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

IN THE DISTRICT COURT
AT WHANGAREI

I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2018-088-002015
[2019] NZDC 1943

MARITIME NEW ZEALAND
Prosecutor

v

MYLES JOSEPH WACKROW
Defendant

Hearing: 1 February 2019

Appearances: Simpson for the Prosecutor
Worthy for the Defendant

Judgment: 1 February 2019

NOTES OF JUDGE G L DAVIS ON SENTENCING

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[1] I have before me today Myles Wackrow. Mr Wackrow has been charged with an offence under s 45 Health and Safety at Work Act 2015, by which it is alleged that he has failed to take care to ensure that acts or admissions that he was responsible for did not adversely affect the health and safety of other persons.

[2] The general background to the offending is that Mr Wackrow was employed at Northport in Whangārei. He was employed by Allied Personnel Services Limited, a subsidiary company of C3 Limited. Mr Wackrow was employed as a ship foreman. By that I understand Mr Wackrow to have been responsible for a number of day-to-day activities that took place on a ship and in particular, in the broader context in which this offending has taken place, was that logs were brought to Marsden Point's

Northport facility. From there, they were loaded onto ships and those logs were then despatched to various locations in and around the world.

[3] Mr Wackrow's specific responsibilities on 16 July 2017 included the responsibility for the unloading of a digger from a vessel that was anchored at Northport. That vessel, the *Aster K*, had a number of logs loaded onto it. Sitting on top of those logs was a digger or an excavator, as it is described in the summary of facts.

[4] Before the *Aster K* could depart from the Marsden Point wharf, the digger had to be unloaded from the *Aster K* onto the wharf. That was done by the digger being hooked up to a crane and the crane lifting the digger from the *Aster K* and onto the wharf.

[5] What is alleged is that during the course of the unloading of the digger, the digger has been lifted off the *Aster K* and the cables that connect the digger to the crane have snapped. The digger has fallen onto the wharf and has landed on the wharf approximately seven metres from a team of four fumigators who were in turn in a fork hoist that was travelling along the wharf. Also in close proximity to the digger was a welder who had been working on the outside of the *Aster K* vessel.

[6] An investigation into the circumstances of the offending has taken place and the prosecution has followed. Mr Wackrow has asked the Court today that he not be convicted. He has applied in accordance with s 106 and 107 of the Sentencing Act 2002 to be discharged without conviction.

[7] The maximum penalty that the Court can impose in respect of a prosecution under s 45 Health and Safety at Work Act 2015 is a fine not exceeding $50,000. It is described for the purposes of the Criminal Procedure Act 2011 as a category 1 offence.

[8] The Court must not discharge a person without conviction unless it is satisfied that the direct and indirect consequences of a conviction will be out of all proportion to the gravity of the offending. Section 107 Sentencing Act is described as a gateway through which all applications must pass.

[9] Mr Wackrow has asked the Court that he be discharged without conviction on three broad grounds. The first is that a conviction, if recorded against his record, will operate as a significant barrier to existing and future employment prospects. Secondly, a conviction, if entered, is likely to create difficulties for Mr Wackrow to travel in the future, and thirdly, it is said in a general sense that Mr Wackrow has suffered a significant financial and personal penalty as a result of the incident itself and the conviction that followed.

[10] In terms of the grounds that operate as mitigating circumstances, it is accepted by both the prosecution and the defence and the Court has been invited to similarly accept that Mr Wackrow is in all other respects of good character. He has never appeared before the Court in any way, shape or form. Secondly, Mr Wackrow is remorseful. Thirdly, that he has pleaded guilty at an early opportunity. Fourthly, he has suffered significant financial loss already, he has lost his employment and has lost savings that he had accumulated during the course of that employment and had to utilise those for day to day living expenses. Fifthly, he has suffered considerable personal angst, anguish and distress arising from the conviction.

[11] I can signal that the Court accepts each of those factors as being not in dispute and it is appropriate that the Court acknowledges those factors also. The principal ground of difference between the prosecution and the defence here lies in the gravity of the offending.

[12] The Court of Appeal has given guidance as to how it is that the Court must approach an application for a discharge without conviction. It is essentially a three step process. Firstly, the Court must undertake an assessment of the gravity of the offending with regard to the particular factual context in which the offending has occurred. Secondly, the Court must identify the direct and indirect consequences of a conviction. Thirdly, the Court must assess whether the consequences of a conviction will be out of all proportion to the gravity of the offending.

