EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2015-009-004205
[2016] NZDC 16603

NEW ZEALAND POLICE
Prosecutor

v

FREIGHTLINES LIMITED
AARON LEE POUREWA
Defendant

Hearing:	16 August 2016
Appearances:	H McKenzie for the Prosecutor S Khan and R White for the Defendant Freightlines Limited R J Ardagh on behalf of S Chatwin for the Defendant Pourewa
Judgment:	16 August 2016

NOTES OF JUDGE T J GILBERT ON SENTENCING

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[1] Freight Lines Limited and Aaron Pourewa are for sentence having each pleaded guilty to a breach of the Health and Safety in Employment Act 1992. FLL, which is what I will call Freightlines, is charged under s 6 and 50(1)(a) and Mr Pouwera is charged under sections 19(b) and 50(1)(a) of the Act. The maximum penalty in respect of each defendant is a fine not exceeding $250,000.

Procedural Background

[2] This matter has had a prolonged history. The charges were originally laid on 4 May 2015 with a first appearance date of 18 June 2015. Not guilty pleas were entered on 15 July 2015 and the matter was set down for a case review hearing. On 2 October 2015, Freightlines entered a guilty plea and Mr Pouwera sought a sentence

indication. Initially it was proposed that the sentence indication would occur simultaneous with the sentencing of FLL on 25 November 2015.

[3] In the lead up to that date, it became apparent that there were two issues requiring resolution. The first was a jurisdictional issue regarding the ability of the Court to award reparation, and the second was a dispute relating to facts, and in particular the practicable steps FLL ought to have taken to avoid the accident which is the subject of this prosecution.

[4] After various teleconferences and adjournments, a hearing on those two issues was scheduled for 21 June 2016. On 15 June 2016, Mr Pouwera filed a notice under s 37(4) Criminal Procedure Act 2011 to the effect that he pleaded guilty. A summary of facts in relation to him had also been agreed. That obviously dispensed with the need for his sentence indication.

[5] I was allocated the matter for the 21 June hearing. In advance of that, submissions had been filed on the reparation issue and on sentencing. There was also correspondence with the Court about which practicable steps were disputed. I will address the issue of reparation below.

[6] In terms of disputed practicable steps, upon a close reading of the submissions, and following discussion with counsel on 21 June, it became clear that there was in fact very little in dispute. To the extent that there remained matters in dispute, they were minor and, in my view, not material to sentence. Accordingly, no evidence was called and a summary of facts was agreed which has subsequently been filed.

[7] At the end of that hearing, the matter was timetabled for sentencing today and to enable restorative justice processes to occur. Mr Breach, the victim, however subsequently advised that he did not wish to engage in restorative justice.

[8] That brings us to today.

Facts

[9] Two long summaries of facts were prepared in relation to this matter. In large measure they are the same in terms of background. Where they differ is in relation to each defendant's specific role, and the asserted breach or breaches of the Act.

[10] FLL is a large transport and freight company. It operates approximately 220 vehicles under its banner, some of which appear to be subcontracted. It employs in excess of 200 staff about 20 of whom are involved in dispatching in what is a 24/7 operation. Mr Pouwera, at the material time, was one of its dispatchers.

[11] The victim in this matter is John Breach. On 10 November 2014, he was a 67 year-old man employed by FLL as a driver of a truck and double trailer unit. In the days prior to 10 November, he had been working significantly in excess of the hours permitted under Land Transport Act 1998 and associated regulations. He had been falsifying his logbook in a number of respects to make it appear as if his work hours were within the permissible limits. The net result of this was that by the time he crashed his truck in the early hours of 10 November 2014, he was badly fatigued.

[12] The crash itself occurred when Mr Breach approached a moderate left-hand bend near the Ashley River bridge. He fell asleep and failed to negotiate the corner. As a result he drove over the centreline and continued off the road into a large tree. He sustained a variety of serious injuries some of which still affect him more than 18 months later. The injuries included, amongst other things, a spinal fracture and a moderate brain injury. Further details were contained in his victim impact statement.

[13] It took three hours for emergency services to extract him from the crumpled cab. He was in the hospital's intensive care unit for two days, the high dependency unit for 10 days, the Burwood spinal unit for 11 weeks, and the Waikato rehabilitation unit for another week before discharging himself earlier than recommended because of his desire to get home. The victim impact statements, which have been read in Court today, make it clear that both he and his long term partner, Ms Griffin, have been badly affected in a variety of ways.

