EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2021-016-000221
[2023] NZDC 12484

WORKSAFE NEW ZEALAND
Prosecutor

v

AFFCO NEW ZEALAND LIMITED
Defendant

Hearing:	9 June 2023
Appearances:	A Simpson for the Prosecutor T Clarke for the Defendant
Judgment:	23 June 2023

RESERVED JUDGMENT OF JUDGE W P CATHCART

Introduction

[1] On 5 February 2020, Alfred William Pohatu Edwards (Mr Edwards) was working at the AFFCO Freezing Works in Wairoa operating the north blast freezer when he was crushed to death beneath a steel frame crate used to transport cartons of meat products in the freezer.

[2] AFFCO was charged under ss 36 and 48 of the Health and Safety at Work Act 2015 (the Act) for breaching its overarching duty under the Act to ensure so far as reasonably practicable the health and safety of workers including Mr Edwards. The charge alleged AFFCO exposed such workers to a risk of death or serious injury

arising from the uncontrolled descent of a steel frame at the back end of that freezer. AFFCO subsequently pleaded guilty to that charge admitting thereby that breach of duty and particulars relied upon by WorkSafe.

[3] I consider Mr Edwards' death a wholly avoidable event. For the reasons given below, I find AFFCO's culpability was high under *Stumpmaster* principles and fixed a global starting point of $750,000.[1] I increased that figure by the sum of $67,500 for AFFCO's previous convictions in this area. From that I deducted a figure of 42 per cent for mitigating factors, including early guilty plea. This resulted in an **end fine** of **$502,500**.

[4] The start point here was a critical factor at the hearing. The figure reached was higher than that advocated by WorkSafe which placed the range in the vicinity of $650,000 to $700,000. AFFCO argued for a fine start point of $600,000. Also, there was some dispute as to the extent of deductions available for various mitigating factors. They are addressed under the respective heading of the mitigating factors.

The charges and particulars

[5] The essence of the offending is captured by the admitted particulars. I have already detailed the foundational duty breached here. The charge listed further particulars. AFFCO admitted them by pleading guilty and via undisputed facts. Understanding the nature and extent of the admitted particulars is important in fixing individual culpability. AFFCO tended to treat the particulars as mere allegations.[2] This is contrary to both plea and the primary undisputed facts.

Background of parties

[6] AFFCO New Zealand Limited (AFFCO) is a limited liability company established in 1966. It has five directors. As noted earlier, the incident occurred at its Wairoa plant which is one of the largest plants in the AFFCO group. That plant has been processing meat in Wairoa since 1916. During peak season it employs in excess of 600 workers.

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[1] *Stumpmaster v WorkSafe NZ Ltd* [2018] 3 NZLR 881.
[2] Defendant's submissions in mitigation of sentence dated 10 February 2023 at [26].

[7] Mr Edwards commenced employment with AFFCO in January 1999. He was employed on a seasonal basis as a blast operator in the freezer department. He commenced work for the 2019/2020 season on 5 August 2019. And as noted at the outset, on 5 February 2020 he was at work when he sustained fatal injuries after he was crushed beneath a steel frame used to transport carton meat products in the north blast freezer.

The blast freezers

[8] Following the slaughtering of animals, boxed cartons of ovine and bovine product are conveyed to one of the three blast freezers in the freezing department at the Wairoa complex. The cartons are individually loaded, either manually or automatically, onto steel frames at the front end of the blast. The general process for the three blast freezers is similar. That is to say, the steel frames are raised to shelf height, and cartons are loaded onto each shelf until it is full.

[9] Once full, the steel frames rotate inside a cabinet-like chamber where cold air (approximately -25˚ Celsius) is blown over the cartons. The steel frames then travel along an upper level to a half-way point known as the "back of the blast". The end steel frame is pushed out and lowered to the ground. The steel frame is then pushed back towards the front of the blast freezer for unloading by the operator and the process is repeated. Once full, each cycle takes approximately 48 hours to freeze the cartons to the required temperature.

[10] The blast freezer involved in this incident was known as the north blast freezer (north blast). The north blast was the smallest of the three freezers. It had the capacity to hold a total of 1,890 cartons. There were 35 steel frames that rotate around this freezer. A steel frame has six rows and each row can hold nine cartons, meaning each steel frame had the capacity to hold 54 cartons.

[11] The north blast was only used during the height of the peak season where it operated for approximately three to four months. For the 2019-2020 season the north blast was instituted on 18 November 2019. It was initially used on the nightshift before its use was extended to the dayshift on 3 February 2020. Unlike the other two freezers, the north blast was constructed in the late seventies and has been at the

Wairoa site since the late eighties. It was significantly older than the other blast freezers at Wairoa. It was less automated than those freezers and others at different AFFCO plants.

