ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2022-044-002193
[2024] NZDC 13600

WORKSAFE NEW ZEALAND

v

BRIGHTWATER ENGINEERING LIMITED

Hearing: 15 March 2024

Appearances: T Branden for the Prosecutor
G Caine for the Defendant

Judgment: 15 March 2024

NOTES OF JUDGE J BERGSENG ON SENTENCING

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[1] Brightwater Engineering Limited, who I will refer to as Brightwater, appear for sentence today having pleaded guilty to one charge of breaching s 36(1)(a) and ss 48(1) and (2)(c) of the Health and Safety at Work Act 2015. This charge carries a maximum penalty classified of $1,500,000.

[2] The charge is that being a PCB (a person conducting a business or undertaking), Brightwater failed to undertake all practical steps to ensure the health and safety of its workers and that includes Mr B while at work, and failed to ensure

that he was not exposed to a risk of death or serious injury while undertaking switchboard installation work.

[3] The particulars of the charge are that it was reasonably practicable for Brightwater, having identified the risk of contacting live parts, to have identified shortcomings with the process, and effectively isolated the hazard to prevent parts coming into contact with the main conductor and to have an effective process to monitor whether the work being carried out was in accordance with industry good practice guidelines and standards, including AS/NZ 386/2011.

[4] There is an agreed summary of facts. Brightwater offers a range of industrial engineering services. Being a PCBU for the purposes of the HSWA, as such it owes a duty under s 36(1)(a) of the Act. On 23 July 2021 Mr B, a qualified electrician who was then subcontracting for Brightwater, suffered burns to his hands, face, neck and upper limbs after an explosion occurred inside the link box that he was working in, causing a flashover fire.

[5] The background to this incident is that PAE NZ Limited had a contract to provide facilities, maintenance and management services to the New Zealand Defence Force, Northern Region. PAE selected Brightwater to undertake work which involved the replacement of five switchboards in a building at the Devonport Naval base. On 28 April 2021 a job safety analysis was prepared for the switchboard replacements. That safety analysis was sent to PAE for review and comment prior to the switchboard replacement work commencing. PAE engaged McMahon Services New Zealand Limited to undertake a review of the safety analysis. McMahon recommended RCD outlets be installed on all power outlets and the outdated electrical equipment to be removed. Brightwater was then selected to undertake the work.

[6] On 2 June 2021, Brightwater's workers started work on replacing switchboard 1. The workers had read and signed the job safety analysis. Brightwater had appointed Mr P to supervise the project. Other workers involved with the project were Mr B and Mr H, an apprentice electrician. On 23 July 2021 Mr B started installing a new fuse disconnect into the link box above switchboard 1. Mr P went to the main switchboard

to isolate the power to the building and remained next to the main switchboard to ensure that no one re-energised the system.

[7] Mr B climbed an aluminium extension ladder which was hooked onto service pipes to access the job. The ladder was extended to 4.66 metres. Both the ladder and Mr B's safety harness was secured to service pipes.

[8] Around 2.40 pm Mr B was working inside the link box when an explosion occurred from within the box, caused by a flashover. Flames engulfed Mr B. The electrical system then tripped, cutting all power which resulted in the fire being immediately extinguished.

[9] Mr B tried to make his own way down the ladder but due to injuries to his hands, he fell from down the bottom rung as he stepped off. He landed on his back hitting his head on a small step ladder.

[10] The injuries sustained by Mr B included burns to his hands, face, neck and upper limbs. There was a cut on the back of his head. The burns were to 13 percent of his total body surface area. He spent three weeks in hospital. He required skin grafts to his right hand and left forearm using skin from his thighs. He has some scarring and he required physiotherapy to regain dexterity of his hands.

[11] WorkSafe was notified of the incident by Brightwater and by the police on the day.

[12] As a company Brightwater has no previous health and safety convictions and it is clear it has been highly cooperative and forthcoming with information during WorkSafe's investigation. It is also acknowledged that Brightwater has made voluntary payments to Mr B consisting of $25,000 by way of emotional harm, an $8,000 ACC top-up and a payment of $2,000 that was made to his parents.

