IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2022-092-001785
[2023] NZDC 14163

WORKSAFE NEW ZEALAND
Prosecutor

v

MPMK HOLDINGS LIMITED
Defendant

Hearing:	22 May 2023
Appearances:	E Dallas and T Williams McIlroy for the Prosecutor H Pryde for the Defendant
Judgment:	22 May 2023

NOTES OF JUDGE K J PHILLIPS ON SENTENCING

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[1] MPMK Investment Limited faces a charge against them under the provisions of sections 48(1), 48(2)(c), and s 36(2) of the Health and Safety at Work Act 2015. The maximum penalty that they are liable to is a fine not exceeding $1.5 million.

[2] The date of the offence is given and runs between 12 September 2019 and 16 March 2021 and is said to have occurred at Westfield Manukau Mall. The Charge itself recites that the defendant, MPMK Holdings Limited, being a person conducting a business or undertaking, failed to ensure, so far as was reasonably practicable, the health and safety of a client of their company, when the company was trading as Edge Cut, Colour, and Beauty Manukau; to ensure that clients were not put at risk from work described as Brazilian waxing treatment carried out as part of the conduct of the business, and that that failure exposed individuals, including the client/victim here who was seriously injured on 15 March 2021, to a risk of serious injury.

[3] In the particulars to the charge it is stated that the defendant company could have reasonably practicably,

(a) developed, implemented and communicated to all workers and monitored their compliance with safe operating procedures for Brazilian wax treatment.

(b) implemented an effective system to assess the competency of workers to carry out Brazilian wax treatments, and to ensure that workers receive ongoing training; and

(c) developed a comprehensive risk assessment to identify the risks and controls for all aspects of its operation.

[4] The charge was laid on 10 May 2022 and went through a degree of ‘churn’ until plea on 2 September 2022, when a plea of not guilty was entered. That plea remained until 21 February 2023 when the not guilty plea was vacated, a guilty plea entered, and a conviction followed. It is now before me today for sentence.

[5] In case of perhaps overlooking it towards the end of my decision, I make the following final orders;

(a) A final order for suppression of the name of the victim and any matters that are mentioned either by counsel for the prosecution or counsel for the defence here today or in papers which are available relating to her identification; and

(b) I make a final order for the suppression of all affidavit evidence and exhibits relating to the finances or credit and debt position of the defendant.

[6] The summary of facts in the case is one where the defendant company trades as Edge Cut, Colour, and Beauty Manukau as a beauty therapy business. It is in the Westfield Mall at Manukau. It has a sister (or in today's world, brother) company which also operates a beauty therapy business in the same mall. Thus there is a significant overlap between the businesses; the same sole director, workers employed by MPMK Investment (Manukau) Limited are required to also work for MPMK Holdings Limited, operating procedures and assessments of competency, ongoing training of workers is identical across the two businesses.

[7] Ms Kaur was employed by MPMK Investment in September 2019. She signed a further employment contract with MPMK Investment (Manukau) Limited in February 2021. She was required to work both at the Kess Hair & Beauty Manukau for MPMK Investment (Manukau) and at Edge Cut, Colour, and Beauty Manukau for the defendant. The summary, which I understand is an agreed summary, says that she, Ms Kaur, had a postgraduate diploma in the subject called cosmetology from India, issued in 2014, but does not have any study qualifications in New Zealand in the beauty industry.

[8] In January 2019 the sole director and shareholder of both businesses interviewed her and arranged for her to undergo a trial at the Kess Hair & Beauty Manukau shop. That assessment took some three hours and involved, basically, the director observing Ms Kaur's threading and waxing work. She was then offered a job.

She commenced working in March 2019, she being on a student visa. She had a break and then re-joined the business in September 2019, signing a contract which involved MPMK Investment (Manukau) Limited requiring her to work also for MPMK Holdings Limited.

[9] A matter of note is that she did not receive any induction or any training on the equipment at the salons when she commenced her full-time employment in September 2019 and that was on the basis that the business hired staff who it believed were competent enough to provide the services offered, that information being based on what was discussed at the job interview.

[10] When the prosecutor interviewed MPMK Holdings Limited management, it was made known to the prosecutor that staff were verbally made aware of safe practices and procedures when they joined, including assessing the risks involved prior to providing a service; information such as if there is to be a waxing service, the condition of their skin must be assessed before the service is provided. The wax temperature is to be tested by the beautician prior to providing a service.

