AN ARD-CHÚIRT

THE HIGH COURT

[2024] IEHC 302

[Record No. 2021/5787P]

BETWEEN

JERZY SALEK

PLAINTIFF

AND

GRASSLAND AGRO LIMITED

AND

FRESHGRASS HOLDINGS UNLIMITED COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered electronically on 16 May 2024

Introduction

1. The plaintiff claims damages for personal injuries arising out of a workplace incident on 15 April 2019. The defendants deny that the plaintiff suffered injury to his back on that day or that there was an unsafe system of work. Causation and contributory negligence are further issues requiring a determination.

The plaintiff's account.

2. The plaintiff explained that he was working on his own at a conveyor belt which was bringing 50kg bags of fertilizer along to be sealed and then onward for deposit onto a pallet. The plaintiff's task was to identify bags which had not been sealed and "to quickly remove the bag from the line and put it over the grid". The grid is an area of grating in the floor to the left of the conveyor belt which allows the contents of any bag removed to fall through to a channel. This channel then moves the fertiliser pellets back to the hopper.

3. In reply to his own counsel's question about how he removed a defective bag, the plaintiff said:-

> *"*I had to drop the upper part of the bag on the sides, turn to the right, lift it, lift it first, then to the right, and put it over the grid.*"*

4. The plaintiff used a piece of paper to show how he caught the top of the bag.

5. He explained that he had to manoeuvre the bag by lifting it and "turn[ing] to the right side, make two steps, and put the bag over the grid". His practise was to place the bags on the grid which according to the evidence of Mr. Brandon (consulting engineer) is a distance between 900 millimetres and 1,250 millimetres from the belt. The plaintiff stated that 30 bags per minute would pass on the conveyor with 450 tonnes passing through in an eight-hour shift, all going well. In this respect, nothing turns on the accuracy of the plaintiff's account or of the defendant's records for the output on the day in question or for other days.

6. Counsel for the defendant put it to the plaintiff that the standard procedure was to identify a bag which had not been sealed properly and then "to cut the bag with a 'stanley' knife and tip the bag onto the floor of the gap." The plaintiff insisted that he lifted the bags and placed them on the grid. I accept the plaintiff's logical explanation that tipping the bag off the conveyor belt would mean that the contents would fall on the floor away from the grid. He said:-

"If we did this in the manner [as suggested by the defendant] it would be impossible to move around in this area."

The position of the defendants.

7. The defendants' position is that there is a shovel and brush at the workstation which coped with the "cut and tip procedure". Mr. Curran who joined the defendants in 2016 and is now the factory manager replied to counsel for the defendants as follows:-

"So if a bag is not sealed correctly the operative has to flick it [the bag] down onto the ground and the contents spill into an open grate, which then you have to turn on to feed the material back into the receptor that started off the material over their head. So, we kind of call it flick and tip or rip and tip, but we flick the bag down onto the ground if the bag is not sealed."

8. Under cross examination, Mr. Curran accepted that the phrase "rip and tip" probably does not appear in any "risk assessment, safety statement, instructions or training". No such description appears in the documents considered by the engineers and the Court.

Credibility of the plaintiff

9. Despite the rigorous cross examination of the plaintiff which:-

(1) suggested that he had not experienced pain in his back when undertaking the relevant task on 15 April 2019 as he had not reported same and had no witness to the incident or aftermath;

(2) alleged that he was claiming for injuries in respect of which he had received compensation from the same employer (defendants) in February 2019 for a claim which had arisen on 20 August 2015;

(3) questioned the plaintiff's motive for taking a video of the operation prior to April 2019 and which was only revealed to his own lawyers recently;

(4) implied that he was returning to get unwarranted damages on top of the €120,000 paid by one or other of the defendants for a workplace incident in the same facility in respect of an injury to his neck in 2015,

(5) challenged the plaintiff's inability to seek or obtain non-manual work since April 2019 and

(6) Implied a lack of motivation to return to work as the plaintiff started on invalidity pension in April 2021 and returned to live in Poland in August 2022;

the Court is satisfied on the balance of probabilities from the consistency of the plaintiff's replies to questions before and during the trial that the plaintiff suffered a back injury when moving an unsealed bag off the conveyor belt and onto the grid which was some 1,000 millimetres from the belt.

