ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSONS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2022-054-000698
[2022] NZDC 22406

WORKSAFE NEW ZEALAND
Prosecutor

v

KAKARIKI PROTEINS LIMITED
Defendant

Hearing: 14 November 2022

Appearances: K Sagaga for the Prosecutor
O Welsh for the Defendant

Judgment: 14 November 2022

NOTES OF JUDGE D G SMITH ON SENTENCING

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[1] I begin today by acknowledging the family and friends of the late Dwayne Summers, he was much loved and liked. His tragic death on 2 April last year has caused much sorrow and grief for his family, a hurt which they will carry with them for the rest of their lives.

[2] There is nothing I can do to remove that sorrow and today is not an attempt to do so. Today is to hold Kakariki Proteins Limited to account for failing to meet its duty to ensure so far as is reasonably practicable the health and safety of its workers

including Dwayne while its workers are at work. It was that failure that exposed its workers to serious risk of injury, and which led to Dwayne's death.

[3] There is no suggestion that anyone at Kakariki Proteins Limited intentionally set out to cause harm. Had anyone done so charges much more serious than the one that we are dealing with today would have resulted.

[4] The process this morning will be as follows. I will set out the charge which has been admitted by Kakariki Proteins Limited and the maximum penalty and I will give a brief description as to what led to Dwayne's death. I understand the family does not want the summary of facts to be read out in court. I will honour that request as much as I am able. It will be necessary when determining the fine to be paid by the company to have some discussion as to the facts, but I hope that all counsel can be mindful of the family's request. All concerned have a copy of the summary of facts and it is available as of right to the press. I ask the press to exercise its discretion and any reporting given the family's request.

[5] After the charge has been set out and a brief description of the failing to keep Dwayne safe I will then ask for family members' victim impact statements to be read to the Court and I will then refer to any other such statements which have not been read.

[6] It will then be necessary to address the law, both the statutory provisions and the case law. That will begin with counsel for WorkSafe and Kakariki Proteins Limited addressing me. I have had extensive written submissions from both counsel, so I do not expect their addresses to the Court to be long. I will be referring to their written submissions in my decision. I will then give my decision and my reasons for it.

[7] The Health and Safety at Work Act 2015, which I will refer to as "the Act" after this, defines what is called a PCBU as a person conducting a business or undertaking. Under that Act a person includes a corporation sole which is the description of Kakariki Proteins Limited. Section 22 of the Act sets out the meaning of reasonably practicable and it means:

…that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the hazard or risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[8] The duties of a PCBU are set out in subpart 2 of part 2 of the Act and s 36 sets out the primary duty of care.

(1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and

(b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

(2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—

(a) the provision and maintenance of a work environment that is without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling, and storage of plant, substances, and structures; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and…

[9] The charge which Kakariki Proteins Limited faces today is a breach of that duty in s 36 of the Act and that is an offence under s 48(1) and (2)(c). If a person, in this case Kakariki, is liable for conviction in the circumstance of this matter they face a fine not exceeding one and a half million dollars.

[10] The charging document, therefore, describes the offence as "being a PCBU having a duty to ensure so far as is reasonably practicable the health and safety of workers who work for the PCBU including Dwayne Michael Summers while its workers were at work and the business or undertaking namely work at its plant in Feilding did fail to comply with that duty and that failure exposed the workers to the risk of serious injury or death, and the particulars are set out, it was reasonable practicable for Kakariki Proteins Limited to have:

(a) Undertaken an effective risk assessment in risk of the LTR2 meal bagging machine in its plant in Kakariki Road, Feilding.

(b) Ensured that the LTR2 meal bagging machine was adequately guarded and

(c) Provided effective training, information and supervision to workers concerning the safe use of the LTR2 meal bagging machine.

[11] Since 2007 Kakariki Proteins Limited have produced meal and oils for stock food. A new bagging machine was delivered in 2017. It had been modified from a previous model to assist with the settling of the meal in the bags. In 2019 it was modified to repurpose the machine for fish and poultry meal, and it was those modifications that rendered the machine unsafe and led to Dwayne Summer's death.

[12] Victim impact statements have been completed by Dwayne's mother, son and Dwayne's brother. An order suppressing the publication of their names is made. At their request WorkSafe NZ have been asked to read some of the reports and I will ask that they do so now.

[redacted]

[13] [redacted]

[14] I will now ask counsel to address me as to the law beginning with Ms Sagaga.