[13] In preparing for the sentencing I have, in addition to all of the submissions that have been filed, read the affidavits filed by Adam Watson, a health and safety expert

who is now employed by Brightwater and David Young, the Auckland general manager.

[14] There is no victim impact statement but through counsel for WorkSafe I have been advised that Mr B has been contacted. He has not provided a victim impact statement. He did not intend to attend at today's sentencing. Last year he left Brightwater and now works elsewhere in the country.

[15] From Mr Watson's affidavit he confirms there was a telephone discussion between him and Mr B. There are notes of that conversation which I have read. I have also read the letter that was written by David Bowman, the Brightwater CEO and Mr B's reply. In Mr Bowman's letter he acknowledged the harm to Mr B and set out the steps Brightwater was taking to address the issues, including the payments that were to be made to him. Mr B's reply was to acknowledge these payments, and express his appreciation for the steps that Brightwater had taken. He indicated that physically he had made a complete recovery. While he had scarring to his hands it is apparent that with the physiotherapy he has undertaken and the passing of time, he was able to return to work without any apparent ongoing issues.

[16] I want to acknowledge the work that has been done by both counsel in terms of the preparation of the submissions, both in writing and orally. Those submissions have been of considerable assistance in terms of today's sentence. By way of summary, WorkSafe submit first, in respect of emotional harm reparation and acknowledging the payment that has been made, they seek a further payment in the sum of $5,000 to $10,000 to Mr B. Nothing is sought by way of consequential loss given the $8,000 payment that has already been made.

[17] Second in terms of penalty, WorkSafe submit that in terms of the *Stumpmaster* categorisation, that this offending should be characterised as being medium culpability and the starting point should be in the range of $500,000.

[18] It is acknowledged, in terms of mitigating factors, that 20 per cent is available for cooperation with the investigation, remorse, reparation and previous good character and a further 25 per cent for the early guilty plea discount.

[19] Costs are sought in the sum of $1,836.18 pursuant to s 152(1) of the Act, that is seen as being a just and reasonable contribution towards internal legal fees. No contribution is sought for investigation costs.

[20] An order is sought that the summary of facts be released if requested, with appropriate redactions for any suppression orders, and if a court ordered enforceable undertaking is ordered instead of a fine, then WorkSafe submits that a conviction should still be entered against Brightwater.

[21] On behalf of Brightwater, Mr Caine submits that a court ordered enforceable undertaking is the appropriate penalty in this case as opposed to a fine. However, if the Court does not exercise its discretion to make such an enforceable undertaking the it is submitted that the offending should be categorised as in the lower end of the medium band of culpability in *Stumpmaster*, with an appropriate starting point being $250,000. 25 per cent is sought for cooperation with the investigation, reparation, remorse, remedial action and Brightwater's prior safety record, and a 25 percent discount for the guilty plea. If there was to be a fine, it is submitted $125,000 would be appropriate and a proportionate penalty for Brightwater. Regarding reparations, it is submitted that in light of the voluntary payments no additional emotional harm preparation is required.

[22] The purpose of the Health and Safety at Work Act 2015 is set out in s 3. In summary, it is to secure the health and safety of workers and workplaces.

[23] Section 151(2) of the Act sets out the specific sentencing criteria to be applied when offender is convicted of that offence under s 48. The court must apply the Sentencing Act 2002, having particular regard to ss 7 to 10, being the purposes and principles of sentencing, the purposes of the Health and Safety at Work Act 2015 and:

a) the risk of and the potential for illness, injury, or death that could have occurred and whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred;

b) the safety record of the person, to the extent that it shows whether any aggravating factor is present;

c) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

d) the financial capacity or ability to pay any fine to the extent that has the effect of increasing the amount of the fine.

[24] There is a guideline judgement in respect of s 48 of the Act, and that is *Stumpmaster v WorkSafe New Zealand*.[1] In that case the Court confirmed there are four steps in the sentencing process. First, assess the amount of reparation. Second, fix the amount of the fine by reference first to be guideline bands and then having regard to aggravating and mitigating factors. Third, determine whether any further orders under ss 152 to 158 of the Act are required. And then finally to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps and this includes a consideration of ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.

