IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-007676
[2022] NZDC 25043

WORKSAFE NEW ZEALAND
Prosecutor

v

WARATAH FORESTRY SERVICES LIMITED
Defendant

Hearing: 14 December 2022

Appearances: A Everett for the Prosecutor
J Lill for the Defendant

Judgment: 14 December 2022

NOTES OF JUDGE K MAXWELL ON SENTENCING

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[1] The defendant, Waratah Forestry Services Limited ("Waratah"), has pleaded guilty to a charge of contravening s 36(1)(a), s 48(1) and s 2(c) of the Health and Safety at Work Act 2015 ("the Act").

[2] Waratah is a PCBU, also known as a Person Conducting a Business or Undertaking as defined in s 17 of the Act. As a PCBU, Waratah was obliged to ensure insofar as it was reasonably practicable the health and safety of workers who worked for it whilst they were at work pursuant to s 36(1)(a) of the Act.

[3] The exact nature of the duties breached by Waratah will be discussed in the course of this sentencing, but the essence of the offending is captured by the admitted particulars, namely that it was reasonably practicable for Waratah to have:

(a) Adequately educated and trained its field technicians about the risks and controls required for safely testing the harvester head.

(b) Adequately monitored its field technicians to correct any unsafe practices.

[4] The charge carries a maximum penalty of a fine not exceeding $1.5 million.

[5] I want to first acknowledge the presence in court today of the family of Mr Nieuwoudt. The process of sentencing in a case of this nature will no doubt feel very disengaged from your reality, namely the loss of a family member, but there is a process that I must now follow. Please know that I have carefully read your victim impact statements. Mr Nieuwoudt was clearly a much-loved family member. I also wish to acknowledge and thank Waratah for their representatives, not only in court today but also online.

The Facts

[6] I start first of all with the facts surrounding the charge. I take these largely verbatim from the agreed summary of facts. On 5 November 2020, Andre Nieuwoudt died at his place of work. He had a wife of 26 years and two sons aged 20 and 22 at the time of his death. The family had immigrated to New Zealand from South Africa in 2005 and they resided in Tokoroa.

[7] Waratah is a limited liability company. They distribute and service Waratah branded products including harvester heads. Mr Nieuwoudt was a worker employed by Waratah as a field technician. He had been employed in that role since 2017.

[8] Freedom Logging Limited purchased a new Waratah HTH625C harvester head logging machine from Waratah in about 2017. The harvester head was mounted on a John Deere tractor carrier. There are numerous Waratah harvester heads in use in the New Zealand forestry industry. Waratah regularly commissions and services them for its customers onsite. Freedom Logging Limited was using the harvester head in its

logging operation. Waratah had tasked Mr Nieuwoudt to carry out onsite repairs to the harvester head.

[9] When a Waratah field technician is servicing or repairing a Waratah machine for a customer, the field technician is in control of the work and the customer follows the field technician's directions. Once trained, a Waratah technician can carry out onsite servicing or repairs alone. Representatives of the customer are often present.

[10] I turn now to the incident on 5 November 2020. Mr Nieuwoudt had been carrying out repairs to the harvester head at Quail Ridge Forest on 4 and 5 November 2020. At the conclusion of the repair work at about midday, he was testing the harvester head. Only he and another employee of Freedom Logging Limited were present at this time. The employee was seated in the cab of the carrier and following Mr Nieuwoudt's instructions. The Waratah key switch for the harvester head, located in the cab of the carrier, was set to auto and the carrier engine was on rather than off resulting in hydraulic supply to the harvester head.

[11] Mr Nieuwoudt was standing inside the arms of the harvester head and manually spun the measuring wheel, which he had been doing repair work on. By manually spinning the measuring wheel, the harvester head activated and the top delimb knives automatically closed upon Mr Nieuwoudt. He received crushing injuries to his chest as well as cuts to his back and the back of his head. The employee immediately called for assistance, but Mr Nieuwoudt died of his injuries onsite.

