IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRI-2021-020-002571
[2023] NZDC 10142

WORKSAFE NEW ZEALAND
Prosecutor

v

PROGRESSIVE MEATS LIMITED
Defendant

Hearing:	18 May 2023
Appearances:	T Bain for the Prosecutor B Harris for the Defendant
Judgment:	18 May 2023

NOTES OF JUDGE G A REA ON SENTENCING

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[1] The defendant company Progressive Meats Limited faced a charge that on or about 15 October 2020 at Hastings, being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety workers who work for the PCBU, including Alesana Baker, while the workers were at work in the business or undertaking, namely at its meat processing site, did fail to comply with that duty and that failure exposed workers, including Alesana Baker, to a risk of serious injury arising from the use of plant, namely a brisket cutter.

[2] Three separate particulars were supplied with the charge. They read as follows:

(a) It was reasonably practicable for Progressive Meats Limited to have firstly provided and maintained adequate systems and processes to

ensure that hazards arising from plant were identified, and managed immediately and appropriately;

(b) Secondly, ensured the brisket cutter was safe to use, namely that the two-handed controls could not be bypassed; and

(c) And thirdly and lastly, ensured adequate instruction, monitoring and supervision of workers for the purpose of ensuring ongoing compliance with safe use and handling.

[3] The hearing took place over five days at the beginning of December 2022 and by a decision delivered on 2 March 2023 I found the company guilty, but restricted to the third of the particulars, namely the failure to ensure adequate instruction in the sense of training.

[4] The other two particulars I found had not been breached and therefore the defendant company was not guilty in relation to those.

[5] The way these charges are structured it is only necessary for the prosecution to be successful in one of the particulars for the charge to be proved and accordingly a conviction is entered on that basis.

[6] There has been considerable debate today at sentencing about the extent to which I have found fault with the defendant company and arriving at a guilty verdict in relation to the third of the particulars. I consider that it is necessary to read parts of the judgment into the sentencing notes so that it is clear the basis upon which I am proceeding to sentence today.

[7] Starting at paragraph [19]

> [19] Mr James Mitchell was the leading hand on the lamb slaughter floor at the time. He gave evidence that he could not remember who trained Mr Baker on the brisket cutter. He said he could remember taking him out there to the job, but he did not recall who it was who actually showed and/or instructed Mr Baker on how to use the brisket cutter.
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> [20] In his evidence Mr Baker said that he was trained by a co-worker called "Arama". He said that Arama started his employment with the

Defendant on the same day as he did but that Arama started work immediately on the lamb slaughter floor while Mr Baker started in the offal room.

[21] Mr Baker said that his "training" on the brisket cutter with Arama lasted about four hours. Mr Baker said he was not shown any documentation before he started using the brisket cutter. He said that initially Arama showed him how to use the brisket cutter using both hands but then Arama switched to using one hand when he operated the brisket cutter. Mr Baker was able to see what Arama had done and was then able to operate the brisket cutter one-handed himself.

[22] Mr Baker said that he did not get any instruction on using the brisket cutter from Mr Mitchell or from anyone else other than Arama. That evidence seems to be supported by what Mr Mitchell himself said. Mr Mitchell believed he was not the one who instructed Mr Baker on how to use the brisket cutter and although he knew Mr Baker was to be trained in its use, he was not able to say who it was that undertook the training.

[23] The Defendant's documentation around Mr Baker's training also does not stipulate who was actually training him.

[24] On Mr Baker's recollection it was only a couple of days after he received training from Arama that the accident occurred. He said that he was operating the brisket cutter using his left hand only and was using his right hand to reach across and pull carcasses towards him so that he could cut their briskets. It was while he was doing that that the blades of the brisket cutter activated and caused the injuries to him that I have already outlined.

[8] I went on to say:

[26] As will become clear in a later part of this decision, Mr Baker's supervisors and the senior management and ownership of the company all gave evidence that they were not aware of the brisket cutter being used one-handedly and until this accident did not believe it could be used one-handedly.

[9] I carried on:

[28] Despite the criticisms that can be made of Mr Baker's evidence, I have no doubt at all that what he says about his "training" on the brisket cutter is accurate. He was adamant that he was shown how to use the brisket cutter by Arama and that it was Arama that showed him how to use it one-handed.

