

**IN THE DISTRICT COURT
AT INVERCARGILL**

**I TE KŌTI-Ā-ROHE
KI WAIHŌPAI**

**CRI-2019-025-000935
[2021] NZDC 2368**

WORKSAFE NEW ZEALAND
Prosecutor

v

MINISTRY FOR PRIMARY INDUSTRIES
Defendant

Hearing: 11 February 2021
Appearances: K E Hogan for the Prosecutor
C White for the Defendant
Judgment: 11 February 2021

NOTES OF JUDGE R J WALKER ON SENTENCING

[1] The Ministry of Primary Industries (MPI) have pleaded guilty to two charges.

Charges

[2] The first charge is laid under ss 36(1)(a) and 49(1) of the Health and Safety at Work Act 2015, in that being a PCBU it breached its duty to ensure the health and safety of workers.

[3] The particulars alleged are that it was reasonably practicable for the Ministry for Primary Industries to have:

- Firstly, identified the hazards and risks associated with cleaning and disinfecting work at farms identified in the biosecurity response to the Mycoplasma bovis outbreak; and
- Secondly, identified the appropriate controls, such as personal protective equipment, to be used by workers involved in the cleaning and disinfecting work; and
- Thirdly, ensured its contractor, namely AsureQuality Limited, had a safe system of work for the cleaning and disinfecting work in place prior to the work commencing; and
- Finally, monitored compliance with the safe system of work for the cleaning and disinfecting work.

[4] The second charge is one laid under s 34(1) that being a PCBU who had a duty in relation to workers carrying out cleaning and disinfecting work at farms identified in the biosecurity response to the Mycoplasma bovis outbreak, failed so far as was reasonably practicable, to consult, co-operate, and co-ordinate activities with all other PCBUs who had a duty in relation to the same matter, namely AsureQuality Limited, OneStaff (Queenstown/Invercargill) Limited, and Industrial Scrub (SI) Limited.

[5] The particulars of that charge are that it was reasonably practicable for Ministry for Primary Industries to have consulted, co-operated, and co-ordinated activities with AsureQuality Limited, OneStaff (Queenstown/Invercargill) Limited, and Industrial Scrub and Sweep (SI) Limited about a safe system of work for the cleaning and disinfecting work.

[6] Two other defendants have already pleaded guilty and have been sentenced in relation to the same incident, namely those entities I have referred to – AsureQuality Limited and OneStaff (Queenstown/Invercargill) Limited.

Facts

[7] Lengthy and detailed summaries of fact have been prepared but the facts have been summarised in the submissions of the prosecutor, Ms Hogan, which I intend to adopt for the purposes of this sentencing.

[8] MPI is responsible for biosecurity of New Zealand's primary sector and for any response to a biosecurity threat. On 22 July 2017 *Mycoplasma bovis* (or M.bovis) was identified in New Zealand for the first time. Between 25 July 2017 and October 2017 MPI and AsureQuality Limited reached agreements regarding AsureQuality carrying out cleaning and disinfection services in the biosecurity response to M.bovis.

[9] By early February 2018 M.bovis was identified in farms near Invercargill. OneStaff was contracted by AsureQuality to provide temporary workers for the cleaning and disinfecting work. On 17 May 2018 a group of OneStaff workers was in a shed at Southern Dairies Centre Farm (SDC Farm), using a sodium hydroxide-based cleaner, called X-Clean Doo Away.

[10] Seven of the workers suffered minor or superficial burns as a result of contact with the product. Five were taken to hospital to receive treatment.

[11] MPI, who were responsible for the biosecurity response and were the head contractor, failed to adequately consult, co-operate and coordinate with AsureQuality and its subcontractors regarding health and safety. Additionally, MPI failed to ensure a safe system of work for the OneStaff workers. It should have, firstly, implemented its existing policies and procedures to identify the risks to health and safety and appropriate controls including in documentation that recorded its agreements with AsureQuality; and secondly, ensured that AsureQuality had a safe system of work including adequate induction and training of the OneStaff workers, provision of sufficient personal protective equipment (or PPE) for the work, and adequate monitoring and all supervision of the work. At all times MPI had access to relevant information and the site where the work was being undertaken.

