IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2019-057-000232
[2024] NZDC 7476

WORKSAFE NEW ZEALAND
Prosecutor

v

EATIM NEW ZEALAND LIMITED
Defendant

Hearing:	26 September 2023
Appearances:	Mr A Everett for the Prosecutor Mr P White for the Defendant
Results:	26 September 2023
Judgment:	5 April 2024

SENTENCING NOTES OF JUDGE NR WEBBY

A fatal crushing in a potato harvester

[1] The need to adequately guard machinery is fundamental and long recognised.[1] Eatim Limited (Eatim) failed to adequately guard a potato harvester which it owned and operated (the Harvester). It failed to ensure that the guarding on the Harvester, was incapable of removal while the machine was still running. On 17 February 2018 Harchet Singh Gill (Harchet Gill) was fatally crushed in the Harvester. He had become entangled in the machine's moving parts. He had been able to access the moving parts of the machine while it was still running.

[1] *Niagra Sawmilling Company Limited v WorkSafe* CRI 2018-425-7 at [94].

Procedural history

[2] WorkSafe New Zealand (WorkSafe) commenced an investigation into Harchet Gill's death the day he died.

[3] On 27 March 2019 WorkSafe charged Eatim.[2] The charge alleged:

> Being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU, including Harchet Gill, while the workers were at work in the business or undertaking, namely operating the Hilda Mk3 potato harvester, serial number ASR196, did fail to comply with that duty, and that its failure exposed the workers to a risk of death or serious injury.
>
> **Particulars**:
>
> It was reasonably practicable for Eatim Limited to have ensured the potato harvester was adequately guarded in accordance with AS/NZS 4024, by the use of guarding interlocked to the harvester's energy source, to ensure that guarding was incapable of removal until the harvester's energy source was isolated and locked in a safe condition.

[4] On 10 May 2023, after a Judge alone trial,[3] I found that WorkSafe had proved the charge. Eatim appeared for sentence before me on 26 September 2023. My sentencing decision was reserved. On 28 November 2023, I issued a results decision. I made the following orders:

Emotional harm reparation

(a) Eatim was to pay emotional harm reparation of $56,000 to Harchet Gill's family (his parents Thana Singh and Karamjit Kaur). $6,000 of this sum was to be paid from Eatim's account dedicated to Harchet Gill.

Fine

(b) Eatim was to pay a fine of $72,000. This fine was to be paid at a rate of $2,000 per month over a period of three years.

[2] Pursuant to ss 48 and 36(1)(a) of the Health and Safety at Work Act 2015 (HASWA).
[3] *WorkSafe New Zealand v Eatim Limited* [2023] NZDC 8436, 10 May 2024.

Legal and expert costs

(c) Eatim was to pay WorkSafe's legal costs of $51,000.[4] This sum included expert costs of $10,100.

[5] My reasons now follow.

The facts

[6] The Harvester, in which Harchet Gill was fatally crushed, was a towed Hilder Mk3 harvester. It had been purchased in used condition on an "as-is" basis by Eatim. The type of harvester was well regarded by commercial potato growers for their use in the heavy volcanic soils around the Pukekohe region. Eatim's business, for the most part, involved growing potatoes and onions in the Pukekohe and Waikato regions. Harchet Gill had been employed by Eatim since January 2017 - first on a casual basis and then on a permanent basis from April 2017. Eatim's two directors, Eamon and Timothy Balle, were involved in the day-to-day operations of the business. It was a "very small" operation. It had two employees based in the Pukekohe region. One was Harchet Gill. It also had two employees based in Matamata. The site where Harchet Gill died, had been leased by Eatim for the purpose of growing and harvesting potatoes.

[7] Extensive work had been done by Eatim to return the Harvester to "service ready" condition. This involved significant remedial mechanical work. Guarding was also installed on some previously unguarded areas of the Harvester. The guarding was placed on both sides of the picking table (just beneath the platforms where the workers stood). The guards were put in place to prevent access to the powered conveyers and rollers that the freshly dug potatoes were conveyed upon. The guards consisted of four screens. There were two on each side. They were made of steel mesh and box sectional steel. After being fabricated they were painted red. The four guards were secured in place by anti-luce/drop-lock fasteners. They were not interlocked to the harvester's conveyer system. This meant that the guards could be easily removed by a worker, such as Harchet Gill, while the Harvester was still operating.

[4] Section 152(1) HASWA.

[8] The guarding selected by Eatim was copied from the guarding on a Hilder harvester owned and operated by Balle Brothers (a parent company). Eatim did not contact a specialist engineer or guarding expert. Eatim considered that the Harvester had been brought up to the identical standard of the Balle Brothers harvester and was "compliant".