10. Mr. Niall Curran, who is the factory manager, explained how the plaintiff was taken back to work in February 2018 after a safety review and with the approval of the defendants' occupational physician. Mr. Curran was sceptical of the plaintiff's allegation of an incident and more particularly of his back injury. Nevertheless, Mr. Curran did not allege concoction on the part of the plaintiff. At most Mr. Curran questioned whether the plaintiff was accurate in his description of the relevant facts. Having heard the evidence, posed questions and reviewed the transcripts, I remain satisfied that the plaintiff suffered pain which increased as the hours and days elapsed.

11. The plaintiff attended Dr. Maria Dziwisz, a general practitioner, on 17 April 2019 which is commented upon in her medical report dated 24 June 2019 as admitted into evidence. At that stage, Dr. Dziwisz commented under "Impression" that the plaintiff had "Minimal degenerative change without impingement".

"Tip and Rip"

12. Mr. Curran told the Court that he had shown the plaintiff how to tip and rip with his stanley knife. There is no dispute that the plaintiff was given a stanley knife. However, there is no record of the plaintiff having been specifically shown the defendants' system from the perspective of the safety and welfare of an employee. At most there was an observe and learn type attitude adopted. The absence of any risk assessment for the particular task is notable given the obligations on employers towards the manual handling of heavy materials. The evidence from both engineers assisted the Court to conclude that the risk associated with shifting or lifting the 50kg bag was not adequately planned, monitored or supervised by the defendant having regard to its statutory duties.

Breach of statutory duty

13. The defendants, contrary to regulation 69 of the Safety, Health and Welfare at Work (General Application) Regulations 2007, failed in their duty as employers "to take appropriate organisational measures, or use the appropriate means, in particular mechanical equipment, to avoid the need for the manual handling of loads by..." the plaintiff who was their employee.

Contributory negligence

14. It is common case that no one person should lift a 50kg bag. In fact a large notice appears on the front of each 50kg fertiliser bag and reads :-

"Caution two person lift required".

15. The plaintiff was an experienced operative. He was one of two permanent employees on the shift, the other being Ronan O'Keeffe who also gave evidence. Each permanent employee had a temporary or seasonal employee assigned to the same area of work.

16. It was evident that there was some tension between Mr. O'Keeffe and the plaintiff particularly after the plaintiff returned to work following his absence due to the incident in 2015. Mr. O'Keeffe made light of a workplace row with the plaintiff. He testified that he

never saw the plaintiff lift a 50kg bag and that the plaintiff did not work alone. That technically was correct. Mr. O'Keeffe said that he personally did not have trouble pushing a 50kg bag off the conveyor belt. He further explained that two men could lift the 50kg bag and referred to the availability of assistance for the plaintiff. However, Mr. O'Keeffe was not able to square the potential of two employees lifting a 50kg bag in the tight space within which the plaintiff had to manoeuvre the 50kg bag. So, although Mr. O'Keeffe's process may have been successful in tipping and ripping the bags when he was on the shift in that area, I am satisfied that the plaintiff adopted the unsafe method which was not observed, monitored or corrected.

17. The evidence of Mr. O'Keeffe merely indicated that an employee like him organised himself to avoid any lifting. He did not give evidence of having been trained to do what was put to the plaintiff as being the safe and required practice. The defendants' case at its height is that the plaintiff did not use his common sense and his honed instincts from training provided when moving an improperly sealed 50kg fertiliser bag.

18. It is established law since *Dunne v Honeywell Control Systems Ltd.* [1991] ILRM 595 (High Court Barron J.) that a defendant employer when seeking to establish contributory negligence must establish a degree of carelessness akin to gross carelessness or recklessness to justify a discount.

19. The Court is satisfied that the plaintiff was expected to get on with this task and that there was little if any invitation to him to comment on organisational matters. There was no proper risk assessment, monitoring or supervision of the task expected of the plaintiff. A safer mechanical process was available and the Court understands how the plaintiff did not draw attention to his way of handling the improperly sealed bag. The defendant has failed to establish contributory negligence on the part of the plaintiff. Yes, the bag had a sign that it ought not be lifted without the assistance of another. It did not advise how it could be

manoeuvred at the point for tipping. The circumstances were such for the plaintiff that the 50kg bags could not have been moved by two employees given the narrow gap.

Quantum

20. The following are undisputed facts which are relevant to the assessment of damages:-

(1) The plaintiff will be 63 in September 2024.

(2) After graduation in a vocational secondary school in his native Poland, the plaintiff worked as a factory operative before driving a truck in the army during his mandatory military service.

(3) The plaintiff was employed continuously as a machine or forklift operator in different factories before moving to Ireland in late 2004.

