

**THE HIGH COURT**

**[RECORD NO. 2016 8807 P]**

**BETWEEN**

**PAUL LEBLIQUE**

**PLAINTIFF**

**AND**

**IARNROD EIREANN**

**DEFENDANT**

**SECOND JUDGMENT of Mr. Justice Robert Eagar delivered on the 27th day of July, 2018**

1. This is a judgment in respect of an application by the plaintiff as set out on the notice of motion dated the 19<sup>th</sup> December, 2017 (The court is giving this judgment having regard to issues which are raised by counsel for the plaintiff on the 1<sup>st</sup> June 2018).

- (1) An order pursuant to Order 44 of the Rules of the Superior Courts seeking to attach and commit (a) David Franks, chief executive of Iarnród Éireann of Connolly Station, Dublin 1, and (b) Mr Chris Rafferty, DART District Manager, Pearse St. Station, Dublin 2, for failure to comply with the order of Gilligan J. made on the 28<sup>th</sup> April, 2017.
- (2) In the alternative, an order for the sequestration of the assets of the defendant pending compliance with the order of Gilligan J. made on the 28<sup>th</sup> April, 2017.
- (3) Such further or other orders as this Court shall see necessary.
- (4) Costs of and incidental to the within application.

2. Before setting out the history the court notes the judgment of Gilligan J. dated the 28<sup>th</sup> April, 2017. Gilligan J. heard the case and gave an *ex tempore* judgment on the 28<sup>th</sup> April, 2017 as follows: -

“It is ordered that there be no order on the balance of the plaintiff’s claim, save a direction that the stopping short incident be dealt with under the Driver Development and Support Scheme and that the plaintiff do recover against the defendant the costs of the action to include all reserved costs and costs of discovery if any when taxed and ascertained.”

3. The case was heard by this court on the 19<sup>th</sup> January, 2018, and the court will briefly set out the issues which this Court has been asked to determine.

4. It was agreed by both parties that the motion for attachment and/or committal ought only be issued where there is a clear breach of a court order and as a last resort. It is conceded by the plaintiffs that the motion to attach David Franks and Chris Rafferty was not an order. The Court will only deal with the applications at para. 2 (for the sequestration of the assets of the defendant pending compliance with the order of Gilligan J. made on 28<sup>th</sup> April 2017) and para. 3 of the notice of motion. Counsel on behalf of the plaintiff said there was inherent jurisdiction for the court that if it finds that there is contempt on the face of the order, then anything above is clearly incidental or inadvertent failures and disobedience of the order.

5. He says as submitted that that it was clearly contemplated by Gilligan J. that the plaintiff be reinstated, he is a train driver and had he not taken the case, he would be spending the next thirty years pressing a button.

### **Background**

6. The plaintiff was a train driver and two years ago stopped his train short on a platform at Tara Street Station and the last carriage was not flush with the platform so

if someone had stepped out they may have been injured. The plaintiff closed the door and no one got off the train. The plaintiff continued to the next station at Bray and his manager, Mr. Rafferty, met with him. The plaintiff explained that had been driving a smaller train in an earlier shift and had stopped at the platform thinking it had four carriages when he actually had eight carriages. At Bray station he went with the line manager and filled out a report.

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

8. The plaintiff was then suspended by Mr. Rafferty and disciplined by way of a hearing on two charges; one for failing to give a sample and the stopping short incident. He had a number of stopping short incidents in the previous two to three years. Mr. Rafferty heard the case and decided he was guilty of both charges and he was dismissed from the company. The plaintiff appealed to a three person body and they decided he was guilty of both offences. The stopping short incident however was dealt with by the Driver Development Training Programme; the sanction decided on in relation to the failing to give a sample was demotion. He has thirty years to run on his contract, he is in his middle thirties and it was decided to put him in a non-

safety critical role. His position was to sit at the top of Pearse Street Station pressing the button if a ticket gets stuck.

9. He litigated to remedy the situation seeking declarations regarding the Railway Safety Act, and the reinstatement of his position. The matter was heard before Gilligan J. in March or April of 2017, during the hearing it transpired that the Railway Safety Act was not complied with in that it specified that the only person authorised to take a urine sample was a doctor. Also, the person who requires a member of staff to take a test must be appointed under a particular section of the Act, but no-one had that power and the sanction had never been invoked, as a consequence, that portion of the case was conceded by the defence.

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

11. The plaintiff returned to work in late April but he has not driven a train and has been subject to medicals by the company medical officer which he has passed and is fit to drive. The plaintiff has not worked since the order made some eight or nine months ago, he arrives in to Fairview Station to sign in and is told there is no work for him. The plaintiff has passed all medical examinations since he returned to work and was certified fit to drive. The defendant was unhappy with that in that if there was no medical reason that the plaintiff cannot drive there must be some psychological issue and in August 2017, a psychological assessment was carried out by Dr. Fletcher, who examined the plaintiff over the course of a day. The plaintiff attended with Dr. Fletcher and after waiting half an hour to one hour, Mr. Ayres (the district inspector)

and Mr. Rafferty, line manager, came out of the consulting room. The plaintiff was concerned with this.

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

13. In late December, the plaintiff on foot of a concern that he had been shut out and would never return to driving duties brought this motion and got short service seeking to attach and commit this Mr. Ayres and Mr. Rafferty or to sequester the assets of the defendant.

14. Counsel on behalf of the defendant first of all noted that the motion for attachment committal and sequestration of assets was fundamentally flawed.