[12] By way of further information taken from the extended version of the caption summary, on 17 May 2018, as a result of what appeared to have been time pressure and some criticism of the cleaning work undertaken to that point by MPI, Industrial Scrub and Sweep (SI) Limited decided to introduce the use of X-Clean Doo Away into the cleaning regime as the SDC Farm. While that product was not listed inASUREQuality's safety plan for cleaning and disinfection, as part of the biosecurity response MPI had previously used it on another site, although it is stressed to me today that MPI were only generally aware of the product.

[13] OneStaff were not advised of the change in chemical or cleaning process. The product itself had a number of listed health effects, including harm if swallowed, severe skin burns, and serious eye damage. The PPE recommended included chemically impregnable gloves, work shoes, protective work clothes such as aprons or overalls, and a face shield or respirator if the chemical was to be sprayed or vaporised.

[14] On site, the chemical was poured into buckets and various dilutions were tested to check which ratio worked best for cleaning. It was at that point that one of the OneStaff workers received some splashes to the face which he felt burn, requiring him to rinse his face immediately with water. The OneStaff workers were then split into four teams and tasks with cleaning in the dairy sheds. Approximately 15-20 minutes into her cleaning and disinfecting work with Doo Away, another of the OneStaff workers said that she felt a burning sensation on her arms, which was then rinsed off with water. She was given new gloves and returned to work, but five minutes later again felt a burning sensation which was treated with saline solution.

[15] As a result of contact with Doo Away during the course of cleaning, a total of seven OneStaff workers received minor burns to either arms, hands, or face. One of the workers received superficial first-degree burns to her forearms which subsequently became infected. Five of the workers were taken to the A&E Department at the Winton Hospital and were subsequently transferred to Southland Hospital but none were admitted for any inpatient treatment.

[16] On 5 November 2020, AsureQuality and OneStaff were sentenced in relation to charges arising from this incident. The sentences imposed are succinctly outlined in the prosecutor's submissions as follows:

- The Court adopted a starting point of \$120,000, with discounts for guilty plea, co-operation, remedial action, previous good record, and remorse, which resulted in an end fine of \$66,000.
- On the s 34 charge there was a conviction and discharge.
- AsureQuality were ordered to pay prosecution costs of \$2,392.93, and reparation to the five victims who filed victim impact statements, amounting to one-third of \$5,000, namely \$1,666.66 was ordered against each of the defendants.
- In relation to OneStaff the Court adopted a starting point of \$70,000, with the same discounts as for AsureQuality, resulting in an end of fine of \$38,500. They, too, were required to pay prosecution costs of \$2,392.93 and their one-third share of reparation amounting to \$1,666.66.

Prosecution submissions

[17] Both the prosecutor and counsel for the defendants have provided the Court with helpful and lengthy written submissions.

[18] The prosecutor reminds me of the purposes and principles of sentencing set out in s 153(2) of the Health and Safety at Work Act which includes reference to the Sentencing Act 2002 and in particular ss 7 and 8.

[19] There is no dispute between the parties in this case that the recent decision of the full bench of the High Court in *Stumpmaster* sets out the four steps that the Court is required to take in relation to matters such as this that come before the Court.¹ Those steps are:

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

- i. to assess the amount of reparation;
- ii. to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors of the offending and the offender;
- iii. to determine whether further orders under ss 152-158 are required; and
- iv. to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the three preceding steps. This includes consideration of ability to pay (which does not rise in this case) and also whether an increase is needed to reflect the financial capacity of the defendant.

[20] The culpability bands in *Stumpmaster* are well known and referred to in both counsels' submissions. I do not propose to repeat them for the purposes of this sentencing.

[21] Dealing firstly with the issue of reparation, it is accepted that the offending in this case did not involve any personal loss to the victims for which reparation is sought. I have, however, previously read the five victim impact statements in the course of sentencing the other two co-defendants in November 2020. I ordered reparation of \$1,000 for each of the victims who had filed a victim impact statement, and apportioned two-thirds of that between the co-defendants. MPI does not take any issue today with paying the remaining one-third share of \$1,666.

[22] It is common ground that in fixing a fine I need to bear in mind the Court of Appeal case of *R v Taueki* where an established starting point must reflect the seriousness of the offending, which is then adjusted for any aggravating or mitigating circumstances personal to the offender.²

[23] The prosecutor submits that the defendant's culpability for this offending falls in the middle of the medium band for the following reasons:

² *R v Taueki* [2005] 3 NZLR 372 (CA).

