

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CRI-2022-042-000998
[2024] NZDC 1567**

WORKSAFE NEW ZEALAND
Prosecutor

v

KEVIN HOWARD STRATFORD
Defendant

Hearing: 23 January 2024
Appearances: K Opetaiia for the Prosecutor
G Praat for the Defendant
Judgment: 23 January 2024

NOTES OF JUDGE J E RIELLY ON SENTENCING

[1] Mr Stratford, what I am about to say in my sentencing remarks will be quite detailed because there are a number of matters that I need to consider including, and importantly, the submissions that have been made on your behalf today. It may be that at times I have to pause to make sure that I refer to the correct document.

[2] You have pleaded guilty to a charge laid pursuant to ss 48(1) and (2)(b) and 36(2) of the Health and Safety at Work Act 2015. The charge is that between 12 February and 16 August 2021, you, being a person required under the law due to your work, a person described as a PCBU, having a duty to ensure the health and safety of other persons, did not do so.

[3] The specific wording of the charge is that you, having a duty to ensure, so far as is reasonably practicable, the health and safety of other persons, including persons travelling on State Highway 60, were not put at risk from work carried out as part of the conduct of your business or undertaking, namely felling trees, you failed to comply with that duty, and that failure exposed any individual to risk of serious injury or death arising from exposure to falling trees.

[4] The specific particulars related to your deviations from your duties are listed in the charging document as follows:

- (a) That it was reasonably practicable that you would have ensured that no trees were felled within two tree lengths of State Highway 60 until the required temporary traffic control and signage was in place as set out in the approved code of practice.
- (b) That you should have obtained formal authorisation and complied with any conditions set by the road controlling authority or the landowners before work commenced.
- (c) That you should have ensured that all persons carrying out the tree-felling works were adequately qualified, trained and competent in the methods of tree-felling that were used.
- (d) Further, that you should have lodged a written notice of intention to commence the tree-felling works at the site at the nearest WorkSafe office at least 24 hours prior to commencing the works at the site.

[5] The summary of facts records as follows.

[6] You operated a tree-felling business in 2021 as a sole trader trading as Stratford Logging. You entered into a contract to fell approximately three hectares of trees at the property of a couple based at 1449 State Highway 60, Tākaka Hill. This is referred to as “the site”. Your son worked at the site with you.

[7] A contract was signed between yourself and the property owner of the site. It was dated 12 February 2021. The works were to commence in February 2021 with an expected duration of 12 weeks. They continued intermittently until December 2021. The contract included that you and your son would manage all operational health and safety requirements and that one of the two owners would monitor the contractor's health and safety management compliance.

[8] The contract contained two sections that identified site hazards. In the first part, a hazard was listed as "forest edge trees - State Highway - Tākaka Hill" with a listed control of "traffic management plan" and then beside it "not required".

[9] The second listed hazard was "forest edge trees and edge trees on boundary will require machine-assisted felling". Controls listed were "mechanised falling machine, use qualified competent tree-feller, forest harvesting contractor will monitor work practices to ensure safety of workers".

[10] The second section identified other hazards and controls including a traffic management plan, edge trees along boundary, and boundary fence.

[11] The contract also stated that you confirmed you had a safety management system, described the risks of the work and how that would be managed and recorded, and that you were competent to do the work. The contract recorded that most of the trees would be felled by a ground-based felling person and that there may be a need to adopt a machine-assisted felling operation at times.

[12] In regard to mitigating risks associated with the contract, the following were identified:

- (a) Awareness of wind-throw trees and persons engaged on falling operations to have relevant wind-throw unit standard and deemed competent to undertake such operations.
- (b) Awareness of the need to use machines to assist to fall edge trees and that persons engaged with the machine are deemed competent to

undertake such operations, and in regard to log trucks on to highway with a signage of trucks crossing that this was not required due to clear road visibility.

[13] The contract contained training records for yourself and your son. They related solely to you. The contract indicated that your son had not obtained any relevant unit standards in the field of work.

[14] You began felling trees at the site in February 2021. You did not notify WorkSafe about the tree-felling works at any stage.

