

THE HIGH COURT

[2010/11755P]

BETWEEN

CATRIONA GILLANE

Plaintiff

AND

FOCUS IRELAND LIMITED

Defendant

JUDGMENT of Ms. Justice Murphy delivered the 24th day of July 2015

1. The plaintiff is a 42 year old woman born on 13th October, 1973. She is married with two children aged 16 and 12. She works as a Housing Support Worker with the defendant with whom she has been employed since 2003. The plaintiff claims damages for personal injury, loss and damage which she maintains occurred as a result of the negligence, breach of duty, breach of statutory duty and breach of contract of the defendant in and about the arrangement of workstations in the Housing Support Workers' office in the defendant's premises at Grange Cohan in the City of Waterford.

2. From 2003 to 2005 the plaintiff worked as a Housing Support Worker based in an office designated for that purpose with other Housing Support Workers. Given the needs and challenges of their clients, the work is demanding and stressful. From 2005 to 2007 the plaintiff was seconded for a two year period as a Tenancy Support Worker and was based in a different office designated for that purpose in the defendant's premises. Towards the end of 2007 her assignment to that office ended and she was reassigned to the Housing Support Unit. This gave rise to a certain awkwardness because the person who had replaced the plaintiff during her period of secondment to the Tenancy Support Unit was still completing her contract which did not expire until the end of January 2008. So apart from the general stresses of the work, the plaintiff was in the uncomfortable position of having to work in close proximity to a person who was about to lose her job because of the plaintiff's return. To accommodate the plaintiff's return an extra desk was required to be installed in the Housing Support Unit office for her use. This additional desk was placed at the end of the office facing a wall on which was placed a boiler which delivered heating to the room by means of two radiators which were placed under the two windows on the left hand side of the room as one enters. The plaintiff's workstation was placed at right angles to an existing workstation which meant that her desk was directly adjacent to one of the radiators and one of the two windows in the room. The heating in the room was controlled by the occupants who could adjust the temperature by means of a dial on the boiler beside the plaintiff's desk. By reason of the nature of their work the occupants of the office were in and out of the office regularly attending to the needs of the defendant's clients. Three of the four workstations were on the opposite side of the room to the radiators. On returning to the office it was not unusual for one or more of the occupants to turn the heating up in order to warm themselves after a period of work out of doors. The plaintiff, who suffers from sinusitis and who was sitting directly beside one of the radiators, regularly found the level of heat to be oppressive and troubling for her sinuses. She coped with this by opening a window immediately adjacent to her workstation. This helped equalise the temperature in her immediate vicinity by admitting a draught of cold air into the room. A further difficulty identified by the plaintiff with her assigned workstation and specified by her in a workstation assessment prepared on 26th March, 2008 was that the *"drawers under my desk get in my way sometimes as the VDU is above them. I have to sit crooked"*.

3. The plaintiff commenced work at this workstation on 5th December, 2007. The plaintiff prepared a plan of the layout of the office for her solicitor, as a matter of probability, on or about 1st May, 2008, a copy of which is annexed to this judgment. The plan shows the location of the plaintiff's desk and the desk of the three other workers who were based in the office in December 2007. The plaintiff's workstation is shown at right angles to another workstation which at the time was occupied by a co-worker named Fionnuala Brazil. At the end of January 2008 the woman who had replaced the plaintiff for her two year secondment finished her contract and left the office. This meant that there were four workstations but only three people working in the office. The aforementioned Ms. Brazil immediately moved workstation to that recently vacated by the contract worker. The plaintiff remained on at her workstation for a further six weeks but moved to Fionnuala Brazil's former workstation around the middle of March 2008. Towards the end of March 2008 a routine assessment form was handed out to all employees. The plaintiff completed her form on 26th March, 2008. The relevant sections of the work place assessment relate to temperature and space. In relation to the general office environment record the plaintiff under the heading temperature stated *"gas heating controlled by staff, windows, fan in summer"*. In relation to humidity she wrote *"don't know air appears very dry when heating is on"*. Under the general office environment heading of average personal space per employee she wrote *"ok. My drawers under my desk get in my way sometimes as the VDU is above them. I have to sit crooked."* In the section dealing with individual workstation assessment when asked whether there was sufficient space to enable easy access to the workstation the plaintiff ticked *"no"*. When asked was there reasonable variation in the position of furniture and equipment she similarly ticked *"no"*. The section of the workplace assessment dealing with temperature raised the following questions:

Is the temperature at the workstation comfortable?