[25] In *Stumpmaster v WorkSafe New Zealand*, four bands were set in terms of culpability assessments. Low culpability attracts fines of up to $250,000, medium culpability attracts a starting point between $250,000 and $600,000, high culpability is between $600,000 to $1,000,000 and very high culpability attracts a start point of an excess of $1,000,000. In *Stumpmaster v WorkSafe New Zealand* the High Court also adopted the Hanham factors that guide sentencing, and these include:

(a) the identification of the operative acts or omissions at issue and this is usually involving a clear identification of practicable steps which the Court finds it was reasonable for the offender to have taken, an assessment of the nature and seriousness of the risk of harm occurring as well as of the realised risk;

[1] *Stumpmaster v Worksafe New Zealand* [2019] DCR 19; (2018) 15 NZELR 1100; [2018] 3 NZLR 881; [2018] NZHC 2020.

(b) the degree of departure from standards prevailing in the relevant industry;

(c) the obviousness of the hazard;

(d) the availability, cost and effectiveness of the means necessary to avoid the hazard;

(e) the current state of knowledge of the risks and of that nature and severity of the harm which could result; and

(f) the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[26] In terms of practicable steps that could have been undertaken, Mr Young in his affidavit at paragraph 25 in respect of the incident notes:

> "The main switchboard powered the bus bar system. The electrical team isolated the whole bus bar system when removed the old ceramic fuses. undertook a stand over watch, standing next to the main switchboard to ensure nobody could turn the power back on and re-energise the system. re-energised the bus bar after being told it was safe to do so by . remained on the ladder and began tidying up the cable that he had connected to the new fuse disconnect. This task required the team working together to pull an additional cable length as the cable was too tight. was feeding the cable up from ground level at was attached to the structure by harness, as he needed his hands free to pull up and clipped the cable. While pulling up the cable the new neutral cable conductor somehow made contact with the bus bar proper that had dropped down from the bus duct, causing a flashover event. The bus bar proper contains the main conductor carrying power to the fuses in the termination box. was caught due to being attached to the structure. The fuse box was not isolated at the time of the incident, having been re-energised."

[27] Then at paragraphs 40 to 42 of his affidavit, Mr Young goes on:

> "An internal investigation was properly undertaken by Michael Steffic our electrical services manager, supported by Rachel McMurtry. Michael concluded that the incident would not have occurred had the workshop been fully de-energised at the main switchboard. Michael also found that the low voltage circuit breaker did not drop out as it should have as it was not set correctly. In particular, the LV breaker was set for the maximum delay on the circuit tripping and at the highest voltage permissible before it would trip. As a result the LV breaker did not perform as intended and instead, the flashover

> continued until the higher voltage breaker supplying the boiler shop transformer tripped instead.
>
> It is common practice for the property owner to ensure that circuit breakers have been set up and operated correctly following appropriate maintenance checks. Michael considered that had the LV breaker tripped then the flashover would have lasted less than one second, that ▇▇▇ may not have been injured at all or if he was, but his injuries would have been significantly less."

[28] The agreed summary of facts refers to a report that was undertaken on behalf of WorkSafe by Carl Llewelyn, a technical officer energy safety. At paragraph 55 of the summary of facts, Mr Llewellyn's analysis states:

> "From what I could see and without clarification from the main injured worker, was the neutral cable from the sub-main from the link box to the switchboard had contacted live parts. This resulted in a short circuit causing an electrical arc that resulted in a catastrophic failure in which severe burning had occurred within that link box. It appeared that a fire had been contained within the link box."

[29] From the evidence provided, I consider that the incident was caused because of human error in that the electrical worker was working near live parts that could have been isolated practicably prior to the commencement of the work. In my opinion I believe that if reasonably practicable steps had been taken to isolate the power to the box and therefore eliminate the hazard, the incident would not have occurred.