[14] FLL, via its Health and Safety Manager, made a serious harm notification to Worksafe on 17 November 2014, a week after the incident. The following day, Worksafe wrote back to FLL indicating, "Based on the information you have provided we have decided not to investigate".[1] On the face of it, that might seem surprising. However, the level of detail provided by FLL in its notification was, at best, sparse with no hint that there were logbook or fatigue related issues.

[15] This is perhaps not surprising given that three days earlier, on 14 November 2014, the health and safety manager, during a company health and safety meeting at which the incident was discussed, is recorded as saying, "No discussions to anyone is to be entered into in regards to John Breach incident. We have been appointed a lawyer and all questions and answers will go through them, however, please make sure that when/if you are spoken to as part of the investigation process, you assist as necessary. Only give information that is asked, please don't offer information if it is not required. [*sic*]"[2]

[16] Once Worksafe declined to investigate, the police elected to. Various business records including fuel purchase receipts, GPS records, logbook pages, and time and wage records, amongst other things, were obtained using the powers under the Act. Mr Breach's falsification of his logbook became apparent upon analysis.

[17] As recorded in the summaries of facts, Mr Pouwera and FLL both accept that the tasks assigned to Mr Breach in the days leading up to the accident could not realistically be achieved within the legal work time limits.

[18] Without setting out all the details, in the week between 3 and 10 November, Mr Breach had worked approximately 77 hours. On the day preceding the accident he had failed to have the mandatory 10 hour rest – the longest possible rest was 7½ hours. He had also breached the requirement to have a half-hour break after each 5½ hours of continuous work time.

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[1] This material was included in annexure "L" to an affidavit of Barry Raymond filed by FLL for sentencing purposes. Mr Raymond is FLL's CEO.
[2] This is noted at annexure "K" of Mr Raymond's affidavit.

[19] For his part, Mr Breach explained the false entries in his logbook by, in effect, saying that he was following his instructions in terms of undertaking the work that had been assigned to him.

[20] I note specifically that on 8 November, he raised the fact that he was in breach of the work time rules with Mr Pouwera, who was FLL's dispatcher. He was initially told to book a motel so that another driver could take over. However, Mr Pouwera and Mr Breach realised that he would not be able to make the Cook Strait ferry if he stayed at the motel. At that point Mr Breach continued working before going home for a sleep near Putararu. That rest was shorter than the minimum required. He then set off for Christchurch and it was at the tail end of that journey that the accident occurred.

[21] Barry Raymond, the CEO of FLL, was interviewed on 1 May 2015. He said that in large measure the company relied on drivers to monitor their work time and rest breaks. He said he was disappointed by Mr Breach's falsification of his logbook.

[22] However FLL, both in submissions and by virtue of its plea of guilty, recognises that it could and should have done more to protect its workers from the serious and obvious hazard that is driver fatigue. Specifically, and with respect to the practicable steps the prosecution has asserted should have been taken, FLL has accepted:

(a) Its task allocation methods did not safeguard against driver breaches of the legal requirements, and FLL's own policies;[3]

(b) It failed to adequately monitor and assess the work time of Mr Breach in setting him a task with the result that the hazard of fatigue was not sufficiently guarded against;[4]

(c) It could, and should, have had an audit process, at least on a random basis, to check whether its drivers were falsifying logbooks. This was

[3] Para 23 of FLL's submissions.
[4] Para 57 of FLL's submissions.

achievable through the use of GPS data and has now been implemented by the company.[5]

(d) It could have done more to ensure its dispatch staff were aware of their responsibility in relation to drivers' health and wellbeing, and the requirements under the work time and logbook rules. Such training has also now been implemented at the company.[6]

(e) Whilst it is possible to have a nationwide, "real time", system and electronic logbooks whereby dispatchers could check and maintain up to date records of the work hours of its drivers, the possibility of such a system was relatively new as at late 2014 and FLL said that it was in fact one of the industry leaders in beginning to roll out of that system at the time of the accident, something which again it has continued to do at a quite considerable cost since.[7]

[23] There were several other practicable steps the prosecution asserted FLL could have taken. However, following discussions on 21 June, these were not pursued by the prosecution and I disregard them except to note that I accept that FLL does provide training and information on workplace fatigue to its drivers, and does have policies requiring compliance with the relevant work time rules.

[24] None of that, however, changes the fact that it failed to ensure the method by which it allocated tasks to drivers was done in a way which best avoided driver fatigue. Neither does it change the fact that it could have done more in the way of training its dispatchers, and monitoring compliance with the statutory requirements and its own policies. That FLL has accepted.

