IN THE DISTRICT COURT
AT ALEXANDRA

I TE KŌTI-Ā-ROHE
KI MANUHEREKIA

CRI-2022-002-000067
[2023] NZDC 18623

WORKSAFE NEW ZEALAND
Prosecutor

v

CLYDE ORCHARDS (1990) LIMITED
Defendant

Hearing:	20 July 2022
Appearances:	Ms Simpson for the Prosecutor Mr Bielby for the Defendant
Judgment:	1 September 2023

RESERVED DECISION OF JUDGE E SMITH
[AS TO SENTENCE]

Introduction

[1] Matthew Nevill (the victim) was one of Clyde Orchards (1990) Ltd's (the defendant) workers. On 13 February 2021, he sustained serious injuries while working for the defendant when his hands were drawn into a hazardous area in the defendant's chain conveyor. The injuries to his right hand led to the surgical amputation of his index, middle, and ring fingers. The injuries to his left hand consisted of two fractured fingers.

[2] The defendant has since pled guilty to one charge of failing to comply with their duty under s 36(1)(a) of the Health and Safety at Work Act 2015 (HSWA). This

is an offence that carries a $1,500,000 fine as the maximum sentence as per s 48(1) and (2)(c) of the HSWA.

[3] The prosecutor – Worksafe – describes and particularises the charge as follows:

> Being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including Matthew Robert Nevill, while the workers are at work in the business or undertaking, namely work involved in the packhouse operation, did fail to comply with that duty and that failure exposed workers to risk of serious injury.
>
> **Particulars:**
>
> It was reasonably practicable for the defendant to have:
>
> 1. Ensured that the R.B Fisher No9772 chain conveyor in the pack-house was adequately guarded.
>
> 2. Undertaken an effective risk assessment of the conveyor system in the pack-house.
>
> 3. Ensured that the R.B Fisher No9772 chain conveyor in the pack-house had an effective lock-out tag-out procedure.

Parties' Positions

[4] There are some areas where there is agreement between the parties as to the appropriate sentencing outcome, and some areas where there is not. I summarise the parties' positions as follows:

(a) **Emotional Harm Reparation:** The prosecutor seeks that the reparation sum be set at $35,000. The defendant seeks that it be set at $25,000.

(b) **Consequential Loss:** The parties agree that the consequential loss sum should be set at $2,465.

(c) **Starting Point for Fine:** The parties agree that the offence belongs in the medium culpability range. However, the prosecutor seeks a $500,000 starting point whereas the defendant seeks a $450,000 starting point.

(d) **Matters of Mitigation**: The parties agree that those matters which bear upon mitigation should result in a 50 per cent discount from the starting point for the fine.

(e) **Defendant's Financial Capacity:** The prosecutor argues that the defendant has the capacity to pay a fine in full. The defendant argues that it has no capacity to pay any fine at all.

(f) **Legal Costs:** The parties agree that the prosecutor's legal costs amount to $3,047.90 and that the defendant should pay those costs.

(g) **Investigation Costs:** The prosecutor argues that the defendant should be liable for the investigator's costs, which come to $8,560. The defendant argues that it should not be liable for those costs.

Facts

The Accident

[5] The defendant operates an orchard for stone fruits and cherries. The orchard has an on-site packhouse which contains multiple machines which grade and pack the fruit for market. The packhouse also contains a cool store.

[6] After the fruit is sized and graded, it is transported from the sorting area to the cool store along a series of chain conveyors.

[7] At the time of the incident, the victim – Mr Nevill – was a student who was aged 19 and who worked for the defendant on a seasonal basis. He had worked for the defendant in this manner for five consecutive seasons. His responsibilities included printing and labelling boxes in the cool store.

[8] In order for Mr Nevill to get from the printer to the cool store, he needed to pass the packing area. The packing area housed the chain conveyors.

[9] On the morning of the incident, 13 February 2021, Mr Nevill was working at his workstation. Around 8:00 AM, he noticed that a box had become stuck on the R.B

Fisher No. 9772 chain conveyor (the relevant conveyor). When he moved the box, he noticed that the chain on the relevant conveyor had become detached from its sprocket.

[10] This prompted Mr Nevill to attempt to put the chain back on while the relevant conveyor was still operating. On his first attempt, the chain did not attach. On his second attempt, it did attach. However, this caused both of his hands to be drawn into a hazardous area within the relevant conveyor. Mr Nevill's right hand became entangled in the unguarded sprocket and chain, whereas his left hand was caught under the chain. He could not turn the machine off.

[11] The victim called for help, and his work colleagues came to assist him. He was then taken to the helipad at Dunstan Hospital via ambulance, and then to Dunedin Hospital via the Otago Rescue Helicopter.

[12] Mr Nevill's index, middle, and ring fingers on his right hand all had to be amputated at the first knuckle, and two of his fingers on his left hand were fractured. He then had to complete multiple months of medical attention and therapy.

[13] The relevant conveyor was not compliant with the guarding standard AS/NZS 4024. In specific, it was not compliant with the requirements regarding nip points, shearing hazards, and maintenance records. Furthermore, a full risk assessment of the machine had never been completed. There was also no appropriate lock-out tag-out procedure for the machine, and the hazard was unguarded – meaning that a hazardous part of the machine was left exposed.

[14] Prior to the incident, Mr Nevill had received no training in regard to how to maintain the machines. Similarly, he had received no training in regard to any formal lock-out tag-out/isolation procedure. His task-specific training manual required him to "report any operational issues to supervisor immediately" and to "not attempt any repairs or maintenance unless authorised to do so". However, when he realised the chain had become detached, he made a split-second decision to attempt to reattach the chain – meaning he did not alert others to the malfunction.

Defendant's Health and Safety Systems and Prior Assessments

[15] At the time of the accident, the defendant's health and safety (H&S) checks included an annual internal H&S assessment. From 2014 onwards, these were carried out by one of the defendant's employees: Mr Robb. On the defendant's behalf, Mr Robb walked around the facilities and undertook his own assessment of the perceived hazards and risks associated with the operation. The packhouse was one of the areas that Mr Robb included in his assessments. Those assessments provided opportunities for the defendant to find, assess, and monitor new and existing risks, and make the needed changes in response. Mr Robb's reports identified – in a general sense – the conveyor system (including its moving parts and belts) as a single hazard. The controls which were developed in response to that hazard included: keeping one's hands away; removing jewellery; tying hair up; tucking clothing away; using correct lifting technique; and only allowing designated staff to perform maintenance. Since 2014, there had been no changes to how the hazard was recorded or its associated controls.