The plaintiff ticked *"yes"*

Is the temperature maintained at a level that ensures operator comfort

The plaintiff ticked *"no"*

Have all sources of excess heat i.e. those likely to cause injury or discomfort to operators been eliminated or suitably controlled?

The plaintiff ticked *"no"*

Asked whether an adequate level of relative humidity was maintained the plaintiff ticked *"no"*.

4. In the section dealing with furniture there were two subheadings, one dealing with the work surface and the other dealing with the chair provided to the employee. Asked whether there was sufficient space below the work surface to enable the operator to achieve a comfortable position, the plaintiff ticked "no". Additionally, she had criticisms to make of the chair provided, particularly in relation to lower back support and thigh support.

5. At the end of the work place assessment document there was space for comments. The plaintiff wrote as follows:

"When I started working in the housing support office I sat in the desk assigned to me. This desk was with my back to the door and some staff in the room. It is located underneath the gas boiler which is quite noisy. The radiator was right beside me and there is only vent for the gas boiler behind me. Since I was beside the radiator I was always very warm and the air was so dry that I began to get sinus infections that I haven't gotten for two years since working in this office. To combat the dryness in the air I turned off the radiator on a number of occasions and tried to set the boiler on timer. But as other staff in the room were cold this was not always possible. To further my efforts to try and combat the dryness or low humidity I began to open the window next to me. After a week or two I found that my neck and shoulders became very stiff but my sinus problems appeared to have cleared up. After a week or two the pain and discomfort became so bad that it really started to effect me being able to sleep at night and to sit comfortably at all. I ended up going to a chiropractor to treat my neck and shoulders and I have spent €250 so far. I have had to go to a specialist massage therapist who has said that my treatment will continue for the foreseeable future. I have paid him €100 with no end in sight to the chiropractor or massage therapist fees. I really feel disheartened that these issues have been caused by being at work. Fortunately for me another workstation became available adjacent to mine and I did move but my neck and shoulders are still really painful."

6. This was the first complaint that the plaintiff made about her workstation. Upon receipt of the complaint the workstations were immediately reconfigured and the plaintiff's desk was placed against the wall between the two windows on the left hand side of the office as one enters.

Adequacy of the Workstation

7. The Court is satisfied on the evidence that no risk assessment was carried out before the decision was taken to place the plaintiff's workstation facing a wall directly adjacent to a radiator and window. It was, in the Court's view, entirely foreseeable that the person sitting at that workstation would be exposed to far greater levels of heat than those further back in the room. Indeed in order to provide sufficient heat for those removed from the radiators it was likely that the person sitting directly adjacent to it would experience excessive levels of heat. It is also entirely foreseeable that a person subjected to excessive heat would reach across and open the nearest window which was the window directly beside the desk, to alleviate the problem. The Court notes that the current configuration of the office shown in photographs taken by the defendant's engineer shows that the workstation is now parallel to the window and not at right angles to it. This provides the employee using that station with more space between the radiator and the desk.

8. While it did not feature majorly in the evidence, there is also evidence that the placement of the pedestal file cabinet under the desk was such that when using the VDU the plaintiff had on occasion to adopt a "crooked" position. The Court is satisfied that had a proper risk assessment been done, as required by s. 19 of the Safety, Health and Welfare at Work Act, 2005, the plaintiff's workstation would not have been orientated in the manner in which it was. Secondly, the Court is satisfied that by adopting the orientation which was in fact adopted, the temperature for the plaintiff was not maintained as required by regulation 7 of the Safety, Health and Welfare at Work (General Application) Regulations 2007 which provides as follows:

(1) An employer shall ensure that—

(a) during working hours, the temperature in rooms containing workstations is appropriate for human beings, having regard to the working methods being used and the physical demands placed on the employees,

(b) for sedentary office work, a minimum temperature of 17.5°C, so far as is reasonably practicable, is achieved and maintained at every workstation after the first hour's work,

(c) for other sedentary work, at every workstation where a substantial proportion of the work is done sitting and does not involve serious physical effort, a minimum temperature of 16°C is, so far as is reasonably practicable, achieved and maintained after the first hour's work,

(d) means are available to enable persons at work to measure the temperature in any workplace inside a building,

(e) the temperature in rest areas, rooms for duty staff, sanitary facilities, canteens and first-aid rooms is appropriate to the particular purpose of such areas, and

(f) in relation to windows, skylights and glass partitions, excessive effects of sunlight are avoided in places of work, having regard to the nature of the work and the characteristics of the place of work.