[12] The thrust to move the steel frames through the north blast was provided by hydraulic rams; two at the top front and two at the bottom back end. There is no conveying chain or other mechanism to move the steel frames through the north blast. The steel frames slid as a block – one pushing onto the next. As one was pushed in, the one at the other end was pushed out. The steel frames did not move in the blast unless the blast was started up by the operator. The rams were designed to have their stroke synchronised by flow divider devices. The purpose of the flow divider was to evenly distribute the hydraulics so that the steel frames go into the blast fully and evenly.

[13] The steel frames were raised at the front and lowered at the back by hoist carriages. The hoist carriages consisted of framing, with guides at each side, that the steel frame slide onto as it came out of the blast. Each side of the hoist carriage was connected by one chain and a hoist mechanism. At the top of the steel frame was a frame carrier plate. The carrier plate sat on guides on the hoist carriage.

[14] Proximity switches detect when the steel frames had been pushed out far enough on the hoist carriage plates and was ready to be moved up or down. The steel frame sat unrestrained (suspending or hanging) on the carriage as it was lifted (at the front end) or lowered (at the back end). As the steel frames sat on the carriage by gravity, if one became obstructed and unable to lower at the back end, it was left behind by the carriage but will continue lowering. The control system had no provision detecting if the steel frame was not in contact with the carriage.

The incident

[15] Mr Edwards commenced work at approximately 5 am on 5 February 2020. He was tasked with operating the north blast. At 10.15 am he left work to attend a tangi. Another worker operated the north blast in his absence. Mr Edwards arrived back at the site and resumed his duties at 11.54 am.

[16] Based on the production time of the last box in the north blast tunnel, it is estimated that at around 5.17 pm Mr Edwards took the last carton off the conveyer belt at the front end of the north blast. Shortly after removing that last carton Mr Edwards entered the back end of the north blast as steel frame 20 had become hung up during its descent. Entry to the back of the blast is via an unlocked door which had a sign stating: "No entry".

[17] It is believed Mr Edwards picked up a steel bar and attempted to free a jammed carton from steel frame 19. He was crouching wholly or partially under steel frame 20 when it fell on him in an uncontrolled manner. Steel frame 20 was carrying 54 cartons. The total weight that fell on Mr Edwards was 1,450 kilograms. His death was instant.

[18] A nightshift worker found Mr Edwards at approximately 5.25 pm and went to get help. Soon thereafter the engineers on site used strops and chain blocks to lift the steel frame off Mr Edwards. The ambulance arrived on site at about 5.50 pm.

[19] At the scene, a steel bar was located beneath Mr Edwards' body and a damaged carton was observed wedged between the right-hand edge of the blast cabinet and steel frame 19. Steel frame 19 was buckled and not square which likely contributed to it protruding out the blast and therefore would have been an impediment to steel frame 20 as it descended.

The investigation

[20] WorkSafe investigators attended the incident on 5 February 2020 and placed a prohibition notice on use of the north blast. The investigation that followed established various propositions.

[21] First, Mr Edwards was experienced in working in the blast freezers and had operated the north blast for approximately 10 to 12 years. The back end of the north blast was unguarded. There was no lock out or tag out implemented on the north blast.

[22] AFFCO had a machinery safety standard document in place (June 2018) which stated: "Administrative controls are the least effective and the most prone to failure … as such they could only be used if there are NO other alternatives." Unlike the mid blast freezer, no engineering controls were able to be implemented on the north blast given its age.

[23] By way of contrast the mid blast freezer was fitted with hooks. Hooks automatically stop the hoist mechanism when the chain goes slack. This means the carriage hoist cannot keep lowering if a steel frame has become caught up while descending. The hooks are designed for safety.

[24] The hazard of falling steel frames causing crushing injuries had not been identified by AFFCO. AFFCO admitted that the machinery risk assessment carried out on the north blast in 2018, which recorded a "No" next to crushing injuries, was not a good check.

[25] Also, the north blast had not been risk-assessed to AS/NZS standard 4024. As per AFFCO's Machinery Safety Standard, it recognised AS/NZS 4024 was the standard that reflected current state of knowledge regarding the safe guarding of machinery. In short, the benchmark standard.

[26] AFFCO had identified the risk of jammed cartons and moving parts of the carton blast tunnel. Both tasks were assigned a risk score of 10. The control measure was for the operator to call fitters or supervisors in the event of the cartons jamming. AFFCO advised the investigators that the blast operators should never interact with the north blast operation inside the blast. According to AFFCO's Machinery Safety Standard, a risk score over five requires a minimum of weekly monitoring. However, no such monitoring occurred.