[29] I consider that his evidence is supported in two key ways. Mr Mitchell took him up to the job when he was to be trained on the brisket cutter, but he did not undertake the training himself. In his evidence he said that it was possible that an employee who had already been trained in the brisket cutter could be used to train a new employee in its use. It is known that at the time there was an employee called Arama who was working in that general area. In addition, Mr Baker said he got his injuries while using the brisket cutter one-handed and the nature of his injuries and how they were caused provides overwhelming support for that. Either Mr Baker must have figured out on his

> own how to bypass the safety system and use the brisket cutter one-handed or someone showed him how to do it.
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> [31] Based on the evidence given by Mr Baker about his training I accept that the only conclusion that can be drawn is that Arama was delegated by someone in authority on the slaughter floor to train Mr Baker in the use of the brisket cutter and that training was completely inadequate and, indeed, positively dangerous. I accept Mr Baker's evidence that he was not told by Arama that the brisket cutter must be used with both hands and that Arama showed him what amounted to a "shortcut" in using the brisket cutter one-handed.

[10] And lastly:

> [34] On the evidence that I accept from Mr Baker the training he got in the use of the brisket cutter could only be described as "dangerous". The Defendant delegated the training of Mr Baker on this piece of equipment to somebody who clearly should not have been given that role and Mr Baker was not properly supervised at the time he undertook the training. Unfortunately, Arama trained Mr Baker to do exactly what resulted in his injuries some two weeks later.

[11] I find it necessary to repeat that in these sentencing comments because I commented at other parts of the decision, and I will repeat here, that I was satisfied that the company had comprehensive training and safety provisions built into their system. I am satisfied on what I heard that the company was driven by the need to maintain a safe procedure in all of its work areas, but that on this occasion because of what actually happened the system of training broke down as a result of human error and the legislation is designed to catch a situation as that. Undoubtedly it is onerous on employers and persons in control, however, that is the statutory basis upon which the Court has to proceed.

[12] In this case there is no proper record of how Mr Baker was trained. The evidence has come from him, and for the reasons that I have already outlined, I accepted what he had to say about it. On the face of it, I was presented with a situation where somebody who had been in employment with the defendant for only as long as Mr Baker had been, was somehow delegated to train him in what is obviously a potentially dangerous piece of equipment. That training taught Mr Baker exactly the wrong lessons around how to use the particular brisket cutter and inevitably was, as I have said, dangerous in the way that the training occurred.

[13] Mr Baker suffered injuries to his hand as a result of this accident. I have read with considerable care his victim impact statement. There is no doubt that he has suffered greatly as a result of what has happened. In my view this is not a situation where he himself has behaved in a dangerous way, he has simply been doing what he was shown was acceptable. That is the evidence that I have accepted during the course of the hearing and outlined in my decision.

[14] It is clear from the material I have that Mr Baker was an active and talented sportsman. He may well have had a university placement in the US to carry on with his volleyball. Obviously as a result of these injuries, that could not happen. He, according to the victim impact statement, started work as an apprentice in the South Island, decided he wanted to join the Army, and after what I take to have been considerable efforts on his part, finally was not able to do so as a result of the injuries that he suffered and the long-term effect of them.

[15] The injuries themselves, while the medical treatment has undoubtedly done wonders as far as Mr Baker is concerned, still leaves him with psychological concerns. He outlines those in considerable detail in the victim impact statement that was read at the start of sentencing today. I accept that this has been both physically and mentally a traumatic event for Mr Baker, and it will continue on for some time.

[16] During the course of submissions, as is common in cases such as this, I have been told about other cases that are similar to this one and arriving at parity between this case and others. What cannot be overlooked here is the long-term effects on Mr Baker who at the time this happened to him was, as I recall, 17 years of age. He was a very young man with what he saw as a significant future ahead of him in the sporting area. He undoubtedly is somebody who works when he can, wants to achieve, and this injury and this event has been a major blow to him. Hopefully as time passes, he can achieve his aspirations in all the areas that he wishes to.

[17] When dealing with a case such as this, the first step is to determine reparation. I have had very significant submissions from counsel for both sides and I thank them indeed for the effort that they have gone to in presenting the case for each side very clearly to me.

[18] As far as the prosecution is concerned, it is submitted that the reparation, excluding that emotional harm reparation figure, should be somewhere between $45,000 and $50,000 and that there should be a consequential loss payment of $7,778 which is what Mr Shaw, the chartered accountant, determined in the affidavit that has been supplied.

[19] As far as the defence is concerned, it is submitted that emotional harm should run somewhere between $35,000 and $40,000 and that there should be a consequential loss payment of $8,000. That is really simply rounding up the figure that Mr Shaw has included in his calculations.

[20] As with all cases under this legislation, it is common for both sides to put in a large number of cases to assist the Court in determining what the correct result should be, I do not intend to individually mention cases. That does not mean I have not taken account of them. They have been highlighted by counsel in their submissions both in writing and from time-to-time during the lengthy sentencing process today. Again, I am grateful to them for that.

