

THE HIGH COURT

[2002 No. 13328 P]

BETWEEN

JOHN O'CONNELL

PLAINTIFF

AND

BUILDING & ALLIED TRADES UNION, EDWARD MORRIS, PATRICK O'SHAUGHNESSY AND MICHAEL MCNAMARA

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 12th day of April, 2018

1. The Court notes that Mr. O'Connell is not in court and an effort was made to contact Mr. O'Connell to remind him about the delivery of the judgment as stated earlier this afternoon following the conclusion of the hearing. In any event, the digital audio recording will be available of this judgment and there is a stenographer here as well.

Introduction

2. The Court of Appeal, by Order made on the 2nd of December, 2016, found that the first named defendant called BATU had breached the plaintiff's constitutional right to earn his livelihood from the 1st January, 2000, and ordered that the plaintiff's claim be remitted to the High Court for the assessment of the quantum of damages to which the plaintiff is entitled by reason only, and I stress the word only, of the said breach by BATU. The plaintiff was also ordered to give, by the 27th January, 2017, particulars of the loss and damage which he claims to have arisen after the 1st January, 2000, and to have been caused by the said breach, together with the facts relied upon in support of his alleged loss and damage.

3. The plaintiff's claims founded on the tort of intimidation and conspiracy were dismissed by the Court of Appeal. The 62 page judgment of the Court of Appeal, having neutral citation [2016] IECA 338, led to five specific conclusions. The findings of Ryan J. in his judgment, having neutral citation [2014] IEHC 360, in favour of the plaintiff on three issues could not be sustained on the evidence, according to the Court of Appeal, and thereby, the claims founded on the specific tort of intimidation and conspiracy were dismissed.

4. The Court of Appeal upheld a finding of Ryan J. that the claim against the sixth named defendant, CIF, that is the Construction Industry Federation, was statute barred while it concluded in favour of the plaintiff's appeal as follows, and I quote:-

"Third, the plaintiff never received a union card after the probationary period. The trial judge was entitled to conclude on the available evidence that no valid justification for the failure to admit an otherwise prima facie qualified person from membership had been advanced by the Union", that is, BATU.

"Fifth, the trial judge was entitled to find that the Union (but not its individual officials) had infringed the plaintiff's right to earn a livelihood by excluding him from membership in circumstances where it enjoyed an effective monopoly control of access to the relevant market and by then informing employers that he was not a member, leading them to dismiss him or not to employ him further because he was not a member of BATU. The assessment of damages in respect of this breach of constitutional rights will have to be remitted to the High Court for determination".

Background

5. Ryan J., at paragraphs 1 to 9 of his judgment, described the scenario leading to the issue of the plenary summons hearing on the 16th October, 2002. Paragraphs 10 to 21 summarise the plaintiff's claim, according to the pleadings. The detailed judgment of Peart J. for the Court of Appeal which thoroughly reviewed the evidence in the High Court binds and guides this Court in its findings and orders.

Particulars of loss

6. Despite the specific terms of the order about furnishing particulars of loss and the facts in support, the plaintiff, who is by now well versed in procedures of the Superior Courts, as shown by the citations quoted earlier in this judgment, in addition to the judgment reported at [2012] 2 I.R. 371, and the Supreme Court determinations, having references [2017] IESC DET 22 and 34, did not furnish particulars until after further directions by Costello J. in January, 2018. Then, those were further refined or corrected after lunch yesterday, the 11th April, 2018, at this Court's request, because of the rather unfocused approach taken by the plaintiff in categorising the headings for damages to be addressed by this Court in his opening.

Loss of earnings

7. It transpires from the sworn evidence of the plaintiff on the 11th April, 2018, that he got advice from a person in the Citizens Advice Bureau about formulating his claim for loss of earnings and he then, rather summarily, read out yesterday the specific claims for loss of earnings for the period from January 2000 to December 2008, which he compiled. In short, the total loss of gross, and I emphasise the word gross, earnings were stated to be €368,689.72 for those years with some unspecified claim for pension loss.