[13] I propose for the moment to return to the facts that I have made reference to. Mr Wackrow was employed by Allied Personnel Services on a casual basis, he had been working for them or for C3 for a period of about five years. It is accepted that at

the time of this incident, Mr Wackrow had not been trained as a ship foreman. He had, however, some experience and some training as a wharf foreman. I understand in terms of the broader hierarchy of responsibilities when a vessel is being loaded or unloaded that the ship foreman is of more seniority than the wharf foreman.

[14] There is a safe operating procedure log for stevedoring and Marsden C3 stevedores, dated 11 March 2015. That, in effect, is a procedure for log loading and it assists or provides some guidance for those who assume responsibility for the loading and unloading of vessels and for workers that are working in the loading and unloading functions.

[15] As a site foreman, it is accepted that their responsibilities include the following:

(a) Issuing radios, completing radio communications test and ensuring that communications are functional.

(b) Placing C3 operational area signage and ensuring it is visible.

(c) Ensuring that personnel required for the shift are in attendance.

(d) Reinforcing safe working practices at toolbox meetings.

(e) Ensuring the berth or the wharf setup is safe and as approved.

(f) Ensuring all personnel are in place with the required equipment.

(g) And monitoring berth (wharf) activity, including compliance with SOPs and intervening immediately on safety concerns.

[16] The prosecution say that there were a number of departures from appropriate safety standards that have individually or collectively contributed to the incident on 16 July 2017. The first of those departures is that there were a number of stevedores that were present on the wharf that departed before the digger was lifted from the

vessel. Those stevedores could have assisted with general site safety and I understand with the specifics of unloading the digger itself.

[17] While it is accepted by the prosecution that Mr Wackrow did not dismiss or let the stevedores go and the stevedores left the site of their own accord, the prosecution say that Mr Wackrow had the responsibility either to ensure they remained onsite or, in the alternate, to not continue with the lift operation.

[18] Secondly, the digger operator was required to set the digger arm in a particular position and to ensure that the digger was then chained up to enable it to be connected to the crane. Thirdly, a C3 Limited crane operator ought to have been driving the crane, and fourthly, there ought to have been communication between Mr Wackrow and the wharf foreman.

[19] It transpires that Mr Wackrow instructed the digger operator to set up the digger arm and to ensure the digger was secured to the crane, however, that did not occur and it appears that there were no checks, rudimentary or otherwise, to ensure that the digger was appropriately set up. What that meant is that immediately upon the weight of the digger being taken by the crane, it was out of balance and the prosecution position is that that was noticeably visible to anybody who ought to have seen it. The crane operator at that point, with Mr Wackrow's instruction, ought to have stopped or ceased the lift.

[20] In addition to that, during the course of the general operation, there was an exclusion zone put in place. It is accepted that was not an impenetrable barrier, but during the course of the operation, in the log loading operation, four fumigators have come into the exclusion zone. They have sought and been given permission by Mr Wackrow to enter the vessel to carry out fumigating activities.

[21] The summary of facts records that Mr Wackrow advised the fumigators or as they were described as [third party employees], that the excavator was still to be lifted off the *Aster K* deck using the number four crane. However he did not communicate further with them giving that advice to ensure that anyone else did. He did not

specifically instruct either the [fumigators] or the Marsden Point welder who was also in the area to stay off the wharf area away from the number four crane.

[22] Later in the summary of facts, it is agreed that while Mr Wackrow instructed the [fumigators] and the Marsden Point welder that an excavator was to be lifted off the *Aster K*, Mr Wackrow understood that to be an instruction to stay clear of the lift area, notwithstanding that it was not specifically spelt out.

[23] What has happened, as I have signalled, is that at some point the [fumigators] have come out of the vessel, they have gone into the exclusion zone, I am told that they have seen the digger lift in operation, they have then turned to move out of the digger lifting or the exclusion zone. They have done so, the cables have snapped and the digger has fallen and landed some seven metres away from the [fumigators].

[24] I am also told today that the digger was 15 tonnes and it follows from that that had the digger landed on any person or property, serious damage or injuries or death may have resulted. It is also accepted, however, that fortunately there was no physical harm or injury caused to any person that was in the vicinity of the digger falling, although there was some damage to each of the wharf and the digger itself. I do not have any evidence or have had any discussions as to the extent of the damage to either the wharf or to the digger itself.

[25] As I have signalled, this is a prosecution under s 45 Health and Safety at Work Act 2015. It is important to emphasise that the Health and Safety at Work Act 2015 replaced the Health and Safety in Employment Act and set in place three tiers of offences. This offence is at the lowest end of the scale of offences, the most serious of offences being one involving reckless conduct, in other words deliberate conduct. This is not a case that falls into that category.