[27] Also, AFFCO was aware of previous instances with the north blast, including cartons jamming, cartons not lining up and steel frames becoming hung up. AFFCO and workers at the site advised the investigators that a steel frame had previously fallen in the mid blast. Moreover incidents and internal maintenance on the north blast were not recorded.

[28] The north blast maintenance manual stated that there should be daily and weekly checks and a service record sheet kept. But there were no daily start-up checks for the blast freezers. This contrasts with other departments. For example, on the slaughter floor there are daily start-up check-ups for the machinery.

[29] Whilst not where the incident occurred, WorkSafe investigators (and the police) observed a control panel at the front end of the north blast. Written on the panel was a note saying: "Jimmy out cradle with bar". Also, there were several metal bars observed lying around in both the front and back end of the north blast. Some of the workers at the AFFCO Wairoa told the investigators that steel bars were used at both the front and back end of the north blast when a carton or steel frame got stuck.

[30] AFFCO was aware that operators previously went into the front of the north blast to straighten cartons, chip ice and level out jammed cartons using a steel bar. Workers at the Wairoa site also told the investigators about several issues with the north blast which included cartons jamming and steel frames becoming suspended. One worker commented that boxes were "always jamming up, coming off and going into the front".

[31] AFFCO advised WorkSafe that it held daily management meetings where the production manager and supervisors do a walk-around. As part of the walk-around AFFCO advised they had discussions with supervisors and key operators, but this does not necessarily include all staff. However, there are *no records* of any meetings or discussions relating to the north blast.

[32] At the end of 2020 the north blast was decommissioned and is no longer in operation.

Unchallenged expert evidence

[33] Unchallenged propositions flow from the expert opinion material contained in the undisputed facts. The north blast was not a reliable machine and required intervention to clear blockages. The considerable number of damaged cartons sighted at the scene attested to this. Frame 20 in particular had descended at an angle and without being controlled by the descending hoist carriages. There was a tendency for

the frame not to sit squarely on the carriages or rails within the structure due to twisting.

[34] At the load/unload (front end) there was some fixed guarding limiting access to the loading hoist mechanism. The back end was, however, effectively unguarded. There was nothing to prevent access to the hoisting mechanism, the space in which frames were lowered or the thrust cylinders. The control block located at the back end required the operator to stand where there was a chance of contact with moving parts.

[35] Entry to the back end was via a standard freezer door which has a "No Entry" warning sign. But unless locked out by engineering staff, there was no absolute means of preventing access to this plainly dangerous area.

[36] The experts concluded that frame 20 became hung up during its descent at the back end of the north blast. When freed by a combination of joggling the trusting rams and mechanical levering, frame 20 came down rapidly and on a diagonal, striking Mr Edwards and impacting the floor at the side furthest from the door.

[37] Best practice rules existed. The Best Practice Guidelines for Safe Use of Machinery (WorkSafe, May 2014) (the Guidelines) outline the hazards that come with using machinery in the workplace, potential injuries and how best to control these hazards. Section 3 of the Guidelines cover the basics of hazard management and common hazards when working with machinery. The Guidelines specify hazard identification methods, including physical inspections, task analysis and process analysis. The Guidelines also set out the process for conducting a hazard and risk assessment. Any such assessment should include a process to systematically identify all reasonably foreseeable hazards, hazardous situations and hazardous events during all phases of the machine life cycle. This includes human factors. The Guidelines also state that a PCBU needs to talk to workers who can advise on the particular hazards and risks for different machinery.

[38] The Guidelines also state that duty holders should continue to assess significant hazards that are being minimised in order to determine whether there are other methods to control them. For example, replacing with a newer machine that eliminates

or isolates the hazard. The Guidelines also state that once control measures are in place they must be regularly monitored.

[39] There are also specific guidelines aimed at the meat industry—the Meat Industry Health and Safety Guidelines 2013. These guidelines note that employee participation is an important part of developing and implementing health and safety practices in the workplace. The guidelines state that an effective health and safety participation system will cover identification of hazards, assessment and control of significant hazards and provision of information.

[40] AFFCO admitted (by plea and facts) that it was *reasonably practicable* for it to have ensured the health and safety of works at AFFCO Wairoa by:

(a) *Ensuring* that a suspended crate *could not drop* from the back of the north blast.

(b) Preventing relevant workers from entering the area where a suspended crate could drop from the back of the north blast.

(c) Educating relevant workers about the risk of a suspended crate dropping.

(d) Identified the risk of suspended crate dropping on a worker and taken one or more of the preventative steps at particulars (a) to (c) above.

Relevant principles and purposes of sentencing

[41] Section 151 of the Act sets out the criteria I must consider in the sentencing exercise:

> **151 Sentencing criteria**
>
> …
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and

(c) the risk of, and the potential for, illness, injury, or death that could have occurred; and

(d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and

(e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

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

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[42] I must hold AFFCO accountable for the harm done by the offending, promote in its corporate entity a sense of responsibility for that harm, deter AFFCO and others generally. And deterrence at a general level must be a significant factor here because s 151(2)(b) obliges a sentencing Judge to have particular regard to the purposes of the Act.

