NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2023-092-001805
[2024] NZDC 6394

WORKSAFE NEW ZEALAND
Prosecutor

v

BF FOODHUB (HIGHBROOK) LIMITED
TOTAL RECRUITMENT LIMITED
Defendants

Hearing:	19 March 2024
Appearances:	T Bryden for the Prosecutor P White and K McDonald for the Defendants
Judgment:	19 March 2024

NOTES OF JUDGE R J MCILRAITH ON SENTENCING

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[1] Before me this morning is the sentencing of BF Foodhub (Highbrook) Limited and Consultants Limited with respect to charges under the Health and Safety at Work Act 2015.

[2] On 16 February 2022, [redacted] was undertaking a cleaning task on the floor at a Mr Chips factory using a chemical cleaning product called Improve 8150. [redacted] was wearing his usual safety boots while undertaking this task. He began to feel a burning sensation in his feet and was taken for medical treatment. He suffered bilateral

chemical burns to his feet resulting in the small toe on his left foot being amputated and having multiple skin grafts on his feet.

[3] A subsequent WorkSafe investigation identified failures on the part of BF Foodhub and Consultants Limited as persons conducting a business or undertaking to comply with their statutory duties under the Health and Safety at Work Act 2015.

[4] BF Foodhub is for sentence having pled guilty to a charge of contravening ss 36(1)(a), 48(1) and 48(2)(c) of the Act which has a maximum penalty of a fine not exceeding $1.5 million. It is charged with being a person conducting a business or undertaking having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who worked for it, including [redacted] while workers were at work in the business or undertaking, namely while undertaking spot cleaning using Improve, in that it did fail to comply with that duty and that failure exposed workers to a risk of death or serious injury arising from exposure to a hazardous substance.

[5] WorkSafe asserts that it was reasonably practicable for BF Foodhub to have:

(a) ensured the provision of effective personal protective equipment to workers, including impervious gumboots and an impervious long apron, and monitored workers to ensure it was worn and fit for purpose; and

(b) effectively consulted and co-ordinated with Consultants Limited as to the work the workers, including [redacted] were to undertake and how to manage the risks to their health and safety arising from that work, including what personal protective equipment was required, who would provide it and ensuring it was fit for purpose.

[6] Consultants Limited appears for sentencing having pled guilty to a charge of contravening s 34 of the Act which has a maximum penalty of a fine not exceeding $100,000. It is charged with being a person conducting a business or undertaking, having a duty to, so far as is reasonably practicable, consult, co-operate with and co-ordinate activities with all other businesses, namely BF Foodhub, who have a duty

in relation to the same matter, namely work being undertaken at BF Foodhub. It was reasonably practical for Consultants Limited to have effectively consulted and co-ordinated with BF Foodhub as to the work workers, including [redacted] were to undertake and how to manage the risks to their health and safety arising from that work, including what personal protective equipment was required, who would provide it and ensuring it was fit for purpose.

[7] In terms of what occurred here, there is of course a very thorough summary of facts, and I will attempt to summarise it briefly now.

[8] BF Foodhub is a limited liability company. It operates in East Tāmaki in Auckland. It trades as Mr Chips and produces a large amount of French fries and chips each year from their East Tāmaki factory.

[9] Consultants Limited is a company operating in East Tāmaki. It is a recruitment company offering a wide range of services, including temporary, permanent and temporary to permanent staffing options.

[10] Consultants Limited and BF Foodhub have a longstanding relationship. Consultants Limited has been supplying workers to BF Foodhub since at least 2014.

[11] [redacted] the victim in this matter, was a labour hire worker on placement from Consultants Limited to BF Foodhub. He started working at BF Foodhub on that basis in August 2021 as a process worker. The job description for a process worker at Consultants Limited stated:

> Day shift, working on production line – checking the quality of the chips, looking for rotten chips – must be quick with hands as working on a production line on a conveyor belt – food industry – must wear safety boots/safety glasses/earmuffs.

[12] [redacted] was 63 years of age at the time of the incident.

[13] As I noted before, [redacted] was working at the Mr Chips factory on 16 February 2022 at the time of this incident. His shift commenced at 7 am in the morning. Prior to starting the shift, the frontline manager at BF Foodhub conducts a

production pre-shift check and hazard awareness check. This included checking staff were wearing personal protective equipment correctly. That manager did the checks and signed the form without making further comments or observations. [redacted] was assigned roles by this manager.

[14] At around 7.30 am that day, the manager asked [redacted] and another Consultants Limited worker to leave the area where they had been working, and he asked them to spot clean a small section of the floor, approximately three metres by three metres with Improve 8150, while the line was running. The manager explained cleaning using the Improve chemical and how to use it safely.