[25] For his part, in the summary pertaining to him, Mr Pouwera has accepted that he could have utilised GPS technology to ensure Mr Breach's compliance with the law. Similarly he has accepted he could have kept a spreadsheet to maintain a record of work time hours of the drivers under his control. He also accepts he ought to have

[5] Para 58.7-58.8 of FLL's submissions.
[6] Para 58.10 and 58.11 of submissions.
[7] Para 58.1-58.6 of submission.

calculated whether tasks he set were achievable within work time limits, and this, in my view, is of importance in this case. It is also self evident that once Mr Breach reported that he was over the work time limits, Mr Pouwera could have done more to stop him continuing to drive.

Approach to Sentencing

[26] The approach to sentencing under s 50 of the Act is well known and has been helpfully traversed in both parties' submissions. The leading case is *Department of Labour v Hanham and Philp Contractors Limited and others* (2008) 6 NZELR 79 (HC), a decision of a full bench in the High Court.

[27] That case sets out at [80] that the approach to sentencing should include the following steps:

(a) Step one: assessing the amount of reparation

(b) Step two: fixing the amount of the fine

(c) Step three: making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

Step One: Assessing the quantum of reparation

[28] Section 32(1)(b) Sentencing Act 2002 provides that the Court may impose a sentence of reparation if the offender has, "Through or by means of", its offending, caused a person to suffer emotional harm or loss consequential on any physical harm.

[29] A reparation order must be a principle focus and is the first step in the sentencing process. The sentences of reparation and fine serve distinct and discrete purposes. The assessment of reparation must be made taking into account s 32

Sentencing Act 2002 along with any offers of amends made by the offender, and the offender's financial capacity.[8]

[30] In this case, FLL has, appropriately in my view, agreed to pay the entire amount of any reparation ordered. Mr Pouwera is of limited means. In view of this, questions of apportionment of reparation between the defendants do not arise.

[31] The prosecutor has sought, "a substantial amount", of reparation, but has not said in written material how much it thinks appropriate. When pressed in the hearing today Ms McKenzie eluded to the fact that reparation in cases of fatality was often set between $60,000 and $90,000. She accepted that any reparation in this case would need to be less than that but suggested a figure perhaps somewhere around about $50,000. The prosecution also claimed that reparation is payable in respect of the difference between ACC payments made to Mr Breach and the wages he would otherwise have earned. This is termed a, "Top up", payment.

[32] For its part, FLL says it is willing to pay reparation. However, it submits that the Court lacks the jurisdiction to order a, "Top up", to fill the gap left by ACC.

[33] This jurisdictional dispute arises out of an amendment to the Act on 6 December 2014. Prior to that date it is common ground that the, "Top up", payments were unlawful in that they would breach the requirements of s 32(5) Sentencing Act 2002 as it then existed. As a result of the amendment on 6 December 2014, it is also common ground that, "Top up", payments are now lawful. As this incident occurred on 10 November 2014, before the amendment but sentencing is not taking place until 2016 after the amendment the issue arises as to whether the amendment to the Sentencing Act has retrospective effect.

[34] This issue was traversed in *Worksafe* v *Halls Direct Ltd* [2015] NZDC 6343.[9] In that case, Judge Sharp considered s 6 Sentencing Act 2002 which reaffirms the longstanding common law rule that penal enactments, and amendments to those enactments, are not to have retrospective effect to the disadvantage of an offender.

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[8] *Hanham and Philp* at [32] to [35].
[9] *Worksafe v Halls Direct Ltd* [2015] NZDC 6343.

[35] The prosecution argues that reparation is not a "discreet penalty" and therefore the rule against retrospectivity in s 6 does not apply. The prosecution has also cited *Worksafe v Premier Business Farms NZ Limited* DC Manukau CRI 2014 092-11613, 5 February 2015 a decision where Judge Johns ordered a top up. It seems from that decision, however, that the jurisdictional issue was not argued before her.

[36] In my view, in the absence of a clear legislative direction to the contrary (which is absent here), alterations in the law which have the capacity to negatively impact a defendant must not be applied retrospectively. It is difficult to conceptualise this amendment any other way given its capacity to result in an order of reparation against a defendant being significantly increased. Accordingly, I agree with Judge Sharp, and Mr Khan, counsel for FLL, that I lack the jurisdiction to order a "top up".

[37] That leaves the issue of quantum of emotional harm reparation. It is acknowledged by the defendants that Mr Breach has been very significantly affected and that reparation is appropriate FLL suggests in the amount of $15,000 to $20,000.