- (a) the chemicals in question did not pose a high risk, such as in a case where death might ensue;
- (b) the failings in this case relate to the adequacy of induction, training, PPE, monitoring and supervision of workers who were using the chemical, and that there was effectively no training, monitoring or supervision provided;
- (c) that the failings here appeared to have arisen by oversight rather than by design;
- (d) that the failings occurred in the context of work being undertaken for the greater public good;
- (e) that nonetheless the failings were significant and gave rise to the minor or superficial burns received by the OneStaff workers;
- (f) as observed in *Stumpmaster*, even a “minor slip-up from a business otherwise carrying out its duties in the correct manner,” attracts the medium band, although counsel for MPI took issue with that interpretation of *Stumpmaster*, submitting that the Court was referring to the low culpability band when it made that comment and WorkSafe have corrected that submission and now say that such a minor slip-up can attract a starting point of up to \$85,000.

[24] WorkSafe submit that MPI’s culpability is less than AsureQuality’s, as the latter assumed responsibility to operationally deliver the cleaning and disinfecting work for MPI. AsureQuality also had contractual and practical proximity to the OneStaff workers. That submission is then tempered by WorkSafe who submit that MPI was not a “hands off” head contractor and had a statutory responsibility for the M.bovis response and could not contract out of its health and safety responsibilities and obligations.

[25] MPI had procedures and policies in place regarding biosecurity responses and health and safety procedures which could have been implemented and it maintained a practical role in the response, including sharing Invercargill headquarters and having daily briefings withASUREQuality.

[26] The prosecutor submits the starting point of \$100,000 is appropriate for both charges faced by MPI, having regard to the \$120,000 starting point adopted previously by the Court in relation to ASUREQuality. WorkSafe acknowledges that there are no aggravating personal circumstances, that MPI has no previous health and safety convictions, and that it co-operated with the investigation into this matter.

[27] WorkSafe seek an ancillary order for their legal costs of \$3,800.06 comprising of the same \$2,392.93 awarded against each of the co-defendants, plus an additional \$1,407.13 being 50 per cent of the cost incurred by WorkSafe since the co-defendants were sentenced.

Defence submissions

[28] MPI is a public service department tasked with overseeing, managing and regulating amongst other things farming, fishing, food safety, forestry and biosecurity in New Zealand. I am told this morning it employs of 2,500 people throughout the country. According to the affidavit filed by the Director of Health Safety and Wellbeing at MPI, it takes health and safety of all workers very seriously, but that the M.bovis outbreak has been New Zealand's largest ever biosecurity response and that MPI does not employ what it refers to as "a standing army" that can be deployed in the event a biosecurity emergency arises. It instead utilises a biosecurity panel of pre-approved providers such as ASUREQuality.

[29] Following on from this incident, MPI identified and implemented a number of improvements to its practices to prevent any reoccurrence of this event, which is detailed in the affidavit filed on MPI's behalf.

[30] Counsel for MPI submits that the Court should adopt a starting point of between \$30,000-\$50,000 and that there are no aggravating factors that would justify

an uplift in that starting point, and that MPI is entitled to appropriate discounts totalling 25 per cent for remorse, willingness to pay reparation, co-operation with the investigation, for remedial action undertaken, and its previous good character in terms of a favourable safety record. MPI seeks an additional 25 per cent discount for its guilty pleas. MPI seeks an end fine in the range of \$16,500-\$27,500 on my calculation.

[31] Counsel for MPI, in written submissions, refers to the wider circumstances in which the M.bovis outbreak occurred. He reiterates that today in his submissions, where Mr White says that matters need to be looked at in context and that context is the key here.

[32] He submits that it was entirely reasonable, given the size of the task at hand, that outside contractors such as AsureQuality were required to undertake cleaning and disinfecting work. I accept the submission in this case that in order to eradicate M.bovis from New Zealand, MPI had to engage responsible and competent contractors, but that MPI did not itself have a hands-on role in cleaning and disinfecting work that was being undertaken, while at the same time acknowledging it fell short of WorkSafe's expectations of a PCBU including the requirement to ensure that the safety plan was being properly implemented by its contractor, AsureQuality.

[33] MPI maintain that they were not aware that Industrial Scrub Limited had made the decision to introduce a more hazardous chemical into the clean-up process, and that it was them who owed the primary duty of care to workers to ensure that the product was being used with appropriate PPE. While MPI submits that it takes health and safety responsibilities seriously and that the incident was regrettable, it is submitted that its failures need to be viewed in proportion to the size of the entire biosecurity response that was taking place at the time.