[21] It is an exercise in judgment based on all of the factors that I have before me in determining not only what the emotional harm reparation should be, but also what the appropriate fine should be and whether there should be any costs and I will deal with that in due course.

[22] In the end I am satisfied that the appropriate emotional harm reparation figure that should be paid to Mr Baker is one of $40,000. I consider that bearing in mind the injury that he had, and the effect that it had had upon him, when I look at other cases that fairly reflects where the emotional harm reparation should lie. In addition, there is no real argument that there is a further payment of $8,000 required for consequential loss and there will be an order for that accordingly.

[23] In the case of *Stumpmaster v Worksafe New Zealand* the Full Court of the High Court laid down guidance as to the fixing of the appropriate fine.[1] It held that a defendant's culpability should be assessed by reference to a number of factors. First,

[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

the identification of the operative acts or omissions at issue. I have already gone to some trouble to identify that. This was a break down in what was otherwise a comprehensive safety and training system brought about by human error in the sense that somebody who should not have been training Mr Baker was given the task to do so. He was not up to that task and in fact provided information or instruction to Mr Baker, that as I have said was positively dangerous in relation to the brisket cutter.

[24] It is necessary to make an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk. Well obviously, it has to be accepted that there is serious risk involved in the misuse of something like a brisket cutter and that is evident by what actually happened. Thirdly, it is necessary to consider the degree of departure from standards prevailing in the relevant industry. As I have already said, the departure here was having the wrong person training Mr Baker in the use of this particular piece of equipment.

[25] Everything else that I have heard meant that not only was the defendant operating at the standard of the relevant industry, but in many ways above it. The defendant company had no previous convictions for anything in relation to work safety and that will be dealt with again in mitigating factors.

[26] It is necessary to look at the obviousness of the hazard. I have already commented on that. It is very obvious that the brisket cutter is a major hazard if improperly used. It is necessary to look at the availability cost and effectiveness of the means necessary to avoid the hazard. That does not feature here. There are no issues around cost or availability. There is simply human error and failing to properly train Mr Baker in the use of the equipment.

[27] Next, the current state of knowledge of the risks of the nature and severity of the harm which can result. Again, the risk is obvious as is the nature and severity of the harm that could result.

[28] Lastly, the current state of knowledge of the means available to avoid the hazard and mitigate the risk of its occurrence. This is an area perhaps where the company may have improved its systems from when this accident occurred. It would

seem to me that when training somebody in equipment such as this there ought to be a proper written record specifically around the training, who did it, and what it comprised of so that there is a record of the way in which a person was trained. Whether that has now been incorporated into what the defendant does, I am not sure, but I am told that they have completely reviewed their own position.

[29] This is not a situation where there is systemic failure. This is not a situation where the company simply did not have any systems set up and operated on a wing and a prayer when dealing with dangerous equipment like the brisket cutter. I once again reiterate that the systems that were in place were not properly activated around the training of this young man.

[30] It has been submitted to me by Mr Bain, on behalf of the prosecution, that the starting point for a fine in this case should sit at the midpoint of the medium culpability range set out the *Stumpmaster* case. The medium culpability is a fine of some $250,000 through to $600,000 and Mr Bain submits that the appropriate starting point is a fine of $425,000. Mr Harris does not accept that the culpability sits in the middle of the medium range. He submits that the starting point of the fine should be $325,000 which is some $75,000 above the lowest point in the medium range.

[31] I consider that the correct position is towards the lower end of the medium but not as low as Mr Harris has submitted. In the end there has been a breakdown in the safety procedures of this company that they must take responsibility for, and it has had the consequences that I have already outlined and as a matter of assessment I consider that the appropriate starting point is a fine of $350,000.

[32] Mr Bain submits that there should be no more than a 10 per cent reduction for mitigating factors where Mr Harris submits that the appropriate reduction is one of 20 to 25 per cent for mitigating factors. There is no doubt that there are a number of mitigating factors in this case.

[33] I gained the impression from listening to the evidence that those involved with positions of responsibility on the slaughter floor at Progressive Meats, and their management and ownership, were truly appalled that this incident occurred and the

injury that was caused to Mr Baker. They all believed that they had systems in place to make sure that could not happen. The fact that it did meant a breakdown somewhere in their system and immediate work was done to try and identify that.

[34] Apart from Mr Baker himself, none of the other witnesses, whether called by the prosecution or by the defence, knew of, or were aware of any potential ability to override the two-handed operation of the brisket cutter and operate it single-handedly. I accepted the evidence given by those witnesses as being completely accurate.

