IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2017-085-003299
[2019] NZDC 12020

WORKSAFE NEW ZEALAND
Prosecutor

v

CENTREPORT LIMITED trading as CENTREPORT WELLINGTON
Defendant

Hearing: 19 June 2019

Appearances: D M Brabant and T M Williams for the Prosecutor
M F Quigg and N E H Logan for the Defendant

Judgment: 19 June 2019

NOTES OF JUDGE P A H HOBBS ON SENTENCING

[1] E te whānau tēnā koutou. Nau mai, haere mai, tēnā koutou katoa.

[2] The defendant company, CentrePort Limited, has pleaded guilty to a charge of failing to take all practicable steps to ensure the safety of its employees. The details are set out in the charging document. The purpose of today's hearing is to sentence the defendant company following that plea.

[3] The defendant's operations are based around the Wellington Harbour, and it carries out a wide range of port activities. It also undertakes commercial property management and development, and the management of ferry terminals. For the purpose of today's sentencing it is relevant to note that the defendant company also

operates an empty container depot where it undertakes the washing and cleaning of empty shipping containers, as well as the repair of damaged containers and container modifications.

[4] Mr Teihi Whaanga worked for the defendant repairing containers. His duties included welding, fabricating, and painting. On 31 January 2017 Mr Whaanga and his colleague, Mr John Flutey, were tasked with repairing and modifying a container for use as a pedestrian walkway. Mr Flutey decided to repair a door header at one end of the container, while Mr Whaanga was to work on a roof patch at the opposite end.

[5] Mr Whaanga used a ladder which was usually used by Mr Flutey. Mr Flutey obtained another ladder from the wash bay. Mr Whaanga placed the ladder fully extended at the end of the container and climbed up the ladder and onto the container roof. There was no edge or fall protection in place. The defendant's practice was to place the ladder against the corner casting of the container. Mr Whaanga was using a portable welding plant during the repair he was undertaking, which involved welding in a new steel patch on the roof of the container.

[6] While standing inside the container, facing outwards with his back to the other end of the container, Mr Flutey heard a ladder fall. He looked around and saw Mr Whaanga lying on his back on the ground with his feet on the ladder, and his head to the side of the ladder near the corner of the container. Mr Flutey provided immediate first aid and alerted his colleagues. Mr Whaanga was taken to Wellington Hospital where he was placed in an induced coma. Mr Whaanga was found to be suffering from injuries to the back of his head which were sustained when he hit the concrete. He was initially in the intensive care unit at Wellington Hospital, and then transferred to the general ward on 13 February 2017. Tragically, Mr Whaanga died as a result of his injuries shortly after his transfer to a general ward.

[7] We have heard directly today from Ben Whaanga about how the death of Mr Whaanga has affected him and the wider family. I have also read Mrs Whaanga's victim impact statement. I wish to acknowledge their loss, and express my condolences to Mrs Whaanga and the wider whānau. They have, in my view today,

shown great strength, dignity and compassion. Mr Whaanga was obviously a man of great character who loved his family, and was loved by his family.

[8] A disputed facts hearing took place over a period of two days, 19 and 20 February of this year. That hearing was held to determine whether or not it had been proved beyond reasonable doubt that Mr Whaanga fell from a height rather than from a standing position, whether or not the insecure ladder was a substantial cause of that fall, and finally whether or not the injury suffered in the fall was the operative cause of his death.

[9] Judge Tuohy was the presiding Judge, and he came to the conclusion, having heard a significant amount of evidence and argument, that the answer to all three of those questions was yes. That means the sentencing proceeds today on the basis that Mr Whaanga did fall from a height, that an insecure ladder was the substantial cause of that fall, and the head injury he sustained in that fall was an operative cause of his death.

[10] There has been a considerable amount of debate about what impact the need for a disputed facts hearing should have on the sentencing outcome, which is something I will return to shortly.

