IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2018-009-006311
[2019] NZDC 3932

WORKSAFE NEW ZEALAND
Prosecutor

v

WIMPEX LIMITED
Defendant

Hearing:	27 February 2019
Appearances:	N Szeto and S Leonard for the Prosecutor J Lill for the Defendant
Judgment:	27 February 2019

NOTES OF JUDGE P R KELLAR ON SENTENCING

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[1] On 1 August 2017 Ms Orcajada was working for the defendant company Wimpex Limited. She was in the process of cleaning an Auger machine when the thumb on her left hand was drawn into the machine resulting in immediate amputation. The subsequent Worksafe investigation identified failures on the part of the defendant company to comply with statutory duties under the Health and Safety at Work Act 2015.

[2] This is a sentencing in respect of a charge of contravening s 36(1) and s 48 of that Act, the maximum penalty for which is a fine not exceeding $1.5 million. The charge is that the defendant as a PCBU failed to ensure as far as reasonably practicable the health and safety of the workers who worked for it and that failure exposed workers to a risk of serious injury.

[3] The reasonably practicable steps the defendant company should have taken in order to comply with its duties are for one, to ensure a competent person conducted an effective risk assessment of the Auger machine; secondly, ensure the machine was adequately guarded; thirdly, develop, implement and monitor a safe system of work for the machine including training and supervision.

[4] The defendant company is in the business of processing contract manufacture and consumer packaging of dry powder and granulated goods. Ms Orcajada was an employee of the defendant. She is the victim. At the time of the incident she had been working for the defendant company for about four years.

[5] The machine involved in the incident was an Auger machine, the model and serial number for which is unimportant. It is used to blend products and the defendant company purchased it directly from a supplier in China in 2011. The defendant company carried out checks on the electrical componentry of the machine when it first arrived in New Zealand. However, no other assessments were carried out.

[6] The machine is required to be cleaned when a batch of different or unrelated product to the one just completed needs to be processed. I understand this happens reasonably regularly, perhaps two or three times a week. Prior to cleaning, the operator is required to complete a pre-cleaning checklist. The checklist is required to be signed off by the supervisor or a senior staff member. Counsel for the informant has described the checklist as a series of administrative controls.

[7] The checklist requires the operator to ensure these things. One, the blender is switched off. Further, the emergency button is in the off position and the electrical supply is switched off at a main switch. Also, the electricity cable is unplugged from the main switch and, finally, a sign is placed on the wall that says, "Cleaning in progress. Do not activate."

[8] At about 4 o'clock in the afternoon on 1 August 2017 Ms Orcajada was in the process of completing the blending of product using the Auger and an associated blender. Prior to blending the next product she needed to clean the machine. She did not isolate the machine from the power supply nor did she complete a pre-cleaning

checklist. She removed the stainless steel cover located on the underside of the Auger as she usually did when completing a clean of the machine. Counsel have very helpfully provided me with larger colour photographs that enabled me to understand how all of this operates.

[9] Ms Orcajada then placed her left hand into the opening in an attempt to clean the previously blended product from the base of the Auger tube. Her thumb was drawn into the machine resulting in immediate amputation. She was taken to Christchurch hospital where her thumb was reattached during surgery.

[10] There is nothing exceptional about the sentencing purposes and principles that apply but, for completeness, I will set them out. In terms of the purposes or objectives of sentencing, they are set out in s 7 Sentencing Act 2002. Relevantly for the purposes of this sentencing, they are to hold the defendant accountable for the harm done by the offending, to promote in the defendant a sense of responsibility for that harm, to provide for the interests of the victim including reparation, to denounce the conduct in which the defendant was involved and, finally, to act as a deterrence both in relation to the offender and generally, this is to the extent that any sentencing can achieve that purpose.

[11] As far as sentencing principles go, I must make an assessment of the gravity or seriousness of the offending and the defendant's culpability. I also have to have regard to the relative seriousness of the type of offence and this is indicated by the significant maximum penalty, a fine not exceeding $1.5 million. I must also have regard to the effects of the offending on the victim, the outcome of any restorative justice process. I must also impose on any defendant the least restrictive outcome that is appropriate in the overall circumstances.