[12] The summary of facts refers in some detail to various industry standards which I will address later. WorkSafe was notified of the incident on 5 November 2020 and attended the scene on 6 November 2020. WorkSafe's investigations established that the harvester head was in good working order and that it was foreseeable that manually spinning the measuring wheel when the Waratah key was set to auto and the carrier engine was switched on would activate the harvester head and the delimb knives would automatically close.

[13] Whilst Waratah field technicians were provided with some instruction regarding safety practices, including via a safety instruction extract document and via

manuals for the harvester head, the manuals for the harvester head were large and the references to the Waratah key switch being turned off were limited. The buddy training system implemented by Waratah was insufficient to ensure Waratah's field technicians' safety knowledge. There was no other supervision and monitoring of Waratah's field technicians regarding their safety knowledge and practices. The test likely being carried out by Mr Nieuwoudt relating to measuring wheel functionality could have been safety carried out with the Waratah key switch for the harvester head in the auto position, if the carrier engine was off.

[14] The summary records that Waratah has not previously been the subject of WorkSafe enforcement action or prosecution and that the company cooperated with the WorkSafe investigation.

Approach to Sentencing

[15] The sentencing criteria under s 151(2) of the Act apply to this offending. The Court must apply the Sentencing Act 2002 and must have particular regard to:

(i) Sections 7 to 10 of the Sentencing Act.

(ii) The purpose of the Act.

(iii) The risk of and the potential for illness, injury or death that could have occurred.

(iv) Whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred.

(v) The safety record of the person, including without limitation any warning, infringement notice or improvement notice issued to the person or enforceable undertaking agreed to by the person to the extent that it shows whether any aggravating factor is present.

(vi) The degree of departure from prevailing standards in a person's sector or industry as an aggravating factor.

(vii) The person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[16] I must hold Waratah accountable for the harm done. In the established authority of *Stumpmaster v WorkSafe New Zealand* the Court affirmed previous authority that sentencing in a health and safety context will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability of harm done to the victim.[1]

[17] One of the principles to be taken into account is that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable. Both counsel agree that the approach in *Stumpmaster* applies where the Court outlined a four stage approach to sentencing:

(1) To assess the amount of reparation.

(2) To fix the amount of the fine.

(3) To consider orders under s 152 through 158 of the Act.

(4) To make an overall assessment of the proportionality and appropriateness of the penalty.

Reparation

[18] WorkSafe submits that there are two kinds of reparation payable. First, reparation for emotional harm arising in particular from the death of Mr Nieuwoudt. Second, reparation for the consequential loss in the form of an ACC top up payment.

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

[19] WorkSafe submits that an award of $130,000 is appropriate having regard to sums which have been awarded in other cases identified at schedule A in the case of *Ocean Fisheries Ltd v Maritime New Zealand*.[2] They refer in particular to *WorkSafe v Alderson Poultry Transport Limited*, *WorkSafe v Higgins Contractors Limited* and *Worksafe v Vehicle Inspection New Zealand Limited* where global awards of $130,000 were awarded.[3]

[20] There are other cases where similar awards have been made. These include *WorkSafe New Zealand v Pakiri Logging* and also *WorkSafe New Zealand v Ports of Auckland*.[4]

[21] On behalf of Waratah, Mr Lill largely agrees with the submissions made by WorkSafe although he identifies an award in the order of $110,000 with adjustments for reparation already paid.

[22] Mr Lill submits that an award of $130,000 is at the upper end and tends to be reflective of particular or special circumstances. He makes the point that in relation to the *WorkSafe v Alderson Poultry Transport Limited* case, the incident was witnessed by a family member and also that in *WorkSafe v Higgins Contractors Limited*, there was agreement as to the sum payable. He also seeks to distinguish the authority of *WorkSafe v Vehicle Inspection New Zealand Limited*, as a customer was involved rather than an employee.

[23] Both counsel agree that consequential loss of reparation for an ACC shortfall in the sum of $191,081 may be justified.