[16] In December 2017, as a result of a WorkSafe assessment, WorkSafe noted that there was a conveyor with inadequate guarding (the observed conveyor). The observed conveyor was similar to the relevant conveyor. As a result, the WorkSafe inspector issued an improvement notice to the defendant which required it to add proper guarding to the observed conveyor. As part of WorkSafe issuing the improvement notice, the WorkSafe inspector provided the defendant with relevant WorkSafe guidance concerning guarding and machines. The inspector also advised that the guarding on the observed conveyor should extended so that there was no gap greater than 5 mm and therefore prevent access to a nip point.

[17] Mr Robb, again, working for the defendant, looked at WorkSafe's guidance from December 2017 and decided against adding further guarding to the defendant's other conveyors (which included the relevant conveyor). This was on the basis that further guarding would not be practicable as there was a need to be able to access the relevant conveyor at multiple points in order to load it.

[18] In terms of the defendant's training, the defendant provided induction training for its staff. It also conducted verbal briefings with all staff prior to the start of each day's work – although these were not documented. One of these verbal briefings was held on 13 February 2021. The daily briefings covered the work to be done each day, and addressed any H&S issues. However, they did not include specific risks or matters relating to specific risk assessments. This being said, the defendant did have training documentation and task-specific training for their staff. The task-specific training records for Mr Nevill listed a number of different activities. Under the heading "general orchard's hazards control", it read: "do not use or operate any equipment or machinery without task and site-specific training".

[19] Although the relevant conveyor is old, it was, in general, maintained and serviced. The chain would need to be reattached once or twice a season. However, that maintenance never involved specific guarding or risk assessment processes for any of the conveyors.

WorkSafe Investigation – Prohibition Notice and Improvement Notices

[20] On 13 February 2021, WorkSafe issued a prohibition notice for the relevant conveyor. The notice listed the recommended remedial measures, which included the engagement of a competent person to examine the possible cause of the chain dislodging from the sprocket. The defendant complied with the notice and the resultant inspection discovered no issues that would have contributed to the chain detaching. However, the prohibition notice was not lifted as the defendant stated that it was no longer using the relevant conveyor and that it had engaged engineers to design a new machine (which was then installed in the 2021/2022 season).

[21] On 15 February 2021, WorkSafe issued two improvement notices to the defendant:

(a) **First Notice:** WorkSafe required the defendant to ensure that workers did not operate any equipment or machines without task- and site-specific training/induction. The defendant complied with this request by having specified staff meetings where attendees discussed their documentation and their training/induction (including the requirement

that workers must not operate any equipment or machines without task- and site-specific training).

(b) **Second Notice:** This notice was issued because the relevant conveyor was assessed as having inadequate guarding. The notice's recommendation was that the machine be repaired to meet the requirements of the HSWA, the AS/NZS 4024 Safety of machinery, and WorkSafe New Zealand's best practice guideline "Safe use of Machinery". The defendant complied with this notice by engaging external engineers to redesign the conveyor system (which resulted in a new set being installed in the 2021/2022 season, which included the aforementioned new machine).

[22] At all times, the relevant industry standards and guidelines were available to the defendant. Those standards and guidelines would have provided guidance on hazards and risk assessment regarding guarding and machines.

[23] Therefore, the defendant was obliged to ensure, as far as was reasonably practicable, the health and safety of its workers while those workers were working in its business or undertaking. It failed to do so in the following respects:

(a) inadequate guarding of the relevant conveyor;

(b) inadequate risk assessment of the conveyor system; and

(c) no lock-out, tag out procedure.

[24] In regard to each of those failures, there were reasonably practicable actions available that would have enabled the defendant to prevent the incident from occurring.

Victim Impact

[25] Mr Nevill read his victim impact statement to the Court.

[26] The impact of the defendant's HSWA failings have been considerable. Although the tangible injuries to Mr Nevill are obvious, a fundamental part of the broader impact upon him is made up of the multitude of ancillary effects upon him and his family.

[27] Those effects are significant. By itemising some of them here, I do not mean to detract from those that I have not mentioned. Nor do I intend to detract from the emotional impact that Mr Nevill has suffered, and which was evident from his victim impact statement. When Mr Nevill told the Court of the incident's impact upon him, he spoke of how his life was changed in a moment and how he has not been the same person since. Mr Nevill now views the world from a different perspective and has at times struggled with his self-confidence and self-esteem as a result.

[28] Mr Nevill further described how he has experienced flashbacks, difficulties sleeping, and the challenges associated with accepting that his fingers have been amputated. From time to time, he relives the pain and effects of the accident. He also told the Court of how he ruminates on the change in his parent's lives, and the direct and indirect consequences to them. Mr Nevill also mentioned his parent's unwavering emotional, material, and financial support. It is clear that their assistance in his rehabilitation has been of immeasurable value to him. Mr Nevill is also clearly cognisant of that fact, and, I think, perhaps even struggles with feelings of guilt for the impact of the incident upon his parents. Nevertheless, it is also clear that he is forever grateful for their support.

[29] Mr Nevill also spoke of how he struggled to conceptualise the physical deformities that he has suffered, and the effects upon his life in areas such as sports, socialising, and studies (in that he had to withdraw from the University of Otago in 2019). He also needed, and began, to see a clinical psychologist over a long period, and has suffered from phantom pain and itching which he deems cruel. He was unable to follow his intended trajectory at the University of Otago in 2021 and 2022, and instead it was in 2023 when he was able to return to Dunedin and complete his Bachelor of Commerce.

[30] Even now the incident's physical effects remain, particularly when temperatures drop and Mr Nevill is unable to keep his fingers warm. He has started to suffer from chilblains on his three amputated fingers which are painful and irritating and remind him of the incident and his injuries.

