**IN THE HIGH COURT OF NEW ZEALAND**
**NAPIER REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**AHURIRI ROHE**

**CRI-2023-441-012**
**[2023] NZHC 3784**

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| BETWEEN | PROGRESSIVE MEATS LIMITED<br>Appellant |
| AND | WORKSAFE NEW ZEALAND<br>Respondent |

Hearing: 27 September 2023

Appearances: A F Pilditch KC and B R Harris for Appellant
T G Bain and K I Opetaia for Respondent

Judgment: 19 December 2023

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**JUDGMENT OF GRICE J**
**(Appeal against conviction)**

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[1] The appellant, Progressive Meats Ltd, is a meat processing business which operates in Hastings. On 15 October 2020, while using a brisket cutter on the slaughter floor at the appellant's meat processing site, the victim injured his right hand, part of which had to be amputated as a result.

[2] As a result of this accident, WorkSafe New Zealand (Worksafe) charged the appellant under the Health and Safety at Work Act 2015 (HSWA) with failing to comply with a duty to ensure the health and safety of its workers, which exposed workers to a risk of death or serious injury arising from the use of plant. In brief, WorkSafe alleged that the appellant should have: first, recognised the risk that the two–handed control on the brisket cutter could be bypassed, and remedied this; and secondly, should have ensured the victim was properly trained and supervised.

[3] A brisket cutter is "like a very large pair of shears that is used to cut the brisket of a lamb carcass during the course of processing."[1] It was accepted by all parties that a brisket cutter is a potentially very dangerous piece of equipment and in the wrong circumstances serious injury or death could follow from an accident with a brisket cutter.[2] There is no dispute in this case that the injuries the victim received were serious.[3]

[4] Following a defended hearing before Judge Rea in the Hastings District Court, in a reserved decision dated 2 March 2023, the Judge dismissed the first allegation. The Judge dismissed the suggestion that the appellant ought to have been aware of the safety defect in the brisket cutter, or that it ought to have replaced or modified the brisket cutter to be safer. However, the Judge found that the appellant failed to ensure the victim's training in dealing with potentially dangerous equipment (like a brisket cutter) was adequate, and under this head found the charge proved beyond reasonable doubt.

[5] The appellant says the Judge erred in finding that the appellant had failed to train the victim in the correct use of the brisket cutter (that is, with two hands), on the basis that the evidence did not support that conclusion to the required criminal standard, and that finding contradicted other findings regarding the appellant's robust safety systems and lack of knowledge that the brisket cutter was capable of being used with one hand.

**Conviction decision**

[6] WorkSafe set out as particulars of the charge, three "reasonably practicable" ways in which the appellant could have reduced or eliminated the risk when using a brisket cutter. It said that the appellant failed to:

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1 *WorkSafe New Zealand v Progressive Meats Ltd* [2022] NZDC 3831 [conviction decision] at [5].

2 At [6].

3 The notes of evidence, briefs of evidence and exhibits had not been transferred from the District Court to the High Court file. Counsel indicated that they wish to proceed with the appeal in any event and provided a copy of the notes of evidence for use during the appeal hearing. They provided an agreed list and copies of the exhibits and other documents on the District Court file, including the briefs of evidence, shortly after the appeal hearing.

(a) provide and maintain proper systems to identify and then manage hazards appropriately;

(b) ensure that the two-handed use of the brisket cutter could not be bypassed; and

(c) ensure adequate "instruction, monitoring, and supervision of workers, for the purpose of ensuring ongoing compliance with safe use and handling" of the brisket cutters.

[7] As the Judge noted, the prosecution had to prove only one of these particulars in order to establish liability under ss 36 and 48 of the HSWA.[4]

[8] The Judge first considered the last of these: whether it was reasonably practicable for the appellant to ensure there was adequate instruction, monitoring and supervision of workers, for the purpose of ensuring ongoing compliance with safe use and handling.

