

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2018-092-008910
[2018] NZDC 27306**

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

HELLERS LIMITED
Defendant(s)

Hearing: 19 December 2018
Appearances: Ms J Burns for the Prosecutor
Mr S Bonnar QC for the Defendant
Judgment: 29 January 2019

ORAL JUDGMENT OF JUDGE J BERGSENG

The charge

[1] Hellers Limited (the defendant) has pleaded guilty to a charge of being a person who trades in food, breached or failed to carry out the duties specified in s 14 Food Act 2014 to ensure food is safe and suitable, in that it sent to the market “Cheese Sizzlers” packaged as “Original Sizzlers”. As a result consumers were not warned the product contained milk or milk products ingredients which are a known allergen. The maximum penalty is a fine not exceeding \$200,000.¹

¹ S 240(1) Food Act 2014.

The Offending

[2] Hellers owns the Huttons Small Goods brand and produces the Sizzlers sausage product range. This range consist of Cheese, Double Cheese and Original Sizzlers.

[3] As a processor of animal products, Hellers operates under a risk management programme. This includes requirements relating to the labelling and inclusion of food allergens on labels. Cheese is a milk product and dairy allergen. Foods containing allergens are required to have this listed on their packaging.

[4] On 22 September 2017, Hellers was packing both Original and Cheese Sizzlers. A rack of Cheese Sizzlers was erroneously tagged as Original Sizzlers. The error was not noticed by staff and accordingly the Cheese Sizzlers were packaged as Original Sizzlers and were subsequently distributed to various outlets including supermarkets.

[5] On the evening of 10 October 2017, an eight year old girl with a known dairy allergy suffered a mild anaphylactic reaction after consuming the mispackaged sausages. She was treated at home by her mother and recovered. On 12 October 2017, a 14 year old girl with a known dairy allergy suffered a severe anaphylactic reaction after consuming the mispackaged sausages. She was treated in hospital for anaphylaxis and released later that day. On 15 October 2017, a 15 year old boy with a known dairy allergy suffered a moderate to severe anaphylactic reaction after consuming the mispackaged sausages.

[6] Hellers first became aware of the problem on the evening of 10 October 2017, when the mother of the first victim left an after hours telephone message advising them of the incident with her daughter. On the morning of 11 October 2017, Hellers put all current stock on hold and commenced an internal investigation. Through its tracing processes, Hellers identified that there had been a mispackaging incident within their

factory. Hellers immediately initiated a recall procedure that day. They also notified MPI of the incident.

[7] On 12 October 2017, Hellers took steps to notify consumers, including sending point of sale notices to supermarkets and booking newspaper advertising for the next two days. Following the notification of the third incident on 18 October 2017, additional media coverage was arranged, including newspaper and radio advertising and noting the problem on the Hellers website.

[8] Hellers have no previous convictions for food safety issues.

Restorative justice

[9] Two of the three victims and members of their families attended a restorative justice conference on 10 December. This conference was undertaken in Christchurch which allowed them to undertake a visit to one of the Hellers processing facilities.

[10] The restorative justice conference that took place in this instance is a prime example of the benefit of restorative justice. In this case, Hellers were able to hear first hand the effects of the mispackaging. The victims were then able to be given a full rundown of how the packaging error occurred and importantly, what Hellers had been done to try to ensure the same error does not again occur.

[11] My reading of the conference report is that it was highly beneficial to all involved. The third victim indicated he did not wish to engage in the process.

MPI submissions

[12] Written submissions have been filed by MPI. It is submitted that the starting point is a fine in the vicinity of \$50,000. MPI acknowledged that credit is available for the steps taken by Hellers to avoid such an error in the future, its attendance at the restorative justice conference and its early plea of guilty. An end sentence in the vicinity of \$30,000 is submitted as appropriate.

[13] MPI submits that it is important to keep in mind the purposes of the Food Act set out in s 4, and in particular that manufacturers ensure the safety and suitability of food they sell, that maintenance and confidence in New Zealand's food safety regime is retained and to require persons who trade in food to take responsibility for the safety and suitability of that food. In terms of the Sentencing Act 2002 the aggravating features are identified as being the extent of the harm caused and the vulnerability of the victims.

[14] While noting that the defendant was warned in relation to undeclared gluten found in sausages in September 2017, MPI does not seek any uplift for this earlier warning. A number of sentencing decisions are provided in terms of guidance, however these are cases decided under the Food Act 1981 at which time the maximum penalty was a fine of \$5000. In each case the need to hold the defendant accountable for its breach of the Food Act 1981 and deterrence of others in the food industry was noted.²

[15] MPI submits in regards to the starting point that with a maximum penalty of \$200,000, which applies to a charge which requires no proof of intentional recklessness, that the Act recognises that unintentional or accidental offending can nevertheless result in serious harm. This is particularly so when, as is the case here, Hellers is a large scale manufacturer whose products are distributed widely across New Zealand. Accordingly, where key safety processes fail, the potential for harm to a large number of people is present. It is therefore incumbent on the defendant and others in a similar position to ensure their essential processes are robust.