8. The plaintiff took the approach that he would have been a full time employee of Davin Builders, Frank McGrath or another builder, based on wages identified in P45s, were it not for the breach of his constitutional right to earn his livelihood. The only allowances identified to reduce the gross figures for those years were the income in the Notices of Assessment for those years which ranged, according to the plaintiff, from €3,491.78 in 2001, €15,184 in 2002, €16,500 in 2003, and €20,085 in 2004, and lower sums for other years.

Other categories of damages*(i) Loss of opportunities*

9. The plaintiff testified that he lost out on job opportunities, also without giving any particulars in advance or without specifics, in evidence yesterday.

(ii) Future loss

10. While the plaintiff accepted that from 2008 onwards was a bleak period for builders and that he could not attribute loss of earnings when there was no work available due to the collapse in the building industry, he still asserted a claim. In the end, the plaintiff admitted that he was not in a position to quantify or give evidence about a loss for that bleak period or for future losses.

(iii) Exemplary Damages

11. The plaintiff testified that he did not know that he was going to win in his claim and that he believed the defendant union, BATU, should be shown up by an award of exemplary damages for bringing the trade union movement into disrepute. He said BATU have the privilege of a monopoly, which it abused, causing him career and pension entitlement damage.

(iv) Aggravated Damages

12. The plaintiff also maintained that he was now seeking aggravated damages due to the conduct of the defendant, and particularly, the continued lack of an apology.

13. On cross examination by Mr. Sweeney, counsel for BATU, the plaintiff was unable to explain the unemployment assistance of €14,831.70 for the period January 2001 to January 2002, which Ms. Ruth Nugent, Officer with the Department of Social Protection, verified. In other words, the plaintiff's claim for 2001 omitted to include this sum to show mitigation of the loss which he advanced.

14. The plaintiff appeared cooperative, polite and understanding, but the Court detected some coyness on his part when asked about holding a revenue Independent Contracting Certificate for periods. He conveniently said that he could not remember. He also answered the question about seeking work outside Limerick by reference to his commitment to a young daughter and that he later got work up country. In fairness, the plaintiff accepted that he was never entitled to a long period of employment like that offered or which could be offered by such firms as SISK or Hegarty. He was, and is, very dependent on the property market for work opportunities.

Conclusion

15. It is unfortunate that the plaintiff is a lay litigant because it contributed to his apparent inability to present what is needed for this Court to quantify the specific net loss which he's obliged to prove on the balance of probabilities. This Court is not a court of inquisition, but administers justice within an adversarial process. The Court cannot take a guess or go off to do its own calculations. To this end, the plaintiff has failed to satisfy this Court as to his specific net loss and the Court remains curious, if not sceptical, about the claim for 2001 in particular, given the unemployment assistance of nearly €15,000 with some €24,000 in earnings from PAYE and self employment block laying services identified in the Notice of Assessment for the year ending the 5th April, 2001.

16. Finality must be brought, and there is no obligation on BATU to assist the plaintiff in formulating his claim. In the circumstances, this Court cannot make any assessment of the net loss of earnings of the plaintiff based on the evidence adduced. I accept Mr. Sweeney's submission that the claim for loss of earnings is speculative.

17. Furthermore, Mr. Ger Kennedy, an official from SIPTU with direct experience of the construction industry in Limerick and nearby counties concisely explained the label of "journeyman" for block layers such as the plaintiff – they move as the opportunities present themselves, and rates for subsistence or travel can often be offered or agreed. Mr. Kennedy was not challenged to any real extent by Mr. O'Connell in relation to his evidence about the following:

- (i) the limited lifespan of work for block layers in any particular project;
- (ii) the increasing introduction of work opportunities through agencies as opposed to the plaintiff's previous employers, and the use of the Independent Certificates from 2002;
- (iii) the effective lockout by the CIF in 2003 in Limerick;
- (iv) the limited influence of BATU outside the city limits of Limerick;
- (v) the change to different building techniques which has reduced the demand for bricklayers since the early part of the first decade of this millennium;
- (vi) the absence of new residential developments since the crash in 2008, and moreover, the slowdown in Limerick which started from in or around 2003.

