IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2020-092-009313
[2022] NZDC 3926

WORKSAFE NEW ZEALAND
Prosecutor

v

CODA SERVICES GP LIMITED
SMART RECRUITMENT LIMITED
Defendants

Hearing:	8 March 2022
Appearances:	R Belcher for the Prosecutor G Galloway for the Defendant Coda Services GP Limited S Curlett and H Bridgman for the Defendant Smart Recruitment Limited
Judgment:	8 March 2022

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] On 23 September 2019 [redacted], an employee of Smart Recruitment Limited, sustained fatal injuries when the fork hoist he was operating at Coda Services GP Limited's site rolled. The task today is for me to complete sentencing with respect to both of those companies.

[2] At the outset I want to express my appreciation for the presence of [redacted] family, who have joined us via VMR for this sentencing. It cannot be easy for you, but I welcome you here and appreciate your being here, as I am sure [redacted] would also.

[3] The WorkSafe investigation into the events, on 23 September 2019, identified failures on the part of both companies to comply with their statutory duties under the Health and Safety at Work Act 2015.

[4] Coda Services has pled guilty to one charge of contravening s 36(1)(a) and ss 48(1) and (48)(2)(c) of the Act. That offence carries a maximum penalty of a fine not exceeding $1.5 million.

[5] The allegation to which it has pled guilty is as follows: being a person conducting a business or undertaking, having a duty to ensure so far as reasonably practicable the health and safety of workers who work for it, including [redacted], while the workers were at work in the business or undertaking, unloading goods at Savill Drive, East Tamaki, did fail to comply with that duty and that failure exposed an individual to a risk of death or serious injury arising from the unsafe operation of a fork hoist.

[6] The particulars of the charge are that it was reasonably practicable for Coda Services to have:

(a) implemented, communicated to all workers and monitored compliance with a safe system of work for devanning and operating fork hoists;

(b) ensured that only trained and authorised workers operated fork hoists at the site and that fork hoists were operated with the proper use of a seatbelt; and

(c) consulted, co-operated and co-ordinated with Smart Recruitment Limited so as to ensure that Smart Recruitment workers were adequately inducted and supervised while working.

[7] Smart Recruitment has pled guilty to one charge of contravening ss 36(1)(a) and 48(1) and (2)(c) of the Act, the same offence, which carries the same maximum penalty of a fine not exceeding $1.5 million.

[8] Its charge is as follows: being a PCBU, having a duty to ensure so far as reasonably practicable the health and safety of workers who work for it, including [redacted], while the workers were at work in the business or undertaking, unloading goods at Savill Drive, East Tamaki, did fail to comply with that duty and that failure exposed an individual to a risk of death or serious injury arising from the unsafe operation of a fork hoist.

[9] The particulars of the charge being that it was reasonably practicable for Smart Recruitment to have:

(a) ensured safe systems of work were in place for devanning and operating fork hoists;

(b) ensured that only trained and authorised workers operated fork hoists at the site and that fork hoists were operated with the proper use of a seat belt; and

(c) consulted, co-operated and co-ordinated with Coda Services so as to ensure that Smart Recruitment workers were adequately inducted, monitored and supervised while working.

Factual background

[10] Turning to the facts, they are set out in a very thorough summary of facts. Counsel have addressed facts in their written submission also. I am satisfied that the facts are adequately summarised in WorkSafe's written submissions and I will adopt that summary.

[11] Coda Services operates a rail-served intermodal freight hub at 113 Savill Drive, East Tamaki, in Auckland. Smart Recruitment supplies temporary and permanent labour, predominantly in warehousing, distribution and manufacturing, and was engaged by Coda Service to unload containers (known as devanning) at the site.

[12] [redacted], then aged 16, was an employee of Smart Recruitment. At the time of his death he had worked for Smart Recruitment for approximately six months

as a devanner at the Coda Services site. He had not received training to use the fork hoist, he did not hold a fork hoist licence and he was not authorised by Smart Recruitment or by Coda Services to operate a fork hoist.

[13] Coda Services managed and controlled the site at all relevant times. There were two Coda Services workers who held the role of shift supervisors and one worker who held the role as compliance administrator. Smart Recruitment's team leader on the site was Mr Rikona. Typically, Smart Recruitment workers would arrive at the site earlier than Coda Services workers responsible for induction. Because of this, Smart Recruitment's devanning manager, Ms Martin, would go to the site three to five times each week to ensure that everything was in order for the workers to start devanning. With the agreement of Coda Services, Ms Martin would at times induct Smart Recruitment workers onto the site if Ms Manuel from Coda Services was not on site to do it. For example, [redacted] induction was completed by Ms Martin without any input from Coda Services.