[31] Naturally, Mr Nevill is aggrieved at the fact that the incident happened. This sentiment was exacerbated when he learned of WorkSafe's notice to the defendant in December 2017. Although he is putting this chapter of his life behind him and putting his best foot forward into the future, he also feels that he will never forget the incident because his hands serve as a reminder. However, he also remains thankful to his doctors, treatment team, occupational therapist, psychologist, friends, and family who are, I consider, significant sources of support for Mr Nevill – not just in a physical sense, but in an emotional and psychological sense as well.

Defendant's Response

[32] The defendant company is a family-owned company that cares about its worker's wellbeing. I am satisfied that the defendant responded to the accident in a particularly responsible and sensitive way. They accept that their response did not and could not repair Mr Nevill's physical and emotional harm but tried, at all times, to be sensitive to that fact given their clear failing in respect of their duty.

[33] The defendant's actions in response included the following actions:

(a) Mr Robb, in the months that followed, keeping in regular communication with Mr Nevill and his family to offer that assistance which the defendant was able to provide.

(b) The defendant immediately making $5,000 available to Mr Nevill and his family to ensure that their travel and accommodation costs while in Dunedin were covered.

(c) The defendant, at a subsequent point, making a further $20,000 available to Mr Nevill as emotional harm reparation.

(d) The defendant also co-operated with WorkSafe throughout its investigation. It immediately removed the relevant conveyor and dismantled and disposed of it after the investigation was completed.

(e) The defendant also engaged an independent consultant to conduct an H&S audit. This prompted a complete overhaul of the defendant's systems and an update to its H&S policies.

(f) The defendant also spent a substantial amount to upgrade its machines to modern equipment.

(g) The defendant's numerous improvements included: a total review of systems and procedures; replacement of the old conveyor system with a new modern conveyor system (c.f. just upgrading the relevant conveyor); creating a new full-time H&S manager position to oversee operating procedures and upskill staff at a cost of around $50,000 per annum (which is a significant commitment for the business); and engaging an external H&S consultancy on a monthly basis.

[34] I consider the defendant is genuine in its expression of remorse. It is clear that the defendant company is deeply troubled by the fact that the incident could, in all likelihood, have been avoided if the procedure and equipment that are in place now were in place at the time of the accident. That is a proper concession for the defendant to have made, and it has been made with genuineness. I also consider that the defendant, in making that concession, is aware that such steps will provide little comfort to Mr Nevill. That is the nature of these sorts of incidents. However, the defendant still wishes for it to be made clear that it has taken significant strides to ensure that this sort of incident never occurs again on its premises.

[35] I consider the company's response to be exemplary and their remorse to be genuine.

Sentencing Framework

[36] Section 151(2) of the HSWA provides specific sentencing criteria to be applied. Those purposes are succinctly outlined at [9] of *WorkSafe New Zealand v Mainland Poultry Ltd* by her Honour Judge Otene:

> The HASWA purposes typically to the fore in sentencing matters such as this are protection of workers against harm from work hazards and risks, noting such protection should be given at the highest level[1] and securing compliance though [through] appropriate enforcement measures.[2] Aligned with that are the Sentencing Act 2002 purposes speaking to offender accountability,[3] promoting the offender's sense of responsibility,[4] victim interests,[5] denunciation[6] and deterrence, specific and general[7] all of which, if met, can contrubte to safe work places. The Sentencing Act principles most generally relevant are those that go to offence gravity and offender culpability,[8] seriousness of the … offence type,[9] victim impact[10] and restorative justice and other amends.[11]

[37] The sentencing exercise engages a four-step process as outlined in the guideline judgment for sentencing under s 48 of the HSWA in *Stumpmaster v WorkSafe New Zealand*:[12]

(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 regards to aggravating and mitigating factors;

(c) determine whether further orders under ss 152 – 159 of the HSWA are required; and

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

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[1] Health and Safety at Work Act 2015, s 3(1)(a) and (2).
[2] Section 3(1)(e).
[3] Sentencing Act 2002, s7(1)(a).
[4] Section 7(1)(b).
[5] Section 7(1)(c).
[6] Section 7(1)(e).
[7] Section 7(1)(f).
[8] Section 8(a).
[9] Section 8(b).
[10] Section 8(f).
[11] Section 8(j).
[12] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

[38] The following principles from *Stumpmaster* are also relevant:

(a) The HSWA expressly requires the Sentencing Act 2002 (SA) to be applied. The SA's applicability is not negated by the aggravating features emphasised in s 151 of the HSWA as needing particular consideration (in distinction to its predecessor);

(b) Given that the SA applies, and so do all of its provisions regarding a defendant's ability or inability to pay, the HSWA's mandated consideration of a defendant's capacity to pay an increased fine does not preclude consideration of a defendant's inability to pay;[13] and

(c) The culpability assessment factors identified in *Department of Labour v Hanham and Philp Contractors Ltd* encompassed all of the features in the subsequently enacted s 151 that the Court must consider (the *Hanham* factors).[14] The *Hanham* factors therefore remain relevant here.

Step 1: Assessing the Quantum of Reparation

[39] Sections 32 to 38 of the SA address reparation. Reparation may be imposed in relation to lost or damaged property, emotional harm, and relevant consequential loss or damage.

Consequential Loss

[40] The prosecutor and defendant agree that Mr Nevill suffered defined consequential loss (due to occupation and rental costs) of $2,465. Those costs are properly claimed and properly have to be paid. There is no disagreement. Therefore, I set the sum for consequential loss repayment at $2,465.

[13] Sentencing Act 2002, ss 8(h), 40(1), and 41.
[14] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79, (2009) 93, 095 (HC).

Emotional Harm

[41] Section 32(1)(b) of the SA provides that a court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer emotional harm.

[42] In *Big Tuff Pallets v Department of Labour*, the High Court observed that imposing reparation for emotional harm is an:[15]

> intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term.

[43] For my part, I emphasise that the nature of the injury is clearly relevant. However, so is the extent of the physical and mental suffering or incapacities which follow. In that regard, I refer to Mr Nevill's entire victim impact statement. I have already attempted to capture some of the accident's effects in this decision and, in particular, Mr Nevill's mental suffering.

[44] Whichever view is taken, the emotional effect on Mr Nevill was considerable. I also imagine that the effect was made all the more significant as a result of Mr Nevill's age and the ancillary effects of the injuries upon his studies, social life, and financial and emotional wellbeing.