[34] MPI submit that the Court accepted, in relation to the sentencing of the co-defendants, that OneStaff was less culpable than AsureQuality, given it was the subcontractor with less control over day-to-day operations and that MPI had even less control in those day-to-day operations than OneStaff. It cites *WorkSafe New Zealand v Aldersen Poultry Transport Limited* in support of its starting point, and submits that while the facts of this case are markedly different, there are

similarities between the role played by Tegel in that case and the role of MPI in this one.³ MPI submit that, like Tegel, it did not have a role in the day-to-day operation of the work being undertaken, in this case cleaning and disinfecting work, but that MPI's culpability is also reduced further by a number of matters, including the context of New Zealand's largest biosecurity response which was unprecedented, that MPI were not aware of the use of the more hazardous cleaning product, and that it selected a competent contractor with a good record of health and safety compliance, and that MPI were removed from direct control of the day-to-day processes adopted by its contractor.

[35] In terms of an overall assessment, MPI submit that the two charges should be dealt with together on a totality basis, given that they arise from the same incident, and that consistent with the approach taken in relation to AsureQuality both charges should be treated as a single instance of offending arising from the same facts.

The Court's assessment

[36] I consider that the culpability in relation to MPI is within the low to low-medium range of the low culpability band, and that in terms of parity with its co-defendants, AsureQuality and OneStaff, it had less control over the day-to-day operation of cleaning and disinfecting work. I accept that its major failing was in its failure to ensure that AsureQuality was adhering to the safety plan, which had only been updated eight days prior to this incident.

[37] In terms of parity with the co-defendants, I asked both counsel for oral submissions today in relation to where that culpability sat by comparison with both OneStaff and AsureQuality. Ms Hogan, for WorkSafe, places the culpability of MPI between AsureQuality and OneStaff, on the basis that although OneStaff were the direct employers of the injured workers, OneStaff were expressly denied access to site. The Ministry were empowered, in her submission, and had site access and direct contact with AsureQuality, again on the basis that they shared offices and daily briefings.

³ *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090.

[38] Mr White submits that OneStaff had greater obligations to ensure the safety of their own staff, that they could and should have ensured access to the site for the health and safety of its workers. The Ministry, he submits, did not have the same nexus to the site and the actual work undertaken, and that the primary failure of MPI here, which I accept, was the failure to ensure that others adhered to the safety plan.

[39] In *Stumpmaster* the Court cautioned against the use of what had been considered standard bulk discounts for remorse, co-operation, remedial action, reparation, and prior good record, because “they distort the sentencing process and bring about sentencing outcomes that are lower than they should be”. The Court in *Stumpmaster* indicated that there should be proper analysis before applying those credits, and that a discount of up to 30 per cent was only available in cases that exhibit all the mitigating features to a moderate degree, or one or more of them to a high degree.

[40] I consider in this case, and again bearing in mind parity with co-defendants, that the combined mitigating features warrant a global discount of 15 per cent in addition to the 25 per cent reduction for guilty pleas available to each of the defendants to reflect their co-operation with the prosecution and remedial action undertaken, and a combined five per cent for previous good record and remorse.

[41] Section 152(1) of the Health and Safety at Work Act provides:

On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable ...

[42] In this case I awarded a prosecution cost of \$2,392.93 against both co-defendants. The prosecution seeks 50 per cent of the additional work undertaken since that hearing. I accept that those costs sought are just and reasonable.

[43] Overall, the final step in the sentencing process is an overall assessment of reparation which, as I mentioned in this case, was not sought specifically, other orders and fine.

[44] I regard MPI’s culpability in this matter as being less than both AsureQuality and OneStaff, where I adopted starting points of \$120,000 and \$70,000 respectively.

Sentence

[45] In relation to MPI, I adopt a starting point of \$50,000. I deduct 40 per cent for the mitigating factors I have referred to previously, which will result in an end fine of \$30,000.

[46] In addition, MPI will be ordered to pay prosecution costs in the sum of \$3,800 and reparation in the sum of \$1,666.66. That fine and costs will be entered against CRN 935.

[47] On CRN 261, the defendant will be convicted and discharged.

Judge R J Walker
District Court Judge

Date of authentication: 24/02/2021

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.