[15] On 16 August 2021, a member of the public who has 20 years' experience in the forestry industry and is certified in tree-felling notified WorkSafe that trees were being felled less than a tree length from State Highway 60 with no traffic management control in place. He estimated that the trees were about 30 metres tall. He said that he could not see any signage or road control in place, although there was a sign at the site's gate. He said that the trees were being felled with machine assistance.

[16] It was his report to WorkSafe on that day that triggered the WorkSafe investigation into your practices at the site.

[17] The following day, an inspector visited the site and observed the evidence of tree-felling conducted within 10 to 12 metres of State Highway 60. The trees were approximately 30 metres tall and there was no evidence that traffic signs or a method to stop traffic while trees were being felled had been in place. Machines were present on the site.

[18] On 2 November 2021, the inspector spoke to you. You told the inspector at that time that there was no traffic management plan in place when the tree-felling occurred and that the trees were being felled within two tree lengths of the road. You said that the trees were about 30 metres tall and were close to the State Highway, describing it as very close, near enough to the road cutting road reserve.

[19] You said that felling trees using a winch was safe and that if you had adhered to the two-tree length rule, it would be unworkable. I infer that what you meant was that it was unworkable to complete the job of tree-felling at that particular area of the site any other way.

[20] On 2 November 2021, a Prohibition Notice was issued to you prohibiting further tree-felling within two tree lengths of the road.

[21] On 11 February 2022, a representative of the Tasman District Council confirmed that no traffic management plan was either submitted or approved for the works at the site by you or anyone else.

[22] On 17 February 2022, Waka Kotahi informed WorkSafe that it had no record of correspondence with you or your company in relation to the logging works, there were no applications in its database for tree-felling at the site, and there was no record of correspondence with the Tasman District Council in relation to this matter.

[23] Regulation 26 of the Health and Safety in Employment Regulations 1995 requires a written notice be lodged with the nearest WorkSafe office at least 24 hours prior to any logging or tree-felling works. No such notice was ever filed.

[24] On 18 March 2022, a forestry expert visited the site. As a result of the enquiries he undertook, it was clear that the approved code of practice for trees not to be felled within two tree lengths from the road and for a traffic management plan to be in place were not being complied with. He measured the distance from the closest stump to the State Highway as as little as 7.4 metres.

[25] He noted several serious deficiencies in the felling techniques on the stumps felled within two road lengths noting that the felling cuts were of very poor quality and well below the accepted industry and unit standard. Trees had been felled with mechanical assistance. He considered that whilst he had not witnessed the felling of the trees at the site, that there was evidence that wedges were not used when the machine-assisted pull method was carried out which he considered substandard practice.

[26] His opinion was that the trees could have easily fallen towards the highway due to a lack of hinge wood that was left on the stump which could have resulted in catastrophic consequences. He considered that the substandard tree-felling cuts posed a very high risk to the tree feller and an extremely high risk to road users within two tree lengths of the road. His expert opinion was that neither you nor your son held the relevant qualifications to be performing machine-assisted tree-felling. In summary, you departed from industry standards and guidelines for tree-felling in a variety of ways.

[27] Your background is that you have a previous conviction that is relevant, that dates back to 1998. You have also been issued with four Prohibition Notices and 28 Improvement Notices in relation to a range of activities including unsafe tree-felling practices, failing to notify WorkSafe of your tree-felling work, workers having inadequate qualifications, and you having in place an insufficient health and safety system.

[28] WorkSafe seeks that a fine is imposed for your admitted offending behaviour.

[29] It is submitted on your behalf, having regard to the particular circumstances of this case, which I will go through soon, and your personal circumstances, that, in the alternative, the Court should make an order for an enforcement undertaking including conditions that you will sell equipment that you currently own specific to your tree-felling forestry work and that you will not carry out any work in the forestry industry for a period of two years, which is the maximum duration that an enforcement undertaking can be made for, in circumstances where you are now aged in your early seventies and you are receiving government superannuation. I infer that the submission is being made that it is unlikely that after the two-year period that you would take up this kind of work again.