[45] The orchard manager and two of the defendant's directors have read Mr Nevill's impact statement. Through their counsel, they are candid in acknowledging that Mr Nevill's injuries as being life changing and that they would have had a significant effect on anyone but especially someone who was Mr Nevill's age with most of his life ahead of him. They say it weighs on all of them that the defendant business employed a young and local person, and had done so for several

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[15] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-000322, 5 February 2009 at [19].

seasons, and that that person suffered, and continues to suffer, in the manner that Mr Nevill has described. In that regard, the defendant accepts without reservation that the harm it caused to Mr Nevill was not just physical but emotional and that, as a result, it is clear that emotional harm and consequential loss reparation should be imposed.

[46] The defendant's attempts at reparation to date have included:

(a) The defendant made an immediate $5,000 payment to Mr Nevill within two weeks of the incident to assist him and his family with costs.

(b) The defendant offered Mr Nevill employment, though Mr Nevill had said he had no interest in working in horticulture again, which the defendant understood.

(c) The defendant also continued to top up Mr Nevill's pay to cover the ACC shortfall for three months following the incident (stopping when Mr Nevill asked the defendant to stop after three months).

(d) On 6 December 2022, the defendant paid a further $20,000 to Mr Nevill in recognition of the emotional harm he had suffered.

(e) The defendant's directors and managers had hoped to meet with Mr Nevill and participate in restorative justice to further apologise in a formal setting and to ask if there was anything else they could do but that did not proceed.

[47] The prosecutor considers the sum of $35,000 properly represents emotional harm reparation, with the defendant considering $25,000 appropriate.

[48] While an emotional harm award is an intuitive exercise, and it is clearly nuanced in terms of the facts that apply for each differing victim, the parties, nevertheless, have provided comparator cases, in assistance, albeit in broad terms, as to an appropriate amount. With regard to other comparator cases to be considered, the principle of consistency of sentence in the settling of an emotional harm payment does not always assist that exercise, given how heavily nuanced the facts are and the actual

effect on this victim from this offending. For example, similar offending may have a very different effect on different victims, and that must be the case as it is to a degree an individualised assessment.

[49] The prosecutor, in support of $35,000 as appropriate to reflect emotional harm, referred to four cases:[16]

(a) *Marshall*: The tips of the victim's right-hand forefinger, index finger, ring finger, and thumb were amputated by a punch forming press. The sum of $35,000 emotional harm was ordered ($25,000 in addition to a $10,000 voluntary payment already made);

(b) *Claymark*: The victim suffered partial amputation of his right-hand middle, ring, and little fingers after it became entangled in a chain. The Court directed $28,000 in emotional harm reparation ($4,000 ordered in addition to $24,000 paid at restorative justice);

(c) *Alto*: The victim suffered partial amputation of her right-hand middle and ring fingers after it was caught in a machine's rollers. The Court ordered $32,500 in emotional harm reparation; and

(d) *Alliance Group*: The victim suffered partial amputation of his right-hand index and middle fingers. The sum of $10,000 was awarded for emotional harm reparation, $22,000 having already been paid.

[50] The defendant, for their part, considers *Claymark* to provide the best guidance, it being the most similar case in that it involves a defendant failing to install proper guarding around a nip point area and failing to conduct risk management exercises in relation to chain drives.

[51] Although *Claymark* has some similarities, this is a case where it is appropriate to let the award also reflect the emotional harm that has flowed from the notable and

[16] *WorkSafe New Zealand v Marshall Industries Ltd* [2018] NZDC 4498; *WorkSafe New Zealand v Claymark Ltd* [2019] NZDC 1977; *WorkSafe New Zealand v Alto Packaging Ltd* [2019] NZDC 14809; and *WorkSafe New Zealand v Alliance Group Ltd* [2019] NZDC 10924.

clear physical harm. The effects have been ongoing for a number of years, have only started remitting, and, indeed, his age means that he has had faced difficulties in assimilating the harm of the incident to his life. An award of $35,000 is therefore warranted.

Step 2: Assessing the Quantum of the Fine

[52] The two-stage sentencing approach is that which is set out in the Court of Appeal decision in *Moses v R.*[17] The first step, following *Taueki*, calculates the starting point by incorporating the aggravating and mitigating features of the offence.[18] The second step then incorporates all of the offender's personal aggravating and mitigating factors together with any guilty plea discount (which should be calculated as a percentage of the adjusted starting point).

[53] As discussed earlier, *Stumpmaster* sets out four guidelines for culpability in offending under s 48 of the HSWA.[19]

[54] The prosecutor and defendant agree that the defendant's culpability falls within the medium culpability range, meaning a starting point between $250,000 - $600,000.

[55] In assessing culpability, *Stumpmaster* referred to the *Hanham* culpability factors.[20]

[56] For the prosecutor's part, they consider a fine of $500,000 reflects the defendant's culpability. The defendant, on the other hand, consider a fine of $450,000 reflects their culpability.

[57] In determining the defendant's culpability, and, as a consequence, the fine, I have had regard to those factors in s 151 of the HSWA (the *Hanham* factors) and considered a number of comparator cases that the prosecutor and defendant have provided for the purposes of consistency in sentencing.

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[17] *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.
[18] *R v Taueki* [2005] 3 NZLR 372 (CA).
[19] *Stumpmaster*, above n 12 at [35(b)].
[20] *Hanham and Philp Contractors Ltd,* above n 14.

[58] Of those *Hanham* factors and those specified in s 151 of HSWA, I find:

(a) Having regard to the operative acts or omissions, the reasonable practical steps that the defendant could have taken were to:

(i) ensure the relevant conveyor was adequately guarded;

(ii) undertake effective risk assessment of the relevant conveyor system; and

(iii) ensure the relevant conveyor had an effective lock-out tag-out procedure.

(b) While a risk assessment was conducted by the defendant's orchard manager on a regular basis, it was not in line with the requirements of the current legislation.

(c) The defendant clearly departed from the industry standard for guarding (AS/NZS 4024) albeit in circumstances where the conveyor was an old machine that did not meet modern requirements and regulations. Irrespective of the age of the machine, it would have been appropriate that it be enhanced to comply with the then-current standards. It was a significant departure from an industry standard and a standard to which the defendant company should have considered a benchmark, and followed, and easily could have.

