THE COURT OF APPEAL

Record No. 2014 1282

[Article 64 Transfer]

Ryan P.
Irvine J.
Hogan J.

Between

GERALDINE MARTIN

PLAINTIFF/RESPONDENT

AND

DUNNES STORES (DUNDALK)

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Irvine on the 14th day of March 2016

1. This is the defendant's appeal against an award of damages in the sum of €67,450 made in favour of the plaintiff by O'Neill J. in the High Court in Dundalk on the 21st May, 2014.

2. On this appeal the defendant not only contests the quantum of the aforementioned award, but it also contends that the liability finding on the part of the High Court judge was misplaced having regard to the facts as found and the relevant legal principles.

Background

3. The plaintiff was born on the 16th October, 1951 and at the time of the events, the subject matter of her claim, she had been working for Dunnes Stores for a period of approximately 26 years. It is accepted that on the 10th August, 2011, while working as a checkout operator, she left her till to replace a 10kg pack of potatoes for a customer who had arrived there with a bag which was torn. In the course of procuring one such bag from a pallet in the fruit and vegetable department, the plaintiff sustained a partial tear to the biceps muscle of her right arm. There is no dispute that the bag in question was wedged between two adjacent bags of potatoes such that it could not freely be moved at the time the plaintiff tried to extricate it for the benefit of the customer.

4. The claim made on the plaintiff's behalf in the High Court was first, that she had not been provided with a safe system of work on the day in question in that, in practical terms, there was nobody at the checkout that she could call upon to carry out the customer's request. She had been indirectly pressurised into carrying out the errand for the customer and the defendant had thus been negligent in failing to provide her with proper assistance and a safe system of work. Second, the plaintiff maintained that she had not received adequate training to allow her safely carry out the operation in question, namely, the lifting of a 10kg bag of potatoes from a pallet not much above floor level and where the bag concerned was wedged between other bags of potatoes.

Judgment of O'Neill J.

5. The trial judge accepted the plaintiff's evidence as to the manner in which the injury had been sustained. Namely, that she was "yanking it [the bag] out" from between the other bags of potatoes when she suffered the injury to her arm.

6. As to the liability issue, the trial judge was satisfied that insofar as checkout operators might have to respond to customers requests, the defendant had in place a system whereby employees would first seek assistance from staff at or near the checkout and, in default of finding a member so available, would seek backup assistance by deploying the tannoy located in the checkout area. This system was reasonably assiduously followed by the defendant. O'Neill J. concluded, however, that on the day in question the store was short staffed and the plaintiff could see no one available to assist her. He found that in such circumstances the plaintiff had no alternative but to leave the checkout and go and get the customer's bag of potatoes herself. He thus found that the plaintiff had not been provided with adequate assistance or a safe system of work.

7. The trial judge also concluded that, having regard to the circumstances in which she had been required to lift the bag off the pallet, namely from almost ground level and out from her body, that the weight of the bag was excessive. He further found that the additional force required to extricate the bag from the adjacent packages presented a very significant risk of injury to any employee and that the lift which the plaintiff had been required to carry out was excessive, inappropriate and potentially dangerous.

8. While the trial judge found that the plaintiff had been well trained in the theory of manual handling and lifting and that the courses provided for her by the defendant were "adequate", he nonetheless went on to conclude that they were "very inadequate" in that they did had not address the practicalities of what employees might be expected to lift. He instanced a number of products such as bags of dog food, compost and potatoes and found the defendant negligent in its failure to incorporate within its training programme the practicalities of lifting such products.

9. In such circumstances the trial judge concluded that the defendant was negligent in requiring the plaintiff to carry out a lift that was excessive, inappropriate and potentially dangerous and was one for which the plaintiff had not been adequately trained.

10. This is how the trial judge voiced his conclusions:-

> "So I am satisfied that the accident which happened to the plaintiff was caused by a dangerous lift and an absence of adequate training in the proper lifting of objects such as this and then the failure of the defendant's system for providing assistance on the day in question. The plaintiff did her best on the day and I see no evidence of any contributory negligence on her part and it seems to me that the defendants are entirely liable for and responsible for this accident because of their failure in their duty to the plaintiff to provide her with a safe system of work on the day and they are, therefore, obliged to compensate for the full amount for damage."

