IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2019-019-001392
[2019] NZDC 18054

WORKSAFE NEW ZEALAND
Prosecutor

v

MCPHERSON CONTACTORS LIMITED
Defendant(s)

Hearing:	26 August 2019
Appearances:	T Williams for the Prosecutor S Connolly for the Defendant
Judgment:	16 September 2019

RESERVE JUDGMENT OF JUDGE G S COLLIN

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[1] McPherson Contactors Limited ("McPherson") has pleaded guilty a charge under regulation 16(1) of the Health and Safety at Work (Mining Operations Quarrying Operations) Regulations 2016 brought against then by WorkSafe New Zealand (WorkSafe). Regulation 16(1) provides that quarry operators and the manager of any quarry must ensure that the manager holds a current certificate of competence as specified in regulations 17 to 22 for the kind of quarrying operation to which the manager is appointed. The maximum penalty for the offence is a fine of $50,000.

[2] McPherson conducts a quarry operation in Te Poi Matamata, extracting alluvial pumice sand which it supplies to civil and rural sites as pit sand or face run for use predominately in the construction and roading industries.

[3] The sole director and appointed quarry manager of McPherson is Stephen McPherson who has managed sand pit operations for a period of over 20 years. Mr McPherson did not hold a current certificate of competence as required by the regulations.

[4] The charging documents was laid on 18 February 2019. McPherson's first appearance was on 27 March 2019 and an early plea of guilty was entered on 18 April 2019.

[5] McPherson's has three previous convictions, two for breaches of restricted land use and one of discharging water contaminants, all arising from charges laid in 2009.

[6] There is no history of breaching Health and Safety Regulations.

[7] McPherson's employs four workers in the quarry. WorkSafe reports that there are no known incidences of workers being injured whilst in the employment of McPherson, nor have any other breaches of Health and Safety Regulations been reported. They are entitled to reply on their previous good record.

[8] Mr McPherson is an experienced operator. At his invitation WorkSafe attended at McPherson's quarry on 16 May 2016 because McPherson wanted to ensure that its business complied with Health and Safety Regulations. At the same time Mr McPherson was advised of the requirement to appoint a quarry manager who held a certificate of competence as required pursuant to regulations 16 and 21. Mr McPherson was also advised of a WorkSafe workshop covering health and safety compliance which was soon thereafter attended by both himself and his wife Diane McPherson. It is uncontested that at least from 16 May 2011 Mr McPherson know of the requirement that McPherson have a suitably qualified person on site.

[9] A further inspection was conducted on 26 February 2018, during which WorkSafe where advised that no person on site held a certificate of competence including the appointed quarry manager Mr McPherson.

[10] On 9 March 2018, WorkSafe issued an improvement notice on McPherson, regarding their failure to appoint a quarry manager with a current certificate of competence, and that no other person present at the site was the holder of the required certificate.

[11] On 27 June 2018 Mr McPherson attended a further interview with WorkSafe at which he confirmed he remained the quarry manager and that he did not hold the required current certificate of competence.

[12] On 2 July 2018 McPherson engaged an independent A grade quarry certificate of competence holder to assist with the overview of quarry operation. Since then that person has visited the quarry fortnightly and has provided ongoing site reports. However the quarry continues to operate without an onsite quarry manager who holds a current certificate of competence as required by the regulations.

[13] In their submissions WorkSafe emphasise that the purpose of the Health and Safety Work Act is to protect workers and other persons against harm by eliminating or minimising risks from work sites, securing compliance though effective and appropriate compliance and enforcement measures, and providing a framework for continuous improvement and progressively high standards of work health and safety. In furthering these principles workers are to be given the highest level of protection reasonably practicable against harm to their health, safety and welfare from hazards and risks arising from their work and from specified types of plant.

[14] This is the first prosecution taken by WorkSafe under regulations 16 and 21. They emphasise that a sentence should be imposed that recognises the need for general and specific deterrence, to send a clear and strong message to quarry operators that the required certificates are essential in what are hazardous work environments, and that emphasises that managers must have the recognised level of skill and expertise to identify and avoid potential harm to those involved in quarry operations.