[24] Section 7(1)(d) of the Sentencing Act states that one of the purposes of sentencing is to provide reparation for harm done by offending. Reparation is compensatory in nature and it is designed to recompense an individual or family for loss. It is an intuitive exercise. Intangible harm is incapable of a tariff case.[5] What I

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[2] *Ocean Fisheries Ltd v Maritime New Zealand* [2021] 3 NZLR 443.
[3] *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090; *WorkSafe New Zealand v Higgins Contractors Ltd* [2020] NZDC 17036; *WorkSafe New Zealand v Vehicle Inspection Ltd* [2021] NZDC 3036.
[4] *WorkSafe v Pakiri Logging* [2021] NZDC 14158; *WorkSafe v Ports of Auckland* [2020] NZDC 25308.
[5] See *Ocean Fisheries Ltd v Maritime New Zealand* [2022] NZCA 164 at [14].

can say is that the emotional impact of this incident is evident from the victim impact statements.

[25] Distinctions can always be drawn as between cases. Each case falls for consideration on its own facts. Mr and Mrs Nieuwoudt had been married for some 26 years. They had moved to New Zealand to start a new chapter and to provide a better life for their two sons. They raised a family; they had recently bought a home and were looking forward to the next chapter.

[26] After Mr Nieuwoudt's death, the family had to deal with the knowledge of how he died and the circumstances in New Zealand at that time did not allow them to grieve in the ordinary way. Borders were shut and others could not grieve with them. Whilst this is not the fault of Waratah, reparation is not about fault. The family's isolation at that particular time simply added to the emotional toll.

[27] I am of the view that in all of the circumstances of this case, a significant sum of $130,000 for emotional harm reparation is just. That, less the $50,000 which has already been paid to family, I therefore will make an order for $80,000.

[28] I also make an order for $191,081 to represent the consequential loss.

Fine

[29] A fine differs from reparation. It is essentially punitive in nature, imposed by and for the State. The standard sentencing methodology applies to the determination of a fine. First, a starting point should be arrived at by reference to the culpability of the offending and second, adjustment should be made for relevant aggravating and mitigating factors personal to Waratah.

[30] Both counsel agree that the factors set out in the established authority of *Department of Labour v Hanham & Philp Contractors Ltd* referred to in *Stumpmaster* are relevant when assessing Waratah's culpability. The factors that I must take into account include the following:

(a) The identification of the operative acts or omissions at issue.

(b) An assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost, and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[31] The *Stumpmaster* bands are as follows:

(i) Low culpability, up to a fine of $250,000.

(ii) Medium culpability, between $250,000 and $600,000.

(iii) High culpability, from $600,000 to $1 million.

(iv) Very high culpability, $1 million plus.

[32] WorkSafe submit that Waratah's culpability sits in the high band range as set out in *Stumpmaster*. They identify a figure of approximately $700,000. As to discounts for mitigating factors, they accept that there are discounts available in the range of 45 per cent. Finally, WorkSafe seeks a contribution towards legal costs together with costs for an expert.

[33] On behalf of Waratah, Mr Lill submits that Waratah's culpability sits around the midpoint of the medium band and identifies a figure of around $450,000. He

submits that discounts of between 50 and 55 per cent are available by way of mitigation. No issue is taken with the legal costs. To a point, issue is taken with the expert report, on the basis that the report confirmed that the processes in place were appropriate if followed.

Operative acts or omissions

[34] These are clearly set out in the particulars of the charging document. On behalf of Waratah, Mr Lill submits that it is important to consider the nature of the breaches carefully when assessing the culpability of Waratah. The gaps in the systems do not relate to improving or modifying the machinery or developing standard operating procedures. Rather, the training and monitoring provided needed to be improved to better ensure compliance with the safety information provided to field technicians.

[35] The Court also observes that care must be taken when assessing culpability by reference to the outcome. Death can sometimes result from a low level of carelessness.

Assessment of the nature and seriousness of the risk of harm occurring as well as the realised risks

[36] There is no dispute that working with hydraulic machinery in a forestry setting is inherently dangerous. The risk here was that the harvester head could activate and seriously injure or kill someone conducting maintenance. It was reasonably foreseeable that manually spinning the measuring wheel when the Waratah key switch was set to auto and the carrier switch was on, would activate the harvester head. That risk in this case was realised when Mr Nieuwoudt was caught in the machine and killed.

