

## THE HIGH COURT

[2014 No. 691 P]

BETWEEN

GAVIN TOBIN

PLAINTIFF

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Mr. Justice McDermott delivered on the 7th October, 2016**

1. This is an application by the plaintiff for an order pursuant to O. 31, r. 12 of the Rules of the Superior Courts requiring the defendants to make discovery on oath of all documents in their power, procurement or possession which it is said are necessary and relevant to the plaintiff's claim for damages for personal injuries allegedly sustained during the course of his employment as an aircraft mechanic while serving in the Air Corps. A considerable body of documentation was sought under fifteen headings much of which have been agreed between the parties and may be the subject of a consent order. The categories of documents which are now no longer in issue are set out at paras. (iii), (iv), (v), (vi), (vii), (viii), (ix) and (xiv) of the schedule to the Notice of Motion subject to some variation in the wording of those paragraphs and the amalgamation of the documents the subject matter of paras. (v) and (vi).

2. The plaintiff was employed as an apprentice aircraft mechanic in September, 1989 in the Air Corps and commenced service at the apprentice school at Casement Aerodrome in Baldonnell in January, 1990. During his training and over the following years he was stationed at the Aerodrome until his service ceased in September, 1999.

3. The plaintiff claims that during the course of his employment as an aircraft mechanic at the Aerodrome he was exposed to various dangerous chemicals and organic solvents on an ongoing basis and as a result suffered personal injuries. He attributes this to the negligence, nuisance, breach of duty and statutory duty and breach of contract of the defendants and their failure to provide him with a safe system or place of work, safe and proper equipment and safe and competent fellow employees.

4. The particulars of negligence, nuisance, breach of duty and statutory duty and breach of contract are set out at para. 7 of the Indorsement of Claim. Following a series of general claims the particulars allege that the defendants:

"(h) Failed to provide the plaintiff with any or any appropriate training in and about the work which he was required to carry out;

(i) Failed to carry out a risk assessment of the task involved;

(j) Failed to ensure that the place of work was insofar as was reasonably practical, safe and without risk to health;

(k) Failed to identify the hazard of the place of work under its control, assess the risk presented by those hazards and be in possession of a written assessment, or in the alternative, having identified a hazard and assessed the risks, failed to take any or any adequate steps to alleviate the same;

(l) Failed to provide the plaintiff and/or his fellow Air Corps personnel with appropriate training with regards to the safe handling of chemicals and solvents and the dangers associated therewith;

(m) Failed to provide any or any appropriate supervision of the plaintiff and his fellow Air Corps personnel insofar as the handling of chemicals and solvents was concerned;

(n) Caused, allowed or permitted the plaintiff to be doused with chemicals by other Air Corps personnel while in the course of his duties;

(o) Failed to provide the plaintiff with any or any appropriate protective equipment to allow him to handle chemicals and solvents in a safe manner;

(p) Required the plaintiff to utilise ineffective and inappropriate gloves while exposed to chemicals and solvents;

(q) Failed to ensure that any or any appropriate ventilation was in place within the area where the plaintiff was required to work;

(r) Required the plaintiff to handle aircraft parts using his bare hands;

(s) Failed to ensure that the system of work which the plaintiff was required to operate was a safe one and did not result in the plaintiff being exposed on an ongoing basis to dangerous chemicals and solvents;

(t) Required the plaintiff to empty, clean and restock chemical storage vats when they knew or ought to have known that it was dangerous and unsafe for him to do so;

(u) Required the plaintiff to handle pump the chemicals from baths when they knew or ought to have known that it was dangerous and unsafe for the plaintiff to do so;

(v) Required the plaintiff to climb into chemical baths or tanks to remove sediment when they knew or ought to have known that it was dangerous and unsafe for him to do so;

(w) Failed to properly investigate the plaintiff's medical complaints having become aware of same;

(x) Caused, allowed or permitted the plaintiff to remain in an environment in the course of his work where he was exposed

to dangerous chemicals and solvents notwithstanding his having on-going medical complaints;

..."

5. The plaintiff also alleges breaches of the provisions of the Safety and Industry Act 1980, the Safety, Health and Welfare at Work Act 1989, the Safety, Health and Welfare at Work Act 2005 and the Safety, Health and Welfare at Work (General Application) Regulations 2007.