[11] The leading guideline judgment for sentencing in cases such as this is *Stumpmaster v WorkSafe New Zealand*.[1] It is accepted that I must engage in a four step process. First, I must assess the amount of reparation to be paid to the victims. I must then fix the amount of the fine by reference to the guideline bands set out in the *Stumpmaster* decision, and having regard to the aggravating and mitigating factors. I must then determine whether any further orders under ss 152 to 158 of the relevant Act are required, and finally I must make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[12] Sentencing is an evaluative exercise. It is not a mathematical exercise, although one might be forgiven today for thinking that it is. That is particularly so in relation to reparation which, of course, includes emotional harm reparation. Fixing an

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

amount of an emotional harm reparation is inevitably a difficult task. It is, to a large extent, an intuitive process. Each case must be considered by reference to its own unique circumstances. It is trite but necessary to acknowledge that no dollar value can be placed on a life. As I have already noted, Mr Whaanga's life was priceless to those who loved him. It would presumptuous of me to say that I could accurately assess the extent of emotional harm suffered by Mrs Whaanga and her whānau, let alone put a dollar value on it. However, I am required to undertake that unenviable task of making an assessment of what is an appropriate monetary figure by way of emotional harm reparation. As required, I make that assessment by reference to previous case law referred to me, and what I know of this case, but in doing so I mean no disrespect to Mrs Whaanga and her whānau, nor do I suggest for a moment that the loss of a loved one can be quantified in dollar terms.

[13] The cases referred to me by the prosecution indicate payments in the range of $75,000 to $125,000 for emotional harm. It cannot be ignored that they were global payments to more than one family member, in some cases to several family members. The prosecution seeks a payment of $100,000 for Mrs Whaanga, and $125,000 for Mr Whaanga's five children, which represents $25,000 each. That amounts to a global figure of $225,000.

[14] Mr Quigg for the defendant company says, based on the cases referred to by the prosecution, that is too high. Mr Quigg submits that $70,000 is appropriate for Mrs Whaanga, and $100,000 for the children, giving a global figure of $170,000.

[15] In my view, the defendant is correct when it submits that $225,000, as sought by the prosecution, is significantly higher than the payments made in the cases referred to by the prosecution. Indeed, the figure of $170,000 suggested by the defendant is higher than the awards in all the cases that have been referred to me. On that basis, it seems to me that the defendant's assessment of reparation is more in line with previous orders.

[16] There is, however, a further dispute about whether previous payments made by the defendant company to Mrs Whaanga and her children should be accounted for by way of deduction. The defendant company paid Mrs Whaanga $52,500 for the reasons

that have been set out in the submissions. In addition, the defendant company has made a payment of $52,526.85 which has been distributed equally to Mr Whaanga's five children. That sum was paid as a result of an insurance policy held by CentrePort for the death or disability of employees. As part of a collective agreement with its employees, CentrePort agreed to pay the premiums, and for any proceeds to be paid for the benefit of the relevant employee. The money was paid to the Public Trust as the administrator of Mr Whaanga's estate and, as I have noted, then distributed to the five children equally as beneficiaries of that estate.

[17] In addition to those payments, the defendant continued to pay Mr Whaanga's wages for a period of time amounting to some $12,000. The defendant also paid almost $6000 for legal expenses, and also paid motel costs, airfares, petrol and food vouchers in the sum of $1500 for the whānau.

[18] The prosecution queries whether or not those sums, in particular the $52,500 already paid to Mrs Whaanga and the $52,526.85, should be taken into account when assessing the amount of emotional harm reparation. I am satisfied that they should. In my view, that approach is supported by case law. They are, in my view, payments by way of reparation. As the defendant submits the key is that the payments are made, not necessarily what labels are attached to them.

[19] Ultimately therefore I am satisfied that the appropriate amount of reparation for Mrs Whaanga is $70,000. The defendant has already paid the $52,500, leaving $17,500 still to be paid, and I hereby order a further payment of $17,500 to Mrs Whaanga.

