NOTE : SUPPRESSION ORDER EXISTS IN RELATION TO ASPECTS OF THIS MATTER – REFER PARAGRAPH [86] HEREIN.

IN THE DISTRICT COURT
AT INVERCARGILL

I TE KŌTI-Ā-ROHE
KI WAIHŌPAI

CRI-2019-025-000959
CRI-2019-025-000936
[2020] NZDC 23107

WORKSAFE NEW ZEALAND
Prosecutor

v

ASUREQUALITY LIMITED
ONESTAFF (QUEENSTOWN/INVERCARGILL) LIMITED
Defendants

Hearing:	5 November 2020
Appearances:	K Hogan for the Prosecutor T Clarke for the Defendant AsureQuality Limited J Lill with A Bagchi for the Defendant OneStaff Limited
Judgment:	5 November 2020

NOTES OF JUDGE R J WALKER ON SENTENCING

Charges

[1] AsureQuality Limited pleaded guilty to two charges, the first being that between 26 April 2018 and 17 May 2018 at Invercargill, being a PCBU having a duty to ensure so far as reasonably practicable the health and safety of workers who work for the PCBU, while the workers are at work in the business, did fail to comply with that duty in that it was reasonably practicable for AsureQuality Limited to have (i) provided, maintained and monitored compliance with a safe system of work for the cleaning and disinfecting work, (ii) provided and monitored the use of appropriate

controls, such as personal protective equipment, by workers involved in the cleaning and disinfecting work, (iii) ensured that the workers involved in the cleaning and disinfecting work were given adequate training, information and instruction, and (iv) ensured adequate supervision of the workers carrying out the cleaning and disinfecting work.

[2] That charge was laid under ss 36(1)(a) and 49(1) and (2)(c) of the Health and Safety at Work Act 2015. The maximum penalty applying to that offence is a fine not exceeding $500,000.

[3] AsureQuality have also been charged under s 34(1) and (2)(b) of the Health and Safety at Work Act 2015 that between 16 October 2017 and 18 May 2018, again 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 the Ministry for Primary Industries, OneStaff (Queenstown/Invercargill) Limited, and Industrial Scrub & Sweep (SI) Limited.

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

[5] The maximum penalty attaching to that offence is a fine not exceeding $100,000.

[6] The second defendant in this matter are OneStaff (Queenstown/Invercargill) Limited, who are charged that between 26 April 2018 and 17 May 2018 at Invercargill, being a PCBU having a duty to ensure so far as reasonably practicable the health and safety of workers who work for the PCBU while the workers are at work in the business, did fail to comply with their duties in that it was reasonably practicable for Onestaff (Queenstown/Invercargill Limited to have (i) followed its written policies

and procedures for new assignments relating to the cleaning and disinfecting work at farms identified in the Biosecurity Response to the Mycoplasma bovis outbreak; (ii) ensured that its workers were provided with adequate training, information, and personal protective equipment; (iii) completed an inspection (or similar) to ensure its workers were undertaking their task safely, and (iv) consulted, co-operated and co-ordinated activities with AsureQuality Limited about a safe system of work for the cleaning and disinfecting work.

[7] Again, that information has been laid under ss 36(1)(a) and 49(1) and (2)(c) of the Health and Safety at Work Act 2015 and carries a maximum fine not exceeding $500,000.

[8] There is a third defendant, the Ministry for Primary Industries, who is currently maintaining not guilty pleas in relation to charges arising from the same incident. A case review hearing, I understand, is scheduled for MPI on 24 November 2020.

Facts

[9] Lengthy summaries of facts have been prepared for each of the defendants, but the facts have been neatly summarised in the submissions by the prosecutor, which I will adopt.

[10] AsureQuality was contacted by MPI to deliver cleaning and disinfection services in the Biosecurity Response to Mycoplasma bovis (M. bovis). By early February 2018, M. bovis was identified in farms near Invercargill. OneStaff was contracted by AsureQuality to provide temporary workers for cleaning and disinfecting work.

[11] On 17 May 2018, a group of OneStaff workers was cleaning a shed at Southern Dairy Centre farm using a sodium hydroxide-based cleaner called X-Clean Doo Away. 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.

[12] While AsureQuality had drafted a generic plan at the beginning of the Biosecurity Response, it had not implemented it.

[13] Also, the safety plan did not encompass an adequate safe system of work for the cleaning and disinfecting work.

[14] AsureQuality did not adequately induct and train OneStaff workers or provide sufficient personal protective equipment (PPE) for the work being carried out.

