IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2020-019-005063
[2022] NZDC 3529

WORKSAFE NEW ZEALAND
Prosecutor

v

BAG BOYS LIMITED
Defendant(s)

Hearing:	25 February 2022
Appearances:	T Braden for the Prosecutor H Pryde for the Defendant
Judgment:	4 March 2022

RESERVED JUDGMENT OF JUDGE B A CROWLEY

Introduction

[1] At the end of the rather torturous path this proceeding has had through Court, counsel agreed that the defendant company is simply not in a position to pay whatever sum the Court may fix as an appropriate penalty. The defendant is in a precarious financial position and may not be able to continue at all. Any fine in a sum deemed appropriate under the Act would render that possibility a certainty, and the prosecutor responsibly agrees that such a fine should not be imposed in this matter. One cannot draw blood from a stone.

[2] Both counsel asked that the Court complete the sentencing exercise and fix the amount of any fine that would have been imposed, had the defendant company had the means to pay. I am happy to do that, partly in acknowledgement of the care and skill Ms Braden and Mrs Pryde have brought to the matter, which has been of considerable assistance to the Court.

Charge

[3] The defendant company faced a charge of failing to ensure the safety of workers while working on Bagging Lines One and Two at the defendant's Horotiu site. The charge is under sections 36(1)(a), and 48 of the Health and Safety at Work Act. The maximum penalty is a fine not exceeding $1.5 million.

Facts

[4] The defendant company bags and supplies aggregates and other landscaping material. During 2018/2019, it relocated its factory from Tamaki Makaurau/Auckland to Horotiu, near Kirikiriroa/Hamilton. The Horotiu site had three hoppers. The first was in a container which had a conveyor belt beneath it. Materials went through the hopper, along the conveyor and were bagged and palleted in what the defendant called Bagging Line One. Line One contained new machinery which has been purpose-bought.

[5] A similar operation was in place for Bagging Line Two. The main difference was that the machinery in Line Two was moved and modified from the previous factory.

[6] The third hopper (the Bulk Bag Shaker) was used to bag larger quantities of material – usually a cubic metre or more.

[7] There was other machinery at the site, including a front-end loader and three forklifts. None of the workers at Horotiu had the appropriate licences to work these machines, but it appears they all did.

[8] The company had not long relocated to Horotiu when WorkSafe Inspectors conducted 2 assessments of the site, on 20 September and 9 October 2019. The first inspection largely involved talking to the main 3 workers at the site, who were co-operative and provided information to the Inspectors freely. On the second assessment, the Inspectors noted multiple failings which placed the workers at undue risk, the most serious of which were unguarded fixed plant.

[9] In relation to Line One, the Inspectors noted:

(a) There was an interlocking system but no lock-out, tag-out system on the machine;

(b) Guarding had been removed exposing the end roller and small feeding hopper;

(c) There was no safe access to the hopper;

(d) Workers were climbing into the hopper to clear blockages on a daily basis;

(e) There was no guarding to prevent workers accessing areas around the hopper, potentially during operation.

[10] In Line Two, the conveyor was unguarded, as were the chain drive and internal machines. The isolation switch used to turn off the power had no lockout / tagout system. A worker present confirmed that blockages on Line Two's conveyor belt were cleared by a worker leaning the unguarded conveyor with a shovel to clear the product and that this was done with the plant still operating. Further problems were noted with Line Two:

(a) There was inadequate and missing guarding;

(b) There were exposed drive chains, cogs and rollers;

(c) As described, workers were clearing blockages manually, while the machine was still running.

[11] These issues are clearly visible in photographs which are contained within the Summary of Facts.

[12] On 9 October 2019, two Prohibition Notices were issued in relation to both bagging lines being inadequately guarded. The Notice regarding Line One was lifted on 11 October 2019 when adequate guarding had been put in place. The Notice regarding Line Two was lifted on 14 October 2019, when it was noted that new guarding had been installed.

[13] A further Prohibition Notice regarding Line One noted the practice of workers entering the hopper to clear blockages. This was lifted on 25 October 2019 when it was confirmed that a new access platform had been installed within the hopper.

[14] On 10 October 1029, a Prohibition Notice was issued in relation to the Bulk Bag Shaker on the grounds it also was inadequately guarded. This was also lifted on 14 October when new guarding had been correctly installed.

[15] On 14 October 2019, an improvement Notice was issued in relation to the lock out, tag out systems on all machinery on site. After an extension was granted, this Notice was complied with on 14 November after appropriate controls were implemented.

[16] Safety requirements for such machinery is readily available from a range of sources including the Health and Safety in Employment Regulations, AS/NZ 4024 – Safety of Machinery, and the Best Practice Guidelines for Safe Use of Machinery.

