EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2020-042-001596
[2021] NZDC 14313

WORKSAFE NEW ZEALAND
Prosecutor

v

AIMEX LIMITED
Defendant

Hearing:	9 July 2021
Appearances:	V Viliami for the Prosecutor WorkSafe New Zealand B Nathan and N Laing for the Defendant
Judgment:	9 July 2021

NOTES OF JUDGE C N TUOHY ON SENTENCING

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[1] The defendant Aimex Limited appears for sentence on one charge under the Health and Safety at Work Act 2015 that being a PCBU, which is defined in the Act as a person conducting a business or undertaking, and having a duty to ensure as reasonably practicable the health and safety of workers carrying out work for them, including [the victim], while the workers are at work failed to ensure that they were not exposed to hazards arising out of the use of a hazardous substance, namely organic solvents, also known as hydrocarbon-based brake cleaner, that it failed to comply with that duty and that failure exposed the workers to a risk of serious injury or serious illness. That is obviously an offence under the Act, s 36(1)(a), carrying a fine not exceeding $1.5 million.

[2] The particulars of the charge are that it was reasonably practicable for Aimex to have conducted an effective risk assessment as per their safety management systems for work requiring the use of hazardous substances of this sort. It was reasonably practicable for them to have developed, implemented and monitored an effective safe system of work for workers exposed to hazardous substances including that one and it was reasonably practicable for it to have ensured the provision of effective information, supervision, training and instruction to protect workers from risk to their safety when working with hazardous substances, in particular the one in question.

[3] The defendant pleaded guilty to that charge on 24 February this year and the matter was remanded for sentencing until 21 April. At that time I adjourned the sentencing until today for a restorative justice conference to take place and that has taken place. The conference was held on 30 June and a report has been provided to the Court about that.

[4] The summary of facts has been read this morning. It is very long and it has been made available in writing to virtually everyone who is here and I do not think it is necessary for me to repeat it again now. I will though of course be referring to it from time to time during this sentencing.

[5] We have also heard this morning three victim impact statements read in open court. They also were particularly detailed. There are three primary victims, or there was a primary victim and two others is probably the better way to put it. [The victim] was the primary victim but other victims who read statements were [the victim's mother] and [the victim's partner].

[6] Again it is unnecessary for me to repeat what was in those victim statements. All I need to say is that they have been heard and there were obviously serious emotional and physical and financial consequences of the injury that [the victim] suffered and they have been kept in mind. I also record that I have read also the report from Psychological Services which was put before the Court or a progress report on [the victim]'s situation and there was another ophthalmic report which I have read.

[7] The restorative justice report was helpful to read. I commend the parties for engaging in the process. It takes some courage on both sides to do that. My experience in cases like this one is that it almost invariably improves the situation. It almost invariably helps people to deal with the emotional damage of an event like this and that emotional damage, I know from experience, can not only impinge on the victim and loved ones, which it very seriously has here, but also a case like this usually takes some toll on a defendant company and its responsible officers.

[8] There was no agreement as to reparation at the restorative justice conference, not because there was any disagreement but simply because the parties felt that the matter should be left to the Court. I noted that both defendant and victim supporters thought it should be at a higher level than WorkSafe's recommendation but, as I pointed out this morning, no recommendation had been actually made by WorkSafe, not specifically in any event.

[9] But one particular recommendation was made from that conference and that is that all employees of Aimex be addressed at a workplace meeting about the impact of this event on [the victim] and his family and I am pleased to have received a letter confirming that that was done on Monday.

[10] So, turning to sentence. Before going into the detail of that I want to explain to the people here, who may not be familiar with the process the general approach which this court, any court must take in a case of this nature, and charges of this nature arising from workplace accidents unfortunately are relatively common and over the years the higher courts, in particular the Court of Appeal, have set out a methodology for sentencing under the Health and Safety at Work Act which lower courts are bound to follow.

[11] In terms of the level of fines and reparation as opposed to the general methodology this is a matter for the sentencing court but again those decisions and the decisions that I will be making today are moderated both by the provisions of the Health and Safety at Work Act and the Sentencing Act 2002 and by previous decisions of courts in other cases, both at this first instance level and on appeal, and those are cases where the statutory provisions I have just referred to have been applied. This

produces predictability and consistency in the application of the law which is a necessary feature of any legal system. So I suppose the point I am making is it is not a matter of the judge just picking a figure from the air so to speak. There is an established methodology and there are established ranges of penalty within the provisions of the law.

[12] The prosecution's submissions have set out the relevant provisions of the law when it comes to sentencing and they are contained in s 151(2) of the Health and Safety at Work Act and they import provisions of the Sentencing Act which apply to sentencing for every type of offence.

[13] The Court has to take into account the Sentencing Act provisions and also the purpose of the Health and Safety at Work Act, the risk of and potential for illness, injury or death that could have occurred, it has to take into account whether death, serious injury or serious illness occurred, the safety record of the person, that has to be taken into account, the degree of departure from prevailing standards in the industry and a person's financial capacity to pay any fine to the extent that it has the effect of increasing the amount of a fine.