[30] The first step as I set out earlier, is to assess the amount of reparation. As noted WorkSafe submission is acknowledging the payments that have already been made and noting that there has been no victim impact statement, but that there are a number of cases which can assist the court in assessing reparation for emotional harm, including *WorkSafe New Zealand and NZDF*, *WorkSafe New Zealand and Heinz Watties Limited, WorkSafe New Zealand and Avon Industries Limited* and *Ninos Limited and Maritime New Zealand Limited*, that an award in the range of $5000 to $10,000 would be appropriate to recognise the emotional impact on Mr B, given $25,000 has already been paid. [2]

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[2]. *WorkSafe New Zealand v New Zealand Defence Force* [2022] NZDC 5429; *WorkSafe New Zealand v Heinz Wattie's Limited* [2019] NZDC 6388; *WorkSafe New Zealand v Avon Industries Ltd* [2018] NZDC 4766; *Maritime New Zealand v Nino's Ltd* [2020] NZDC 2536.

[31] Mr Caine on behalf of Brightwater acknowledges that Mr B has suffered emotional harm, but it is submitted that no further reparation order should be made, given the voluntary payments that have already been made. It is noted that while Mr B did not provide any victim impact statement, there are the letters which I have previously referred to in particular that Mr B had indicated he had made a 100 per cent recovery as far as mobility is concerned, that he will have few permanent scars and that nothing stands out significantly, and at paragraph 43 of Mr Watson's affidavit, that he confirmed that he was not suffering from ongoing limitations due to the injuries. By reference to other cases, WorkSafe and Broad Spectrum Limited and WorkSafe and Wallace Murray Electrical Limited, it is submitted that $25,000 in total, would be a consistent level of emotional harm reparation in broadly similar cases.[3]

[32] Given that Mr B has chosen not to make a victim impact statement and acknowledging that he has already expressed his appreciation to Brightwater for the payments made, I have come to the conclusion that there should be a further limited payment made of $5,000 by way of emotional harm reparation.

[33] I have considered the *WorkSafe* decision. In that case it was an incident of an unstructured and a controlled and dangerous mock battle, during which the risk management plan was not followed. The various soldiers were doused in fuel before a Molotov cocktail was thrown at them. They were not dressed in flame retardant personal protective gear and in that case, counsel agreed that reparation payments to the victims should be made totalling $100,000. That is a high sum, likely in part to reflect the extent of the danger the victims were put in and the extent of both physical and psychological trauma as a result of the mock battle. While the extent of the injuries suffered by the soldiers appear similar to those suffered by Mr B, a mock battle would undoubtedly have caused more serious and ongoing psychological impact.

[34] In the Avon Industries case, the risk to the worker was obvious. He had been warned about this a week prior. No further preventative steps were undertaken. He suffered long-term impacts as a result of burns, unable to walk for long distances,

[3] *WorkSafe New Zealand v Wallace Murray Electrical Limited* [2019] NZDC 5675.

mow his lawns, work on his hobby of restoring bikes and cars. $30,000 was ordered in that case.

[35] I find that an all up payment of $30,000 reflects appropriately the emotional harm reparation payment that should be made.

[36] No order is required in terms of consequential losses.

[37] I now turn to fixing the quantum of the fine.

[38] Summarising the submissions that have been made in terms of WorkSafe's submissions regarding the operative Acts and omissions at issue, it is submitted that Brightwater failed to take the following reasonable, practicable steps:

(a) isolating the hazard to prevent parts coming into contact with the main conductor; and

(b) having an effective process to monitor whether work carried out was in accordance with the industry good practice guidelines and the appropriate standard.

[39] As for the nature and seriousness of the risk of harm occurring as well as the realised risk, it is submitted that Mr B was exposed to a risk from working in proximity to energised conductors and falling from height. The seriousness of that risk cannot be underestimated. There was real risk that a worker could have been killed. The realised risk was that Mr B suffered burns to 13 percent of his body, a cut to the head, had difficulty climbing down the ladder with burnt hands. The degree of departure from standards prevailing at the relevant industry on this issue, it is submitted that the risks associated with working with live electrical current are subject to significant industry standards and guidelines, ASNZS 4836:2011 defines isolated electricity as separated from all possible sources of electrical energy and rendered incapable of being energised unintentionally. Steps have been taken to isolate the power to the link box eliminating the hazard, the incident would not have occurred.