Appellant's submissions

11. Mr. Mohan S.C. on behalf of the defendant maintains that the trial judge's finding that the plaintiff was not provided with adequate assistance while working at the checkout and that she had no option but to carry out the task of fetching the bag of potatoes herself was not supported by the evidence. The defendant's system required checkout staff, if they needed help, to call for help, if necessary by using the tannoy system. It was at the end of the check-out aisle and the plaintiff chose not to use it. The uncontroverted evidence was that there were five people who might have assisted her had she done so. However, she decided to depart from the system which the judge had found was reasonably assiduously applied and in such circumstances the defendant could not held in breach of any duty of care to the plaintiff nor liable for what later occurred.

12. Mr. Mohan reminded the Court that an employer is not the insurer of the welfare of their staff members. The defendant's obligation is to take such measures as are reasonable and practicable to protect the employee from injury having regard to the circumstances of the work being performed at any given time. He maintained that the measures deployed by the defendant and which were detailed in the course of the evidence were reasonable in all the circumstances. It was neither reasonable nor practicable to require additional staff to be available at the checkout to immediately deal with a request from a checkout operator for assistance. Even if there was a member of staff deployed full time for this purpose at times they would be off dealing with one problem when another might arise in which case it was reasonable that additional assistance might be provided by the checkout operator seeking assistance of another staff member using the tannoy.

13. As to the trial judge's findings that the plaintiff had been asked to carry out a lift which was excessive, inappropriate and dangerous and one for which she had not been trained, on the facts of the case this was not so. The plaintiff was not lifting a bag of potatoes from the floor at a distance from her body at the time she sustained her injury. A 10kg lift, on the evidence, was only excessive if such a weight were being lifted in that manner and this was not how the injury had been sustained.

14. As to the trial judge's finding that the plaintiff's training had been inadequate, Mr. Mohan submits that it is wholly unreasonable to expect an employer to train an employee as to how they might go about lifting every potential type of product or object they might have to handle in the course of their employment. This would be unreasonable, impracticable and would impose an unfair burden on an employer. It would involve the employer in trying to identify every potentially difficult product that an employee might potentially have to handle in the course of their duties after which there would have to be given practical training as to how they might carry out any manoeuvre or lifting action. He submitted that the training provided to the plaintiff was sufficient to protect from the risks and hazards she was likely to encounter as a result of the manual handling or lifting of any of the defendant's products. Further, even if the plaintiff had been trained in the manner proposed by the trial judge as required to meet the defendant's obligations, the high likelihood was that she would not have been trained to lift potatoes in the imponderable circumstances that had occurred in this particular case and thus training would not have avoided what had occurred. He relied upon the fact that the plaintiff had expressed herself comfortable about how to lift a 10 kg bag of potatoes.

15. Mr Mohan submits that the trial judge ought to have concluded that there was no negligence on the part of the defendant in so far as its training of the plaintiff was concerned. The evidence established that the plaintiff had been trained to identify a dangerous load. The documentation completed by her following her manual handling training evidenced the fact that she should have comprehended the danger of seeking to extricate the bag of potatoes and she should not have attempted it. Further, insofar as she was injured carrying out this type of manoeuvre no evidence was led to the effect that she ought to have been trained to deal with what she should have done when faced with a bag of potatoes which was clearly wedged in place. Mr Osborne, the plaintiff's consulting engineer, never mentioned the defendant's obligations in such circumstances.

The plaintiff's submissions

16. Mr. Kilfeather S.C. submits that the trial judge was quite correct in finding the defendant negligent in its failure to provide adequate assistance to the plaintiff when she was at the till. He submits that but for that negligence she would not have been faced with the lift which caused her injury. She had no practical assistance on the day in question having regard to the shortage of staff and this created a foreseeable risk of injury, particularly in circumstances where staff on the tills were under pressure and the company policy was to ensure that the customer was served with all due expedition.