Hellers submissions

[16] On behalf of Hellers, no issue is taken with the starting point identified by the prosecutor. It is submitted that a global reduction of up to 30 percent is available for the factors of remorse, payment of reparation, steps taken to assist the victims, participation in restorative justice, cooperation, remedial and improvement action

² *NZFSA v Chico's Restaurant Ltd* CRI-2007-059-1880 DC Queenstown, 16 June 2008; *NZFSA v McGregor's Wanaka Ltd* CRI-2007-002-000134 DC Alexandra, 1 August 2008 and *MAF v Avondale RSA and Anor* CRI-2012-090-006663, DC Waitakere, 22 January 2013.

taken after the accident and previous good character. Additionally, a reduction of 25 percent for the earlier guilty plea is said to be available.

Discussion

[17] The defendant as a person who trades in food has the primary duty of ensuring that its food is safe and suitable.³ Safety means a condition in which food, in terms of its intended use, is unlikely to cause or lead to illness or injury to human life or public health.⁴ Suitability in the context of this case means that the food, given its intended use, is appropriately composed, labelled and identified.⁵

[18] The purpose of the Act is, amongst others, to achieve the safety and suitability of food for sale in NZ, to maintain confidence in New Zealand's food safety regime and require persons who trade in food to take responsibility for the safety and suitability of that food.⁶

[19] Counsel have advised me that as far as they are aware that this is the first case to be prosecuted under s 240 of the Act. The provisions of the Sentencing Act 2002 are also relevant, in particular the purposes and principles of sentencing. The purposes of sentencing relevant include holding Hellers accountable for its breach of the Act, denunciation and deterrence. The relevant principles include the gravity of the offending, the effect of the offending on the victims, the least restrictive outcome that is appropriate in the circumstances and the outcome of Hellers involvement in the restorative justice process.

[20] The approach taken in *Department of Labour v Hanham and Philp Contractors Ltd*⁷ and updated and modified in *Stumpmaster v Worksafe New Zealand*⁸ also provides guidance in terms of prosecutions of this kind, where there has been a failure of a manufacturing process where such failure exposes someone to the risk of seriousness illness or death. A three stage process is required. First, assess the amount of

³ S 14 Food Act 2014

⁴ S 12 Food Act 2014

⁵ As above

⁶ S 4 Food Act 2014

⁷ *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

⁸ *Stumpmaster v Worksafe New Zealand*⁸ [2018] NZHC 2020 [9 August 2018]

reparation to be paid has been made. Second, fix the amount of the fine by reference to the aggravating and mitigating factors and third, make an overall assessment of the proportionality and appropriateness of the combined payment of reparation and the fine. This third step includes consideration of ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant

Reparation

[21] Reparation is payable to the victims of the mispackaging. Of the three victims, two, together with family members, attended a restorative justice conference. In the course of the conference, the parents of the victims were of the view that any monetary penalty would be best paid to the organisation Allergy NZ.

[22] While I have no doubt that Allergy NZ does very good work in this area and like many organisations would be in need of whatever funds were available for it to continue with any programmes and education that it might be involved in I do not have the power to direct emotional harm reparations be paid to such an organisation.

[23] The consequences of food being consumed by someone who is allergic to that food are well known. They can range from discomfort to death. Products used in the manufacturing process need to be clearly identified on the packaging for this very reason. In this case each of the victims has made a full recovery. In the case of victim two, the speed at which her mother was able to respond to her daughter's call and the proximity of the hospital were important factors. It was more by luck that the consequences were not more serious. The impact of the packaging failure has had a significant consequence on at least two of the three victims. Their trust in being able to rely on the packaging was put in doubt. Some of those fears however have been allayed by the restorative justice process.

[24] In the circumstances of this case I make an order for reparation to be paid to the victims in the sum of \$5000 each. How they choose to disburse that reparation is entirely a matter for them.

Setting the starting point

[25] Hellers was clearly aware of the basic importance of the correct product going into the correct packaging. To achieve this they had set out a number of processes designed to achieve this. In the case of Sizzlers, after the product had been cooked if it was Cheese Sizzlers the bin was marked with a yellow tag and if Double Cheese Sizzlers two yellow tags. The product had a different appearance if it was Cheese Sizzlers as opposed to Original Sizzlers. Clear records were kept of the quantity of the different type of Sizzlers cooked. After cooking the Sizzlers were pre-packed into translucent blue casings before being placed into cold storage. They were then retrieved from the chiller for packaging as required. Different codes were entered into the packaging machine depending on the product being packaged. I have no doubt that other processes would also have been used to identify the different products however the above processes are those which are relevant in this case.

[26] On the day of the mispackaging the packaging line had commenced the day packaging Original Sizzlers before changing to Cheese Sizzlers. There was then a third change back to Original Sizzlers and finally a late notice change were Cheese Sizzlers were to be packaged. It was at the point of this last change in packaging that the Cheese Sizzlers were wrongly packaged as Original Sizzlers.