[9] The leading hand on the lamb slaughter floor at the time gave evidence that he could not recall who instructed the victim on how to use the brisket cutter. The victim's evidence was that he was trained by a co-worker, who had started his employment on the same day as the victim. The co-worker had started work on the lamb slaughter floor while the victim had started in the offal room. According to the Judge, the victim said his "training" on the brisket cutter with the co-worker, Mr A lasted about four hours. The victim said initially the co-worker showed him how to use the brisket cutter with both hands but then switched to using one hand. The victim saw what the co-worker did and so he operated the brisket cutter one-handed himself, when he became more proficient.

[10] The victim said he did not get any instruction on using the brisket cutter from anyone else other than Mr A. The Judge found this was supported by what the leading hand had said himself, who had known that the victim was to be trained in its use but

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4 At [13].

had not been able to say who it was that undertook that training. The Judge noted the appellant's documentation also did not stipulate who was to do or did train the victim.

[11] The victim recounted that it was while he was operating the brisket cutter using only one hand that the blades of the brisket cutter activated and caused the injuries to his hand.

[12] The Judge said there were several inconsistencies in the victim's evidence and the victim accepted he had no recollection at all of what happened after the accident. The Judge said, however:

> [28] Despite the criticisms that can be made of [the victim's] evidence, I have no doubt at all that what he says about his "training" on the brisket cutter is accurate. He was adamant that he was shown how to use the brisket cutter by [the co-worker] and that it was [the co-worker] that showed him how to use it one-handed.

[13] The Judge considered the victim's evidence was supported in two key ways. First:[5]

> … [The leading hand] took him up to the job when he was to be trained on the brisket cutter, but he did not undertake the training himself. In his evidence he said that it was possible that an employee who had already been trained in the brisket cutter could be used to train a new employee in its use. It is known that at the time there was an employee called [the co-worker's name] who was working in that general area …

[14] Secondly:[6]

> … In addition, [the victim] said he got his injuries while using the brisket cutter one-handed and the nature of his injuries and how they were caused provides overwhelming support for that. Either [the victim] must have figured out on his own how to bypass the safety system and use the brisket cutter one-handed or someone showed him how to do it.

[15] The Judge accepted the victim's evidence and concluded that the co-worker must have used the brisket cutter one-handed during the course of "training" the victim, and that was how the victim learned to do it. The Judge accepted the victim's evidence that he was not told by the co-worker that the brisket cutter must be used with both hands. The Judge considered the co-worker had showed him what amounted

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5 At [29].
6 At [29].

to a "shortcut" in using the brisket cutter one-handed.[7] The Judge concluded that the co-worker was delegated by someone in authority on the slaughter floor to train the victim, and that the victim's training was "completely inadequate and, indeed, positively dangerous."[8] The Judge found that the appellant had delegated the training of the victim on this piece of equipment to "somebody who clearly should not have been given that role" and that the victim "was not properly supervised at the time he undertook the training."[9]

[16] The Judge concluded:

> [35] When dealing with potentially dangerous equipment like a brisket cutter it must always be reasonably practicable for proper training to be given and the safety aspects explained otherwise there is no point in giving any training at all.
>
> [36] No matter how comprehensive the training may have been in other areas it was completely inadequate in this case. On that basis that particular, and the charge, is proved beyond reasonable doubt.

[17] The Judge noted this finding on the third particular determined the outcome of the charge but went on to consider the other two particulars alleged. The first that the appellant should have provided and maintained adequate systems and processes to ensure that hazards arising from the brisket cutter, being a potentially dangerous piece of equipment, were identified and managed immediately and appropriately. Secondly, that the appellant should have ensured that the brisket cutter was safe to use. The Judge considered whether the appellant should have given far more scrutiny to the brisket cutter from a safety point of view on a regular basis, and whether it was reasonably practicable for the brisket cutter to be independently safety-checked by an expert from time to time, including tests to see whether the two-handed safety system could be defeated and the brisket cutter operated one-handedly.

