IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-000214
[2022] NZDC 355

WORKSAFE NEW ZEALAND
Prosecutor

v

FLICK ANTICIMEX LIMTED
Defendant

Hearing:	7 December 2021
Appearances:	V Veikune for the Prosecutor (via AVL) O Welsh for the Defendant (via AVL)
Judgment:	7 December 2021

NOTES OF JUDGE D J SHARP ON SENTENCING

---

[1] This is a sentence in respect of WorkSafe New Zealand and Flick Anticimex Limited. The defendant company is for sentence on one charge of contravening ss 36(1)(a) and 48(1)(2)(c) Health and Safety at Work Act 2015, referred to as "the Act". Maximum penalty for such offences is $1,500,000 fine. The particulars of the offence relate to exposure of individuals to risk of death or serious injury arising from risks from toxic fumigant gases, specifically methyl bromide, hydrogen cyanide and formaldehyde.

[2] The prosecution maintain it was reasonably practicable for the defendant to have by implementation of training, monitored compliance, an effective safe system

of work to carry out fumigation, that work being at the time part of the defendant company's business. The defendant company's business required:

(a) Effective and proper ventilation of situations involving fumigation;

(b) Ongoing work health safety monitoring and health monitoring;

(c) Appropriate safety equipment correctly fitted and employed and with employer insistence upon proper use.

[3] The factual situation was that the defendant company had a core business of conducting pest control services and at the time of offending this included fumigations in addition to washroom hygiene services. The defendant company operates from five offices around New Zealand (Auckland, Tauranga, Napier, Wellington and Christchurch) employing 50 full-time equivalent employees.

[4] The fumigation services that were involved had as part and parcel, use of hazardous substances. As such the defendant company staff were involved in fumigations and were certified handlers for methyl bromide and hydrogen cyanide (as a minimum), as well as being controlled substance licence holders.

[5] Hazard substances are regulated through a range of legislative instruments.

[6] Hazard substances are classified by the Environmental Protection Agency.

[7] The relevant hazardous substances involved in this case are class 6 – substances toxic to people. During the relevant period the defendant's fumigation services involved the use of three acutely toxic fumigants:

(a) Methyl bromide – a class 61B hazardous substance – acutely toxic – fatal. The use of methyl bromide is subject to Ministry for Primary Industries' requirements and was used to fumigate logs shipped from New Zealand;

(b) Hydrogen cyanide – a class 6.1A hazardous substance – acutely toxic – fatal. Hydrogen cyanide is used to fumigate imported bananas and pineapples;

(c) Formaldehyde – a class 6.1B hazardous substance – acutely toxic – fatal. Formaldehyde is used to fumigate imported equine equipment such as saddles.

[8] The defendant carried out methyl bromide functions at clients' worksites and at a dedicated container at their own worksite. Methyl bromide is applied to the area being fumigated ("the fumigation area") from a compressed gas cylinder where it exists as a liquid. From the cylinder the liquid passes into a glass dispenser ("sight glass") with a graduated scale to measure the amount of liquid needed. This is then piped to a heat exchanger to transform the liquid into a gas. The gas then moves through hoses into the fumigation area to be distributed among the cargo being fumigated.

[9] To ensure the gas remains in the fumigation space for the required period various methods are used to prevent gas escape, depending on the nature of the fumigation. For example, for shipping containers the doors are closed and gaps sealed; for shipping containers containing logs, up to six containers are placed side-by-side each with one door ajar, and all six are covered with a tarpaulin. The tarpaulin is sealed around the bottom edges.

[10] To vent the fumigated area the tarpaulins are removed, all container doors fully opened to allow the gas to escape and disperse into the atmosphere. Once this occurs, respiratory protection becomes critical for the risk minimisation action required for workers.

[11] The defendant company carried out hydrogen cyanide functions entirely at clients' worksites in rooms capable of being segregated. Hydrogen cyanide was applied using a sealed container containing hydrocyanic acid. Once opened, this reacts with air to produce hydrogen cyanide gas that disperses into the fumigation area.

