IN THE DISTRICT COURT
AT NAPIER

I TE KŌTI-Ā-ROHE
KI AHURIRI

CRI-2022-041-946
[2023] NZDC 21751

WORKSAFE NEW ZEALAND
Prosecutor

v

FOREST MANAGEMENT (NZ) LIMITED
Defendant

Hearing: 6 October 2023

Appearances: Mr S Cossey for Prosecutor
Ms E Harrison for Defendant

Date of Decision: 31 October 2023

RESERVED DECISION OF JUDGE G A REA ON SENTENCE

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[1] On 30 June 2021 at Tangoio in Hawke's Bay Mr Jake William Duncan was killed when struck by a log while working for a logging company.

[2] That logging company, Logged On Logging 2020 Limited("LOL") has pleaded guilty to a charge under s 48(1) of the Health and Safety at Work Act 2015 for exposing workers, including Mr Duncan, to the risk of serious injury or death during the course of the logging operation. The charge that LOL has pleaded guilty to requires an acceptance that its failure to properly have regard to the health and safety of its workers exposed them to the risk of serious injury or death and in the case of Mr Duncan it in fact caused death. LOL has yet to be sentenced.

[3] This defendant faces a lesser charge under s 49(1) of the Act. That charge provides as follows:

> **Date of offence:*** 30 June 2021
>
> **Offence location**:* at Skid 3, 257 Arapaoanui Road, Tangoio, Hawke's Bay
>
> **Offence description**:* Being a PCBU, having a duty to ensure, so far as is reasonably practicable, the health and safety of workers whose activities in carrying out work it influenced, or directed,while the workers were carrying out the work, namely work at Skid 3, 257 Arapaoanui Road, Tangoio, Hawke's Bay, did fail to comply with that duty.
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> **Particulars:** It was reasonably practicable for Forest Management (NZ) Limited to have:
>
> 1. Ensured that an adequate pre-harvest risk assessment was documented properly prior to work being commenced at Skid 3, 257 Arapaoanui Road, Tangoio, Hawke's Bay.
>
> 2. Adequately monitored the effectiveness of Logged On Logging 2020 Limited's health and safety systems.
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> **Legislative reference:***Health and Safety at Work Act 2015, Sections 36(1))b) , 49(1) and (2)(c)
>
> **Maximum penalty:*** 1 **Representative Charge:*** No **Alternative Charge**:* No

[4] Although the death of Mr Duncan was the trigger that lead to the prosecution of both companies there is no allegation by the Informant that any failings by this Defendant were in any way causually connected with the death of Mr Duncan.

[5] What is alleged against the Defendant and accepted by its guilty plea is that it was reasonably practicable for the Defendant to have:

(a) Ensured that an adequate pre-harvest risk assessment was documented properly prior to work being commenced at Skid 3, 257 Arapaoanui Road, Tangoio, Hawke's Bay.

(b) Adequately monitored the effectiveness of LOL's health and safety systems.

[6] As far as this Defendant is concerned paragraph 54 of the Summary of Facts stated that the pre-harvest check list that had been completed by the Defendant and LOL listed only two hazards on the logging site and therefore there was no adequate documented recorded in the pre-harvest check list and risk assessment of the risks, hazards and controls.

[7] Paragraph 55 of the Summary of Facts states that the Defendant also acknowledged that there were more risks that should have been documented but does not then go on to list what those risks were.

[8] Paragraphs 56, 57 and 58 of the Summary of Facts deal with the failure of the Defendant to monitor the effectiveness of LOL's health and safety systems. They state that the Defendant relied heavily on LOL to identify risks and hazards, rather than taking an active and collaborative approach in health and safety issues at the sites in which it was using contractors. The Summary further alleges that the Defendant required site risk assessments to be completed by LOL but did not interrogate or challenge the content of those assessment as a standard practice. As a result it is claimed that the Defendant failed to adequately monitor the effectiveness of LOL's health and safety systems.

[9] In his final written submissions Mr Cossey said that the Defendant failed to ensure that the pre-harvest risk assessment was documented properly at the site and did not adequately monitor the effectiveness of LOL's health and safety systems. He went on to say that the Defendant's conduct departed significantly from industry guidelines and that the departure was regarded seriously. He stated that there was a need for the Defendant to interrogate and challenge the site assessments of LOL, and take an active role with its contractors including LOL.

[10] For the Defendant Ms Harrison accepted that there was a breach of the obligation to properly document the pre-harvest risk assessment. As she put it "the written material created on that topic had a generic quality to it and was not populated with the information identified from the site walkabouts and the discussions between the Defendant and LOL."

[11] Ms Harrison acknowledged that that this failure was in breach of the ACOP which provides that:

> "The principal shall verify that the employer has a documented safe management system in place before commencing operations and shall periodically audit the effectiveness of this system."