Degree of departure from prevailing industry standards

[37] The actions taken must be seen in light of the regulations, approved codes of practice and the best practice guidelines that were readily available to Waratah and in relation to which staff should have been appropriately trained.

[38] These include the Health and Safety and Employment Regulations 1995 which require the need to ensure moving parts of a machine are secure when carrying out maintenance. Also, the 2012 Forestry Operations Approved Code of Practice (ACOP) 6.3.1 and 6.5 which set out that work on the machines should only be undertaken by competent persons and importantly, that they should be deactivated when maintenance is carried out. Further, the WorkSafe Best Practice Guidelines which sets out a process that should be followed in terms of risk assessment to identify and deal with risks.

[39] WorkSafe submit that Waratah failed to ensure that Mr Nieuwoudt had been trained as to the correct processes and controls to be followed when maintaining the harvester head. That Waratah failed to ensure that they maintained that those workers were in fact following the industry accepted standards and processes.

[40] On behalf of Waratah, Mr Lill submits that the risk had been clearly identified. He submits that there is no evidence or admission that the training was markedly different from other industry participants or the prevailing industry practice. That said, Waratah does acknowledge that the training and monitoring system in the form of a buddy system is an informal system and does not meet the high standards of a PCBU.

Obviousness of the hazard

[41] All agree that the hazard arising from a harvester head is obvious. On behalf of Waratah, Mr Lill submits that Mr Nieuwoudt had carried out the testing on numerous occasions. He submits that the gaps identified by WorkSafe are narrower than in other cases which have come before the Court.

Availability, cost, and effectiveness of the means necessary to avoid the hazard

[42] WorkSafe submit that the simple solution was to ensure that any work was done with the machine switched off. That the failings related to supervision and training and to ensure that safe systems were followed.

Comparison with other cases

[43] I have been referred to several authorities. These were annexed to the submissions filed on behalf of WorkSafe and on behalf of Waratah. WorkSafe relies on the following authorities: *WorkSafe New Zealand v Alto Packaging Limited*, *WorkSafe New Zealand v ANZCO Foods Limited and Riverlands Eltham Limited* and *WorkSafe v Easton Agriculture Limited*.[6] They also refer to *WorkSafe New Zealand v Kiwi Lumber Masterton Limited*.[7]

[44] WorkSafe submits that these authorities deal with "unguarded nip points". WorkSafe fairly acknowledge that this is not a case of a company that "does nothing", that they had a detailed lockout procedure and enforced breaches. That said, WorkSafe make the point that this has limited value when important content is not emphasised and is not monitored.

[45] WorkSafe also refers to paragraph [66] of *Stumpmaster*. There the Court made a general observation that under the new bands which had been identified a starting point of between $500,000 and $600,000 would be common. Again, in this case they identify a starting point of $700,000.

[46] On behalf of Waratah, Mr Lill distinguishes the authorities referred to by WorkSafe. He makes the point that this case falls for consideration in circumstances where procedures were not followed, as distinct from circumstances involving inadequate or no guards. Again, that said, Waratah acknowledges that the situation could have been improved by the training and monitoring of field technicians.

[47] I agree with Mr Lill that distinctions can be drawn as between this case and the authorities referenced by WorkSafe. Waratah had identified the risk, implemented controls and standard operating procedures. Mr Nieuwoudt was experienced. I am satisfied that the departure from prevailing industry standards in this respect was

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[6] *WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148; *WorkSafe New Zealand v ANZCO Foods Limited and Riverlands Eltham Limited* [2022] NZDC 12765; *WorkSafe New Zealand v Easton Agriculture Ltd* [2018] NZDC 2003.

[7] *WorkSafe New Zealand v Kiwi Lumber Masterton Limited* [2020] NZDC 19117.

towards the lower end. However, there was clearly a failure to adequately train and monitor the field technicians, hence the charge before the Court.