[18] The Judge dismissed the charge on the first and second particulars, finding that on the evidence there was nothing that could have alerted the appellant to the safety defect in the brisket cutter, and WorkSafe had failed to prove beyond reasonable doubt

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7 At [31].
8 At [31] and [34].
9 At [34].

that safer procedures were reasonably practicable.[10] It was only in respect of the inadequate instruction, monitoring and supervision that the appellant was found to have breached its duty.

**Submissions**

*Appellant's submissions*

[19] The appellant appeals the conviction on the grounds that the Judge erred in finding that the appellant had failed to train the victim in the correct use of the brisket cutter (that is, with two hands), on the basis that the evidence did not support that conclusion to the required criminal standard. The appellant says the manner in which that conclusion was reached gives rise to a miscarriage of justice. The appellant also says that this finding contradicted other findings regarding the appellant's robust safety systems and lack of knowledge that the brisket cutter was capable of being used with one hand. The appellant submits the evidence was not sufficient to support any conclusion of guilt.

*Respondent's submissions*

[20] The respondent says the only possible outcome in respect of the appellant's training was that it was inadequate, and the appellant was guilty. In particular, the respondent submits the victim gave clear and credible evidence about how he was trained, which was supported by that of the leading hand and not challenged or contradicted. Moreover, the respondent submits the evidence showed that the victim's inadequate training was carried out under the appellant's supervision. The faults in the victim's training, and the subsequent lack of proper monitoring and supervision, were attributable to the appellant. Finally, the respondent submits the Judge's factual findings were not contradictory. The respondent says the appellant went some way to discharging its obligations under the HSWA, but had not done everything that was reasonably practicable, and failed in the implementation of its policies in this way.

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10 At [59]–[60].

**Approach to appeal**

[21] The Court must allow an appeal of a decision in a Judge-alone trial if it is satisfied that the Judge erred in their assessment of the evidence to such an extent that a miscarriage of justice has occurred, or a miscarriage of justice has occurred for any reason.[11] The appellant submits if the appeal is allowed, in this case an acquittal is appropriate, because, even putting the prosecution case at its highest, the evidence was not sufficient to support the finding of guilt.

[22] A "miscarriage of justice" is any error, irregularity, or occurrence in or in relation to or affecting the trial that (a) has created a real risk that the outcome of the trial was affected; or (b) has resulted in an unfair trial or a trial that was a nullity.[12] A miscarriage of justice is "more than an inconsequential or immaterial mistake or irregularity".[13] The errors or irregularities must depart from good practice in a manner that is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate court must condemn the trial as unfair and quash the decision.[14]

[23] A "real risk" that the outcome was affected exists when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".[15] The appellant does not have to establish that the verdict was "actually unsafe" but rather that there is a real possibility the verdict would be unsafe.[16] To meet the "real risk" test, "something more" than a simple disagreement with a Judge's factual assessment is required.[17]

[24] In an appeal from a Judge-alone trial, the appellate court must form its own independent judgment on the merits of the appeal following the approach in *Austin, Nichols*.[18] If an appellate court comes to a different view on the evidence, the

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11 Criminal Procedure Act 2011, s 232(2)(b)–(c). For conviction appeals involving WorkSafe see for example *Southern Pallet Recycling Ltd v WorkSafe New Zealand* [2022] NZHC 1042, (2022) 18 NZELR 873; and *Waimea Sawmillers Ltd v WorkSafe New Zealand* [2016] NZHC 915.

12 Section 232(4).

13 *Matenga v R* [2009] NZSC 18 at [30].

14 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78], citing with approval *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

15 *R v Sungsuwan* [2006] 1 NZLR 730 (SC) at [110].

16 At [110].

17 *Gotty v R* [2017] NZCA 528 at [15].

18 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575, citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

Judge necessarily will have erred and the appeal must be allowed.[19] However, the appellant bears the onus of persuading the appellate court to reach a different conclusion, and in discharging that onus must identify the respects in which the judgment under appeal is said to be in error.[20] Additionally, in determining whether the judgment was wrong, the appellate court "must take into account any advantages a trial judge may have had."[21] Some caution must therefore be adopted before departing from factual findings. Ultimately the appellant must persuade the appeal court that the trial Judge erred.

