IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRI-2022-020-1394
[2022] NZDC 24631

WORKSAFE NEW ZEALAND LIMITED
Informant

v

ZENTHE LIMITED
Defendant

Hearing:	11 November 2022 and 8 December 2022
Appearances:	Mr V Veikune for Informant (by AVL on both dates) Ms L: Castle for Defendant (in person on 11 November 2022 and by AVL on 8 December 2022)
Date of Decision:	14 December 2022

SENTENCING DECISION OF JUDGE G A REA

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[1] On 9 August 2022 the Defendant pleaded guilty to a charge under sections 36(1)(a), 48(1) and (2)(c) of the Health and Safety at Work Act 2015. The charge recorded that on or about 26 May 2021 at 8 Cooper Street, Havelock North, Hawke's Bay, the Defendant being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business or undertaking, namely operating the Metro Mach Hot Press Machine, that failed to comply with that duty and that failure exposed workers including Harvey Duncan, to a risk of serious injury.

[2] The Informant provided particulars for the charge. It asserted that it was reasonably practicable for Zenthe Limited to have:

(a) Ensured, competent person/s reviewed and assessed the machine to determine its compliance with the standard described in AS/NZS 4024 or better;

(b) Ensured the machine was adequately safeguarded to the standard described in AS/NZS 4024 or better.

By its guilty plea the Defendant accepted that the charge against it was proved.

[3] The Defendant is based in Havelock North and specialises in the manufacture of architectural panels and batten systems for walls and ceilings in commercial and industrial settings.

[4] On 4 December 2020 the Defendant entered into a contract with AWF Limited for the latter to supply labour for its business. On 3 March 2021 AWF Limited employed Mr Harvey Duncan (the victim) as a casual or field employee. On 5 March 2021 AWF Limited placed Mr Duncan with the Defendant to work in the Defendant's workshop in Havelock North.

[5] In August 2019 the Defendant purchased a Hot Press Machine. It began using that machine in its workshop around November/December 2020. The machine was used to press two wood product boards with adhesive between them to form battens.

[6] On 29 March 2021 Mr Duncan completed the necessary training with the Defendant to enable him to operate the machine.

[7] On 26 May 2021 while working with the machine Mr Duncan loaded wooden boards into the machine using his left hand to realign them. He used his right hand to press what he thought was the button to lower the press. Unfortunately he mistakenly pushed the wrong button causing the press to shut on his left hand whilst still inside the machine. Again, unfortunately both buttons on the operation panel were coloured green.

[8] The machine closing on his left hand caused Mr Duncan severe crush injuries resulting in the surgical amputation to the first joint of his second and fourth fingers and also his middle finger. His left hand was not his dominant hand.

[9] Subsequent investigations revealed that the machine was not compliant with the appropriate guarding standard. It was not fitted with any protective devices on any of its four sides and as a result workers were not prevented from reaching into the hazardous area between the pressing plates during operation.

[10] In August 2020 the Defendant engaged a health and safety consultant to prepare a health and safety manual for it. The manual was based on a similar health and safety manual the consultant had created for another company associated with the Defendant's directors.

[11] The Defendant did not ensure that the consultant it instructed was properly qualified to provide specific guarding advice in relation to the machine that caused injury to Mr Duncan. The Defendant did not seek specific machine guarding advice from the consultant either.

[12] The Defendant did not ask the consultants to undertake a risk assessment of the machine and the consultant was not a certified machine safety expert.

[13] On 19 August 2020 the consultant visited the Defendant's manufacturing site and was shown the machine in question. He did not observe it in operation during his visit. The consultant completed a safety manual for the Defendant and invoiced them for the work that he had done. The summary of facts records the consultant as invoicing the Defendant at a "discounted rate" for his work. That must certainly have been the case because a copy of the invoice has been produced during the hearing showing a total bill of $138.47 inclusive of GST.

[14] In arriving at the appropriate sentence in this case consideration must be given to the sentencing criteria set out in s 7 and 8 of the Sentencing Act 2002. It is not necessary to set those out specifically in this decision because they are very well known and apply to all sentencing undertaken by the Courts.

[15] In August 2018 a Full Court of the High Court delivered a guideline judgment for sentencing under s 48 of the Health and Safety at Work Act 2015. In *Stumpmaster v Worksafe New Zealand*[1] four steps were set out in the sentencing process:

(a) Assess the amount of reparation to be paid to the victim.

(b) Fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

(c) Determine whether any other orders under the Act are required; and

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[16] Four levels of culpability for offending under s 48 were set out in *Stumpmaster*. They are low culpability, medium culpability, high culpability and very high culpability. For reasons which I will explain, I consider that this offending sits around the midpoint of the medium culpability band. The fine range set for that band is between $250,000.00 and $600,000.00.

[17] Following the approach in *Stumpmaster* it is necessary to set the amount of reparation that should be paid to Mr Duncan. Mr Duncan has not supplied a victim impact statement so I have nothing directly from him as to the impact that his injuries has on him now and going forward. However, the absence of a victim impact statement does not mean that reparation should not be paid simply because the effect of the injuries on Mr Duncan is not known to the Court directly from him. In my view the Court is entitled to draw an inference from the nature of the injuries that he has received as to what the effect on any individual would be and to use that knowledge as a basis for reparation.