(2) The temperature referred to in paragraphs (1)(b) and (c) shall be a dry bulb temperature taken at the working position of the employee at 1.1 m above the floor surface.

(3) Where, due to process requirements, a workplace temperature below 16°C is necessary, the employer shall assess the risks and take any necessary measures to ensure the safety, health and welfare of the employer's employees.

The Court is satisfied that the ad hoc arrangement apparently arrived at by the defendant to accommodate the plaintiff in the Housing Support Worker unit was negligent and in breach of statutory duty and failed to have adequate regard for the safety and well being of the plaintiff.

Causation

9. For the reason stated above, the Court is satisfied that there was negligence and breach of duty, including breach of statutory duty, on the part of the defendant in configuring the plaintiff's workstation. The next and much trickier issue is whether or not that negligence and breach of duty, including breach of statutory duty, caused the condition of which the plaintiff now complains. Based on the evidence of the plaintiff's doctors the Court is satisfied that the plaintiff is suffering from a chronic inflammatory condition which, when active, causes pain in her left trapezius and sternocleidomastoid muscles. Prior to the events giving rise to these

proceedings, she did not suffer from this condition. However she was a sinusitis sufferer which is also an inflammatory condition and can be an exacerbating factor in neck pain according to the evidence of Dr. Darragh Foley Nolan consultant rheumatologist. In her original complaint of 26th March, 2008 the plaintiff specifically stated that upon returning to the Housing Support Workers unit she began to get sinus infections that she hadn't got for two years since working in the housing support workers unit.

10. The Court has had evidence from three doctors, two on behalf of the plaintiff and one on behalf of the defendant. Dr. John Downey, the plaintiff's GP at the time of the onset of her condition, gave evidence that, on the basis of the plaintiff's reporting, she had been subjected to sitting in a draught for a period of months and that he had concluded that she had developed chronic myositis of the trapezius muscles particularly on the left side. Dr. Darragh Foley Nolan consultant rheumatologist states in his report at paragraph 3.2 that;

"Catriona's symptoms came on after she had been exposed to a draught after she had opened a window following her co-workers turning up the heat regularly."

11. Dr. Darragh Foley Nolan saw the plaintiff on one occasion, on the 8th July, 2014, more than six years after the event. In examination in chief he stated that the history given by the plaintiff *"was unusual enough in that we don't see that many people in whom a draught is a major issue in terms of the etiopathogenesis of neck pain"*. He was of the opinion that the plaintiff does have soft tissue spasm which is causing recurring difficulties and was in keeping with the history as outlined. When cross-examined on this issue, he stated *"I mean in explaining that, clearly at six years removed from it's hard to recreate exactly what actually happened."* His opinion was based on the time frame that he had been given, the examination that he had done and the history that he had been given and it was all of those that led him to the conclusion that the plaintiff's workstation was an important factor in the development of the problem. Mr. Michael O'Riordan, an orthopaedic surgeon who examined the plaintiff for the defendant on two occasions, being 29th January, 2013 and 28th February, 2014, is adamant in both his report and his evidence that the plaintiff's condition is not connected to an exposure to a draught. He went so far as to say in his second report *"in all my years I have never heard such long lasting symptoms of such apparent severity be caused by a simple draught"*.

