EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2015-085-2309
[2016] NZDC 24649

WORKSAFE NEW ZEALAND
Prosecutor

v

MINISTRY OF SOCIAL DEVELOPMENT
Defendant(s)

Hearing: 5 December 2016

Appearances: D La Hood and S Backhouse for the prosecutor
B Stanaway and H McKenzie for the defendant

Judgment: 6 December 2016

SENTENCING NOTES OF CHIEF JUDGE JAN-MARIE DOOGUE

Executive summary

[1] On 4 July 2016, the Ministry of Social Development ("the defendant") pleaded guilty to one charge of failing to take all practicable steps to ensure the safety of employees at the Ashburton office of Work and Income New Zealand ("the Ashburton office"). The charge was brought under ss 6 and 50 of the Health and Safety in Employment Act 1992. The defendant accepted it failed to take five of the six practicable steps which the prosecutor alleged it should have taken.

[2] On 9 September 2016, I found that the defendant failed to take the remaining practicable step, namely that it should have ensured there was no physically unrestricted access by clients to the staff working area. Crucially, however, I also found that the prosecution had not proven that the defendant's failures caused the harm wrought by Mr Russell John Tully on 1 September 2014. The relevant hazard,

being the one that was reasonably predictable to the defendant prior to 1 September 2014, was client-initiated violence in the form of manual assault or assault with a weapon other than a firearm.

[3] I now proceed to sentence the defendant. Section 50 of the HSEA provides that an offender is ordinarily liable to a fine not exceeding $250,000. However, the defendant is a Crown organisation for the purposes of the Crown Organisations (Criminal Liability) Act 2002 (COCLA). Section 8(4) of that Act prevents the defendant from being fined.

[4] Although I cannot order that a fine be paid, it has become the practice of this Court to undertake a nominal sentencing exercise to indicate what the defendant would have had to pay if it were liable to a fine.[1] This is so the Court can achieve the purposes of sentencing, which include holding the offender accountable for the harm done to the victim, and promoting the offender's sense of responsibility for harm.[2]

[5] A sentence of reparation would also ordinarily be considered in a prosecution of this type. However, no sentence of reparation has been sought by the prosecutor. I acknowledge that the defendant has already made significant ex gratia payments to the victims who were affected by the 1 September 2014 incident, including the families of the two women who were murdered by Mr Tully.

[6] In addition to assessing the nominal level of fine that I would impose, the defendant has also applied for a discharge without conviction. In order to discharge the defendant without conviction, I must be satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[3] The prosecutor opposed the application for a discharge without conviction, and submitted that the defendant's conduct falls within the middle of the upper band

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[1] See for example *Department of Labour v Public Trust* DC Gisborne CRI-2007-016-3496, 4 June 2008; *Ministry of Business, Innovation and Employment v NZ Defence Force* DC Auckland CRN13067500014, 2 August 2013; *WorkSafe New Zealand v Waikato Institute of Technology* DC Hamilton CRI-2014-019-005332, 10 November 2014; *WorkSafe New Zealand v Waiariki Institute of Technology* [2015] NZDC 13775; *WorkSafe New Zealand v KiwiRail Holdings Ltd* [2015] NZDC 18904; *WorkSafe New Zealand v KiwiRail Holdings Ltd* [2015] NZDC 24979.

[2] Sentencing Act ss 7(b) and (f).

[3] Sentencing Act ss 106–107.

as set out in *Department of Labour v Hanham and Philp Contractors Ltd* (*Hanham v Philp*).[4]

[7] For the reasons that follow, I assess the defendant's culpability to be at the lower end of the lower *Hanham and Philp* band. Had a fine been available, I would have awarded a fine of $16,000. I decline the defendant's application for a discharge without conviction.

Background

[8] The defendant pleaded guilty to an offence of failing to take all practicable steps to ensure the safety of its employees, under the HSEA ss 6 an 50. The defendant acknowledged that it breached the HSEA by:

(a) failing to ensure that employees and contractors were adequately trained to respond to an emergency response incident;

(b) failing to adopt and effectively embed a "zero tolerance policy" well prior to the incident by:

(i) publishing a "zero tolerance policy";

(ii) embedding a "zero tolerance policy" in systems, standards and procedures and, in turn, in its staff; and

(iii) strategising to create a positive security culture and implementing those strategies;

(c) failing to implement a client risk profiling process;

(d) failing to implement a client management plan tailored to the risk of assessment of that client; and

[4] *Department of Labour v Hanham and Philp Contractors Ltd* HC Christchurch Cri-2008-409-2, 18 December 2008.