[15] AsureQuality did not adequately monitor and/or supervise the work being carried out at all times AsureQuality had site access.

[16] Further, AsureQuality did not consult or co-ordinate with the other entities involved in the Biosecurity Response – MPI, the other sub-contractor (called Industrial Scrub & Sweep, whom I will refer to as ISS), and OneStaff – regarding OneStaff workers' health and safety.

[17] For its part, OneStaff did not ensure its workers had adequate induction, training and sufficient PPE for the work being carried out. It also did not ensure its workers were adequately monitored and/or supervised, and it did not consult with AsureQuality in that regard.

[18] Just expanding on that summary a little, on 17 May 2018, as a result of what appears to have been time pressure and some criticism of the cleaning work undertaken to that point, ISS decided to introduce the use of X-Clean Doo Away into the cleaning regime at the SDC farm. While that product was not listed in AsureQuality's safety plan or cleaning and disinfection plan as part of the Biosecurity Response, MPI had previously used it on another site. OneStaff were not advised of the change in chemical or cleaning process.

[19] The product itself had a number of listed health effects, including harm if swallowed, severe skin burns, and serious eye damage. The PPE recommended was 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.

[20] 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 a OneStaff worker, received some splashes to the face, which felt burn, requiring to rinse face immediately with water.

[21] The OneStaff workers were then split into four teams and tasked with cleaning in the dairy sheds. Approximately 15 to 20 minutes into her cleaning and disinfecting work with Doo Away, another OneStaff worker, , said that felt a burning sensation to arms, which were then rinsed off with water was given new gloves and returned to work but, five minutes later, felt the burning sensation, which was treated with saline solution.

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

Submissions for the prosecutor

[23] Both the prosecutor and counsel for both defendants have provided the Court with lengthy written submissions which have been supplemented by oral submissions to me this morning.

[24] The prosecutor reminds me of the purposes and principles of the Sentencing Act 2002 set out in s 151(2) of the Health and Safety at Work Act 2015, which includes reference to the Sentencing Act 2002, and in particular ss 7 and 8.

[25] There is no dispute in this case that the recent decision of the full bench of the High Court in *Stumpmaster v WorkSafe New Zealand* sets out the four steps that the

Court is required to take approaching sentencing in relation to these matters.[1] Those steps are:

(a) to assess the amount of reparation;

(b) to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) to determine whether further orders under ss 152–158 of HASWA are required; and

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[26] I accept that while the *Stumpmaster* bands relate to offending under s 48 of the Act, which has a more serious maximum fine of $1.5 million, and that the most serious charge faced by both defendants in this case has a maximum of $500,000, then the adjusted bands according for the lower maximum penalty submitted the prosecution are as follows:

low culpability	:	Up to $83,333
medium culpability	:	$83,333 to $200,000
high culpability	:	$200,000 to $333,333
very high culpability	:	$333,333 plus

Those culpability bands are very close, of course, to those endorsed in the case of *East by West* which is referred to me by both of the defendants in their written submissions.[2]

[27] Dealing with the issue of reparation, it was accepted by the prosecutor that the offending in this case did not involve personal loss to the victims for which reparation was sought, and no reparation was quantified at the time that written submissions were received.

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

[2] *East by West Company Limited v Maritime New Zealand* [2020] NZHC 1912.

[28] However, since then I have received and read a total of five victim impact reports, which I will refer to now. Two of those reports were only received yesterday by the Court.

[29] says that has had ongoing effects of the chemical burns she sustained, including loss of movement and sensation in right hand and increasing problems with wrist, which caused frequent pain and difficulty with lifting. says has permanent scarring to wrist, which people assume may have resulted from self-harm and have judged accordingly. is angry and distressed at injuries, which says could have been avoided if proper oversight and training had been provided. acknowledges the lump sum of $1,200 received from OneStaff but in victim impact statement questions the motivation and timing for it.

[30] says after receiving the chemical burn, still notices that wrist is painful some two years later and suspects some nerve damage. But the biggest outcome for has been mentally. no longer likes to work around chemicals of any nature. does feel that OneStaff became a much better employer after improving their practices following this incident.

[31] did not receive any physical injuries but did assist others by administering first aid. feels was singled out as a whistleblower and troublemaker for raising concerns about what had occurred and was subsequently dismissed says unfairly, which has caused anxiety and depression.

