

**IN THE DISTRICT COURT
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE
KI WHAKATĀNE**

**CRI-2020-087-000284
[2020] NZDC 17036**

WORKSAFE NEW ZEALAND
Prosecutor

v

HIGGINS CONTRACTORS LIMITED
Defendant

Hearing: 21 August 2020
Appearances: B McCarthy for the Prosecutor
M Ferrier for the Defendant
Judgment: 21 August 2020

NOTES OF JUDGE I D R CAMERON ON SENTENCING

[1] The company Higgins Contractors Limited appears for sentence.

[2] It has pleaded guilty to one charge of failing to comply with its duty to ensure the health and safety of its workers, that failure contributing to the death of three men. The charges are brought by WorkSafe New Zealand and at the time Higgins was contracted by the New Zealand Transport Agency to undertake works to state highways in the Bay of Plenty District.

[3] The incident occurred in the early afternoon on 26 February 2019 when a roadside maintenance crew was working on State Highway 2, Pikowai on the Matata straights approximately 30 kilometres north-west of Whakatane. A vehicle

travelling eastbound along the same stretch of road in the direction of the work site vehicles crashed into the rear of one of those work site vehicles. Three workers were struck by vehicles and fatally injured.

[4] A very detailed written agreed summary of facts has been filed with the Court outlining all the background and the various investigations into the crash and the statutory duties of Higgins. It will be annexed to this decision.

[5] The essential facts are these. On the afternoon of 26 February 2019 a Higgins' employee drove to the work site in a Higgins ute. He was then joined by a crew from Kiwi Waste Disposal Limited who were contracted to provide Higgins with truck-based setting up and water tank equipment for the cleaning of culverts. The two Kiwi Waste trucks were parked behind the Higgins ute with a gap of about 13 metres to the ute and parked to the left of the fog line on the road. A Kiwi Waste employee then set up road cones alongside the Kiwi Waste trucks. Both trucks had flashing lights activated. Work on the excavation of the culvert began.

[6] At the time the work commenced there had not been any site-specific discussion about traffic management set up, hazard identification or risk assessment. The traffic management crew, including the site traffic management supervisor, were not present when the work started and no traffic management plan had been put in place at the work site. There had been no site safety briefing as there ought to have been. Under the Higgins standard operating plan for culvert cleaning the shoulder of the road or the nearest lane should have been closed. This did not occur.

[7] The traffic management crew, being the three persons subsequently killed, then arrived at the site and parked the traffic management truck to the left of the fog line with the right side of the truck on the fog line about 30 metres behind the second Kiwi Waste truck. The traffic management truck had "pass with care" and "men at work" signs affixed to the rear of the truck and highly visible and had orange hazard lights and a flashing roof light. Crucially, the traffic management crew did not set up any traffic management equipment and the site foreman did not check whether such equipment had been set up.

[8] About 20 minutes after the traffic management crew had arrived a Budget truck, travelling in the same direction as the site vehicles were facing, struck the rear of the traffic management truck causing it to overturn into the left-hand drain and strike the three traffic management crew as it did so. The Budget truck continued on to impact the Kiwi Waste tanker before rolling over onto its left side into the drain.

[9] David Eparaima, Haki Hiha and Dudley Raroa were all fatally injured.

[10] Those are the essential facts. In terms of the victim impact statement these were filed in respect of Gloria Gray, the widow of Haki Hiha, Anna Nepia-Eparaima, the partner of David Eparaima and Esther Waretini, the partner of Dudley Raroa. Mr West from WorkSafe New Zealand read to the Court the victim impact statements of both Anna Nepia-Eparaima and Esther Waretini. The Court has read and considered the further victim impact statement by Gloria Gray, the widow of Haki Hiha.

[11] It is clear from each of those victim impact statements that the loss of their loved one has caused the family extreme suffering and ongoing emotional harm. It is an understatement to say that each of them are dearly missed by all their family members.

[12] I record for completeness that the driver of the Budget truck pleaded guilty to three charges of careless use of a motor vehicle causing the deaths of the three men and on 19 June 2019 was sentenced to 250 hours of community work, disqualified from holding or obtaining a driver's licence for a period of 21 months and ordered to pay emotional harm reparation of \$7,000 to each of the three families of the deceased men.

[13] In terms of sentencing principles, I need to impose a sentence which holds Higgins accountable for its failures, denounces its conduct and deters it from future like failures and also to provide for the interests of the victims. I have had the benefit of extensive written submissions from counsel for the prosecutor, WorkSafe New Zealand and on behalf of Higgins Contractors Limited, the defendant. I have

read and considered those submissions carefully as well as the relevant authorities referred to in that material.

[14] I deal first with emotional harm reparation which I am able to impose pursuant to s 32 of the Sentencing Act 2002.

[15] The prosecution seek an order that Higgins pay each of the affected families the sum of \$130,000 and Higgins, through its counsel's submissions, agrees to do that.

[16] The Court accepts that such a figure for each of the families is appropriate and accordingly those orders are made.

[17] Again, under s 32 of the Sentencing Act the Court has power to impose reparation for consequential losses, in particular the loss of income. Detailed calculations have been set out in the respective submissions. By my calculations Higgins has already paid some \$21,578.90 to the Hiha family and \$55,571.24 to the Eparaima family.