The events of 17 February 2018

[9] Harchet Gill arrived on site at approximately 6.30 am. He was responsible for the harvesting activity on site. This included training and supervising the workers. His role involved driving the tractor which towed the Harvester. Four seasonal workers worked on the Harvester grading potatoes.

[10] He discussed the harvesting plan for the day with Eamon Balle. The contract workers arrived on site. They were given a safety briefing by Harchet Gill. They were told that they should *only* get on and off the harvester when the machine was stopped. Harvesting began. Harchet Gill drove the Tractor towing the Harvester. Four seasonal workers stood on platforms beside the picking table.

[11] Work stopped around 8:00 am. Harchet Gill cleaned the Harvester. The ground was wet. This had caused a build-up of mud on the Harvester. He cleaned the mud off with a shovel. Work commenced again. At 10:00 am work stopped for morning tea. Harchet Gill cleaned the Harvester again. The Harvester and the Tractor were switched off. Harchet Gill removed one of the guards. He went inside the Harvester. He cleaned the conveyer. Harvesting continued again until 12:00 pm. He told the workers to go and have lunch. He stayed with the Tractor and Harvester. The workers walked about 100 metres to their cars.

[12] Harchet Gill removed a guard on the left side of the Harvester. He entered the main conveyer system through an area just below the picking table. The Harvester was still running. He was drawn into the network of rotating rollers of the conveyer system. He was fatally injured.

[13] One of the workers came back to the Harvester to get his lunch and cigarettes. He saw Harchet Gill's body inside the Harvester. He didn't know how to the turn off the two machines. He ran back to the other workers. They came back to the Harvester. One of the men phoned his brother. He told Shane Balle what had happened. Mr Balle came to the site. He quickly switched off the Tractor. The Harvester was not running by this time.

[14] Harchet Gill died at the scene. His body had to be extracted from the Harvester. The cause of his death was *multiple blunt force trauma* inflicted as a result of becoming entangled/entrapped in the moving parts of the Harvester while it was still running.

The WorkSafe Investigation

[15] WorkSafe commenced an investigation into Harchet Gill's death that afternoon. Shortly after the investigation commenced the CEO of Potatoes New Zealand, Stuart Wright, issued a statement:

> Harvesters are extremely dangerous machinery, which need to be managed well to protect our workers. Potatoes NZ urges growers throughout NZ to stop and look what can be done to ensure that the likes of this accident does not occur to another worker.

[16] On 28 February 2018 WorkSafe issued Eatim with a 'Probation Notice' for inadequate guarding on the Harvester. The notice was issued for "reasons including the absence of any interlocking guards". The Harvester has remained out of service since this time.

[17] As mentioned above (at [3]), WorkSafe charged Eatim on 27 March 2019 and on 10 May 2023, after a Judge alone trial, I found that WorkSafe had proved the charge.

Approach to sentencing

[18] The approach to sentencing in workplace accident situations is now well established. The guideline judgment for sentencing under s 48 of the Act is

Stumpmaster v WorkSafe New Zealand.[5] In this decision the High Court confirmed a four-step process:

(a) Assess the amount of reparation to be paid to the victim(s);

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

(c) Determine whether further orders under ss 152-158 of the Act are required; and

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Assessing reparation – Emotional harm

[19] The issue of emotional harm reparation arises in this case. Reparation for emotional harm is compensatory, not punitive[6] and, of course, difficult to quantify financially. In *Big Tuff Pallets v Department of Labour*[7] the High Court observed:

> Fixing an award for emotional harm is an intuitive exercise: its quantification defies finite calculations. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short term or long term.

[20] I have been provided with a victim impact statement (VIS) from Harchet Gill's parents (Mr Thana Singh and Karamjit Kaur) for which I am extremely grateful.[8]

[21] There was clearly and understandably a high level of distress, pain and grief caused to Harchet Gill's family when they found out about his death. The VIS records:

> We were waiting for his phone call on that day as well. Our son would call me but another boy who is also from our village and worked with Harchet had

[5] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.
[6] *Ocean Fisheries Limited v Maritime New Zealand* [2021] NZHC 2083 at [112].
[7] *Big Tuff Pallets Ltd v Department of Labour* (5 February 2009).
[8] The original statement has been written in Punjabi and has required the use of a translator.