**Relevant law**

[25] The purpose of the HSWA is to provide a balanced framework to secure the health and safety of workers and workplaces.[22] The guiding principle of the HSWA is that workers and other persons should be given "the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable."[23]

[26] Under s 36(1)(a), PCBUs, or "persons conducting a business or undertaking", are subject to the "primary duty of care" and must ensure, so far as is reasonably practicable, the health and safety of its workers. "Primary" means "first in terms of being of fundamental application and importance".[24] Duties are not transferrable and a PCBU cannot rely on default by others to excuse its own deficiencies. Where a duty applies, a PCBU must eliminate risks to health and safety so far as is reasonably practicable, or if it is not reasonable practicable to eliminate risks, to minimise those risks so far as is reasonably practicable.

[27] "Reasonably practicable" is defined in the Act to mean that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters. Such matters may include the likelihood of the risk occurring, and degree of harm that might result, whether the

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19 At [38].
20 At [38].
21 At [38].
22 Health and Safety at Work Act 2015, s 3(1).
23 Section 3(2).
24 *Linfox Logistics (NZ) Ltd v WorkSafe New Zealand* [2018] NZHC 2909 at [52].

person knows, or ought reasonably to know, about the risk and ways of eliminating or minimising the risk, and the availability, suitability and cost of ways to eliminate or minimise the risk.

[28] In *Baiada Poultry Pty Ltd v R*, the High Court of Australia considered a similar provision to s 36(1)(a), stating:[25]

> … The words "reasonably practicable" indicate that the duty does not require an employer to take every *possible* step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken, and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty …

[29] The HSWA "does not require employers to ensure that accidents never happen", but rather "requires them to take such steps as are practicable to provide and maintain a safe working environment."[26] Each case must be assessed in view of the circumstances, and "not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them."[27]

[30] A PCBU must be alert to the possibility that workers will not always act in perfect, safety-maximising ways. Worker error does not detract from PCBU responsibility.[28] Where a business delegates responsibility to an employee or contractor, the HCWA provides that the business is liable for acts or omissions carried out by that agent.[29] Thus if a person in charge of a workplace fails to implement a workplace safety policy correctly, and as a result exposes workers to risk, the business is liable for that conduct.[30] In *Linework Ltd v Department of Labour*, the Court held

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25 *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92 at [15] (emphasis in original).

26 Though dealing with different legislation, see *Holmes v R E Spence & Co Pty Ltd* (1992) 5 VIR 119 (VSC) at 123.

27 At 123.

28 *Department of Labour v Hanham & Philp Contractors Ltd* [2008] 6 NZELR 79 (HC) at [138]; and *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526, (2013) 11 NZELR 1 at [52].

29 Health and Safety at Work Act, ss 160–161.

30 *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [23]–[24] and [38].

that the acts and omissions of the person in effective charge of a work site should be attributed to the company,[31] stating:[32]

> … The fact that [the foreman] was personally under a duty and may have breached that duty does not exculpate [the company] from its own breach of duty …. [The foreman] was the embodiment of the employer – its designated authority – for on-site safety purposes. His acts or omissions as [the company's] foreman or site supervisor are properly attributable to the company.

**Discussion**

[31] I now turn to consider whether the Judge erred in his assessment of the evidence and finding the appellant liable under the third particular of the charge.

[32] The appellant submits there are two main but related respects in which the Judge erred. First in relation to the sufficiency of evidence establishing that the victim was "trained" to use the brisket cutter with one hand rather than with two hands, and as a corollary how that liability finding was reached. Secondly, the appellant submits the Judge's findings on this issue were contradictory to the findings he made in respect of the other particulars.

*Sufficiency of evidence*

[33] The appellant submits there was insufficient evidence for the Judge to be satisfied, beyond reasonable doubt, that the victim had been "trained" to use the brisket cutters with one hand by someone who was authorised to train him, namely the co-worker. There are two main arguments under this head.