[12] Section 151(2)(b) of the legislation obliges the Court to have particular regard to the purposes of the Act. They are set out in s 3. The main purpose of the Act is to provide a balanced framework to secure the health and safety of workers and work places by doing a variety of things and, in particular, protecting workers and other people from harm to their health and safety by eliminating or minimising risks, providing for a fair and effective workplace representation, co-operation and so on,

promoting the provision of advice, education and training in relation to work health and safety, securing compliance of the Act through various compliance and enforcement measures, ensuring the appropriate scrutiny and review of actions taken by people performing functions and exercising powers, and providing a framework for continuous improvement and progressively higher standards of work health and safety. Any sentencing for contraventions of the Act must have those overarching principles in mind.

[13] Regard must be had to the principle that workers and other people should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[14] Fortunately, the sentencing methodology with respect to prosecutions of this nature is settled. I have to have regard to the provisions of ss 7 to 10 Sentencing Act. I have got to have regard also to the purposes of the legislation under which the charge is brought. I have to consider the risk of and potential for injury or death that could have occurred. I need also to consider whether the injury that occurred could reasonably have been expected to have occurred. I have got to consider the safety record of the defendant to the extent it shows whether any aggravating feature is present and I should also consider the degree of departure from prevailing standards in the industry and further, and this is a point to which I will return later, I must consider the defendant company's financial capacity or ability to pay any fine and that can of course result in an increase or indeed a decrease in the amount of the fine.

[15] So the steps that are involved in sentencing are, first, to make an assessment of the amount of reparation, if any, to be paid to the victim; secondly, fix the amount of the fine by reference to the guideline bands and then either increase or decrease that having regard to any aggravating or mitigating factors relating to the offending. Then determine whether further orders under ss 152 to 158 of the Act are required and then, as with all sentencing, stand back and make an overall assessment of the proportionality and appropriateness of imposing sanctions under those preceding steps.

[16] The first thing to do is to assess reparation for emotional harm and any consequential loss. I think it is fair to say with respect to the submissions from the informant and the defendant that this is as much an art as a science, perhaps more of the former.

[17] A victim impact statement was filed along with the submissions. As I have mentioned the victim, Ms Orcajada, suffered an amputation of her left thumb which was later able to be attached during surgery. Unsurprisingly, Ms Orcajada collapsed twice whilst waiting for an ambulance. She was in severe pain and shock. She spent five days in hospital and after two months of medical consultations began a return to work plan through ACC. The mobility in her thumb has not yet returned to normal. I suspect it probably never will. She has experienced pain in it over the winter. The shortened length and numbness of her thumb has caused her difficulty in picking up and holding objects.

[18] She returned to her normal working hours at the defendant company in January last year, that is 2018. She was eager to return to work despite being apprehensive about the incident. She says, rightly or wrongly, that she felt she was being treated differently and the company did not want her back. In any event, I readily accept that she experienced symptoms of anxiety. She was prescribed medication and advised to take a week off work. She actually resigned in July 2018.

[19] The case was referred to restorative justice for assessment. I entirely respect the fact that Ms Orcajada did not feel comfortable attending a restorative justice conference. Make no comment about that save to say that in general restorative justice conferences have genuinely restorative effects for both victims and for offenders.

[20] The effects of the incident have woven their way into Ms Orcajada's personal life. She has lost confidence. She does her best to be strong for her family and tries to look forward but she feels understandably self-conscious about the injury.

[21] The prosecutor submits that the appropriate amount of reparation for emotional harm to be paid to her is in the region of $15,000 to $20,000. By reference to a number of authorities to which Ms Szeto has helpfully directed me, the

informant's submission is that the amount of emotional harm reparation should be at the higher end of that range. Counsel for the defendant company also by reference to authorities to which he specifically referred me submitted that it should be towards the lower end of that range.

[22] Happily, there is no controversy between the informant and the defendant company as to the amount of reparation for consequential and economic loss. There has been a calculation of the shortfall between what Ms Orcajada received by way of payments from ACC and her actual pay, the total sum being $3808. That includes a sum of just over $524 because Ms Orcajada worked fewer hours after she had returned to work.

[23] The second step in the process is to assess the quantum of the fine. Sentencing methodology must follow *R v Taueki* but the Court in *Stumpmaster v Worksafe New Zealand* has established various guideline bands for culpability.[1] These are sufficiently well-known for it to be unnecessary for me to set them out in these sentencing notes.

[24] The factors which are relevant to determining culpability are these. The first is the identification of operative acts or omissions at issue and the practicable steps it was reasonable for the defendant to have taken in terms of the Act.

