IN THE DISTRICT COURT
AT WHĀNGĀREI

I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2020-088-002559
[2021] NZDC 22782

WORK SAFE NEW ZEALAND
Prosecutor

v

KERR CONSTRUCTION WHĀNGĀREI LIMITED
Defendant

Hearing: 18 November 2021

Appearances: K Hogan for the Prosecutor (via AVL)
N Beadle for the Defendant (via AVL)

Judgment: 18 November 2021

NOTES OF JUDGE G TOMLINSON ON SENTENCING

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[1] Kerr Construction Whāngārei Limited appears before me today having entered a guilty plea to a prosecution under ss 36(1)(a) and 48(1), (2) and (c) of the Health and Safety at Work Act 2015. That is a single charge of failing to ensure as far as practicable the health and safety of one of their workers, exposing that worker to the risk of serious injury or death. The maximum penalty for that charge under that legislation is $1.5 million fine.

[2] The facts are as follows in short order and they are well known to all the participants here but for completeness sake I will summarise them. Kerr Construction Whāngārei Limited were undertaking refurbishment works at a commercial premises here in Whāngārei. A site specific safety plan was in place for the work that was

originally contracted for and in my assessment all was in order and compliant in terms of looking out for and providing for the safety of their workers.

[3] An additional task was added to the job to be undertaken by the company. That is or was the removal of some air conditioning units after the original contractor tasked with that particular job became unavailable. The removal of these units which were at a height and of significant weight was not included or contemplated in the original site specific safety plan. That plan did however include matters such as ladders, hazards from falls but nothing in regards, removal of such heavy items from height.

[4] A discussion occurred as to how this removal should take place and notwithstanding the failure to include this in the site specific safety plan, had the outcomes of those discussions been followed which identified the necessity for the hireage and use of a genie lift then despite not being included in the site specific safety plan it is likely that the serious injury to Mr Pollock would not have occurred.

[5] Regrettably no genie lift was available to be obtained and the decision to remove these air conditioning units, absent a genie lift was made. The new plan, such as it was and inadequate as it was exposed Mr Pollock and although not charged, the apprentice, Mr Milne to significant risk of serious injury or death as the plan was to use mobile scaffolds under the units, unbolt the units, drop or lower them on to the mobile scaffolds and then continue them on to the floor.

[6] The mobile scaffold units were set up incorrectly. Even had they been set up correctly they still would have been and this is my word, "stupidly" unsafe and still would have exposed Mr Pollock and Mr Milne to risk of death or serious injury. It is a clear example of employees and agents of a company and by extension an application of law, the company placing "getting the job done" ahead of the safety and welfare of the employees.

[7] Now I do not make that comment lightly and it is not a reflection of the company attitude but the reason the legislation that we have exists is because of the power imbalance that exists between workers and companies notwithstanding the very close relationships that most small New Zealand businesses have with their employees

and Mr Beadle has quite properly characterised that as a family situation in his submissions to me and I accept that absolutely, but there needs to be a recognition of that power imbalance because where people are in those circumstances, they feel a desire to get the job done, to not waste time and employees in those circumstances may in fact take risks that the employer is not satisfied with, would not want to have happen and would not endorse. In this case however those risks were taken in almost, I suspect the situation I have described.

[8] The mobile scaffolds as I have said were not set up correctly. The one in use by Mr Pollock had no guard rails, Mr Milne's had guard rails on three sides and a piece of timber on the fourth. Platform height was set at around 1.6 metres off the ground or just under that height by about five millimetres and as I have indicated in my discussion, combined with the height of the average human male, that meant Mr Pollock's head and thus the most vulnerable part of the human body was at least 3.2 metres above the concrete floor.

[9] The injury to Mr Pollock came about when an air conditioning unit weighing some 54 kilogrammes was being removed. It was partially unbolted and then it subsequently released itself connecting with the scaffold that Mr Pollock was upon, causing him to lose balance and fall to the floor, contacting headfirst, losing consciousness and suffering multiple skull and rib fractures and a serious brain injury which was and has required ongoing rehabilitation.

[10] Thereafter an agent and employee of the company who has I note, since been disciplined and who was a person that was trusted absolutely by the company; instructed Mr Milne, the apprentice to adjust the height of the scaffold from which Mr Pollock was thrown and then prepared or attempted to prepare after the event, a safety analysis for the removal of the units.

[11] Ultimately the job was completed with the hire of a genie lift.