[15] The manager informed [redacted] and the other worker that it was very important that they wear all PPE and specifically have their glasses on at all times as their eyes could be damaged if they had contact with the chemical. He says that he explained the need to be wearing gloves and have their body covered with clothing and shoes so as to avoid getting chemicals on their skin. He advised [redacted] and the other worker that if they did get chemicals on their skin, for example their overalls got wet, they were to immediately stop, run the affected area under water and to contact him.

[16] Around 8 am, the manager demonstrated sprinkling Improve on the floor and using a broom to scrub and hose the chemical off. He then observed [redacted] and the other worker doing this role for approximately 10 to 15 minutes before leaving them to do the job and he left to undertake other tasks.

[17] Around half an hour into the cleaning, [redacted] said that he and the other worker had a morning break. By an hour or so into the cleaning, he said he began to feel pain on the top insides of his feet which he described as a burning sensation. He discussed it with his co-worker. His co-worker went and got help and [redacted] was taken to showers.

[18] The manager was told in the middle of the morning that [redacted] had got Improve in his shoes and was cleaning his foot. The manager went to see him and saw [redacted] leg and the condition of his safety shoes. The manager told [redacted] to keep his leg under

water and then telephoned someone at Consultants Limited and asked if someone could come and take [redacted] to hospital.

[19] A representative from Consultants Limited arrived and took [redacted] for medical treatment, specifically to the A&E in Ti Rakau Drive, Pakuranga. [redacted] was evaluated there and subsequently transferred to Middlemore Hospital. He was admitted that day to the National Burns Centre at Middlemore Hospital. He remained there until 2 May 2022. As noted earlier, he suffered bilateral chemical burns to his feet resulting in his small toe on his left foot being amputated and he undertook multiple skin grafts.

[20] The agreement between Consultants Limited and BF Foodhub was that Consultants Limited would supply PPE for workers on placement with BF Foodhub. BF Foodhub supplied hairnets and food-related PPE, such as gloves, but things such as earmuffs, safety glasses and safety boots were supplied by Consultants Limited. Workers were expected to wear steel cap safety boots.

[21] Consultants Limited's process for ensuring the PPE that workers used remained fit for purpose was to conduct visual checks during site visits. It also relied on workers and clients telling them if PPE needed replacement.

[22] It is clear from a photograph of [redacted] boots taken after the incident that the boots were no longer of outstanding quality.

[23] Consultants Limited said that as part of the induction process, they did a visual check of [redacted] boots to ensure that he had fit for purpose boots prior to starting work at BF Foodhub. This was, however, six months prior to the incident. [redacted] chose to supply his own boots. If he had not done so, they would have supplied them.

[24] [redacted] confirmed that at the time of the incident, he was wearing different boots to those that had been sighted by Consultants Limited originally.

[25] Despite [redacted] boots being worn and cracked, they were primarily doing the job of a safety shoe rather than a gumboot in that they offered protection from impact, cuts, punctures and protected grip to prevent slips and falls.

[26] Following the incident, BF Foodhub changed its practice so that wearing gumboots and impervious ponchos is now a requirement during spot cleaning with Improve as well as during major clean-ups.

[27] [redacted] has attended court this morning and I have had the privilege of him reading his victim impact statement to me. I will not go into a great deal of detail about the impact that the accident has had on [redacted] given that he has read it out in open court. All I will say is that he has understandably suffered considerably as a result of the injuries he received.

[28] As I understand it, he was in the burns unit at Middlemore Hospital from 16 February until 2 May 2022, a considerable period of time. He underwent over nine separate surgeries to repair his feet. In addition to those surgeries, he has suffered ongoing infections since he left hospital, particularly in his toes, and has had to regularly undertake courses of antibiotics. He continues to suffer intermittent pain as a result of the injuries that he suffered.

[29] As noted earlier, he has had a toe permanently amputated. In a sense, he expressed the view that he has been fortunate in that he was originally told he may lose more toes on both feet, and he is grateful to the work of the doctors at Middlemore Hospital who were able to save most of his toes.

[30] However, the reality is that he has suffered ongoing pain and discomfort and has of course suffered consequentially as a result. He has not worked since the incident, and he has also not been able to undertake a number of the activities that he used to undertake. In particular, he told me that he used to run regularly and is no longer able to do so.

[31] The approach to sentencing in these matters is well-understood as set out in the *Stumpmaster* decision in the High Court.[1] I first consider the amount of reparation to be paid to [redacted] I then fix the amount of the fine to be paid by each defendant. I then consider whether any ancillary orders under the Act are required and, finally, I make

[1] *Stumpmaster v WorkSafe New Zealand* [2019] DCR 19; (2018) 15 NZELR 1100; [2018] 3 NZLR 881; [2018] NZHC 2020.

an overall assessment of the proportionality and appropriateness of the sanctions imposed by the first three steps.

