

THE HIGH COURT

[RECORD NO. 2016 8807 P]

BETWEEN

PAUL LEBLIQUE

PLAINTIFF

AND

IARNROD EIREANN

DEFENDANT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 16th day of March 2018.

1. This is a judgment in respect of an application by the plaintiff as set out on the notice of motion dated the 19th December, 2017:

(1) An order pursuant to Order 44 of the Rules of the Superior Courts seeking to attach and commit;

(a) Mr David Franks, chief executive of Iarnród Éireann of Connolly Station, Dublin 1

(b) Mr Chris Rafferty, DART District Manager, Pearse St. Station, Dublin 2

for failure to comply with the order of Gilligan J. made on the 28th April, 2017.

(2) In the alternative, an order for the sequestration of the assets of the defendant pending compliance with the order of Gilligan J. made on the 28th April, 2017.

(3) Such further or other orders as this Court shall see necessary.

(4) Costs of and incidental to the within application.

2. Before setting out the history the Court notes the judgment/ order of Gilligan J. dated the 28th April, 2017. Gilligan J. heard the case and gave an *ex tempore* judgment on the 28th April, 2017, the order included *inter alia*: -

"IT IS ORDERED that there be no order on the balance of the plaintiff's claim, save a direction that the stopping short incident be dealt with under the Driver Development and Support Scheme

IT IS ORDERED that the plaintiff do recover against the defendant the costs of the action to include all reserved costs and costs of discovery if any when taxed and ascertained."

3. The Court also notes that both parties agreed that there was no mention in the hearing of the case of other stopping short incidents which form the basis of the issues before this Court. It is obvious in the view of this Court, that this is of some significance. The case was heard by this Court on the 19th January, 2018, and the Court will briefly set out the issues which it has been asked to determine.

4. It was agreed by both parties that the motion for attachment and committal ought only be issued where there is a clear breach of a court order and as a last resort, the Court will therefore only deal with the application at para. 3 of the notice of motion, and refuse the reliefs sought at paras. 1 and 2 of the notice of motion.

5. Counsel on behalf of the plaintiff, said there was inherent jurisdiction for the court that if it finds that there is contempt on the face of the order, then anything above a clearly accidental or inadvertent failure is a disobedience of the order.

6. Counsel for the plaintiff, submits that it was clearly contemplated by Gilligan J. that the plaintiff be reinstated, that he is a train driver and had he not taken the case, he would be spending the next thirty years pressing a button.

Background

7. The plaintiff was a train driver and on the 25th January, 2016, stopped his train short on a platform at Tara Street Station where the last carriage was not flush with the platform so that, if someone had stepped out they may have been injured. The plaintiff closed the door and no one got off the train. The plaintiff continued to the next station at Pearse Street and his manager, Mr. Rafferty, met with him. The plaintiff explained that he had been driving a smaller train in an earlier shift and had stopped at the platform thinking it had four carriages when he actually had eight carriages. At Bray station he went with Mr Colbert and filled out a report.

8. Mr. Colbert contacted Mr Rafferty and requested the plaintiff be tested for drugs and alcohol as per the company's testing policy. The plaintiff asked whether the testing person would be a doctor and was told it did not matter and he could find out when the person arrived. The plaintiff offered to go to a local GP or get back on the train and back to the company medical officer but his manager told him to stay and wait. Two hours later the testing person arrived from Randox. The plaintiff was breathalysed and was then asked for a urine sample. The plaintiff asked if he was a doctor and when he was told no, the plaintiff refused to give a sample of urine.