(4) Between July 2005 and August 2015, the plaintiff was employed as a forklift and warehouse operative at the defendants' premises.

(5) The plaintiff sustained a repetitive strain injury to his left arm in August 2015 causing him to cease work then.

(6) In September 2017 the plaintiff asked to return to work and by February 2018 the relevant medical personnel agreed that he could resume duties divided equally between forklift and production line work. As the plaintiff had considerable holiday leave to take, he only worked five days between August and October 2018.

(7) In 2018 the plaintiff recovered €120,000 for the injury sustained in August 2015.

(8) The relationship between Mr. Curran and the plaintiff was not good coming up to April 2019 for reasons which the Court need not comment upon other than to iterate its finding that the plaintiff suffered an insult to his back during the afternoon of 15 April 2019.

Causation

21. The medical certificate of Dr. Dziwisz handed to Mr. Curran by the plaintiff on 17 April 2019 stated that the plaintiff "was suffering from: back pain. Degenerative disc disease, t.b.c. and l-s spine." Mr. Curran testified that the letter dated 6 August 2019 from the plaintiff's solicitor was the first notice which Mr. Curran received about the plaintiff having sustained a back injury on 15 April 2019. The plaintiff testified that he told Mr. Curran on the afternoon after the incident about his back. Mr. Curran *"*presumed it was a pain in [the plaintiff's] neck". It is not necessary to impugn any witness other than to reject the suggestion that the plaintiff has concocted the pain suffered on 15 April 2019. Mr. Curran's presumption about the certificate was unfounded and may have arisen from the history of a poor relationship and the exchanges which developed in 2019 between Mr. Curran and the defendants on the one part and the plaintiff on the other.

Effect of the incident on 15 April 2019

22. The account given by the plaintiff to Dr. Aideen Henry, Consultant Orthopaedic and Sports Medicine Physician, was consistent with his account to the Court. Dr. Henry opined in her evidence to the Court that the plaintiff's lower back pain since 15 April 2019 "… is likely to be an aggravation of a preexisting degenerative lumbar spine".

23. Mr. Tansey, Consultant Trauma and Orthopaedic Surgeon was asked in direct examination by counsel for the defendants for his opinion on causation and prognosis. He examined the plaintiff on 30 January 2024. Mr. Tansey opined that the plaintiff suffered a soft tissue injury related to a strain which ought to have improved and settled down. Mr. Tansey said that "there is plenty of people with low back pain who can work in these [sedentary] occupations and who do work". Unfortunately, Mr. Tansey was not privy to the assessment for the Department of Social Protection which has awarded the plaintiff an invalidity pension which will cease on his 66th birthday.

24. Ms. Elva Breen who has expertise in vocational rehabilitation assisted the Court in relation to the rigour and conditions applied for granting an invalidity pension. She explained that an applicant must demonstrate "that for twelve months prior to [the application] you are on illness benefit usually and that you are not fit for work for those twelve months and for the further twelve months… he [the plaintiff] is now at stage B which is permanently incapable of work."

25. The Court is satisfied that the plaintiff suffers from chronic lower back pain. He may be able to lift a tray of six large 1½ litre bottles from a Supermarket and drive as shown on the video shown in the Court. However, he has such chronic pain that he is considered by the State to be unfit for work. That started with the incident on 15 April 2019.

What if?

26. The plaintiff has had a life of labouring and the effects of his preexisting degenerative changes are unsurprising. The plaintiff was questioned about his episode of back pain in October 2023 which confined him to bed. Dr. Henry who examined the plaintiff most recently on 4 December 2023, reported and opined that the plaintiff's symptoms began on 15 April 2019. However, the Court has not heard evidence to the effect that the recent severe episode of pain for which the plaintiff had an appointment with a spinal orthopaedic surgeon through the public system in Poland, is attributable to the incident in April 2019.

Conclusion

27. The plaintiff bears the burden of proving negligence, causation and loss. In other words, the Court is confined to what has been established on the balance of probabilities. Counsel made submissions at the conclusion of the trial and the Court accepts the consensus (save that the defendants do not accept that an incident occurred on 15 April 2019) that the injuries suffered by the plaintiff fall within part 7 (B) – back injuries (c) (ii) of the Personal Injuries Guidelines adopted by the Judicial Council which were given force of law by virtue

of section 30 of the Family Leave and Miscellaneous Provisions Act 2021 as declared by the Supreme Court in *Delaney v The Personal Injuries Assessment Board, the Judicial Council, Ireland the Attorney General* [2024] IESC 10 (unreported judgment of 9 April 2024). That category reads as follows:-

> **"**Injuries to the back less severe than those included in the higher bracket. These will include injuries causing disturbance of ligaments and muscles causing pain and discomfort, soft tissue injuries resulting in a prolonged acceleration and/or exacerbation of a preexisting back condition, usually by five years or more - €20,000 - €35,000."