[32] The first matter I need to address is that of reparation, specifically emotional harm reparation under s 32(1)(b) of the Sentencing Act 2002 is sought by WorkSafe, and that is appropriate. Both companies accept that reparations should be paid to Mr B. The issue is the quantum of reparations and the apportionment of that emotional harm reparation payment between the two defendants.

[33] I have been referred to a number of cases by way of comparison by both WorkSafe and also the two defendants in an attempt to assist me set an appropriate amount of emotional harm reparation. I always observe though before doing so that what the High Court said in the *Big Tuff Pallets* case is absolutely spot on, and that is that:[2]

> Fixing an award for emotional harm is an intuitive exercise. Its quantification defies finite calculation. The objective is to strike a figure which is just in all the circumstances and which in that context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering.

[34] It is a difficult task. Comparative cases provide some guidance of course and there is a desirability for consistency, but it is very much an intuitive task.

[35] WorkSafe has submitted that an award of $60,000 is an appropriate level. For its part, Consultants Limited has submitted that $35–40,000 is an appropriate level and BF Foodhub agrees with the submission of Consultants Limited.

[36] Ms Bryden referred to the *Alto* case as being the most recent case involving similar type of injuries.[3] I believe that is entirely correct. When I have read the cases to which I have been referred, it is clearly the one that is of most relevance in terms of assisting in setting the amount of emotional harm reparation. When I look at the extent of the surgeries and ongoing anguish suffered by the victim in that case and compare it to that suffered by [redacted], I accept entirely the submission by WorkSafe that [redacted] has suffered more. That is an intuitive assessment because of course I do not really

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[2] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 at [6].
[3] *WorkSafe New Zealand v Alto Packaging Ltd* [2019] NZDC 14809.

know the extent of suffering of the victim in *Alto*, but I do know the extent of suffering on [redacted] part. While I respect the submissions that both defendants have made, I do consider that an amount of $60,000 is an appropriate amount of emotional harm reparation in this case.

[37] In terms of the apportionment of that payment between the two defendants, WorkSafe submits that it should be paid on a 50/50 basis by each of the defendants. BF Foodhub accepts that rationale. Consultants Limited, however, submits that an approach similar to that taken in the *AWF* case is more appropriate, with an apportionment of 80/20 between the two defendants with Consultants Limited being liable for 20 per cent of the reparation payment.[4]

[38] I have read the *AWF* decision and it is clear that the 80/20 apportionment in that case was as a result of an agreement between the two defendants prior to the matter being considered by the Court.

[39] In my experience, a 50/50 apportionment is more common, and I see no reason to depart from that in this case. I respect the submissions that have been made for Consultants Limited, but as I see it, the level of culpability and responsibility for [redacted] level of anguish and emotional harm, I do not see any basis to distinguish between the responsibilities of BF Foodhub and Consultants Limited, so the $60,000 reparation payment will be apportioned 50/50 between the two defendants.

[40] I note that BF Foodhub has already paid an amount of $15,000 by way of emotional harm reparation to [redacted] Accordingly, it will be required to pay a further $15,000, and Consultants Limited will be required to pay $30,000.

[41] I turn to another aspect of reparation which is consequential loss. Under s 32(1)(c) of the Sentencing Act, I can order payment of any loss or damage consequential on any emotional or physical harm or loss suffered by [redacted] He has suffered a loss in terms of what ACC paid him by way of compensation after the accident. That has, to an extent, been "topped up" by Consultants Limited. I

[4] *WorkSafe New Zealand v AWF Ltd* [2022] NZDC 24471.

understand that of the loss that [redacted] suffered, which was $1,428, was met in part by Consultants Limited in an amount of $1,232.56.

[42] That leaves an outstanding consequential loss figure of $195.44. While I did not seek counsel's views as I am dictating this decision now, it seems only reasonable to me that that consequential loss should be paid by BF Foodhub rather than being split 50/50 between the parties, given that Consultants Limited have paid the large amount I just mentioned earlier, so a consequential loss payment will be required from BF Foodhub of $195.44.

[43] I turn to the second part of the sentencing framework which is the setting of a fine. The culpability factors in setting a start point are of course well-understood. They were referred to in the old case of *Hanham and Philp*.[5] They are the identification of the operative acts or omissions at issue and the practicable steps that an offender ought to have taken, an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk, the degree of departure from standards prevailing in the relevant industry, the availability, cost and effectiveness of the means necessary to avoid the hazard.