[26] Furthermore, it is acknowledged that the Health and Safety at Work Act 2015 imports responsibilities to various persons or organisations throughout the course of work in the workplace. The legislation has conferred responsibilities upon what is now described as PCBUs relating to health and safety in the workplace, but in addition to that it has also placed responsibilities on workers.

[27] My understanding of the legislation is that it has created additional obligations and responsibilities for everyone engaged in the workplace to ensure that the workplace, the work environment is one that is safe and that all reasonable steps or reasonable care is taken to ensure that any acts or omissions do not otherwise adversely affect the safety of fellow workers.

[28] It is, in my view, a high threshold and the reason for that is, in my view, obvious. Any failures to ensure the health and safety of fellow workers can often result in unintended but regrettably tragic consequences. The act, in my view, moves towards ensuring that the responsibility is shared by everybody in the workplace, not simply management.

[29] I do not see the new regime set out in the Health and Safety at Work Act 2015 as being one which allows employers to devolve responsibilities for health and safety to employees, but nor does it allow employees to abdicate responsibilities for day to day health and safety to employers.

[30] Returning now to the application for a discharge without conviction, having set the scene, it is the Court's function to undertake the three step enquiry that I made reference to earlier. In *Z v R*, the Court endorsed the three stage process that I have made reference to.[1] In paragraph 27 of that decision, the Court of Appeal said as follows:

> For our part, we consider that there is much to be said for the approach adopted by the Divisional Court in *A(CA747/2010)*. That is: when considering the gravity of the offence, the Court should consider all the aggravating and mitigating factors relating to the offending and the offender; the Court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the Court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

[31] In addition to that, in *Z v R*, the Court of Appeal endorsed the approach that the aggravating and mitigating features set out in the Sentencing Act 2002, particularly in

[1] *Z (CA447/12) v R* [2012] NZCA 599.

s 9, are also relevant to an assessment of the gravity of the offending. That includes, amongst other things, to hold a person accountable for their actions. Secondly, to denounce and deter conduct in this case that may otherwise place the health and safety of fellow employees at risk. Thirdly, to promote in a defendant responsibility for the harm to others that offending may result from.

[32] Factors to be considered in identifying the gravity of the offence and the surrounding nature of the offence and the circumstances of the commission of the offence in this case are as follows:

(a) The broad acts or failures to act that I have made reference to, including:

(i) Failing to ensure that the appropriate staff were present to assist in the lifting process.

(ii) Failure to ensure that the digger operator had correctly placed the digger arm and connected the digger to the crane.

(iii) Failing to ensure that the crane operator himself was one of the C3 staff and appropriately qualified.

(iv) Failing to ensure that, through communication with a wharf foreman, that there were not persons present in the exclusion zone at the time the lift commenced and during the continuation of that lift.

[33] In terms of the mitigating factors, it is accepted, as I have signalled, that Mr Wackrow has not previously appeared before the Court in the past.

[34] In the case *Delaney* and others from the High Court in Wellington, the Court signalled that it is entitled to consider the prospects of a person appearing in the Court in the future as being one of the mitigating features.[2]

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[2] *Delaney v Police* HC Wellington CRI-2005-485-22, 22 April 2005.

[35] Here, I am satisfied that the early guilty plea, the expressions of remorse by Mr Wackrow are factors that need to be taken into account in assessing the overall gravity of the offending. In addition to that, one has to look at the penalties that Parliament has imposed and acknowledge that here this is the lowest possible penalty that can be imposed for those that run themselves foul of the health and safety legislation.

[36] My assessment of this, when one takes the factors into account, is that the gravity of the offending here is at the lower end of the scale. It is not at the lowest end of the scale, I do not believe it is at the middle range of the scale here also. I am mindful that Mr Wackrow was not trained by C3 to act as a ship foreman.

[37] However, having said that, Mr Wackrow, for whatever reason and it has not been properly explained why, chose to take on the responsibilities of the ship foreman and that, in my view, is a position of significant responsibility and one, that having chosen to take it on, one would have thought that the appropriate or the responsibility also remained to ensure that all reasonable steps were taken to ensure the safety of others. Mr Wackrow has acknowledged those steps were not taken by virtue of the entry of his guilty plea.

[38] Having assessed the gravity of the offending, the Court's task is then to identify the direct and indirect consequences of a conviction. I remind myself it is not necessary that the identified consequences would invariably or probably occur, it is sufficient for the Court to come to a judicial decision that there is a real and appreciable risk that such consequences will inevitably occur.