[40] Regarding the obviousness of the hazard, it is noted that a flashover had been identified by Brightwater as a possible hazard. Brightwater was in the business of undertaking electrical work and consideration had been given to safety with the job safety analysis.

[41] Regarding the availability, cost and effectiveness of the means necessary to avoid the hazard, after the incident Brightwater replaced the main switch including the lockout handle. This was not seen to be prohibitively expensive. Complete isolation is the most cost-effective and safest way of ensuring safety and following the incident, there have been discussions with the defence force that operations being undertaken at NZDF may need to be paused from time to time for full isolation of buildings.

[42] On behalf of Brightwater, Mr Caine submits that this is not a case where particular denunciation or deterrence is necessary because this was not a case of wilful disregard for safety. A health and safety system was in place. Brightwater had identified the risk of a flashover. It had taken steps to prevent that hazard, however this was a situation of failing to properly implement existing practices. Accordingly it is submitted that any need for general deterrence is met by this prosecution. There is no justification for Brightwater's culpability being assessed above the low band.

[43] Regarding the sentence and factors addressed in Hanham, as for the operative acts or omissions at issue, it is noted that Brightwater's identification of the risk of a flashover reduces its culpability, accepting that it did not identify shortcomings with the process and isolate the risk effectively.

[44] I have been referred to the *Treescapes* and the *Crighton* decisions regarding the nature and seriousness of the risk of harm occurring as well as the realised risk, Brightwater accepts there was potential for severe injuries or death to be caused by working with live electrical currents. Brightwater accepts that it failed to identify shortfalls in the processes implemented, but it submitted that its procedures set it apart from cases where PCBUs do not address the likelihood of harm at all.[4] Specific safety procedures in place included a job safety analysis had been completed and it was

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[4] *WorkSafe New Zealand v Treescape Ltd* [2015] NZDC 10056 and *WorkSafe New Zealand v Crighton and Son Ltd* [2016] NZDC 2069.

updated during the course of the work. That analysis identified flashover as a hazard. A pre-start hazard identification was conducted daily during the project.

[45] Brightwater accepts that this particular hazard was not identified the day of the incident. During training and hazard identification meetings, workers including Mr B were made aware of health and safety requirements including isolation procedures and risks. All Brightwater workers involved with the switchboard upgrade were qualified apart from Mr H who was an apprentice.

[46] The actual harm to Mr B was exacerbated by the low voltage circuit breaker failing to trip when the flashover occurred and it is submitted that this is a relevant factor reducing Brightwater's culpability.

[47] In terms of the fall hazard, it is accepted that working at height represented a risk and that Mr B suffered a minor injury due to falling, however it is noted that controls were in place to reduce that risk and Mr B had ensured the ladder was correctly fitted and he was using a harness.

[48] Regarding the degree of departure from standards prevailing at the relevant industry, it is submitted that Brightwater implemented a combination of controlled measures for the job. The hazard was eliminated by isolation for some parts of the job. Brightwater had administrative assessments, supervision and processes in place to monitor the work that was being completed. Brightwater had provided Mr B with the appropriate PPE. Brightwater has subsequently reviewed its safety systems to ensure absolute future compliance.

[49] Regarding the seriousness of the hazard, Brightwater accepted that working near live electrical currents is hazardous. It submits that it had appropriate systems to control that hazard. It acknowledges that prosecution arises from deficiencies in its actions rather than a broader failure to recognise or respond to the obviousness of the hazard.

[50] Regarding the availability and cost effectiveness to avoid the hazard, Brightwater agrees with WorkSafe, that isolation would be the most effective way to

ensure safety. Had Brightwater identified the shortfalls in the process implemented, it would have taken measures to isolate the power to the link box.

[51] For those reasons, it is submitted by Mr Caine that Brightwater's culpability lies at the lower end of the medium band.

[52] In terms of my assessment of Brightwater's culpability, I find that it lies at the lower end of the medium band for these reasons. Prior to the incident, all members of the electrical team had undertaken the Brightwater health and safety induction. The electrical services manager had completed three safety checks with the team on site. A peer reviewed JSA was completed for the job. Hazard ID forms were completed each day, however the hazard ID form for the task on the day of the incident related to the switch board tasks, that was upgrading power outlets. There was no further hazard identification for the upgrade of the fuses. The form however still specified live supply as a hazard and noted that these should be correctly isolated.