(e) failing to implement effective incident investigation and incident data analysis, including by:

(i) analysing the incident basis of security incidents on an annual basis and transferring the learnings to the defendant;

(ii) setting key performance indicators with respect to security incidents and reviewing these monthly/quarterly;

(iii) engaging periodically with selected frontline staff from selected locations to evaluate the effectiveness of security/related systems;

(iv) instituting a comprehensive investigation process and analysis model applied to critical security/related incidents;

(v) developing a security management plan or equivalent document at the highest level of the defendant with clearly stated context, purpose, defined accountabilities, plan owner, internal review and external audit timeframes etc; and

(vi) completing a security audit using established risk management models and standards to aid in the establishment of the security management plan.

[9] WorkSafe accused the defendant of failing to take one further practicable step, namely that it failed to ensure that there was no physically unrestricted access by clients to the staff working area. This practicable step was referred to as "practicable step A". The defendant denied that it had failed to take this practicable step. Accordingly, the step was the subject of a disputed facts hearing.

[10] At the conclusion of that hearing, I found that the defendant was required to, and had failed to, implement practicable step A. Specifically, I found that:[5]

[5] *WorkSafe v Ministry of Social Development* [2016] NZDC 12806 at [7].

(a) there existed a reasonably predictable hazard of client-initiated violence involving manual assaults and assaults involving weapons (other than firearms) on WINZ employees;

(b) the implementation of a physical barrier to delay violent clients was a reasonably practicable step open to the defendant prior to 1 September 2014; and

(c) an appropriate physical barrier would have been a secured desk at the point of interaction between a client and a case manager, which would delay a client attempting to reach around or over the desk. The delay would allow an employee to utilise a rapid route of egress to a safe zone.

[11] The prosecution has not sought at any stage of proceedings to rank the defendant's culpability in failing to take each of the practicable steps. I consider that is the correct position for them to have adopted.

[12] I note that this prosecution arose following the events of 1 September 2014. Mr Russell John Tully, wearing a balaclava and armed with loaded shotgun, entered the Ashburton office. Moving swiftly and deliberately, he shot at four employees, killing two of them. Mr Tully was subsequently found guilty of murder and sentenced by the High Court to a term of imprisonment.[6]

[13] Although WorkSafe's prosecution was instigated by that event, I want to make it very clear that I made no finding of causation between the defendant's failures and the harm caused by Mr Tully. In my decision of 9 September 2016, I found that:

(a) it was not reasonably predictable for the defendant to know at the relevant time that a lone mission-oriented gunman, such as Mr Tully, would attack and Ashburton staff; and

[6] *R v Tully* [2016] NZHC 1133.

(b) the prosecution had not proven that there was a reasonably practicable step open to the defendant which would have prevented the harm caused by Mr Tully.

Purposes and principles

[14] Before I set the appropriate starting point for sentencing in this case, I first must consider the purposes and principles of sentencing appropriate to this case. These purposes and principles will inform my sentencing approach throughout.

[15] As in many health and safety cases, I consider that deterrence, denunciation and accountability are the most important principles to consider.[7] These are particularly important purposes in the present circumstances, where no financial penalty can be imposed on the defendant. The victim impact statements received in this case demonstrate that the defendant must be accountable to those who have experienced harm, who in this case are its employees (Sentencing Act 2002 s 7(b)). I also consider that it is important to deter the defendant from similar conduct in the future (Sentencing Act 2002 s 7(f)). General deterrence is also an important consideration, given the interactions of the public with a number of institutions such as the defendant.

[16] Additionally, an important purpose of sentencing in this case is to promote in the offender a sense of responsibility for, and acknowledgement of, the harm it caused, both potential and realised (Sentencing Act 2002 s 7(b)).

