IN THE DISTRICT COURT
AT TE KUITI

I TE KŌTI-Ā-ROHE
KI TE KŪITI

CRI-2021-073-000032
[2022] NZDC 17228

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

UBP LIMITED
Defendant

Hearing:	2 September 2022
Appearances:	Ms R C Woods for the Prosecution Mr B R Harris and Mr S Coupe for the Defendant
Judgment:	7 September 2022

NOTES OF JUDGE A S MENZIES
[Sentencing]

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[1] This sentencing is to determine the appropriate penalty to impose on UBP Limited, the defendant company (UBP or the defendant), following the tragic death of its employee Jared Te Whare,

[2] Because there are recognised and acknowledged failings on the part of the company that have contributed to Jared's death, the company has pleaded guilty and is accountable. The sentencing process will determine the nature of that accountability as far as the legislation is concerned. That process involves considering matters that are clearly identified both in the legislation and in earlier cases that have considered similar prosecutions to provide the framework. Generally, that

takes the form of all or any of a fine, reparation payment and costs. That process is not designed nor intended to undertake the impossible task of measuring the value of a life or suggesting that the payment of any sum of money will in any way compensate a family for the loss of a loved one. Rather it is the best approach the law can provide to determine and address accountability following either the injury or death of an employee.

[3] UBP has pleaded guilty to a charge under ss. 36(1)(a),48(1) and (2)(c) of the Health and Safety at Work Act 2015 (the Act) that it failed to take reasonably practicable steps to manage the risk of a fall from a height as particularised in the charging document. Those steps included training all workers with access to the legging stand or parts of the legging stand and adequately monitoring their compliance with processes and systems by way of supervision. This charge carries a maximum penalty of a fine of $1.5 million.

[4] The fatal accident occurred on 11 February 2020. The charge had a first call on 16 April 2021 and initially a plea of not guilty was entered. The charge worked its way towards trial and a five day trial was scheduled for 13 June 2022. A plea of guilty was entered on the eve of trial following amendment to the charge and the supporting summary of facts.

[5] The company has no previous convictions of any description.

Background facts

[6] A detailed summary of facts has been agreed which records the background circumstances. UBP operates a beef processing plant in Te Kuiti. At the time of incident Mr Te Whare was employed as a general labourer. He suffered from both an intellectual delay and epilepsy, both of which conditions were known to the defendant.

[7] Mr Te Whare was an obliging and helpful employee, willing to take on tasks where he could. He regularly arrived at work earlier than his scheduled start time and would frequently work beyond the end of his shift. He volunteered to assist with the

in-between clean, either alongside or instead of the floor boy employed by UBP. Accordingly the in-between clean became part of his regular routine.

[8] The in-between clean required activities such as cleaning surfaces, including the legging stand, and replacing consumables. The legging stand is a platform over two metres from the floor, used by the Leggers to access the carcasses hung from a railing system which moves the carcasses through each of the processing stations. The legging stand is approximately four metres long, varying in height above the ground between 2.295 metres and 2.351 metres.

[9] There can be no edge protection in place along the legging stand due to the risk of meat contamination. Therefore, to protect the welfare of Leggers operating on the legging stand, a system was utilised involving the use of harnesses while working on the stand to manage the fall from height risk. UBP has supervisors responsible for completing spot checks to ensure the Leggers wear harnesses. UBP's contract cleaners were also required to use harnesses when cleaning the legging stand. Not all workers at UBP were required to work on the legging stand and therefore not all workers were trained on the use of harnesses. There were occasions when Mr Te Whare had been seen on the legging stand and reprimanded by fellow workers.

[10] On the day the incident occurred, Mr Te Whare arrived at work between 12pm and 3pm. He began the in-between clean at approximately 3pm. Between 3.20pm and 3.30pm (ie just prior to the start of the night shift at 3.30pm) Mr Te Whare was seen to go onto the legging stand, possibly at the request of other workers, to press a button which would bring carcasses along to a position in front of the legging stand.

[11] Mr Te Whare was seen to suffer a seizure whilst on the legging stand and fell to the concrete floor below. As a result of the fall, Mr Te Whare suffered severe head and chest injuries. He died as a result of his injuries.

[12] An investigation followed and various features were identified:

(a) Mr Te Whare and the floor boy accessed the legging stand stairs as part of the in-between clean.

(b) There was no edge protection in place on the legging stand because of potential contact contamination during processing.

