IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2017-006-000527
[2020] NZDC 25865

WORKSAFE NEW ZEALAND

v

TALLEY'S FISHERIES LIMITED

Hearing:	8 December 2020
Appearances:	B H McCarthy and V S K Veikune for the Prosecutor J H M Eaton QC for the Defendant
Judgment:	8 December 2020

NOTES OF JUDGE G P BARKLE ON SENTENCING

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[1] Talley's Group Limited have pleaded guilty to a charge under ss 36(1)(a) and 48(1) of the Health and Safety at Work Act 2015 of having a duty to ensure that the health and safety of workers was so far as reasonably practicable complied with exposed a worker to a risk of serious injury by exposure to an unguarded nip point on the conveyor belt in the mussel opening room at its Blenheim plant on 20 April 2016.

[2] The summary of facts provided by WorkSafe is not disputed by the defendant company. It advises the court that Talley's is a large food processing company with processing plants throughout New Zealand including the mussel plant at Blenheim. That plant includes a mussel opening room with a conveyor belt system. The conveyor belt machines in the mussel opening room require frequent cleaning to prevent biological contamination. During each work shift, a half-hour clean is undertaken

every two hours and a two hour clean is undertaken at the end of the work shift by approximately 10 nominated mussel openers.

[3] That process of cleaning involves the hosing down of the conveyor belt machines while the machines are still running. The conveyor belt machines are then stopped and the large conveyor belt is removed and manually cleaned by the mussel openers. However the smaller conveyor belts cannot be removed and are manually cleaned while the machine is still running.

[4] Ms Yeong Hwa Lee ("Ms Lee") was a Korean national who studied English in Auckland for three months, prior to working at the Blenheim plant. She was on a working visa in New Zealand and had worked as a mussel opener for Talley's for approximately three months at the time of this incident. Prior to commencing work Ms Lee received a general induction which included receiving a booklet, instructions on how to open mussels and what sort of accidents could occur at the plant.

[5] On 19 April 2016, Ms Lee commenced her shift at 6 pm, as a mussel opener. The following day at approximately 4 am, Ms Lee and Mr Park, who was another mussel opener commenced cleaning the mussel opening room with other nominated staff. After they had cleaned their designated areas they moved on to clean an absent worker's area. Mr Park began hosing down the small conveyor belt located in the absent worker's area while the machine was not running. He then turned the machine on and asked Ms Lee to scrub an area he had missed. While Ms Lee was cleaning the conveyor belt, her right hand became trapped in the exposed nip point at the top of the conveyor belt and roller.

[6] Mr Park stopped the belt in response to hearing Ms Lee's calls for assistance.

[7] Ms Lee's hand was unable to be removed from the belt without it having to be cut. She sustained severe crush injuries and a laceration to her right hand.

[8] WorkSafe were notified the same day. As a result of its investigation, WorkSafe identified the following:

(a) Mussel openers could reach the exposed nip point of the conveyor belt during operations, cleaning and maintenance.

(b) Previously installed guarding of the exposed nip point of the conveyor belt had been removed due to a biohazard caused by product being trapped down the side of the guard.

(c) When the guard was removed no alternative solutions or other means of protecting workers from the exposed nip point was implemented.

(d) At the time of the incident there were no hydraulic interlocking devices.

(e) The controls of the conveyor belt were located above the conveyor system but were not locked out before cleaning began.

[9] On 2 June 2016, WorkSafe issued a prohibition notice in respect of the conveyor belt machine. The following day Talley's provided photographs to WorkSafe showing that a guard had been installed on the conveyor belt machine. The guard was later modified to a mesh and grill type guard which allowed for cleaning without its removal.

[10] The risks associated with operating and controlling a conveyor belt machine are well known and are the subject of industry guidance.

[11] Talley's conduct departs from regulation 17 of the Health and Safety in Employment Regulations 1995 - industry standards and guidelines for safe use of machinery.