[34] First, the appellant submits there was insufficient evidence to prove beyond reasonable doubt that the victim was in fact trained by the co-worker in the manner that he described. Secondly, the appellant also submits there was insufficient evidence to prove that the victim's training was carried out with the appellant's authority. The respondent submits there was ample evidence to prove the charge on which the appellant was convicted, namely that the co-worker trained the victim in one-handed

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31 At [24].
32 At [38].

use of the brisket cutters, and that the victim's training was carried out with the appellant's authority.

*Training in one-handed use*

[35] The appellant submits that a proper characterisation of the evidence, put at its highest, is that the victim was trained to use the brisket cutter with two hands. The appellant says he had been assessed for competence and demonstrated that he knew how to use the brisket cutter. It submits that rather than being trained that one-handed use was an acceptable method of use, the victim simply started doing what he said he saw others doing, namely using the brisket cutter with one hand, knowing this was not what he had been trained to do. The appellant submits that this was at the least a reasonable possibility, sufficient to raise reasonable doubt as to what exactly the victim had been "trained" to do. The appellant says there were alternative reasonable possibilities on the evidence that were inconsistent with guilt on this basis, such as having observed and then picked up, even from the co-worker himself (but not as part of his training), "bad habits" such as using the brisket cutter with one hand, which the appellant could not be vicariously liable for. The appellant submits that in those circumstances the benefit of that doubt should have been given to the appellant, and the Judge was wrong to be satisfied, beyond reasonable doubt, that the victim had been trained in one-handed use.

[36] The respondent submits there was ample evidence that the victim was trained by the co-worker in one-handed use and that was never put to the victim that he was lying about who trained him, or how he was trained. It says there was simply no evidence to contradict the victim's account.

[37] The co-worker who the victim said trained him, Mr A, was not called as a witness for the prosecution. Neither was he identified nor interviewed by the WorkSafe investigators. The appellant submits this meant the prosecution could not prove that the co-worker had trained the victim. That overlooks the fact that however, the victim gave first-hand evidence about how he was trained, and, as the respondent points out, there was no challenge to the victim's evidence on this point. The appellant

could have called the co-worker if it had so chosen. It cannot now speculate as to what the co-worker's evidence might have been.

[38] The particular alleges failures of "instruction, monitoring, and supervision". The Judge focused on the victim's training. Practical demonstrations are an important part of the training process, and the victim learnt on the job through observing the co-worker. The evidence of the victim was clear about what he was shown to do — to use the cutter with one hand.

[39] Mr Pilditch KC for the appellant submitted that those in authority, including Mr Mitchell who was the leading hand/supervisor, did not know it was the practice to use the brisket cutter one-handed let alone that it was happening. He said the victim was trained to use it two handed but must have seen people, including his co-worker Mr A, using it one-handed. Mr Pilditch submitted there was no systemic failure. The appellant said that in the circumstances, the company could not be liable for co-workers adopting a practice about which those in authority knew nothing.

[40] Mr Pilditch pointed to a document that the victim signed saying that he had undergone the training and would follow procedures. This was dated 30 September 2020. The incident with the brisket cutter happened on 15 October 2020.

[41] The material which was attached as separate pages before the signature page set out the procedures for the use of the cutter. Page 2 of the instructions stated that the cutter must be operated with one hand on each handle. Mr Mitchell, the leading hand/supervisor signed the document under the designation "Tutor". The victim signed the document as "Trainee" which acknowledged that he had undergone training on the brisket cutter, he understood it and would follow safe work procedures all times.

[42] Mr Mitchell said there was no documentary evidence that would assess a trainee's competence in various aspects of using the cutter nor was there any information about what exactly was covered in the training for the cutter. Mr Mitchell said that he would have given the training material to the trainee to read, and they could ask any questions arising from it. He said the trainee would be then taken to

learn on the job. Mr Mitchell in his evidence said that a competent worker would be assigned to train someone to operate the cutter. Mr Mitchell didn't watch the victim read the material before he signed it. Nor did he remember who trained the victim, although he had been "told that" Mr A had done the training.