[20] Similarly with Mrs Whaanga's children I am satisfied that $100,000, or $20,000, each is the appropriate order, less the $52,526.85 already paid, leaving a figure rounded up of $47,500 therefore requiring a further payment of $9500 to each of the five children, which again I formally order be paid today.

[21] There is no dispute that Mrs Whaanga is entitled to a further $85,952.23 representing consequential economic loss, and I again today formally make an order for that further payment to Mrs Whaanga.

[22] This brings me to the fine. Both parties accept that the defendant's culpability sits in the high culpability band as set out in the *Stumpmaster* decision. Ms Brabant for the prosecution submits that the starting fine should be $800,000. Mr Quigg for the defendant says $600,000 is the appropriate starting point for the fine. Culpability is to be assessed by reference to the factors referred to in the judgment of the *Department of Labour v Hanham & Philp Contractors Ltd*[2] together with the factors listed in s 151 Health and Safety at Work Act 2015.

[23] The defendant admits that it failed to take the reasonable, practicable steps that are set out in the summary of facts. The defendant accepts that it did not meet its responsibilities in relation to the use of ladders, and that it exposed its workers to the risk of death or serious injury. The defendant failed to develop and implement a system of safe work for undertaking repairs to the roof of containers. The defendant failed to implement processes to ensure that ladders were well maintained and used correctly, nor did the defendant provide any protection and fall prevention systems to control the risk of a fall from height. It is also clear that the training in respect of these matters was inadequate. It also seems to me that the risk of falling in such circumstances is a relatively obvious and foreseeable risk. That risk was ultimately realised, resulting in Mr Whaanga's tragic death.

[24] I acknowledge that the defendant had identified the risk of working at height and using ladders in a general sense. There was a hazard register that set out controls and processes to be followed in a general sense. The defendant was also moving towards a safer system of work at the time of the incident and was in the process of ascertaining the best means necessary to avoid the hazard. Unfortunately, the steps taken by the defendant at the time were inadequate. Its systems were inadequate and a departure from best practice.

[25] In my view, the appropriate starting point for the fine is $700,000. There is no dispute that a 5 percent uplift should be applied to account for the defendant company's previous conviction under the health and safety legislation relating to the death of an employee who was struck by a forklift. This increases the fine to $735,000.

[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

[26] There is considerable difference between the parties about what credits or mitigating factors should be applied. Ms Brabant for the prosecution submits that no more than five percent is appropriate for reparation. Ms Brabant acknowledges that 10 percent is available for co-operation with the investigation and remedial steps taken since the incident. However, Ms Brabant submits that nothing is available for remorse. In total, the prosecution submits that 20 percent is available for mitigating factors.

[27] Mr Quigg for the defendant company submits that 20 percent credit is available for reparation. Mr Quigg also submits that a further discount of five percent should be given for remorse together with a further 10 percent for its co-operation throughout the investigation and remedial action, giving a total of 35 percent for mitigating factors.

[28] I am satisfied that five percent is too low in relation to the reparation. It does not, in my view, recognise and acknowledge the early steps taken by the defendant to deal with reparation for Mrs Whaanga and the wider whānau. There must also be some recognition of the total amount of reparation ordered without, of course, undermining or distorting the ultimate outcome. In my view, a 10 percent credit for reparation already paid, and still to be paid, is appropriate.

[29] I do not accept that there should be no credit for remorse. The defendant company has today, through Mr Quigg, expressed its remorse for Mr Whaanga's death. The defendant company's actions immediately following the tragedy are not those of a defendant with no remorse for what occurred. While I acknowledge the prosecution's submissions about the need for the disputed facts hearing, it does not, in my view, inevitably follow that a party or person who pursues such a course of action has no remorse. Parties are entitled to exercise their rights, and the Sentencing Act 2002 does provide for such a process.

