provided enforceable undertakings to WorkSafe) – were charged with more serious offences which, in the defendant's submission, indicated they were more directly responsible for the accident, and more culpable.

[13] There is no dispute that the decision in *Stumpmaster* sets out the approach to sentencing under the Act. The High Court in that case confirmed a four-step process that is required. Those steps are:[2]

(a) Assessing the amount of reparation to be paid to a victim; and

(b) Fixing the amount of the fine to be paid by reference first to the guideline bands and then having regard to aggravating and mitigating factors; and

(c) Determining whether further orders under ss 152-158 of the Act are required; and

[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3].

(d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[14] The first issue is, accordingly, setting reparation. In this case there have, via the enforceable undertaking process I have referred to earlier, already been significant discussions and agreement about an appropriate reparation amount to be paid to Mr Campbell by those PCBUs involved in this incident. The amount that he was paid was $40,000. I am told that The Supplychain paid Mr Campbell $20,000 as part of its enforceable undertaking; that Linfox paid him $18,000; and that the balance of $2000 was paid by the defendant in this case, Bulldog.

[15] That confirmation has been provided via the defendant's submissions and in my view, taking into account both that amount of compensation and the additional steps by way of assistance provided to Mr Campbell by Bulldog in terms of the personal relationship that he had with the proprietor of Bulldog, I can see no requirement for any further reparation order.

[16] Turning, therefore, to the second issue, which is assessing the quantum of fine. As mentioned earlier, the *Stumpmaster* decision set out culpability bands but those bands were for defendants who were charged under s 48 of the Act. There are no bands set for offending under s 34.

[17] There is no dispute before me though, and it appears to me entirely appropriate, to apply those bands with an appropriate adjustment to take account of the fact that the maximum penalty in this case is a $100,000 fine. The appropriate adjusted bands are, therefore, as follows:

(a)	Low culpability:	A fine up to $15,000
(b)	Medium culpability:	A fine between $15,000 to $30,000
(c)	High Culpability:	A fine between $30,000 to $60,000
(d)	Very high culpability:	A fine between $60,000 to $100,000

[18] Counsel have both referred to two prior decisions with respect to offending against s 34. Those are the cases of *WorkSafe New Zealand v Storage and Distribution Specialists Limited and WorkSafe New Zealand v Premier Project Management Limited*.[3] Both decisions were decided prior to *Stumpmaster* but are of assistance in terms of assessment of culpability.

[19] In WorkSafe's submission the culpability of Bulldog is slightly greater than that in the *Storage and Distribution Specialists Limited* case. In Bulldog's submission its culpability is slightly less.

[20] In that case, Judge Hikaka held that the culpability of the defendant was in the low area of the medium band and he adopted a starting-point for a fine of $15,000.

[21] The basis of WorkSafe's submission is that the culpability of this defendant, as I say, is slightly more serious than in that case. This is because it says that instead of consulting with The Supplychain and Linfox, it instead instructed its drivers to follow the approach taken at other sites without checking that this was consistent with the rules at the distribution centre.

[22] It also says that Bulldog was aware that curtainsider trucks were being dual loaded on occasions and took no steps to raise that as an issue that needed to be discussed with the other parties. It accepts that Bulldog had previously reported concerns about Mr Awhetu's forklift driving but says that it could easily have raised these other issues as was required under its consultation obligation.

[23] The submission on behalf of Bulldog is, as I say, that its culpability is less than that in the *Storage and Distribution Specialists Limited* case. There appear to be several bases for this:

(a) Firstly, it is noted that in that case the defendant had apparently taken no steps to meet its s 34 obligations, whilst it is submitted that Bulldog had taken some important steps, including raising issues about Mr Awhetu's forklift driving.

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[3] *WorkSafe New Zealand v Storage and Distribution Specialists Ltd* [2017] NZDC 27252.

(b) Second, that the defendant in that case had apparently taken no steps to familiarise its employees with work sites they were visiting, and it kept no records of such. That being in contrast to the approach of Bulldog with respect to its workplaces generally.

(c) Third, that the defendant in that case had apparently had no awareness of exclusion zones, whilst Bulldog's employees were trained in the use of exclusion zones. The problem in this case being simply that the distribution centre had not clearly identified those.

[24] Bulldog has accepted entirely that it should have raised the issue with Linfox and The Supplychain. It says though that its failure to do so nevertheless must be seen in context. This is probably the most interesting aspect of this case. Bulldog has submitted that it was one of a multitude of subcontractors operating at the distribution centre. While it had raised the issues of erratic forklift driving, it had declined to engage in any further consultation on that issue or driver safe zones.

[25] I am told that its primary reason for having made that decision was that as a small company reliant on its contract with Linfox for its survival, it had a commercial rationale for being reticent. The other context, of course, being that having raised issues regarding Mr Awhetu's forklift driving, apparently without success, it was reluctant to engage any further.

[26] As I say, that is an interesting point because, given the obligation to consult, one must be careful before taking into account that commercial reality. However, in my view, that is an important context in relation to this offending, as is the overall approach of Bulldog to safety, and the safety of Mr Campbell specifically. I do not consider that its liability is in the medium band level. I do consider that its culpability is in the low band level primarily for the reasons submitted by Bulldog.

[27] In terms of starting point, WorkSafe submitted that an appropriate start-point for a fine was in the vicinity of $20,000. For Bulldog, it was submitted that the level of $6000-$10,000 as a starting point was appropriate. In my view, the appropriate starting point is $10,000.

[28] I now turn to aggravating and mitigating factors. There is no dispute that there are no aggravating factors here. The issue is simply what mitigating factors are present. Again, there is no dispute that the following mitigating factors are present: remorse and payment of reparation; co-operation with WorkSafe's investigation; Bulldog's prior good safety record; and the willingness of Bulldog to take remedial action. Details of that remedial action have been set out in the agreed summary of facts and it is clear those were responsible steps to have taken.

[29] There is no dispute before me that a total discount of 20 percent from the starting-point of a fine is appropriate for those mitigating factors. That takes the level of fine down to $8000.

[30] There is then no dispute that the guilty plea discount appropriate in this case is 25 percent, the plea having been entered early in the process. That reduces the amount of the fine to $6000.

[31] The third step is the issue of ancillary orders. In this case the only order sought is that Bulldog ought to make a payment to reflect the costs incurred by WorkSafe. WorkSafe has sought a contribution to its costs of $1452.69.

[32] On behalf of Bulldog, Mr Boshier has submitted that the breakdown of legal costs, internal and external, provided by WorkSafe does not indicate in any great detail the amount of time and expense incurred with respect to Bulldog as opposed to the other parties involved in this investigation and potential prosecution. Ms Simpson accepts that point has some merit but nevertheless is of the view that it is appropriate for the costs to have been divided on a party-by-party basis.

[33] I have some difficulty, without wishing to be critical at all, of WorkSafe with such an arbitrary approach given the level of charge faced by Bulldog. At the same time, I do not accept Mr Boshier's point that without further breakdown of costs, no costs order ought to be made. Whilst having a moment ago expressed some degree of disfavour with arbitrary approaches, I am nevertheless myself going to take an arbitrary approach around costs. The amount of costs that I will order, which is a discretionary matter for me, is $500.

[34] The final step is to stand back and consider the proportionality of the fine, reparation and costs orders. The overall outcome is that no further reparations are to be paid. A fine of $6000 is to be paid and a contribution to costs of $500 is to be paid. I am satisfied that final outcome is an appropriate proportionate response.

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Judge McIlraith
District Court Judge

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