[12] There are also a number of papers and publications of WorkSafe identified in the summary of facts, which deal with how identification of hazards with moving machinery and their risk assessment together with how a safe working environment can be reasonably assured.

[13] Talley's was obliged to ensure, so far as it was reasonably practicable, the health and safety of workers who work for the company while they were at work. The

defendant failed to do so and exposed its workers, including Ms Lee, to a risk of serious injury. It is accepted that it was reasonably practicable for Talley's to have ensured that there was an effective system of machinery lockout of power before cleaning and maintenance was undertaken.

Law

[14] Section 7 of the Sentencing Act 2002 sets out the purposes of sentencing. Those that have particular relevance in this case include to hold the defendant accountable for the harm done, to denounce the conduct, promote a sense of responsibility for the harm caused and to ensure there is a level of deterrence both specific and more generally in the industry.

[15] Section 8 of the Sentencing Act sets out the principles that must be taken into account including the gravity of the offending and culpability of the defendant, the seriousness of the type of offence, the effects of the offending on the victim and general desirability of consistency with appropriate sentencing levels.

[16] The guideline judgment for sentencing under s 48 of the Health and Safety at Work Act ("the Act") is *Stumpmaster v WorkSafe New Zealand* in which the High Court confirmed that there are four steps in the sentencing process:

(a) assess the amount of reparation to be paid to the victim;

(b) fix the amount of the fine by reference to the guideline bands and the aggravating and mitigating factors;

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

(d) make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.[1]

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

[17] The court in *Stumpmaster* set out four guidelines bands for culpability with monetary penalties in offending under s 48 of the Act. Also in that decision the court stated that the factors relevant to the culpability assessment that had been set out in the *Department of Labour v Hanham & Philip Contractors Limited* did not need to be re-worked or re-worded.[2]

[18] Fixing the level of fine involves an assessment of culpability, the aggravating and mitigating features and the proportionality and appropriateness of the fine. This inevitably involves an assessment of comparative cases. However the Court of Appeal has repeatedly observed, most recently in *Zhang v R,* that while consistently in sentencing is important, sentencing is nonetheless an evaluative exercise to be conducted in the individual case, having regard to the individual circumstances.[3]

Submissions of WorkSafe

[19] As Ms Lee the victim has left New Zealand, the informant does not seek any order of reparation.

[20] Ms McCarthy on behalf of WorkSafe submits that Talley's liability falls at the lower end of the medium culpability band. On the basis a start point of $350,000 is submitted as appropriate.

[21] WorkSafe then submits that an uplift from the start point of 10 per cent would be appropriate to reflect the defendant's previous convictions. Ms McCarthy then submits that the defendant is entitled to discounts for co-operation with the investigation of five per cent, remorse of 10 per cent and today, for the guilty plea, 25 per cent.

[22] Ms McCarthy also seeks costs in the amount of $3,359 pursuant to s 152(1) of the Act.

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[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC).
[3] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

Submissions of Defendant

[23] Mr Eaton on behalf of the defendant seeks to add further context to the offending. He advises that after the improvement notice was lodged and the work that I have referred to in respect of installation of guards undertaken, there was then litigation concerning appropriate steps that Talley's should take to control the biohazard, listeria. This more particularly related to a prosecution following a similar incident at the Motueka plant of the defendant company in 2017.

[24] At the time of this incident, Mr Eaton advises that Talley's was in receipt of expert advice that the procedures in place were the appropriate way to balance the risk of the listeria biohazard and the risk of employee injury. He submits that there was a real and serious challenge faced because the purpose of the cleaning procedures was to eliminate the risk of listeria which has potentially fatal consequences for consumers of mussels.

[25] Talley's has in pleading guilty, Mr Eaton emphasised, only admitted one reasonably practicable step that it could have taken to safeguard its employees in the operation of the conveyor belt. The sole failing, alleged and admitted was the failure to ensure there was an effective system of lockout. It is underlined that there is no allegation that there was no system or indeed a flawed system.