12. Both Dr. Downey and Mr. Darragh Foley Nolan, consultant rheumatologist, based their conclusions on the plaintiff's current condition on her reporting to them of what occurred. It must be said that on viewing the evidence as a whole, the plaintiff's reporting in this case has not been consistent. The Court does not consider that this arises from any deliberate falsification but it does give the Court cause to pause when her doctor's opinions are based significantly on the accuracy of her reporting. In her first account of events, which is the workplace assessment report of 26th March, 2008 she states that after a week or two in the housing support unit she found that her neck and shoulders became very stiff but her sinus problems appeared to have cleared up. That report goes on to say that after a week or two the pain and discomfort became so bad that it really started to affect her ability to sleep at night and to sit comfortably at all. This suggests that the problems manifested themselves almost immediately upon her return to the Housing Support Unit and not following two months continual exposure to draught which formed the basis of her GP's Dr. Downey's report.

13. The day following the completion of the workplace assessment, the 27th March, 2008, she attended her GP's clinic in Carrick-on-Suir, where she saw Dr. Andrew Downey. The main purpose of her visit according to the records was that she had a sore throat, runny nose, malaise, aches. On examination her ears were congested and her throat was slightly red. A viral infection was considered likely. Almost as an afterthought, the note records that the doctor also prescribed Diclac for neck pains which had been ongoing for a few months.

14. The plaintiff told Mr. Michael O'Riordan, the orthopaedic consultant retained by the defendants, that the pain started in early December 2007. Similarly she told Dr. Darragh Foley Nolan, as recorded by him at paragraph 2.4 of his report, that she would have taken some painkillers following the aches she developed in her neck within a week of her taking up work in the Waterford office. This reporting accords with the evidence of her co-worker Fionnuala Brazil who gave evidence that coming up to Christmas time in December 2007 the plaintiff complained to her of an awful crick in her neck. She knew it was December because they *"would have to cover for the people who were on reception and the people who took in rents and stuff like that, so we would have been based over there covering for them if they were off or if they had to go to the bank and stuff like that, but that morning I remember her chatting about it."*

15. In cross examination she was asked if the complaint may have been made in January or February and she said:-

"I don't think so. Now the only reason I don't think so was we were based over there, one of the staff had been out ill, so we would have been covering with the gentlemen that I referred to, our other ex colleague."

16. When pressed whether that complaint could have been made in January or February 2008 she said:-

"I don't think it was January or February for the reason that, in my mind I'm thinking Christmas time, but I don't have a date. I didn't know at the time I needed to think about it...so it could be [January or February]...it could be but I doubt it."

17. In her evidence to the Court the plaintiff stated that she began opening the window to reduce the heat in January 2008 on a daily basis. She stated:-

"I just began leaving the window open then so that I could get on with my work. I did feel the cold on my neck and my shoulder but I still felt extreme heat at the same time. So it probably went on for the whole month of January and it would have been like three or four hours a day maybe if I was sitting in the office there trying to get on and do my work and into February then and it was early to mid February that I started to feel real pain and soreness in my neck."

This appears to the Court to contradict at least to some degree the account given to Dr. O'Riordan and Dr. Darragh Foley Nolan. In giving her evidence, the plaintiff's initial recollection was that she went to the doctor first, Dr. Andrew Downey and then to the chiropractor. However, the documentation provided suggests that this is wrong and that the plaintiff initially on the recommendation of a work colleague went to the chiropractor. Her first visit to the chiropractor appears to have been on 26th February, 2008 and she didn't attend her GP until 27th March, 2008. The plaintiff also gave evidence that when the girl who had been covering for her on a contractual basis during her two years secondment, left at the end of January 2008, she immediately took her desk which took her away from the window. This again on the evidence appears to be incorrect. The plaintiff didn't move from the assigned work station to the work station at right angles to that until the middle of March 2008 some six weeks after the contract worker had left at the end of January. Similarly, the plaintiff gave evidence that she only realised that the workstation might be the cause of her problems when she spoke with Dr. John Downey who asked her questions about where she was sitting and her work arrangements etc. This