[43] The victim was interviewed by a Worksafe investigator a few days after the incident but at that stage could not remember who had trained him. He had no recollection of what happened when he woke up after the accident having been taken from Hawkes Bay to Waikato hospital.

[44] In his evidence, the victim said he was trained by Mr A, his co-worker who had been working on the floor using the brisket cutter for about two weeks before he trained the victim. The victim said the leading hand, Mr Mitchell did not teach him anything but he did check on the victim once.

[45] The victim said that Mr A trained him by demonstrating its use and showed him how to do so with one hand. Initially, the victim used the cutter with two hands until it "got easier and it got easier and easier" and so was able to use it with one hand. Mr A trained the victim for about four hours and then there was no supervision. The victim said in addition to Mr A, he saw other people use it with one hand. The Judge accepted the victim's evidence as to the training he received. He was entitled to do so. The Judge found the victim was trained to use the cutter by Mr A using the technique that resulted in his injuries two weeks later.

[46] I do not accept that as Mr Pilditch put it the judge "pivoted" from his acceptance at [18] that the cutter was designed to be used with two hands to his conclusion that the training was inadequate, because the victim received inadequate training on use of the cutter.

[47] There was uncontradicted evidence that the instruction by the co-worker was inadequate and the victim had been shown by the co-worker during training how to use the cutter with one hand. That supported the finding that the monitoring and supervision of the victim was inadequate. For example, the victim's evidence was that he was only checked on once by the leading hand while using the brisket cutter.

*Authority*

[48] The appellant submits there was no evidence that the co-worker was delegated to train the victim. The appellant says it was an error for the Judge to rely on inferential reasoning to conclude that the co-worker must have been delegated by someone in authority to do so.

[49] Even if the co-worker had been so delegated, the appellant submits he was not authorised to teach one-handed use, as this was contrary to the safety protocols in place. The appellant submits a worker cannot be acting within the scope of their authority when they depart from the instruction they are given on how equipment is to be used, and therefore how a person is to be trained in the equipment's use.

[50] The respondent makes three submissions in response.

(a) First, that the co-worker's failings were not the only basis on which the charge was proved. For example, the leading hand who was responsible for supervising the slaughter room, and who signed the victim off as competent to use the brisket cutter, failed to adequately monitor the victim's use of the brisket cutter. That is attributable to the appellant.

(b) Secondly, the co-worker was authorised to train the victim. The only inference available from the evidence is that the leading hand had delegated responsibility for training the victim on the use of the brisket cutter to the co-worker, who was an employee of the company. Therefore s 161(2) of the HSWA applies. This attributes liability to the PCBU for conduct engaged in by an employee of the PCBU acting within the scope of their actual or apparent authority or by any other person at the direction of an employee of the PCBU given within the scope of their actual or apparent authority.

(c) Finally, the respondent submits that the co-worker's failures are attributable to the appellant, because the co-worker himself breached duties under the HSWA and/or failed to follow the appellant's mandated

> training process. Section 33(2) of the HSWA confirms that where two or more people have duties in relation to the same matter, each duty holder must comply with that duty to the standard required even if another duty holder has the same duty. In *Linework* the Court of Appeal expressly rejected the submission that the conduct of an employee who breached their own health and safety duties should not be attributed to their employer.[33]

[51] I accept the respondent's submissions on this point. On the evidence it was open to the Judge to conclude that the co-worker was responsible for the training of the victim. The co-worker was an employee and his failure in training are attributable to the appellant. There was ample evidence for the Judge to be satisfied beyond reasonable doubt on that issue.

[52] For completeness, while the appellants say the Judge erred in failing to specifically refer to s 161(2). I do not consider this was an error. This is an attribution provision and it is not necessary to refer to it in order for it to be operative in the relevant circumstances. Any failure to refer to s 161(2) did not give rise to a miscarriage of justice.