[39] In that regard, as I have signalled, Mr Wackrow relies primarily on two broad grounds. The first is that he says that in the event a conviction is entered that it will have a negative impact on his career because there is a health and safety element in his work. He appends to his affidavit a letter from his employer in which his employer says the following:

> We believe Myles adds value to our business as he is earning the respect of who we work for and he is gaining a sound understanding of the industry. A conviction would certainly have a negative impact, especially as health and safety is still an integral part of his role.

[40] Mr Wackrow has been employed by [new employer deleted][3] now for about a 12 month period. It appears that his position, as at the date of this letter, is as a crew co-ordinator. His role was to assist the crew foreman with the day-to-day running of the health and safety systems, policies and requirements. It is said in the letter that his approach to this was to read all the documentation, then ask for clarification on any points so he understood all aspects of it.

[41] He has spent a lot of time liaising with supervisors from forest owners that [the employer] contracts to and they have received very positive comments back on how well he has done from [two of the major clients].

[42] When one looks at that letter, it appears the employer is saying two things. One, there will be a negative impact as a result of a conviction, and two, Mr Wackrow is highly regarded by both the employer and those that he works with in the industry. It is difficult to see in those how somebody that is so highly regarded will have current employment difficulties in light of that reference. However, I accept that is not to say that Mr Wackrow will forever be working for this employer. There is a possibility of course that a conviction will have a negative impact in the future.

[43] The second aspect is that Mr Wackrow wishes at some point to travel to England to see his brother. Quite responsibly, Mr Worthy has not pitched the entry of a conviction as being a complete barrier to travel, but he has signalled, and quite properly so, that any conviction is likely to pose greater difficulties, and perhaps to use my words, not Mr Worthy's, possibly more hoops for Mr Wackrow to jump through.

[44] The concern that the Court has here is this. In the event a conviction is not entered, the fact that a person who had responsibility for health and safety matters in an inherently dangerous environment may be able to mask or cover over the fact that this incident has occurred and keep that from other employers in the future. One would have thought given the nature of the act itself, that would not fit comfortably with the notion of ensuring that there all reasonable steps are taken to ensure the health and

[3] With the consent of the parties Mr Wackrow's current employment details have been redacted.

safety of persons employed or present at a worksite. It may be a relevant consideration for an employer.

[45] Where there is an absolute bar to employment, the Court may well be more inclined to grant a discharge without conviction, however, where there is a screening body, and I accept that is not the case here, the Court is less likely to do so.

[46] When one sits back and looks at these factors, I am of the view that the balancing exercise falls firmly in favour of a conviction being entered in this case. The purpose of the legislation, as I have reiterated, is to ensure all reasonable steps are taken to not adversely affect the health and safety of persons. That said, the deterrent factor, in my view, is one of the considerations the Court must keep in mind.

[47] Having arrived at the point where I have signalled that a conviction is appropriately entered in this case, I have been asked by the defence to convict and discharge Mr Wackrow. I have been asked by the prosecution to impose a fine.

[48] It is agreed that the following factors need to be taken into account in considering a fine. Firstly, the starting point, and while there is some discussion and difference between the parties as to what the starting point might be, what is acknowledged in this case is that there are a number of factors that would warrant any fine being reduced. The first of those factors is Mr Wackrow's financial position, the second factor is co-operation, that Mr Wackrow has engaged with prosecution authorities, C3, his employer being prosecuted and Mr Wackrow is co-operating with the authorities in furtherance of that prosecution.

[49] Another factor to consider is the remorse, the credit for the guilty plea. The parties agree that by the time the starting point is adopted, which they say in general terms would be somewhere in the $8000 region, that with the appropriate discounts, a fine somewhere in the vicinity of $800 to $1000 is appropriate.

[50] Having considered the matter, I am of the view that it is quite right for the prosecution to seek a fine with a starting point, in the vicinity of that range of $8000. However, by the time the discounts are taken into account and an end fine of $800 or

thereabouts was arrived at by the Court, the question in the Court's mind is, "Is there any greater deterrence for Mr Wackrow or for the public at large in an $800 fine being imposed?". I am of the view that that is not the case.

[51] I do not think Mr Wackrow personally requires greater deterrence. I accept the submissions that he has suffered significantly as a result of the prosecution. Whether the world will have its own practices shaken to the point where health and safety in employment improves significantly as a result of an $800 fine that Mr Wackrow would have to meet, I do not think that is the case.

[52] Mr Wackrow, I am of the view that a conviction needs to be entered today to mark the offending, but nothing more than that. Accordingly, the application for a discharge without conviction is declined. A conviction will be entered today and you will otherwise be discharged.

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Judge GL Davis
District Court Judge

Date of authentication: 11/02/2019
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