[43] One of the principles to be taken into account is that workers and other persons 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.[3]

Approach to sentencing

[44] The relevant guideline judgment is *Stumpmaster v WorkSafe New Zealand*.[4] *Stumpmaster* set out four steps for the sentencing Judge, now well-established:[5]

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

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

[3] Section 3(2) of the Act.
[4] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.
[5] At [3] and [35].

(c) determine whether orders under ss 152-158 of the HSWA are required; and

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

Step 1: Reparation—s 32(1)(b)

[45] Quantifying an emotional loss reparation payment is an intuitive but difficult exercise. The judicial objective is to strike a figure which is just in all the circumstances. As applied here it means to compensate for actual harm arising from the offence in the form of anguish, distress and mental suffering by the victims. The nature of the injury is, or may be, relevant to the extent it causes physical or mental suffering or incapacity, whether short-term or long-term.[6]

[46] There is not, and cannot, be a tariff for the loss of life or grief. Case law only provides a broad indication of an appropriate figure. It is therefore generally accepted a close comparative analysis of the facts of other cases is unhelpful.[7] And in *Stumpmaster*, the High Court observed the increase in penalties under the Act "should not lower the size of reparation orders."[8]

[47] Here, AFFCO went early to settle the level of appropriate emotional harm payment. On 15 June 2021, AFFCO made payments of $100,000 to Mr Edwards' widow and then additional financial support in the sum of $39,171 to her and associated whānau. Totalling $139,171.[9] WorkSafe accept that the appropriate emotional harm payment in a fatality case like this is in the vicinity of $130,000.

[48] A simple review of the case law cited supports WorkSafe's general range. In *WorkSafe v Shore Living Limited* and *Chang Yung Construction Ltd,* the sum of $130,000 emotional harm payment was awarded to the deceased's wife and one child.[10] In *WorkSafe v Vehicle Inspection NZ Ltd,* the sum of $130,000 emotional harm

[6] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland, CRI-2008-404-322, 5/2/2009 at [19].
[7] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.
[8] *Stumpmaster,* above n 4, at [56].
[9] Affidavit of Nigel Stevens dated 17 February 2023 at [26].
[10] *WorkSafe v Shore Living Ltd and Chang Yun Construction Ltd* [2021] NZDC 13214.

payment was awarded to the victim's wife and three young children.[11] The payment was considered by the Court to be within the "appropriate range".[12] In *WorkSafe v Centreport Ltd,* a sum of $170,000 emotional harm reparation was ordered ($70,000 to the victim's wife and $20,000 each to his five adult children).[13] In *WorkSafe v Alderson Poultry Transport Ltd,* the sum of $130,000 was awarded to the deceased's family.[14] And in *WorkSafe v Higgins Contractors Ltd,* the sum of $130,000 was agreed by the parties and ordered to each of the three deceased's families.[15]

[49] Both parties invited me to accept the total payment made by AFFCO as appropriate in the circumstances without the need for any further award of emotional harm reparation or need for an order. I agree. The loss to the whanau here is palpable. Mrs Edwards and Mr Edwards were married when she was 17 years of age and effectively spent their lives together ever since. [Mr Edwards' son's] life has changed. He particularly feels the void in relation to his own children now unable to have a life with their grandfather. [Mr Edward's brother] also speaks of the pain he feels. He expresses it as "survivor's guilt". The death of his brother "eats away" in his mind "constantly". To its credit, AFFCO went early here and made these payments at a level consistent with the range of case law cited earlier. No more need be said on this topic.

Consequential loss

[50] Prior to the hearing the parties agreed on the quantum of a consequential loss order under s 32(1)(c) of the Sentencing Act 2002. On 10 February 2023, AFFCO made a payment for such consequential loss in the sum of $84,471 to the surviving spouse and granddaughter, a sum agreed by WorkSafe. I was asked to endorse the figure as appropriate here.

[51] As is well settled in these cases, a Court is entitled to make awards of reparation to cover consequential loss for victims in respect of loss that is not covered by any entitlements received under the ACC Scheme. AFFCO accept there is a proper legal

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[11] *WorkSafe v Vehicle Inspection NZ Ltd* [2021] NZDC 3036.
[12] At [27].
[13] *WorkSafe v Centreport Ltd* [2019] NZDC 12020.
[14] *WorkSafe v Alderson Poultry Ltd* [2019] NZDC 25090.
[15] *WorkSafe v Higgins Contractors Ltd* [2020] NZDC 17036.

basis for WorkSafe to claim the consequential loss figure here. It accepts that Mr Edwards' surviving spouse and granddaughter are both "victims" for the purposes of s 4 of the Sentencing Act. The agreed figure was fixed according to an accepted methodology. I therefore agree. No more needs to be said under this topic.

