IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRN: 22020500159
[2022] NZDC 24471

WORKSAFE NEW ZEALAND LIMITED
Informant

v

AWF LIMITED
Defendant

Hearing: 11 November 2022

Appearances: Mr V Veikune for Informant (by AVL)
Ms S Pryde for Defendant

Date of Decision: 12 December 2022

SENTENCING DECISION OF JUDGE G A REA

[1] On 11 October 2022 the Defendant pleaded guilty to a charge under s 34(1) and (2)(b) of the Health and Safety at Work Act 2015. The charge recorded that between 23 April 2021 and 26 May 2021 at 8 Cooper Street, Havelock North, Hawke's Bay the Defendant being a PCBU who had a duty in relation to its workers, including Harvey Duncan, failed to, so far as reasonably practicable, consult, co-operate with, and co-ordinator activities, with all other PCBUs who had a duty in relation to the same matter, namely Zenthe Limited.

[2] The Informant provided particulars for the charge. It asserted that it was reasonably practicable for the Defendant to have consulted, co-operated with and co-ordinated activities with Zenthe Limited as to the work Mr Duncan was to undertake and the most effective means to manage risks to his health and safety arising from that work, included the risk of crush injuries posed by operating the Metro Mach Hot Press Machine. By its plea of guilty the Defendant accepted that the charge against it was proved.

[3] The Defendant is a company specialising in nationwide labour hire. The other company associated with this prosecution, namely Zenthe Limited, is based in Havelock North and specialises in the manufacture of architectural panels and batten systems for walls and ceilings in commercial and industrial settings.

[4] On 4 December 2020 the Defendant and Zenthe entered into a contractual agreement for the supply of labour. On 3 March 2021 the Defendant employed Mr Harvey Duncan (the victim) as a casual or field employee, he being an employee who is placed with another employer to work for them.

[5] On 5 March 2021 Mr Duncan began work at Zenthe's workshop in Havelock North.

[6] In August 2019 Zenthe purchased a Hot Press Machine. It began using that machine in its workshop around November/December 2020. The machine was used to press two wood product boards with adhesive between them to form battens.

[7] On 29 March 2021 Mr Duncan had completed training with Zenthe on how to operate that machine.

[8] On 26 May 2021 while working with the machine Mr Duncan loaded wooden boards into the machine using his left hand to realign them. He used his right hand to press what he thought was the button to lower the press. Unfortunately he mistakenly pushed the wrong button causing the press to shut on his left hand whilst still inside the machine. Again, unfortunately both buttons on the operation panel were coloured green.

[9] The machine closing on his left hand caused Mr Duncan severe crush injuries resulting in the surgical amputation to the first joint of his second and fourth fingers and also his middle finger. His left hand was not his dominant hand.

[10] Subsequent investigations reveal that the machine was not compliant with the appropriate guarding standard. It was not fitted with any protective devices on any of its four sides and as a result workers were not prevented from reaching into the hazardous area between the pressing plates during operation. Zenthe had not engaged a competent person to assess the machine's safety and compliance with the appropriate standard.

[11] It is accepted that Zenthe had not advised the Defendant that Mr Duncan was being trained on that machine. However, on 23 April 2021, prior to the accident, an employee of the Defendant in a responsible position was informed by Zenthe that Mr Duncan was being trained on the machine and at that stage had been signed off as competent to use the machine for just under a month.

[12] Despite being aware that Mr Duncan had been trained on the machine and as such was exposed to a new hazard of machine use that up until then the Defendant was not aware of, the Defendant failed to effectively consult, co-operate with and co-ordinate activities with Zenthe as to the work that Mr Duncan was to undertake and to determine the most effective means to manage risk to his health and safety.

[13] In failing to consult and co-operate in this way the Defendant failed to follow its own health and safety risk management procedures covering health and safety of its off-site employees, including Mr Duncan.

[14] In arriving at the appropriate sentence in this case consideration must be given to the sentencing criteria set out in sections 7 and 8 of the Sentencing Act 2002. It is not necessary to set those out specifically in this decision because they are very well known and apply to all sentencings undertaken by the Courts.

[15] In August 2018 a Full Court of the High Court delivered a guideline judgment for sentencing under s 48 of the Health and Safety at Work Act 2015. In *Stumpmaster v Worksafe New Zealand*[1] four steps were set out 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 first to the guideline bands and then having regard to aggravating and mitigating factors.