[17] In sentencing the defendant, I have regard to the principles set out at s 8 of the Sentencing Act 2002. In particular, I take into account the degree of culpability of the defendant, which in health and safety cases is governed by varying bands of offending. I also take into account the effects of the offending on the victims, which has been presented to the court in the form of victim impact statements (Sentencing Act 2002 s 8(f)). I am careful, however, to only consider those statements insofar as

[7] *Department of Labour v Hanham and Philp Contractors Ltd* HC Christchurch CRI-2007-409-2, 18 December 2008 at [40].

they relate to the defendant's offending, and not the harm caused by Mr Tully. That harm was not caused by the defendant.

[18] I have also considered the seriousness of the type of offence in comparison with other offences, and the general desirability of consistency in sentencing levels.

Starting point

[19] Sentencing in health and safety cases is governed by the principles set out by a full High Court in the case of *Hanham and Philp*. *Hanham and Philp* requires the Court to undertake a three-stage process: assessing the amount of reparation; fixing the amount of fine; and making an overall assessment of the proportionality and appropriateness of the penalty.[8]

[20] No sentence of reparation is sought in the present case. I therefore proceed to fixing the amount of the nominal fine that would have been imposed in this case, were it not for the provisions of COCLA.

[21] In *Hanham v Philp*, the High Court set out three bands of culpability:[9]

(a) low culpability, which requires a fine of no more than $50,000;

(b) medium culpability, which requires a fine of between $50,000 and $100,000; and

(c) high culpability, which requires a fine of between $100,000 and $175,000.

[22] Fine levels higher than $175,000 will be imposed only in cases of extremely high culpability.

[23] In *Hanham v Philp*, the Court identified six factors which are relevant to the assessment of culpability:[10]

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[8] At [80]. See also the recent endorsement of this approach in *R v Bishop* [2016] NZHC 494 at [11].
[9] At [54]–[55], [80].

(a) Identification of the operative acts or omissions at issue;

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

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

(d) The obviousness of the hazard;

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

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

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

[24] Many of these issues were traversed in the defendant's guilty plea and the subsequent disputed facts hearing. The operative acts or omissions at issue have been identified and set out in the six practicable steps set out at [8]–[10] above.

[25] As noted in my earlier decision, the potential harm was serious physical injury or death, through manual assault or assault with a weapon (other than a firearm). Although I accept the defendant's submission that the overall likelihood of such an event occurring was low, it was more than negligible.[11] It was identifiable in international trends in similar organisations, and most significantly, in the defendant's incident reporting database. That database recorded a significant number of security events nationwide, including a number of events at the Ashburton office.[12] It is likely that the frequency of those events was underreported, and the defendant's CEO has accepted that more could have been done in response to those

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[10] At [54].
[11] *WorkSafe v Ministry of Social Development,* above n 5, at [94].
[12] [73]–[78].

incidents. However, the possibility of a lone mission-oriented gunman, which would obviously create an even more serious degree of harm, was not a reasonably predictable risk.

[26] Accordingly, I do not consider the Ashburton office murders to be part of the "realised risk" for the purposes of the defendant's culpability. The risk of client-initiated violence was realised, however, in the form of emotional distress to Ashburton office employees which was operating at the relevant time. These harms were set out in the victim impact statements provided to the court. The victim impact statements record the emotional distress experienced by staff. For present purposes, I place particular weight on the victim impact statements which reflect the experiences of staff in the Ashburton office prior to 1 September 2014. They paint a picture of staff who felt distressed and under-supported when confronted by violent clients. Staff experienced feelings of anxiety and that they were expected to simply "put up" with abusive behaviour. One employee felt that there was "no facility or willingness by MSD to deal with intimidating clients". This reflects the defendant's failure to engage with frontline staff, part of the fifth practicable step which the defendant acknowledged it failed to take.

[27] Staff felt anxious, apprehensive, intimated, scared, tense, nervous uncomfortable, or exposed and exhausted by the lack of physical protection and responsiveness of the defendant. In short, they felt vulnerable. The victim impact statements demonstrate that staff had at times been cornered and threatened, and did not feel that clients were adequately dealt with even when they had caused physical damage to the building. Although the full risk of physical harm was not realised prior to the 1 September 2011 incident, it is clear that a moderate degree of emotional harm was caused by the defendant's failure to take the identified practicable steps. As per s 51A(2)(c) of the HSEA, I consider that this is the appropriate degree of harm to consider when weighing the defendant's culpability.