[26] The charge alleges and the defendant admits that the system was not effective on the day with the focus on the *effectiveness* of the lockout system, rather than the guarding of the machine. Counsel also noted that the process had been in place for five years without incident. Staff were trained to never touch the conveyors while they were in operation. In Mr Eaton's words, "It was inexplicable that Mr Park turned the machine on while Ms Lee was cleaning the conveyor belt".

[27] In Mr Eaton's submission, the culpability of his client company is properly fixed at the bottom of the lowest band of *Stumpmaster*, particularly as the defendant was relying on industry norms, expert advice regarding listeria infection and was attempting to balance a risk to the wider public with the risk of injury to their employees.

[28] He then submitted that no uplift should be made for previous convictions because the bare fact of such convictions is inadequate without more detail about what the conduct involved. He particularly draws attention to Talley's being a significant employer and that the context of the prior convictions are different from that before the Court today.

[29] He then advocates for discounts for remorse of 10 per cent, a further 10 per cent for co-operation with the investigation and five per cent for remedial steps taken. Mr Eaton concurs with and accepts the concession of Ms McCarthy that a 25 per cent discount be applied for the guilty plea.

Reparation

[30] In *WorkSafe New Zealand v Qing Hong Company Ltd* it was noted that assessing emotional harm reparation is futile if the victim cannot be contacted and has not completed a victim impact statement.[4] Immigration New Zealand has confirmed Ms Lee is no longer in the country, having left one month prior to the expiration of her working visa. Accordingly no reparation will be ordered.

Quantum of fine

[31] In respect of the start point of the fine, I am of the view that the following factors are relevant to the culpability assessment.

The identification of the operative acts or omissions at issue

[32] The defendant failed to ensure that there was an effective system of machinery lockout of power before cleaning and maintenance was undertaken. The machine simply should not have been running when the victim began scrubbing it. I accept that Talley's have not been charged in relation to the failure to adequately guard the machine. However the removal of the guard is relevant in the sense that it became particularly important for the lockdown procedure to be followed once that guard was not in place.

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[4] *WorkSafe New Zealand v Qing Hong Company Ltd* [2016] NZDC 10123.

An assessment of the nature and seriousness of risk of harm occurring as well as the realised risk

[33] The realised risk was serious and significant although fortunately not as serious as it may have been. Workers were required to clean the conveyor belts frequently and during every shift.

[34] The actual risk was that an employee could have suffered the amputation of a limb or appendage.

Degree of departure from industry standards

[35] The risks associated with un-guarded machinery are well known. It is clear that when cleaning is performed, the machine must be locked out unless it is essential that the machinery move. There is no suggestion that it was essential for the conveyor belt to move in the scrubbing phase of the cleaning.

[36] The defendant's conduct departs in a general sense from the MBIE Position Paper for the Safe Use of Machinery, the Best Practice Guidelines for the Safe Use of Machinery and WorkSafe's fact sheet on guarding of conveyors; all of which identify the hazards associated with moving conveyor belts and more particularly unguarded machinery.

[37] The defendant is also in breach of reg 17 of the Health and Safety in Employment Regulations1995 which provides that the machinery must be secured against movement and every control device must be secured in the inoperative position by the use of locks or lockout procedures.

[38] I accept the defendant did have a lockout procedure but did not ensure it was followed on every occasion. The victim had been trained, as had Mr Park, but Ms Lee was relatively inexperienced because she had only worked in the role for three months.

[39] The defendant's argument that they were balancing the risk of listeria infection is, I accept of some relevance in terms of assessment of culpability. However the short point is that the lockout procedure does not increase or decrease the risk of listeria

contamination. The defendant, having decided to remove guards needed to take particular care to ensure that the lockout procedure was effective, every time it was employed.