9. The plaintiff was then suspended by Mr. Rafferty and disciplined by way of a hearing on two charges; one for failing to give a sample and the stopping short incident. Mr Lebligue had a number of stopping short incidents in the previous two to three years. Mr. Rafferty heard the case and decided he was guilty of both charges and he was dismissed from the company. The plaintiff appealed to the Disciplinary Appeals Tribunal, a three person body and they decided he was guilty of both offences. The stopping short incident however, was dealt with by the Driver Development Training Programme; the sanction decided on in relation to the failing to give a sample was demotion. The plaintiff has thirty years to run on his contract, he is in his middle thirties and it was decided to put him in a non-safety critical role. His position was to sit at the top of Pearse Street Station, pressing the button if a ticket gets stuck.

10. He litigated to remedy the situation, seeking declarations regarding the Railway Safety Act, and the reinstatement of his position.

The matter was heard before Gilligan J. in March and April of 2017, during the hearing it transpired that the Railway Safety Act 2000 (as amended) was not complied with, in that it specified that the only person authorised to take a urine sample was a doctor. Also, the person who requires a member of staff to take a test must be appointed under a particular section of the Act, but no-one had that power, the section had never been invoked and as a consequence, that portion of the case was conceded by the defence.

11. The defendant accepted that he had to be reinstated as averred in their affidavits, he was reinstated within a couple of months and his salary reinstated. During the course of the hearing it was submitted that, if the stopping short incident was the only incident before them, no demotion or dismissal would have occurred.

12. The plaintiff returned to the company in late April, 2017. The plaintiff has not driven a train since the order was made some eight or nine months ago, in that he arrives in to Fairview Station to sign in and is told there is no work for him. The plaintiff has passed all medical examinations since he returned to work and was certified fit to drive. It is submitted by Counsel for the plaintiff, that the defendant was unhappy with that, in that if there was no medical reason that the plaintiff cannot drive, there must be some psychological issue and on 23rd August, 2017, a psychological assessment was carried out by Dr. Fletcher, who examined the plaintiff over the course of a day. The plaintiff attended with Dr. Fletcher and after waiting half an hour to one hour, Mr. Ayres (the district inspector) and Mr. Rafferty, line manager, came out of the consulting room. The plaintiff was concerned with this.

13. In early September, the plaintiff contacted Dr. Fletcher in relation to the report who said that he had done a preliminary report and sent it to Irish Rail. Dr. Fletcher then sent two more reports to the plaintiff at that time, one was dated 25th August, 2017, and the second report dated 18th September, 2017 and he suggests that there is a marked difference in the second report in that it puts forward the defendant's point of view.

14. On the 15th December, 2017, the plaintiff on foot of a concern that he had been shut out and would never return to driving duties, obtained short service and brought this motion seeking to attach and commit Mr. Franks and Mr. Rafferty or to sequester the assets of the defendant.

15. Counsel on behalf of the defendant, noted that the motion for attachment, committal and sequestration of assets was fundamentally flawed.

16. Counsel then referred to the replying affidavit of Mr Tom Ayres, noting the plaintiff was driving the 8:25hrs train from Howth to Bray on the 25th January, 2016 and stopped the train short in Tara Street which exposed the passengers in the rearmost carriage to danger. At that time the plaintiff was on Category B development plan due to the fact that he had previously driven trains which had involved four separate safety critical incidents (this Court's emphasis). Mr. Ayres set out the various steps which have already been outlined by this Court.

17. Counsel said that the defendant had complied with the court order in that the plaintiff had been reinstated to the grade of train driver without any financial loss in earnings incurred.

18. He submitted that from the 28th April, 2017, to in or around the beginning of December, 2017, the defendant with the plaintiff's participation, addressed the stopping short incident at Tara Street under the Driver Development and Support System and Scheme as per the order of the court and he said the process was close to being concluded when the plaintiff initiated the current application.

19. He said that the plaintiff is currently not carrying out train driving duties as he is being processed under Ops SMS 3.2 Driver Development and Support System, part of which includes an assessment for suitability for train driving with an occupational psychologist. While he is not actively driving, it is not unusual for safety critical workers to be stood down from carrying out safety critical duties during the course of participating in such a process.