(d) Although I note that the defendant made a prompt and complete response to the 2017 improvement notice regarding guarding on the observed conveyor, the fact that a notice was issued regarding the observed conveyor, it being in close proximity to the relevant conveyor, which was in defalcation. The defendant argues that it incorrectly relied on that inspection and its compliance with the improvement notice as an assurance that it was then adhering to the relevant standards and that there was no issue with the relevant conveyor. The defendant

acknowledged that is not a defence, and, in hindsight, agrees that the 2017 notice should have prompted a wider assessment of the guarding throughout the packhouse – including the relevant conveyor. For completeness, I do not consider the fact that WorkSafe did not give a notice of improvement regarding the relevant conveyor in 2017 as reducing the defendant's culpability and I do not understand the defendant to be arguing that.

(e) I consider the hazard, by virtue of exposure of moving parts of machinery, was obvious and well known within the manufacturing industry as a clear hazard that is completely obvious. That risk had been brought to the defendant's attention by virtue of the 2017 notice. The risk of harm was easily anticipated and ought to have been appropriately managed. I do not consider the fact that the staff had received supervisory and manual training not to attempt any repairs or maintenance if authorised to do so to have sufficiently negated either the obviousness of the hazard or its actual hazard.

(f) It was not cost prohibitive for the defendant to ensure the conveyor was effectively risk assessed and safeguarded to the appropriate standard.

(g) The risks of harm that can eventuate from inadequate guarding of machines are not only obvious, but they are also significant and sufficient industry standard advice regarding those risks and hazards was clearly available to the defendant at all times.

(h) The potential and realised risk to workers from the omissions was serious, including possible significant physical and emotional harm as a result of serious injury.

[59] In terms of comparator cases provided by counsel for the prosecutor to assist in considering the starting point, the most analogous are those of *Alto Packaging, Niagara,* and *Alliance.*[21]

[21] *WorkSafe New Zealand v Alto Packaging Ltd*, above n 18; *Niagara Sawmilling Company Ltd v*

Alliance

[60] In *Alliance*, the victim had two fingers on his right hand partially amputated by a rotating cutter while he was cleaning a mincer machine. The victim was working alone at the time of the incident. There were no procedures in place for the operational clean-up of the machine, nor was there a policy in place for working alone. The victim had been adequately trained on how to do the weekly clean-up on the hogger machine. The Court took into account the fact that the issue with the mincer box was not easily viewable when determining that the starting point for a fine of $500,000.

Niagara

[61] The victim's glove was caught in a wood grader/trimmer machine, resulting in injuries which required the amputation of two fingers. The machine was partially, but inadequately, guarded in that access to one side of the machine was prevented but not the other. An external consultant recommended changes, but the defendant's H&S advisor disagreed considering it would cause other risks. The High Court found the failure to guard machinery was a fundamental breach, referring to other cases on different types of plant. The High Court agreed culpability fell within the medium culpability band and upheld the starting point of $500,000.

Alto Packaging

[62] The victim's fingers got caught in a roller on an extrusion coating line machine when trying to feed material through. The tips of the victim's right-hand middle and ring fingers were amputated. The failures were not installing suitable guarding, not developing and implementing a safe system of work, and not engaging a competent person to undertake a systematic risk assessment of the extrusion coating line machine. The District Court assessed culpability in the medium range and adopted a starting point of $500,000.

[63] The prosecutor argues that the defendant was less culpable than the defendant in *Alliance* due to the injuries suffered and the fact that the victim in *Alliance* was only

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WorkSafe New Zealand [2018] NZHC 2020; and *WorkSafe New Zealand v Alliance Group Ltd* [2018] NZDC 20916.

five days into the job at the time. The prosecutor submits that this matter is similar to *Alto Packaging*, *Niagara* and *Alliance* in terms of the injuries suffered and the essential failure being the inadequate guarding of a machine.

[64] However, the point that is more telling in respect of a starting point of $500,000 in this matter, is the fact that the conveyor had inadequate guarding and the fact that it had not been subjected to an appropriate risk assessment. Those facts are compounded by WorkSafe raising the need to guard the machines with the defendant in 2017.

[65] For the defendant's part, they seek to argue that their culpability is better reflected through a $450,000 fine. They seek to distinguish the *Niagara* case and claim their culpability is more in line with two cases, being *Marshall Industries* and *Claymark*.[22]

Marshall Industries

[66] The victim's right-hand forefinger, index finger, ring finger and thumb were amputated while manufacturing metal earthing iron clips. The defendant had not identified the hazard and failed to carry out an audit on the machines as the press was deemed to be low priority. Furthermore, the moving parts had not been adequately isolated with the guards attached to the press. The Court determined a starting point of a fine of $400,000. The defendant submits the injuries and effects were more significant in *Marshall Industries*; however, the culpability was similar and therefore the scope of the risk would be assessed at a similar level or less.

[67] In terms of differentiating *Niagara*, the defendant highlights that the *Niagara* defendant was assessed as being moderately culpable because an external consultant had identified the specific risk that led to the victim's injury and had made a recommendation which was not followed, and which would likely have prevented the incident. In this case, the defendant submits that it complied with the improvement notice issued in 2017, meaning that – unlike the *Niagara* defendant – they did not ignore the notice but acted upon it immediately. The defendant argues that, in terms

[22] *WorkSafe New Zealand v Marshall Industries Ltd*, above n 18; and *WorkSafe New Zealand v Claymark Ltd*, above n 18.

of culpability, the Court should take into account that it acted swiftly when asked to remedy what it reasonably believed was the only guarding issue in the packhouse in the notice of 2017. Although the defendant does also acknowledge that it was a misstep not to consider the wider implications, and it should have triggered it to assess other nip points. Nevertheless, unlike Niagara, it acted immediately when notice was given. It argues that the level of starting point for the fine of Niagara of $500,000 reflects the fact that the specific hazard had been identified but essentially ignored as being a low priority issue at the defendant company.

Decision

[68] I agree with the prosecutor's proper concession that this case is less serious than *Alliance* due to the injuries suffered.