[53] Mr Young's affidavit expresses that the workers were aware of the hazard, but thought that there was a low risk of contact occurring. Steps were therefore clearly in place to ensure the safety of the workers but the accident arose due to inadequacy in monitoring.

[54] While Mr B was at risk of falling from height, he was appropriately harnessed and as such, this risk would not have been an issue if it were not for the flashover. The realised risk was serious, although Mr B has expressed that he has recovered and continued to work for a period of time for Brightwater. He will however have enduring physical scars.

[55] Given the obvious risk of a flashover, it is evident that power to the link box should have been isolated. This would have been a simple step to take. It is not entirely clear whether complete isolation would have been in accordance with industry standards, however Brightwater certainly had a range of safety and control measures in place.

[56] So it is in light of these factors I find that Brightwater's culpability is low but for the seriousness of the realised risk to Mr B. I therefore assess its culpability at the low end of the medium band in *Stumpmaster*.

[57] In terms of setting the actual starting point for the fine, I have considered the various submissions made by WorkSafe that $500,000 would be the appropriate starting point. I have considered the cases of *WorkSafe and Wallace Murray, WorkSafe and Dimac Contractors, WorkSafe and Northpower*.[5]

[58] In terms of the defence submissions, which submit a starting point of $250,000, it is submitted that Brightwater's culpability is less than in *Wallace Murray* and it submits that its culpability is significantly less than in *Northpower*.

[59] I find an appropriate starting point for the fine is $300,000. That is not at the very lowest end of the medium band but it is towards the lower end.

[60] The most helpful case is that of *WorkSafe and Wallace Murray Electrical*. In that case, Judge Brandts-Giesen considered that there was an attempt to identify the risks and prepare a workplan, however the assessment was too informal. The company had done the preparatory work before commencing their task and significant remedial work had been undertaken subsequently which indicated a commitment to avoid similar problems in the future. It had been noted that there was a need to shut down the electrical supply but that would have stopped the water supply to a significant part of Invercargill for some hours which would have placed further pressure for the tradesmen to complete their task quickly and therefore replacing one risk with another. Judge Brandts-Giesen considered that that issue could have been handled more appropriately.

[61] I find that Brightwater's culpability is slightly lower than that in *Wallace Murray* in terms of the health and safety system it had in place, however on the other hand in terms of the realised risk, the injuries suffered by Mr B were significantly more serious. In *Wallace Murray* the victim suffered burns to his hands

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[5] *WorkSafe New Zealand v Wallace Murray Electrical Ltd* [2019] NZDC 5675; *WorkSafe New Zealand v Dimac Contractors Ltd* [2017] NZDC 26648 and *WorkSafe New Zealand Ltd v Northpower Ltd* [2017] NZDC 17527.

and fingers and was discharged from hospital the same day he was admitted, whereas Mr B required skin grafts and spent three weeks in hospital.

[62] I turn to any aggravating and mitigating factors. There are no aggravating factors.

[63] In terms of mitigating factors, there is not a lot of difference between what has been submitted. I acknowledge that Brightwater have actively cooperated throughout the course of the WorkSafe investigation. A five per cent discount is given.

[64] In terms of offers to make amends, there was credit for assisting Mr B from the outset. That reflects in reduced stress and uncertainty for him and his family. For that, there is a further five per cent reduction.

[65] Regarding remorse, the best manifestation of remorse is taking every step available to keep the workforce safe, as noted in *Stumpmaster*. In this case Brightwater has offered to support Mr B from the outset and has continued to support him back into work.

[66] Remorse is also indicated by remedial steps taken. The remedial steps taken were significant on the part of Brightwater. The steps taken are to prevent a future incident. They are set out in Mr Watson's affidavit. They include:

(a) appointing a full-time health and safety professional;

(b) the implementation of a new live electrical work policy and a live electrical work permit;

(c) increasing engagement with workers while risk assessments are being completed;

(d) undertaking a new health and safety management system customised for the business by an IT specialist;

(e) an entire HS management system has been audited in house;

(f) health and safety inductions have been refreshed;

(g) strong client interaction in health and safety matters; and

(h) all ladders assigned to electrical workers have been removed and replaced with nonconductive fibreglass ladders.