28. Having regard to the mandatory nature of those Guidelines, the Court awards general damages for suffering in the sum of €30,000. The current pain and suffering attributable to the breach of duty which has been found, is not readily distinguishable from that which the plaintiff would have at this stage of his working life. It is indeed now over 5 years since the plaintiff suffered after manoeuvring the 50kg bag and the Court is not satisfied to exclude other factors which now cause his ongoing pain and suffering.

Loss of earnings

29. Mr. Nigel Tennant, Consultant Actuary, on the uncontested basis that the plaintiff was earning €494 net per week (gross = €575 per week) in April 2019, calculated that the plaintiff's net loss of earnings from 15 April 2019 to 15 April 2024 is €127,573 which includes the sum of €49,568.50 paid to the plaintiff by way of "recoverable benefits".

30. Mr. Tennant calculated a multiplier of €173 for future loss of earnings up to age 66 which yields a capital sum of €85,462 after applying a 1¼ % actuarial basis using the latest available Irish population cohort mortality statistics (Irish Life Table 17 with CSI improvements applied).

31. Mr O'Loinsigh, vocational rehabilitation consultant, who reported to the defendants' solicitors in April 2024, agreed that "it would be very difficult for [the plaintiff to undertake] any physical type of work". He suggested that he could be a "security operative" who would earn €22,00 per annum. However, Mr. O'Loinsigh expressed the view that the plaintiff's poor command of English and the availability of statutory entitlements have led to his decision to return to Poland with effect from August 2022. Ms. Breen opined that the plaintiff could not undertake "full time lighter work" but accepted that he could do voluntary type work with soccer or tennis teams and particularly in Poland where he could use his native language more than if he stayed in Ireland. Ms Breen highlighted how he would be at a competitive disadvantage given his constant pain and age.

32. Ultimately the Court concludes that the plaintiff on the balance of probabilities would not now be working as a warehouse operative because of some circumstance other than the incident giving rise to these proceedings given his underlying condition. The Court is left with trying to ascertain what the Plaintiff would have undertaken after his 61st birthday in 2022.

33. In relation to loss of earnings, the principles enunciated in *Reddy v Bates* [1983] IR 141 ("Reddy v Bates") as applied and reviewed by Noonan J. in *Twomey v Jeral Limited, Jeremy Buckley and Alice Buckley* (unreported judgment of 16 June 2022) [2022] IECA 177 ("Twomey") assist the Court in taking account of the exigencies of life.

34. Counsel accepted that Reddy v Bates may be applied to an award for past loss of earnings. Taking account of the exigencies of life and the circumstances which probably would have occurred as mentioned, the Court is satisfied that the plaintiff without the incident in April 2019 would have moved to more sedentary employment at some stage after his 61st birthday in 2022. Furthermore, the Court takes account of his return to Poland in August 2022. Applying a 25% reduction which reflects a shorter period up to April 2024 and

aligns with the outer range mentioned in Twomey, the claim for past loss of earnings from 15 April 2019 up to 15 April 2024 is €127,573 - € 31,893 = €95,680.

35. As for future loss of earnings until retirement age, the plaintiff has not satisfied the Court that he can attribute that part of his claim to the incident in April 2019. Apart from the inconclusive medical evidence, the plaintiff has chosen a more fulfilled and peaceful life in his home country where he could help in clubs and otherwise at this stage of his life. He is able to look after himself and is capable of undertaking light tasks as long as they are not full-time.

36. In summary the Court awards €30,000 for general damages, agreed special damages of €3,000 and €95,680 for past loss of earnings which is subject to a recoverable benefits certificate addressed to the compensator for part of that sum. Subject to hearing Counsel on 30 May 2024 at 10.30am, I will direct the defendants to pay the sum of €128.680. I will also hear counsel on 30 May 2024 in relation to any application for costs.

Solicitors for the plaintiff: Crimmins Howard.

Counsel for the plaintiff: Patrick McCartan SC, Gerald Tynan SC and Rebecca Treacy BL.

Solicitors for the defendants: Harrison O'Dowd LLP.

Counsel for the defendants: Michael F Collins SC and Sandra Barnwell BL.