[12] Mr Pollock has thankfully to everybody's relief recovered sufficiently to return to work and I understand that he is working four days a week and I acknowledge the company's efforts and actions after the initial perhaps, less than meritorious conduct

contact by Mr Hayden's in terms of changing the scaffold height, I acknowledge the company's actions thereafter to co-operate with the investigation and top up the salary of Mr Pollock in terms of the 20 per cent ACC shortfall, reimburse the family for the costs of attending at the hospital and providing support and in all those respects the company has, from that point onwards conducted themselves as Mr Beadle has submitted and as one would expect in a small family-owned and family-operated culture of business that we have here in New Zealand.

[13] Kerr Construction Whāngārei Limited has been in this business for some 50 years, in the construction industry.

[14] In terms of how to approach this sentencing, this has been pretty much standardised by *Stumpmaster v WorkSafe New Zealand* where the Court held that the approach to sentencing required four steps:[1]

(a) The first is to assess the amount of the reparation.

(b) Next is to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigations factors.

(c) Thirdly to determine any further orders under ss 152 to 158 and that is the cost awards.

(d) And then to make an overall assessment of proportionality which I, having looked at it, amounts to essentially what those of us who undertake more mens rea based criminal work would describe as "totality".

[15] The *Stumpmaster* bands are as follows: low culpability, up to a $250,000 fine. The second is medium culpability, $250,000 to $600,000. The third is high culpability, $600,000 to $1 million and the fourth, very high culpability, $1 million plus.

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1 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

[16] For a person who has owned a small business all be it a law firm, those are eye watering figures but they eye watering for a reason. They are designed and are there to protect employees and workers, not only from themselves but also as I have said earlier because of that imbalance of power and to help ensure that families and workers know that when they go to work there is every chance they will come home again.

[17] In terms of a standard *Taueki* sentencing approach, I am also obliged to record and take into account restorative justice offers to make amends and other matters and I do so in this case.[2] And I turn to the first matter under *Stumpmaster* that I must determine and that is the amount of reparation.

[18] Both Mr Beadle for Kerr Construction Whāngārei Limited and Ms Hogan for WorkSafe are agreed that $30,000 is the emotional harm reparation component that should be awarded. Ms Hogan in her detailed and comprehensive submissions sets out at para [4.6] at table of a number of cases all of which received significantly greater emotional harm or reparation figures other than the *WorkSafe New Zealand v Phil Stirling Ltd* case where one of the victims there received $30,000.[3]

[19] That is the figure that is agreed Ms Hogan and Mr Beadle for Mr Pollock. Having considered it and looked at those cases, the table and considered the factors here too, noting the other matters that the company have done to ensure that Mr Pollock and his family were not out of pocket, I am satisfied that $30,000 is appropriate. I also in reaching that, make reference to Mr Beadle's submissions, paras [17 through 20] and his analysis there too, including the analysis of a case that will loom large in this decision, *WorkSafe New Zealand v Forest View High School Board of Trustees*.[4] In that case the teacher was awarded $50,000, the student $45,000, their injuries and their difficulties were greater than Mr Pollock's and when I factor in the $18,876.52 that the company has already paid in terms of ensuring that Mr Pollock's family are not out of pocket and meeting those obligations, I am satisfied that $30,000 is an appropriate award and accordingly I direct $30,000 of emotional harm reparation to be paid to Mr Pollock.

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2 *R v Taueki* [2005] 3 NZLR 372 (CA).
3 *WorkSafe New Zealand v Phil Stirling Ltd* [2019] NZDC 10608.
4 *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21548 and [2019] NZDC 21558.

[20] I then am required to determine the amount of the fine first by reference to the guideline bands and then having regard to the aggravating / mitigating factors.

[21] Ms Hogan for Worksafe says the middle of the median band, that band of course has a range of $250,000 to $6000,000. She says based on the cases that she has prepared and referred me to, $5000,000 should be the start. I looked at the bands and middle of the median band is in fact $425,000 but Ms Hogan relies on the *Forest View* decision drawing the analogies and where it is distinguished she says that other factors work against Mr Beadle's submissions and she stands firmly by her start point of $500,000. She submits an uplift of five per cent for Kerr Construction Whāngārei Limited's prior involvement in WorkSafe prosecutions in where a subcontractor was regrettably and tragically killed. And she asks for a 50 per cent of the actual costs, some $4,357.