[12] As far as the second particular is concerned Ms Harrison accepted that the Defendant reviewed and audited LOL's health and safety protocols but that there was also scope for it to interrogate those protocols more, and to engage more collaboratively.

[13] It is clear that while there was a pre-harvest risk assessment it was not properly documented. The dangers of that failure are obvious. There is no on-going ability for anyone to review the totality of the pre-harvest risk assessment if it is not properly recorded and as a result there is no ability to correct any difficulties that may have shown up on that assessment.

[14] Despite Ms Harrison's acceptance that there was greater scope for the Defendant to look into LOL's health and safety protocols more than they did there is nothing in the Summary of Facts or in the submissions of Counsel to indicate to me what health and safety systems are being referred to in that regard.

[15] There is nothing in the Summary of Facts to indicate that the Defendant was deficient in relation to individual or particular health and safety systems that were in place for the logging operation. There is just a general allegation that the Defendant was not up to scratch in that particular area without identifying where those deficiencies lay.

[16] During the course of the hearing I discussed this issue with Mr Cossey and he was unable to identify anything other than the lack of documentation around the pre-harvest risk assessment where the Defendant has failed in its obligations. Certainly there is nothing in the Summary of Facts that could lead to a conclusion that any inadequacy in monitoring had any effect at all in the health and safety of workers.

[17] This issue is important when it comes to determining the amount of the fine that the Defendant will have to pay. Ms Harrison has submitted that any breaches are of a largely technical nature and that the fine should be imposed at a much lower level as a result. On the other hand Mr Cossey submits that the Defendant's offending is much more serious and should not be dealt with simply as a technical breach.

[18] Despite Ms Harrison's acceptance under the second particular that the Defendant could have been more active in examining, and if necessary challenging, LOL's health and safety systems there is simply no evidence to indicate where in particular the Defendant had failed to carry out its obligations and nor whether any such failure impacted on the health and safety of workers.

[19] In the end I consider the Defendant should be sentenced on the basis that there is a clear default that did impact on health and safety in relation to the inadequate documentation of the pre-harvest risk assessment but that there is no evidence of any other default that impacted on health and safety.

[20] Fixing the amount of a fine under the Act is guided by the bands set in *Stumpmaster v Worksafe New Zealand*[1]. While the bands in that case were set to apply for sentencing under s 48 of the Act which is more serious than s 49, the High Court in *East By West Company Limited v Maritime New Zealand*[2] confirmed the applicability of the *Stumpmaster* culpability bands to s 49 charges adjusting them to reflect the maximum penalty under s 49 which is one one third of that available under s 48.

[21] The bands under s 49 were set as follows:

Low culpability up to $85,000

Medium culpability $85,000 to $200,000

High culpability $200,000 to $335,000

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[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020
[2] *East By West Company Limited v Maritime New Zealand* [2020] NZHC 1912

Very high culpability $335,000 to $500,00.

[22] Mr Cossey submitted that on a review of the facts, and based on sentences imposed in other cases, the defendant's culpability in this case was at the top of the medium band and he submitted a starting point of $160,000 was appropriate.

[23] For the Defendant Ms Harrison submitted that a starting point of between $65,000 and $85,000 was appropriate putting it at the top of the low culpability band. She also cited authority in support of her position in that regard.

[24] While other sentencing decisions are of assistance it is necessary to look at what is proven against the Defendant in this case and then to assess culpability in accordance with the *Stumpmaster* bands. As I have said a preharvest risk assessment did take place here but the results of it were not properly documented. The reason why proper documentation was required from a health and safety point of view was to ensure an ongoing ability to review the totality of the preharvest risk assessment, to apply that preharvest risk assessment during the course of the logging and to use or consult it in relation to any difficulties that may arise on the job.

[25] I regard the failure to properly document the assessment to be more than a technical breach. It is a breach that could well impact on health and safety issues.

[26] In his submissions Mr Cossey categorises the breach as serious. I accept his conclusion in that regard is from an amalgam of the failure to properly document the preharvest assessment as well as the unspecified failure of the Defendant to adequately monitor LOL's health and safety systems. I do not accept that the Defendant's breach of s 49 can be categorised as serious and as such I do not believe a fine at the upper end of the medium culpability range is warranted on the facts.

[27] I believe that the starting point for a fine is one of $72,000.00. It is accepted by the parties that the defendant is entitled to a discount of 5% to reflect its previous good safety record and a further 5% for its cooperation with the investigation. It is also accepted that the full guilty plea discount of 25% is appropriate. Overall the

defendant is entitled to a 30% deduction from the starting point based on those factors. A 30% discount is $21,600. Therefore the Defendant will be fined the sum of $50,400.

[28] The Defendant also accepts that it should pay costs to the Informant in the sum of $3,083.69 and there is an order accordingly.

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Judge G A Rea
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: …31/10/2023