18. Taking all of the evidence into account and bearing in mind the burden of proof which rests with the plaintiff, I find that the impact of BATU's breach for the plaintiff's right to earn a living was confined to Limerick and ran from 2000 to 2003. In this respect, I am tracking the wording of Ryan J. at paragraph 139 of his judgment, which is at page 45.

19. In conclusion, the plaintiff has failed to satisfy the Court as to any specific net loss or that he took action to offset his perceived loss by seeking work outside Limerick even allowing for the ill described wish or need to contribute to the care of his young daughter.

20. Moreover, the plaintiff's reply in cross examination that he was originally not interested in damages and was more focused in getting his job back apparently fed into his lack of adherence to the directions of Ryan J. at paragraph 139 of his judgment, the Court of Appeal Order, as cited earlier, and the thrust of what was intended by Costello J. in January 2018.

Damages

21. I will deal with general damages later, which is the only form of damages which appears to be available for the Court to consider in regard to the plaintiff's claim.

22. Having set out earlier in this judgment the plaintiff's "Other" categories, I will now explain why each of them cannot be considered for the awarding of damages by this Court:-

(i) Loss of opportunities

23. The plaintiff did not advance evidence to satisfy the Court that he lost out on any particular opportunity.

(ii) *Future loss*

24. This was effectively abandoned due to the plaintiff's admission that he could not formulate same.

(iii) *Exemplary damages*

25. I am not in a position to adjudicate on the degree of oppression or arbitrariness of the breach, which are two elements to be considered when considering exemplary damages, and the onus rests on the plaintiff to satisfy the Court in that regard. Notwithstanding, Mr. Sweeney, counsel for BATU, rightly emphasised that the claim for exemplary damages was never pleaded or particularised before this assessment hearing.

(iv) *Aggravated damages*

26. Apart from repeating the emphasis of Mr. Sweeney about the absence of pleading or particulars in this regard, the absence of any apology for the breach, which occurred some 18 to 15 years ago in a confined market, hardly merits any noting despite the plaintiff's understandable distress about certain events that long ago. Although easy for others, including myself, to encourage the plaintiff to move on, there comes a time for any aggrieved person to lose out on the expectation for an apology in respect of the subject events so many years ago.

Distress

27. The plaintiff was given leave by this Court to call Professor O'Moore in the interests of bringing closure, but not disregarding the rights of a party, the defendant here, to be prepared to test and interrogate and challenge the evidence, and particularly in view of the directions given by the Court and the Court of Appeal. In effect, I said that Professor O'Moore could be called, but that I would disregard her evidence, which I do. Therefore, the plaintiff, by his own decision not to furnish particulars or give evidence about the mental distress for which he now seeks damages, is the author of his own downfall in this regard. The plaintiff's position as a lay litigant cannot put himself into a better position than if he was represented by qualified lawyers.

General damages

28. I have identified the following judgments as a possible assistance to me in assessing general damages for the breach of the plaintiff's constitutional rights in excluding the plaintiff from access to the relevant market, i.e. block laying in Limerick, from 2000 to 2003:-

(i) *Kearney v. Minister for Justice*, [1986] IR 116, where IR£25 was awarded by Costello J. for infringing the right to communicate arising from a prison's failure to deliver letters to a prisoner promptly.

(ii) *Kennedy v. Ireland*, [1987] IR 587, where IR£20,000 was awarded each to two journalists from the unauthorized tapping of their phones and IR£10,000 to a non journalist.

(iii) *Sullivan v. Boylan Contractors (No.2)*, [2013] 1 IR 510; [2013] IEHC 104, where Hogan J. awarded €22,500 for breach of the constitutional right to the inviolability of the dwelling of the plaintiff in that case.

29. On the scale, the breach in this case is far less severe than the breaches in the last two mentioned cases, and significantly more than that of number one. Considering all of the matters which have been put before the Court and having read the judgments, I award the plaintiff €15,000 in respect of general damages for the breach of constitutional rights.