[Counsel address the Court]

[15] Section 151 of the Health and Safety at Work Act 2015 sets out the sentencing criteria which applies to matters such as this. In determining how to sentence or otherwise deal with somebody who is convicted of an offence under s 48, the first thing the Court must do is apply the Sentencing Act 2002 and in particular have regard to ss 7 and 10 of that Act and then in addition to that take into account the purposes of the Act and the risk and potential for death in this case that could have occurred and whether that did occur, could reasonably have been expected. The safety record of the person is to be taken into account, the degree of departure from prevailing standards in the sector, and then finally the person's financial capacity or ability to pay any fine to the extent it has the effect of increasing the amount of the fine. There is no suggestion in respect of that last matter that there is any inability to pay a fine or reparation.

[16] So, starting with the Sentencing Act. Section 7 of the Sentencing Act makes it clear that when sentencing the Court is required to hold the offender accountable for the harm done to the victim and the community by the offending, to promote in the offender a sense of responsibility for and acknowledgement of that harm, to provide for the interests of the victim or victims, to provide reparation for the harm done, to

denounce the conduct and deter the offender and others from acting in a similar way, and to protect the community and finally to assist in rehabilitation and reintegration which is not particularly relevant here.

[17] Section 8 of the Sentencing Act requires that the Court takes into account the gravity of the offending including the degree of culpability and take into account the seriousness of the type of offence in comparison with other types of offences as indicated by the maximum penalties prescribed for those offending. The Court must impose the maximum penalty prescribed if the offending is within the most serious of the cases unless it is inappropriate to do so and must impose a penalty near to the maximum if the offending is near the most seriousness of the cases but also, and importantly, which has been referred to by counsel, it has got to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances. I am required as the last of the matters in s 8 to take into account any outcomes of the restorative justice process that has occurred, as there was here. Then I am required to take into account the aggravating and mitigating factors which you have heard referred to by counsel when they have addressed me. That is set out in s 9 of the Sentencing Act.

[18] Section 12 of the Sentencing Act makes it clear that if a court is lawfully entitled under that Act to impose a sentence or order of reparation, it must impose it unless satisfied that that would result in undue hardship for the offender and in circumstances of this case, it is clear that the Court is entitled to impose an order of reparation for the emotional and other harm caused and a sentence of reparation can be imposed in addition to any other sentence.

[19] I want to talk about the sentencing methodology. The leading case on the approach to sentencing under the Act is the full bench decision of the High Court in *Stumpmaster v WorkSafe New Zealand* which was a 2018 High Court decision where the Court confirmed there is a four-step process:[1]

(a) Assessing the amount of reparation.

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

(b) Fixing the fine by reference first to the guideline bands and then to have regard to aggravating and mitigating factors.

(c) To determine whether there are further orders under the ss 155 to 158 of the Act; and

(d) Making an overall assessment of the proportionately and appropriateness of the total imposition of sanctions under those first three steps.

[20] I deal then firstly with reparation. We have heard through the victim impact statements the effects that Dwayne's death has had on their lives. There was a restorative justice meeting held and I have a copy of that report from the meeting. That records that Kakariki Proteins Limited has paid a total of $20,000 to the family to assist with the costs of the funeral and to assist with other debts. Dwayne had been assisting his mother's financial support during his life and his passing has put her in a difficult position. Notwithstanding that, there is no request for any other compensatory reparation and my determination today relates purely to emotional harm reparation.

[21] Both counsel have provided me with cases that show the reparation determined in those cases. I note that in *Big Tuff Pellets Limited v Department of Labour*, the Court commented:[2]

> Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term.

[22] In February last year, His Honour Nation J determined the case of *Ocean Fisheries Limited v Maritime New Zealand*.[3] That was a prosecution that arose from the death of three crew members of a fishing trawler which sank off the

[2] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 at [19].
[3] *Ocean Fisheries Limited v Maritime New Zealand* [2021] NZHC 2083.

Canterbury coast and His Honour reviewed reparation awards in 47 cases which were scheduled at the back of his decision.

[23] His Honour acknowledged that it is important to quantify in monetary terms what might be appropriate compensation for emotional harm caused by a bereavement. Inevitably calculating an appropriate award is somewhat arbitrary and it is for that reason that judges have had to rely on awards in other cases to ensure consistency and the cases which His Honour reviewed had a range of $7,500 to $125,000 for a child and $5,000 to $44,000 for a parent and $4,000 to $125,000 for a sibling.

[24] Here, WorkSafe seek an award of $130,000 apportioned as follows. Mother $60,000, brother $50,000, and son $20,000. Kakariki Proteins Limited submit that an award of $100,000 less amounts already paid is appropriate apportioned as Mother $50,000, brother $30,000, and son $20,000. They submit it is appropriate to treat Dwayne's mother as akin to a spouse in terms of awards given that she was financially dependent on Mr Summers and I accept that submission.