[18] In my sentencing decision in relation to AWF Limited dated 12 December 2022 I was required to set the appropriate level of reparation. In the end there was very little, if any, disagreement between Counsel in this case and the AWF Limited case as

[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020

to the appropriate level of reparation which I set at $15,000.00. It has also been agreed between all of the parties that based on culpability 80% of that should be paid by this Defendant and 20% by AWF Limited. As a result there will be an order that the Defendant pay reparation in the sum of $12,000.00 to Mr Harvey Duncan.

[19] As far as the fine is concerned I have received extensive submissions from both Counsel as to what that should be. Both Counsel have referred to a number of different authorities (which I do not need to particularise) in support of their respective starting points.

[20] Each Counsel has made submissions on the list of relevant factors that should be taken into account in assessing the fine. Those were originally set out in *Department of Labour v Hahnam and Philp Contractors Limited*[2] and they were approved and applied in the *Stumpmaster* case. Again, because of the ultimate outcome of this sentencing, I do not consider it necessary to lengthen this decision by considering each of the relevant factors in turn.

[21] In the end I consider this case falls around the midpoint of the medium culpability band because the Defendant allowed Mr Duncan to work on an unguided machine. It was the Defendant's obligation to ensure that the machine was properly guarded and it is a serious matter to allow an employee to work on an unguarded machine which simply does not meet the required safety standard.

[22] Based on an analysis of the authorities submitted by the Informant Mr Veikune has submitted that the appropriate starting point for the fine is $500,000.00. Ms Castle on the other hand submits that the culpability of the Defendant in this case does not reach the level of those other cases where the starting point has been $500,000.00 or slightly above and she therefore submits that the appropriate starting point is in the range of $380,000.00 to $400,000.00.

[23] In my view the Informant's starting point is slightly too high and the Defendant's slightly too low. Based on the injuries suffered by Mr Duncan and the

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[2] *Department of Labour v Hahnam and Philp Contractors Limited* HC Christchurch CRI-2008-409-2, 18 December 2008

level of culpability that the Defendant bears for those injuries I consider the appropriate starting point to be a fine of $450,000.00.

[24] One of the reasons why the sentencing was adjourned from 11 November 2022 to 8 December 2022 concerned the approach that the Court should take in relation to the advice received by the Defendant from the consultant. Ms Castle consistently submitted that to some degree at least the Defendant was entitled to rely on the consultant and since he did not point out the guarding difficulties in relation to the machine and because the Defendant acted on his advice there should be a reduction in the fine imposed.

[25] This approach was strongly opposed by Mr Veikune for the Informant. He submitted that the Defendant should have known that the consultant did not hold himself out as an expert in guarding machinery and the Defendant could not dilute its own culpability under the Act by pointing to the possible failures of another. He submitted there should be no deduction at all simply because the Defendant had hired a consultant who failed to identify the problem.

[26] In the end I do not consider it is necessary to make any final determination on this issue. Because of the Defendant's financial position it is not in a position to meet the full amount of the appropriate fine that would be imposed if it was in a financial position to do so. If any discount was allowed for this factor it would have to be relatively modest and in the end could not effect the final outcome as far as the Defendant is concerned.

[27] The Informant accepts that the Defendant was entitled to the following discounts from the $450,000.00 fine:

Less 25% for plea
Less 5% for co-operation
Less 5% for remorse
Less 5% for reparation to be paid
Less 5% for no previous convictions.

That represents an overall discount of 45% from the starting point leaving an end fine of $247,500.00.

[28] On behalf of the Defendant Ms Castle sought a further 5% discount for the subsequent remedial steps taken by the Defendant. I do not consider that such a further discount is appropriate. The remedial steps taken were any that were required by the Law to ensure the Defendant complied with its obligations under the legislation. That is what they are required to do and if they had done so from the outset this accident would not have happened.

[29] The Defendant's ability to pay the proper fine has been an issue throughout the sentencing process. The Informant had an expert accountant consider the financial position of the Defendant and he concluded that the Defendant had the capacity to pay a lump sum fine of $90,000.00 from its existing overdraft facility. That accountant was unable to conclude when the Defendant might have financial capacity to pay a fine by instalments and the amount of those instalments.

[30] The onus is on the Defendant to satisfy the Court that an otherwise appropriate level of fine should not be ordered on the grounds of financial impecuniosity. I am satisfied with the material before me and the analysis of that material by the specialist accountant for the Informant that the most that the Defendant can realistically pay now or into the intermediate future is the $90,000.00 that it has available by way of overdraft facility. While it may be possible to add something to that based on future income earning potential that at the present time is largely based on optimism and I do not consider it would be fair to increase the amount payable on that basis.

[31] Therefore the fine that I impose on the Defendant is one of $90,000.00.

[32] AWF Limited were ordered to pay costs to the Informant in the sum of $1,222.46. There does not seem to be any reason why the Defendant should not pay the same amount to the Informant and there will be an award of costs accordingly. There will also be an order against the Defendant for Court costs in the sum of $130.00.

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Judge G A Rea
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: …14/12/2022