[14] So those are the general provisions and I have not referred to them other than in a very summary way. The particular methodology or approach to sentencing has been set out in a case called *Stumpmaster* and it is a case which would be referred to in every sentencing for offending of this nature.[1]

[15] Sentencing is a four step process: assess the amount of reparation to be paid to the victim, that is first; secondly, fix the amount of the fine by reference to guideline bands, which I will talk about in a minute; determine whether any other orders are necessary, and the only order asked for here is an order for costs of an amount which in context is minimal; and make an overall assessment of the proportionality and appropriateness of what the Court may have assessed under the three earlier steps.

[16] So the first step is to assess the quantum of reparation, that is, the amount of reparation. There are two aspects to it in this case. The major aspect is emotional

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

harm. That is something which is intrinsically incapable of mathematical calculation. I think another judge has said that it is essentially an intuitive process moderated, however, by what other judges in other cases have imposed.

[17] The prosecution have provided a helpful bundle of similar but, as always, not identical cases in which significant sums ranging from $30,000 to $50,000, and in one case $60,000 - but I think that was more than one victim - have been awarded for emotional harm reparation.

[18] A specific figure has not been exactly fixed on either side but the effect of the submissions is that neither party is objecting to a figure for emotional harm at the top of that range or the high part of that range of $50,000 and I assess that emotional harm should be fixed at what is close to the highest point that is usually reached in cases of this nature. I do not wish to repeat everything I heard in the victim impact statements but clearly emotional harm has been very significant in this case and for that reason the figure of $50,000 will be fixed.

[19] There is also reparation sought for consequential loss, this being the difference between the 80 per cent of previous income paid by ACC to [the victim] and what 100 per cent would be. My calculations based on those given for the earlier hearing on 21 April are that that would be about $14,300 and I intend to round that up to $15,000 to take account of any miscellaneous amounts of money that this accident has cost. I am sure, without having been provided detail, that significantly more than that small difference will have been expended by [the victim] and his family as a result of this.

[20] So we move to the fine. The maximum penalty is a fine of $1.5 million. The process here requires the Court to first fix what the Courts call a starting point which takes into account in that assessment all the aggravating and mitigating circumstances in relation to the offence itself and the *Stumpmaster* case sets out the guidelines for assessing that by creating four categories of offending, those categories being divided by how culpable or blameworthy a defendant's conduct is assessed to be. The four categories are: low category, low culpability and that can attract a fine up to $250,000. Medium culpability, a fine can be between $250,000 and $600,000. High culpability,

between $600,000 and $1 million and very high culpability at $1 million plus, obviously up to the maximum.

[21] Remember when we are talking about these things that there is always a worse case. Apart from anything else some defendants have a previous bad record of similar offending. Some workplace accidents result in death. Some workplace accidents result in multiple deaths and some workplace accidents involve very serious failures of duty, if I can call it that. So every case has to be assessed in context and those are the bands that the Court of Appeal has set.

[22] In this case the prosecution has submitted that there should be a starting point of $550,000, that is, at the high end of the medium culpability band and that submission has been supported by detailed reasons which are in a bundle that has been put before the Court earlier and the defence have submitted that the starting point should be $350,000, meaning at the lower end of medium culpability also supported by detailed reasons.

[23] So the factors that I wish to address in detail on this point are those that the Court must look at and the first point is to identify the acts, or in this case the omissions that took place, and the practicable steps that could reasonably have been taken.

[24] The omissions have been identified in the summary of facts and probably are best explained in terms of the reasonably practicable steps that were not taken and could have been. Those were conducting an effective risk assessment as per Aimex's safety management system for work requiring the use of hazardous substances, and specifically this one, brake cleaner; developing and implementing and monitoring an effective safe system of work for workers exposed to the hazardous substance; and ensuring the provision of effective information, supervision and training to those workers.

[25] I consider that those omissions were quite major omissions and the steps that could have been taken are reasonably obvious and could easily have avoided this incident if there had been a more serious rather than perhaps a formulaic focus on the health and safety of employees. It seems to me, reading the summary of facts, that

despite the various formal documentation and formal systems set up by the company there was no real appreciation on the ground, at ground level you might say, of the potential for serious harm or even death by inhalation or absorption of this commonly used substance. Because I am sure that had there been that appreciation in a real sense, the cleaning of this engine room would not have been undertaken in this reasonably casual way, if I can put it like that. Maybe that is a harsh way of putting it but that is what it seems, reading it all.

[26] First it seemed to me that there ought to have been a specific training of employees in relation to the use of this substance including anyone who was going to use it, whether they were an apprentice or not.

[27] Some actual assessment of the risk on this particular job might have led to the use of masks, it might have ensured that there was adequate ventilation because the fact of the incident seems to show that there was no adequate ventilation. If there was it would not have happened.