[25] [redacted]

[26] [redacted]

[27] I move then to the question of what fine is appropriate. Again, I have been referred to a number of cases that enable the starting point to be determined. In *Stumpmaster*, which has been referred to, the High Court adopted the approach of an

earlier case of *Department of Labour v Hanham and Philip Contractors Limited*, which was decided when the maximum fine was $250,000.[4] In taking that into account, in *Stumpmaster* the Court determined there should be four bands. Low culpability up to $250,000, medium culpability $250,000 to $600,000, high culpability $600,000 to $1,000,000, and very high culpability $1,000,000 plus.

[28] In WorkSafe's submissions, they have started the process by referring to the Court of Appeal's decision in *Moses v R* and that a two-step methodology is to be used.[5] The first step following a decision in *R v Taueki* calculates the adjusted starting point incorporating aggravating and mitigating features and the second step incorporates all the aggravating and mitigating factors personal to the offender together with any guilty plea discount which should be calculated as a percentage from the adjusted starting point.[6]

[29] It is submitted by the prosecution that in *Stumpmaster* the Court observed that low culpability cases will typically involve the minor slip up from a business otherwise carrying out its duties in the correct manner and it is unlikely that actual harm would have occurred or will have been comparatively minor and then I am taken through s 22 of the Act which I have referred to as to what is reasonably practical which I have already read to the court and it is submitted that the following reasonably practicable steps were not taken in ensuring particularly a safe system of work in respect of the meal bagging machine including undertaking an adequate risk assessment of that machine and providing effective training and supervision to its workers concerning the use of the machine and, secondly, ensuring that the meal bagging machine was adequately guarded.

[30] I am referred again to *Stumpmaster* where it was noted that although necessarily the risk under s 48 prosecutions will always at least be of causing serious harm or illness, it is still important to have regard to exactly what the risk was. How many people did it involve, for example, and might a worker have been killed. The hazard was, here, a worker being crushed or trapped in a machine while it was

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[4] *Department of Labour v Hanham and Philip Contractors Limited* (2008) 6 NZELR 79 (HC).
[5] *Moses v R* [2020] NZCA 296.
[6] *R v Taueki* [2005] 3 NZLR 372 (CA).

operating, and the risk was clearly one of serious injury or death. The risk was created by the machine being modified to fit under an auger and two crushing hazards were created between the frame and the cross-bracing when the inner frame lowered and between the frame and the auger when the interframe raised.

[31] It is submitted that the risk increased when the frame in the machine was descending. The frame descended under its own weight due to the force of two pneumatic rams and so if a person was trapped in the machine, even with the suspension of the frame moving by the forces of gravity, the rams still worked to force the frame as low as it would go. That created a significant crushing hazard. While the machine was in automatic mode, as it was almost all the time, it was lifting and lowering bags every two or three minutes and in the circumstances where a worker was reaching through to unclip the meal bag or level meal using an arm, there was a risk of crushing or entrapment each time.

[32] It is submitted the frequency with which the machine was used, and the constant automatic mode of the machine presented a serious risk of harm occurring. Yet, the risk presented to workers by the inadequate machine guarding had never been identified by the defendant and the submission is that is a significant aggravating feature of the offending.

[33] It is then submitted that there is a degree of departure from the standards prevailing in the industry and the submission is that they had significantly departed from those standards. I have been taken through the *WorkSafe New Zealand Best Practice Guidelines* and the *Australia and New Zealand Standards for Safety of Machines Series*. Failure to guard the machine, no closing close guarding, no locally accessible lock or isolating switch, no perimeter guarding are identified.

[34] It is submitted there had been inadequate training and supervision. The machine was not included in the defendant's hazard and risk register and the requirement for guarding was paramount and well-known when working with machinery. The submission made is that the serious risks from exposure to the moving parts of the machine are well known and documented and that the defendant should

have been aware of the risk of exposure to crushing hazards by moving an unguarded machinery.

[35] The costs of undertaking an appropriate and effective risk assessment and implementing the controls was not grossly disproportionate when weighed against the likelihood and risk of harm. In the submissions made on behalf of Kakariki Proteins Limited, it is submitted that this is not a case where particular denunciation and deterrence is necessary because it is submitted it is not a case of wilful disregard, they had a comprehensive health and safety system that was implemented, it took, they submit, a reasonable approach to the way it identified and attempted to mitigate health and safety risks including ensuring various methods were adopted to identify risks such as equipment review, conducting site inspections and feedback from staff, preparing safe work procedures for key tasks to assist workers to perform work safely, provided ongoing training, and obtained support from subject matter experts to advise on issues such as machinery safety and health and safety system improvements. It has already acted to prevent any further breach of the Health and Safety at Work Act 2015.