20. At the time of the incident on the 25th January, 2016, the plaintiff was already on Category B Driver Development and Support Plan, due to four previous incidents. The purpose of the plan included: - "To provide an opportunity for Driver Lebligue to regain confidence and competence to perform his duties consistently to the required standard" and also "to focus on addressing any underlying behavioural issues which may lead to repeat violations or errors". Counsel for the defendant submitted that in considering the stopping short incident of the 25th January, 2016, under the scheme, the defendant correctly took into account previous incidents in accordance with the terms of the scheme and it is clearly envisaged in the System including under para. 8.3 and Appendix A of Opm SMS. 3.2. He noted that the steps taken under the Driver Development and Support Scheme meant the plaintiff was referred to the safety performance review panel. The safety review panel is required to conduct a systematic review which includes reviewing supporting competence records and evidence of a drivers' safety performance which can determine whether a train driver can return to driving duties with a revised development and support plan or alternatively to be either temporarily or permanently removed from train driving duties. The review plan was required to examine the train driver file during the entire safety history over the course of a train drivers' career. During the review the safety panel enquired of the plaintiff were there any lifestyle or personal issues which may have been contributive to Mr. Lebligue's poor driving performance to train handling which resulted in a pattern of safety critical incidents including the stop short incident at Tara Street station.

21. The safety review panel, counsel submitted, recommended that the plaintiff undergo medical assessment to establish if there was any underlying issues contributing to his behaviour and the number of incidents he had. The plaintiff attended the chief medical officer (CMO) on the 30th June, 2017, the medical assessment concluded that there were no medical factors to be taken into account in dealing with the activities, the CMO however went on to recommend that the company engage the services of an Occupational Psychologist to assess the plaintiff.

22. Counsel submitted that the plaintiff sat the required assessments, conducted by the external consultant, Dr. Fletcher, on the 23rd August, 2017. The plaintiff, in his affidavit, proceeds to criticise the fact that a draft report of Dr. Fletcher was furnished to the defendant for comment. He said however, that it was normal practice for draft reports of an Occupational Psychologist to be furnished to the defendant for such comment. The draft OPC report of the 25th August, 2017, was also forwarded to the plaintiff. It was open to the plaintiff to make comments on the draft report but he chose not to do so. A second draft report recommended (although this was not binding on the defendant) that the plaintiff could return to driving duties following extensive retraining. The concerns of Iamróid Éireann were further taken on board by Dr. Fletcher in his Supplementary Report which recommended that Mr. Lebligue should carry out a different role for a short period of six to nine months to give him an opportunity to build up trust with the company before returning to driver duties. The Occupational Psychologist's report also recommended the plaintiff would require extensive retraining before returning to driving duties but recognised that this retraining could commence while carrying out a role other than DART driving.

23. The Occupational Psychologist's report and the supplementary report were provided to the plaintiff on Thursday the 14th

December, 2017, and the plaintiff was invited to meet with Tom Ayres and Dr. Fletcher to discuss the reports on Friday 15th December, 2017 if he wished to do so. The plaintiff did not attend the meeting and instead an application was made on behalf of the plaintiff on the 15th December, 2017 for an attachment and committal motion to be made returnable to Tuesday 19th December, 2017. The only issue which this Court has to deal with is whether or not the procedures which Iarnród Éireann instigated were in compliance with the order of Gilligan J. in circumstances where Gilligan J. had been unaware of the previous stopping short incidents.

24. Gilligan J. in his judgment of the 28th April, 2017, directed that the stopping short incident be dealt with under the Driver Development and Support Scheme and at Ops SMS 32 Driver Development and Support System sets out Iarnród Éireann's railway undertaking requirements for the application of driver's development and support.