[12] Fumigation workers must open the cannisters while in the sealed fumigation room. Hence their only form of exposure control at this time is personal protective equipment. When the fumigation is completed, the room is vented by permanently fitted extraction fans that can be operated through a control panel installed outside the room.

[13] The defendant company carried out formaldehyde fumigations entirely at their own worksite using a shipping container. Liquid formaldehyde was added to the closed container via an open-to-air funnel on the outside of the container and passed into it. The formaldehyde then dropped into potassium permanganate crystals placed inside the container.

Standards and Guidelines

[14] The controls required for hazard substances generally are prescribed in the Health and Safety at Work Legislation.

[15] WorkSafe also has specific guidance on health and exposure monitoring and generic guidance as to the process for developing and reviewing safe systems at work. There is well developed guidance (that the defendant company was aware of) on the selection, use and maintenance of respiratory protective devices. These comprehensively detail the requirements for complete respiratory protection programmes, including the selection of equipment, training, issue, fitting, wearing, maintenance and record keeping and evaluation.

Workers Suffering Methyl Bromide Poisoning

[16] On 27 June 2020 a defendant company fumigation worker, Mr Brett Glogoski, was admitted to North Shore Hospital after experiencing symptoms for two months, including drowsiness, fatigue, confusion, clumsiness and occasional blurred vision. Blood bromide testing confirmed that he had suffered acute methyl bromide poisoning. Mr Glogoski was treated and discharged home on 1 July 2020. He was cleared by an occupational medical specialist to return to half days at work on

20 July 2020 with full days from 27 July 2020. He was to have no further contact with methyl bromide work.

[17] Following the hospitalisation of Mr Glogoski the defendant company immediately initiated blood tests for the other Auckland based fumigation workers employed by itself. Five of the eight workers further tested, Adam de Beer, Cameron Hall, Navineet Chand, Mala Tevita and Michael Gaslevich, were found to have methyl bromide poisoning. The workers reported symptoms consistent with such exposure, including tingling at the end of fingertips, light-footedness, falling over and poor vision, poor impulse control and stinging in the eyes. These workers were tested again in August 2020 and continued to have elevated levels of blood bromide. Further testing in October 2020 showed a significant reduction in blood bromide levels.

WorkSafe Investigation

[18] WorkSafe were notified by the defendant company of Mr Glogoski's hospitalisation on 2 July 2020 and an investigation was later commenced.

[19] The defendant company produced a document to WorkSafe entitled *Hazardous Substances and Dangerous Goods Principle*, which set out how the defendant company would manage the health and safety risks relating to the use of hazardous substances. This document referred a wide range of New Zealand and overseas' standards and guidance and demonstrated the defendant was aware of best practice. It specifically noted the defendant company:

(a) Shall implement a risk management approach to hazardous substances to determine whether a person's health is or could be at risk from exposure to hazardous substances used or produced in the workplace;

(b) Shall ensure the employees working with or exposed to hazardous substances shall receive appropriate training. That training shall include consideration of the process of chemical risk management and

assessment of level of risk; safe work practices; incident notification and reporting.

[20] The reporting requirements included registers of substances, atmospheric monitoring and the need for surveillance as part of the risk management programme.

[21] The WorkSafe investigation identified substantial failures by the defendant company in managing the exposure of its workers to the toxic fumigants, these included:

(a) The defendant failed to adequately assess and control the risks presented to workers at the venting stage. There was no system by which workers exposed to methyl bromide gas, hydrogen cyanide gas or formaldehyde gas were systematically monitored.