> called his family about Harchet's death. But for the next 15 days, we were told that Harchet had some injuries, and he was in hospital, and he wasn't yet able to talk because he was also aware of the fact that we would not be able to bear this shock. Then we found out about it on the day Harchet's dead body was to be sent to India. Then we went through a lot of pain. That shock has really weakened us physically and mentally … even now when we miss Harchet then our heart gets sad, and we are unable to sleep at night.
>
> …
>
> Harchet was everything to us. He was the pillar of support for our life, and he was the one fulfilling the dreams of everyone in the family. We loved him a lot and he loved us. He wasn't able to withstand even an inch of our pain. He had taken the responsibility of the whole house on to his shoulders because Harchet's elder brother was unwell, and he was not capable of doing household and outside jobs … Harchet always used to say that he will get his elder brother treated in a big hospital.

[22] Harchet Gill's death has without a doubt had a harrowing impact on his parents, who come from a humble farming village in Punjab, India. They are a family that has struggled financially for years, especially having four children. Harchet Gill was the youngest of their children.

[23] As a result of his family's circumstances, Harchet Gill decided to move to New Zealand to pursue study, work and a better life so that he could provide more money and therefore financial security and stability for his family in India. It is clear from the VIS how dependent his family were on him financially and emotionally. He was a dutiful, caring, kind and supportive son who had a vision to give his family the best life possible.

[24] WorkSafe, citing *Vehicle Inspection New Zealand Limited*;[9] *Alderson Poultry Transport*[10] and *Higgins Contractors Limited*,[11](where awards of $130,000 were made to families following fatalities) submits that an emotional harm payment to Harchet Gill's family of $130,000 is appropriate. WorkSafe acknowledges that a payment of $50,000 has already been made and should be reduced from any emotional harm payment to be made.

[9] *WorkSafe New Zealand v Vehicle Inspection New Zealand Limited* [2021] NZDC 3036.
[10] *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090.
[11] *WorkSafe New Zealand v Higgins Contractors Limited* [2020] NZDC 17036.

[25] In addition to $50,000 already paid to Harchet Gill's family, Eatim has also expended a further $24,517 *"consistent with its remorse over the incident"*. Eatim transported one of Harchet Gill's family to New Zealand and one of its employees, who was from the same village as Harchet Gill, to India.

[26] Eatim acknowledges that the three cases cited by WorkSafe "understandably" fall at the higher end of the range available for reparation awards in cases involving fatalities. They also involve features absent in the present case:

(a) *Vehicle Inspection New Zealand Limited*,[12] where the deceased was a customer and not an employee, involved the death of a relatively young parent leaving a surviving widow with three young children.

(b) *Alderson Poultry Transport*[13] involved the death of a woman in front of her husband who had to care for his emotionally damaged children.

[27] Eatim submits that when reference is made to the awards referred to in *Ocean Fisheries Limited*[14] an order of $114,000 is appropriate. Such an award would fall in the middle of the range of reparation awards and would be in excess of most awards given to parents of adult workers.

[28] Harchet Gill's family in India were clearly dependant on him financially. His death, quite understandably, has had a significant impact on them. I consider that an emotional harm reparation award of $130,000 is appropriate. As detailed (above), $50,000 has already been paid to Harchet's family. Eatim has also spent just over $24,000 in repatriating his body back to India and transporting one of his family members to New Zealand. Taking those payments into account, the award for emotional harm is $56,000. $6000 of that sum is to be paid from Eatim's account dedicated to Harchet Gill.

[12] *WorkSafe New Zealand v Vehicle Inspection New Zealand Limited* [2021] NZDC 3036.
[13] *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090.
[14] Schedule A: *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083.

Assessing fine

[29] I must next set a fine by reference first to the guideline bands in *Stumpmaster* and then having regard to aggravating and mitigating factors. The culpability bands identified in *Stumpmaster* are:

(e) Low culpability – Up to $250,000

(f) Medium culpability – $250,000 to $600,000

(g) High culpability – $600,000 to $1,000,000

(h) Very high cupability - $1,000,000 plus

[30] The Court in *Stumpmaster* observed that low culpability cases "will typically involve a minor slip up from a business otherwise carrying out its duties in the correct manner. It is unlikely actual harm will have occurred, or if it has it will be comparatively minor".[15] The Court considered "… it likely that under the new bands a starting point of $500,000 to $600,000 will be common".[16]

[31] In *Department of Labour v Hanham and Philp Contractors Ltd*[17] the High Court identified a list of sentencing factors which continue to be relevant. They are:

(a) The identification of the operative acts or omissions at issue;

(b) The assessment of the nature and seriousness of the risk of harm occurring;

(c) The degree of departure from industry standards;

(d) The obviousness of the hazard;

[15] *Stumpmaster* at [52].
[16] *Stumpmaster* at [66].
[17] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) NZELR 79.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard;

(f) The current state of knowledge of the risks and of the nature and severity of the harm that could result; and

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[32] WorkSafe submits that a starting point "at the cusp" of the medium and high *Stumpmaster* bands and that a starting point of $600,000 appropriate. Eatim submits that a starting point in the range of $500,000 to $550,000 is appropriate. Both WorkSafe and Eatim refer me to *Ron Frew Family Partnership*[18] (where a starting point fine of $350,000 was imposed) and *Easton Agriculture Limited*[19] (where a starting point fine of $800,000 was imposed). Both cases involve potato harvesters.