Step 2: Quantum of fines

[52] *Stumpmaster* sets out four guideline bands for culpability:[16]

Low culpability	:	starting-point of up to $250,000.
Medium culpability	:	starting-point of $250,000 to $600,000.
High culpability:	:	starting-point of $600,000 to $1 million.
Very high culpability	:	starting-point of $1 million plus.

[53] The *Hanham & Philp Contractors Ltd* culpability factors remain relevant under the *Stumpmaster* approach.[17] I address the relevant factors below. And in fixing the respective starting point fines policy, the legislative scheme of the Act requires me to ensure the penalty "bites" and is not to be treated as a mere licence fee level.[18]

[54] There was no dispute before me that the start point falls within the guideline band set for "high culpability" with a range of start point fine between $600,000 and $1,000,000. As noted earlier, WorkSafe contended that culpability fell within the lower end of the high culpability band, attracting a start point range between $650,000 to $700,000. AFFCO contended for a start point of $600,000. As noted at the outset, I considered the appropriate start point was $750,000.

[55] My reasons are set out below.

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[16] *Stumpmaster, above n 4,* at [37].
[17] *Department of Labour v Hanham & Philp Contractors Ltd* HC Christchurch CRI-2008-409-2, 16 December 2008.
[18] *Department of Labour v Street Smart Ltd* HC Hamilton, CRI-2008-419-26, 8 August 2008 at [59].

Identification of the operative acts or omissions and the practicable steps it was reasonable for AFFCO to have taken

[56] I reiterate that AFFCO through its plea and admission of primary facts, conceded that it was reasonably practicable for it to, amongst other matters, ensure that a suspended crate could not drop from the back of the north blast and prevent workers from entering that dangerous area. AFFCO conceded it could have identified that risk and taken one or more of the preventative steps.

[57] Failure to identify and take these reasonably practicable actions was a serious breach here. The north blast was not risk-assessed to the required standard. Not one of the reasonably practicable steps were contemplated let alone taken. Moreover, access to the back end of the north blast was poorly controlled. Once in the space at the back of that freezer there were no control measures which might prevent a person from accessing the specific dangerous area. Much more was expected of AFFCO in the circumstances.

[58] AFFCO accepted it identified the risk of cartons becoming jammed and the risk of exposure to moving parts in the north blast tunnel. And AFFCO admitted it failed to "specifically [identify] the risk of a steel frame falling from the back of the hoist carriage, exposing workers to the risk of crushing injuries when trying to free a jammed carton from the steel frame."[19] But that makes it worse. Because knowledge of the first two risks would likely lead a prudent operator to recognition of the third risk as obvious. By failing to identify that specific risk AFFCO was, in my view, at the very least, grossly careless.

[59] AFFCO accepted that workers ought not to have been able to access the dangerous area at the back of the north blast without restriction. But when asked what more could have been done to protect workers like Mr Edwards—putting decommission of the freezer to one side for the moment—AFFCO's counsel struggled to point to a preventative step that would have eliminated the non-identified risk in contrast to merely minimising it. Administrative controls may have helped or reduced the risk, but not removed the serious risk of exposure to this hazard. AFFCO conceded

[19] Defendant's submissions in mitigation of sentence dated 10 February 2023 at [28].

that it was not possible to fit the same engineering controls, as were implemented on the other freezers.

[60] In my view, nothing short of decommissioning the north blast was adequate here. I rejected therefore the submission that decommission was simply the "best way" going forward. Any lesser options constituted non-viable alternatives under the Act here. In short, AFFCO was grossly careless in failing to identify the specific risk. Decommission of the north blast was the only viable option. AFFCO ought to have done that years ago.

The nature and seriousness of risk of harm and actual harm caused

[61] As per s 151(2), the risk of injury, serious harm, or death, and the actual harm that occurred is a further relevant factor in fixing placement within the bands. In my view, the primary facts and the inferences drawn from them pointed to the irresistible conclusion that workers like Mr Edwards were being exposed to a very high, but avoidable, risk of injury or death whilst the north blast remained operative. Risk of death or serious injury could reasonably have been expected there – s 151(2)(d). And the risk of being seriously hurt or killed as a consequence of a risk of the steel frame in the back of the hoist carriage of the north blast falling when a worker was trying to free a jammed carton from the steel frame was high.

[62] Here, death tragically eventuated. In fixing culpability the degree of harm that occurred must be taken into account. As held by Dobson J in *Jones v WorkSafe NZ*:[20]

> …The nature of the risk that [a] defendant ought to have been aware of, and the extent to which that risk was realised by actual harm being inflicted, are two components of the culpability analysis.