[32] says that received scarring to both forearms which took a long time to heal. It reinforced inability, says, to trust people. was someone who felt bullied by superiors and co-workers and says that suffered anxiety, sleeplessness, and worry, and has suffered flashbacks.

[33] says that did not receive any external chemical burns but has since experienced asthma and several heart attacks, and has scarring on lungs, which acknowledges may or may not be related to the incident. (That is a concession that is fairly made, in my view.) life since then, however, has taken somewhat of a downward spiral.

[34] OneStaff submits that it should not be liable to make reparation for emotional harm in this case, because of s 32 of the Sentencing Act 2002 providing that reparation is only payable in respect of emotional harm caused through, or by means of, the offence.

[35] OneStaff say that any emotional harm suffered as a result of the workers' exposure to the chemical cannot be said to have been caused through, or by means of, the offence charged against them, because they were not aware, and could not have reasonably foreseen, the use of this chemical, because it was not approved for use and their manager was not permitted to be on site.

[36] AsureQuality say that they are willing to meet a reparation order if it is made by the Court but refer to the nature of the injuries, which are referred to as minor or superficial burns in the agreed summary of facts. It is acknowledged that suffered the worst injury, because superficial burns subsequently became infected. They point out, however, that victim impact statement is difficult to reconcile with the hospital clinical sheet and an email that felt very well supported by AsureQuality and the personal support provided to And, nor do the victim impact statements received by the Court in relation to any of the five statements quantify any financial loss other than shortfalls in wages not covered by ACC for and incidental doctors' costs, which appear to have been compensated by the $1,200 lump sum payment from OneStaff.

[37] It is common ground that in fixing a fine, I need to bear in mind the Court of Appeal decision in *R v Taueki*, whereby 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.[3]

[38] The prosecutor submits that the defendants' culpability for this offending falls within the medium band, for the following reasons:

1. that the chemicals in question did not pose a high risk, such as in a case where death might ensure;

[3] *R v Taueki* [2005] 3 NZLR 372.

2. that the failings in this case relate to the adequacy of AsureQuality's induction training, PPE, monitoring and supervision of workers who were using the chemical, and there was effectively no training, monitoring or supervision provided by AsureQuality;

3. that the failings here appear to have arisen by oversight rather than by design;

4. that the failings occurred in the context of work being undertaken for the greater public good in the M. bovis emergency response;

5. that nonetheless, the failings were significant and gave rise to the minor or superficial burns received by the OneStaff workers.

[39] The prosecutor also submits that OneStaff's culpability is less than AsureQuality's because it was the subcontractor, but that they also had policies requiring them to obtain further information and assurances from AsureQuality regarding the health and safety of its workers.

[40] The prosecutor submits that a starting point of $140,000, with a $10,000 uplift for the additional s 34 charge faced by AsureQuality, is an appropriate starting point, while the starting point for OneStaff should be a lesser amount of $100,000 to reflect their lesser culpability.

[41] The prosecutor cites a number of cases in order to support that starting point.

Submissions for AsureQuality

[42] AsureQuality is a state-owned enterprise owned by the New Zealand Government. It employs approximately 1,800 staff based over 100 locations throughout Australasia. A full outline of the broad spectrum of its activities is outlined in the affidavit the Court has received from the company's head of safety and wellbeing, Ms Beale. The affidavit is lengthy and sets out the company's approach to health and safety and specifically its response to the M. bovis outbreak.

[43] Counsel for AsureQuality submits that the Court should adopt a starting point of $100,000 as a global fine, being one at the low end of the medium culpability band; that there are no aggravating factors which would justify an uplift from the starting point; and that the defendant is entitled to discounts totalling 30 per cent for various mitigating factors and a further 25 per cent for the entry of an early guilty plea. AsureQuality, therefore, seek an end fine in the vicinity of $52,500.

[44] In terms of fixing a starting point for a fine, I am referred to two decisions which approximate the bands I have referred to previously and where the low culpability range is up to $85,000 and the medium culpability range is between $85,000 and $200,000.

[45] AsureQuality submit that the starting point for a fine should be $100,000, at the low end of the medium culpability band, as opposed to the $140,000 to $150,000 adopted by WorkSafe.

[46] AsureQuality submit that it and MPI had not approved the use of Doo Away, although the prosecutor submits that the chemical had been used previously on other sites and had been approved by MPI, and that this was not a case of them failing to identify the risk of exposing workers to chemicals, nor did they deliberately run a risk; but rather, AsureQuality did not anticipate the possibility of ISS introducing a new chemical with a different risk profile.