[35] Following the accident, the company removed the brisket cutter from circulation. They did a considerable number of tests in relation to it. They obtained a replacement brisket cutter which they did test and found that it also could have its safety system bypassed and they had a modification made to it to ensure that that could not occur.

[36] I accepted the evidence that everything that the company could do to make sure this never happened again was done. Their procedures were updated, and I am told from submissions that significant changes have been made to their training sheets and the documentation across the plant. It is accepted that the company has co-operated fully with Worksafe during the course of the investigation, but of course not to the extent where it was prepared to accept the veracity of the allegations made against them.

[37] In adjusting the final fine for mitigating factors, it is also necessary to take into account the reparation, both emotional harm and consequential loss reparation, that has been ordered. I take Mr Bain's point that it simply does not operate on a dollar for dollar basis, however, it has is always been accepted that the overall amount, including the reparation figure, must be looked at to ensure that a fair result is obtained for both the complainant and the company.

[38] I consider that the mitigating factors, including the consequential loss and emotional harm reparation payments, must amount to a discount greater than the 10 per cent submitted by Mr Bain. On its own the reparation payments would subsume a considerable amount of that 10 per cent. Equally I consider that the 25 per cent

maximum or top figure put forward by Mr Harris is simply too great in the circumstances of this case.

[39] I believe that the appropriate reduction for mitigating factors, without specifying a percentage for each part of them, is one of 20 per cent. That also takes into account that the defendant company has no previous convictions, and as I understand it, has not been the subject of any other prosecutions by Worksafe. That reduction of 20 per cent leaves a final fine of $280,000.

[40] There has been a significant debate between the parties as to the issue of costs. Mr Bain accepts that the prosecution did not succeed on all of the particulars that it relied upon but submitted that a reduction from a $50,000 cost base to one of $25,000 a 50 per cent differential was appropriate in the circumstances.

[41] Mr Harris submitted that this was a case where the parties should meet their own costs, but if the Court considered that some costs were owed to the informant it should be considerably less than the $25,000 being sought.

[42] I find the decision around costs to be a relatively difficult one. As I listened to the case it seemed to me that the prime focus of the prosecution dealt with the first two particulars contained in the charge. Based on the evidence of the engineer Mr Mains, the theory of the case for the prosecution was that whatever the safety provisions that the company had in place, and whatever its own internal inspection criteria was, it was essential when dealing with dangerous equipment like the brisket cutter for the company to use the services of an independent expert to from time-to-time check whether in fact the particular equipment could have its safety provisions overridden by workers using it.

[43] There was no evidence from Mr Mains as to how often such checks would have to be made. There was no evidence before me that that sort of regime in place and any of the meat works in the country or indeed anywhere else. The defence to the charges was that it simply was not reasonably practicable in the circumstances and that was the conclusion that I arrived at as well.

[44] Despite what Mr Bain has said to me today, there is no doubt in my mind that the principal focus in this case from the prosecution point of view was endeavouring to support the thesis that Mr Mains gave in his evidence about safety checks by independent experts.

[45] I accept what Mr Bains says that there was still the particular about ensuring adequate instruction or training, and of course that is where the prosecution has succeeded, but there is no doubt in my mind that what was five sitting days would have been considerably less if those two particulars around safety testing were not included in the charge.

[46] Whether or not the matter would have been resolved without them is purely speculation and I am obliged to consider the matter on the basis that the charge was defended as a whole and that included all three of the particulars. In the end, however, the way the case was presented by the prosecution absolutely ensured that a considerable amount of work and expert evidence had to be considered by the defence to meet the challenge that Mr Mains' evidence represented in this prosecution.

[47] In the end the prosecution was unsuccessful in two-thirds of the allegations that it made. That does not tell the story in its totality because obviously they were successful in one and that is all they needed to be to get a conviction. However, the cost and time involved in dealing with the two allegations or particulars that were not made out simply swamped the other considerations around training and instruction.

[48] On that basis I consider that it would not be fair for either party to contribute to the costs of the others whether under the Health and Safety at Work Act 2015 as far as the prosecution is concerned, or the Costs in Criminal Cases Act 1967 as far as the defence is concerned. I believe that in fairness to both parties this is a case, a rare case, where costs should lie where they fall and accordingly, I am not prepared to make an order of costs.

[49] So just for completion, there will be an order for emotional harm reparation to be paid to Mr Baker in the sum of $40,000. There will be a figure of consequential

loss to be paid to him in the sum of $8,000. There will be a fine on this charge in the sum of $280,000 and there will be no order as to costs.

[50] I reserve the right to tidy up the grammar in that as it is typed up.

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Judge G A Rea
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: …29/08/2023