[17] As a result of the failure to ensure the safety of workers at the Horotiu site, the defendant was charged with exposing those workers to a risk of serious injury. The defendant company was co-operative with WorkSafe at all times and entered an early

guilty plea to the charge. As the summary of facts acknowledges, the safety issues at the site were remedied within a short period of time.

Sentencing

[18] I adopt the methodology set out by the prosecutor, and approach the sentencing as follows:

(a) An assessment of any reparation (which is not required in this case, as both counsel note);

(b) Fixing the amount of the applicable fine, by reference to the guideline bands and other authorities, and then an assessment of the aggravating and mitigating factors;

(c) Considering any further orders under the Act (none here are required);

(d) Making an overall assessment of the proportionality and appropriateness of imposing any sanctions identified under steps 1-3 (here, that amount to a decision about whether the fine calculated is appropriate).

Quantum of Fine

[19] Both counsel submitted that the offending falls within the medium culpability band, as set out in the High Court guidelines in *Stumpmaster v WorkSafe New Zealand*[1]. The prosecutor submitted that the offending was roughly within the middle of this band, and that a starting point of a fine of $420,000 would be appropriate. For the:

Assessments	**Range**
Low Culpability	Up to $250,000

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

Medium Culpability	$250,000 - $600,000
High Culpability	$600,000 - $1,000,000
Very High Culpability	Over $1,000,000

[20] In relation to the assessing culpability set out in the guideline judgment under the earlier legislation, name of the cases, *Department of Labour v Hanham and Phillip Contractors Limited*[2], counsel made the following arguments.

Identification of the operative acts or omissions at issue

[21] The prosecutor submitted that as a result of the failings in the Horotui site the workers were exposed to a risk of serious harm from drawing in, entrapment or crushing with in the machinery. It was reasonably practicable to have ensure health and safety of the workers by installing adequate barriers, guarding interlocking systems on lines one and two, developing a safe and effective system of work and ensuring the maintenance of that, and ensuring effective training and instructions to workers.

[22] The defendant acknowledged those deficiencies and accepted that there were practicable steps that could have been taken to prevent the risk of injuries. The defence submitted that the defendant did have health and safety procedures in place including a health and safety plan, hazard registers and a training progress check list. The defence notes that the lack of guarding in line one occurred after it had been removed for maintenance and not replaced due to oversight. The defence emphasised that this was not a situation were a company had cut corners regarding safety and health to maximise profit. Regarding the machinery purchased for this site, the defence submitted that it had not been tampered with and while a lockout/tagout system would have been ideal, there were safety mechanisms in place were three emergency-stop buttons and interlocking gates which protected the operator inside the container. The

[2] *Department of Labour v Hanham and Phillip Contractors Limited* [2008] 6 NZELR 79.

operator had to open an interlocked gate to get to the expose mechanisms which would have shut down the entire line.

Assessment of the seriousness of the risk of harm as well as realised risk

[23] The prosecutor submits that the risk was significant and could have resulted in serious injury to the three workers involved. It is submitted that any injury occurring as a result of the efficiencies was likely to be serious. The prosecutor acknowledges that the degree of harm that has actually occurred must be taken into account and acknowledged there had been no actual harm.

[24] The defendant admitted the seriousness of the risk, which was forseeable. The defendant emphasised the following excerpt from the *Stumpmaster* case:

> [14] We remain of the view that what actual harm occurred is irrelevant and important feature in fixing placement within the bands. That the defendant is "lucky" no one was hurt does not absolve it of liability under s 45, but the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.

The degree of departure from standard prevailing in the relevant industry

[25] Both counsel accepted that the risk associated within adequate guarding are well known within the industry and an understandable focus for WorkSafe.

The obviousness of the hazard

[26] Again, both counsel accept that the hazards in this case were obvious, and as noted they are readily apparent from the photographs of the site.

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

[27] Again, both counsel agreed that the defendant was able to remedy all of the safety hazards, most with in a few days. The estimated costs of the entire remedy to the faults identified was in the region of $60,000.

Starting point - authorities

[28] The prosecutor relied on the comment of Duffy J in *Department of Labour v Street Smart Limited*[3]:

> There are good policy reasons, which accord with the purpose and scheme of the health and safety in the Employment Act, for ensuring that were employers infringe, penalties must bite, and not be at a "licence fee" level.

[29] The prosecutor cited a number of cases involving significant injury. Those cases included the *Stumpmaster* and *Hanham* decisions themselves, as well as *WorkSafe New Zealand v Carter Holt Harvey Limited*[4] and *WorkSafe New Zealand v Furntech Plastics Limited*[5]. The staring point adopted by the Courts in those matters was in the upper end of the medium culpability range or on the cusp of the medium to high range and involve starting points of between $500,000 and $600,000. The prosecutor accepted that the present case involve no actual injury and in a comparative analysis submitted a starting point of $420,000 as appropriate.