[11] Ms Kaur was not provided with any training for the treatments she would be providing to clients. She was not provided with any standard or safe operating procedure for the task she was required to perform in her work and thus, through those matters being put together, she did not undertake any such safe practices or procedures.

[12] On 15 March 2021 a client came into the shop to receive a Brazilian wax treatment. Ms Kaur was the beautician giving that treatment. She did not wear gloves during the treatment as there were none in the room and she needed to keep testing the temperature of the wax on her hand because she knew that the wax pot heating mechanism was not working that day.

[13] Ms Kaur proceeded to apply yellow wax onto the right side of the labia majora. It was too hot. She turned off the yellow wax pot to allow it to cool down and waited 10 minutes. She proceeded to resume the treatment, applying it to the left side of the labia majora this time, and then ripping it off. The client advised her that it was still too hot and Ms Kaur allowed it to cool for a further 10 minutes. She then used blue

coloured wax onto the right and left side of the labia minora, then she ripped the wax off with a cloth strip approximately four times when the client told her to stop because of the pain.

[14] The client stood up, got dressed and noticed blood dripping down her leg, but paid the bill and left the shop. The client, the victim in this matter, went to the food court of the mall for lunch. She went to the toilet and noticed a lot of blood and went back to the premises where she had had this procedure because she had found a jelly-like substance full of blood to come from inside her. Ms Kaur again checked her injury, offered her a cash refund, took down her contact details, and the victim returned to her home.

[15] Later that day she was still bleeding so she consulted a beauty therapist. She was told she required stitches and to seek medical treatment. She went to an urgent care outlet and was transferred to Middlemore Hospital where the doctors observed a four centimetre labial laceration requiring stitches. She was confined to bed for two weeks, unable to work. The summary mentions that she continues to experience mental distress from the incident. I will come back to that when I discuss the victim impact statement.

[16] Ms Kaur had refunded the money for the service to the client, the victim, without informing the salon manager about what had happened but another employee did call the manager to tell her about the incident and confirmed the victim had left. Ms Kaur discussed the matter with her manager, explaining some but not all of the details. The victim had told the salon manager she was going to see the doctor. The salon manager told Ms Kaur not to call the client. The salon manager was told by the victim that she needed stitches and was advised to take bed rest. The client then said to the salon manager that when Ms Kaur used the wax, she had said it was too hot and that Ms Kaur had said that the wax was very hard to remove so she had tried again and again, which resulted in the bleeding, and Ms Kaur then stopped the process.

[17] The manager of both businesses, the husband of the sold director, was then told of the incident two days after that. It was not reported to WorkSafe New Zealand, as

required by s 56 of the Health and Safety at Work Act and the site was not preserved as is required under s 55.

[18] On 6 May 2021 that manager sent a set of guidelines prepared by the New Zealand Association of Registered Beauty Therapists to Ms Kaur, setting out in a letter attached that she was to read and understand the contents in detail and that "You will now take the responsibility," it was said, "of incidents caused by not following guidelines. You will sign an acknowledgement that you have read this." Those guidelines, which must have been in the possession of or had the knowledge of the defendant company, contained information available to the defendant and to its sister company at the time of this incident.

[19] It had guidelines specifically detailing the matters relating to hair removal, waxing, tweezing, threading, and noting:

(a) All commercial treatments that risk breaking the skin are required to comply with the general standards for risk of breaking the skin. Waxing is a potentially high risk beauty treatment. It may unintentionally draw blood from follicle or skin surface. Treatments that risk breaking the skin carry the risk of drawing blood and body fluids so may be considered a moderate risk of transmitting blood-borne viral diseases and infection. A complete and thorough consultation and prior consent form must be completed before any treatment is conducted. The therapist must advise of the risks of the treatment and the potential for infection to occur during and afterward and give advice as to the procedure to be undertaken concerning precautions and post-treatment procedures.

(b) Therapists must cover their hands with clean, well-fitting single-use disposable gloves before commencing hair removal.

(c) Wax should be initially applied to the inside of the therapist's wrist to test the temperature of the wax.

[20] The guidelines go on to detail the procedures for managing accidents, to record and manage incidents, etc. It was also in it to notify WorkSafe New Zealand, so the structures were clearly there and available but ignored by the defendant.