[22] Mr Beadle in comprehensive written submissions and in impassioned oral submissions before me today says to me that, yes the median band is appropriate although he makes the oral submission to me that he was sorely tempted to advocate the low culpability band but believes that such advocacy may have been futile, but in very skilful way makes a submission to me that he was tempted and points me and tries to drag me very strongly in that direction without actually departing from the submission that he made of $300,000. He quite properly supports that by reference to cases *WorkSafe New Zealand v Lindsay White Painters and Decorators Limited*, where the victim in that case or the worker in that place suffered multiple complex facial lacerations and a fractured elbow.[5] Less serious injures than in this case and in that case the starting point was $300,000. *WorkSafe New Zealand v Build Northland Limited*, another case that he refers me to and was counsel upon and a case out of this Court by a decision of Judge McDonald, again $300,000 is submitted as the start point based on that and in that case the victim fell three metres, again from mobile scaffolds to concrete floor.[6] In that *Build Northland* decision the victim was far more seriously injured than Mr Pollock.

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5 *WorkSafe New Zealand v Lindsay White Painters and Decorators Limited* [2017] NZDC 28091.
6 *WorkSafe New Zealand v Build Northland Limited* [2019] NZDC 23940.

[23] He advocates for no uplift for the prior matters coming as they do under the different legislation and highlights, perhaps did not highlight I probably raised it more than anything, the difficulty that exists in terms of uplift where the maximum penalties and the penalties imposed have changed significantly. Any uplift based on a percentage would inevitably amount to a double punishment of Kerr Construction Whāngārei Limited because on the previous occasion the fine was $50,000 and any percentage applied to either Mr Beadle's $300,000 or Ms Hogan's $500,000 would necessarily amount to a significant figure potentially even larger than the original fine and that creates a difficulty for the sentencing judge.

[24] At the end of the day Mr Beadle says 25 per cent for guilty plea and all other matters that are highlighted in terms of mitigating conduct on the part of Kerr Construction Whāngārei Limited he submits that amounts to a further 25 per cent. His final position therefore is a 50 per cent discount from a start point of $300,000 and he advocates that the fine should be $150,000.

[25] In sentencing Kerr Construction Whāngārei Limited I must take into account the principles and purposes of the Sentencing Act 2002 under s 7 and 8. Under s 7 purposes, I must hold Kerr Construction Whāngārei Limited accountable for the harm done to the victim and community by the offending. I must promote in Kerr Construction Whāngārei Limited a sense of responsibility for and an acknowledge of that harm and I accept that Kerr Construction Whāngārei Limited and the people there too have that sense of responsibility and acknowledgement of the harm. I must provide for the interests of the victim of the offending, I must provide reparation for harm done and I have already done that. I must denounce the conduct and I must deter Kerr Construction Whāngārei Limited and others from committing similar offences. In terms of principles I must take into account the gravity of the offending in the particular case including the degree of culpability of the offender and that is a difficult exercise in terms of strict liability but Mr Beadle has done his absolute best to mitigate that culpability and he makes strong points. Must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offending. I must take into account the information provided to the Court concerning the effects on the victim, I must impose the least restrictive outcome that is appropriate in the circumstances.

[26] In terms of assessing a start point I on a standard *Moses* and *Taueki* approach, I must first assess the aggravating factors relating to the offence.[7] The reality in this case is the aggravating factor and the most significant aggravating factor is the failure to add to the site specific safety plan for the new activity. Now in saying so I recognise that the discussion was undertaken and that had the genie lift matter been added to the plan and followed, that would have meant that we would not be here today.

[27] The defence says to me that in relation to aggravating factors that there was a plan and this can be a distinguishing factor from *Build Northland* however I find that whilst there was a plan for other work, there needed to be a specific plan and it needed to be put in place for the work that has ultimately lead to the injury.

[28] I find that this matter is more on a par with *Worksafe New Zealand v Forest View High School Board of Trustees* whilst it is on more of a par there are differences. I accept that in *Forest View High School* there was no plan. One does expect a plan but one can see how a plan would not be implemented in a school environment. *Forest View High School* was also a much higher distance to fall from but the risks were the same.

[29] I distinguish this matter from *Build Northland* and notwithstanding this is mobile platforms, the removal of heavy overhead objects and the seeking to drop them down was never going to be proper in terms of using the mobile scaffolds which why the genie lift should have been applied and it is that that I distinguish it from.

[30] In *Forest View High School* Judge Hollister-Jones he adopted a $500,000 start point and made the finding that were *Forest View High School* a construction company he would have reached a higher start point. That may be so and I am dealing with a construction company here, however the height is less, there was a plan and a written plan initially, this matter should have been added to it, it was not. There was then a plan, orally to use the genie lift, that was not followed and whilst Kerr Construction Whāngārei Limited can and should be able to rely on their employees, their employees and the people responsible have acted inappropriately and taken steps that they should not have done.