[14] Coda Services provided Smart Recruitment with one 2018 Hyster fork hoist to carry out the devanning work. The manual for the fork hoist contained the following observations: a caution note that only operators who have completed the lift truck operation skill training may operate the lift truck; another caution note that operators must always fasten their seatbelt when operating the vehicle; and a further warning note that before operating the lift truck, operators needed to fasten their seatbelts.

[15] Coda Services had in place forklift operating rules which provided that only people who had a current forklift certification and who had been authorised to do so could operate a fork hoist at the site. Coda Services also had a fork hoist "safe work – quick guide" document that stipulated that a person should never operate a forklift with which they are unfamiliar or have not been trained to use. Smart Recruitment employees were subject to Coda Services health and safety requirements while at the Coda Services site. Some Smart Recruitment workers held fork hoist certificates or licences which were provided to Coda Services, but Mr Rikona was the only Smart Recruitment worker in the devanning team who was authorised by Smart Recruitment or by Coda Services to operate the fork hoist. Mr Rikona held a current fork hoist licence.

[16] In the early afternoon of 23 September 2019, there were nine temporary workers on site, six of whom were Smart Recruitment employees. Mr Rikona and [redacted] were both at work on the site. Mr Rikona was operating the fork hoist and was using it to move pallets. Sometime after 1 pm he decided that [redacted] "deserved a jam" on the fork hoist. He had previously shown [redacted] how the gears and levers worked and told him to get on the fork hoist and move some pallets. [redacted] moved one stack of pallets with the fork hoist without incident. On his return journey to collect more pallets, the fork hoist was unladen, with the forks in an elevated position. He steered the fork hoist sharply to the right. During this manoeuvre the fork hoist lifted onto one side and tipped over. [redacted] was not wearing a safety belt. The fork hoist landed on top of him and he suffered fatal injuries. He was pronounced dead at the scene by paramedics.

[17] The principle cause of the incident was determined to have been operator error. As noted, the subsequent WorkSafe investigation concluded both Coda Services and Smart Recruitment failed to meet their duties imposed under the Health and Safety at Work Act.

[18] I have received a victim impact statement from [redacted] family. In it the effect of this incident on the family has been made clear to me by [redacted] partner to [redacted] mother, and [redacted] sister. I do not propose to go into any detail of what is in that victim impact statement. Suffice to say that reading it left me feeling extremely affected by it in terms of its bluntness and the raw nature of the expressions in there, and I thank you very much for making those views clear to us.

Sentencing approach

[19] The approach to sentencing in workplace accident situations is now well established. It is set out in the *Stumpmaster* decision of the High Court.[1]

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

[20] There are four steps in the sentencing process which I must go through. First, I must assess the amount of reparation to be paid to the victim. Second, I must fix the amount of the fines to be paid by reference first to the guideline bands and then having regard to aggravating and mitigating factors. Third, I determine whether any ancillary orders are required. Fourth, I must make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[21] I have been motivated today not to see the need for any adjournment of this sentencing. It has been important to me to ensure that there was closure provided for [redacted] family. I say that because the final step in the *Stumpmaster* process for sentencing in such matters is not going to be able to be completed by me today.

[22] With respect to Smart Recruitment, I am not going to be in a position to make an overall assessment of the proportionality and appropriateness of the sanctions under the first three steps today. I am reserving that aspect of the sentencing. I will come to the reasons for that later.

Reparations

[23] So, the first thing I need to address is the issue of reparations.

[24] Reparations can be imposed in relation to loss of or damage to property, but also for emotional harm. Pursuant to s 32(1)(b) of the Sentencing Act 2002, the Court may impose a sentence of reparation if an offender has, through or by means of an offence, caused a person to suffer emotional harm.

[25] All three lawyers in court this morning have talked about the difficulty of assessing the appropriate amount of emotional harm in any case of this nature. All I want to say to you, as [redacted] family, is that it is well understood by the Courts and by me personally in undertaking the task I am undertaking, as it is by the representatives of the companies here in court and on VMR, that any amount of emotional harm I order to be paid to you cannot in any way compensate for the loss of [redacted] We all understand that, but it is simply the task that I have to undertake, following the guidance from decisions from higher Courts.