6. The plaintiff claims that in the initial stage of his apprenticeship he enjoyed very good health, was physically active and a keen cyclist and hill walker. He was assigned to the "engine shop" in mid-1991 and experienced symptoms of fatigue. He developed high-levels of anxiety and an inability to concentrate. He continued to suffer from symptoms of anxiety and difficulty in concentration. In September, 1994 the plaintiff commenced studies in electronics at the Institute of Technology but was unable to complete the course because he was unable to concentrate. In June, 1995 he developed testicular pain following a particular work exercise which involved spray painting for an entire day without any personal protective equipment.

7. When he left the Air Corps service the plaintiff continued to suffer symptoms and attended Tallaght Hospital in 2003 because of persistent vomiting and diarrhoea. He suffered various other symptoms thereafter. In December, 2011 the plaintiff was advised, following an occupational history and background investigation by a Toxicologist that his various medical complaints and conditions were as a result of chronic exposure to high levels of organic solvents in his workplace during his employment with the Air Corps. It is stated:

"The clinical picture provided by the plaintiff was typical of an organic Encephalopathy characterised by fatigue, poor concentration, sleep disturbance, anxiety and depression. It was concluded that a diagnosis of oligo-spermia which occurred in December 2007 might be associated with this exposure to solvents in the course of his employment. He was advised that future additional risks to his health were posed by this past exposure including the possible onset of Alzheimer's disease and a variety of cancers."

8. A letter seeking further and better particulars of the plaintiff's claim issued on the 16th July, 2014. Paragraph 9 sought particulars of the claim that he was exposed to various dangerous chemicals and organic solvents on an ongoing basis in the course of his employment and in particular, sought:

"(a) The precise dates upon which the plaintiff alleges that he was first exposed to chemicals and solvents;

(b) The date upon which the plaintiff alleges that he was last exposed to them;

(c) Confirmation of the purpose for which each such chemical or solvent to which he was exposed was allegedly used in the Defence Forces; and

(d) Identification of the proprietary and generic names of all and any chemicals and solvents to which he alleges he was exposed."

9. The plaintiff was also asked at para. 7 the dates during which he was employed in the Defence Forces, whether he was employed as an aircraft mechanic for the entire period, whether he held other positions within the Defence Forces and whether at any point he changed position to one involving less strenuous duties such as office duties.

10. In reply to the particulars raised at para. 7 the plaintiff outlined his history of employment with the Air Corps. He was engaged in basic military training for the initial four months. He attended the Air Corps apprentice training school from January, 1990 until July, 1991. He was engaged in aircraft mechanic training from July, 1991 in the Engine Repair Flight (ERF) for approximately ten weeks before transferring to basic flight training school for approximately ten weeks. The plaintiff states that he was subsequently attached to the Light Strike Squadron for approximately ten weeks and then for a further ten weeks to the Transport and Training Squadron. He spent a further ten weeks in the Maritime Squadron before returning to ERF. In the summer of 1993 he was sent to the Air Corps Training Depot for approximately three months for further military training before returning to ERF. He ceased working as an aircraft mechanic in February, 1994 when he was transferred to Air Support Company Signals to work in IT.

11. Further particulars were given in respect of the matters raised at para. 9 concerning his exposure to dangerous chemicals. The plaintiff outlined that his first exposure to dangerous chemicals occurred in September, 1989 following a flood within an attic of the "Apprentice Hospital" when white asbestos lagging was washed down onto the floor area. When it dried he was ordered to clean it up. His first exposure to solvents and dangerous chemicals was in ERF in July, 1991. He stated that his last exposure to chemicals as part of his day-to-day employment was in February, 1994. He continued to call to the ERF on a regular basis for tea and lunch breaks over the following two to three years. During his service in Air Support Company Signals he was exposed to lead solder fumes and also Genklene (1,1,1-Trichloroethane). He stated that he did not receive any training in respect of the chemicals and was unsure as to why some of them were in use. However, he was aware that florescent dye was used to detect cracks in components using UV-light; Ardrex 1074 was used to etch aluminium components; degreasing and cleaning solvents were used on engine parts and for paint removal; jet fuel and petrol was utilised in an attempt to remove residue from component parts; Metahyl Ethyl Ketone was used to remove residue. The plaintiff alleges that he was further exposed to Aeroshell 500 Turbo Engine Oil and Aeroshell Grease 8 Graphite grease which was used as a lubricant for jet engines. He was also exposed to cellulose thinners and paint. In the same reply he listed the various chemicals to which he was allegedly exposed of which he was aware.