Approach to sentencing

[15] The leading case on the approach to sentencing in health and safety prosecutions is the High Court decision in *Stumpmaster*[1] which endorsed the approach taken in *Department of Labour v Hanham and Philp Contractors Limited* [2]. This confirmed a four-step process:

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

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

(c) Determine whether further orders under sections 152-158 of the HSWA are required; and

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

[16] WorkSafe submits that the approach outlined in *Stumpmaster* is relevant to this prosecution and should be adopted.

[17] Section 151(2) of the Act refers to specific sentencing criteria which is to be applied and which requires the Court to consider:

(a) Sections 7 to 10 of the Sentencing Act;

(b) The purpose of the Act;

(c) The risk of, and the potential for illness, injury, or death that could have occurred;

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.
[2] *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79 High Court, Christchurch.

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

(e) The safety record of the persons (including, without limitation, any warning, infringement notice, or improvement notice issues to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present;

(f) The degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) The person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[18] McPherson takes no issue with this approach subject only to noting than unlike in *Stumpmaster* the charge against McPherson was one of omission that did not involve a failure which exposed any individual to any identifiable risk or resulted in any death or injury or illness. Also, in *Stumpmaster* the potential maximum fine is $1,500,000 rather than $50,000.

[19] McPherson does not dispute the proposition that the bands identified in *Stumpmaster* can be applied but scaled down to fit the $50,000 maximum fine available for a regulation 16 breach. Support for this approach exists in *WorkSafe New Zealand v Topham Holding Limited*[3] and *WorkSafe New Zealand v Scott William Larsen*[4]. In Stumpmaster four bands of culpability where identified, low, medium, high and very high.

[20] Although both WorkSafe and McPherson accept the proposition that it may be appropriate to define bands, there is a difference in each of their calculations. WorkSafe proposes that the low band be a fine of up to $10,000, medium between $10,000 and $20,000, high between $20,000 and $35,000 and very high between $35,000 and $50,000. These bands were proposed as being those utilised in the case

[3] *WorkSafe New Zealand v Topham Holding Limited* [2010] 2 NZLR 298.
[4] *WorkSafe New Zealand v Scott William Larsen* [2018] NZDC 16740.

of *WorkSafe New Zealand v Scott William Larsen,* an offence under s 103 of the Act punishable by a fine up to $50,000. McPherson calculates $50,000 as being 3.33 percent of $1,500,000 and by scaling proposes the bands at a low culpability $8,325, medium culpability $8,325 to $19,980, high culpability $19980 to $33,000, very high culpability $33,000 plus. I do not consider that a strictly mathematical basis needs to be adopted in order to define the bands. Overall, I prefer the bands proposed by WorkSafe and adopted in *Larsen* and for that reason, accept the bands as proposed by them.

[21] WorkSafe submit that a starting point in the very high band is appropriate to reflect the culpability of the offending. They suggest a starting point in the vicinity of $40,000 for the following reasons:

(a) McPherson's prolong failure to comply with regulations. The first notification to McPherson was given on 30 May 2016 and there remains ongoing non-compliance with the requirement that a quarry manager with the requisite certificate be on site;

(b) That McPherson exposed persons working on the site to a serious risk of harm arising from the unmanaged risks of operating a quarry in the absence of a qualified manager able to provide the necessary health and safety oversight. They maintain that the failure to have a properly certified manager meant that the likelihood of a worker receiving a serious injury was greatly increased.

(c) That McPherson's conduct departed significantly from industry standards and guidelines which had been in place as a statutory requirement since at least the passing of the Quarry and Tunnels Act 1982.

[22] In mitigation WorkSafe accepts that discounts are available for an early plea of guilty 25 percent, the co-operation of McPherson 5 percent and the previous good record of McPherson's 5 percent. Total discounts are proposed of 35 percent and an end fine of $27,000 is sought.