[36] There is no suggestion that deterrence is a particular concern in this case, and it is submitted that the need for general deterrence is met by the prosecution in conviction of the company. It is accepted that there was potential for serious harm caused but submits the risk of harm was less due to the nature of the machine and its operation and the limited requirements for operator involvement with it.

[37] I have been referred to Mr Dahlenburg's affidavit and the process of design and construction of the machine and expert involvement, the slow moving nature of the machine, which was referred to by Ms Welsh in her submissions, that limited operator interaction and the lack of operation need for Mr Summers to access the back of the machine. It is submitted that in light of those factors, the company generally did not contemplate an incident like Mr Summers ever occurring.

[38] It is accepted, however, that the risk posed by unguarded moving machinery is obvious. However, I am referred to Mr Dahlenburg's affidavit as to why it was not obvious here and I am referred to the other matters to which I have already referred. They had engaged subject matter experts, it was a slow moving machine, the time it

took to fill each machine, the no need for accessing the rear of the machine, and that they had been taught to only operate the machine from the front.

[39] The starting point referred to by WorkSafe is $800,000. By Kakariki Proteins Limited, $600,000. That means that it is accepted by both the prosecution and the defence that this fits into the high culpability bracket of $600,000 to $1,000,000. The starting point I adopt is $700,000. In doing so, I note the decisions of the *Department of Labour v Street Smart Limited* in 2008, *WorkSafe New Zealand v Eastern Agriculture*, *WorkSafe New Zealand v Kiwi Lumber Masterton Limited*, *WorkSafe New Zealand v Alto Packaging Limited*.[7]

[40] Kakariki Proteins Limited submits that the $800,000 starting point in *Alto* involved higher culpability and I accept that to some degree. Further, *Eastern Agriculture* predates *Stumpmaster,* and it is likely the starting point would have been lower had it had the advantage of having that decision.

[41] I was also referred to *WorkSafe New Zealand v Homegrown Juice Company Limited* and *Worksafe v Cottonsoft Limited* and I have taken those into account in making a decision that the starting point, as I say, should be $700,000.[8] There is no dispute that there should be a 25 per cent discount for prompt guilty pleas. That was determined by the Supreme Court in *Hessell* and has been a constant since that decision.[9]

[42] WorkSafe accept that there should be a five per cent discount for remorse and also for the reparation order. It disputes there should be any other discounts, arguing a discount for co-operation is not warranted and relies on the High Court in *East by West Company Limited v Maritime New Zealand*.[10]

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[7] *Department of Labour v Street Smart Limited* DC Thames, 18/2/2008, CRI-2007-075-716, Everitt DCJ*; WorkSafe New Zealand v Eastern Agriculture* [2018] NZDC 2003; *WorkSafe New Zealand v Kiwi Lumber Masterton Limited* [2020] NZDC 19117; *WorkSafe New Zealand v Alto Packaging Limited* [2022] NZDC 6148.

[8] *WorkSafe New Zealand v Homegrown Juice Company Limited* [2019] NZDC 16605; *Worksafe v Cottonsoft Limited* [2019] NZDC 1851.

[9] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[10] *East by West Company Limited v Maritime New Zealand* [2020] NZHC 1912.

[43] In that decision of *East by West Company Limited*, the following factors were relevant to the assessment of appropriate discount:

> Those who owe duties under HASWA have a statutory duty to assist inspectors in the exercise of their powers under health and safety legislation. In those circumstances, cooperation is to be expected and would not, in the usual case, attract a discount.

[44] That is an outlier in terms of the case law. There have been deductions for matters such as this in virtually all the cases and indeed, as Ms Welsh has pointed out, the High Court did not upset that deduction in the decision it made on the appeal from the District Court.

[45] I accept, noting the submissions made by the company, in my view a discount of 10 per cent is appropriate for offering to make amends and for the remedial action which they took. That includes the $20,000 paid to assist Mr Summers' mother and their prompt assistance there with people. For the co-operation with the prosecutor, I am prepared to allow five per cent and I think it is appropriate that there should be a discount for their good safety record. Those matters, therefore, make a total of 50 per cent. The end fine, therefore, is $350,000.

[46] I am required to determine what further orders under ss 155 to 158 of the Act are required. There is agreement by the parties that there should be a contribution to the prosecution costs of $10,985 and that should be paid in addition to the other matters awarded. There is an order accordingly.

[47] Finally, I am required to make an overall assessment of the proportionately and appropriateness of the total imposition of sanctions. In my view, the awards of $130,000 for reparation and the $350,000 fine, a total of $480,000, are proportionate and appropriate for the harm caused.

[48] There is to be a suppression of the names of the victims.

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Judge D G Smith
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/11/2022