[26] I have been referred to a number of decisions where emotional harm reparation has been awarded in cases involving fatalities. There has been limited debate between counsel as to the amount of emotional harm reparation I should award. In my view, this is one of those cases where an amount of $110,000 is the appropriate amount. I have looked at the other decisions to which I have been referred and, while it may be possible to differentiate between this and others, in my view the amount that is sought by WorkSafe, being $110,000, is the appropriate amount.

[27] In terms of apportionment of that payment, I have raised that with Mr Belcher, who represents WorkSafe, in court. I am told that the appropriate way for me to provide for this payment is simply for the payment of the emotional harm reparation to be made directly to [redacted] family.

[28] In terms of apportionment of the $110,000 between the two defendants, I have landed very clearly in a position with respect to culpability on this matter (and I will return to that in due course), that the appropriate apportionment of culpability here is equal. With respect to the reparation payment, therefore, each company will be responsible for paying $55,000 of emotional harm reparation.

[29] Coda Services, for its part, has already paid $40,000 emotional harm reparation and I have been taken through those payments which were made shortly after the accident. It will accordingly have to pay a further $15,000 emotional harm reparation. Smart Recruitment will have to pay $55,000.

[30] With respect to consequential losses, which can also be ordered by the Court in such situations, given the circumstances of this accident there are no consequential loss payments to be made.

Level of Fines

[31] The second step is for me to assess the level of fines. The *Stumpmaster* decision to which I have referred earlier set out what are known as bands of culpability. There are four bands: low culpability, medium culpability, high culpability and very high culpability.

[32] In terms of the relevant considerations for assessing culpability, there is a well-known list of relevant factors that were reinforced in the *Stumpmaster* decision and which have their origins in the earlier *Hanham & Philp Contractors Ltd* decision.[2]

[33] Those factors are: the identification of the operative acts or omissions at issue and the practicable steps it was reasonable for an offender 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 prevailing standards in the industry; the obviousness of the hazard; and finally, the availability, cost, and effectiveness of the means necessary to avoid the hazard.

[34] Counsel for both Coda Services and Smart Recruitment have addressed these culpability factors. There are a number of particular points that I want to make with respect to the assessment of culpability.

[35] Firstly, with respect to Coda Services, in my view Mr Galloway identified very simply and succinctly what the critical issue was here in terms of Coda Services' culpability. He observed in his written submissions that the critical issue was the monitoring and ensuring of compliance with the systems that Coda Services had in place. He observed that this was a fundamental failure, but he quite properly submitted that Coda Services forklift operating rules, which aligned with industry standards, demonstrated Coda Services awareness and compliance with appropriate requirements. That, in my view, was a fair description of the critical issue for Coda Services. With respect to the general failure to monitor compliance, which was at the heart of this incident, Mr Galloway noted that the failure to monitor and ensure compliance was a departure from the expectations and standards within this industry.

[36] With respect to Smart Recruitment, again, by reference to the written submissions that were filed and expanded on in oral submissions this morning, there were a number of important points that I felt sounded, when reading those submissions and listening to Ms Curlett.

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[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095, (2008) 6 NZELR 79.

[37] Ms Curlett noted that in hindsight Smart Recruitment accepted it should not have sent its workers to work at Coda Services site until its SOPs had been provided by Coda Services as part of pre-qualifications checks, or else it should have sent its own SOPs and advised that these were what should be followed in the undertaking of work. Smart Recruitment noted that it had informed all its workers that only licensed forklift drivers were permitted to drive forklifts. Both Mr Rikona and [redacted] were aware of that. However, after the accident Smart Recruitment became aware that Mr Rikona's practice was to, on occasions, allow other staff to have a go at driving forklifts.

[38] Most concerningly, from the summary of facts and noted by Ms Curlett, was the CCTV footage taken by Coda Services which showed a large number of instances of unsafe operation of forklifts leading up to the accident. Ms Curlett noted that Smart Recruitment had not seen that CCTV footage and nor were any of Smart Recruitment's managers made aware of those instances of unsafe operation by Coda Services.