[28] Looking today at the fan that was used, it was placed not in the compartment in which the work was being carried out but in a compartment further forward and at the further end of that compartment. It seems that that fan could have been more adequately placed and it was in the end result. Whether there could have been another hatch open, that was an obvious step that could have been taken and there needed to be supervision and monitoring of the employee doing the work. Probably any of those steps would have avoided this accident and certainly all of them would have avoided the accident.

[29] The nature and seriousness of the risk is something that has to be taken into account. The risk of harm to one or more workers was high. It was high in the sense that it was always there and high in the sense that it could have resulted and did result in this case in a significant, a serious injury and potentially it could have been worse.

[30] The degree of departure from standards, it is probably not necessary to comment any further on that. It did seem to me that there was really no effective training of [the victim] in the use and the dangers of this substance that he was using

and no effective supervision on that day and, as I have already mentioned, that was probably the result of a lack of appreciation higher up the chain from [the victim] at that time of the reality of the risk and its potential consequences. Because had there been that appreciation, I am sure that those involved would not have allowed this to happen because they certainly did not intend it to happen.

[31] The availability of necessary means I have also really spoken about as well. I am conscious that it is always hindsight in these cases and I am well-aware of how easy it is with the benefit of hindsight to judge harshly because no-one has anticipated what happened here and of course that is the problem.

[32] I have noted the various cases that have been cited by counsel in which fines have been imposed for sums of anywhere between $200,000 and $600,000 and I do not wish to discuss those in any detail. I do not think it is necessary to go beyond the *Stumpmaster* guidelines.

[33] I have read the defence submissions and discussed them with Mr Nathan and that has been helpful. It may well be that the introduction of the 20 litre container added to the amount of vapour which must have been in the atmosphere in that engine room for some time but, as I mentioned, I cannot see how that might mitigate culpability in any way.

[34] [The victim] took it there without any realisation that it may have increased the danger, if it did, and, as I say, I think that is a reasonable inference. He was only 19, had just started his apprenticeship and it seems quite plain that he had no understanding of the potential danger of the material he was using, or at least the degree of danger, and no realisation that that danger might have been increased by the introduction of more of the material into the confined space or staying in it for longer and was under no effective supervision at that time. So I do not see that that mitigates the situation in any way.

[35] There was a submission that there was no evidence to establish that the air flow was inadequate. In my view there was. The evidence is that [the victim] became

unconscious from inhaling a noxious vapour in the engine room, so by definition it seems to me the ventilation was inadequate to prevent that happening.

[36] There were documented systems and policies but unless followed at ground level in specific instances they are not much help. The impression I have received, as I have mentioned is that there were policies and systems in place. It is just that people on the ground did not apply them diligently enough because they did not appreciate the consequences of not doing so or the necessity to do so in the specific situation.

[37] I have come to the conclusion that the offending is at the higher end of the medium category and that an appropriate starting point is $500,000. There then needs to be recognised discounts on that figure. Most of those, as I mentioned during the submissions, have been agreed by the prosecution and defence in the sense that each of them has submitted the same percentage because it is done by way of percentage for the various recognised factors.

[38] First of all the guilty plea, 25 per cent, which is the maximum for a guilty plea, and it is an acceptance in effect by the prosecution that the guilty plea has been entered at the earliest possible time or practicable time. Remorse is assessed at five per cent and agreed on both sides at that level. I think that the defendant is certainly entitled to remorse for undertaking the restorative justice process which they were not required to do and that is an indication of remorse, as is the holding of the meeting on Monday. Co-operation with the prosecution and that is assessed at five per cent and agreed at that. That is an accepted factor. Remedial steps is an accepted factor, again agreed at five per cent.

[39] The only difference between the two submissions on either side was that which I referred to before. The prosecution allowed five per cent for good conduct. The defence sought five per cent for that and 10 per cent for no previous convictions, or vice versa, I cannot remember, but effectively 15 per cent for a combination of good conduct meaning good citizenship of the company in other ways and its lack of previous convictions.

[40] I would look at those as one factor and I call it good character and the company is entitled to it. I think it is entitled to a bigger discount than the prosecution has submitted. I think it is entitled to a 10 per cent discount. The company is a relatively large company, large employer, 60-odd employees. It is in an industry where there is a reasonably high risk of workplace accidents. It has been in business for more than 10 years and it has no previous convictions, nor any other warning or the like during that time, so it is entitled to recognition of that in the normal way.

[41] That means a total discount of 45 per cent on the starting point and an end fine of $275,000, if my arithmetic is correct.

[42] So the only other matter to deal with is the prosecution costs. They seek $1,434.12 in various costs of prosecution which is minimal in the circumstances of the case and that will be allowed, meaning that there would be a total penalty of $341,000 or $342,000. I do not think that that is in any way disproportionate or inappropriate and I see no reason to adjust the figures I have reached for fine, reparation or costs for that reason, so that will be the decision of the Court.

ADDENDUM

[43] An alteration to the figures in paras [41] and [42] is required. Counsel have pointed out, and I agree, that my arithmetic was not correct. The end fine, taking into account the starting point fixed and the percentage discounts allowed, should be $250,000. That means that the total penalty amounts to $316,434.12.

C N Tuohy
District Court Judge