17. Mr. Kilfeather further submits that the trial judge was correct in concluding that the lift that the plaintiff was undertaking at the time she sustained her injury was excessive and unsafe having regard to its weight, its position at almost floor level and the distance between the bag of potatoes and the plaintiff. He maintains that the finding of the trial judge to the effect that the defendant was negligent in failing to adequately train the plaintiff, in practical terms, how to lift a load such as a bag of potatoes or other like heavy product was to fall short of their obligations as the plaintiff's employer.

Legal principles

18. Time and time again the courts, in personal injuries litigation, have stressed that the duty of the employer to their employee is not an unlimited one. The employer is not to be taken as an insurer of the welfare of their employees. *In Bradley v. C.I.E.* [1976] I.R. 217 at 223, Henchy J. stated as follows:-

> "The law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances."

19. The duty owed by an employer of course varies depending upon the knowledge and experience of the employee. Further, the more hazardous the work in which the employee is involved the more stringent the duty of the employer to protect the worker. However, their duty is met once they take reasonable and practicable steps to avoid accidental injury. As has often been stated, it is not possible to eradicate all risks and accidents.

20. The Safety, Health and Welfare at Work Act 2005, provides at s. 8(1) thereof that:

> "Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."

21. What the words "reasonably practicable" mean are defined in s. 2(6) of the 2005 Act, namely:-

> "For the purposes of the relevant statutory provisions, 'reasonably practicable', in relation to the duties of an employer, means that an employer has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work."

Decision

22. It is not in contest that this court is bound by the decision of McCarthy J in *Hay v. O'Grady* [1992] I.R. 498. Thus, findings of fact made by the trial judge which are supported by credible evidence cannot be displaced by the appellate court. This is because the appellate court, unlike the trial judge, does not enjoy the opportunity of seeing and hearing the witnesses. Likewise, were inferences are drawn based upon oral evidence heard by the trial judge, an appellate court ought to be slow to interfere with or draw different inferences than those drawn by the High Court judge. However, insofar as inferences are drawn from circumstantial evidence, an appellate tribunal is in just as good a position as the trial judge to reach its own conclusions.

23. There are a number of matters which are not in dispute between the parties. Firstly, the plaintiff was a hard-working and loyal employee of the defendant and the judge found her to be a credible and honest witness. Secondly, there is no dispute that the defendant had a system in place whereby members of the checkout staff could access assistance from other members of staff should they require it. If necessary, the system included their recourse to the tannoy which the trial judge found was to be located at the end of the checkout aisle. Thirdly, it is accepted that the plaintiff was trained in manual handling techniques on a regular basis. After each such manual handling course she was tested in respect of her knowledge. This involved her considering a range of questions on a questionnaire and answering them. albeit in a tick box format.

24. Critical to my conclusions on this appeal is the extent of the onus placed on an employer to take due care for the safety and welfare of their employee. I have already referred to the statutory obligations in this regard. In the context of this case it is reasonable to say that the obligation of the defendant was to identify potential hazards likely to affect the safety and health of the plaintiff and then, whether through training or the implementation of procedures and precautions which were practicable in all the circumstances, to guard against those risks: see *Quinn v. Bradbury* [2011] IEHC *per* Charlton J.

25. Insofar as the trial judge concluded that the defendant failed to comply with its duty of care to the plaintiff when she was stationed at the checkout, I fear that I must disagree with his findings based upon the evidence heard in the course of the trial. From that evidence it would seem to me that there is very little potential hazard or risk faced by an employee working at a checkout in Dunnes Stores in Dundalk, regardless of its expectation that its customers needs would be met by checkout operators as a matter of priority. From time to time in the course of any given day they might be asked, as occurred in the present case, to fetch or exchange a product for a client and most of those products are ones which, in the normal course of events, the customer would themselves bring to checkout.