[28] The next factor identified by the High Court in *Hanham and Philp* is the degree of departure from standards prevailing in the relevant industry. I note that, as the defendant points out, at the relevant time there were no codified industry standards for government services. However, in relation to separation between staff

and clients, it is clear that some government organisations — such as ACC and CYF — utilised physical barriers to improve staff safety. I accept that these organisations, particularly by virtue of their lower volume of client interactions, are not perfectly analogous to the defendant. However, it is clear from the report commissioned by the defendant prior to 1 September 2014 — the "Ruffell Report" — that the defendant's security systems were weaker than comparable government agencies, although some improvements were made after the Ruffell Report.

[29] Overall, I consider that the defendant's systems were weaker than those of other service-oriented New Zealand government agencies with a similar client base, but were not a major departure from industry standards. In particular, they were comparable to the systems in place at the defendant's Australian counterpart. This does not obviate the defendant's culpability, but for the purposes of sentencing, the prevailing industry standards do not bear much impact on the culpability starting point.

[30] The next factor I must consider is the obviousness of the hazard. I have already found that client-initiated violence was a reasonably predictable hazard. The defendant had experienced violent incidents from as early as 2008. The defendant's own data, even with its likely underreporting, recorded numerous instances of clients threatening to bring and use weapons, actually bringing weapons onto sites, and prior instances where weapons had actually been used. There had been sustained instances of clients acting aggressively. The defendant's own data reporting system recorded 31 moderate and serious incidents at the Ashburton office between 2008 2014.[13] All this was in line with international trends. The possibility of a fatal attack involving staff was known to the defendant: there was known precedent in the form of a 1999 stabbing at an ACC office. Indeed, the defendant CEO properly acknowledged that aggression and violent incidents were inevitable for an organisation such as the defendant.[14] These incidents are detailed in my earlier decision, and the aggressive behaviours at the Ashburton office are reflected in the victim impact statements. Although I accept that some of the recorded incidents in

[13] It is likely that these figures were underreported. I note, however, that one of these incidents may in fact have been misreported and in fact have occurred in Timaru.
[14] At [69].

the Ashburton office may be referred to the CYF rather than the WINZ division of the office, I consider that the hazard was, overall, reasonably obvious.

[31] The *Hanham and Philp* factors, and indeed the HSEA itself at s 2A, require me to consider the "current state of knowledge", being the knowledge available to the defendant at the material time. I must not approach the question with the benefit of hindsight.

[32] I find that the reasons set out at paragraph [93] of the disputed facts judgment establish that the risk of harm could be established on the basic of current knowledge. The hazard was reasonably obvious. It was raised with the defendant in the Ruffell Report prior to 1 September 2014 as a "likely threat". There had been numerous incidents of clients threatening to bring and use weapons, actually bringing weapons onto sites and prior instances where weapons had been used. Ashburton office employees had experienced a number of threats of violence and incidents involving aggressive behaviour, suggesting that they were at the same underlying risk as the remainder of the country. Each of these facts was objectively available to, and indeed subjectively known by, the defendant at the material time. Although physical separation of clients and staff may not have been a universal practice at the time, other systems such as zero tolerance policies and client risk profiling systems were utilised by similar organisations.

[33] Finally, I consider the availability, cost and effectiveness of the means necessary to avoid the hazard, as well as the state of knowledge available to avoid the hazard or mitigate the risk. As I have already found, an appropriate physical barrier, being a secured desk at the point of interaction between a client and a case manager, was an available, affordable and effective means of addressing the hazard.[15] This means of addressing the hazard was in use at some comparable government organisations, and was therefore within the current state of knowledge. I acknowledge that the cost would have been significant, but it was not disproportionate to the risk. The defendant has also acknowledged that the other five practicable steps would have had some impact in addressing the hazard of client-initiated violence.

[15] At [7](c).