(c) While Leggers were trained to use the full arrest harness system, other workers, including Mr Te Whare were not trained to use a harness, on the basis that they were not required to work on the legging stand.

(d) While Mr Te Whare had been directed not to go onto the legging stand, other workers had seen him on the legging stand on multiple previous occasions.

(e) There were no warning signs or designations stating that access to the legging stand was prohibited for workers other than the Leggers.

Victim impact statements

[13] Six victim impact statements have been provided by members of Mr Te Whare's family. Four of those statements were presented in Court.

[14] Having reviewed and heard those statements, it is clear that Mr Te Whare was a very much loved son, brother and uncle. There are common references to Mr Te Whare's loving, supportive and carefree nature. The individual statements reflect the more personal relationships each member of the family had with Mr Te Whare and the various difficulties of coming to terms with their loss. All family are still struggling with the loss of Mr Te Whare still at a relatively young stage of his life. The family's anguish reflects the senseless and preventable nature of the accident.

Legal issues

[15] The guideline judgment for sentencing under s 48 of the Act is *Stumpmaster v Worksafe New Zealand (Stumpmaster).*[1] In that decision the Court confirmed there are four steps in the sentencing process:

[1] *Stumpmaster v Worksafe New Zealand (Stumpmaster)* [2018] NZHC 2020.

(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 – 159 of the Act are required;

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps. This includes considerations of a defendant's financial capacity – which in this case is not in issue.

[16] The guideline bands referred to are:

(a) Low culpability – up to $250,000.

(b) Medium culpability – $250,000 - $600,000

(c) High culpability - $600,000 - $1,000,000.00

(d) Very high culpability $1,000,000.00 plus.

[17] Comments in the *Stumpmaster* decision which reinforce the guideline bands include:

> [52] … The pattern of decisions suggests such cases will typically involve a minor slip up from a business otherwise carrying out its duties in the correct manner. It is unlikely actual harm will have occurred, or if he has, it will be comparatively minor. A ceiling of $250,000 represents adequate deterrence for such offending and allows for a series of graduated steps through the remaining bands.
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> [54] We are satisfied a figure of $600,000 for the top of the middle band represents a significant deterrent that reflects the statutory purpose. It is a substantial figure and one which may well be higher depending on the degree of departure and the actual harm caused.

[18] *Stumpmaster* endorsed the following approach in *Department of Labour v Hanham & Philp Contractors Limited*[2]:

- The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken.
- An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.
- The degree of departure from standards prevailing in the relevant industry.
- The obviousness of the hazard.
- The availability, cost and effectiveness of the means necessary to avoid the hazard.
- The current state of knowledge of the risks and of the nature and severity of the harm which could result.
- The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

Reparation assessment

[19] Mr Te Whare was not survived by a wife, partner or dependent children. Any reparation will therefore be payable to family members and I have already reviewed the victim impact statements that have been provided. Reparation is not sought for any consequential loss and therefore the assessment required is the fixing of an appropriate sum for the emotional harm arising from the fatality and the offence.

[20] There are examples of the Court awarding an individual amount to each family member at the level of $10,000.[3]

[21] Counsel in this case are not significantly apart in terms of the arguments advanced in respect of reparation. The prosecution recognises that the assessment is ultimately an intuitive exercise to be undertaken by the Court but submits that an award of reparation for emotional harm in the order of $50,000 - $60,000 to Mr Te Whare's family would be appropriate. The defence broadly agrees with this

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[2] *Department of Labour v Hanham & Philp Contractors Limited* [2008] 6 NZELR 79 (HC).
[3] *Ocean Fisheries Limited v Maritime New Zealand* [2021] 3 NZLR 443.

assessment submitting that in the circumstances of this case a lump sum payment of $50,000 to the family to be distributed amongst family members would be appropriate. Counsel does note that UBP paid an early payment of $10,000 to a family member (Maria Toi) shortly after the incident.

[22] The range suggested by experienced counsel is clearly appropriate and I consider that the starting point should be $60,000. The only remaining issue is whether that payment should be inclusive or exclusive of the earlier $10,000 payment. In my assessment the total amount should be $60,000 including the initial payment. That payment was made promptly and voluntarily to assist the family and should properly be regarded as part of the overall reparation payment. I therefore direct reparation of a further payment of $50,000 to be paid within 28 days of the release of this decision to the family member nominated for the purpose being Carmin Teshina Te Whare.