[30] The defendant referred to the case of *WorkSafe New Zealand v Dreamworks Construction Limited*[6] as being a case not involving actual injury, but the clear risk of harm. The harm at risk in that case was not as significant as in the present case (involving a potential fall of about 1.6 metres) and the District Court Judge adopted a starting point of $200,000.

[31] The defendant also referred to *WorkSafe New Zealand v Eurocell Wood Products Limited*[7] which in the defendant's view involved a similar level of culpability but actual serious injury to a worker and a starting point adopted of $450,000. The defendant further referred to *WorkSafe New Zealand v PG and SM Callaghan Limited*[8] which involved a more significant risk and significant injury to a worker and attracted

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[3] *Department of Labour v Street Smart Limited* HC Hamilton CRI-2008-419-26, 8 August 2008.
[4] *WorkSafe New Zealand v Carter Holt Limited* [2018] NZDC 22605
[5] *WorkSafe New Zealand v Furntech Plastics Limited* [2018] NZDC 18150.
[6] *WorkSafe New Zealand v Dreamworks Construction Limited* [2020] NZDC 22967.
[7] *WorkSafe New Zealand v Eurocell Wood Products Limited* [2018] NZDC 21568.
[8] *WorkSafe New Zealand v PG and SM Cullinghan Limited* [2017] NZDC 28149.

a starting point of $400,000. In *WorkSafe New Zealand v Nutrimetics International (New Zealand) Limited*[9] the defendant submitted there was a similar risk of injury, but a significant injury was actually caused in a starting point of $350,000. Finally the defendant compared the present case to the case of *WorkSafe New Zealand v Atlas Concrete Limited*[10]. Again the defendant submitted a reasonably similar degree of risk but which in that case caused serious injury led to a starting point being adopted of $300,000.

[32] In relation to the cases relied on the prosecutor, the defendant submitted that those cases all involved either a failure to address an identified risk or a failure to train staff and all involved significant realised harm.

[33] The defendant therefore submitted the cases relied on by the prosecutor were significantly more serious than the present case and those put forward by the defendant were more closely comparative to the present case.

Starting point - Discussion

[34] I am grateful to counsel for providing comprehensive authorities. I view the cases referred to by the prosecutor as being significantly more serious than the present case. Serious harm was caused in all of those cases which involved at least as significant risk, and in most cases more significant risk. The cases relied upon by the defence tend to involve the exposure of a limited number of workers to significant risk in cases where that risk resulted in significant injury. Given the reasons for the exposure for risk in this case which are through inadvertence and not a wilful decision put workers at risk to increase the margin of profit, I think the comparisons made by the defence to other cases are appropriate and I adopt a starting point for the offending at $300,000, as the defence suggested.

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[9] *WorkSafe New Zealand v Nutrimetics International (New Zealand) Limited* [2018] NZDC 4972.
[10] *WorkSafe New Zealand v Atlas Concrete Limited* [2017] NZDC 2723.

Mitigating factors

[35] Both counsel agree there are no factors aggravating the offending. The defendant company had been operating for 18 years and had never breached health and safety requirements before. Counsel agreed a reduction of five percent to recognise the previous good record of the defendant was appropriate. Counsel further agreed that a reduction of five percent for the defendant's complete co-operation with the investigation was appropriate, and also that a reduction of 25 percent for the prompt guilty plea was also appropriate.

[36] The defendant sought two further reductions to sentence in relation to mitigating factors which were not accepted. Firstly, the defence sought a five percent reduction for remorse on the part of the defendant's sole director. Secondly the defendant seeks a further reduction of a further five percent in relation for the comprehensive remedial steps undertaken by the defendant because of the investigation. The prosecutor opposes these matters on the bases that there is no evidence of remorse and that the remedial steps taken were the minimum required to remedy the exposure to risk.

[37] I have read the affirmations of the director carefully. He reported to take pride in the previous safety record of his company and expresses remorse for the risk he exposed his workers to. I accept those matters and find a discrete reduction is appropriate. I also note the list of matters set out at paragraph 10 of his first affirmation which were put in place to not only remedy the defects in the plant but also to make improvements for the future. Again, in my view this goes beyond remedial steps which were required and justifies a discrete reduction.

[38] For those reasons I would therefore set the starting point of $300,000 to be reduced by 45 percent which would have resulted in a fine imposed of $165,000.

Overall assessment of proportionality and appropriateness of fine

[39] The defendant filed sworn statements by the company director and the accountant who had provided advice to the company for many years. The prosecution

obtained an independent assessment of the accountant's views. That enabled counsel to agree that in its present circumstances, the defendant company is not able to meet any monetary penalty.

[40] I agree with counsel. I impose no fine – the defendant company is convicted and discharged and ordered to pay costs in the sum of $2,822.70.

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Judge BA Crowley
District Court Judge