[38] It is also acknowledged that his partner, Ms Griffin, has been affected. However, in respect of her, FLL argues that she does not fall within the definition of "victim" contained in the Sentencing Act. As such, the Court lacks jurisdiction to compensate for her emotional harm.

[39] It may well be the case that Ms Griffin does not fall within that definition. However, it seems to me that what anguish she feels is shared at least in part by her long-term partner, Mr Breach. Put another way, the fact that she has been emotionally harmed will correspondingly cause hurt to Mr Breach. Accordingly, at least in the circumstances of this case and bearing in mind that emotional harm reparation is always a somewhat subjective assessment I think the distinction FLL seeks to draw makes little practical difference.

[40] FLL also submits that the amount of emotional harm reparation should be reduced on account of Mr Breach's own contribution to this accident. The

prosecutor has drawn my attention to contradictory authority in this respect which was discussed in *Department of Labour v Eziform Roofing Products Ltd* [2013] HZHC 1526. After considering the differing arguments and authorities, Duffy J said at 52.

> Unless employers are influenced by the means of this Act to change the culture of employees who display a cavalier attitude towards safety precautions, the community will continue to bear the cost of the harm that results. It would be wrong, therefore, to permit employers to rely on an injured employee's foolishness or carelessness to mitigate the employer's culpability. It follows that in matters of workplace health and safety, to attach little, if any, weight to a victim's carelessness will not be inconsistent with the requirement in s 9(2)(c) of the Sentencing Act. Indeed, to do otherwise would subvert the policy of the Health and Safety in Employment Act.

[41] That all makes good sense to me and is in line with the approach taken in the leading case, *Hanham and Philp*. Accordingly, I do not accept the fact that Mr Breach undoubtedly had a role to play in the accident, at least in this case, justifies a decrease in either reparation or fine. In making this assessment, I observe that he has paid the highest price of anybody. The fact is that if FLL, and its employee Mr Pouwera, had undertaken the practicable steps open to them, the prospects of this accident would have significantly diminished.

[42] Bearing in mind the emotional harm to Mr Breach (a component of which includes the emotional harm he would have experienced as a result of his partner's anguish) I order emotional harm reparation in the sum of $30,000. That is somewhat higher than payments ordered in the cases cited by FLL, but in my view that is justified given the extent of harm in this case. Every aspect of Mr Breach's life has been impacted over a long period including his financial wellbeing, his physical capabilities, and the relationship he has with others including Ms Griffin.

Step Two: Assessing the quantum of the fine

[43] The assessment of a starting point for the fine involves an assessment of culpability within the following scale:[10]

(a) Low culpability: fine of up to $50,000

[10] *Hanham and Philp* at [57].

(b) Medium culpability: fine between $50,000 and $100,000

(c) High culpability: fine between $100,000 and $175,000

(d) Extremely high culpability a fine greater than $175,000+

[44] It is clear from the wide bands referred to above that assessments of culpability are not an exact science. The Court must use its best endeavours based on the material presented to assess the appropriate level of culpability for each defendant. The difficulties inherent in this are compounded here by the fact that the parties agree there are no prior cases which are factually analogous to this one.

[45] Factors relevant to the assessment of culpability as set out in *Hanham and Philp* [54]) are:

(a) Firstly the identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 2 of the Act;

(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;

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

Starting point for FLL

[46] The prosecution submitted that FLL's culpability sits at the "upper middle to lower high" band which, although not explicitly stated, I infer equates to an asserted starting point of $90,000-$110,000.

[47] FLL, submits that a starting point at the top of the lower band of culpability or bottom of the middle band of culpability is appropriate. That would put the starting point somewhere between $40,000 and $60,000. Mr Khan submits a figure of about $50,000 is appropriate.

[48] As I have noted above, there was some dispute between the parties as to the precise nature of the practicable steps FLL ought to have undertaken. However, FLL has not shirked the fact that it failed to ensure the method by which it allocated tasks to drivers was done in a way so as to best avoid driver fatigue. It also accepts that it could have done more in the way of training its dispatchers, and monitoring compliance with the statutory requirements and its own policies. An obvious example was conducting random audits of driver logbooks against GPS records, something which it now does following this accident.

[49] It is indisputable that fatigue of drivers at the helm of large truck and trailer units poses an obvious, well known, and serious risk of harm not only to the driver, but also to other road users. That risk, at least so far as Mr Breach is concerned, was realised in this case in what was a life changing accident.

