IN THE DISTRICT COURT
AT HAMILTON

MS closed.

CRI-2013-019-005810

MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT
Informant

v

CANPAC INTERNATIONAL LIMITED
Defendant

Hearing:	24 April 2014
Appearances:	M Denyer for the Informant G Nicholson for the Defendant
Judgment:	24 April 2014

NOTES OF JUDGE R L B SPEAR ON SENTENCING

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[1] Canpac International Limited is for sentence on a charge under s 18(1)(a) and 50(1)(a) of the Health and Safety in Employment Act 1992.

[2] The specific charge is that on or about 29 April 2013 at Hamilton, Canpac failed to take all practicable steps to ensure that its employee Madeline Waretini was not harmed while doing work that she was engaged to do.

[3] Canpac has pleaded guilty at the earliest possible opportunity and it is entitled to distinct credit for that.

[4] I have today received detailed written submissions from counsel for both the informant and the defendant to which counsel have spoken. I am grateful indeed to counsel for the careful and extensive submissions that they have provided to me and thus the assistance that they have given to me in respect of this sentencing exercise.

[5] The way in which I have described this particular charge fudges one of the background features to this case. The complainant or victim, Madeline Waretini, came to work for Canpac through her employer Drake Personnel. That company provided workers as required for Canpac under some particular business arrangement. I mention this because of the way in which the charge is drafted; but it causes no difficulty here. In short, the obligation or duty was on Canpac to ensure that Mrs Waretini was not harmed while doing the work that she was required to do while working at Canpac's factory.

[6] Canpac is in the business of manufacturing cans and operates a number of production lines that by necessity have a number of moving parts. The particular area that Mrs Waretini was working was known as the magazine and it is where a stack of flat metal plates, known as blanks, were fed into power rollers to take them further down the line for processing.

[7] At paragraph 7 of the informant's submissions it is said that part of Mrs Waretini's role was to apply pressure with her hands onto the stack of blanks when the stack became low so that the blanks would feed smoothly through the rollers. Further, that in order to do this a clear plastic guard had to be removed from the magazine and the sensor which stops the blanks being fed into the rollers had to be overridden.

[8] It would appear that this was standard operating procedure and that Mrs Waretini was trained to act in this way when the stack of blanks became low and to ensure that the blanks kept being fed into the rollers.

[9] On the day in question, while Mrs Waretini was doing this, she was bumped or upset in some way and it would appear that she moved her hands outwards to gain balance. Unfortunately, her right hand was pulled in between the rollers. She suffered injuries to the middle and ring finger of her right hand. Those injuries required the partial amputation of the tip of her middle finger and crushed her ring finger. With the assistance of other workers she was able to extract her hand and she then received medical attention.

[10] Her victim impact statement explains what a painful time she had as a result of this injury. She says that for over a month she experienced extreme pain that had to be addressed by significant painkillers including morphine. She has had to come to terms with the fact that her ability to use her right hand is now substantially diminished and of course she was right handed so that simply aggravates the position.

[11] As with most injuries of this nature, not only is there a physical disfigurement and not only does the victim suffer significant pain for a considerable period of time but there are the emotional aspects to having to live with this drop in functionality with which the victim has to come to terms. This is detailed carefully by Mrs Waretini in her victim impact statement. It is clear that this has been a life changing experience for her and it has diminished her capacity both to work at the level she used to work and also to enjoy life.

[12] Mr Nicholson is quite correct when he states that reparation is not available to deal with future economic loss such as an inability to earn at the same rate as was the case before the accident and of course there is the statutory compensation scheme that comes into play here as well. I mention this as a forerunner to the assessment of reparation which is part and parcel of this sentencing exercise.

[13] The investigation by the Ministry into the accident resulted in an acknowledgement on the part of Canpac that its standard operating procedure was flawed and that it exposed the worker to the type of injury or susceptibility to accident as occurred here.

[14] The sworn material placed before me today confirms that Canpac swiftly reviewed its standard operating procedure and that it has now implemented a standard operating procedure that will not permit an accident of this nature reoccurring. I mention that as Mr Nicholson has argued that the response by Canpac to the accident is one for which it should receive credit as a responsible employer who openly acknowledges that "it got it wrong" in respect of how this machinery should be operated. However, it has taken all responsible steps to ensure that this will not reoccur.

[15] It is well understood that the first consideration that should be given by the Court in cases of this nature is to the assessment of reparation. While counsel were apart significantly on this issue in their written submissions, they have now agreed that a fair assessment of reparation in this particular case, having regard to other cases of a not dissimilar nature, is $10,000. I confirm that I am in agreement with counsel that reparation should and can appropriately be made in that sum. Furthermore, that this is deserving of a 15 percent credit against the sentence that would otherwise be imposed upon Canpac.

[16] The attention now needs to turn to the assessment of the fine that should be imposed on Canpac. In this respect, it is necessary for the Court to remind itself that the purpose of a fine is primarily to punish. It is to be punitive but it must serve a purpose beyond just punishment. This penalty must mark the seriousness of the offending and in particular it must act as both a general and a specific deterrent in relation to the need for there to be safety in the workplace. The general deterrent must be for all those who run machinery-based businesses or indeed any employment environment. The specific deterrent must be on Canpac knowing that if there is another safety issue that results in prosecution then the fact that they have been convicted on this occasion will be one of the matters taken account of by the Court.

[17] Counsel have referred me to a large number of cases throughout the country where starting points have been taken of between $60,000 and $75,000. A starting point of course is just that. It is the point at which the Court starts for general offending of this nature.

[18] Mr Denyer for the prosecution submits that the Court should start with a point of $100,000 but that seems to be completely out of kilter with the approach taken in other cases although I suspect that he is factoring into that starting point submission also the aggravating features that he has argued apply here.