[30] I have received a significant amount of information about your personal circumstances that has been filed in support of the submissions made on your behalf. It is submitted on your behalf that the Sentencing Act 2002 objectives are better served by removing you from the forestry industry than imposing a fine because imposing a fine is somewhat meaningless when it is money that goes into the State coffers, and

also because if a fine is imposed, it would be the Court forcing you to continue to work in the industry in order to pay the fine.

[31] It is also submitted on your behalf that the purpose of the legislation under which you have been charged, the Health and Safety at Work Act, is about securing health and safety of workers and workplaces and that, therefore, cessation of all commercial forestry work by you would do more to secure the health and safety of any workers and workplaces that you may otherwise be in when a fine would not do that and would rather do the opposite.

[32] In support of the proposal that is put forward for a Court ordered enforcement undertaking, your counsel has provided very succinct written submissions supplemented by oral submissions today together with two affidavits filed on your behalf setting out your personal circumstances and financial means. I infer from the submissions made on your behalf that you have agreed that you will comply with any enforcement undertaking that the Court imposes, particularly in regard to sale of two particular items of forestry machinery and also in not engaging in any forestry work for a period of two years, which is the maximum duration of any such order.

[33] It is pointed out that, in your case, unlike in many other cases where charges are brought under this Act, that there was no injury or near miss event in regard to your tree-felling works at the site. Further, it is submitted on your behalf that you were not unmindful of your obligations to the health and safety of others, that you turned your mind to the risks, but rather than dealing with the risks that WorkSafe and other experts in the field say you did not appropriately manage, that your error was in your judgement as to what steps were reasonably practicable.

[34] It is submitted on your behalf that you allowed yourself to be persuaded by the cost of traffic control as a principal consideration instead of prioritising safety to yourself, your workers, and the community, who in this case are the road users in the vicinity of the tree-felling site.

[35] Further, it is submitted that it would have been uneconomic for your client and yourself to have a traffic management plan in place as reasonably expected by the

rules, regulations, and protocols in New Zealand, and that you instead relied on your knowledge and experience in the use of this machinery and the industry of tree-felling to ensure that you were managing the risks that tree-felling might pose to others, including members of the community.

[36] Overall, it is submitted that the fact that no trees fell on to the roadway, and that there were no mishaps or accidents supports your view of what was necessary.

[37] By your guilty plea, you have acknowledged that failing to notify WorkSafe, Waka Kotahi, and the Tasman District Council was in breach of your obligations in operating your business and conducting this work. This is described on your behalf as an error of judgement in circumstances where you honestly believed that the requirement for a traffic management plan would be prohibitively expensive and out of all proportion to the risks of the machine-assisted felling operation.

[38] It is also submitted that it is unrealistic for the informant to suggest that the costs of obtaining the necessary consents and contracting of traffic management services could have been passed on to the landowner.

[39] Your counsel and the informant's counsel have referred to a decision of *WorkSafe New Zealand v Otago Polytechnic* where the Court did grant as the sentencing outcome a Court ordered enforcement undertaking.¹ I do not intend to go into the facts of that case in detail as they are in stark contrast to the facts in your case but, in summary, as the informant has submitted, your lack of insight and continuing attempts to justify your transgressions place your case in a very different light than that of the defendant in that case.

[40] There are inconsistencies in the information that you have put before the Court about your personal circumstances. The evidence in your affidavit is more demonstrative of you having a genuine belief that you can disregard the rules, regulations and guidelines that apply to the forestry industry if it suits your own ends and that of your clients, because you have an overinflated sense of your abilities and because it seems that you have an air of arrogance about your responsibilities under

¹ *Worksafe New Zealand v Otago Polytechnic* [2020] NZDC 11114.

the rules and regulations that are in place in our country. This may be because there is no evidence that you have ever caused harm to yourself or anyone else over a very lengthy career working in the forestry industry. Your attitude ignores the potential risks involved in this kind of work.