[50] From the material presented to me, I have difficulty in concluding that FLL's practices varied materially from other participants in the freight industry. That said, especially for a company its size, it could and should have done more which is expressly recognised in its plea. I find it difficult to accept that because others in the industry might not be meeting minimum standards, this should operate as a

mitigating feature for the defendant who by any standards is a large player. The reality is FLL failed in its obligations.

[51] In the circumstances, I assess FLL's culpability as nearing the upper end of the "moderate" band and fix a starting point at $85,000. I have crosschecked that against the maximum of $250,000 and it equates to approximately one third of the maximum. In my view, that is a fair reflection of FLL's failings in this case.

Starting Point for Mr Pouwera

[52] I have found setting a starting point in relation to Mr Pouwera somewhat more difficult. On the one hand he was working at FLL in circumstances where the company has acknowledged it could have done more in terms of training for dispatchers. It also appears from the material provided to me that he was under significant pressure in his role as dispatcher. For example according to that material between 3 November 2014 and 10 November 2014, the week leading up to the incident he worked 15 hours each day and was undertaking dual tasks.

[53] On the other hand, he clearly knew that Mr Breach was exceeding the work time limits. Although he initially suggested he should get a motel when this was raised with him, it is quite clear from the summary that he acquiesced in Mr Breach continuing to work. He ought to have insisted that did not. He also should have known that the tasks he was setting were not achievable within the time limits. In my view his actions represented a significant failing in his role as a dispatcher, and in his obligation to his fellow employees.

[54] I have not ignored the cases cited by Mr Pouwera's counsel, but in my view they are factually distinct and do not provide any real assistance in the context of this matter. I simply cannot accept that his culpability is at, a, "very low level", justifying a starting point of $15,000. In this respect, I agree with the prosecution.

[55] I assess his culpability as being somewhere in the middle of the "moderate" band and fix a starting point at $60,000. Had it not been for the extreme pressure he

was working under, which I accept diminishes his culpability, I would have fixed the starting point at $85,000, or perhaps even higher.

End Point for FLL

[56] From the starting point, deductions need to be made for personal mitigating features.

[57] The first asserted mitigating feature is, "Co-operation with authorities". I accept that FLL provided information that it was bound to provide under the Act. However, the comments I have noted above in the internal memorandum and the Worksafe self report suggest that not much more than the minimum was done, at least in the early stages. Simply complying with statutory obligations does not strike me as a mitigating feature. Rather, the failure to do so would constitute an aggravating feature. In the circumstances, only very modest credit could be accorded on this front. Of course, credit for a guilty plea inherently recognises the taking of responsibility.

[58] The second asserted mitigating feature is remorse. FLL is said to be remorseful, and agreed to participate in a restorative justice conference. I accept that this is to the credit of FLL.

[59] The third asserted mitigating feature is the remedial action FLL has taken to prevent a recurrence. In this regard I received extensive affidavit evidence from Mr Raymond, FLL's CEO. It is clear that the company has taken this incident seriously and has spent considerable time and money in updating its practices and training. This includes, for example, the continued implementation of electronic logbooks and I accept credit is due for this.

[60] The fourth asserted mitigating feature is FLL's, "Favourable safety record". Mr Khan notes that there have been no prior convictions under the HSE Act, and that recent ACC evaluations for FLL have been favourable.

[61] I have, however, been provided with FLL's list of previous convictions which total 16 between 1996 and 2011. Some of these convictions are relevant including those which relate to permitting its drivers to exceed work time limits. There are two convictions in 2007 and allowing a vehicle to be used with logbook omissions, one conviction in 2007 and one in 2011.

[62] In my view applying credit in these circumstances would be wrong. I accept that FLL is a large company and as such it might well acquire certain convictions under the strict liability and vicarious liability provisions which apply to it. But given the 16 convictions it has acquired, some of which are relevant to the underlying cause of this offending relating to drive fatigue masked by false logbook entries, in my view, a discount under this general head would be contrary to principle. However, neither do I apply an uplift to the otherwise appropriate starting point on account of the convictions.

[63] Finally, credit is sought for having arranged insurance to cover reparation, and certainly this is a factor I can take into account, along with FLL's, willingness, which is to its credit, to meet the entire reparation figure.

[64] In view of the mitigating features I have discussed I would allow a total discount of $17,000, or 20 percent bringing the end point down to $68,000 prior to the credit for the guilty plea.