The defendant did have methyl bromide gas monitors, but these were not always available to or used by workers for venting methyl bromide fumigations. In addition, workers were from time-to-time under pressure from clients to close containers before they considered them to be properly ventilated;

(b) Given the lethal nature of the fumigants involved and the potential concentration that workers would be exposed to, it was essential that the respiratory protection provided by the defendant company was appropriate, a suitable fit for the worker, fitted correctly and routinely worn. The defendant company did not have an adequate system in place to ensure this occurred;

(c) The defendant company could not provide fit testing results for three of eight workers involved in the fumigations nor evidence that they had annual fit tests. Four workers reported doing fumigations before they had their first fit test. Secondly, there were defects in the fitting and use processes which were identified;

(d) Thirdly, in respect of the routine wearing of the respiratory protection, in the absence of clearly set out and enforced rules, workers adopted different practices to wearing respiratory protection, including not wearing it during methyl bromide venting (one worker holding his breath), not wearing it due to issues with fogging and prescription glasses, not wearing it during night time fumigation due to visibility issues, or needing to remove it due to sweat breaking the seal. The defendant company did not have a coherent system for health monitoring of workers potentially exposed to toxic substances. While some monitoring did take place, this was ad hoc and the defendant company failed to respond adequately to concerning blood tests;

(e) The defendant company had changed its fumigation practices in December 2019 moving from generally only fumigating single containers to fumigating six containers side-by-side as one unit at a client's site in Mangere. This involved greater risk, given the larger volume of gas and the multiple fumigations at the same site in one day. Further, the site lacked lights so for night-time fumigations the workers had to park vehicles very close to the fumigated containers and use car headlights to see. The lack of visibility led some workers to not wear respirators at night, as they could not see with them on. The defendant company did not identify the inadequate lighting as a health and safety risk or review its controls for the changing worksite practices at that site;

(f) The defendant company did not have a rigorous internal system to ensure the training, instruction, competence and supervision of fumigation work. Not all workers received induction training when they started working with the defendant company. Whilst the defendant company had a documented system with 10 step process for training fumigation technicians and assessing their competency on an ongoing basis, this was not followed in practice.

(g) The defendant company had no system to regulate the calibration, use and maintenance of gas monitors or how to interpret data provided, including the effects of interference, false readings from other gases, reductions in response due to high humidity et cetera. The training and assessment of staff on the use of gas monitors was not systematic or structured and on occasions involved non-fumigation staff assessing other workers;

(h) The defendant company did not have a certified handler for formaldehyde fumigations. A failure to ensure health and safety as a consequence of failing to meet the obligations required under the Act. A failure to have implemented by training and monitored compliance a safe system of work for fumigations resulted. The defendant company has not previously appeared before the Court.

[22] Section 151(2) of the Act sets out a sentencing criteria that I must apply. I am required to have regard to the principles and purposes of the Sentencing Act 2002, in particular ss 7 and 10 Sentencing Act must be applied. In addition, I must consider the principles and purposes of the Act and I have to consider the risk of, and the potential for illness, injury, or death that could result or could have occurred and:

(a) Consider whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred; and

(b) The safety record of the person (including without limitation), any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person, to the extent that it shows were there any aggravating factors present; and

(c) The degree of departure from prevailing standards in a person's security or industry as an aggravating factor; and

(d) The person's financial capacity or ability to pay any fine to the extent it has the effect of increasing the amount of the fine.

Sentencing Act considerations

[23] As regards s 7 Sentencing Act, the Sentencing Act 2002 requires that I:

(a) Hold the offender accountable for the harm done by the offending;

(b) Promote in the offender a sense of responsibility for that harm;

(c) Provide for the interests of the victim of the offence; and

(d) Denounce the conduct in which the offender was involved;

(e) Deterrents both in relation to the offender and generally.

[24] As regards holding the offender accountable, in this case there has been a guilty plea and while that generates credit in terms of mitigation it also shows the responsibility of the defendant for acts involved. In addition, the general manager of the company has filed an affidavit in which he details attendance at restorative justice conferences, the company's regret for the offending that occurred and the steps that the company has taken as a responsible corporate citizen. I see the company itself to have largely provided the accountability which is required. Similarly, the responsibility for harm seems to me to have been taken onboard by the company and as much as it can as a corporate citizen I see the company's remorse as genuine and its approach to the victims of offending as appropriate.

[25] In respect of providing for the victims of offending, it is always a difficult task to try to put people who have suffered harm back in the position they were in prior to the harm taking place. I accept the families of those hurt are included in those who suffer from the harm that is caused. I intend to make emotional harm reparation payments and to acknowledge the victims despite the fact that there is little that can be done really for the suffering that is felt by people other than to provide some economic recompense. Usually that is not enough as far as the victims of offending are concerned but that is the only avenue that is available.