Starting point: conclusion

[34] The prosecution suggested a starting point of a fine of between $90,000 and $100,000. The prosecution analogised this case to a number of decisions where no harm was caused, but the risk and potential for harm was significant. Those cases demonstrate that the upper two bands of culpability may be applied even where no harm results from the offending.[16]

[35] I do not accept that the cases cited by the prosecution are the most appropriate analogy to the present case. Those cases generally involved either a defendant totally ignoring a warning,[17] dishonesty,[18] or departure from well-established industry standards.[19] Here, the failure to take the practicable steps can best be described as systemic rather than wilful. I accordingly adopt a lower starting point than those identified in the prosecution cases.

[36] Taking all six of the *Hanham and Philp* factors together, I consider the defendant's culpability to be low. The defendant's failure to carry out the practicable steps resulted in moderate harm, in the form of emotional distress for employees. I accept that although the defendant should have been aware of the hazard of client-initiated violence, it was challenging for the defendant to identify the appropriate means of addressing that hazard, and there were no codes of industry standards that the defendant could rely on. I accept the defendant's submission that it was a large, complex employer facing unique challenges.

[37] The *Hanham and Philp* approach requires me to arrive at a starting point that is overall proportionate and appropriate to the offending. In this respect I emphasise, as I noted in my earlier decision, that the defendant had commissioned a security report and had begun to implement improvements prior to 1 September 2014. Although the pace of change was slow, it is clear that progress was being made.[20]

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[16] See for example *Jones v WorkSafe New Zealand* [2015] NZHC 781 at [38].
[17] *WorkSafe New Zealand v Page* DC Auckland CRI-2014-004-004462, 12 December 2014; *Jones*, above n 17; *WorkSafe v Lyttelton Port Co Ltd* [2016] NZDC 15032.
[18] *Page*, above n 18.
[19] *WorkSafe New Zealand v Bryant* [2015] NZDC 10021; *WorkSafe New Zealand v Vanu* [2016] NZDC 6049.
[20] *Ministry of Social Development,* above n 5, at [18].

The defendant has cited the presence of some security guards and the remote client unit procedures as examples of this.[21]

[38] Although the risk was obvious and the potential harm serious, I am satisfied that the *Hanham and Philp* factors, together with a consideration of case law and the overall proportionality of the case, invite a starting point in the lower culpability band. I agree with the prosecution submission that this case is somewhat unique, and that precedents are therefore of limited value. I adopt a starting point of $40,000.

Aggravating and mitigating factors

[39] Neither the prosecution nor the defence has suggested that any aggravating factors are appropriate. I agree.

[40] The defendant has invited me to consider four mitigating factors, namely:

(a) the progress that was being made in health and safety matters prior to 1 September 2014;

(b) the remorse and attempts to make amends since 1 September 2014 (Sentencing Act 2002 s 9(2)(f), HSEA s 51A(2)(e)(ii));

(c) steps taken to prevent the harm occurring in the future (HSEA s 51A(2)(e)(iv)); and

(d) the entry of a guilty plea (Sentencing Act 2002 s 9(2)(b), HSEA s 51(2)(e)(i)).

[41] I do not place much weight on the first of these factors because I have already considered it as part of the overall proportionality in setting the starting point. Indeed, I found that the defendant's slow but nonetheless evident attempts to address the risks of client initiated violence prior to 1 September 2014 to be a key reason for

[21] The remote client unit was a procedure instigated when a client caused particular concern. The client would be dealt with remotely and only an agent appointed by the client would be permitted to enter the defendant's premises.

adopting a low band of culpability. Accordingly, I do not give this factor double weight by considering it also as a mitigating factor.

The remorse and attempts to make amends since 1 September 2014

[42] The defendant has made significant ex gratia payments to Mr Tully's victims. They have offered support and counselling services to other employees at the Ashburton office. The defendant has acknowledged that more could and should have been done to protect employees before 1 September 2014.

[43] The prosecutor has suggested that the defendant did not express proper remorse because it released a press release describing its guilty plea as merely a "pragmatic step". The prosecutor implies that this suggests that the defendant has not accepted responsibility for its actions and should not be entitled to a discount for remorse. However, on closer examination of the press release I find that it does not undercut the overall tenor of the defendant's remorse. The press release does indeed state that "Russell Tully was solely responsible for the murders", and I made no finding which would contradict that statement. The press release also recognises that the practicable steps identified by WorkSafe are valid and should be implemented, and that the defendant has "absorbed the painful lessons of Ashburton".