26. The defendant had a system in place whereby any member of the checkout staff who required assistance was instructed to seek assistance from such members of staff as might readily have been available to them. If they were not so available they were trained to call for assistance using the tannoy. The undisputed evidence in this case was that Mr Joe Smith, Mr David Robinson and other members of staff were available to respond to a request for assistance had such a call been made over the tannoy. However, the plaintiff did not follow her training. She ignored the system that was put in place by her employer to make sure that she would not be required to undertake any unwarranted tasks. The trial judge's finding of fact that there was no other help available to the plaintiff and that she had no option but to go and get the potatoes herself, is not actually supported by the evidence.

27. I can well understand how the plaintiff, anxious to please the customer, and, indeed, her employer, immediately went off to replace the bag of potatoes when asked by the customer to do so. She made a judgement call based upon her belief that the store was short staffed because it was a holiday period. She knew that her direct supervisor was on holidays and her acting up supervisor was working at the express checkout till. She assumed Mr Smith was on his lunch, which he was not. He was available to assist had he been called. Further, the evidence was that there were other members of staff on the floor who were also in a position to render assistance had she used the tannoy. She did not follow the system which she had been trained to operate and which was designed to best protect her interests.

28. I am quite satisfied from the evidence that Dunnes Stores had a policy and procedure in place to protect the welfare and safety of those working at their checkouts. Those procedures took into account the possibility that, from time to time, there would be no one immediately available at the tills themselves in which case the checkout operator has been trained to seek assistance from a member of staff using the tannoy. I agree with Mr Mohan's submission this was a reasonable procedure to deploy and that the trial judge erred in law in concluding that the defendant had failed in its obligations to provide proper assistance for the plaintiff on the day in question.

29. For my part I believe that it would be neither reasonable not practicable to expect the defendant to have an employee ever present available to deal with any query as might be brought to the checkout operator by a customer. As Mr. Mohan pointed out, even if the store had one or more full time assistants available to checkout operators, it would invariably happen that from time to time these would be deployed on the floor when another problem needing attention. In such circumstances assistance would only be available over the tannoy. The temporary unavailability of a staff member in such circumstances could not, in my view, be considered sufficient to establish a breach of duty on the part of an employer.

30. Thus, a system which depends on the occasional use of the tannoy is, in my view, perfectly acceptable as providing a system which is practical and reasonable for the purposes of protecting the health and safety of the employee working as a checkout operator. I agree that this was a reasonable system to have an operation and it was one which, had the plaintiff operated it, would have brought Mr Smith to the checkout to assist the plaintiff. Contrary to the trial judge's conclusions, the system on the day in question did not fail and there was no evidence to support that finding or his finding that no other help was available to the plaintiff.

31. Further, even if the defendant was negligent in failing to provide the plaintiff with adequate assistance while she was working at the checkout, a proposition which I reject for the reasons earlier advanced, the same was not causative of her injuries for the reasons to which I will shortly refer.

32. As to the trial judge's finding that the defendant was negligent in failing to afford the plaintiff adequate practical training as to

how she might lift a product such as the 10 kg bag of potatoes, or a like weight packet of dog food or compost and/or his finding that the lift which she was required to make was excessive, inappropriate and potentially dangerous, I once again find myself in disagreement with his conclusions.

33. From his judgment, it is clear that O'Neill J. found, as a matter of fact, that the plaintiff had sustained her injury when she was trying to "extricate" the bag of potatoes by leaning in over the pallet and "yanking it out" from its wedged position between other bags of potatoes. The plaintiff did not sustain her injury by lifting a 10kg load from floor to shoulder height out from her body in the manner depicted as being excessive for women in the document providing guidance in respect of the management of manual handling in the workplace, and which was attached to the report of Mr Joseph Osborne, consulting engineer, dated 6th October 2011. Thus, his finding that the load which she was lifting was excessive is not, in my view, sustainable on the evidence.

