

**IN THE DISTRICT COURT  
AT NAPIER**

**I TE KŌTI-Ā-ROHE  
KI AHURIRI**

**CRI-2022-041-000947  
[2023] NZDC 28652**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**LOGGED ON LOGGING 2020 LIMITED**  
Defendant

Hearing: 15 December 2023

Appearances: S Cossey for the Prosecutor  
N Beadle for the Defendant

Judgment: 15 December 2023

---

**NOTES OF JUDGE G A REA ON SENTENCING**

---

[1] Logged on Logging 2020 Limited has pleaded guilty to a charge that on 30 June 2021, in the Aropoanui Road area in Tangoio, Hawke's Bay, it being a PCBU and having a duty to ensure as far as reasonably practicable the health and safety of workers who work for that PCUB, including Jake William Duncan, while the workers were at work in the business or undertaking, namely work at its contracted site at Skid 3, 257 Aropoanui Road, Tangoio, Hawke's Bay, did fail to comply with that duty and that failure exposed the workers to the risk of serious injury or death.

[2] The particulars of the charge were that it was reasonably practicable for the defendant company to ensure:

- (a) Firstly, that an adequate pre-harvest risk assessment was documented properly prior to commencing work at Skid 3.
- (b) Secondly, that an adequate risk assessment was undertaken in relation to the use of plugs or bridges.
- (c) Lastly, that effective controls were put in place to minimise the risk of breaker outs being struck by falling logs.

[3] On 30 June 2021, Mr Duncan (the deceased) was working as head breaker out for the defendant company at the site mentioned in the charge. At 6.45 am, there was as usual a tailgate meeting of the crew before work started. The tailgate meeting recorded that Mr Duncan and his fellow breaker out, Mr Hyde, were reminded to be aware of the safety zones. Mr Duncan and his fellow breaker out (Mr Hyde) walked down the edge of the site to a line change, the normal practice would have been to walk down the lines and assess the logs that needed clearing from the day before. However, due to the line change, this did not happen.

[4] Logs were attached to strops by Mr Duncan and Mr Hyde and hauled to, and automatically released at the shoot. The strops immediately headed back down the hill. A log came loose from this area at the top of the hill and travelled down the hill towards Mr Duncan and Mr Hyde. The breaker outs spotted the log coming down the hill, they were on a knoll to which they had retreated for the haul some 16 to 20 metres away from the lines.

[5] They see the log as it came over the first bluff and put in a radio call to hold the lines which the order operator did. The strops were stopped just above the first bluff, approximately 120 metres from the hauler. Mr Hyde jumped off the knoll to the left, looking down the hill. Mr Duncan jumped to the right and was struck by the log. Emergency services were called, but Mr Duncan died at the scene.

[6] The tragedy that has occurred on this site has led to considerable anguish, sadness and despair amongst the family and wider friends and acquaintances of the deceased and undoubtedly amongst his workmates as well. As I have said, there was

an investigation by WorkSafe and as a result of that investigation, the charge that I am dealing with today was laid and ultimately, the company pleaded guilty to that charge.

[7] Normally in sentencing in a matter such as this, it is incumbent on a judge to go through the entire sentencing process, including citing authority and determining what the appropriate amount of reparation and fines should be based on other decisions, the legislation and the overall circumstances of what has occurred.

[8] It is absolutely vital that the court makes a decision based on the case that is before it and not one based on circumstances that are no longer appropriate to it. In this case, it has been accepted that the appropriate reparation that should be paid is \$130,000. In his submissions for the informant, Mr Cossey has submitted that the potential apportionment of that sum should be:

- (a) \$110,000 for Ms Deana Cacciopoli and her and Mr Duncan's daughter, Georgia.
- (b) Secondly, \$10,000 for Ms Jenine Lindsay, Mr Duncan's mother.
- (c) Lastly, \$10,000 for Mr Philip Duncan, Mr Duncan the deceased's father.

[9] I am assuming, hopefully correctly, that those apportionments have been after discussion and at the present time I do not intend to make any further enquiries in relation to them. There will be a fund available. I am instructed to meet the full amount of the consequential loss reparation to the persons that I have named and accordingly, there will be orders for the amounts that I have outlined to the people that I have mentioned.

[10] As far as the fine is concerned, it is accepted by both sides that no fine can be imposed on the defendant company because it is in liquidation and has no ability at all to meet a fine. The law requires an examination of the ability of any defendant to meet a fine and there is no jurisdiction for the court to impose one where there is a total inability to meet a fine. That is perhaps unfortunate in circumstances such as this

because it will be seen by those with an interest that the defendant essentially escapes punishment. However, the situation is such that both parties here and the Court accept that a fine cannot be imposed because of the liquidation of the company and its impecuniosity prior to that liquidation.

[11] Mr Cossey on behalf of the informant has submitted to me that it would be appropriate for me to go through the various steps usually undertaken to determine what an appropriate fine would be. That, in this case, would be an entirely academic exercise that I am not prepared to embark upon. It may well be that some other judge at some other time may be prepared to do so. I can understand from WorkSafe's point of view that they wish to have a source of cases that they can turn to and to cite in other cases in the future, however it needs to be remembered that this is a sentencing court, it is not a court of policy or precedent. My job is to ensure that the appropriate sentence is imposed on the facts before me and on the facts before me, there is no ability of this defendant to meet a fine and no fine can be imposed.

[12] There are legal expenses of \$3,310.36 that I am advised can be paid and there will be an order that the informant is to be paid that amount by the defendant, provided there is funds available in the liquidation to do so.

[13] There is one remaining outstanding issue and that deals with consequential loss. There is a significant dispute between the parties as to how much consequential loss payment should be awarded. That payment, when made, will also be able to be paid because of insurance cover. I think it is important as well bearing in mind the press are here, to say that it may seem incongruous on the one hand that \$130,000 plus consequential loss can be awarded and has finance to do it, but there is no finance available for a fine. The reason why the reparation and any consequential loss can be met is because of ongoing insurance that I am assured by counsel is still available to meet those awards. That of course does not cover a situation in relation to a fine.

[14] I was hopeful that the consequential loss aspect of this case could be disposed of today so that everybody knew where they stood. However, there is a significant legal dispute between the parties as to how consequential loss and particularly the discounting of it should be approached. The difference between their respective

positions can be as much as \$80,000. That is \$80,000 that would be available to Ms Cacciopoli and the children, depending on the outcome of the decision and I consider it requires appropriate submissions and thought for the decision to be arrived at.

[15] Whatever it is, it will be done on the basis of what I consider to be the correct legal approach here and I am looking to counsel to provide any additional assistance that they can. As has already been agreed, any further submissions will be filed and served by the prosecutor on or before 5 pm on 26 January 2024 and the defence will have three weeks to file and serve its submissions which must be done on or before 5 pm 16 February 2024.

[16] A copy of that will be typed up and made available to counsel.

G A Rea  
District Court Judge