[39] Smart Recruitment accepted that it could have better consulted, co-operated and co-ordinated with Coda Services to ensure that its workers were adequately monitored and supervised while working. It noted that there was clearly a gap in understanding between Smart Recruitment and Coda Services as to who would complete monitoring and supervision of Smart Recruitment workers. It also accepted that it failed to properly pre-qualify the Coda Services site and determine how monitoring or supervision would in fact be carried out. I felt, however, that the nub of the issue was identified by Ms Curlett in her written submissions when she noted as follows:

> Smart Recruitment understood that its workers were being supervised by Coda's day shift supervisor, while Coda Services employees understood that Mr Rikona was responsible for supervising Smart's devanning team and presumably also believed that he was reporting health and safety issues back to Smart Recruitment. The reality, however, was that serious issues were not in fact being noted or reported.

[40] As I raised with Ms Curlett, it is always a double-edged sword to note the steps that are taken by an employer to correct what has occurred in enabling an accident such as this to occur, but this is one of those cases where that particularly starkly identifies what could have been done and is a comment on culpability. As Ms Curlett

quite responsibly noted, in my view, while Smart Recruitment does not now send full-time supervisors onto any client's site where its workers are placed, it has in place far better systems than it did. The systems that it now has in place ensure that its workers are supervised and monitored and these all relate to improved pre-qualification systems.

[41] By way of this process, Smart Recruitment now ensures prior to putting its workers at a client's site that the clients know that they need to monitor those Smart Recruitment workers and report back to Smart Recruitment any safety concerns. Importantly, as a further check, a devanning manager who already regularly visited devanning client sites now also uses those visits to check supervision and any changes to the site that might impact on the health and safety of employees. That is now a more formal process than was in place at the time of this incident.

[42] Counsel have referred me to a significant number of cases and, as Mr Galloway noted, it is always both unhelpful and helpful, frankly, to look at cases. They provide some reassurance but they are always able to be picked and chosen so as to support a particular proposition. Nevertheless, they provide a very clear framework within which to assess culpability and, of course, take guidance from higher Courts.

[43] In this case, I have found the decisions in the *WorkSafe New Zealand v Ports of Auckland Ltd* case and the *WorkSafe New Zealand v Pakiri Logging Ltd* case, along with that of *WorkSafe New Zealand v Alderson Poultry Transport* and Tegel Foods, of particular relevance and assistance.[3]

[44] With respect to submitted start points, WorkSafe has submitted that the offending of both defendants here sits within the high band under the *Stumpmaster* decision and submits that an appropriate starting point with respect to Smart Recruitment is $800,000 and Coda Services $900,000.

[45] Coda Services submits that an appropriate start point within the high culpability band would be around $700,000. For its part, Smart Recruitment submits

[3] *WorkSafe New Zealand v Ports of Auckland* [2020] NZDC 25308; *WorkSafe New Zealand v Pakiri Logging Ltd* [2021] NZDC 14158; and *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090.

that a start point of around $500,000 would be appropriate, placing its culpability in the medium band.

[46] The *Ports of Auckland Ltd* case saw a starting point of $850,000 for a fine. I have read that case carefully and considered the circumstances in which the judge set that start point. In my view the culpability of both Coda Services and Smart Recruitment in this case is less than that of Ports of Auckland in that case. There is not the same evidence of systemic failure present before me as was present in that case. This is, in my view, very simply a case, albeit an extreme one, of the left hand not understanding what the right hand was doing and vice versa. The culpability does sit properly in the high band, in my view, but it does not sit as high as WorkSafe has submitted. By reference to the fine imposed in the *Ports of Auckland Ltd* case, I consider that the appropriate start point is a fine of $750,000. That will be the start point for both defendants.

[47] I do not accept that the culpability of Smart Recruitment is less than that of Coda Services. This is not a particularly scientific exercise, I appreciate that, but taken at an overview level, to me, as I said, the left hand did not know what the right hand was doing and vice versa. Both parties were, in my view, equally responsible for that situation. It is no answer to that to submit, that because Smart Recruitment was operating a smaller business within part of Coda Services larger business, it was somehow less responsible for the overall work situation of its people. That is not an argument that I find particularly compelling. Smart Recruitment had responsibility for its people. It is responsible for Mr Rikona, and one could equally take the view that as a labour provider it was particularly responsible for this task on this site fitting in with others, and in some senses one could argue that its responsibility was heightened.

[48] I think that the fair and appropriate response is that advocated by Mr Galloway, which is that each party is equally culpable.

[49] There are no aggravating factors with respect to either defendant that would justify an uplift in that starting point, so the starting point for a fine is $750,000 with respect to each company.

