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IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-027-000441
[2020] NZDC 10180

WORKSAFE NEW ZEALAND
Prosecutor

v

NEW VISION BUILDING AND CONSTRUCTION LIMITED
Defendant

Hearing:	27 May 2020
Appearances:	T Williams for the Prosecutor B Alcorn for the Defendant
Judgment:	27 May 2020

NOTES OF JUDGE M-E SHARP ON SENTENCING

Introduction

[1] The Defendant, New Vision Building and Construction Limited, appears for sentence having pleaded guilty to one charge of contravening s 36(1)(a) and s 48 Health and Safety at Work Act 2015 ("HSWA").

[2] The events giving rise to this prosecution came about because on or about 25 April 2018 while working as an apprentice building contractor to New Vision

Building and Construction Limited, The victim was tasked with constructing an agricultural shed on a farm. He was using a man cage attached to a tractor front loader to work at height. The man cage became detached from the tractor and both fell about 3.5 metres to the ground. The victim's body was suspended in a harness outside the man cage but his feet made contact with the ground resulting in serious injury to his knees. He was required to take approximately three months off work.

The Prosecution

[3] The Prosecution proceeded on the basis that the Defendant had a duty to ensure so far as it was reasonably practicable, the health and safety of workers working for the Defendant including The victim whilst those workers were at work in the business. The Defendant failed to do so and that failure exposed The victim to a risk of death or serious injury from a fall from height.

Agreed summary

[4] There is an agreed summary of facts which I wish to be attached to the sentencing notes, so that all I am required to do at this point is to paraphrase exactly what happened. However, in brief or as brief as I can be, the Defendant is both a limited liability company and a PCBU which is a person conducting a business or undertaking in New Zealand. The Defendant is in the business of residential construction. It carries out new builds, renovations and extensions, with some agricultural building erection.

[5] Mr Kieran Horne is the sole director and he is present at this sentencing on behalf of the Defendant, by AVL. In March 2018, the Defendant verbally agreed with Jacobs Contracting Limited to construct a shed at its premises in Kerikeri for the storage of agricultural equipment. The Defendant engaged independent contractors, one Adam McManus and The victim to complete construction of the shed. Those two men had been individually contracting to the defendant to provide labour services since May and March respectively 2017. Mr McManus was a qualified builder; The victim an apprentice builder.

[6] As luck would have it, the director of Jacobs had a tractor with forks and an attachment tool as well as a man cage which he lent to the Defendant for use in constructing the shed. I say as luck would have it because whilst this might have seemed to be a cheaper means of achieving the end, that is to construct a shed, in fact because it was defective of course substantial injury was caused and the Defendant has not only had to admit responsibility but has had to pay reparation to The victim A bit more about that shortly.

[7] The man cage was not certified. It did not have a self-closing gate mechanism, a mesh back panel or an appropriate anchor point for a harness system. The director of Jacobs instructed both McManus and The victim how to use the tractor, but they were not shown how to put on the fork attachment. The tractor and attachments, man cage were used to work at height between 19 and 24 April 2018. On the evening of 24 April 2018, a cherry picker was delivered to the site for working at height the next day but on 25 April 2018, Mr McManus and The victim continued to use the tractor and attachments with the man cage for this purpose considering it quicker and easier to set up and use.

[8] Unfortunately, and unbeknownst to them, the tractor and front loader, excluding the man cage and fork attachment, had been used by Jacob's worker early in the day, at which time the fork attachment was disconnected and reconnected to the tractor and tool carrier. It was reconnected to the tractor and attachments by Mr McManus and The victim using chains. Mr McManus operated the tractor; The victim was inside the man cage which was raised to 3.5 metres. He drilled and bolted end posts and double rafters for the shed for around two hours. He was harnessed to the iron bracing at the rear of the man cage.

[9] However, as he was standing at the front of the man cage, using the drill with his right hand and resting his left arm on the roof purlin, the forks and man cage became detached from the front loader tool carrier and fell to the ground. The man cage dropped straight down from below The victim and he fell approximately 3.5 metres to the ground with the man cage but ended up suspended in the harness outside it, with the harness sling loop over the top of the man cage rear support. As I have

already said, because his legs made contact with the ground he suffered serious injury to his knees.

The Prosecution

[10] The basis upon which the Prosecution commenced was because WorkSafe's investigation revealed that the Defendant should have developed, implemented, monitored and reviewed an effective safe system of work for the construction of the agricultural shed, should have provided effective information, training, instruction and supervision to its workers, should have ensured appropriate plant and equipment was used by them when working at height and should have adequately consulted, co-operated within co-ordinated activities with Jacobs as to the scope of their respective health and safety duties, in particular to ensure risks of working at height were appropriately managed. The Defendant failed to do those things.