[63] In simple terms the actual harm inflicted is a relevant sentencing factor in determining how serious the offence was—s 151(2)(d).[21] The risk of serious injury or death here was foreseeable. AFFCO was aware of previous instances with the north blast, including cartons jamming and steel frames becoming hung up. Workers advised WorkSafe investigators of these prior incidents.

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[20] *Jones v WorkSafe NZ* [2015] NZHC 781 at [38].
[21] *Stumpmaster* at [40].

The degree of departure from standards prevailing in the relevant industry

[64] Also, AFFCO's conduct departed significantly from the relevant industry standards. For example, its own machinery's safety standard (June 2018) recognised that the industry standard AS/NZS 4024 captured the current state of knowledge regarding the safeguarding of machinery. AS/NZS 4024 should have been referred to as the benchmark. As that standard acknowledges, in the hierarchy of controls administrative controls are the least effective and most prone to failure. And should only be used where there was no other alternatives. As noted earlier the only viable alternative here was the decommissioning of the north blast.

Obviousness of the hazard

[65] In light of my reasoning thus far, the hazard that a worker was being exposed to a falling crate in the back of the north blast was so obvious that AFFCO's failure to identify that risk, let alone eliminate, isolate, or minimise it, was grossly careless. AFFCO likely knew that workers within the north blast had been freeing blocked crates with the use of a jemmy bar. Preventing workers from entering the dangerous area would have minimised the risk. But only the act of decommissioning the blast freezer would have ensured the obvious hazard was eliminated.

Availability, cost and effectiveness of means necessary to avoid the hazard

[66] Simple compliant controls could have been installed following a risk assessment of the north blast that it should not have been used. If the appropriate effective risk assessment had taken place, an early decision that the north blast should not be used was not grossly disproportionate when weighed against the likelihood of risk of harm and death here.

[67] I accept that AFFCO has replaced the north blast (and south blast) freezer at a significant cost of $11 million. Also, it has incurred the associated cost of installing a new engine room to service the freezer for another $14 million. Be that as it may, the only effective means of avoiding the hazard which resulted in Mr Edward's avoidable death was early identification of the hazard and then decommissioning the north blast.

[68] Moreover, the north blast manual required daily or weekly checks and a service record sheet to be kept. None of this was done. Proper record-keeping would have alerted AFFCO to the obvious work hazard at play here.

Comparative case law

[69] Apart from *Stumpmaster,* the parties cited to me the following cases: *WorkSafe v Alto Packaging Ltd, WorkSafe v Kiwi Lumber (Masterton) Ltd, WorkSafe v Homegrown Juice Co Ltd*, *WorkSafe v ANZCO Foods Ltd and Riverlands Eltham Ltd.*[22]

[70] In *Alto Packaging,* the victim was fatally crushed while using a machine to produce polystyrene to shape into meat trays. The incident occurred in what was referred to as the extrusion area where the deceased's body was drawn into the lower rollers of the machine and he was crushed. The company had not properly risk-assessed the machine nor had adequately guarded it nor developed a standard operating procedure. It was a case of an obvious need to guard the machinery which had been highlighted by *prior* accidents at the site. A start point of $800,000 was imposed.

[71] In *Kiwi Lumber (Masterton) Ltd,* the victim was required to fix a fault on a timber carrying conveyor. That required him to go to the top deck of the machine known as a bin sorter. The machine was not turned off or padlocked. He climbed onto the conveyer walkway to fix the fault. Unbeknown to him another worker cleared the fault on the control panel and the conveyor belt restarted. The victim attempted to jump to safety but was knocked down by a piece of timber and thrown into the nip point. She died at the scene from crushing injuries.

[72] Again, the case was about the unguarding of machinery. Also, there was evidence that the lock-out procedures were not consistently followed by workers and that the bin sorter was not fit for purpose. A start point of $700,000 was adopted.

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[22] *WorkSafe v Alto Packaging Ltd* [2022] NZDC 6148; *WorkSafe v Kiwi Lumber (Masterton) Ltd* [2020] NZDC 19117; *WorkSafe v Homegrown Juice Co Ltd* [2019] NZDC 166605; *WorkSafe v ANZCO Foods Ltd and Riverlands Eltham Ltd* [2022] NZDC 12765.

[73] In *Homegrown Juice Co Ltd,* the victim was cleaning a bottle filling machine when her clothing caught in the hooks of the moving machine. The victim was drawn into the machine and died from asphyxia. The company had failed to undertake a risk assessment of the bottling machine. It was unguarded and there was no interlock system in place. Whilst the company had intended to install such a system it was not in place at the time of the incident. A start point of $700,000 was adopted.