[19] There is clearly a need for consistency in sentencing approach so that it is not a lottery and that what occurs in Invercargill should also occur within certain bounds in Whangarei and in between in Hamilton. The consistent approach taken by the

Courts does seem to suggest that for offences of this nature, and at this level, $60,000 is an appropriate starting point.

[20] The question then is whether this should be lifted to represent any aggravating features to the offending. Mr Denyer has argued that there are significant features here that require an uplift and, unsurprisingly, Mr Nicholson argues against that.

[21] The aggravating features pointed to by the informant are the fact that this standard operating procedure was indeed inherently and obviously flawed in its approach and presented the safety hazard that I have already addressed. In this respect, it is argued that it is different to cases where machines are safeguarded and an employee has removed the guard or disabled the safety mechanism for some purpose and that has resulted in an injury to that worker. I agree that there is a difference, but the difference in the main is a rather subtle one.

[22] What Mr Denyer's submission needs to be placed beside is the fact that this company endeavoured to devise a safety procedure or standard operating procedure for this machine and so its focus was on a safe working practice; but it just got it wrong.

[23] I consider that in those circumstances there is no need for a further uplift from the $60,000 starting point that counsel accept is applied consistently around the country.

[24] Mr Denyer in his written submissions pointed to a concern about the safety record of Canpac which has one previous conviction although Mr Denyer does not seek to make any moment of that, principally as he accepts it was some years ago back in 2002 and for an entirely different aspect to Canpac's operation.

[25] Mr Denyer's submission is that Canpac's own records indicate that there have been at least 49 incidents relating to these production lines and he suggested that this deserved an uplift. This is disputed by Canpac. This is a matter of sentencing significance and so that dispute would need to be resolved by determination through

a Newton hearing for it to play a part in this sentencing consideration. On reflection, Mr Denyer has conceded the point for this sentence. Accordingly, that is not a matter that the Court will take into consideration.

[26] Insofar as mitigation is concerned, I have already indicated that 15 percent is an appropriate credit to be given for the reparation to be paid. What other mitigating factors are there?

[27] Before taking account of the credit for a guilty plea, Mr Denyer submits that 25 percent is appropriate. Against that Mr Nicholson argues that 30 percent should be allowed for mitigating factors. Well what are the factors that the Court should take account of insofar as mitigation of penalty besides reparation?

[28] Reference has been made to *Ballard v Department of Labour* (2010) 7 NZELR 301 (HC) and in particular paragraph 41 where Stevens J dealt with a number of mitigating factors. Mr Nicholson has certainly focussed upon those particular factors in support of his submission that 30 percent should be applied for credit together with the 15 percent for reparation.

[29] There is no doubt that Canpac co-operated with the Ministry and its inspectors following the accident. Mr Nicholson argues that this is worthy of 10 percent. I consider that to be too high and I consider five percent would be more appropriate given that any responsible employer could be expected to co-operate in an investigation where one of its workers is injured.

[30] The issue of remorse is raised and of course the complainant in her victim impact statement spoke about what she considered to be Canpac's lack of empathy with her situation and the failure on its part to engage with her and assist her during those difficult times following the accident. That is, however, taken issue with by Mr Muir who explains exactly what Canpac did do in relation to Mrs Waretini and its concern for the difficult situation that she found herself in.

[31] This, again, is a matter of sentencing significance and again it is not one that the informant wishes to pursue at a disputed facts hearing. I accept the five percent

discount that Mr Nicholson argues for in this respect. I accept that Canpac is concerned for its workers and that it displayed its remorse to Mrs Waretini following the accident as best it could.

[32] There might well have been some visitation of frustration on the part of Mrs Waretini to Canpac for the fact that she was injured but that is a matter that can perhaps be seen more as her frustration at her disability.

[33] I have mentioned also that Canpac has changed its standard operating procedures in relation to this particular machinery line and it is accepted that this will remove the risk that was presented by the earlier standard operating procedure which unfortunately caught Mrs Waretini.

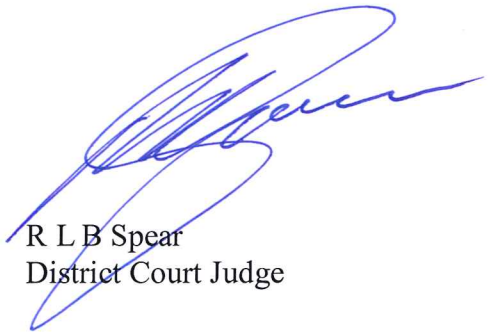
[34] Finally, Mr Nicholson argues that Canpac is entitled to a 10 percent discount for its safety record. I certainly consider that it is entitled to something but the fact remains is that it is operating high speed machines; I am informed that this particular machinery line uses or absorbs up to 200 metal blanks per minute. That they have not had another serious accident would appear to be more good luck than good design given the flaw in the standard practice. I will allow five percent in that respect which brings me to a total discount for mitigating circumstances of 35 percent.

[35] On a strictly mathematical basis then the starting point of $60,000 has to be reduced by 35 percent to represent the reparation and the other mitigating factors which brings the fine equation to $39,000. The guilty plea here attracts a further credit of 25 percent which brings fine down further to an end point of $29,250.

[36] The Courts have said, consistently, that sentencing is not a mathematical exercise in the true sense. That it requires the Court, at the end of the day, after taking account of all relevant factors, to stand back and make a final determination as to what is an appropriate penalty.

[37] In my view, a fine of $25,000 is appropriate to meet the sentencing objectives here and to make all due allowances for those factors that I have mentioned. Sso the

least restrictive outcome here is a fine of $25,000 together with an order for reparation of $10,000 to be paid to the complainant by 24 May 2014. There will be also the standard court costs of $130.



R L B Spear
District Court Judge