34. It is also clear from the evidence and the findings of the trial judge that he accepted that the plaintiff had been trained and assessed on a regular basis in relation to manual handling skills and techniques. The plaintiff, in the course of her evidence agreed that she had been trained how to lift heavy items, albeit by way of training using an empty cardboard box. She knew that the load was to be lifted as possible to her body. Further, she had been instructed as to how to assess the size and weight of any load which she was expected to handle and she also agreed that she understood that when pulling a load any stretching or twisting action might cause injury. She acknowledged these factors by reference to an assessment test sheet dated 7th March 2006 referable to a manual handling course which she had completed at that time. She also accepted under cross-examination that she had been taught to look for help if she needed it and that she must not lift or handle any load which she felt uncomfortable about handling.

35. For my part, I am not satisfied that trial judge's finding that the defendant was negligent in failing to have in place a manual handling training system which included practical training for employees concerning products of the nature referred to by the trial judge in his judgement is supported by the evidence. Such a system, I believe, would be neither reasonable not practicable for any employer particularly one such as the defendant, who presumably has an ever changing range of products from groceries to furniture to household goods which employees have to handle on a regular basis. However, the more significant point is that there could be no causative link between any such failure on the part of the defendant and the plaintiff's injuries. Even if the defendant had had such a system of training in place it would not have covered the situation which arose in the present case. The injury was not sustained because the plaintiff was lifting a 10 kg bag of potatoes from a pallet. It was sustained when the plaintiff lent in sideways over the pallet and "yanked" this product from between two other bags of potatoes, which for some reason she left in situ while trying to extricate the bag concerned. This precise scenario was unlikely to be covered by any manual handling course practical or otherwise.

36. I am quite satisfied that for an employer, such as the defendant in this case, it reasonably discharged its obligations to the plaintiff by training her on a regular basis as to the principles of safe manual handling which it was then up to her to deploy when faced with any given task. The fact that the training in respect of safe lifting techniques may have been done using empty cardboard boxes or boxes with handles cannot, on the evidence, be considered to amount to a failure on the part of the defendant to meet its common law and statutory obligations to the plaintiff. Its obligation was to identify potential hazards and then implement procedures designed to protect the employee from the risks pertaining to such hazards, which it did.

37. In this particular case the hazard faced by the plaintiff did not emanate from lifting a 10kg bag of potatoes. The plaintiff knew the weight of the pack - it is printed on the bag. She said in evidence she had no concerns about lifting such a bag. She had also been trained to identify lifting or handling activities which might potentially place her at risk. In the course of the evidence she demonstrated that she well knew that twisting her body while pulling a load might expose her to a risk of injury. She had been trained to seek assistance if she was uncomfortable about any task she had been asked to perform. It was readily apparent to her when she went to lift the bag of potatoes that it was stuck. She was also, according to own evidence, standing sideways onto the pallet when she lent in to try and move the pack of potatoes. It was obvious from the very start that the bag of potatoes could not readily be moved. She accepted that if she felt uncomfortable about performing a lift or any other manual handling exercise that she ought to have sought assistance rather than undertaking it herself. Based upon that training she should have assessed the lift in these circumstances to be unsafe.

38. This is, indeed, an unfortunate case. The plaintiff, a loyal and hard-working member of the defendant's staff, because of her commitment to her employer and her desire to meet a customer's needs, took on a task which was contra indicated by her training and did so in circumstances where she knew or ought to have known she might sustain an injury. She did not seek assistance at the checkout, as she might have done having regard to her training, and further, when faced with moving a heavy bag of potatoes which was obviously wedged in position such that it could not be easily extracted without force, proceeded to try to yank it free thus causing herself an injury.

39. Having considered all of the evidence that was before the High Court, I am not satisfied that the plaintiff's injuries can be ascribed to any negligence, breach of duty or breach of statutory duty on the part of the defendant who, to my mind, had taken all reasonable precautions and had implemented all reasonable practices to protect the plaintiff from injuring herself in circumstances such as those which presented in the present case.

40. While it is impossible not to have great sympathy for the plight and predicament of the plaintiff, the law on the matter is, I fear, very clear.

41. In these circumstances I am satisfied that the defendant's appeal must be allowed.