[67] The suite of changes indicates a commitment to ensure Brightwater's workforce is safe in the future.

[68] For those steps, a 10 per cent discount is given and for previous good character a further five per cent, so all up 25 per cent. 25 per cent is also available for the early guilty plea, so that is a 50 per cent reduction.

[69] The third step is to determine whether further orders under the Act are required. As I have noted, it is not a dispute that $1,836.18 is an appropriate contribution towards costs.

[70] The issue then turns to whether this matter can be resolved by way of a court ordered enforceable undertaking. That is not supported by WorkSafe without the Court also ordering a conviction. It is submitted that a conviction is required to meet the purposes of sentencing. If a court ordered enforceable undertaking is the outcome the prosecutor in this case supports the assurance reporting and order requirements detailed in schedule 1 of Brightwater's submissions.

[71] The submission of behalf of Brightwater is that a court ordered enforceable undertaking is most appropriate outcome as opposed to a fine. This is on the basis that would best meet the sentencing criteria of section 151 of the Act, the purposes and principles of sentencing under the Sentencing Act 2002 and it would also achieve the purposes of the HSWA. It is noted that Brightwater has engaged with the industry, the community and Mr Watson in considering what activities it could undertake. The proposed undertaking is detailed in schedule one of Mr Caine's submissions. In summary, it proposes:

(a) a two phase health and safety management plan;

(b) the purchase of an elevated work platform;

(c) the purchase of 20 burn specific emergency kits or additional trading for hazard and risk management and first aid;

(d) production of an educational health and safety video which will be publicly available; and

(e) setting up a scholarship program to benefit recovering burn victims.

[72] The cost is estimated between $291,786 and $296,786.

[73] Under section 152(1) of the Act, the Court may order an offender to pay the regulator a sum that is just and reasonable. As I have noted, it is agreed that $1,836 is an appropriate contribution. An order is made accordingly.

[74] Section 156 of the Act gives the Court the power to make an order for the release of the defendant upon the defendant giving an undertaking with the specified conditions, being a court ordered enforceable undertaking, and this is part of the consideration of the third stage of the sentencing process.

[75] It has previously been noted that in enforceable undertaking is not seen as a soft option, particularly given the amounts that are often involved. I have noted the cost of the proposed undertake on the part of Brightwater and that is higher than the end fine that could appropriately be imposed on Brightwater.

[76] I accept that there is some benefit to Brightwater in the proposed undertaking, but I find that the undertaking will help prevent similar safety issues occurring in the future. Compared to a fine, this will be significantly more beneficial to Brightwater's workers and the victim in this case. The educational health and safety and educational video and scholarship program costed around $80,000. These are clearly intended to benefit the wider community.

[77] For those reasons, I grant the application for a court ordered enforceable undertaking.

[78] In respect of the issue of whether a conviction should be entered, I am of the view that one should be entered. That requires a consideration of the circumstances of this case while acknowledging that this is offending that is not at the lowest band of culpability. It is towards the lower end of the medium of band and in all the circumstances, I find that a conviction would continue to ensure Brightwater's ongoing accountability and it would more likely provide both general and specific deterrence within the industry. It would be accordingly a just and appropriate response to the offending.

[79] Accordingly, I grant the s 156 order. There is to be a court ordered enforceable undertaking in terms of schedule 1 of Mr Caine's submissions of 15 March 2024. That is with the addition of the wording of section 156(2)(a), (b) and (c).

[80] The special conditions are those as per schedule 1 under the heading "Further Proposed Terms".

[81] The reviews are to be six monthly. The independent auditors report is to be filed for the second six monthly review and then a final independent auditors report at the date of the final review.

[82] Proceedings are adjourned for a period of 18 months to enable the enforceable undertaking to be implemented.

[83] Suppression of the victim's names and those of his co-workers, Mr P and Mr H is granted. My sentencing notes will be anonymized to reflect that order.

Judge J Bergseng
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhenga: 01/07/2024