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7 *Moses v R* [2020] NZCA 296.

[31] Taking those matters into account I am satisfied that a start point less than the $500,000 in *Forest View High School* is appropriate because there was at least an oral plan that was not followed and because it was at a lesser height, I take a start point therefore of $375,000 for the fine.

[32] The next thing I need to do is take into account aggravating and mitigating factors relating to the offender or the company. In terms of aggravating factors, the only one is that prior conviction. I have to recognise it and I will recognise it but I will not do so by providing a percentage. On the previous occasion the total award was around $130,000. Some time has passed but I recognise and uplift that fine by $15,000 to recognise those prior matters which gives me a final adjusted start point of $390,000.

[33] In terms of mitigating factors, Kerr Construction Whāngārei Limited have entered a guilty plea and I am satisfied that that guilty plea is sufficiently early as to allow a full 25 per cent discount for plea. Kerr Construction Whāngārei Limited and the people there too, importantly have demonstrated appropriate and proper remorse. That remorse coupled with the assistance to the family and going above and beyond that which is required of them by providing for the lost wages, reimbursing the family for the necessity to travel and matters that one would expect in a family business with such close familial ties is still worthy of credit in my view because in taking those steps what the company has done is stepped away from worrying about the bottom line and started to worry about the people for whom they have a responsibility and for whom they care.

[34] I am satisfied that in those circumstances I can increase or apply a discrete discount for both actions and I increase that discount by 15 per cent. I do not reach the level that Mr Beadle advocates for 25 per cent. This is not a situation where I am satisfied that a 50 per cent discount can be maintained. One of the matters that Mr Beadle raised in his written submissions was co-operating with the investigation.

[35] These strict liability offences and where mandated statutory investigation and co-operation exists, this does not allow in my assessment an extra discount for co-operation that would otherwise follow in terms of mens rea criminal offending where

a defendant confesses to a serious crime and assists with the investigation. Co-operation is mandated and in those circumstances I am not prepared to increase the discount for that cooperation.

[36] So I have settled on a discount of 40 per cent taking those factors in to account. Forty percent discount of three hundred and ninety thousand is 156. I round that up to $160,000. That gets me by my maths and correct if I am wrong counsel to a fine of 230,000.

[37] I then, must as set out in the *Stumpmaster* decision consider proportionality. In my language that is totality but on a proportional basis looking at the history that Kerr Construction Whāngārei Limited have had, looking at how the incident played out, the actions of the employee, the actions of Kerr Construction Whāngārei Limited after the event including the regrettable actions of the employees immediately thereafter which were then rectified by more senior management and employees. I look to see whether $230,000 in those circumstances is proportionate. It strikes me in terms of a small business and where there is this very close connection that that may be slightly disproportionate and I reduce that fine by an additional $20,000 and I settle on a final fine of $210,000 and Kerr Construction Whāngārei Limited is accordingly fined $210,000.

[38] The next matter is the costs. Ms Hogan refers and makes the submission in terms of prosecutor's costs under her heading, "Ancillary Power – s 152(1)", she submits that the external counsel costs for the work up to and including sentencing submissions was $5,069.20 and internal costs were $2,908. She advocates for 50 per cent of that as just and reasonable additional contribution towards the cost of prosecutions.

[39] It has always struck me as an odd situation in a criminal matter where a prosecutor with a statutory obligation to prosecute and bring matters can then seek costs of that prosecution. However I am satisfied that the legislation and the precedent case law allows for an order for prosecution costs. Ms Hogan seeks 50 per cent.

[40] I am satisfied that a contribution for those costs is proper but I will not order 50 per cent. I will order $3,500 in terms of contribution to costs.

[41] I note in terms of *Stumpmaster* the proportionality decision is probably supposed to be made at this point. I look at it again and add the matters together and the total cost to Kerr Construction Whāngārei Limited, not taking into account the matters that they have already done off their own bat in terms of the 20 per cent top with ACC in assisting the family, putting those simply to one side; the total cost therefore is something in the region of $243,500. I have already made a proportionality assessment. I look at that again and I am satisfied that in all the circumstances, it is proportionate and that is the total costs and fines that are ordered.

[42] On that basis, fined $210,000. Prosecution costs, $3,500. Emotional harm reparation, Mr Pollock, $30,000.

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Judge G Tomlinson
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/11/2021