The obviousness of the hazard

[40] The hazard was obvious, the dangers relating to nip points are well-known and a failure to eliminate or mitigate the associated risk was described in the *Stumpmaster* decision as a long-recognised and fundamental breach. The defendant had removed guards on the machine, so the hazard was particularly obvious.

The availability, cost and effectiveness of the means necessary to avoid the hazard

[41] Following the incident the defendant had mesh guards installed on the machine. While there were undoubtedly some costs associated with the means necessary to avoid the hazard, it is not suggested that these costs were greater than or disproportionate to the benefits to employee safety. In fact one would imagine there is little cost associated with ensuring the pre-existing lockout procedures were effective. It is not suggested that the costs of the new guarding is disproportionate.

[42] I note that any fault on the part of Mr Park is not a matter of mitigation from the defendant's point of view as there is no suggestion he intentionally or wilfully disregarded the safety practices. It appears he may have been careless but carelessness of employees do not minimise an employer's culpability in respect of workplace accidents.

[43] Ms McCarthy drew to the Court's attention a number of cases that she submitted were of relevance. Briefly those included first the *Stumpmaster* decision that dealt with the appeal from the District Court decision of *Worksafe New Zealand v Niagara Sawmilling Company Limited*.[5]

[5] *Worksafe New Zealand v Niagara Sawmilling Company Ltd* [2019] NZDC 9720; and *Stumpmaster*, above n 1.

[44] In that case there were three reasonably practicable actions addressed by the District Court that the defendant failed to undertake. The machine in that case was partially guarded but the court found that although that guarding was in place, it did not meet the required standards. The High Court agreed that culpability was within the medium band and upheld a start point of $500,000.

[45] In *Worksafe New Zealand v Furntech Plastics Ltd* a victim suffered six broken bones in his left wrist, wrist lacerations and severe crushing injuries.[6] The Court had found that the defendant failed to develop and implement a safe system of work and also ensure the machine was adequately guarded. Once more the culpability was assessed in the mid-range with a start point of $500,000.

[46] Ms McCarthy's submission was that this matter is most closely analogous to that of *WorkSafe New Zealand v NZCC Limited*.[7] In that case the victim sustained a serious injury when her left hand and fingers became trapped in the running nip point between rollers on a casing finishing / cleaning machine. The victim suffered a broken left wrist and de-gloving of the back of her hand requiring skin grafts. The court found the defendant failed to engage a competent person to undertake a systematic risk assessment of the machine and recommend appropriate controls. The court adopted a start point of $350,000 placing culpability at the lower end of the medium band.

[47] I also refer to *Worksafe New Zealand v AFFCO New Zealand Ltd*, where the complainant had his head caught by a hook on a mutton chain which suspended him and carried him a short distance.[8] In that case the defendant company had failed to ensure that the lockout procedures were followed and that the cleaning staff were familiar with such procedures. The start point was assessed at the lower end of the medium band.

[48] In *Ministry of Business, Innovation and Employment v Industrial Processors Ltd* the complainant had his hand caught in a moving conveyor belt.[9] The defendant

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[6] *WorkSafe New Zealand v Furntech Plastics Ltd* [2018] NZDC 18150.
[7] *WorkSafe New Zealand v NZCC Ltd* [2019] NZDC 16662.
[8] *Worksafe New Zealand v AFFCO New Zealand Ltd* [2017] NZDC 27001.
[9] *Ministry of Business, Innovation and Employment v Industrial Processors Ltd* DC Waitakere, CRI-2012-090-7036, 26 July 2013.

had failed to securely fence the machinery and develop a safe lockout procedure. Again the Court held that the culpability fell in the middle of the medium band.

[49] In *WorkSafe New Zealand v Allflex Packaging Ltd*, film travelling through a nip point became creased and the complainant attempted to flatten it while the machine was operating.[10] The complainant's hand was caught in the nip point and he suffered crush injuries. No safe lockout procedures had been developed in respect of the machine. There had been no training of the victim or instruction in relation to the hazard. The start point that was taken in that case was $480,000.