Assessing the fine

[23] In broad terms the parameters of the liability issues are reasonably clear. Mr Te Whare ascended the legging stand which is a platform over two metres above a concrete floor. The hazard of falling from a height was recognised as was the need for safety measures. They took the form of training for, and the use of, safety harnesses and supervision of both the use of safety harnesses and the exclusion of those not permitted on the legging stand.

[24] By way of its guilty plea, UBP acknowledges short comings in those areas but also points to the fact that Mr Te Whare was not required as part of his normal role to use the legging stand in any way and, having done so, tragically suffered a grand mal epileptic seizure which either caused or significantly contributed to his fall. It is also relevant that it was known to UBP both that Mr Te Whare suffered from epilepsy and was known to use the legging stand reasonably frequently because of his willingness to assist in areas outside his specific role. There was the added feature that Mr Te Whare had recently been injured and at the time of the incident, was on a restricted return to work that required him to remain at ground level.

Identification of the operative acts or omissions at issue and available reasonably "practicable steps"

[25] There were no particular difficulties in determining the operative acts or omissions at issue. What was required was effective steps by UBP to keep Mr Te Whare away from the legging stand and/or its location by way of supervision or exclusion zones given both the fact that he was not trained to use the safety harnesses (because it was not part of his job) and required to remain at ground level. UBP failed to manage those manageable requirements.

An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk

[26] The risk of a fall is widely recognised in the industry. Similarly, the risk of serious injury or a fatality is obvious and widely recognised from a fall above two metres onto a concrete floor. As the prosecution recognises, the assessment of the degree of risk associated with the legging stand is potentially complicated by the fact that Mr Te Whare suffered a seizure precipitating his fall. Had there been no seizure, he may not have fallen at all or may have been able to protect himself in some manner (eg using his hands to break the fall) and thereby lessen the effects of the impact. The prosecution argues however that the seizure is no more than a neutral feature because the circumstances themselves (a fall from above two metres) carried in any event the inherent risk of serious injury or fatality.

[27] The defence argues that a number of features lessen the gravity of UBP's failure in this context. They include the fact that Mr Te Whare's fall undoubtedly occurred because of, in whole or in part, the misfortune of the grand mal seizure which had the tragic coincidence of occurring when he was climbing the legging stand. From the point of view of the liability of UBP, Mr Te Whare was not required to be on or even near the legging stand as part of his normal role. Further, while UBP acknowledges awareness of Mr Te Whare's epilepsy, it is the UBP position that seizures associated with epilepsy were very infrequent in terms of what was known to UBP.

The degree of departure and standards prevailing in the relevant industry

[28] Given the known risk of falling, industry guidelines and the identified safety measures, it was incumbent on UBP to enforce its policies by effective supervision and communication.

The obviousness of the hazard

[29] The hazard in question was indeed obvious as were the measures in place to address the hazard. UBP was aware of Mr Te Whare's propensity to assist outside his core role including accessing the legging stand.

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

[30] The monitoring and enforcement of appropriate policies including an exclusion zone for those not required, or permitted, to be in the area was straight-forward.

Starting point for a fine

[31] Both counsel have traversed a range of authorities to assist in the assessment of the appropriate fine level. The prosecution argues that the appropriate starting point for a fine would be $450,000. The defence position is that the appropriate range to consider is between $375,000 and $450,000, weighted at the lower end of that range despite the outcome of the fall.

[32] Of the many cases discussed in submissions, the two that perhaps have the closest similarity are the *Department of Labour v Alpha Refuse Collection Limited*[4] and *Worksafe NZ v Sharpeye Limited.*[5]

[33] In the *Alpha Refuse* decision, the victim suffered an ACC injury and was stood down for medical reasons. He was a runner for kerbside rubbish collection. On the day of the accident, he waved down the truck driver and joined the crew as a "freebie". The driver did not know that he was stood down and did not check before allowing

[4] *Department of Labour v Alpha Refuse Collection Limited* CRI-2010-092-14054.
[5] *Worksafe NZ v Sharpeye Limited* [2019] NZDC 24307.

him to join. Whilst standing at the back of the truck while it was reversing, he fell off and was struck and killed by the truck. The Court found that it was probable that he had suffered an epileptic fit at the time.