25. At Ops SMS 3.2 Driver Development and Support System: -

"The purpose of this standard is to manage the risks arising from sub-standard performance by providing a system that presents drivers with advice, support and development to improve and develop their competence and fitness. If the competence of a driver working for Iarnród Éireann's Railway Undertaking is below the required standard, systems must be put in place to develop and restore competence. This process may involve the temporary, or in cases where the person is no longer suitable for carrying out the activity, permanent removal from driving duties and the withdrawal of the individuals complementary certificate where issued."

26. Following the safety performance review panel meeting of the 26th May, 2017, concerning the review of Paul Leblaque as directed as per s. 10 of Ops SMS 3.2, the summary of the meeting sets out the following incidents :

(1) On the 20th November, 2013, there was a platform overrun at Shankill and the panel were satisfied that the root cause of this safety critical incident can be attributable to low rail adhesion.

(2) On the 26th August, 2014, there was a second platform overrun at Raheny, the time of the incident was 11.00hrs and it was cited that low rail adhesion was the root cause. Taking into consideration that there was a light shower of rain prior to the incident, it was not possible to complete the analysis as there was no Teloc download available.

(3) On the 18th October, 2014, there was a third platform overrun at Raheny. The time of the incident was 00:08 hrs where weather conditions were dry and there were two carriages off the platform. It is noteworthy that earlier that day there had been two earlier platform overruns with this traction unit (8308) and nine platform overruns in total on that day. The particular platform overrun was attributed to driver Leblaque as he had not demonstrated any defence driving techniques prior to this during the course of his driving duties on the day in question.

(4) On the 25th October, 2014, there was a fourth platform overrun at Portmarnock, the time of the incident was 12:20 hrs. The train overran the platform by 4 carriage lengths and the weather conditions were dry and sunny. The incident was attributable to the driver and he was temporarily stood down from driving duties by his traction executive. He was told by the traction executive that his interview with the traction executive would serve as a written warning regarding his future driving conduct.

(5) On the 15th August, 2015, there was a fifth platform overrun at Clongriffin. The train concerned was the 17:00hrs Greystones/ Malahide service. The door next to the driver's cab was adjacent to the ramp at the end of the platform. The train was a four carriage set and the stopping point would normally be at the middle of the platform. The plaintiff failed to report this incident at the time and when he booked off for duty he did not report it either or complete an abnormal occurrence form. Irish Rail management became aware of this incident via Twitter, as it was highlighted by a passenger. When questioned by DTE, the plaintiff claimed there was no incident at Clongriffin. It took four days to gather evidence to prove that the incident did take place on the train and that the plaintiff was in charge.

27. These incidents were in addition to the incident on the 25th January, 2016 and the Court notes that none of these issues appeared to have been within the knowledge of Gilligan J.

The psychological report

28. Criticism was made of the way that the psychological report was finally prepared. It appears to this Court that it was appropriate to send the draft reports to the various parties for them to give their comments and this Court is of the view that that is the appropriate manner for such a report to be prepared. The final summary psychological assessment report was dated the 11th December, 2017, the Court notes the following: -

(1) Driving on autopilot

Dr. Fletcher states that the plaintiff's most recent incident (Tara Street) could be partially explained by driving in autopilot with the plaintiff's platform overrun at Clongriffin in August 2015, when the plaintiff stated that as he approached the station he was distracted by a trampoline on the fourth floor balcony of an apartment. He said that this was a distraction to him. He thought it was hilarious. He then came into the station too fast and as a result he overran the station. Dr. Fletcher stated that if the plaintiff returns to driving he will need to avoid driving in autopilot and drive more in conscious control.

(2) Anticipation of risk and acting accordingly.

Dr. Fletcher says a key issue for any train driver is the ability to anticipate future risks. He noted that a stronger anticipation of risk and then acting on the risk might have avoided the incident occurring in Tara Street, if he had recognised in advance the risk of making a mistake because he was on an eight car train compared to the previous four car train, and he might have been able to avoid the incident. With the incident at Clongriffin, if as the plaintiff was coming into the station he realised he was at risk as he was to undertake a station stop then he might have avoided himself being distracted by the trampoline and so avoid the overrun.