[26] I need to denounce conduct which is the basis of offending. While I have said that this is a responsible corporate member of society the need to take care in respect of workers' health and safety is a significant burden of business and it needs to be fully undertaken by those in control. It is appropriate that the company expresses regret for a failure that should not have occurred.

[27] There needs to be deterrence in the personal sense, that is that the company must learn from this and not repeat this failure. It has no history of non-compliance and I have every reason to believe that deterrents will be effective. Deterrents in some cases do not have a general effect, however, in respect of commercial entities and business it is one of the more effective ways in which conduct can be modified. It is important that this sentence does that as well as meet the other principles and purposes that have been referred to.

[28] As regard to s 8 Sentencing Act, I have to assess the gravity of the offence and try and gauge the degree of culpability. I have to take into account the serious nature of the type of offence that is present and I have to take into account the effects of the offence upon the victims of offending.

Health and Safety at Work Act

[29] With regard to the principles and purposes of the Act, s 151(2)(b) provides that it is necessary to:

(a) Protect workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high risk plant; and

(b) Providing for fair and effective workplace representation, consultation, co-operation and resolution of issues in relation to work health and safety; and

(c) Encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices and

assisting organisations such as the defendant company and workers to achieve a healthier and safer working environment; and

(d) Promoting the provision of advice, information, education and training in relation to work health and safety and securing compliance with this Act through effective and appropriate compliance and enforcement measures and ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act and providing a framework for continuous improvement, progressively higher standards of work, health and safety.

[30] Further in the subsections set out above, regard must be had to the principle 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.

[31] Also in respect of the principles and purposes of the Act, there is reference to the maximum penalty demonstrating Parliament's intention that offending in respect of the safety of employees is something to be regarded as a serious matter.

[32] The sentencing takes place under s 48 of the Act, that is in the context of *Sumpmaster v WorkSafe New Zealand.*[1] This involves firstly, the assessment of the amount of reparation to be paid to the victims. Secondly, fixing a fine by reference to the guidelines and the respective bands that have been set, with a consideration of the aggravating and mitigating factors driving this consideration. Thirdly, considering whether there are orders that are needed under s 152 through to s 159. Also, to assess the overall proportionality of the penalties imposed and to assess whether the company is in a financial position to meet the appropriate degree of punitive response.

Assess the Reparation

[33] The prosecutor submits that $20,000 to $25,000 award in favour of Mr Glogoski and Mr de Beer and to Mr Gaslevich, with nominal reparation to be made

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

in respect of the other employees who have tested in respect of methyl bromide poisoning. I have read the victim impact statements that have been provided. They speak of physical effects and some social impacts that the exposure to the toxic chemicals have brought about. If one contemplates sudden hospitalisation, uncertain long-term effects (although these are not quantified and I cannot take them into account but they are certainly emotional impact factors) and physical reactions, I find that the victim impact statements are quite measured. I do not accept a submission that they are prepared in support of unrealistic financial windfalls. To me it is possible to see in the statements that have been provided, including those of the family, a degree of emotional harm that is present, difficult to quantify, but hard to bear for the employees who have been harmed by exposure to potentially lethal chemicals.

[34] The actual effects are measurable and have been referred to and it is the overlying concern about harm that has resulted that to me needs to be given recognition. I accept that the cases that have been provided by the prosecution relate to examples of greater harm and the permanent head injury type cases are always going to attract greater awards than I consider could be justified in this case. The prospect of valuing somebody's emotional harm and physical pain and suffering is a difficult thing to do when removed from the actual effects and subject only to written reports.

[35] Mr Glogoski I award $25,000. Mr de Beer I award $15,000. Mr Gaslevich also $15,000. I provide for the travel expenses of Mr de Beer in the sum of $150. As regards Cameron Hall, Navineet Chand and Mala Tevita, they have not provided victim impact statements but nonetheless they were affected by what is acknowledged is a failure to meet appropriate standards and in each case I make the award of $2,000 in respect of emotional harm reparation.