[41] I agree with the submission made on behalf of the informant that you have demonstrated a dismissive attitude towards the regulations that apply to this kind of work. I am concerned that you are a person who would not comply with an enforcement undertaking even if it was extremely prescriptive and I note that you operate your business in a remote area of New Zealand with very little oversight from others around you, and enforcement authorities are based a significant physical distance from where you work.

[42] There is also force in the informant's submission that, in a case where your client at the site was your friend and you were trying to carry out work with limited costs for yourself and your friend, that a situation may well arise in the future where others in your community may assist you in continuing to work in the forestry industry even if you have undertaken that you will not.

[43] In the case of *WorkSafe New Zealand v Otago Polytechnic*, the extent of the undertakings were significant and left the Court feeling a sense of comfort that not only would the undertakings be met, but also that the community would be greatly benefited by the undertakings.

[44] This is regulatory law. It is in place to protect workers and other people who are in and around work sites. Most of the case law that applies to sentencing for cases of this kind refers to start points for sentence involving fines and end outcomes where fines are imposed because that is the framework upon which the legislation anticipated sentencing would proceed.

[45] The predominant principles behind sentencing are to denounce the conduct of particular defendants and deter others from committing offences in a similar way. Although it is an alternative under the legislation, I do not consider given the particular circumstances of your offending behaviour and also your particular personal

circumstances that a court ordered enforcement undertaking is the appropriate sentencing outcome in your case.

[46] Putting that aside, I now turn to work out what the appropriate sentence should be. I refer to the case of *Stumpmaster v WorkSafe New Zealand*.² That provides guidelines for assessing culpability of offending behaviour. The associated decisions I have been referred to support that the fines for an individual should be adjusted downwards by around a fifth to ensure that people charged as individuals, as you are charged under the Act, have the benefit of the adjustment to the *Stumpmaster* bands, taking into account the maximum fine being a fifth of what it is if the defendant is a company or body corporate.

[47] I have had particular regard to the decision that has been referred to by the informant of the *Department of Labour v Arborco Palmerston North Ltd*.³ In that case the offending behaviour involved a company who had failed to put in place a traffic management plan at the time they were tree-felling and there had been no harm caused to any person, two factual matters that are similar to your case.

[48] In assessing start point, your counsel has put forward, if the Court was minded to adopt an approach of imposing a fine, that the *Arborco* case can be differentiated because in that case there had been a requirement by a health and safety inspector for the company to stop work and they had resumed work without authority to do so.

[49] That is a factor that is not present in your case but, overall, I consider that your offending behaviour is far more serious than that in *Arborco* because you have acknowledged in your affidavit evidence that you turned your mind to the need to a traffic management plan being required, or certainly contemplated it which demonstrates an awareness of the guidelines, but you deliberately decided not to carry out your obligations in regard to traffic management for reasons that we now know were financially motivated to benefit yourself and perhaps also your client. This shows an informed deliberate dereliction in your obligations as a forestry contractor.

² *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

³ *Department of Labour v Arborco Palmerston North Ltd* DC Palmerston North CRN 4054500532, 13 June 2005.

There were also a variety of ways in which you derogated from your duties under the guidelines and regulations as set out in the particulars of the charging document.

[50] On the evidence of the WorkSafe investigator, it seems that you placed yourself, your son, and any road user on State Highway 60, which is a busy road used by many members of the public, at significant risk from falling logs. In those circumstances, I consider that your offending behaviour is more serious than in the case of the *Department of Labour v Arborco Palmerston North Limited*. That said, I acknowledge that in that case the defendant was a company. You have been charged as an individual and so there needs to be a proportionality assessment.

[51] I consider that the circumstances of your offending behaviour that are most relevant to assessing its gravity are the obviousness of the hazard, your awareness of it and you being willing to deliberately take the risk not to comply with what you knew to be best practice which placed others at significant risk of harm.

[52] As his Honour Judge Gilbert said in the case of *WorkSafe v Stoneyhurst Timbers Limited*:⁴

The fact that there is a moderate cost of remedying these issues is not an excuse. To suggest otherwise would be to sacrifice employee safety on the altar of profitability which is something that is clearly unpalatable.