[23] McPhersons submit that the offending falls within the low culpability band and does so in reliance on *Larsen* where a starting point of $20,000 was adopted, and *Topham* where the company was fined $20,000. In *Topham* the defendant failed to ensure that asbestos was removed before the demolition of a building which was done by himself with family help and the assistance of other contractors. There was a present danger with those onsite being exposed to a known risk. In *Larsen*, damaged machinery without proper protection was being used in a forestry operation. There was an identifiable risk to the safety of the operator. Despite having been issued with an improvement notice Mr Larsen did nothing to remedy the identified damage. The Judge took into account the nature of the industry, the inherit risks, and Mr Larsen's complete refusal, despite many requests to do anything to remedy the risk that had been identified. McPherson argues that both cases can be distinguished because in each there were present and identifiable risks coupled with non-compliance, whereas this case is one of non-compliance without any known present risk.

[24] In support of a proposed starting point of $3,000, which is towards the low end of the lower band, McPherson's emphasis:

(a) That no injury occurred.

(b) That no specific risks or unsafe practices where identified in the summary of facts.

(c) That other than the prosecution, McPherson has a spotless health and safety record.

(d) That the mining operation is a shallow pit mine which does not involve the use of explosives, crushers or any fix plant. The potential for injury is therefore less than in other quarry operations.

(e) That Mr McPherson is an experience operator, who although not formally qualified, has a very good safety history.

(f) That the initial contact made by WorkSafe was at Mr McPherson's invitation so that any potential hazards could be identified and eliminated.

(g) That McPhersons cooperated with WorkSafe.

(h) That steps were taken, including trying to employ someone with the necessary qualification and obtaining the oversight of a certificated manager.

[25] I do not entirely accept the starting point proposed by either WorkSafe or McPherson and assess McPherson's culpability as being within the medium band. I do so because:

(a) Apart from McPherson's failure to comply there is a lack of other aggravating facts, as present in both *Larsen* and *Topham.*

(b) However the fact that a manager with the required certificate was not present at the quarry was identified and brought to the attention of McPherson in March 2016. This was an ongoing default which persisted for a two-year period prior to charges being laid.

(c) The purpose of the certificate is to ensure that there is an onsite manager trained and capable of identifying and eliminating risks within the environment.

(d) Even if Mr McPherson was an experienced quarry operator (and was able to identify hazards) the failure by McPherson to employ a suitably qualified manager meant that there was the potential for the quarry to be managed by someone without the skills and training required to identify and eliminate potential hazards.

(e) During that two-year period McPhersons failed to take sufficient steps to ensure that Mr McPherson obtained the appropriate qualifications.

(f) Despite efforts being made they failed to employ an onsite manager qualified for that purpose.

(g) McPhersons have the capacity to meet any fine imposed.

[26] The absence of identifiable risk factors, combined with the prolonged period of time during which the default remained active, and the potential for harm arising from the operation of the quarry by a manager without the requisite qualifications, justifies a starting point in the middle of the medium band. For that reason, I set the starting point at $15,000.

[27] I do not assess there are any other aggravating factors that justify an uplift. WorkSafe identity as an aggravating factor McPherson's prolonged failed to comply, but this is already accounted for in setting the starting point.

[28] Mitigating factors include:

(a) The early plea of guilty.

(b) McPherson's co-operation with WorkSafe.

(c) Subsequent steps taken to comply including the unsuccessful attempts to hire a person with the requisite qualification and the hiring of a person with a A grade qualification on 2 July 2018.

(d) Steps taken by Mr McPherson to enrol in and complete the appropriate qualification.

The early guilty plea justifies a discount of 25 percent and the other factors combined a further 10 percent. Overall the mitigation factor justify a 35 percent discount being $5250.

[29] Accordingly, on McPhersons plea of guilty they are convicted and fined $11,250.00

Costs

[30] WorkSafe claim costs. These are opposed by McPherson.

[31] I accept the submission made by WorkSafe that costs can be awarded. Their position is supported by the High Court in *Stumpmaster*. Costs are therefore awarded pursuant to s 152(1) of the Act in the amount of $1,689.64.

G S Collin
District Court Judge