also appears to be incorrect because the notes taken by Dr. John Downey indicate that the discussion in relation to the plaintiff's work arrangements did not take place until 18th April, 2008 almost three weeks after she had filed the workplace assessment form in which she made a complaint of having experienced difficulties at her workstation virtually from the outset of her placement there. The plaintiff clarified this aspect of her evidence on day 2 of the hearing and stated that in fact it was her conversation with the Chiropractor that led her to make the connection between her symptoms and her workstation. The Chiropractor was unwilling to furnish a report or to give evidence in the matter. It was following her conversation with the Chiropractor that the plaintiff moved workstation to the free workstation vacated in January by Fionnuala Brazil. When pressed by the Court as to when she started having trouble with her neck and shoulder and trapezius muscle, the plaintiff replied *"I suppose I was sitting at the desk in December and January and at the end of January and starting into February it became really sore"* and it was at that point that she received advice to go to the chiropractor. When discussing her symptoms with the chiropractor she was asked about her work situation. It was then for the first time that she made a connection between her workstation and her inflammatory condition. Throughout the period from December 2007 through January, February and March, 2008, the plaintiff made no complaint to anyone about sitting in a draught, or having to adopt an awkward posture at her desk, this despite weekly meetings in which health and safety relating to clients and staff were the first item on the agenda. While the plaintiff experienced pain in her neck and shoulders during that period she made no connection between that pain and her workstation.

18. The condition of myositis from which the plaintiff is undoubtedly suffering can occur spontaneously and without trauma. The plaintiff had a pre existing inflammatory condition of sinusitis and on examination by Dr. Darragh Foley Nolan she was found to have Raynaud's Syndrome which according to Dr. Darragh Foley Nolan can be a pre disposing factor to pain.

The Role of Stress

19. Both in his evidence and in his report Dr. Darragh Foley Nolan consultant rheumatologist placed particular emphasis on the role of stress both in the initiation and perpetuation of pain of the type which the plaintiff suffers on a recurring basis

20. Both Mr. O'Riordan on behalf of the defendants and Dr. Darragh Foley Nolan Rheumatologist on behalf of the plaintiff independently recommended a physiological assessment of the plaintiff. Dr. Darragh Foley Nolan concluded his report by stating:

"I would strongly recommend an independent assessment by a psychologist to assess the degree that the stress Catriona experiences is a contributing factor to her neck pain flares in terms of their duration and severity."

21. Though Dr. Foley Nolan produced his report in July of 2014 no such independent psychological assessment was put before the Court.

Decision of the Court

22. In circumstances where the plaintiff's reporting has been inconsistent in terms of the onset of her symptoms and where no complaint of any type was made as to the unsuitability of the workstation during the three month period she was assigned to it, and where the plaintiff only made a connection between her workstation and her inflammatory condition on consulting a chiropractor who was not willing to come before the Court and give evidence, and where an independent psychological assessment recommended by both the plaintiff and the defendant's medics has not been conducted, the Court has difficulty concluding that as a matter of probability the workstation is the cause of the plaintiff's ongoing inflammatory condition in her trapezius and sternocleidomastoid muscles. At most in the Court's view, the defects in her workstation were merely a contributory factor in the onset of her condition and have no causative role in the perpetuation of them. Notwithstanding her confused reporting as to the sequence of events, which is not surprising given the circumstances and the lapse of time and which confusion, the Court is satisfied, is not due to any dishonesty on the part of the plaintiff, the fact is that for a period of three months the plaintiff was assigned to and sat at a workstation which was defective and in the course of which she developed symptoms from which she had not previously suffered. In coming to the conclusion that the workplace station was a factor in the onset of her condition the Court attaches particular weight to the fact that prior to her assignment to that workstation the plaintiff had no history of inflammation of the type from which she now suffers. In these circumstances the Court considers it appropriate to compensate the plaintiff for the pain and suffering which she suffered immediately following the onset of her symptoms but not for her ongoing pain and suffering. In the immediate aftermath the plaintiff received active treatment from Dr. John Downey her GP up until July 2008, but thereafter resorted to alternative methods because she found acupuncture too painful. It appears to the Court that in the particular circumstances of this case it is appropriate to compensate the plaintiff for one year post onset of this condition, to reflect the role of the defendant's negligence in its onset. The Court considers that the appropriate level of general damages for that period is €15,000 having regard to the significantly painful and debilitating nature of the plaintiff's condition during that period. The Court notes that special damages are agreed at €4,000 but having regard to the Court's finding that the defendant is liable only for the first year of the pain and suffering attributable to the plaintiff's condition, the Court proposes to award the plaintiff €1,000.