

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2020-070-000567
[2021] NZDC 11060**

MARITIME NEW ZEALAND
Prosecutor

v

GENERA LIMITED
Defendant

Hearing: 10 June 2021
Appearances: C Paterson for the Prosecutor
T Reweti for the Defendant
Decision: 18 June 2021

NOTES OF JUDGE I D R CAMERON ON SENTENCING

[1] Genera Limited has pleaded guilty to one amended charge of breaching its duty to ensure the health and safety of its workers, such that the failure exposed an individual to a risk of death or serious injury. The obligation is imposed under ss 36(1), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015. The maximum fine is \$1.5 million. The prosecutor which laid the charge is Maritime New Zealand.

[2] The facts are contained in a detailed and agreed Summary of Facts. In short, one of Genera Limited's employees, Mr Karl Brown, fell from a log stack on a ship en route from New Zealand to China. He fell approximately two metres onto a deck of the ship and sustained serious injuries.

[3] Genera Limited had employed Mr Brown as an in-transit fumigation technician. On this occasion he was responsible for checking phosphine gas levels on log stacks aboard the vessel *M.V Bunun Justice*. The ship was loaded with logs and on 20 January 2019 set sail for China from the port of Tauranga, New Zealand. This was Mr Brown's first voyage as a fumigation technician. Mr Brown was the only employee of Genera Limited on the vessel, and attended to his tasks from 20 January 2019 to the date of the accident on 27 January 2019. As described, on that day, while carrying out his duties on a log stack, Mr Brown slipped on logs and fell some two metres onto a deck. He suffered serious injuries as follows:

- (a) A fractured left femur (near the hip) which required surgery.
- (b) A dislocated left knee – surgery was required to drain excess fluid.
- (c) Cuts and bruises to his face, including his mouth, eyebrow and nose.
- (d) Damage to his front teeth.
- (e) Damage to his left shoulder.
- (f) A dislocated right index finger.

[4] Mr Brown was unable to move because of his injuries, and because he did not have a buddy or a radio with him he was unable to contact anyone on board the ship. It was some nine hours after the accident, at approximately 6.20 pm, after Mr Brown had failed to attend breakfast, lunch or dinner, that the master of the ship realised he was missing, and a search by crew members located Mr Brown at approximately 6.45 pm that day.

[5] Mr Brown told the crew that he was in a great deal of pain and could not be moved but the crew who did not speak English did not understand him. The crew put his leg into a splint, put him on a stretcher and took him to the first aid room. No crew member on board was able to administer first aid and there was no pain relief on board for Mr Brown to take.

[6] Genera Limited were advised of the accident at 10 pm on 27 January 2019, and they arranged for Mr Brown to be treated at the nearest port which was Madang, Papua New Guinea. It took three days to reach that port, during which time Mr Brown received no first aid treatment or pain medication. He had to toilet on the floor as he was not given any assistance. While that was an appalling situation, the responsibility for that does not rest with Genera Limited alone. One would have expected others on the vessel to have better cared for Mr Brown's needs over those 3 days.

[7] Mr Brown's condition was assessed on arrival in Papua New Guinea on 30 January 2019, and because of inadequate facilities and weather conditions he remained there until 2 February 2019, when he was flown to a hospital in Brisbane and had surgery on his fractured femur and later surgery on his left knee to remove the excess fluid.

[8] Genera Limited arranged and paid for Mr Brown's medical care when he left the ship, including his initial hospital stay in Papua New Guinea, his private hospital care in Australia, surgeries on his broken femur and left knee, repatriation flights to New Zealand, travel to his home in a special vehicle and other associated costs. Those costs amounted to \$132,123.

[9] Subsequently, Mr Brown was offered a full-time position with Genera Limited working at the port of Tauranga in September 2020, but he declined that as he stated he did not wish to work at the port. The chief executive officer of Genera Limited visited Mr Brown on 3 September 2021 and provided him with an apology from the company and offered reparation in the sum of \$55,000. Mr Brown declined that offer stating that he would accept \$80,000.

[10] The Summary of Facts states that Mr Brown is still receiving rehabilitation for his injuries, and has also suffered depression and has recurring visions of the accident. He has worked in a limited capacity since the accident, but has had to resign from various jobs because of recurring pain related to his injuries. I have read an updated victim impact statement from Mr Brown elaborating on these matters.

[11] In *Stumpmaster v WorkSafe New Zealand* the High Court identified a four-step process of assessing the amount of reparation, fixing a fine by reference to guideline bands, determining whether any further orders are to be made, and then making an overall assessment of the proportionality and appropriateness of the combined sanctions.¹

[12] I have had the benefit of detailed submissions from both Maritime New Zealand and Genera Limited. Having considered those submissions and the authorities referred to, and in accordance with my sentence indication, I fix the sum of \$60,000 for reparation.