[47] They submit the risk of injury, serious harm, or death, and the actual harm that occurred, is a relevant factor in fixing placement within the bands, and that the three chemicals identified in the generic safety plan and approved by MPI were considered to be low hazard products intended to be used in a diluted form.

[48] While the risk of harm did come to fruition, AsureQuality say that the worst injury was suffered by who, again, received superficial first-degree burns to forearms. AsureQuality submit this is not a case where there was any wilful disregard for safety and that steps have subsequently been put in place to ensure that another similar incident does not occur again.

[49] AsureQuality submit that the cases relied upon by the prosecutor are distinguishable on the grounds that they reflect more significant failure and a greater degree of harm, which I accept.

[50] In terms of mitigating factors, AsureQuality say that it should receive a five per cent discount for its willingness to meet any reparation award and for providing support to its workers, which it says it did by contacting a number of the injured workers, providing light duties for and arranging management to meet with to discuss concern had raised.

[51] It submits that it should receive a discount, for co-operation with WorkSafe throughout the investigation process, of 10 per cent, and five per cent each for remedial action, previous good record, and remorse, which are all substantiated by affidavit evidence from Ms Beale.

[52] It is common ground that the defendant should receive a 25 per cent reduction on any starting point for the early guilty plea that was entered.

[53] AsureQuality take no issue with the costs sought by the prosecutor.

[54] In terms of an overall assessment, AsureQuality submit that the two charges should be dealt with together on a totality basis, given that they arise from the same incident.

[55] In summary, AsureQuality submit that its position is that it has an unblemished record; that the injuries to the workers were minor or superficial burns as a result of chemical exposure; that the company has taken steps to ensure that there will not be any repetition; and that their failings must be viewed in the context of an urgent emergency response to the M. bovis outbreak.

Submissions for OneStaff

[56] OneStaff acknowledges that its manager did not follow usual policies and procedures and regrets it did not do more to have ensured its workers' health and safety. It submits, however, that the offending was at a low level of culpability, that

the circumstances around the M. bovis outbreak were unprecedented, and that OneStaff, once the issue had come to light, stopped supplying workers until appropriate assurances had been received and that they have subsequently taken steps to ensure that an incident of this nature does not occur again in the future.

[57] It submits a starting point in the low culpability band of around $65,000 is appropriate and that after taking into account mitigating circumstances, that an end fine of $39,000 would be appropriate.

[58] OneStaff is a labour hire company which operates nationally. In April 2018, AsureQuality engaged OneStaff to provide temporary workers to undertake cleaning and disinfecting work in response to the M. bovis outbreak. OneStaff say they understood from AsureQuality that the work would involve mild citric acid-based cleaners. Their staff were assigned work and instructed by ISS. They say Doo Away was not a product listed on any plan and was more hazardous than what they were told their workers would be using. Basic instruction, it appears, was provided by ISS to some workers, who then passed that on to others. The PPE provided on site was not suitable for the more hazardous substance and, as a result, OneStaff workers received the burns I have previously referred to.

[59] OneStaff say they take workers' health and safety very seriously and outline in their submissions the pre-deployment procedures it had in place, which it acknowledges were not followed here. OneStaff submit, however, that their offending falls into the low culpability band, because it did not obtain information from AsureQuality about PPE requirements and confirmation that an induction process would take place before workers went on site but, due to the high degree of confidentiality surrounding this particular work, were unable to inspect the site or follow its own procedures in terms of carrying out an on-site assessment or obtain details of the tasks each worker would be required to undertake.

[60] As a labour hire company, it says that to some extent, they must rely on the industry expertise of those companies to whom they provide workers and have less day-to-day control or influence over the work actually undertaken than a typical employer might have. In short, it says to some extent it relied on those contracting its

services, who had a greater degree of influence and control, to ensure that appropriate health and safety measures were in place.

[61] Counsel for OneStaff has referred me to the case of *WorkSafe New Zealand v Alderson Poultry Transport Limited*, which was a prosecution under s 49 of the Act, which I accept has some relevance to establishing a starting point in this case.[4]

[62] In terms of remedial action, OneStaff has undertaken a review of its processes and invested in new technology to ensure that this lapse is not repeated and observes that those changes and improvements are likely also to improve the practices of the companies who hire their staff.

[63] OneStaff has a clean record, has paid some compensation to has co-operated fully with the investigation, and instituted improvements that I have previously referred to.