[30] In this case, I agree with Mr Quigg that any reduction in discount as a result of the disputed facts hearing should be addressed when dealing with the credit for a guilty plea, not when dealing with remorse. I am satisfied that the defendant is entitled to 15 percent credit for its remorse, co-operation with the investigation, and the remedial action it has taken since the incident.

[31] This leaves the credit to be applied for the guilty plea. The prosecution says 10 percent is appropriate; the defendant says 15 percent is appropriate. There is no doubt that the defendant entered its guilty plea at an early stage, however, the disputed facts hearing, who required that hearing, and whether it was required at all has been the subject of significant debate. Ms Brabant for the prosecution essentially submits that the disputed facts hearing could have been avoided but for the approach and stance taken by the defendant company. Ms Brabant for the prosecution further submits that the outcome of that hearing was largely inevitable.

[32] Mr Quigg, on the other hand, submits that it was the prosecution that sought the disputed facts hearing, although Ms Brabant has taken some issue with that today and made her position on that clear. Mr Quigg also submits that the defendant's position in relation to causation was understandable and reasonable. Mr Quigg also submits that it did try to reach some compromise to avoid the need for a disputed facts hearing, although that again is disputed by Ms Brabant for the prosecution.

[33] In my view, the fact that there was a disputed facts hearing must diminish the credit available for a guilty plea. I do not suggest there was no basis for such a hearing, nor do I suggest that it was undertaken for an improper purpose or to unnecessarily prolong the proceedings. I must acknowledge a party's right to avail itself of the procedures that are available, and to pursue its position or theory. However, it seems to me that often the most obvious answer is the right answer, and that proved to be the case in this case.

[34] For the reasons advanced by the prosecution, I agree that the credit for a guilty plea should be no more than 10 percent. Applying the uplift of five percent and the credits I have noted, that results in an overall fine of $506,048 which I formally order today to be paid. There is no suggestion that there are any financial impediments for the defendant in paying such a fine and reparation.

[35] In terms of ancillary orders, the prosecution seeks total costs of $51,381.57. That includes $7394.05 being half of the prosecution costs, and $43,987.52 being the costs incurred by the prosecution for three expert witnesses at the hearing together with their travel and accommodation costs. Ms Brabant for the prosecution accepts

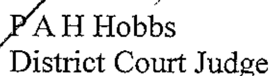
that the costs sought will exceed those awarded in other cases, but again the prosecution submits that the disputed facts hearing should have been avoided, and was essentially only required due to the approach taken by the defendant company.

[36] As I have already noted, the defendant company is entitled to avail itself of the procedures and process available to it. I acknowledge that the defendant was unsuccessful at the disputed facts hearing. I also acknowledge that there may have been some inevitability about the outcome of that hearing. However, I do not believe there was any misconduct on the part of the defendant or bad faith. With that in mind, it seems to me that what is essentially an award of indemnity costs in respect of some of the costs sought is inappropriate. The defendant has acknowledged and accepted that payment of the prosecution costs as sought is appropriate of $7394.05, and I formally make that order.

[37] The defendant has suggested a payment of 66 percent of the costs incurred by the prosecution in relation to the experts at the disputed facts hearing. In my view, that is a more appropriate award of costs, and accordingly I make a total costs order of $36,425.81 payable by the defendant to the prosecution which includes the $7394.05 referred to.

[38] If I stand back and look at the total financial orders made today, they amount to $693,426.04 by my calculation. If the payments already made by the defendant by way of reparation are included, then the total financial cost or penalty to the defendant is $798,452.89. I am satisfied that the orders that I have made are appropriate in the particular circumstances of this case.

[39] I hope, like Mr Ben Whaanga, that the Whaanga family now have some closure, and I wish them well with the unveiling of their beloved husband, father, father-in-law and grandfather's headstone this weekend.



P A H Hobbs
District Court Judge