[27] The particular batch of Cheese Sizzlers had been correctly coded after cooking and a yellow tag attached. They were then held in the chiller until required for packaging. When they were moved from the chiller to the packaging line and operator entered the packaging code for Original Sizzlers, 82016, rather than the packaging code for Cheese Sizzlers, 82017. The yellow tag that had been attached to the product from the chiller was not matched with the packaging. None of the staff involved in that the packaging noted the different visual appearance of the Cheese Sizzlers going into the Original Sizzlers packaging. The fact that more Original Sizzlers had been packaged that day than product available and that fewer Cheese Sizzlers had been packaged than product available was not noted.

[28] The packaging error arose as a result of human error when a code, only one digit different, was wrongly entered into the packaging machine. That error was then

compounded by the operator failing to notice the visual difference, failing to match the tag with the end product being packaged and finally, no one checked the yield of Original Sizzlers and Cheese Sizzlers.

[29] While it is apparent Hellers had in place some measures to ensure that what was being packaged matched the packaging, it was not a particularly robust system of checks and balances. There were a number of flaws in their process which were identified by Hellers following this incident. These included:

- (a) the use of the same translucent blue casings no matter the type of Sizzler being manufactured;
- (b) the product codes having sequential numbers;
- (c) the manner in which they planned their packaging with short notice product changes; and
- (d) the failure to check product yields.

[30] The consequences of the mispackaging is a relevant factor. The fact that there was no lasting harm to any of the victims is a relevant sentencing factor however it does not absolve Hellers of liability. It was clear there was significant potential for real harm to have been caused to the victims.

[31] A high standard of care is expected of a food manufacturer which is acknowledged in the purposes of the Act. A maximum fine of \$200,000 is a clear indicator from Parliament, that where a trader in food falls below the high standards required the penalty imposed will be significant. In the case of a large scale food traders, the potential for harm is significant, as was the case here. In this case there was a failure on the part of Hellers to ensure that its food was safe and suitable. The consequences of a failure to meet its primary obligation is a significant failing.

[32] Taking into account the factors that I have identified I find that Hellers culpability falls in the medium range in breaching its obligation to ensure its product was safe and suitable and set the starting point for the fine at \$75,000.

Mitigating factors

[33] As a result of this offending, significant changes have been undertaken at Heller's processing plants in terms of the procedure that is adopted for packaging. Action taken to prevent this situation arising in the future includes:

- (a) Original Sizzlers are no longer produced/packaged on the same day as Cheese Sizzlers.
- (b) Any changes to a production or packaging plan are now more clearly managed and are communicated direct from planning to factory.
- (c) The processing factory now has the mandate to decline late planning changes if they are aware of allergen risks associated with the changes.
- (d) Production and packaging is planned to better group allergen families together.

[34] Further, a new role, a Hold Chiller Operator, has been created. That person has the responsibility to ensure correct labelling. Label scanning has been updated to automatically create a packing room label from the scanned chiller label. This would eliminate the issue of human error. There are additional manual checks that have also been created.

[35] Additional training has been given to staff to improve labelling awareness. The storage packaging of the Original and Cheese Sizzlers has now been differentiated so that the Cheese Sizzlers are prepacked in a different colour casing from that used for Original Sizzlers.

[36] MPI accepts that over a number of years Hellers has established itself as a trusted New Zealand manufacturer. Hellers has taken significant steps to address the internal processes which did not allow for human error. The processes now adopted, if followed would mean that this type of packaging error should not occur in the future.

[37] It is apparent that Hellers has done all that it could to address its failings. Its response to the initial notification, its internal investigation and the changes to its

processes through to its involvement in the restorative justice process are indicative of a company that has dealt with a serious issue in a model way.

[38] Hellers is entitled to call upon its previous good character. Its reputation as a trusted manufacturer has been hard earned and I have no doubt that its failure on this occasion will impact on that reputation. While it has had a previous warning, I consider the circumstances of that warning as quite distinct from this current charge.

[39] I am satisfied that Hellers is remorseful. It took action immediately and has put in place significant changes to its processes to ensure this particular error cannot occur again.

[40] Hellers attended and fully participated in the restorative justice conference. In doing so, Hellers were able to regain the confidence of those who were directly affected by its earlier packaging failure. Hellers has been co-operative with MPI.

[41] Hellers comes before the court having been remorseful, co-operative, made efforts to address the underlying cause of its breach and is entitled to call upon its previous good character. As was recognised in *Stumpmaster*, cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree, a global discount to at least 30 percent is available.⁹ I am satisfied that a 30 percent reduction, \$22,500, for mitigating factors is available to Hellers.

[42] Hellers are entitled to a full reduction of 25 percent, \$13,125, for the plea of guilty which came at the earliest possible opportunity.

[43] The fine is \$39,375.00

Outcome

[44] Finally I have considered the proportionality and appropriateness of the combined fine of \$39,375.00 and emotional harm reparation of \$15,000. There is no suggestion there is any financial difficulty in Hellers ability to pay these amounts. I

⁹ *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 [9 August 2018] at [67].

am satisfied that the combined sanctions reflect the level of the offending and the steps taken by Hellers in response and no further adjustment is required.

[45] Hellers is to pay \$5,000 to each of the three victims and is fined \$39,375 together with Court costs of \$130.

Judge J Bergseng
District Court Judge

Date of authentication: 29/01/2019

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