[21] The investigation by WorkSafe, when notified, discovered and noted the following. The defendant:

(a) had not developed any safe operating procedures for Brazilian wax treatments;

(b) had not undertaken any risk assessment identifying the risks and controls for Brazilian wax treatments, because they had not done it in respect of any other aspect of their operations either;

(c) did not ensure that workers provided clients with information as to the risks of treatment and obtained informed written consent before proceeding;

(d) had no effective system to assess the competency of workers to carry out Brazilian wax treatments;

(e) did not provide any ongoing training to workers on carrying out Brazilian wax treatments;

(f) had not provided Ms Kaur with induction or training on Brazilian wax treatments or other treatments she was expected to provide to clients;

(g) had no system in place for recording accidents;

(h) did not make any record of this incident;

(i) did not check the steps required to report the incident to WorkSafe, and as such exposed its client to the risk of serious injury and that risk was clearly realised, in my view, in respect of the victim who was seriously injured on 15 March 2021.

[22] The summary notes that the defendant has not previously appeared. I have been greatly aided and assisted today by not only the written submissions that have been detailed to me with cases and cases and then more cases, but also by the oral arguments put by counsel, with junior counsel and senior counsel for both WorkSafe and for the defence, and those matters have been of assistance.

[23] I think the most important thing that I did hear today was the reading of the victim impact statement by junior counsel for WorkSafe. It is a very detailed document that goes into the matters that impacted this victim as a result of this injury and treatment. There was a four centimetre long labial injury one centimetre deep. It is frightening to read, or have read to me, the comment by the victim that she was prepared to give birth to 10 children rather than suffer the pain she had in relation to this laceration. She described it like a massive paper cut, excruciating pain. The rip was so deep that fatty tissue between the layers of skin was perforated and was oozing from the outside, as if she was torn right apart, she said.

[24] The doctor said he had not seen'.. anything like it 'and she was to go straight to hospital and then had to wait five and a half hours before getting treatment at Middlemore Hospital. She had to go to the delivery seat of the birthing unit to be stitched which was the most painful procedure. She then was released from hospital and then the healing process began, which occasioned major difficulties of soreness, irritation and swelling, the wound not healing properly for four months. Still today, the side where the laceration was is numb. If it is not numb, it feels that there is a string under her skin and it is being pulled down, feeling sharp pain.

[25] She operates an agency as a real estate business. It took her four weeks to be able to go back but she could not work, she could not train staff, and thus lost staff, could not do her job, etc. Particularly of importance is that she says she has pain and, if so, cannot be intimate with her husband. She says that in the end, when she feels pain, she refuses. The whole husband-and-wife relationship, I take it from the victim impact statement, has been changed markedly as a result.

[26] She says that she received some accident compensation for a week. She puts a huge sum down as her loss of income; no profit from her business, could not

supervise staff, and really had difficulties with the business overall. She continues to feel dirty and will not go into the Westfield Manukau Mall. She has difficulties in her ongoing relationships with her daughter and friends due to what happened to her. She is extremely emotional, spends a lot of time crying. It has changed everything in her life. As I have said, it has impacted upon her relationship. Apparently her husband had been fishing out of town on the day the injury was occasioned and the following day she had difficulties in driving to pick him up.

[27] By April 2022 she was diagnosed with depression. As she put it, she had lost the plot. Her personality has changed. She began to consume alcohol, from occasional weekend social drinks to every day, occasionally causing difficulties. She puts it this way:

> My husband would be sleeping and I would be wide awake. Every day was like *Groundhog Day.* I had no feelings in my brain. My husband would try to make me feel better and hug me but I would push him away. It has been the longest impact it has had on me, still suffering from emotional harm, and cringe about what happened. I start shaking or crying when I talk about what happened.

[28] There is no gainsaying, in my view, of the major impact this has been on this victim and certainly I consider here that we are talking about an injury being occasioned by the negligent acts of the defendant company's staff which have occasioned life-changing events to the victim.

[29] In assessing the matter, I must first of all have regard to the law that bind me, as senior counsel for the defendant has pointed out to me. She has made available to me Judge Large's decision in a case called *WorkSafe New Zealand v Dreamworks Construction Limited*.[1] Whilst I question its applicability on a factual basis to this case, certainly it is applicable on the law, and the learned judge has set it out well.

[30] *Stumpmaster v WorkSafe New Zealand* gives a four step approach to sentencing in health and safety offending.[2] Stage 1 is assessing the amount of reparation, and junior counsel for each side has 'gone into bat' in relation to that issue. I then move

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[1] *WorkSafe New Zealand v Dreamworks Construction Ltd* [2020] NZDC 22967.
[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

to fix the amount of the fine, considering the orders under ss 152 and 158 of the Act, and make an overall assessment of proportionality and appropriateness.