[53] I consider that your offending behaviour falls into the category of medium culpability rather than low culpability. The informant submits that the start point for sentence should be a fine of \$90,000 which they say is at the lower end of the medium culpability band. Your counsel, in the event that the Court considered a fine the appropriate outcome, said that it should be assessed as either at the very high end of the lower culpability category or lowest end of medium culpability, with a start point of \$50,000. The band for medium culpability for a person is between \$50,000 and \$120,000.

⁴ *WorkSafe v Stoneyhurst Timbers Limited* [2016] NZDC 17200.

[54] I consider that the start point should not fall at the lowest end of the band, but certainly at the lower end of the medium culpability band in circumstances where there was no actual harm caused to any person by your offending behaviour.

[55] I adopt a start point for sentence of a fine of \$70,000. I consider that there needs to be an uplift to take into account your previous record of non-compliance in the field of health and safety and employment. The number of compliance issues you have had is concerning and, although I do not have evidence of this in a concrete form, I imagine that this is unusual for persons working in this industry. The uplift is measured by five per cent, which is a sum of \$3,500.

[56] You shall receive a full credit for your early guilty plea, which, on my assessment, is somewhat generous given the timeframe that has been required to proceed to sentencing but, in saying that, I note that another charge was at some point withdrawn. That is why I am giving you a full credit for your guilty plea. The 25 per cent credit attaches to the start point of \$70,000 and then the uplift of \$3,500 is added on. That arrives at an end point of \$56,000.

[57] I do not consider that there are any other mitigating factors relevant to assessment of credit to the fine in your particular case, in circumstances where you have demonstrated limited insight into your offending behaviour, and that your affidavit contains assertions by you that can only be considered as attempts to justify your lack of compliance with the rules, regulations, and guidelines in place in the tree-felling industry.

[58] I need to carry out a proportionately assessment to assess your ability to pay the indicated fine to decide whether there should be an adjustment downwards because of an inability to pay the fine.

[59] You are a person who has put your concerns about the financial costs involved in completing your work ahead of important safety considerations and, most saliently in this case, your traffic management control obligations. You did not carry out any of the required obligations in regard to traffic management control, which was clearly, given where you were felling trees, an absolute minimum requirement.

[60] When I consider the evidence about your financial circumstances, there is an overwhelming theme of you providing limited information to the informant and the Court, you providing selective information at varying times about not only your financial means but your personal circumstances generally, including your current sources of income and of you attempting to minimise the value of your assets, including property and other assets.

[61] As recently as 19 January this year, in circumstances where it had been many months since this proceeding was adjourned, after a significant amount of discussion about your financial means and when you knew how important your financial position was to the sentencing process, you have not included any reference to your continuing work in the forestry industry, which at its most favourable is derelict, at worst, is deceitful, given the nature of this proceeding.

[62] Whilst you have had someone assess the value of your assets for their current sale value, that is only in relation to some of your assets, not all, and there was an absence of any information about the most important aspect of your financial circumstances about how much cash you have readily available to pay a fine.

[63] There was no reference in your most recent affidavit to the cash sum that you have in the bank. You had to be asked by your lawyer during the hearing today about that. That means that there is no independent evidence to verify if what you are saying is accurate about that sum. There has been no opportunity for the informant to independently test or verify that information. You say today that there is a particular sum in your bank account that is far less than it was in August last year and say that some of that is accounted for with no independent evidence to verify that. You have other income over and above your government superannuation, but there has been no information provided about the extent to which that supplements your income at the present time.

[64] In all the circumstances, I consider that you have deliberately attempted to put forward an inaccurate picture of your current financial position in an attempt to avoid paying a fine that is commensurate with the level of your offending behaviour. In those circumstances, I consider that the appropriate outcome today is that there should

not be any adjustment to take into account your personal circumstances, which are entirely unclear and minimised, and instead to impose the fine that is the indicated end point of \$56,000.

[65] That is the fine that I impose today: \$56,000.

Judge JE Rielly

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 20/03/2024