[33] In *Ron Frew Family Partnership*, a worker was seriously injured when his foot became caught in converging rollers on a potato harvester. The roller nip point was unguarded and there was no formal operating procedure in place. Eatim acknowledges that the fact of fatality in the present case increases its own culpability.

[34] In *Easton Agriculture Limited*, a worker who was working alone on a potato harvester was found trapped in the back of the machine while it was still in motion. It was unknown exactly what had occurred. The worker was declared dead at the scene. In a decision delivered before *Stumpmaster*, the sentencing Judge considered the relevant factors to be:

> 1. The windrower had a nip point that was obvious and unguarded. The risk of serious injury or death from unguarded nip points in such machinery is well known in all industries including agriculture.
>
> 2. The unguarded nip point in this machine presented a significant risk. It was at waist height and easily accessible. The mere description of how it operated, with the counter-rotating rollers, and its purpose of removing vegetation from crops, means it requires no imagination at all that someone drawn into this machine while operating it, for

[18] *WorkSafe New Zealand v Ron Frew Family Partnership* [2018] NZDC 20330.
[19] *WorkSafe New Zealand v Easton Agriculture Limited* [2018] NZDC 2003.

whatever reason, would suffer serious injuries to their limbs and crush injuries likely to cause death.

3. The lack of a guard on this machine was contrary to relevant industry safety standards.

4. [The deceased] was working alone at the time. I regard this as very important. The lack of a guard meant there was really no barrier to a worker in his position from making a mistake, suffering an accident or a mechanical malfunction, or a combination of such factors, without being discovered or rescued until sometime later.

The present case

[35] Eatim failed to ensure that the Harvester was adequately guarded (by ensuring that that the guarding was incapable of removal until the harvester's energy source was isolated and locked in a safe condition) in accordance with the Best Practice Guidelines and AS/NZS 4024. Despite acknowledgement that potato harvesters in general are extremely dangerous machinery, which need to be well managed to protect workers, I found that there was an overreliance on safe operating procedures and safe systems of work: *the last resort of the hierarchy of controls*.[20] That workers could take short cuts or act contrary to instructions was well known in the industry. Eatim needed to be mindful that even trusted, rigorously trained and experienced employees like Harchet Gill could foreseeably take shortcuts and behave contrary to common sense when working on such a machine. Unfortunately, Eatim was not so mindful.

[36] The risk involved was exposure to the moving parts (in particular the in-running nip points) of the machine, which had potential to lead to entrapment within the machine. The risk of serious injury or death from unguarded nip points in such machinery is well known in all industries including agriculture.[21] To state the obvious, the risk arose because workers, like Harchet Gill, were able to easily remove the guards that Eatim had installed while the machine was still running. The realised risk of a failure to adequately guard such machinery was his fatal crushing. As in the *Easton* case, Harchet Gill was working alone at the time. The ability to remove the guards, while the machine was still running meant there was no room for mistakes by him or an ability for any mistakes to be rectified by others.

[20] *WorkSafe New Zealand v Eatim Limited* [2023] NZDC 8436, 10 May 2024 at [99].
[21] *WorkSafe New Zealand v Easton Agriculture Limited* [2018] NZDC 2003.

[37] This is not a case where Eatim had no guarding at all in place (as was the case in *Ron Frew Family Partnership* and *Easton Agriculture Limited*). Eatim's culpability must therefore be regarded as somewhat less than those two companies. I accept that Eatim had attempted to put in place what *it* considered to be "the best guards available". In fact the guarding was the same "if not identical" to the guards used by Balle Brothers. The Harvester in question also had more guarding than some other potato harvesters being used in the industry. Notably, of the machines that WorkSafe's expert Mr Mains observed during the six seminars held by *Potatoes New Zealand*, missing or incomplete guards were found on every machine; fixed guards were generally not secured in the manner required and none of the guards assessed guaranteed the machinery was stopped before the guard could be opened or removed.