[31] In relation to sentencing under s 48, I am required in the terms of s 151 to apply the provisions of the Sentencing Act 2002, with particular regard to ss 7 and 10 of that Act; in regard to the purposes of the Health and Safety at Work Act, the risk of and/or the potential of illness, injury or death that could have occurred, whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred, the safety record of the offender, the degree of departure from prevailing standards in the sector or industry, and the offender's financial capacity to pay a fine.

[32] In assessing culpability in relation to the fixing of a fine, I have to consider the identification of the operative acts or omissions at issue, and what practicable steps are reasonable for the offender to have taken to avoid what occurred.

[33] Secondly, 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 the nature and severity of the harm that could result, the current state of knowledge of the means available to avoid the hazard or mitigate the risk of it occurring.

[34] I assess reparation. It is emotional harm reparation and I do so with the assistance of the submissions that have been made to me by counsel in that regard. The issue in regard to reparation that the prosecutor makes clear to me, and I think the most important factor that I can say, is that it is not set by guidelines. It is not set by what other judges in other cases have detailed. My job is detailed, referring to 5.3 of the prosecution submissions, in *Big Tuff Pallets Ltd v Department of Labour*:[3]

> 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.

[3] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-322, 5 February 2009.

[35] I accept what the WorkSafe counsel said, that I do that by reference to the victim impact statement. The difficulty I think we all have, particularly counsel who argue reparation, is that there are no directly comparable cases. It is rather unique, albeit that senior counsel for the prosecutor brought to my attention footnote 14 of the written submissions, of more serious cases involving injuries to intimate parts of a person's body where reparation has been, in the *WorkSafe New Zealand v Goldpine Industries Ltd*[4] case, $70,000, and *WorkSafe New Zealand v Shoreload & Propping Limited*[5], $35,000, but it is difficult because WorkSafe mentions a number of authorities relating to, I think, the often-quoted case of *WorkSafe New Zealand v Niagara Sawmilling Company Ltd*[6] (lacerations to fingers), *WorkSafe New Zealand v Nelson Pine Industries Ltd*[7] (laceration to a forearm causing nerve, tendon and muscle damage), *WorkSafe New Zealand v Riverlands Eltham Ltd*[8] (lacerations to an arm and crushing of a carpal tunnel), and then WorkSafe discusses matters relating to significant psychological impact in the cases and the assessments of reparation in that situation.

[36] WorkSafe say we have here, first, high levels of pain experienced during and after the treatment as detailed in the victim impact statement, two to four weeks off work, unable to drive, sit properly or run her life generally, numbness, sharp pain, effect on the intimacy with her husband, traumatised in respect of relationships with persons, difficulties in sleeping. The submission that is made by WorkSafe is that the emotional harm reparation award, when one considers it all, should be in the vicinity of $15,000. I note everything that I have been told by the junior counsel for the prosecution in that regard and I do not think that '..any stone was left alone 'in the arguments that were put forward in that regard.

[37] In respect of the defence, it was the same approach in that overall the situation is one where there was acceptance of the fact of emotional harm reparation being paid but the quantum was the question, and in reality, what I was being told by counsel for

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[4] *WorkSafe New Zealand v Goldpine Industries Ltd* [2019] NZDC 24343.
[5] *Worksafe New Zealand v Shoreload & Propping Ltd* [2016] NZDC 5273.
[6] *WorkSafe New Zealand v Niagara Sawmilling Company Ltd* [2019] NZDC 9720.
[7] *WorkSafe New Zealand v Nelson Pine Industries Ltd* DC Nelson CRN15042500075, 10 June 2015.
[8] *Work Safe New Zealand v Riverlands Eltham Ltd* DC New Plymouth CRI-2014-021-349, 17 October 2014.

the defendant was that the reparation figure of $7,000 to $10,000, on the number of authorities that were discussed by counsel in her submission, is the appropriate level of emotional harm reparation.

[38] I suppose when I look at the *WorkSafe New Zealand v Niagara Sawmilling Company Ltd* case, I do not accept the submission that the nature and impact of the injuries on the victim there are comparable to the injuries to the victim here. *WorkSafe New Zealand v Nelson Pine Industries Ltd* was another matter and I note there that there was a serious laceration to an arm and a loss of strength and functionality in the arm, wrist and hand. I read the submission then made that the injuries suffered in that case are significantly more serious than the harm suffered here. That is a matter of debate but it is an entirely different scenario of injury to what has been described by the victim in this set of circumstances in an entirely different and, in my view, position in regard to the impact. That is what my job is in assessing emotional harm to look at.