Assess the fine

[36] Turning to the fines. Both counsel see this as a case of medium culpability in terms of the bands which are described in *Stumpmaster*. That band range goes from $250,000 to $600,000. The prosecution contend for a $550,000 fine. The defence suggest a range of $350,000 to $450,000 as meeting the appropriate principles and purposes of sentencing.

[37] The prosecution take me to assessment of the factors which are significant. The prosecution say that the reasonably practical steps not taken by the defendant are contained in the particulars of the charge, that when there is an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk, the circumstances are that there were three acutely toxic fumigants involved under a number of classifications. Under the legislation the substances being class 6 toxic to people with potentially fatal impacts.

[38] The failure to adequately assess and control these risks are said by the prosecution to expose the workers to a serious risk of harm, that should not be underestimated. In fact what happened here was hospitalisation and elevated blood levels, absence from work and unpleasant and worrying symptoms. But the circumstance as it stood could well have produced far more serious results and that risk is effectively the gravamen of the prosecution case.

[39] The departure from standards prevailing in the relevant industry were that the controls for hazardous substances are prescribed. The requirements for exposure monitoring are again prescribed and there is readily available WorkSafe guidance on implementing key controls, managing remaining hazardous substances, risks, reviewing control measures, health exposure monitoring, information, instruction and training processes for developing and reviewing safe systems at work. There is well developed guidance, that the defendant was aware of, on the selection, use and maintenance of respiratory protective devices.

[40] The use of the three toxic fumigants by companies in the business of fumigation is not unique, it is part of the defendant's business. Yet there was a failure to make a safe system of work that was systemic. The defendant fell short of the relevant standards required for these industries. The obviousness of the hazard posed by acutely toxic fumigants are obvious. The defendant had a document entitled *Hazard Substances and Dangerous Goods Principle* which set out how the defendant would manage the risks. The defendant was aware of best practice, unable in this case to have implemented the necessary protections for workers.

The availability, costs and effectiveness of the means necessary to avoid the hazard.

[41] Since the incident the defendant has made improvements and is continuing to make progress to improve health and safety systems, including hazardous substances, fumigation regulation compliance, certified handler requirements, hazardous substance location compliance, respiratory protection programme training and health and exposure monitoring. In addition, the defendant has foregone a part of the business that related to fumigations. As at 25 November 2020 the blood bromide results were below the guideline levels, indicating methyl bromide exposure was under control.

[42] It is not cost prohibitive for the defendant to make the above improvements and develop, implement and monitor compliance with an effective safety system at work. Part of an effective safe system would not have been especially costly or difficult for the defendant to ensure provision of effective controls, ventilation in fumigation areas, ongoing health monitoring of workers and insurance that the appropriate equipment was available, fitted and correctly used by workers.

The Authorities

[43] The prosecution have relied on a number of authorities, *WorkSafe New Zealand Limited v North Island Mussels Limited* and *WorkSafe New Zealand v Precision Animal Supplements Limited* [2]. The defendant says in reply, largely on oath and from Alexandra Andrievski, who is general manager. He speaks of his role as general manager since 2017. He references to the company approach to health and safety, the company's requirements as specified in its previous fumigation role outlined. He speaks of steps to deal with hazardous substances and compliance with the Ministry of Primary Industries' and WorkSafe's requirements. He speaks of how training is done, both internally and external training policies. He speaks of the requirement for staff to be trained, the workplace monitoring is referred to by him and he talks of internal monitoring, his own efforts, turning up at company

---

[2] *WorkSafe New Zealand Limited v North Island Mussels Limited* [2018] NZDC 20269; *WorkSafe New Zealand v Precision Animal Supplements Limited* [2018] NZDC 19342.

sites unannounced and ensuring that works are carried out. Internal and external audits being carried out. He indicated that the company's response is to pay reparation, to attend at restorative justice and that it has now ceased its fumigation activities.