[50] Having regard to the factors that I have identified as relevant to the culpability assessment together with those prior decisions I have referred to, I set the start point of the fine at $250,000.

Prior Convictions

[51] Turning to the position concerning an uplift for the prior convictions for health and safety offending of the defendant company. Ms McCarthy refers to three matters. One from the Nelson District Court on 12 May 2012, and a second on 24 August 2014 and then a third in which the offending occurred on 22 May 2015 but due to the procedural history was not concluded in the Ashburton District Court until 3 September 2020. Her submission is that an uplift of 10 per cent for those matters is appropriate. Mr Eaton resists such uplift being applied. He particularly draws attention to the different areas of the Talley's operation in which these matters arose and a general lack of similarity in the offending. Therefore, on a principled basis, no such uplift should be provided.

[52] I note that in the *Stumpmaster* decision, the High Court applied a 15 per cent uplift to reflect the defendant's three prior convictions in the *Niagara* appeal that I have already referred to. The Court noted that it did not have details of those convictions but a greater uplift may have been appropriate had the details been known.

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[10] *WorkSafe New Zealand v Allflex Packaging Ltd* DC Manukau CRI-2017-092-14520, 15 October 2018.

[53] Also as I understand from counsel, when the Ashburton prosecution was concluded earlier this year, his Honour Judge Phillips applied an uplift of 10 per cent for the prior matters in the Nelson District Court that I have referred to. Also somewhat ironically it appears Mr Eaton, on that occasion, submitted that an uplift of five per cent was appropriate whereas as I have said today he submits that there should be no uplift. In my view there should be an uplift of 10 per cent applied.

Matters of Mitigation

[54] Turning now to the issues for which a reduction of the fine is appropriate. There is no dispute that a reduction of 10 per cent should be applied for remorse and the steps taken by Talley's to assist Ms Lee. I note Mr N Howes', Group Manager, Human Resources of the defendant company, affidavit that has recently been filed refers to Ms Lee being flown to Wellington to see a hand specialist. There were also payments for friends and support people to go with her. There were weekly meetings as I understand to monitor her situation. Other expenses such as food and medical costs were also met. I accept in those circumstances that 10 per cent is an appropriate figure.

[55] There has been co-operation with the investigation. Again, there is no dispute that is the case. A credit of five per cent should be allowed for that matter.

[56] Then there is the question of remedial steps that have been undertaken by Talley's. What as I understand took place within a relatively short time of the incident were that guards were installed. Thereafter there have been wider steps taken within the Talley's Group in respect of health and safety matters. Those are also detailed in the affidavit of Mr Howes.

[57] In my view the steps taken of correcting the particular issue that caused the injury and deficit that was exposed by the incident was the minimum that could have been expected. I also did not note any mention of remedial steps taken to ensure that the lockout procedure was effective every time it was used. In the circumstances my view is that there should not be any discount for the particular remedial steps takes.

[58] There is now agreement by WorkSafe that a 25 per cent reduction is appropriate so far as the plea is concerned.

[59] Therefore in total that means a 40 per cent reduction of the fine that was arrived at of $275,000 including the increase for the convictions. That means a reduction of $110,000 which makes the end fine an amount of $165,000.

[60] I am satisfied next that the amount sought by the prosecution in terms of legal costs of $3,359 is an appropriate amount and will order that sum.

Proportionality Assessment

[61] The final step in the process of imposing penalty is to stand back and undertake the proportionality assessment. There have been no submissions made that Talley's is not in a position to pay the fine nor that the overall fine which is to be imposed is appropriate. Therefore there will be no reduction in the amounts that have been imposed.

[62] In summary therefore the fine to be imposed on the defendant company is one of $165,000. The costs of prosecution ordered pursuant to s 152 of the Act is the amount of $3,359. There is no order for reparation made.

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Judge GP Barkle
District Court Judge

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