[50] I turn now to the discounts or mitigating factors that are applicable. Firstly, both companies have pled guilty at a reasonably early opportunity and are therefore entitled to the maximum 25 per cent discount for their guilty pleas. There was some disagreement in written submissions as to the amount of other discounts available. However, as made clear in discussion and oral submissions, my view is that both Coda Services and Smart Recruitment are entitled to an additional 25 per cent discount. Those discounts are available for their co-operation with the investigation undertaken by WorkSafe, their payment of reparations, in the first instance on the part of Coda Services, and their willingness to pay reparations, which was always signalled by Smart Recruitment, their remorse, which I consider to be genuine and demonstrated by both companies' willingness to participate in restorative justice, and with respect to both companies, their prior good record. Discounts for those factors, in my view, are appropriately 25 per cent.

[51] Accordingly, therefore, we have discounts of 50 per cent from the start point of a $750,000 fine, meaning a fine of $375,000 for each defendant.

Ancillary Orders

[52] I turn now to ancillary orders. Section 152(1) of the Act provides that on the application of WorkSafe, I may order an offender to pay to the regulator a sum that I think just and reasonable towards the cost of the prosecution, including the costs of investigating the offending and associated costs.

[53] In this case WorkSafe seeks an order for costs in relation to internal and external legal costs incurred in the prosecution, being 50 per cent of its recorded legal costs. The amount it seeks is $14,053.96.

[54] WorkSafe also seeks an order for costs in relation to external costs incurred during the investigation, engaging the expert services of Transport Specifications Limited to inspect the fork hoist after the incident and provide a report to WorkSafe, the amount of that external cost being $9,676.96.

[55] WorkSafe also seeks an order for costs with respect to its engagement of an external accountant from Grant Thornton with respect to the financial ability of Smart Recruitment to pay a fine, the amount sought being $3,200.

[56] Accordingly, WorkSafe submits that legal and investigation costs should be borne equally by both Coda Services and Smart Recruitment and the total costs sought against each defendant are therefore Coda Services, $11,865.46, and Smart Recruitment, $15,065.46.

[57] While it is true that in this case the amount of legal costs is higher than I have seen in some others, it is nevertheless lower than many others also. The same comment could be made with respect to investigation costs. On balance, I am satisfied that all of these costs are appropriately sought and ought to be paid by the defendants in the amount sought pursuant to s 152(1).

Proportionality Assessment

[58] The fourth step, as I noted earlier, is what is known as the proportionality assessment. At this stage, I stand back and ask myself whether the overall combination of an award of emotional harm reparation, a fine and contribution to investigation costs and so on is a proportionate sentence, given the seriousness of the offending. I am able to complete this process with respect to Coda Services and not with respect to Smart Recruitment.

[59] With respect to Coda Services, I am satisfied that the overall combination of the fine of $375,000, the contribution to emotional harm reparation of $55,000 (with $15,000 now remaining to be paid) and the contribution to costs outlined earlier is an appropriate overall outcome.

[60] With respect to Smart Recruitment, I am unable to complete this process at the moment. That is because an issue has arisen as to the financial position of Smart Recruitment and in particular its ability to pay the fine that I have set. I have received some information from Smart Recruitment, both from its managing director and also from the accountant who provides services to Smart Recruitment, and I have also

received a response from WorkSafe, both in submissions and also in an affidavit from Grant Thornton. While not being remotely critical of counsel at all, yesterday I received further evidence from WorkSafe and further submissions from WorkSafe with respect to the financial position of Smart Recruitment, being an update on the earlier submissions.

[61] I have raised with Ms Curlett, whether she wishes to orally respond to that today or whether she wishes to reserve her position and file further evidence and submissions in writing. After some consideration she has chosen the latter course, which was my preference. I have provided for a timeframe of 14 days within which Smart may file any further affidavit evidence and submissions in relation to the financial position and its ability to pay the fine now set.

[62] Mr Belcher on behalf of WorkSafe has raised some concern about any further evidence being filed, but in the circumstances I considered that was appropriate. If, on receipt of what is filed, Mr Belcher wishes to seek leave to file any further evidence from WorkSafe, then he should feel free to do so.

[63] Once I have received further evidence and submissions, I will release a reserved decision solely on this final issue.

[64] The final things that I need to deal with are suppression orders. Suppression is appropriately sought by WorkSafe of [redacted] name, the names of [redacted] family members and the contents of their victim impact statement. There is no opposition, of course, to that suppression order being made and it is so made. I am also making a direction that the summary of facts, with appropriate redactions for these suppression orders, can be made available upon request by any party.

Judge R McIlraith
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/03/2022