[39] I have read the cases put to me by the defence in *WorkSafe New Zealand v Allflex Packaging Ltd*[9]*, WorkSafe New Zealand v Eurocell Wood Products Limited*[10], and I note the amounts that were determined there were appropriate amounts of reparation. I read and see that the defence acknowledges that injury to the genitals is of a different and more personal nature but then the argument is that those cases with higher levels of reparation are distinguishable because the injuries are significantly greater. I have read also *WorkSafe New Zealand v Kaye's Bakery Ltd* and the other cases mentioned by the defence which they use as their base for the levels that they have put to the Court as appropriate.[11]

[40] I consider, when I have regard to the issue of reparation and balancing the competing arguments, that I must take account and place weight on the fact of what was lacerated. Laceration occurred to a part of the victim's body which provides the base for intimate relationships, which provides the base for her life and style of living in regard to her relationship with her husband, and the reality of the situation here is that it cannot be compared with an injury to an arm or a hand or whatever. It is entirely

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[9] *WorkSafe New Zealand v Allflex Packaging Ltd* DC Manukau CRI-2017-092-14520, 15 October 2018;
[10] *WorkSafe New Zealand v Eurocell Wood Products Ltd* [2018] NZDC 21568.
[11] *WorkSafe New Zealand v Kaye's Bakery Ltd* [2018] NZDC 5427.

dissimilar and, to me, has a much greater impact upon the ability of the complainant to live her life as she once had been doing prior to this occurring.

[41] I am mindful of the nature of what we are talking about. It is the labia majora and the labia minora and I note all the impacts that are discussed in the victim impact statement. Having read all the authorities and cases and giving due weight on the uniqueness of this present case, it is my view that the emotional harm reparation figure should be set at $20,000 and I set it at that accordingly.

[42] I move on to the assessment of the financial penalty. Again, we have had a good deal of argument around where that fine should be, taking into account the general provisions in ss 7, 8, 9 and 10 of the Sentencing Act, the provisions of the Health and Safety at Work Act, and with the overriding reach and reality here that this company cannot afford to pay any fine at all. It is, when I have regard to the evidence, not at all argued by WorkSafe, in a financial position which one questions whether it should be still continuing in business at all. Its debts outweigh its assets, its income is limited, it is not paying its way, and yet trading in an industry such as it is, and here we have a situation where its culpability is to the level, in my view, where a very solid fine is just not able to be met.

[43] I have regard to the submissions by the prosecution in respect of fixing the level of fine. The first step in the process there is to again refer to *Moses v R*.[12] I have to calculate an adjusted starting point incorporating all aggravating and mitigating factors and then look at any personal aggravating and mitigating factors, guilty plea discounts as a percentage of the adjusted starting point. *Stumpmaster v WorkSafe New Zealand* set four bands; low culpability with a starting point of a fine up to $250,000, medium culpability, a starting point of $250,000 to $600,000, high culpability, $600,000 to $1 million, very high, a starting point of $1 million plus.

[44] I want to make it very clear that in *Stumpmaster v WorkSafe New Zealand*, the Court observed that low culpability cases:[13]

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[12] *Moses v R* [2020] NZCA 296.
[13] *Stumpmaster* at [66]

> "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 it has it will be comparatively minor," and with all due respect to senior counsel for the defendant, I think that is entirely unassailable by the defence in this case. It is not a minor slip-up, as I have attempted to set out in the matters that are put already in this sentencing. This is not a business that was carrying out its duties in the correct manner at all and, indeed, the lacunae are obvious and had been existing for a long, long time, and actual harm has occurred as a direct result of the inaction of the defendant company. There is no way in the world that the harm could be described as comparatively minor.

[45] So, I do not accept that this offending can be put into the low culpability band. Clearly, it was reasonably practicable for the defendant company to have developed, implemented, communicated and monitored compliance to all workers with safe operating procedures for Brazilian wax treatments.

[46] Secondly, clearly it could have implemented an effective system to assess the competency of workers to carry out that form of treatment and to ensure also that they were getting ongoing training, and thirdly, developed a comprehensive risk assessment involving the risks and controls for the aspects of this operation.