[74] AFFCO argues that most of these cases relate to a lack of engineering controls such as interlocks, guarding, emergency stop buttons, et cetera in factory machines. Whereas AFFCO argues here that the failure was to restrict access to the back of the north blast freezer. That distinction is true but takes the matter no further. The failure to identify the specific risk here and decommission the freezer was grossly careless. AFFCO's position stands alone in comparison to these cases which are simply helpful guidelines.

[75] In fixing the start point fine here, I accept that on one view of recent case law in 2021 and 2022 prosecutions involving fatalities may suggest that the Courts have begun to adopt a much lower start point in the preponderance of decisions. For instance, see *WorkSafe NZ v UBP Ltd* (start point $450,000); *WorkSafe NZ v Waratah Forestry Services Ltd* (start point $530,000); *WorkSafe NZ v Sequal Lumber Ltd* (start point $450,000*); WorkSafe NZ v Smart Environmental Ltd* (start point $450,000); *WorkSafe NZ v Car Haulaways Ltd* (start point $450,000) and *WorkSafe NZ v Vehicle Inspection NZ Ltd* (start point $500,000).[23] Little principled ground is gained here by trying to draw that long bow. The review is helpful but not in a material way here.

[76] Having said that, I found *Alto Packaging* the most helpful of the decisions cited to me. Because the conduct there was more serious because the need to guard the machine at issue in that case had been highlighted to the defendant company by *prior* accidents at its site. That was not the case here.

[77] For all of the above reasons, and in accordance with the guidance in *Stumpmaster,* I fixed a start point of $750,000 here.

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[23] *WorkSafe NZ v UBP Ltd* [2022] NZDC 17228; *WorkSafe NZ v Waratah Forestry Services Ltd* [2022] NZDC 25043; *WorkSafe NZ v Sequal Lumber Ltd* [2021] NZDC 22700; *WorkSafe v Smart Environmental Ltd* [2021] NZDC 20061; *WorkSafe NZ v Car Haulaways Ltd* [2021] NZDC 3119; and *WorkSafe NZ v Vehicle Inspection NZ Ltd* [2021] NZDC 3036.

Aggravating factor—previous convictions

[78] AFFCO has 12 previous convictions in this general area but eight of them are over 10 years old. Only the last four convictions relate to offending in the last 10 years. WorkSafe seeks an increase in the start point of around 15 per cent to reflect this criminal history. WorkSafe point out that in the two most recent AFFCO sentencings (both in July 2020) the Court adopted in the second case a five per cent uplift but in the first case, a 10 per cent uplift. Also, that in 2016 a 10 per cent uplift was applied by the High Court to reflect previous convictions.[24]

[79] I do not consider an uplift of 15 per cent is justified in principle here. The mere existence of previous convictions does not justify an increase. Principles must apply. As a general principle, weight to be given to that history depends largely on the circumstances of the offending and the offender. Also, the greater period of time within which there is no relevant offending the less weight the Courts are likely to attach to it. And, under the Bill of Rights, there is an obligation to ensure that any increase is justified in principle and proportionate to the start point to avoid violating the prohibition against being punished twice for the same offence.

[80] Here, there was only one prior conviction relating to the Wairoa site. The incident occurred in 2002 when a worker suffered crushing injuries to his fingers while attempting to relocate the frame of a brace stunner. Moreover, AFFCO has been operating in New Zealand since 1904 and employs over 3,750 workers over 12 sites.[25] And the size of AFFCO's business is a relevant factor here when considering an increase for previous convictions.[26] As is the fact that the industry involved here is inherently dangerous.

[81] Having said all that, there is justification in principle for an increase because of the need to deter AFFCO further given its history. Under the guidance of the principles set out in *Orchard v R*, I increase the start point by a further figure of $67,500 (nine per cent increase).[27]

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[24] *WorkSafe NZ v AFFCO NZ Ltd* [2020] NZDC 12998; *WorkSafe NZ v AFFCO NZ Ltd* [2020] NZDC 13629; and *WorkSafe NZ v AFFCO NZ Ltd* [2016] NZHC 2862.
[25] Stevens' affidavit at [7].
[26] See comments on this point in *Department of Labour v Fletcher Concrete and Infrastructure Ltd* DC Nelson, CRI-2009-042-1043, 20 August 2009 at [41]-[44].
[27] *Orchard v R* [2019] NZCA 529.

Mitigating factors

[82] *Stumpmaster* cautions against what it referred to as "routine standard discounts" that may lead to distorting the sentencing process with outcomes becoming "too low". As a general principle, the scope of discounts must be measured against gravity of offending. Untethered or excessive discount creeping has a tendency to undermine the relevant purposes and principles of sentencing here. And I note on that score that in *Stumpmaster*, the High Court suggested an overall discount of 30 per cent for mitigating factors is only expected in cases that exhibit all the mitigating factors to a moderate degree or one or more to a high degree.[28] But the High Court was quick to observe that this was not to be treated as a ceiling on the amount of credit in mitigation.