[44] The *Stumpmaster* decision set out the bands for fines in relation to BF Foodhub's offending. Those bands are as follows:

(a) For low culpability, up to $250,000.

(b) For medium culpability, $250,000 to $600,000.

(c) For high culpability, $600,000 to $1 million.

(d) For very high culpability, $1 million plus.

[45] With respect to Consultants Limited's offending, the District Court has adapted the bands for offending to reflect the lower maximum fine level and those bands have been recognised as:

[5] *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.

(a) Low culpability, a fine up to $15,000.

(b) Medium culpability, a fine between $15,000 to 30,000.

(c) Very high culpability, a fine between $60,000 to $100,000.

[46] Prior to coming into court, I had read the extensive submissions of WorkSafe. It has quite properly gone through the *Hanham* factors and identified the culpability level in its submission. For BF Foodhub, it submits that its offending falls in the medium band and it has submitted that an appropriate starting point would be a fine of $450,000. For Consultants Limited, it has placed its culpability in the medium band and has submitted a start point of $25,000 to $30,000.

[47] BF Foodhub for its part submitted that its culpability fell at the lower end of the medium band and submitted a start point of $330,000 should be set. In terms of its primary reasons for that, it placed its culpability as lower than that of the defendant in the *Perry Metal Protection Ltd* case which I have read.[6] In particular, it submits that there were more practicable steps that the defendant in that case failed to take and that it was on notice of the risk created to workers from a previous occasion, whereas in this case, BF Foodhub was not. It also noted that harm was caused to three workers in the *Perry Metal Protection* case.

[48] In the present case, BF Foodhub submitted that it had conducted a risk assessment and the controls that it had for the activity were consistent with the safety data sheet that it had and, most importantly, in my view, the expert guidance that it took on board. I refer at that point to the affidavit of Mr Balle which I have read and which sets out the steps that BF Foodhub had taken in terms of getting expert advice.

[49] Most importantly, in my view, in assessing the culpability of BF Foodhub, I accept Mr White's submission that this is not a situation where BF Foodhub had ignored its responsibilities around safety. Rather, it is a situation where it had done its

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[6] *Department of Labour v Perry Metal Protection Ltd* DC Lower Hutt CRI-2008-032-002481, 26 August 2008

best and acted in accordance with the information that it had available but had simply not, with the benefit of hindsight, done enough.

[50] I accept that is a fair assessment of BF Foodhub's culpability, and for that reason, I agree with Mr White that its culpability sits in the low end of the medium band. On that basis, given this is not a scientific exercise, I see no reason to disagree with his submitted start point of $330,000 for a fine.

[51] With respect to Consultants Limited, it has submitted that its culpability sits at the low to medium band level, almost on the cusp between low and medium as I recall the submissions. I have no disagreement with that. When I looked at the comparative case law, I thought that the points made by Ms McDonald in her written submissions were quite fair. In particular, I noted that Consultants Limited had carried out site safety inspections at BF Foodhub's premises along with BF Foodhub's senior staff, and it did not know about the use of hazardous chemicals on site. I appreciate there is some nuance around that statement, but as best as I can understand it, that may well be the case.

[52] There were regular visits by Consultants Limited to the site. It held toolbox meetings with its worker. It highlighted the need to always be wary of health and safety hazards and ensure that correct PPE was worn. It had open lines of communication with both BF Foodhub and its own staff.

[53] I note that following the incident, Consultants Limited had made a number of improvements to its health and safety management systems. I will not detail what those are, but I note also that the same comment could have been made about BF Foodhub.

[54] In my view, I have no issue with the placement of Consultants Limited's culpability in the low/medium band level, and at that point, I can see no basis to differ from Ms McDonald's submitted start point of $15,000.

[55] In terms of discounts from those fine levels, as discussed with counsel, in my view, both defendants are entitled to 50 per cent discount from those starting points.

That 50 per cent discount comprise 25 per cent for prompt guilty plea and then a further 25 per cent for am amalgam of willingness to pay reparations, genuine remorse, co-operation on both defendants' part with WorkSafe's investigation and the prior good record that each of these defendants have in terms of health and safety offending. On that basis, a 50 per cent discount is appropriate for both.

[56] That means that in terms of the fine to be paid, BF Foodhub has to pay a fine of $165,000 and Consultants Limited has to pay a fine of $7,500.

[57] I turn to ancillary orders. Costs are sought by WorkSafe in the amount of $4,666.22. No issue is taken by either defendant with that amount. Each will, therefore, be liable to contribute $2,333.11 to WorkSafe's costs.

[58] The final step in the process is for me to stand back and assess whether the combination of reparation payment, fine and cost contribution is appropriate in the circumstances. I do so and consider that it is.

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Judge R McIlraith
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 05/04/2024