[44] Subsequent to these charges the company has reflected on its processes and updated its processes and procedures and has attended, as said, at three restorative justice conferences personally, made apologies on behalf of the company. He does not accept all that the complainants have said in their victim impact statements, he points to matters that the company says are not objectively correct. But he expresses regret and gives a sincere apology on behalf of the company for both the harm and the risks created.

[45] The defence, while not taking issue with a number of the factors by the prosecution, say that when analysis is conducted of *WorkSafe New Zealand v North Island Mussels Limited*, that case shows a lower starting point more in line with what the defence says is an adequate reflection of the requirements of the Sentencing Act and the provisions of this Act. The *WorkSafe New Zealand v Precision Animal Supplements Limited* case is also said to have provided a lesser starting point more in line with the range which is prescribed by the defendant.

[46] The defence points to serious hazardous substances in the *WorkSafe New Zealand v Precision Animal Supplements Limited.* It did lung damage to the people that were involved and was exposure to a high degree to substances with properties likely to do serious harm.

[47] In respect of the *WorkSafe New Zealand v North Island Mussels Limited* case, the person who was injured lost an eye, permanent disability, and something which needs to be taken into account when the assessment is made as to the appropriate starting point.

[48] Here the employees were exposed to what has to be regarded as high risk. The substances involved have a recorded potential outcome of being a fatal outcome. The

material is very dangerous when not adequately managed and I have to, at least in my view, consider that as a factor in respect of the sentencing.

[49] There were also quite a number of employees who were subject to exposure, to a risk that was in breach of the requirements of the employer and I do see it as a matter of good fortune that this was not a situation that there were greater health consequences for the employees who faced that risk. The work system did not pick up serious non-compliance with known rules and processes and there was an absence of monitoring that might have been one of the factors that limited the potential for greater harm.

Sentence Reparation and Costs

[50] Those factors take me to the point that I consider a starting point of $500,000 is required to meet the principles and purposes of sentencing and of the Act. From there, I apply a 25 percent reduction on the basis of *Moses v R*, that is a reduction of $125,000.[3] From there I take into account the fact that reparation is going to be ordered plus there was an appropriate approach to the individuals by way of restorative justice and I reduce the $375,000 figure by $45,000 to take into account those matters. As regards the co-operation with the prosecution and the changes in procedure and processes that have been adopted, I further reduce the $330,000 figure by $30,000.

[51] As regards the remorse, I see that is genuine, I see that from a body that is motivated to be an appropriate corporate citizen. I have referred to the apologies which have been made by the general manager and I see this as appropriate and I reduce the $300,000 figure by $20,000 in respect of the remorse and the approach to the victims of the offending.

[52] From there, I feel obliged to take into account the defendant has no history of non-compliance, what happened here was a system had been put into place. It failed because it was not put into effect on the ground in an appropriate manner and it lacked the backup of an appropriate monitoring system. For those reasons I reduce, on the

---

[3] *Moses v R* [2020] NZCA 296.

basis of previous good character and corporate compliance, by $30,000. That brings the sum of $250,000.

[53] I consider that figure, together with the $61,000 in relation to emotional harm reparation and the $150 which I have awarded in relation to Mr de Beer's travel, together with the agreed prosecution costs of $12,144.50 to be reached. I consider overall whether that is an appropriate outcome given the nature of the charges and the principles and purposes that I have applied, I see no reason to modify that for proportionality. I am told the company is not in a position where financial capacity needs to be taken account and, accordingly, those are the figures.

[54] Mr Glogoski has $25,000 in respect of emotional harm reparation. Mr de Beer $15,000. Mr Gaslevich $15,000. Mr Hall $2,000. Mr Chand $2,000. Mr Tevita $2,000.

[55] I am told there are no other orders that are required with regard to sentence and I ask that this be transcribed promptly as can be carried out for me to amend on the basis of grammar or construction but, otherwise, the reasoning will remain the same.

[56] I take the reparation figures to be paid in total in the sum I have assessed, having taken into account the payments that have been voluntarily made. The figures are net figures to pay. The sums already voluntarily paid I took into account when I did the calculations.

D J Sharp
District Court Judge