(c) Determine whether any other orders under the Act are required; and

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

[16] In *Worksafe v Bulldog Haulage Limited*[2] Judge R J McIlraith adapted the *Stumpmaster* band for offending under s 34 of the Act, which is the section under which this Defendant has been charged.

[17] Judge McIlraith set out four separate bands. They are low culpability, medium culpability, high culpability and very high culpability. For reasons which I will explain, I consider that this offending sits around the midpoint of the medium culpability band. Judge McIlraith considered that medium culpability should be met with a fine between $15,000 and $30,000 and I agree with that range.

[18] It was the Defendant's obligation to know what work Mr Duncan was doing in the Zenthe workshop and to satisfy itself that all health and safety requirements related to what he was doing had been met. While Zenthe undoubtedly had an obligation to advise the Defendant if Mr Duncan was changing the job he was doing or acquiring knowledge of other jobs it was equally the Defendant's obligation to be pro-active in ensuring that one its employees was operating in safe working conditions.

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[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020
[2] *Worksafe v Bulldog Haulage Limited* [2019] NZDC 12202

[19] That obligation comes all the more significant on and after 23 April 2021 when the company had constructive knowledge through one of its own employees that Mr Duncan was being trained on another machine. Immediate enquiries should have been made to ensure that the machine he was working on complied with all safety requirements.

[20] At para [25] of her written submission Counsel for the Defendant in dealing with her conclusion on what the starting point for the fine should be submitted as follows:

> "[25] AWF's failure to co-operate, co-ordinate and consult with Zenthe was not symptomatic of a general aversion to health and safety. AWF had a comprehensive health and safety framework focused on meeting its obligations to co-operate, co-ordinate and consult with Zenthe."

[21] With respect to that submission it is the Defendant's failure to comply with the very things in its own "comprehensive" health and safety framework that contributed to the accident to Mr Duncan. It is for this reason that I consider there is medium culpability in this case.

[22] Following the approach in *Stumpmaster* it is necessary to set the amount of reparation that should be paid to Mr Duncan. Mr Duncan has not supplied a victim impact statement so I have nothing directly from him as to the impact that his injuries has on him now and going forward. However, the absence of a victim impact statement does not mean that reparation should not be paid simply because the effect of the injuries on Mr Duncan is not known to the Court directly from him. In my view the Court is entitled to draw an inference from the nature of the injuries that he has received as to what the effect on any individual would be and to use that knowledge as a basis for reparation.

[23] In the end there was little, if any, disagreement between Counsel as to the appropriate level of reparation which I set at $15,000.00. It is agreed between the parties that based on culpability 80% of that should be paid by Zenthe and 20% by this Defendant. As a result the Defendant's share of reparation is $3,000.00.

[24] I have been informed, and I accept that reparation considerably in excess of that amount has already been paid by the Defendant to Mr Duncan and as a result there will be no order for reparation made against the Defendant.

[25] As far as the fine is concerned I have received extensive submissions from both Counsel as to what that should be. Both Counsel have referred to a number of different authorities (which I do not need to particularise) in support of their respective starting points.

[26] Counsel for the prosecution submits that the appropriate starting point is a fine of $25,000.00 and Counsel for the Defendant submits that the appropriate starting point is a fine of $15,000.00. I consider that the starting point should be a fine of $22,000.00 which is around the middle of the range for medium culpability where I consider this offending fits.

[27] It is proposed by the Informant and accepted by the Defendant that there should be a 5% uplift to reflect a previous conviction/convictions. That adds $1,100.00 making the total starting point a fine of $23,100.00.

[28] There are four mitigating factors that are accepted by both the Informant and the Defendant as being applicable in this case. Those are:

> 25% for the plea of guilty
> 5% for co-operation
> 5% for remorse
> 5% for reparation.

Therefore there is a total mitigation of 40% from the overall starting point. Leaving an end fine of $13,860.00. Although I have some reservations about some of the alleged mitigating factors I am prepared to accept Counsels' assessment and impose the fine accordingly.

[29] It is also accepted that there should be an award of costs of $1,222.46 payable by the Defendant to the Informant. There will also be an order against the Informant for Court costs in the sum of $130.00.

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Judge G A Rea
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhenga: …13/12/2022