12. In the defence, the defendants do not require proof that they employed the plaintiff as an aircraft mechanic at Casement Aerodrome Baldonnel. However, the plaintiff was put on full proof in relation to the duties and obligations alleged to be owed by the defendant to the plaintiff, the fact that he was ever exposed to dangerous chemicals or solvents on an ongoing basis or at all, the allegation that the defendants acted negligently or in breach of duty or statutory duty and the fact that he suffered the alleged or any damage as a result.

13. In para. 3(a) of the defence it is stated that "no admission is made that the defendants exposed the plaintiff to dangerous chemicals or solvents whether on an ongoing basis or at all". The defendants plead that if the plaintiff suffered any personal injury, loss or damage it was not caused by any act or omission on its part or was not a reasonably foreseeable consequence of any such act or omission. Furthermore, if the plaintiff suffered any personal injury, loss or damage it is said that this was due wholly or partly to his own negligence. Clearly there is a full contest on liability and if the plaintiff is to succeed, he must establish all facts relevant to liability on the balance of probabilities.

## Categories and Documents

14. The following are the remaining categories of documents in issue between the parties and identified by reference to the paragraph numbers set out in the Notice of Motion:-

### (i) and (ii)

"(i) The Safety Data Register maintained by the defendants in respect of Casement Aerodrome for the period between 1st January 1990 and 1st September 1999 to include each safety data sheet relating to each and every chemical being utilised at the said premises during the said period.

(ii) All documentation, notes, records, reports etc. listing or identifying any chemicals which were utilised by the plaintiff in the course of his duties during the said period together with any documentation identifying the quantities and dates of purchase of such materials."

15. This documentation is said to be relevant because the plaintiff's case is that due to the negligence, breach of duty and breach of statutory duty of the defendants he was exposed on an ongoing basis to toxic chemicals which ultimately caused him to suffer serious personal injuries. The defendants decline to furnish the documentation requested under these categories. The defendants accept that the following matters are in dispute between the parties:

"(a) Whether the plaintiff was exposed to dangerous chemicals and solvents whilst working at Casement Aerodrome Baldonnel;

(b) Whether the defendants knew or ought to have known that the plaintiff was exposed to such dangerous chemicals and solvents and that this exposure posed a risk that he would suffer injuries;

(c) Whether the defendants failed to properly train the plaintiff in how safely to carry out his work in light of these risks;

(d) Whether the defendants failed to ensure that the system of work which the plaintiff was required to follow was safe having regard to the risk; and

(e) Whether the defendants failed to provide the plaintiff with proper equipment, sufficient to ameliorate or address the risk."

16. The defendants claim that they are not aware of any Safety Data Register kept at the Aerodrome but are in a position to make discovery of Material Safety Data Sheets in respect of the chemicals utilised at Casement Aerodrome during this period and therefore in respect of category (i) was willing to make discovery of:

"The Material Safety Data Sheets regarding the chemicals utilised at the ERF workshop between the period 1st January, 1990 and 1st September, 1999."

17. In respect of category (ii) the defendants maintain that they do not have any documents "identifying the chemicals which were utilised by the plaintiff". It would not be possible to make discovery of documents which refer to chemicals actually utilised by the plaintiff in the course of his duties. However, it is acknowledged that they have records which would make it possible to discover documents concerning chemicals "which were purchased" for use in the ERF workshop at the times in question. However, they complain that full discovery of this category which required all records concerning chemicals in use at the Aerodrome was unnecessarily wide and would impose too heavy a burden on the defendants.

18. The burden is outlined in the affidavit of Capt. Nic Caba in which she claims that these documents were stored manually and electronically on the defendant's ANS system. With the passage of time and change of personnel it will be difficult to locate hard copy documents manually stored, a process made more difficult by the fact that between 2005 and 2007 the ERF workshop at Casement Aerodrome was demolished which has made it difficult to locate the records previously stored therein. It is stated that these documents which are principally invoices, work orders or purchase orders were stored on the Air Corps AMS system. In order to locate a document within the system it would be necessary to manually review the main screen on the system which lists each document by date, type and reference number. The affidavit sets out in detail that a great deal of time would be required to identify such documents falling within the terms of the discovery sought. Following its identification on the main screen it would be necessary to call up the individual document in order to identify whether it is in fact discoverable. Unfortunately there is no method for electronically searching the content or text of the individual documents which will add to the burden in making discovery. An estimate is given that it would take ten members of staff who may have other members of staff working under them, and approximately two hundred and twenty man-hours to review, locate and categorise the documents of which the plaintiff has sought discovery.