[69] However, I do not consider *Niagara* as distinguishable as argued by the defendant. Some small distinction is applicable from *Niagara* in the sense that that case did involve failure to comply a direct notice. However, the culpability is very similar in terms of the factors I have referred to at paragraph [58]. In that regard, while comparator cases can be of use, I prefer an analysis of culpability that is based on the actual factors that are present.

[70] *Alliance Group* had, however, factors which tend towards greater culpability in the way I find are also present for the defendant, given the victim in that matter had not been adequately trained on the actual job he was performing which resulted in the injury.

[71] The setting of a fine and assessing culpability is not an exacting science. That said, consistency in cases is important. I have reached the view that the defendant's culpability in this matter is towards the high end, and I set the fine at $500,000.

Aggravating factors

[72] There are no aggravating factors.

Mitigating matters

[73] The prosecutor and defence agree that mitigating matters ought to be set at 50 per cent. I agree. Transparency, however, is required so that all can appreciate how that calculation is broadly arrived at.

(a) **Early Guilty Plea**: 25 per cent for a very early guilty plea is warranted.

(b) **Co-operation**: The defendant co-operated entirely and speedily, which warrants a five per cent discount.

(c) **Remorse**: I find the defendant to be particularly remorseful. In this regard, I refer to paragraph [33] hereof as warranting a further five per cent discount.

(d) **Good Character**: There is no doubt that the defendant company is of broad good character. One prior improvement notice was responded to with pace and exactitude. A further five per cent is warranted.

(e) **Reparation**: Reparation is ordered, most has already been paid, and there is clear confidence that the balance will be paid upon judgment. A further five per cent discount is warranted.

(f) **Remedial Steps**: The defendant company took immediate, fast, and extensive remedial steps (see paragraph [33]). A further five per cent is warranted.

[74] Accordingly, the fine is reduced from the $500,000 starting point and set at $250,000.

Step 3: Ancillary Orders: Regulatory Costs

[75] It is agreed that the defendant ought to pay a reasonable sum towards the costs of the prosecutor, that sum being $3,049.90. These costs are modest.

[76] However, on this occasion, I do not find that there is a need for the defendant to contribute to the entire investigative costs as has been sought. The investigation itself was modest and lacked any significant complex elements. This was a matter which was well within the prosecutor's ability to sustain within their operational costs without compensation. A contribution by the defendant to these costs of $2500.00 is warranted.

Step 4: Proportionality Assessment

[77] The last step involves consideration of the total sums and orders that are being imposed on the defendants. The total that is imposed must be proportional to the circumstances of the offending and the offender.

[78] Here, the defendant argues that it has little or no financial capacity to pay any fine. The defendant therefore seeks that no fine is imposed. The prosecutor argues that the fine is within the defendant's financial capacity and that, if it cannot be paid in a lump sum, periodic payments can be ordered to dissipate any financial distress.

[79] It is also proper for the Court to consider the important deterrent aspect of fines, especially in respect to corporate offenders.

[80] Section 40(1) of the SA provides that the Court must take into account the offender's financial capacity when determining the amount of the fine.

[81] A significant number of cases have indicated that there is a strong interest in businesses, particularly small businesses, operating, and even more so when the imposition of a fine may jeopardise or compromise the defendant's ability to continue to employ workers or to continue trading. The impact on that entity's operation can limit the level of any fine.[23]

[82] The Court also retains a discretion under s 42 of the SA to reduce or otherwise eliminate a fine where the financial capacity is an issue.

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[23] *WorkSafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587 at [51] - [57]; *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395 at [55]; and *WorkSafe New Zealand v Meycov Foods Ltd t/a Rutherford & Meyer* [2015] DCR 94 at [9].

[83] When exercising that discretion, it behoves the Court to carefully consider the evidence provided in support of arguments of financial incapacity. This also involves the need to consider, again, particularly with corporate defendants, the ability or actual structuring of financial circumstances so as to appear less able to pay a fine and consideration as, for example, shareholders or directors being remunerated or receiving dividends in precedence over financial obligations to third parties (such as a fine). In that sense, broadly the precedent suggests that the Court assess as genuine a lack of funds to pay a fine.

[84] I do not accept that there is any principle that suggests a fine should not be paid if a defendant has to borrow or extend an overdraft or access loan facilities to facilitate a fine. That is simply a matter that goes to the Court's discretion. A fine is very much, in my view, a cost involved in running a business in the same way that funds may be raised by loan, advance, or credit as any other operating matter.

Evidence of Financial Capacity

[85] The defendant obtained affidavit evidence from the defendant company's long-term accountant, Mr Pedofsky of 13 December 2022 and 13 July 2023. The prosecutor provided evidence of Mr J Shaw, Financial Advisory Services Partner at Grant Thornton New Zealand by way of affidavit of 10 May 2023.

(i) Evidence of Philip Pedofsky of 13 December 2022

[86] Mr Pedofsky has been the defendant company's external accountant since 1990 and is therefore well positioned to give evidence as to his understanding of the defendant's recent and current financial position. His overall evidence was that a fine would place additional pressure on the company's burgeoning overdraft facility, with the company not having capital reserves to service a fine at any level without further borrowing.[24]

[87] I summarise the material matters from Mr Pedofsky's evidence as follows:

[24] See affidavit dated 13 December 2022 at [23].

(a) He considered the defendant's trading position is relevant to determining the financial position of the company with it having been severely impacted by COVID-19 related issues.

(b) The horticultural industry continues to face some unique and significant "head winds" at the commencement of 2022/2023 season with the following issues prevailing across the industry:

i. labour shortages, significantly and particularly so for the defendant;

ii. the spring/summer season had a negative impact on production, these being particularly climate related given night-time temperatures, current weather conditions, and faster climate change than predicted;

iii. compliance costs with recent regulatory changes such as fair pay agreements and increases to minimum wage creating uncertainty for payroll expenses; and

iv. the impact of other rising costs in relation to direct expenses.

(c) In terms of the overall health of the 2022 accounts, those showed a loss for tax purposes of $34,404 following from a 2021 loss of $404,015.

(d) The 2022 accounts show equity of $4,752,095, although this is largely represented by fixed assets such as land, trees and infrastructure.