[48] I have drawn some assistance from the authority of *WorkSafe New Zealand v ANZCO Foods Limited and Riverlands Eltham Limited*. There, a starting point of $550,000 was identified in a case involving the death of a worker which involved moving machinery. Mr Lill submits that the offending in that case was more serious. He submits that the failures in that case were in relation to monitoring the systems in place to ensure workers were complying with systems. He also submits that in addition to improving monitoring, an engineering control to prevent employee access should have been installed.

[49] I accept that distinctions can always be drawn. The Court in *ANZCO* found that the hazard was not obvious. The same cannot be said for this case. I have found assistance from *ANZCO* because the Court considered that the focus of the case was primarily about monitoring systems.

[50] The cases referred to by WorkSafe involved machinery that was inadequately guarded and where there was generally a further feature, such as the failure in training and monitoring or operating procedures. Therefore, those cases carry a higher degree of culpability.

[51] The offending in this case falls within the middle range of the medium band. A starting point in the order of $530,000 may be justified.

Aggravating and mitigating factors

[52] There are no aggravating factors, so I turn to the mitigating factors.

[53] The first is the plea of guilty. The plea was entered at an early stage and I agree with both counsel that a 25 per cent discount is available.

[54] A further discount is available for co-operation. Waratah cooperated with the investigation and that is expressly referred to in the summary of facts. I also agree that a further five per cent is available for that factor.

[55] I turn to the issue of reparation and remorse. Waratah has already paid $50,000 to Mrs Nieuwoudt and the family. In *Stumpmaster*, the Court considered that the efforts of a defendant to assist the victim from the outset merit particular noting. The Court observed those are times are greater stress and uncertainty for the victim and family and genuine efforts to assist from the outset are reflective of the matters for which this extra credit is given.

[56] WorkSafe submit a discount of five per cent is available. On behalf of Waratah, Mr Lill submits that a discount in the order of 10 to 15 per cent is available. I agree that 10 per cent is available having regard to the circumstances of this case and the steps taken by the company.

[57] I also now turn to the matter of previous good character. I accept the submissions advanced on behalf of the company that Waratah is a responsible company. This is Waratah's first health and safety offence and I agree that a five per cent discount is warranted.

[58] Finally, I turn to remedial steps. There was some discussion about the steps taken by the company as part of sentencing today. WorkSafe acknowledge that steps have been taken and those were further outlined in submissions this morning. I agree that a further five per cent is available for that factor.

[59] Taking into account a reduction of 50 per cent for mitigating factors, that leaves a fine of $265,000.

Costs

[60] On the application of WorkSafe, the Court may order Waratah to pay WorkSafe the sum that it thinks just and reasonable towards the costs of the prosecution, including the cost of investigating the offending and associated costs.

[61] In considering a contribution to costs, I have to factor in the overall picture in terms of the penalty. I agree there should be a contribution towards legal costs, that will be in the sum of $3,025.50.

[62] I turn to the issue of the expert advice. Mainmech assisted with the technical investigation and travelled to the site. On behalf of Waratah, Mr Lill submits that the expert did not identify a breach or provide a foundation for an allegation in the charge. Rather, the report found that the processes were followed.

[63] There was an incident at Waratah's site, an investigation followed. Waratah has pleaded guilty and has accepted that it was reasonably practicable to educate, train and monitor its field technicians. An investigation was required, and the report has assisted Waratah in reducing culpability. In the circumstances, half of that cost should be met by Waratah in the sum of $1,505.62.

[64] Section 151 of the Act requires me to take into account the financial position of Waratah and whether they are able to pay the fine imposed. There is no evidence to suggest that they would not be able to pay the fine and the costs.

[65] Having regard to the total monetary cost to Waratah. I do not consider it to be an unjust outcome or an inappropriate outcome.

Outcome

[66] By way of a summary:

(a) Waratah is fined $265,000.

(b) I make an order for reparation in the sum of $80,000 and consequential loss of $191,081.

(c) Prosecution costs of $3,025.50 and a further $1,505.62 towards the expert report.

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Judge KH Maxwell
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 28/12/2022