19. It is submitted that a set of interrogatories should issue requesting that the defendants identify whether the chemicals identified at para. 9(d) of the plaintiff's replies to particulars were in fact used in the ERF workshop during the specific periods of time identified by the plaintiff.

20. In reply, the plaintiff averred that the type of software used by the first named defendant to store information is known as Air Corps Aircraft Maintenance Management System (AMMS) and is not an AMS system. It is submitted that there are discovery tools by which the database may be interrogated to produce the necessary information which are integral to the system and formed part of it when originally purchased.

21. The plaintiff also takes issue with the suggested limitation of discovery to documentation relating to the ERF workshop as the only area within Casement Aerodrome where the plaintiff alleges he and his fellow Air Corps personnel were exposed regularly to dangerous chemicals. He deposes that other areas were regularly frequented by him and other Air Corps personnel carrying out their duties. These were:

"(a) The Engine Repair Flight Building and adjoining workshops;

(a) Engine Shop;

(b) Non-Destructive Testing Shop;

(c) Machine Shop;

- (b) The Basic Flight Training School Hangar;
- (c) The Light Strike Squadron Hangar;
- (d) Transport and Training (shared with Maritime) Hangar;
- (e) Air Support Company Signals (the Top Workshop);
- (f) The Engineering Wing Hangar and adjoining workshops;
- (a) The Spray Painting Shop;
- (b) The Hydraulic Shop;
- (c) The Sheet Metal Shop;
- (d) The Carpentry Shop;
- (e) The Welding Shop."

22. I am satisfied that the defendants' interpretation of the pleadings as a claim based on injuries sustained when exposed to chemicals in a geographically limited area defined by the ERF is misconceived when the pleadings and particulars furnished are considered. At no stage was the plaintiff asked to define a precise geographical location within which this exposure occurred. He gave a history of his employment which included reference to periods spent carrying out different types of work at Casement Aerodrome and I am not satisfied on the evidence adduced in the pleadings that the plaintiff's claim was ever so circumscribed by him.

23. I am satisfied that the defendants' proposals that the plaintiff should serve interrogatories upon the defendants requesting that they identify whether the chemicals set out at para. 9(d) of the replies to particulars were in fact used in the ERF workshop during specific times identified by the plaintiff is an insufficient response to the discovery sought. The plaintiff deposes that though he has identified to the best of his knowledge, some of the chemicals to which he was exposed he does not know and cannot be expected to know all of the chemicals which were in use within the workplace. The plaintiff claims that he requires a full list of all chemicals in use together with the full list of the safety data information concerning such chemicals in order to prepare his case and/or furnish same to experts retained on his behalf. In that context the quantities and dates of purchase and use of chemicals and mixtures and the safety data concerning their handling, application and use form a highly relevant and important part of the case. It is noteworthy that the defendants make no admission that the defendants exposed the plaintiff to dangerous chemicals or solvents whether on an ongoing basis or at all following the delivery of replies to particulars which set out the chemicals to which he believed himself to be exposed. It is clearly part of the plaintiff's case that this exposure continued at Casement Aerodrome over a number of years and I am entirely satisfied that it is necessary and relevant to his case that discovery be granted in relation to these documents. It maybe that interrogatories may follow this discovery in the more usual way (*Delaney and McGrath, Civil Procedure in the Superior Courts*, 3rd Ed. para. 12-16).

24. I am satisfied that the documents sought in categories (i) and (ii) may reasonably be supposed to contain information which either directly or indirectly will enable the plaintiff to advance his own case and/or damage the case of the defendants. Having regard to the nature of the case made I am satisfied that the plaintiff will suffer serious disadvantage in the preparation and presentation of his case if the relevant records sought under these categories are not made the subject of a discovery order. I am satisfied that the plaintiff may be deprived of access to documents which would enable him to prove matters in dispute in these proceedings and central to the determination of liability. (*Framus Ltd. v. CRH Plc.* [2004] 2 I.R. 20 and *Ryanair Plc. v. Aer Rianta Cpt.* [2003] 4 I.R. 264).