[34] This case was considered under the 1992 legislation with a maximum penalty of $250,000. Liability was determined in the middle band ($50,000 - $60,000) with a starting point of $60,000 adopted. If those figures were transposed into the current legislation, the starting point would be the equivalent of approximately $375,000.

[35] While there is an obvious comparison with both the victim in *Alpha Refuse* and Mr Te Whare suffering from epilepsy, I consider that the level of culpability in *Alpha Refuse* was lower because the victim was acting against company policy and procedures in circumstances where it was more difficult to anticipate and manage the actual activity that led to the fatality. The *Alpha Refuse* case therefore suggests that the starting point should be higher than $375,000.

[36] In the *Sharpeye* case, the company was engaged to build a large glass atrium above an apartment complex. The work involved a 14 metre fall risk which had been identified by all involved. Safety netting was arranged, but primary control was access to the roof and use of fall protection harnesses and safety ropes. The victim was a senior worker and site manager responsible for work safety. There was one glass panel missing for design reasons. The victim walked around the atrium without being harnessed and decided to do some impromptu work, lost his balance and fell through the gap. He suffered multiple injuries but survived. The Court found culpability at the lower end of the medium band and set the starting point at $375,000.

[37] That case involved a victim, a senior employee, acting against company policy and procedures in circumstances more difficult to predict and manage. Again, therefore I consider that the level of culpability of UBP is higher than in *Sharpeye*.

[38] In the *Alpha Refuse* decision, the Court noted a number of features relating to the accident comprising the victim's failure to take his epilepsy medication, his eagerness to return to work when not cleared to do so and the probability that he suffered a medical event and fell into the gutter before being run over by the truck.

The Court considered that all those features should be reflected in mitigation of penalty which resulted in a ten per cent reduction from the starting point of $60,000, leaving an available fine of $54,000.

[39] I consider that the prosecution starting point of $450,000 is well founded and that is accordingly the starting point for the fine that I adopt. Both the circumstances are more serious than *Alpha Refuse* for example and the mitigation features of less weight. In this case, there are the features of the unfortunate seizure causing or contributing to the fall and the fact that Mr Te Whare was not in fact required to be involved with the legging stand as part of his normal responsibilities. Those mitigating features warrant a reduction of five per cent from the starting point of $450,000 which leaves an available fine of $427,500.

[40] As the prosecution acknowledges, there are no circumstances in this case that would warrant an uplift from the starting point. There are however further mitigating factors which have been outlined in the submissions provided. Responsibly, counsel have reached agreement as to the appropriate discounts as follows:

(a) Previous good record – UBP has no previous relevant convictions – 5 per cent.

(b) Co-operating with the investigation – UBP has co-operated throughout – 5 per cent.

(c) Remorse – an initial payment of $10,000 was made and UBP has co-operated with the restorative justice process proposed – 5 per cent.

(d) Reparation – 5 per cent.

[41] A total discount available from those mitigating factors is therefore 20 per cent.

[42] UBP pleaded guilty as noted earlier. The plea was entered to an amended charge immediately prior to trial. Therefore, both the parties, Mr Te Whare's family and the state were saved a lengthy trial and that warrants recognition.

[43] The prosecution argues that the appropriate discount would be 15 per cent because of the comparatively late stage of the entry of the guilty plea and the fact that UBP could have acknowledged liability in relation to the second particular in the charging document at an earlier stage. The defendant argues that a higher credit of 20 or perhaps 25 per cent should be available given the prompt plea to the amended charge and the agreed facts.

[44] Clearly a considerable amount of effort went into resolution of this matter and ultimately a trial was avoided, and liability acknowledged. The appropriate allowance in my view is 20 per cent for the guilty plea.

[45] The result is therefore:

Starting point for fine		$427,500
Less mitigation	20 percent	$85,500
Less guilty plea	20 per cent	$85,500
		$256,500

[46] Stepping back from that outcome, I am satisfied it is a proportionate and appropriate outcome in relation to the offending.

[47] The prosecution seeks an order by way of a 50 per cent contribution to the external costs of the prosecution in the sum of $13,060.63. The defendant acknowledges that a contribution is appropriate but argues for the sum of $10,000. I accept that the prosecution figures are appropriate and there is no reason to depart from the order sought. Accordingly, there will be an order directing UBP to pay costs towards the prosecution of $13,060.63.

[48] In Summary therefore the sentence is

(a) Reparation $50,000

(b) Fine $256,500

(c) Costs $13,060.63

A S Menzies
District Court Judge