[83] Here, AFFCO seeks a discount package no less than 60 per cent. For the reasons that follow, I considered this was excessive upon examination.

Guilty plea discount

[84] There is no dispute here. A full discount of 25 per cent is granted to AFFCO under controlling case law. Whilst the entering of the plea took some time, this was a reflection of the complexity of the case and in recognition that the parties maintained resolution discussions before the charging document was amended and the plea entered.

Co-operation with WorkSafe investigation

[85] AFFCO seeks a 10 per cent discount here. I consider that this claim largely ignores that AFFCO has a statutory duty to comply and fully. A discount at the rate claimed has the tendency to award cooperation required by law. Nevertheless I recognise that co-operation was full, there was no attempt to disguise or hide what had happened. AFFCO was completely open about the incident, as to be expected. In the circumstances, and measured against gravity, a five per cent deduction.

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[28] *Stumpmaster* at [66]-[67].

Reparation and remorse

[86] Under this heading, AFFCO sought a 10 per cent discount for having made emotional harm and consequential loss reparation payments and a further discount at the same rate for expressions of remorse (including a willingness to make amends).

[87] I deal with the remorse claim first. I accept that AFFCO is remorseful. The facts point to no other conclusion. But remorse does not justify a 10 per cent discount here. Because it has to be measured against my finding that AFFCO was grossly careless in failing to identify the key hazard risk and prevent it by decommissioning the north blast. Displaying remorse for this serious failure does not justify a 10 per cent discount. A five percent discount is given for remorse.

[88] I accept that AFFCO moved quickly to make the various emotional harm and consequential loss payments to the deceased's wife. These early efforts to try to alleviate the stress and uncertainty for the Edwards whanau are acknowledged and justify a discount. However, the 10 per cent claim is too large here and out of line with the preponderance of case law.[29] In the circumstances a five per cent discount.

Remedial action

[89] I have considered whether I should grant a further discount for remedial action taken by AFFCO since the incident. AFFCO seeks a further discount of five per cent to reflect the steps taken. It points to the decommissioning of the north blast and its $11 million replacement. AFFCO further argues it has gone "the extra mile" because it has also installed a new engine room to the service the freezer for another $14 million.

[90] I am not prepared to give a discount for remedial action relating to the decommissioning and replacement of the north blast. In line with my findings, AFFCO should have decommissioned this piece of ageing machinery years ago. As the prosecutor maintained, the woeful deficits in this case should never have existed in the first place. And AFFCO should not be rewarded for doing what it ought to have

[29] *Stumpmaster* at [64].

done previously. Also, there was no suggestion here that AFFCO lacked the financial muscle to incur these necessary costs in the interests of its workers at Wairoa.

[91] However, I accept that AFFCO has gone the extra mile here. The discount measured against gravity of offending is two per cent.

Step 3: Ancillary orders – regulator's costs

[92] The prosecutor seeks a contribution for WorkSafe costs in the sum of $5,346.55 as a just and reasonable contribution towards the costs of prosecution. This figure represents half the external legal costs and half the internal legal costs incurred. As per *Stumpmaster,* costs in this area are now commonplace. Here again, the parties agreed that the amount of $5,346.55 should be awarded under this heading.

[93] I consider that figure is plainly within range and is appropriate. The total sum ordered under s 152 is therefore $5,346.55.

Step 4: Proportionality assessment

[94] This final step requires me to make an assessment of the proportionality and appropriateness of the imposition of the total package of sanctions here. This final step reflects the totality principle. The total must be proportionate to the circumstances of the offending and the offender. Here, the package (including court costs) comes to just over $731,500.

[95] The application of the totality principle was to a degree already factored into my reasoning. And the risk here was that a further material deduction would provide to a degree double discounts which would be inappropriate. Moreover, in fairness to AFFCO it did not seek a proportionality adjustment. Also, AFFCO clearly has the financial capacity to pay here.

[96] Having stood back and reviewed that package, I did not consider any further deduction for totality purposes was required. In my view, the outcome strikes an appropriate balance under the legislation against a leader in the meat processing industry in the context of a worker's avoidable death.

Conclusion

[97] In line with the above reasoning:

(a) The emotional harm payments totalling $139,171 was approved—no order necessary.

(b) The consequential loss payment totalling $84,471 was approved—no order necessary.

(c) The end fine is $502,500 with court costs of $130.

(d) Prosecutor's costs in the sum of $5,346.55 ordered under s 152.

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Judge WP Cathcart
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/6/2023