(e) Given the 2022 loss (and previous losses) the defendant's total losses for tax purposes was $599,569.

(f) The company's cash flow is dependent on its overdraft facility (Rabobank) which has a current maximum of $5,595,000. The company uses the overdraft facility to cover expenditure prior to receiving crop

income. The fluctuation of that overdraft facility was demonstrated by its monthly balance from 31 July 2022 – 31 October 2022 as follows:

i. 31 July 2022: $3,547,088 OD

ii. 31 August 2022: $3,606,854 OD

iii. 30 September 2022: $3,924,849 OD

iv. 31 October 2022: $4,303,946 OD.

(g) Mr Pedofsky's estimate based on a similar trading result for upcoming 2022/2023 season, anticipated a net cash improvement of $1,791,000 for the period 1 December 2022 – 30 June 2023. If correct, the effect of cash sales would result in a closing overdraft balance of $3,004,000 (by comparison, the closing position in the previous financial year was $3,339,253).

(h) While this projection results in a reduction of the overdraft facility, he nevertheless opined that, in light of recent losses and the constraints highlighted above, the company's liquidity would be tight for the foreseeable future and under pressure by lending requirements imposed by Rabobank. The terms of that overdraft require any process or the sale of company assets to be applied against current debt.

(i) Given the above, Mr Pedofsky's view is that the defendant could not afford to service a fine of any amount and further incurring a fine would put additional pressure on an overdraft facility that is high for a company of its size and, given it has nil cash reserves available, the only source of funds to meet a fine would be additional borrowing.

(ii) Evidence of Jay Shaw of 10 May 2023

[88] Mr J Shaw, Financial Advisory Services Partner at Grant Thornton New Zealand, filed an affidavit on behalf of the prosecutor, dated 10 May 2023.

[89] Mr Shaw considered the evidence of Mr Pedofsky and provided an alternative opinion.

[90] Mr Shaw provided an opinion as to the company's financial capacity to pay a lump sum fine or alternatively a fine by instalment. He held the ultimate opinion that the company *did* have the financial capacity to pay an annual fine of at least of $105,000 in future years and potentially more if earnings improved. Alternatively, the defendant could fund payment by instalment by virtue of its overdraft. In coming to this latter conclusion, Mr Shaw assumed a fine of $250,000 at a current interest rate of 7.55 per cent indicating an annual interest cost of $19,000 which he asserted was materially less than the net cash flows the defendant had delivered in historic years on an adjusted basis.

[91] In support of those opinions, Mr Shaw noted and asserted (my summary):

(a) The defendant's financial capacity to settle a fine by lump sum can be determined by reference to its solvency position, the liquidity profile of its assets, and the expected maturity of its contractual liabilities based on the following:

(i) The company has a relatively strong balance sheet.

(ii) This is represented by net assets of $4,752,000 as at December 2022 which, if adjusted for estimated cash improvements, expected and, assuming no other balance sheet major changes, estimated net assets of $5,680,000 as at 30 June 2023.

(iii) He agreed, however, that the company's financial capacity to pay a fine is likely influenced by three matters:

1. any liquid assets, such as cash;

2. any surplus assets that could be realised to pay the fine; and

3. any available external funding (including from shareholders).

(b) He noted that the defendant's net asset position was materially reduced in the year ending 2021 as a dividend of $2.9 million was declared and credited to the shareholders accounts. The dividend was declared in the same financial year (2021) as the offence on 13 February 2021, but Mr Shaw could not determine if it was declared before or after the incident. This was not a matter replied to subsequently by Mr Pedofsky in his subsequent affidavit or clarified by the defendant.

(c) The company did not have liquid assets such as cash to pay a fine as at 31 December 2022, but did have access to the overdraft facility. That facility could be used to pay a fine. In particular, taking Mr Pedofsky's estimates, that overdraft will have reduced to $3,004,000 by 30 June 2023 compared to $3,336,000 at 30 June 2022 – a significant improvement and clearly an improvement whereby a fine of up to $250,000 could be paid from that facility meaning that the overdraft would be a similar overdraft position of that of 30 June 2022 (i.e. $3,336,000).

(d) There was clear 'headroom' in the overdraft with its facility limit at $5,595,000 and an interest rate of 7.55 per cent.

(e) In terms of whether the company had any surplus assets to realise a fine, Mr Shaw identified that the company had made advances to related parties totalling $1,486,000 as at 31 December 2022 with no explanation as to the possibility of recovery of these loans. If recoverable, a fine could be paid.

(f) The ability to pay a fine from the overdraft facility, in part, is somewhat dependent on the company's ability to service the increased interest payments on any increased overdraft. Mr Shaw opined such ability was readily apparent as a result of:

(i) expected future earnings capacity based on financial information suggests sustenance of interest on an increased overdraft;

(ii) in particular, historical revenue increased year on year from the years ending 2019 through to 2022 at a compound annual growth rate of 14.6 per cent with a declining gross margin that reduced the impact of that revenue growth but still overall profitability by way of trend;

(iii) employing the same historical analysis, increased positive cash flows also looked likely to be generated;

(iv) accordingly, if the company continued to perform as it had historically, there would be significant ability to pay an annual fine of at least $105,000 in future years and potentially more.

(iii) Further Evidence of Mr Pedofsky, 13 July 2023

[92] Mr Pedofsky provided updating evidence as of 13 July 2023 by way of updating financial position as at 30 June 2023 and reply to the evidence of Mr Shaw.

[93] It transpires that the company profitability had increased significantly as it had a profitable 2022/2023 growing season, with an estimated provisional company profit as at 30 June 2023 to be $110,602. However, the defendant company argues there is context to that improved position that the Court needs to take into account and also sought to argue there would be no meaningful or appropriate 'headroom' in the overdraft facility to cover a fine.

[94] In particular, Mr Pedofsky's updating evidence materially provided (my summary):

(a) The profitable season had been due to higher returns due to Hawkes Bay and Marlborough having light crops due to bad weather and, therefore, higher returns for pre-Christmas cherries and similar were received by the company.

(b) Export returns were up on average due to favourable exchange rates and awkward timing of an early Chinese New Year.