[38] WorkSafe acknowledges that Eatim did not *significantly* depart from the standards prevailing in the potato harvesting industry at the time. However, industry standards are not to be judged on what others in the industry are doing, but what they should have done. From the evidence at trial there appeared to be a *can't do* attitude within the industry. As I stated in my decision: Such industry inertia may continue to prevent the adoption of the required safety measures.

[39] Having regard to those matters and the comparable cases of *Ron Frew Family Partnership* and *Easton Agriculture Limited*, I agree that Eatim's offending falls into the upper end of the medium culpability band. I consider that a starting point of $550,000 is appropriate.

[40] There are no *aggravating factors* requiring an uplift from that starting point. There are, however, *mitigating factors* and discounts are appropriate. It is acknowledged by WorkSafe that the following discounts are appropriate:

(a) *Remorse* - It is acknowledged that Eatim showed real concern for Harchet Gill's family and friends after his death. This included paying for his friend, who also worked for Eatim, to travel to India. It also involved flying one of Harchet Gill's family members to New Zealand. I consider that a 10 per cent discount is appropriate to reflect this factor.

(b) *Reparation* - Eatim provided financial support to Harchet Gill's family prior to sentencing. WorkSafe acknowledges the merit in ensuring victims do not have to wait until sentencing to receive reparation and that ensuring early financial relief should be a priority. I consider that a 10 per cent discount is appropriate to reflect this factor.

(c) *Co-operation* - Eatim has co-operated with WorkSafe in its investigation. I consider that a five per cent discount is appropriate to reflect this factor.

(d) *Good health and safety record* - Eatim has no previous convictions despite many years in the industry. I consider that a 10 per cent discount is appropriate to reflect this factor.

[41] Combined discounts of 35 per cent reduce the fine payable by Eatim to $357,500.

Ancillary orders

[42] WorkSafe seeks:

(a) An award for costs of $55,247.28 (50 percent of WorkSafe's legal costs including WorkSafe solicitors and external Counsel);[22] and

(b) An award of $20,217.39 (costs incurred in having to engage an external expert Mr Mains).

[43] Eatim submits that this is an excessive amount and that in the absence of detailed information as to how these costs have been calculated[23] that costs should be capped to a reasonable level. Moreover, the Court should not award full costs for an expert such as Mr Mains, who has been retained by the Regulator, because that would effectively incentivise such experts.[24]

[22] *Prosecutions Costs Report* as of 28 August 2023.
[23] With particular reference to external Counsel's costs.
[24] *WorkSafe v Bakeworks Limited* [2023] NZDC 5236.

[44] Accordingly, while I accept WorkSafe's submission that the amount sought represents only half of actual costs, I consider that a fair and reasonable contribution to WorkSafe's legal costs is $50,394.57.[25] This sum includes expert costs of $10,108.70.

Overall assessment of proportionality

[45] This final step requires the Court to make:

> An overall assessment of the proportionality and appropriateness of the combined packed of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[46] In short, [redacted] WorkSafe has taken a different view. [redacted]

[47] In *YSB Group Limited*[31] the High Court considered the following principles to be important in assessing a company's financial capacity to pay:

(a) It is important to determine a provisional fine or starting point before adjustment to reflect a defendant's financial capacity.

(b) Fines may be in instalments but should not be ordered for any length of time and that 12 months is normally an appropriately lengthy maximum period.

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[25] Section 152(1) HASWA.

[redacted]

[31] *YSB Group Limited v WorkSafe New Zealand* [2019] NZHC 2570.

(c) A fine ought not to place a company at risk.

(d) A fine should be large enough to bring home the message to directors and shareholders of corporates.

(e) One must avoid a risk of overlap that in a small company director are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on a company. The Court must be alert to make sure it is not in effect imposing a double punishment.

[48] [redacted]. Accordingly, mindful of the factors noted in *YSB*, I consider that a reduced fine, payable in instalments is appropriate.

Result

[49] In conclusion, the following orders are made:

Emotional harm reparation

(a) Eatim is to pay emotional harm reparation of $56,000 to Harchet's family (his parents Thana Singh and Karamjit Kaur). $6,000 of this sum is to be paid from Eatim's account dedicated to Mr Gill.

Fine

(b) Eatim is to pay a fine of $72,000. This fine is to be paid at a rate of $2,000 per month over a period of three years.

Legal and expert costs

(c) Eatim is to pay WorkSafe's legal costs of $51,000. This sum includes expert costs of $10,100.

Suppression of financial details

(d) Although I have deliberately not gone into great detail about Eatim's financial position, I also make an order suppressing information about Eatim's financial position as detailed at [46] and [48] (above).

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