Approach to this sentencing

[11] The guideline judgment which all Courts use for the purposes of sentencing under the Health and Safety at Work Act is *Stumpmaster v WorkSafe New Zealand.*[1] There, the Court confirmed a four-step process:[2]

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

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

(c) Determine whether further orders under ss 152 to 158 HSWA are required.

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

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.
[2] At [4].

Reparation

[12] I deal first with reparation. In its very full and helpful submissions, WorkSafe suggests that reparation of between 10 and $15,000 should be paid to the victim. It also suggest that there should be additional reparation paid to the victim for the shortfall between what he received by way of ACC and his particular needs. Though I will deal with this again under the head of remorse, in fact the Defendant has already paid reparation to the victim. He has paid the sum of $15,000 and his counsel suggests that a global award of $15,000 is more than appropriate in this case.

[13] Given that the Prosecution has sought a range of between 10 to $15,000, plus the $1144.55 being the shortfall between ACC and what his normal wages would have been, it is clear that the $15,000 that has already been paid is more than enough to meet the Prosecution's demands and I see it as an appropriate award to make.

[14] I will divide it into reparation for emotional harm of $13,855.45 and consequential loss reparation of $1144.55 which in the aggregate amount to the $15,000 that has already been paid to the victim.

[15] Beyond saying that I have read the victim impact statement, and that I acknowledge The victim has suffered pain, difficulty and now suffers from stress and anxiety about working at height plus there have been personal physical consequences for him inasmuch as he is unable to carry out some recreational activities which he formerly enjoyed, I will say nothing more as to the reason that I find the sums ordered to be appropriate. Suffice to say that, as the Prosecution says however, comparable cases have resulted in reparation awards which are within the realm of that which I have ordered, and in particular I refer to *Department of Labour v Hanham & Philp Contractors Ltd*, *WorkSafe New Zealand v Marcel Syron Priority One Construction 2012 Limited*, *WorkSafe New Zealand v Rickie Shore Building Ltd*, *WorkSafe New Zealand v Totally Rigging Ltd*.[3]

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[3] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; *WorkSafe New Zealand v Marcel Syron Priority One Construction 2012 Ltd* [2016] NZDC 27011; *WorkSafe New Zealand v Rickie Shore Building Ltd* [2016] NZDC 18215; *WorkSafe New Zealand v Totally Rigging Ltd* [2016] NZDC 21266.

Quantum of fine

[16] I now move to assess the quantum of the fine. Before I do so, however, I make it clear that I am not going to impose a fine in this case because the Defendant company is of very poor means: it is simply not financially viable. Given that we are also in still a national state of emergency because of Covid-19, when many employers and employees have lost and will sadly continue to lose their livelihoods, I consider that imposing a fine on a small company in financial difficulties would be quite nonsensical and not at all in line with the authorities.

[17] However, I do accept that the Prosecution likes to address Courts in sentencing matters such as this on comparable cases in order to give the Court a hallmark range of options, shall we say, for sentencing, particularly given that the Sentencing Act 2002 requires, amongst its purposes and principles, that there be consistency in sentencing practice, particularly given similar charges and similar facts. I accept and understand that it is important to now address how (if I was going to impose a fine) I would arrive at it.

[18] First of all, I look at the four guideline bands for culpability set out in *Stumpmaster v WorkSafe New Zealand* and I find, as the Prosecution suggests and not gainsaid by the Defence, this is a case that falls into the medium culpability range or band, with a starting point of between $250,000 to $600,000.[4] Where the Prosecution and I disagree a little is that WorkSafe suggests that the culpability of the Defendant in this instance places it at the higher end of that band. The Defence suggests that it should be at the lower end of that band.

[19] Whilst I do not of course mean to derogate from the consequences, physical and emotional that were suffered by the victim in this instance, when one deals with as many cases of this type as I do then it is difficult to see this case as being any more than around the middle or median of the medium culpability range. Therefore, I do not accept the Prosecution's submission that there should be a fine starting point in the range that is submitted, that is $500,000. The Defence submits that a starting point of $300,000 is consistent with relevant case law and the facts of this particular case.

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[4] Above n1, at [4].

[20] I agree with the Prosecution's careful analysis of the factors which allow the Court to determine not only the band into which the offending falls but also where exactly in that band. So, I will very briefly traverse those now to then indicate where I would have started were I going to impose a fine.