[65] The prosecution has accepted in written submissions that full credit should be applied on account of the guilty plea. Ms McKenzie today resiled in a luke warm fashion from that on the basis that this matter at one point was set down for a disputed fact hearing. But owing to the way in which the disputed facts hearing resolved and the circumstances in which it was initially set down I certainly do not hold that against FLL

[66] Although on one view of it the plea was not entered at the earliest possible opportunity, given the stance taken by the prosecution at least in its written submissions, I will apply a further 25 percent reduction which is probably generous

in the circumstances. That leaves the end sentence for FLL as a fine of $51,000 and reparation of $30,000.

[67] There is the capacity to uplift that fine under s 40(2) Sentencing Act to take account of FLL's undoubted resources and I will consider this in a moment.

Endpoint for Mr Pouwera

[68] He has submitted that in large part the blame for this incident sits with FLL, and to some extent Mr Breach given has failings. However, as I have found, irrespective of the culpability of others, his failings in his role as a dispatcher were significant which accounts for the $60,000 starting point I have identified already. That takes into account the pressure he was under. The question then becomes what discounts might be applied.

[69] He has four convictions between 1991 and 1996. Each of them were driving related, although they are unrelated to his professional role. In the circumstances, I do not think credit on account of previous good character is warranted, however, neither would I impose an uplift.

[70] I accept that the defendant is genuinely remorseful for the harm caused to Mr Breach and for the role he played in this incident. I also accepted that he co-operated. As a result of the stress arising out of this investigation his long-term partner has left him and he now lives with his mother to whom he pays board.

[71] I also accept that he has pleaded guilty which is to his credit. At best, all of these factors in combination might mitigate the fine of somewhere between $30,000 and $40,000.

[72] I now turn to his financial capacity. He has filed a declaration of financial capacity and is clearly in a parlous financial state. Since this incident, Mr Pourewa has been restructured in his work. He is no longer a dispatcher and earns $20,000 less than he did at the time, his income now being $47,000. He has debts of about $10,000. He has three children and three grandchildren and is responsible in part for

their support. He does not own any real estate. He has one car worth only $1,800. His income which is surplus after expenses is around about $40 per week.

[73] In short, I accept that he has a significantly diminished capacity to pay any fine I might impose and that is something which must be borne in mind under the Health and Safety in Employment Act, and s 40 Sentencing Act 2002. Ordinarily community work might operate as a viable alternative but because this matter is fineable only, that is not an option.

[74] Bearing in mind the defendant's ability to pay, or lack thereof, I fix the end fine at $4,000. That is a fraction of what would be appropriate but at $40 per week, it would still take him around about two years to pay and so for him represents a very significant penalty. He can make what arrangements are necessary to pay that over time with the registry.

Step Three: Overall Assessment

[75] The final step in the sentencing process is an overall assessment. The total of the fine and the reparation imposed must be proportionate to the circumstances of the offending, and appropriate to achieve the sentencing principles of accountability, denunciation and deterrence.

[76] Given that Mr Pouwera will not be contributing to reparation, I am satisfied that the fine set out above is appropriate and that no adjustment is needed. That is a fine of $4000.

[77] In relation to FLL, the fine in conjunction with reparation totals $81,000. Whilst in some circumstances that may require modification down by reducing the fine, in my view, that amount is appropriate here.

[78] FLL, by any standards, is a very large company. Its assets are set to be somewhere in the region of $25 million. As noted above, its size and resources could well justify an uplift to ensure that the sentence imposed has an appropriately deterrent effect. However, I do not think that is necessary here and I note that it has

taken the full brunt of reparation which is to its credit and has offered to pay some of the prosecution costs. Further it has taken steps to reduce the chance of this occurring again.

[79] In all the circumstances standing back, I am satisfied that the purposes and principles of sentencing will be achieved by a sentence in line with what I have indicated.

Conclusion

[80] The fine in respect of Mr Pouwera will be $4,000.

[81] The fine in respect of FLL will be $51,000. It is also ordered to pay to Mr Breach reparation in the sum of $30,000 which is to paid within 14 days of today and in line with discussions earlier on it will be ordered to pay $5000 towards the costs of prosecution. That is outside of the scale that normally applies under the Costs in Criminal Cases Act but owing to the complexity of this type of matter, in my view, that is appropriate and after discussion that was the figure that was offered quite responsibly and appropriately in my view by Freightlines Limited.

[82] There is Court costs of $130 to be paid which is the standard fee for prosecution and that will be payable by FLL, but given Mr Pouwera's state I am not going to impose Court costs upon him.

T J Gilbert
District Court Judge