[18] It is submitted that the following further payments be made for consequential losses:

- (a) To the Hiha family the sum of \$41,701.06 to be paid in monthly instalments at the request of the family until 2024.
- (b) To the Eparaima family the sum of \$8,490.09 in a lump sum.
- (c) To the Raroa family the sum of \$54,420.80, again in a lump sum.

[19] The Court accepts the methodology of the calculations and the appropriateness of the amounts involved and orders are made accordingly.

[20] I turn now to identify the culpability of factors in accordance with a case of *Department of Labour v Hanham & Philp Contractors Ltd*.¹

¹ *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095.

[21] First the operative acts or omission. The key omission of Higgins was its practice not to require the site traffic management supervisor to undertake a safety briefing with the workers at each individual work site. This is notwithstanding that each individual work site had its own particular inherent risks and only after such an on-site inspection could the correct traffic management requirements be properly identified, communicated to workers and put in place before any of the work started. This includes advance warning signage, cones, vehicle and staff positioning as well as, if necessary, closing shoulder of the road and closing the nearest lane.

[22] Instead Higgins relied on an early morning meeting of workers off-site when all likely hazards and controls at the various intended work sites were included in what was known as the “start of the day”. The reason Higgins did not do this was because of what it describes as the cyclical nature of the work. But of course that is no excuse for not carrying out a proper risk assessment at the site itself and not starting work until everybody understood the potential hazards and the various safety measures put in place. It is accepted by Higgins that all new work sites ought to have been risk assessed and documented at site and those risks discussed with workers.

[23] “The nature and seriousness of the risk of harm and the realised risk”. There was a risk of serious harm and it was realised in the most tragic way with the death of three of its workers.

[24] “The degree of departure from industry standards”. In my view there was a significant departure from industry standards in the respects identified.

[25] “The obviousness of the hazard”. In my view the inherent hazard was obvious, but nevertheless risk-reducing measures were not fully carried out.

[26] “Availability, cost and effectiveness of the means to avoid the hazard”. An on-site meeting was readily available, but simply not implemented. However, the Court accepts that Higgins took a number of other steps to attempt to ensure staff had the necessary knowledge, skills, procedure and equipment to adequately manage work sites.

[27] In terms of the appropriate fine, I agree with the submissions that the case falls at the high end of the medium culpability band identified in *Hanham's* case, which is a range of \$250,000 to \$600,000.

[28] In terms of the appropriate starting point for a fine, Higgins accepts the prosecution's submission that a \$600,000 starting point is appropriate before any aggravating or mitigating factors are taken into account. The Court agrees with this level as a starting point.

[29] There are no aggravating factors present other than those that have been discussed. In particular, Higgins has no previous convictions relating to failing to keep its workers safe.

[30] In terms of the mitigating factors, in this case there was genuine and demonstrable remorse shown by Higgins from the outset. There was full co-operation with the authorities. There have been payments by way of reparation and an agreement to make further payments of reparation as described and also Higgins have undertaken a number of other measures to address the underlying cause.

[31] These mitigating factors are conveniently set out in the affidavit of Mr Pearce from Higgins and have been taken into account by the Court. In particular, Mr Pearce attests to there now being a whole variety of measures in place to prevent this happening again. For example, he refers to a new temporary traffic management App having been developed which requires that each time staff arrive at a new site they must input traffic and environmental information into the App via their tablets and that is reviewed by others. After that, the necessary safety plan would be implemented.

[32] There is reference to Higgins' nationwide supervisors undertaking training across the board with Higgins' personnel in relation to traffic management. Other initiatives to manage the risks and reduce them have been undertaken and are in the process of being implemented on a continuing basis.

[33] Senior management of Higgins Contractors Limited are present today via AVL because of the Covid lockdown and their commitment to ensuring this never happens

again is very clear and I am sure appreciated by the families concerned. It is noteworthy that immediately following the accident Higgins shut down its entire operations throughout New Zealand to ensure that preventative measures could be implemented before any resumption of work.

[34] The reasons for me today for explaining some of the steps that Higgins has now taken is to advise all those interested parties that a significant discount to the starting point of \$600,000 is justified in this case because of those mitigating factors. The prosecution accept that a 30 per cent discount for those various mitigating factors, including the payments of reparation and for consequential loss, is appropriate.

[35] The Court agrees with that as well. There must be and there ought to be a full 25 per cent discount for Higgins' early guilty plea to the charge.

[36] The level of discounts then is 55 per cent and applying that to the starting point of \$600,000 the level of \$270,000 is reached.

[37] Accordingly, in conclusion the Court makes the following orders:

- (a) The defendant, Higgins Contractors Limited, is convicted of the charge and Higgins Contractors Limited now is ordered to pay each of the three families \$130,000 by way of emotional harm reparation.
- (b) Further consequential losses are ordered to be paid by Higgins Contractors Limited as follows:
 - (i) to the Hiha family the sum of \$41,701.06 to be paid in instalments as requested by the family;
 - (ii) to the Eparaima family the sum of \$8,490.09; and
 - (iii) to the Raroa family the sum of \$54,420.60.
- (c) Higgins Contractors Limited is fined \$270,000.

- (d) Higgins Contractors Limited are ordered to pay costs to WorkSafe New Zealand in the sum of \$3,000.

I D R Cameron
I D R Cameron
District Court Judge