[25] The informant submits that the defendant company failed to take a number of reasonably practicable actions. In the first category failed to complete a risk assessment of the Auger machine. The company should have made sure that a detailed risk assessment for the machine was carried out and that appropriate control measures were implemented before starting operations. Furthermore, a competent person experienced in working with and using New Zealand Standard 4024 should have been engaged if there was no relevant inhouse expertise in machine guarding. That is the first category.

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[1] *R v Taueki* [2005] 3 NZLR 372 (CA); and *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

[26] The second is to make sure that the Auger was adequately guarded. It should have been guarded in accordance with that New Zealand standard.

[27] Thirdly, it should have ensured a safe system for work on the machine and that workers were adequately trained and supervised in safe working procedures for operating it. The company should have had adequate policies and procedures in place to make sure risks in relation to the machine were identified and appropriate control measures were implemented, maintained and monitored to ensure that they were effective and made sure that people followed the policies and procedures. Workers should have been trained in safe working procedures for operating the machinery by a competent person and training should have included safe work instructions for clearing jams and cleaning when the guard had to be opened. That was not every day but it was quite frequently. That is the first category.

[28] The second is the obviousness of the hazard and, as a corollary of that, the availability, cost and effectiveness of the means necessary to avoid the hazard, the current state of knowledge of the risk and the nature and severity of the harm which could result and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. It is trite that the hazards and risks associated with inadequately guarded machinery are well-known in the manufacturing industry and are widely documented in guidance. There is nothing new about this.

[29] In 2015 the defendant company was involved in a duty holder review process with Worksafe after a worker had the tip of a finger amputated on an ineffectively guarded machine. At the time the defendant company was provided with information on machine guarding and controls.

[30] Within just a week of the current incident, the defendant company arranged for the fixed guarding to be put in place with the ability to remove this only with specialist tools. In particular, a bolt was added to the stainless steel cover on the underside of the Auger tube. I think it is fair to say that the fix was very straight forward.

[31] The informant submits that the cost to guard the machine is insignificant and certainly not disproportionate to the risk of harm to workers. One cannot help but

agree with that submission. I do not know the cost of the remedial step that was taken but I do not imagine it was particularly much.

[32] The next factor to consider is the risk of and the potential for injury or death that could have occurred. Death would have been a very unlikely outcome in this case although there is potential for even more significant amputation arising out of operation of the machine. The resulting harm could have been much more serious.

[33] The next factor is whether serious injury occurred or could reasonably have been expected to have occurred. The informant submits that given the checklist which staff were required to complete, the defendant company have clearly identified the risk and so the risk of this occurrence is entirely foreseeable.

[34] What is the degree of departure from prevailing standards in the industry? The submission is made that the defendant company has departed significantly from well-known industry standards. The applicable standard gives the current state of knowledge for the safeguarding of machinery. It includes how to conduct a risk assessment of a machine and the process for selection of fixed moveable and interlocked guards.

[35] Those best practice guidelines for the safe use of machinery summarises the New Zealand Standards and sets out guidance on how one identifies, assesses, controls hazards, chooses the right type of guarding and safe systems of work. It also describes the hierarchy of controls that require elimination, isolation and then minimisation of a hazard. It recommends interlocked guards when a machine is accessed often.

[36] So the risks of carrying out the work were not adequately addressed and no safe system of work was in place to ensure workers undertook their duties safely. The defendant company relied on its use of similar machines and the administrative controls provided via the checklist.

[37] The informant and the defendant differ as to the appropriate starting point. The Crown submits that the defendant company's culpability is at the high end of the

medium culpability band with a starting point of some $500,000. The defendant submits that the starting point ought to be no higher than some $400,000.

[38] Both the informant and the defendant have referred me to a number of comparable cases. Rather than take up even more time in these sentencing remarks, suffice to note that I have read and had regard to each of the decisions to which counsel has referred me.

[39] The informant submits that in this present case the defendant company was aware of the risk but it relied merely on the administrative controls, namely the checklist, to manage it. The defendant company did not engage an expert, it did not install appropriate guarding but, instead, relied on that checklist. This is despite the 2015 duty holder review. One would think that the defendant company would have been particularly astute to any risks such as this.

[40] In terms of mitigating factors, there is general agreement between both informant and defendant as to the level of discounts. The prosecutor submits that co-operation with the investigation deserves a five percent discount, that the prior good character of the defendant company should be reflected in a further five percent reduction and, depending upon the level of reparation, a five percent discount should also be considered.