(c) Central Otago had particularly good weather in contrast to the rest of the country and only a small amount of its fruit was rejected.

(d) While the increased profit had assisted in reducing the end of year Rabobank overdrawn balance by $146,674, the company had spent $339,616 on plant and capital replacements.

(e) In terms of being able to service a fine, Mr Pedofsky's response included:

(i) The overdraft facility interest rate was greater than Mr Shaw provided, now at 9.45 per cent.

(ii) He had provided an overdraft balance prediction of 30 June 2023 of $3,004,000 but in fact the closing overdraft balance on 30 June 2023 was actually $3,217,202.

(iii) The 'headroom' is required to cope with the usual ebbs and flows of a horticultural industry, and a large fine would impact significantly on that buffer which was essential to cope with seasonal cost requirements prior to receipt of income and a safeguard that is required particularly in light of any climatic event.

(iv) Further, given the higher interest rate, the interest expense of a substantial fine in the region sought by WorkSafe was estimated at $23,500 and $28,350 on an annual basis.

(v) While a fine over time would be preferable, the headroom in the overdraft facility would be reduced by the additional expense and compounded by additional interest expense at a current rate of 9.45 per cent.

[95] For those reasons, Mr Pedofsky formed the view the company had limited ability to pay a fine and incurring a fine would put additional and unnecessary pressure on an overdraft facility that is high relative to a company the defendant's size.

Decision

[96] The defendant company is a family-owned horticultural business in Central Otago. It was incorporated in April 1990 and has operated since that time. It is a long-standing company.

[97] It has only two shareholders being Mr K J Paulin and Mr R P Paulin. They share equally in the share capital of 300 ordinary shares.

[98] On any view, the company has a healthy balance sheet.

[99] While having a healthy balance sheet with likely net assets of between four and five million, it is a company that has to carefully assess its liquidity position. That is because of the nuances of the industry, its income being seasonal, costs occurring at different points throughout the year, and that seasonal income is affected by, at times, climate, market forces including labour shortages, wage costs, compliance costs, and increases in other expenses. Given those vagrancies, the company largely operates by way of significant overdraft largely through Rabobank. That overdraft and its level fluctuates in accordance with those timings of costs and income and industry particularities. At this time, there is a significant interest cost to that overdraft of 9.45 per cent.

[100] I do not, however, find favour in the defendant's argument that it is financially incapable of paying a fine, and certainly not that it is incapable of paying by way of instalment.

[101] The fact that the company has operated for many years with a significant overdraft suggests that it will likely always operate (and has done so since the 1990s) with an overdraft or similar. It structures its company affairs in that way and successfully, given its healthy balance sheet. Over that time I anticipate there have

been many ebbs and flows and ups and downs because of differing financial circumstances it services, and profitably so.

[102] In my view, a fine here should be viewed as an unusual operating expense in the same sense that the defendant has, from time to time, taken account of other unexpected costs. The result may be an increase in the defendant's overdraft.

[103] I agree with Mr Shaw that the company's ability to pay a fine (lump sum or instalment) has to come from: cash reserves (of which there is none); realisation of assets (most are fixed and needed for the operation although I am conscious that there is outstanding loans to third parties that could be called in and there is no meaningful evidence to suggest they could not or the impact on the company if they were); or, by way of raising further monies to pay a fine (in this case by way of the use of the overdraft).

[104] I do not consider there to be strong evidence that this is an operation that would suffer pressure if a fine was imposed. In fact, the evidence of Mr Pedofsky does not go that far to say that the company would fail, but rather it would be difficult, and significantly so, if a fine were imposed given the likely need to use an overdraft (if it chose not to realise the third-party loans) and the interest cost of that. I do not infer from the language used or evidence of Mr Pedofsky that the company would inevitably fail or affect the number and nature of workers, or similar, if a fine was imposed. I accept there may well be some extra costs to the company and that this may even affect a degree of productivity and profit. However, this company is very different to small operations where failure of the business or reducing staff can be demonstrated if a fine is imposed.

[105] I note monies were paid by way of capital improvements at a time when the company must have known it was facing a fine of a considerable amount.

[106] I am persuaded that if the company chooses not to call in the third-party loans while it has no cash reserves available, it is reasonable in these combined circumstances, particularly having regard to the objects of the HSWA, that the defendant does sustain a fine. It is critical for purposes of deterrence that it does so.

Particularly given that I do not consider it likely to result in the company's closure or similar.

[107] However, on this matter I am satisfied that the general and personal deterrence that is critical in these matters can be met through the ordering of a fine that is paid in instalments (even though that will create some cost in terms of interest payments).

[108] In addition, however, given my intent is to ensure that deterrence is optimised, the Court has to consider if the level of fine that I have arrived at $500,000 less 50 per cent is still required to perfect the deterrence aspect that the fine must have.

[109] I have been significantly impressed by the company's preparedness to employ a person dedicated to health and safety at a cost of $50,000 and also external assessment. While it is correct that the Court has already reduced the fine by way of five per cent for remedial steps taken and a further five per cent by of remorse do not consider myself to be double-counting if I take into account the ultimate level of fine by way of financial capacity to provide accommodation for these significant steps taken. While the company could, of course, in the future, after the fine is imposed, stop those external safety assessments, or cease the dedicated health and safety position, I do not consider this defendant's now attitude to its H&S obligations should be considered in that cynical way.

[110] I consider that the level of the fine and how it is to be paid (by instalment) must take into account these unusual features of this defendant company's response to its culpability.

[111] I have reached the view that a fine by way of instalment, taking into account that there is going to be interest costs to the company and its already significant steps taken showing it has responded already by way of personal deterrence in the employment of a health and safety position, that the appropriate outcome is to set the fine at **$225,000** payable over four years.

Orders and directions

[112] For those reasons, I make the following orders and directions, namely:

(a) emotional harm reparation to the victim is set at **$35,000** ($25,000 has been paid);

(b) a consequential loss reparation to the victim at **$2,465**;

(c) a fine in the sum of **$225,000** payable by way of yearly instalments over four years of **$56,250.00 each year**; and

(d) an award of the prosecutor's legal costs in the amount of **$3,047.90** and a contribution of **$2,500** to the prosecutor's investigative costs.

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Judge E Smith
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 01/09/2023