(3) Learning from past incidents.

Dr. Fletcher said the number of similar incidents over three years suggests that the plaintiff may have found it difficult to learn from each event and Dr. Fletcher noted that the plaintiff had looked at each incident in isolation rather than looking at them collectively.

(4) Making safe and effective decisions

Dr. Fletcher noted that one of the assessment tools that the plaintiff completed involving him reading fictitious rail scenarios and then having to decide how best to manage each situation safely. On this particular exercise the plaintiff scored well above average, however, Dr. Fletcher notes that a review of the plaintiff's incidents suggest that when he is faced with a safety situation himself then he may not always make the right safe decision and he also noted that it is his opinion that the decision not to report the incident was erroneous.

(5) Recommendation of the psychologist

Dr. Fletcher noted a number of key defences to the plaintiff as a DART driver with Irish Rail; these defences have probably helped keep the plaintiff safe in the past and could continue to keep him safe in the future if he returned to driving. However, he noted there were a number of key risks that had been highlighted for the plaintiff around his safety incidents. His conclusion was based on all of the evidence that has been presented as part of the report including the assessment tools, the interview and feedback from the plaintiff and it is recommended that the plaintiff be given the opportunity to return as a train driver. Dr. Fletcher states that if the plaintiff did return to driving then he would need to undergo some extensive retraining given how long he has been away from the job. This retraining may be an ideal opportunity for the plaintiff to park and leave behind his old ways of driving and learn and develop a different and improved approach to driving the DART trains. He stated that there were enduring concerns in Irish Rail about the plaintiff's suitability to return to driving given his history with Irish Rail. There were also concerns as to whether or not he is committed to change.

29. Dr Fletcher stated that the plaintiff needs to demonstrate to Irish Rail his commitment through a consistent and enduring change in his behaviour. In addition, Irish Rail should develop a bespoke performance appraisal that the plaintiff can be assessed against to demonstrate his change in behaviour during retraining. The results from the performance appraisal can then be used to help determine if Mr Lebligue does return to driving.

30. Dr. Fletcher notes that the recommendations are purely advisory and that it is Irish Rail that will make the final decision regarding whether or not the plaintiff does return to driving based on all of the evidence that is available. If the decision is made that the plaintiff does return to driving then the OPC will support the plaintiff by preparing an NTS Development Plan that is designed bespoke for him.

31. The order of Gilligan J. did not expressly state that he would be reinstated as a train driver and it was not envisaged by in his court order that the plaintiff would be immediately driving trains. Gilligan J. expressly stated that the stopping short incident (which occurred on the 25th January, 2016) would be dealt with under the Driver Development and Support System.

32. The Court noted that the plaintiff is currently not carrying out train driving duties as he has being processed under Ops SMS 3.2, part of which included the assessment for suitability for train driving with the occupational psychologist.

33. The Court also notes that in the plaintiff's case the Driver Development and Support System was close to being concluded when, the plaintiff instituted the application.

34. The Court accepts: -

- (1) That the process under the Driver Development and Support System and Scheme was close to being concluded
- (2) That the occupational psychologist was not recommending that the plaintiff should immediately resume driving trains or that it would be appropriate to do so.
- (3) That Dr. Fletcher, in a supplementary report, recommended that the plaintiff should carry out a different role for a short period of six to nine months to give him an opportunity to build up trust with the company before returning to driving duties.
- (4) That the psychologist also recommended that the plaintiff would require extensive retraining before returning to driving duties, and recognised that his retraining could commence while carrying out another role other than DART driving.

35. This Court is conscious of the absolute requirement for Iarnród Éireann to take the appropriate steps to ensure the safety of passengers. In all the circumstances, the Court is satisfied that the order of Gilligan J. has been followed by Iarnród Éireann. The Court dismisses the plaintiff's application.