[47] What we have here, going away from the term "Brazilian," is the use of hot wax on sensitive and intimate areas of the body and the potential for injury is starkly obvious. Here we have the aggravation, which is visited despite what the senior counsel argues must be visited to the defendant. We have the risk because the wax pot heating mechanism was known not to be working; - not known to the management, I give that, but it was known to the staff who were meant to be skilful and could work appropriately. What did they do? They continued to apply the wax even though the client was saying that it was too hot. Cool down for 10 minutes and then apply it again? Too hot. Do it again? Too hot. All of this, in my finding, was clearly foreseeable and avoidable, and of course the whole beauty industry, I think, to a certain degree depends on working with hot wax and that type of apparatus.

[48] I must also take into account that there were guidelines from the organisation, which is called, I think, the New Zealand Association of Registered Beauty Therapists. There was a comprehensive guidance document, the *Health and Hygiene Guidelines for Beauty Therapy Clinics, Spas and Training Establishments*, and that points quite clearly that high-risk beauty treatments may unintentionally draw blood. Treatments

that run the risk of breaking the skin carry the risk of drawing blood. A complete and thorough consultation and client consent form must be completed and the therapist must advise of the risks for the treatment and the potential for infection.

[49] The departures, as I see them, by the defendant, despite the eloquent submissions and argument put to me today by the defendant, are as detailed in the WorkSafe areas. The company had not developed any safe operating procedures for such treatments, had not even undertaken a risk assessment to identify the risks and controls that were needed, did not ensure that clients were provided by staff the information levels as to the risk of treatment and obtain informed consent, did not seem to have, in my view, an effective system to assess the competency of workers when one has regards to the interviewing and practice in appointment of Ms Kaur at the time she obtained her job. There was not any ongoing training. She did not get training in that area of the industry at all, and then we have the deficits relating to no procedures for recording accidents or making records or reporting and so forth.

[50] I need to have regard to the obviousness of the hazard. I do not think I need to discuss again the working with hot wax because I think that is obvious, but the likelihood of serious injury or problems when a wax has clearly caused difficulties for the client and is then ripped off in the manner described in the summary is obvious. I do not know whether there was any training in the ripping off process or a risk assessment in that regards to the business, but when that is a core treatment for your business operation and the risk of hot wax is so obvious, I consider that the obviousness issue here is at a high level.

[51] The manager sent Ms Kaur those guidelines. He was aware of them. She was aware the wax pot was not working properly. It was the consequence of all those that became inevitable that once the problem had arisen the injury would be occasioned. It is also interesting to note here that the steps required to be taken by this defendant were not going to cost the defendant any large sums of money, and indeed, they provided absolutely basic minimum health and safety requirements.

[52] There are, and I accept from the defence, no aggravating factors in relation to the defendant requiring an uplift. I accept there are matters of mitigation that I do

need to take into account. Again, I refer to the submissions I have heard from the defence. I note the authorities that they have mentioned and discussed and the matters that are detailed.

[53] It is my view here that the starting point for the fine must be above the $200,000 figure. I consider it is in that band 2 of *Stumpmaster v WorkSafe New Zealand.* I accept the prosecution's submissions that it is at the lower end of that band. I set the starting point at $250,000.

[54] However, as against that, I accept also that the defence is entitled to claim a full guilty plea credit of 25 per cent. I consider that the defendant is entitled to a credit for remorse and the matters that are detailed in that regard. I accept that the defence argument in relation to the remorse and reparation of five per cent is applicable. I accept previous good character carries five per cent. I agree that here we have a defendant who fully co-operated with the investigation; a total of 40 per cent.

[55] I consider, therefore, in the end when I do my sums, that the matter should be completed in the following way; in respect of getting to a fine level it would be $250,000 less 40 per cent credit. But actually doing the mathematics does not help us at all because it goes without argument from the prosecution and from the defendant that this company cannot pay one cent, yet it continues in trade, which is concerning. I have no option because I am required as a matter of law to take into account the financial position of the defendant and it has been made very clear to me on the evidence available to me that it does not have assets, it basically does not have income, and in reality, it is a company waiting to go into liquidation with nothing coming out for debt payments.

[56] As a result of that, the company is convicted and fined zero dollars. The company is ordered to make emotional harm reparation of $20,000 to the victim before 7 June. I understand that will be met from another source of finance.

[57] Further, it will pay consequential losses of $455. That payment will also be made no later than 7 June. Further, it will meet the costs of prosecution of $6,624.37, that having been agreed upon by the prosecution and the defence.

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Judge KJ Phillips
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/07/2023