[64] It submits that a total discount on the starting point of 40 per cent is available, including the guilty plea discount.

The Court's assessment

[65] I accept in this case that the culpability in relation to both defendants is at the low- to low-medium range and that OneStaff, as the subcontractor, with less control over the day-to-day operation, should have lesser culpability than AsureQuality.

[66] I accept this case shows failures that did not impose risk of death and involved inadequacies around training and lack of appropriate PPE, monitoring and supervision against a background of work being undertaken to remedy the M. bovis outbreak, and that the actual injuries were acknowledged by the prosecutor to be minor or superficial burns to those workers affected.

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[4] *WorkSafe New Zealand v Alderson Poultry Transport Limited* [2019] NZDC 25090.

[67] Both defendants were responsible for the safety of the workers on site and needed to ensure that the chemicals used were used safely, with adequate training and oversight and with adequate PPE.

[68] I now turn to considering appropriate adjustments for personal circumstances as that term applies to what are, in this case, two corporate entities.

[69] It is acknowledged by the prosecutor that there are no aggravating personal circumstances in this case. It is also acknowledged that neither defendant has any previous health and safety convictions and that they fully co-operated with the investigation. There is no dispute that the defendants are both entitled to a 25 per cent deduction for their guilty pleas.

[70] 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.

[71] The Court in *Stumpmaster* indicated that there should be proper analysis before applying those credits and that a discount of 30 per cent was only available in "cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree", a quote that has been reiterated by the prosecutor, Ms Hogan, in her oral submissions to me this morning.

[72] I consider in this case that the combined mitigating factors applying to both defendants warrant a global discount of 20 per cent, in addition to the 25 per cent reduction for guilty pleas available to each of the defendants, for their co-operation to the prosecution, for remedial action undertaken, and for previous good record and remorse, to which I allocate a percentage of five per cent to each of those matters to reach a global figure of 20 per cent.

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

> (1) 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 towards the costs

of the prosecution (including the costs of investigating the offending and any associated costs).

[74] In this case, external counsels' costs for work up to and including the filing of submissions in this matter was just short of $12,000 plus GST, and the internal WorkSafe costs were $2,538.38. There is no contribution sought in relation to investigation costs.

[75] The prosecutor submits that a contribution of 50 per cent towards their costs would be just and reasonable and that split equally between the three defendants, those costs amount to $2,392.93 each.

[76] I agree that those costs sought are just and reasonable, and costs in that sum will be awarded against each of the two defendants before me today.

[77] The final step in the sentencing process is an overall assessment of reparation, which I mentioned earlier has its difficulties in this case. I also have to assess the level of fine.

[78] AsureQuality do not raise any issue in relation to its ability to meet a fine. OneStaff submits that a fine at the level that they submit is appropriate is within its capacity to pay if paid over time.

[79] It has been said in various different ways in relation to previous cases before the Court that fines in relation to these matters need to have some bite and should not be seen by businesses as simply being the costs of doing business, or licence fees; but nor should the fine drive any company into extinction, where the potential fallout for employees, that this legislation is seeking to protect, is obvious.

Sentence - AsureQuality

[80] In relation to AsureQuality, I consider that a fine of $120,000 is an appropriate starting point, with an end fine of $66,000 following the deduction discounts for mitigating factors that I have referred to previously, plus costs of $2,392.93.

[81] In relation to the remaining CRN ending 959, on that charge the company is convicted and discharged. That is on the basis that I consider that both charges have arisen from the same incident.

Sentence - OneStaff

[82] In relation to OneStaff, I consider that a fine of $70,000 is an appropriate starting point, which, with the discounts I have referred to deducted from that starting point, result in an end fine of $38,500, plus costs of $2,392.93.

Reparation

[83] In relation to reparation, I am satisfied that there is a link in terms of causation between the offending and the injuries suffered, but at the same time have to acknowledge that any reparation must reflect the agreed position that the harm in this case was limited to minor or superficial burns.

[84] Given those factors, I am going to award reparation for emotional harm in the sum of $1,000 to each of the victims who have provided the Court with victim impact statements.

[85] That cost, totalling $5,000, will be apportioned equally between the two defendants as to a two-thirds share. In other words, they will meet that reparation in the sum of $1,666.66 each, acknowledging that there is a third party, MPI, who is currently defending the charges before the Court.

Suppression

[86] Finally, an order will be made as to the suppression of all financial details relating to both companies.

Judge R J Walker
District Court Judge

Date of authentication: 20/11/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.