[44] I consider that, in a "robust evaluation of all the circumstances", the defendant has expressed genuine remorse.[22] As such, I find that the defendant is entitled to a sentencing discount of 20% for offers to make amends, reparation and remorse. This accords with the discount given for these mitigating factors by the High Court in *Ballard v Department of Labour*.[23]

Steps taken to prevent the harm from occurring again

[45] The defendant has taken a number of steps to address the hazard of client-initiated violence. Shortly after 1 September 2014, the defendant commissioned an independent report to identify shortcomings in its security arrangements. I am satisfied that the report, authored by Murray Jack and Rob Robinson, was genuinely

[22] *Hessell v R* [2010] NZSC 135 at [64].
[23] *Ballard v Department of Labour* HC Hamilton CRI-2010-419-25, 31 March 2010 at [42].

independent. The defendant has increased security at its sites, including the use of multiple security guards. It has implemented many of the practicable steps, including the zero-tolerance policy. It has formed an in-house security project team which I understand is reviewing the earlier decision in these proceedings. And it is trialling a prototype layout at two of its offices, which essentially meets the requirements of a physical barrier between clients and employees.

[46] I consider that the steps taken by the defendant since 1 September 2014 are meaningful. The victim is entitled to a 10% discount.[24]

Guilty plea

[47] The defendant pleaded guilty to the charge and is accordingly entitled to credit.

[48] The prosecution submits that the discount should be reduced because the defendant sought a disputed facts hearing. The prosecution has cited the case of *Wang v R*, in which the Court of Appeal found that where a disputed facts hearing is required, "the guilty pleas do not carry with them the same entitlement in terms of reduction in public expenditure and demand on state resources".[25] The Court found that this "may reduce the credit otherwise due to the defendant".

[49] In the present circumstances, I do not believe that the rationale of *Wang* applies. The defendant pleaded guilty at a relatively early stage, particularly given that the prosecution took some time to formulate the alleged practicable steps. In this respect, the defendant faced obstacles that are not usually encountered in regulatory prosecutions. The plea was essentially entered at the earliest available opportunity. The defendant did not seek a disputed facts hearing in relation to five of the six steps, thus ensuring considerable public savings. Furthermore, the disputed facts hearing was clearly on a difficult and contested point. Not all of the alleged prosecution facts were accepted, such as the predictability of a gunman, and the

[24] At [42].
[25] *Wang v R* [2016] NZCA 56 at [24].

causal link between the defendant's offending and the harm wrought by Mr Tully. The defendant was plainly justified in disputing some of the facts.

[50] Although it may be unusual in a case where a disputed facts hearing takes place, I consider that the defendant is consequently entitled to a guilty plea discount at the higher end of the *Hessell* range.[26] I settle on a figure of 20%, acknowledging that the guilty plea was made at an early stage, and although the defendant did not plead guilty to all proven aspects of the charge, the disputed facts hearing was in many respects justified.

Mitigating factors: conclusion

[51] Although it was not submitted by counsel, I note that the defendant has co-operated with the WorkSafe investigation. In line with s 51A(2)(iii) of the HSEA, I find that the defendant is entitled to a 5% discount. I also add a further 5% for the defendant's unblemished health and safety record, having not been subject to any previous health and safety prosecution.

[52] I thus apply a 60% discount, bringing the total nominal fine to $16,000.

Discharge without conviction

[53] The defendant has applied for a discharge without conviction. Section 107 of the Sentencing Act 2002 requires that I only allow the application if I am "satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence". Before reaching a decision on the discharge application, I must:[27]

(a) Identify the gravity of the offending;

(b) Identify the direct and indirect consequences of a conviction; and then

[26] *Hessell*, above n 23.
[27] *Z v R* [2012] NZCA 599.

(c) Consider whether those consequences are out of all proportion to the gravity of the offence.