[13] In terms of fixing a fine, Genera Limited accepted that the hazard of falling from logs stacks was obvious. To this end it had provided some training to Mr Brown, but it did not provide specific working at heights training. What it did do was to implement the use of spikes on shoes to reduce the risk of slipping while walking on or down log stacks. Mr Brown during his subsequent interview with Maritime New Zealand accepted that as part of the job “you have to wear your spikes”. Unfortunately, Mr Brown made the decision not to wear his spiked shoes when inspecting the logs on 27 January 2019.

[14] He also did not take a “buddy” with him, as he chose to carry out his inspection while all the crew were having breakfast, and nor did he take a radio with him. He acknowledged that his training included taking a buddy with him as well as a radio. The fact that Mr Brown lay on the deck undetected for a period of nine hours was a direct result of his failure to take a buddy with him or a radio.

[15] Despite these poor decisions by Mr Brown, Genera Limited accepts that the training which Mr Brown received in terms of working at heights on log stacks was inadequate. Since the accident Genera Limited has undertaken extensive measures to train its employees about the hazards of working at heights, as well as the implementation of controls to address those risks. These safety measures include fall arrest equipment that includes a safety harness, a double lanyard and climbing helmet. Also included is the provision of adequate first aid kits.

¹ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

[16] I have considered the various authorities referred to by Maritime New Zealand and Genera Limited in terms of fixing a starting point for the fine. Maritime New Zealand places much emphasis on the District Court case of *WorkSafe New Zealand v Dimac Contractors Ltd*.² However, in that case the fact situation was entirely different and the Judge made a finding that there was no reason why the defendant company could not have ensured that the power lines were disconnected, thereby eliminating the risk of harm. That is quite different to the current fact situation.

[17] By contrast, I accept that the authorities of *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd*³ and *WorkSafe New Zealand v Rangiora Carpets Ltd*⁴ are similar to the current case in terms of their facts. Both related to falls by workers from a similar height and resulted in serious injuries. Also, in those cases the omission was a failure to identify the risk of a fall and to put measures in place to prevent that risk from occurring. In both cases a starting point of a \$300,000 fine was adopted.

[18] In the current case the control measure instigated by Genera Limited was the compulsory wearing of spikes, which measure was effective during the preceding 18 years where approximately 6,000 voyages had been undertaken with no falls from log stacks by any of its employees.

[19] However, there needs to be recognition of the fact that there was no formal requirement imposed by Genera Limited to ensure that its employee would always be accompanied by a crew member when conducting fumigation services and the provision of a radio by Genera Limited so as to communicate with onboard crew. The informality surrounding those safeguards clearly contributed to the decision of Mr Brown to carry out the inspection alone and without a radio.

[20] There were also deficiencies in standard operating procedures of Genera Limited in failing to provide an effective means of communication with its

² *WorkSafe New Zealand v Dimac Contractors Ltd* [2017] NZDC 26648.

³ *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd* [2017] NZDC 28091.

⁴ *WorkSafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587, [2018] DCR 276.

employees. Also, the failure to provide a fully provisioned first aid kit clearly exacerbated the pain and suffering to Mr Brown over the three days it took from the date of the accident to the arrival at Papua New Guinea. This case therefore aligns with the *Lindsay Whyte Painters* and *Rangiora Carpets* cases, but those aggravating features warrant an uplift from the \$300,000.

[21] I consider that the current case falls within the medium culpability range identified by *Stumpmaster*, namely starting points from \$250,000 to \$600,000. I assess the starting point for a fine in this case at \$350,000.

[22] Turning to discounts, in this case there has been genuine remorse expressed by Genera Limited. This attracts a discount of 5 per cent. A 25 per cent discount for a guilty plea is appropriate. Accordingly, the overall discount from the starting point of \$350,000 is 30 per cent, reducing the level to \$245,000.

[23] In terms of costs, I consider it appropriate that 50 per cent of the legal costs incurred by Maritime New Zealand be paid to it. That 50 per cent figure amounts to \$25,135.75.

[24] Finally, consequential losses by way of reparation are agreed in the sum of \$6,089.96.

[25] In conclusion, the Court has amended the charge by amending the particulars in accordance with the application. Genera Limited having pleaded guilty by notice to the amended charge. I now enter a conviction against Genera Limited and make the following orders:

- (a) Reparation to Mr Karl Brown in the sum of \$60,000 for emotional harm.
- (b) A fine of \$245,000.
- (c) Consequential losses in the sum of \$6,089.96.

(d) Maritime New Zealand to be paid costs in the sum of \$25,135.75.

IDR Cameron

I D R Cameron
District Court Judge