[21] Could death, serious injury or serious illness have occurred, or could it reasonably have been expected to have occurred? (s 151(2)(d) HSWA). The answer has to be yes. Of course the risk of harm from a fall from height is serious and can result in significant injury or death. Such risks are indeed well known in the construction industry.

[22] What was the degree of departure from prevailing standards in the relevant industry? The Prosecution submits that the Defendant departed significantly from industry standards and guidelines for working at height. Certainly, there was a significant departure but not an unusual departure I have to say, particularly where building is being conducted on a farm. That is not to say that it is not reprehensible and, more particularly, such things occur in the realm of small company practice.

[23] The Defendant accepts that the man cage was missing certification and that it was also missing a self-closing gate mechanism, a mesh back panel and an anchor point for a harness system. I accept that the tool carrier was found post incident to have a broken pin locator guide. I imagine that had Jacobs not offered the equipment to the Defendant, proper equipment which did meet the necessary standards would have been hired. It is just a shame that is not what happened. But it is not just the provision of the equipment which went wrong here, it was that at the time of the incident the workers were unsupervised by anybody competent in the use of the tractor and man cage. So, I do accept that there was a significant departure in this instance.

[24] The obviousness of the hazard – it was certainly obvious and the risk foreseeable. The availability, cost and effectiveness of the means necessary to avoid the hazard. As the prosecutor acknowledges, there is certainly a cost in developing a safe system of work to the provision of training and supervision as well as ensuring appropriate plant is available. But the Defendant is no different from so many other very small companies operating in New Zealand. The margins in the building industry

are low and becoming lower. I know for a fact that many small building companies will do whatever they can to keep costs down in order to acquire contracts and this may be one such example. I am not sure.

[25] However, when determining where within the medium culpability band an incident such as this sits, in my view one must bear in mind the economic circumstances of a small company and whether it did have the means available to avoid the hazard or mitigate the risk of its occurrence. That is not to say that it is absolved of legal or other responsibility, but it is in a different situation from a very large company which has greater resources. It is there that I find there is a difference.

[26] Accordingly, I have reached the conclusion that somewhere between the two figures which are suggested by counsel is an appropriate starting point, namely $400,000.

Aggravating and mitigating features

[27] There are no aggravating features of the offending. Equally there are no mitigating features of the offending but there are substantial personal mitigating features and they are as follows. The Defendant had no blemishes on its previous safety record and the Prosecution suggest that a five percent discount to reflect this is appropriate. I agree. The Defendant has already paid reparation which is not only an offer to make amends but is also indicative of remorse. That means that it is also entitled to a further discount, which I do not feel the need to particularly quantify at the moment. The Defendant co-operated fully with the investigation. The Prosecution suggest that a five percent discount is available. I would agree with that.

[28] It should also be remembered that the Defendant was not in that category of company which had no health and safety plan. In fact, the opposite is true. Prior to the accident New Vision was already a member of Hazard Co which provides health and safety systems and advice to be used by companies within the construction industry to empower them to effectively manage their health and safety responsibilities. The Defendant used this health and safety management system to assess the actual and potential risks at the site and to identify appropriate controls and

to ensure that The victim had appropriate personal protection equipment. But where it really fell down is in having failed to adequately assess the equipment which was offered for the purposes of the contract by Jacobs and it failed to train and supervise its workers for working at height.

[29] The Defendant pleaded guilty at a very early opportunity and it is accepted by all concerned that the full *Hessell v R* 25 percent discount is appropriate for this.[5] That would have meant that from $400,000 starting point the Defendant would have been entitled to aggregate discounts of over 50 percent which would have reduced the fine to $200,000. I consider that would have been an appropriate fine under all of the circumstances had the Defendant been able to meet it.

Training order

[30] However, under s 152(1) HSWA, the Court may order the Defendant to pay to WorkSafe a sum that it thinks just and reasonable towards the cost of the prosecution and may order a training order for the Defendant. The purpose of a training order is to make an offender take action to develop skills that are necessary to manage work, health and safety effectively. The Defendant has in fact applied to the Court for a training order. The specifics of it have been considered by WorkSafe and are agreed.

[31] It will require the Defendant to provide its workers and director, that is three people, with training concerning working at height, particularly the use of harnesses for a New Zealand Qualifications Authority qualification, NZQA unit standards 15757, 23229, 17600 and 25045, with the training provider Vertical Horizonz or a similar NZQA accredited provider and will require the Defendant to provide its workers and director with training concerning working at height (use of mobile elevated platforms) for an NZQA qualification, NZQA unit standards 23966, 23960, 23961, 23962, 23963 and 23964 with the same training provider or a similar NZQA accredited provider.