*Contradictory factual findings*

[53] The second main ground of appeal is that the Judge could not have found the appellant liable for the victim's training when he had concluded that in general the appellant's systems to identify and manage hazards were robust, and its management well-meaning. The appellant alleges the Judge failed to recognise that his findings in respect of the first two particulars necessarily meant the training that occurred in the victim's case was an aberration that was not reasonably detectable by the appellant.

[54] The appellant submits the Judge treated the particulars on a mutually exclusive basis, which was an error because the findings on the first two particulars were relevant to the finding on the third. The appellant says the Judge's finding that the appellant did not know, nor ought to have known, that the brisket cutter could be operated with

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[33] At [38].

one hand, and therefore it was not practicable for the appellant to mitigate that risk, contradicts the finding that the appellant failed to train the victim in the correct use of the brisket cutters. The appellant says that if the appellant could not mitigate the risk of one-handed use of the brisket cutters, because it simply believed it was impossible to use them in this way. Therefore, it could not mitigate the risk of an employee being shown to use the brisket cutter in a one-handed way either, seeing as that was an unknown possibility.

[55] The appellant submits that Judge was satisfied that the appellant's safety systems were adequate, indeed that they were "robust".[34] Therefore given the Judge found it had taken all practicable steps to have proper systems in place concerning the use of the brisket cutter and other dangerous equipment, it is difficult to conceive how the appellant could have prevented the victim from being shown how to use the brisket cutter in the way in which he claims he was trained. The appellant submits it simply had no way of knowing that such one-handed use was possible. Therefore, although the victim may have been trained to use the cutter in that dangerous way, this was not a risk that could have been mitigated. The appellant submits it had done all it practicably could to detect misuse through its robust safety systems, and cannot have been expected to know and be aware of every isolated misuse that could arise in circumstances where it believed the brisket cutter could not be operated with one hand in any case.

[56] This overlooks the fact that the HSWA required the appellant to do everything reasonably practicable "on the floor of the factory … while operating … plant and machinery" to ensure the health and safety of its workers. The respondent submits that in this context, it was the actions of the appellant's supervisors and trainers that counted. The respondent says they fell short, and therefore so too did their employer.

[57] At sentencing, the Judge stated:[35]

> I am satisfied on what I heard that the company was driven by the need to maintain a safe procedure in all of its work areas, but that on this occasion because of what actually happened the system of training broke down as a result of human error and the legislation is designed to catch a situation as

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34 Conviction decision, above n 1, at [48].

35 *WorkSafe New Zealand v Progressive Meats Ltd* [2023] NZDC 10142 at [11].

> that. Undoubtedly it is onerous on employers and persons in control, however, that is the statutory basis upon which the Court has to proceed.

[58] This states the law correctly. Although the appellant claims that it is not responsible for the specific failings of the leading hand or co-worker because its systems and processes overall were compliant with the HSWA, as the Court of Appeal stated in *Linework*:

> "To ask, as the appellant's counsel did, what more the employer could have done, is to beg the question: whose acts and omissions are to be attributed to the employer?"[36]

[59] The HSWA provides for the statutory basis upon which liability is grounded. In this case the liability for the deficiencies in implementation of the training and safety procedures rests with the appellant.

[60] I am satisfied the Judge made no error in finding that although the appellant's systems and processes were robust, the implementation of the workplaces policies and procedures on the ground were inadequate in this case. That failure exposed the victim to a risk of serious injury, which resulted in the victim suffering a serious injury. I do not accept that the Judge's findings were contradictory in the way the appellant alleges, and accordingly this ground must fail. The Judge was satisfied beyond reasonable doubt on the fact that the training and supervision were inadequate. There was sufficient evidence for him to reach that conclusion.

**Conclusion**

[61] Both grounds of appeal fail for the reasons set out above. The Judge made no error. Accordingly, the appeal is dismissed.

Grice J

Solicitors:
Richmond Chambers, Auckland
Luke Cunningham & Clere, Wellington
WorkSafe New Zealand, Wellington

[36] *Linework*, above n 30, at [23].