Gravity of the offending

[54] For the reasons set out above, I accept that the gravity of the offending sits in the lower of the culpability bands. Furthermore, the defendant submits that its health and safety failures would have been unlikely to come to WorkSafe's attention if not for the actions of Mr Tully, which I have already found that the defendant cannot be held causatively responsible for. I accept that submission.

[55] The defendant also argues that the gravity of the offending is reduced by the fact that the prosecution took some time to appropriately formulate the first practicable step, and that it was not completely formulated by the time of the disputed facts hearing. I do not consider this relevant to the gravity of the offending. The focus of the gravity of the offending must be the defendant's actions or omissions themselves, not the formulation of the charge. I have already found that the defendant failed to do what was required by the Act in relation to physical barriers between staff and clients.

[56] In any event, the defendant has not challenged the formulation of the other five practicable steps, and indeed pleaded guilty to those. Even if I were to leave aside the disputed practicable step, the remaining five practicable steps still constitute a breach of the HSEA which, although I have found to fall in the low culpability band. Even when the mitigating factors are taken into account, I consider that the culpability of the offending requires the defendant to be appropriately held to account.

Direct and indirect consequences of conviction

[57] The defendant has argued that the direct and indirect consequences of conviction would be severe. I consider the defendant's submissions to be primarily addressed to the "indirect" nature of the conviction. The defendant, which is not a natural person, will not suffer the usual direct consequences of a conviction (such as

restrictions on employment or travel). Instead, the defendant's concerns are primarily reputational.

[58] The defendant is concerned that a conviction would convey the impression that the defendant's failure to take all practicable steps contributed to the harm caused by Mr Tully. The defendant's concerns are understandable. It is clear that some of the media attention focussed on this case has, thus far, conveyed that impression. The defendant is further concerned that documents such as the victim impact statements and summary of facts have a tendency to suggest causation, even if they do not express this outright.

[59] I accept the defendant's concerns. However, I am not satisfied that a discharge without conviction will address them. Misreporting has been a risk of these proceedings since they commenced, including coverage of the guilty pleas. A judgment, however, must speak for itself. I have endeavoured to emphasise throughout this decision — and I do so again — that the prosecution has not proven that there was anything the defendant could have done to mitigate against as extreme an event as Mr Tully's attack. I am not sure that a discharge without conviction would correct misreporting any more than a clear statement from the Court. It would not prevent the defendant's concerns that the summary of facts or victim impact statements could be quoted out of context. The misreporting would not, in reality, be the consequence of a conviction any more than it would be a consequence of any other aspect of this proceeding thus far.

Proportionality

[60] The defendant has breached the HSEA by failing to take six practicable steps to ensure the safety of its employees. The gravity of the offending extends to systematic failures and the failure to implement physical barriers for the safety of its staff. The defendant faced a reasonably predictable risk and failed to implement adequate controls to address that risk. Although I have assessed the defendant's culpability to fall in the lower band, and the offending has many mitigating factors, this does not mask the fact that the offending is nonetheless significant and the defendant should be held to account.

[61] I am not convinced that a conviction would carry any inherent consequences over and above the consequences of the proceeding thus far. I therefore do not consider that the consequences of a conviction, in and of itself, would be out of proportion to the offence. I therefore dismiss the application for a discharge without conviction.

[62] I am, however, prepared to find a more appropriate way for the defendant's concerns to be addressed. I direct that the prosecutor works together with the defendant to update the summary of facts. A new summary of facts should be filed with the registry. The new summary of facts should revise any sections of the existing summary which suggest a causal link between the defendant's failures, and the harm caused by Mr Tully on 1 September 2014.

Conclusion

[63] The defendant is convicted.

[64] The prosecutor has not sought an order for reparation, and the defendant has made significant ex gratia payments. I do not award any sentence of reparation.

[65] Because the defendant is a Crown organisation, no fine may be imposed. However, if a fine were available, I would have imposed a fine of $16,000, recognising the lower band of culpability and incorporating significant discounts for mitigating factors.

[66] The defendant's application for a discharge without conviction is dismissed. However, I direct that a new agreed summary of facts be filed with the court for my consideration, and if in order I direct the previous iteration be removed from the court record.

Jan-Marie Doogue
Chief District Court Judge