25. I am also satisfied that there must be proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the plaintiff's case or damage the defendants' case and it is therefore important to bear in mind that an order for discovery should not be oppressive to the defendants. Murray CJ. in *Framus Ltd. v. CRH Plc.* in adopting and applying the principles set out by Fennelly J. in *Ryanair Plc.* stated:

"It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out the crucial question is whether discovery is necessary for 'disposing fairly of the cause or matter'. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."

26. It is therefore necessary to consider whether, as the defendants submit, the breadth of the discovery sought is too wide. I am satisfied that the plaintiff has established that this is not so. The claim is based on a continuum of events over a number of years involving the use by and exposure of the plaintiff to dangerous chemicals in the course of his work by his employer. The nature, extent and likely purpose of their use, if any, and the circumstances in which such chemicals were likely to have been used is probably to be gleaned from the documents and AMS records in the possession, power and procurement of the defendants. It seems to me that the nature of the claim necessarily requires that this burden of discovery be imposed upon the dependents. The defendants accept that records were kept and still exist but also indicate that some records may have been lost and those that exist are unlikely to assist in identifying the chemicals actually used by the plaintiff or to which he may have been exposed on a particular occasion. That may be so, but documents or records previously held but now lost may be addressed in the normal way in the discovery affidavit. The identification in the defendants' records of the chemicals named and likely to have been used by the plaintiff in the course of his duties is highly relevant to the establishment of his claim.

27. I am therefore satisfied to make an order for discovery in respect of categories **(i)** and **(ii)** as necessary for the fair disposal of the plaintiff's claim and relevant to it notwithstanding the significant degree of work which will be required to comply with it

#### **Other Issues**

28. The parties have agreed the terms of discovery under most of the remaining paragraphs set out in the Notice of Motion.

29. Under paras. **(v)** and **(vi)** the defendants have agreed to discover all documents, notes, reports and records pertaining to special safety training and information in chemicals (including dangerous chemicals) provided to the plaintiff in the course of his employment by or on behalf of the defendants.

30. Under paras. **(x)** and **(xi)** it emerged during the course of the hearing that this aspect of the claim related to an initiation prank or rite carried out upon new apprentices known as "tubbing" which involved exposure to chemicals. The court was not satisfied that any generalised or specific claim was made about specific spillages in the particulars furnished. It is therefore appropriate that discovery be made of any documents of the type set out in these paragraphs relating to alleged "tubbing" incidents as described by the Plaintiff at Para.7 (n) of the Indorsement of Claim.

31. Under para **(xii)** the plaintiff seeks discovery of:-

"All environmental impact records, Environmental Protection Agency Emission Licences, EPA inspection records , reports or correspondence relating to Casement Aerodrome for the relevant period."

32. The defendants are satisfied to furnish discovery of all such documents "relating to chemical safety at the ERF Work Shop at Casement Aerodrome generated in the period 1st January to 1st September,1999". I am not satisfied that the location restriction proposed is appropriate and I am satisfied that the order for discovery should apply to those locations within the Aerodrome set out in the plaintiff's affidavit at para. 8 with the exception of the carpentry shop.

33. Under para. **(xiii)** the plaintiff seeks discovery of :

"All records relating to the disposal of chemicals maintained at Casement Aerodrome to include documentation in relation to disposal methods, method statements, segregation and labelling of waste chemicals and the monitoring of personnel involved in such activities."

34. The plaintiff does not claim that he was involved in waste disposal in a general way. The defendants object to discovery under this heading as irrelevant to the claim. In the particulars of claim the plaintiff alleges negligence and breach of duty arising from the emptying, cleaning and restocking of chemical storage vats and hand-pumping chemicals from baths or tanks. He was obliged to climb into and remove sediment from these baths or tanks. I am satisfied that this paragraph is too widely drawn and should be confined to any documents or records relating to the plaintiff's description of and engagement in the tasks described at paras. 7(t), (u) and (v) of the Indorsement of Claim.

35. It seems to me that the claim for discovery in para. **(xiv)** is also too widely drawn. It seeks discovery of all standard operating procedures for use by personnel relating to "activities" at Casement Aerodrome. This does not appear to me to be relevant: any relevant material concerning information in respect of chemicals is adequately addressed in the order granted under paras. **(v)** and **(vi)** above.