[32] Those conditions are to be complied with within six months of the date of the order and following completion, the defendant is to provide copies of the certification

[5] *Hessell v R* [2010] NZSC 135.

from the training provider to the Court and WorkSafe to evidence that the training has been completed. The costs involved in complying with that order are to be met by the Defendant. That is an entirely appropriate training order and I consider it is an entirely appropriate alternative to the imposition of a fine given the Defendant's personal circumstances, which I will refer to now.

[33] As my Brother Judge Brandts-Giesen, said in *WorkSafe New Zealand v Kaye's Bakery Ltd:*

> While a fine must bite, it must not kill. Small to medium businesses are the life blood of this nation but their long-term survival rate is never guaranteed, there is always continual vulnerability.[6] It is not for this Court to push a company into receivership or liquidation because if that happens staff lose jobs, expertise is lost and workplace associations are dissolved.

Defendant's position

[34] Never was that utterance more true than it is today. The Defendant has three employees and Mr Horne, who is present with us today by AVL, is its sole director. He has lodged an affidavit with the Court that the Defendant company is currently facing significant financial difficulties, and I do not doubt that because of Covid-19 those difficulties are greater than they were when the affidavit was sworn, on 11 February 2020. [redacted] I imagine that projected loss is greater now. The reasons for the Defendant's financial position are revealed in Mr Horne's affidavit, so I will not traverse them now but accept completely that the company is struggling to remain operational. It does own some assets, but they are needed for the day-to-day running of the business.

[35] I have seen an affidavit from the Defendant's accountant. It provides additional detail on the Defendant's declining income and states that the Defendant does not have the means to service any additional debt or liability as a result of which would likely lead to the company becoming insolvent. Those are all sound reasons why this Court should not further endow this company with debt; debt that it will be unable to pay.

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[6] *WorkSafe New Zealand v Kaye's Bakery Ltd* [2018] NZDC 5427 at 30.

[36] The Prosecution, thankfully, accepts the position which is set out in the relevant affidavits and does not oppose the ordering of a training order to be undertaken by the Defendant in lieu of the fine which would otherwise have been imposed.

Sentence

[37] Without further ado then, I therefore convict the Defendant, impose the training order which I have already indicated the terms of.

[38] I order the reparation which has already been paid, so that no further reparation is necessary.

[39] I make it clear that I consider the Defendant to have exercised and demonstrated significant remorse in this matter. It is no mean feat and certainly will not be cheap for the Defendant to undertake the training which is set out in the order, as I have mentioned it, and this at a time when the company is in quite alot of financial difficulty. As I understand it, and I do accept, Mr Horne has continued to keep a close acquaintanceship with The victim I consider that he has done everything that he could on behalf of the company and personally to make amends.

[40] So, the suggestion which is set out in his counsel or, at least, in the Defendant's counsel's memorandum of submission as to a global discount of 20 percent for co-operation, reparation and remorse and a good safety record of 20 percent is one that finds favour with me. Of course, it is not necessary to specifically and definitively quantify such things given that I am not fining the Defendant. However, for the purposes of consistency at sentencing and the Prosecution's desire to be able to refer to other similar decisions in the future, I do mention that.

Costs

[41] Accordingly, I now move to the issue of costs in favour of the Prosecution which are sought in the sum of $2202.03. As I understand it, the Defendant is agreeable to paying those costs. Mr O'Connor is acknowledging that to me now and I, therefore, also order that sum and cost to be paid given that WorkSafe puts a great

amount of work and effort into its investigations and prosecutions and should have some of its costs offset in even just a small way.

Summary

[42] So, in summary, a conviction, training order as discussed, costs in favour of the prosecution in the sum of $2202.03 and the reparation orders which I have mentioned, that is $13,855.45 for emotional harm reparation with consequential loss reparation of $1144.55.

Suppression

[43] As I understand it, and this is unopposed, the Defendant seeks suppression of the affidavits and accounting information provided to both the Prosecution and the Court. I accept that this is appropriate because the financial position of the Defendant company is commercially sensitive and publication could certainly prejudice it. Accordingly, I make that order as well and last, but not least, once again unopposed, I make an order suppressing the name of the victim, [redacted]

[44] Given Covid-19 and all the difficulties that have ensued as a result of it, I change the length of time within which the training order requirements must be completed to a 12 month period, from today.

M-E Sharp
District Court Judge