[41] As far as discount for remedial steps is concerned, there is departure between Ms Szeto and Mr Lill. The defendant's submission is that a further five percent discount ought to be considered for the steps that the defendant company has taken. As far as that is concerned, the informant has made the submission that following the incident, indeed within a week of it, the defendant company had fixed guarding in place requiring specialist tools for its removal. Those tools or that tool is kept with a supervisor to make sure the machine is checked prior to cleaning. The prosecutor submits that those are not reformative steps that go the extra mile, they are steps merely that correct what the prosecutor submits is a woeful deficit that should never have existed in the first place. So the difference between the prosecutor and the defendant is between 15 and 20 percent of the starting point.

[42] There is no controversy between them as to credit or allowance for guilty plea. They both agree that a 25 percent discount is appropriate for this. Whilst I do not disagree with counsel, perhaps that discount is somewhat too mechanistically applied. For one, guilty plea discount should reflect not only the timing of the plea but also take into account the strength of the prosecution, the benefits to the administration of justice and a variety of other considerations. In cases where a guilty plea is almost inevitable, a 25 percent discount may not be justified. However, that may await another case.

[43] The prosecutor seeks costs or a reasonable sum towards the costs of the prosecution of $815.35 and there is no controversy about that.

[44] Once all these steps have been undertaken, one needs to make a proportionality assessment or stand back and make sure that the sentence is right, putting it bluntly.

[45] The final step in the process is to analyse the defendant company's financial position. I will get to that in a moment but the submission is made that the amount of the fine should be reduced to reflect the financial position of the company. There is detailed financial information provided by the defendant company through an Ernst Young report and the prosecutor has analysed that and filed an affidavit of a Mr Waldron setting out that analysis.

[46] So with all of those things in mind, the way in which I have approached the sentencing is this. An appropriate sum for emotional harm reparation is $15,000. The sum for consequential loss as reparation is, as agreed, $3808.

[47] In terms of the quantum of the fine, the offending falls within the medium to high end of the medium culpability band of *Stumpmaster v Worksafe New Zealand* of $450,000.

[48] As far as mitigating factors are concerned, there is no controversy that a five percent discount should be allowed for the fact that the defendant company co-operated with the investigation, as it should. As far as the prior good character of the defendant company is concerned, I would allow a slightly higher or somewhat

higher percentage than the prosecutor submitted so I have allowed 10 percent to reflect that factor. I have allowed a further five percent to take into account the reparation both for emotional harm and consequential loss. That 20 percent in total amount is reduced from the starting point of the fine so 20 percent of $450,000 is some $90,000 leaving a provisional total fine of $360,000.

[49] From that sum an allowance of 25 percent for the defendant company's guilty plea should be allowed. That is also the sum of $90,000 leaving an overall fine of $270,000, to which should be added total reparation of $18,808 and costs to the prosecution of $815.35.

[50] I need to make an overall assessment to ensure two things. The one is that the overall penalty is not wholly disproportionate to the gravity of the offending and the other is to have regard to the financial position of the defendant company.

[51] Ernst Young provided a report that made an assessment of the defendant company's financial position.

the submission is made that the fine that would otherwise be appropriate be reduced and be directed to be paid in instalments to reflect the company's financial position.

[54] Mr Waldron for Worksafe has reviewed the financial documents supplied by the defendant company. He has expressed an opinion that there is additional financial capacity for the company to service a larger fine.

[55] The proposed option by the company's financial consultant that indicates payments from cash flow over time is affordable. Mr Waldron has agreed with that in principle but said, given the overall growth phase that the company is in, he considers the term proposed relatively conservative. He recommends a longer term of some four to five years to be a suitable period.

[56] So one must weigh all of these things up when determining what is the both overall assessment and the financial capacity of the defendant company to make payment of fine, reparation and costs.

[57] My overall assessment is that the company pay a fine of $240,000, that it also make payment of emotional harm reparation of $15,000, reparation for consequential loss of $3808, costs towards the prosecution of $815.35 and, for what it is worth, Court costs of $130, the fine, total sum of reparation and costs all to be paid at the rate of $4000 per month over the period of the next five years.

[58] I could, and actually will, defer the commencement of those payments until, say, July 2019 after the company has currently met its repayment obligations to the Inland Revenue. The first of the payments received will be, as they must always be, appropriated towards both emotional harm reparation and consequential loss.

[59] I will suppress publication of particulars of the defendant company's financial position as set out in the information which the defendant company provided and in the submissions.

P R Kellar
District Court Judge