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

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

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

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

19. At the time of the incident on the 25<sup>th</sup> January 2016, the plaintiff was already on Category B Driver Development and Support Plan, due to four previous incidents. The purpose of the plan included: - "To provide an opportunity for "Driver Leblique to regain confidence and competence to perform his duties consistently to the required standard" and also "to focus on addressing any underlying behavioural issues which may lead to repeat violations or errors"" and he submitted that in considering the short stopping incident of the 26<sup>th</sup> January 2016 under the scheme, the defendant correctly took into account previous incidents in accordance with the terms of the scheme and is clearly envisaged in the System including under para. 8.3 and Appendix A of OPS S. 3.2. He noted that the steps taken under the Driver Development and Support Scheme meant the plaintiff was referred to the safety performance review panel. The safety review panel is required to conduct a systematic review which includes reviewing supporting competence records and evidence of a drivers' safety performance which can determine whether a train driver can return to driving duties with a revised development and support plan or alternatively to be either temporarily

or permanently removed from train driving duties. The review plan was required to examine the train driver file during the entire safety history over the course of a train drivers' career. During the review the safety panel enquired of the plaintiff were there any lifestyle or personal issues which may have been contributive to Mr. Leblique's poor driving performance to train handling which resulted in a pattern of safety critical incidents including the stop short incident at Tara Street station.

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

**21.** Counsel submitted that the plaintiff sat the required assessments, conducted by the external consultant, Dr. Fletcher, on the 23<sup>rd</sup> of August, 2017. The plaintiff, in his affidavit, proceeds to criticise the fact that a draft report to Dr. Fletcher was furnished to the defendant for comment. He said however that it was normal practice for draft reports of an Occupational Psychologist to be furnished to the defendant for such comment. The draft OPC report of the 25<sup>th</sup> August 2017 was also forwarded to the plaintiff. It was open to the plaintiff to make comments on the draft report but he chose not to do so. A second draft report recommended (although this was not binding on the defendant) that the plaintiff could return to driving duties following extensive retraining. The concerns of Iarnród Éireann were further taken on board by Dr. Fletcher in his Supplementary Report which recommended that Mr. Leblique should carry out a different role for a short period of six to nine months to give him an

opportunity to build up trust with the company before returning to driver duties. The Occupational Psychologist's report also recommended the plaintiff would require extensive retraining before returning to driving duties but recognised that this retraining could commence while carrying out a role other than DART driving.

**22.** The Occupational Psychologist's report and the supplementary report were provided to the plaintiff on Thursday the 14<sup>th</sup> December, 2017, and the plaintiff was invited to meet with Tom Ayres and Dr. Fletcher to discuss the reports on Friday 15<sup>th</sup> December if he wished to do so. The plaintiff did not attend the meeting and instead an application was made on behalf of the plaintiff on the 15<sup>th</sup> December for an attachment and/or committal motion to be made returnable to Tuesday, 19<sup>th</sup> December, 2017. The only issue which this Court has to deal with is whether or not the procedures which Iarnród Éireann instigated were in compliance with the order of Gilligan J. in circumstances where Gilligan J. had been unaware of the previous stopping short incidents.

**23.** Gilligan J. in his judgment of the 28<sup>th</sup> April, 2017, directed that the short stopping incident be dealt with under the Driver Development and Support Scheme and at SMS 323.2 Driver Development and Support System sets out Iarnród Éireann's railway undertaking requirements for the application of drivers' development and support.

**24.** At OPS SMS 323 Driver Development and Support System: -

“The purpose of this standard is to manage the risks arising from substandard performance by providing a system that presents drivers with advice, support and development to improve and develop their competence and fitness. If the competence of a driver working for Iarnród Éireann's Railway Undertaking is below the required standard, systems must be put in place to develop and



restore competence. This process may involve the temporary, or in cases where the person is no longer suitable for carrying out the activity, permanent removal from drivers' duties and the withdrawal of the individuals complementary certificate, where issued."

25. Following the safety performance review panel meeting of the 26<sup>th</sup> of May 2017, concerning the review of Paul Leblique as directed as per s. 10 of OPS SMS 32, the summary of the meeting sets out the following incidents :

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

(2) On the 26<sup>th</sup> August, 2014, there was a second platform overrun at Raheny, the time of the incident was 11 o'clock and it was cited that low rail adhesion was the root cause. Taking into consideration that there was a light shower of rain prior to the incident, it was not possible to complete the analysis as there was no Teloc download available.

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

(4) On the 25<sup>th</sup> October 2014, there was a fourth platform overrun at Portmarnock, the time of the incident was 12:20 hrs. The train overran the

platform by 4 carriage lengths and the weather conditions were dry and sunny. The incident was attributable to the driver and he was temporarily stood down from driving duties by his traction executive. He was told by the traction executive that his interview with the traction executive would serve as a written warning regarding his future driving conduct.

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

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

### **The psychological report**

26. Criticism was made of the way that the psychological report was finally prepared. It appears to this Court that it was appropriate to send the draft reports to the various parties for them to give their comments and this Court is of the view that that is the appropriate for such a report to be prepared. The final summary

psychological assessment report was dated the 11<sup>th</sup> December, 2017, the court notes the following: -

(1) Driving in autopilot

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

(2) Anticipation of risk and act accordingly.

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

(3) Learning from past incidents.

Dr. Fletcher said the number of similar incidents over three years suggests that the applicant may have found it difficult to learn from each event and Dr.

Fletcher noted that the applicant had looked at each incident in isolation rather than looking at them collectively.

#### (4) Making safe and effective decisions

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

#### (5) Recommendation of the psychologist

Dr. Fletcher noted a number of key defences to the applicant as a DART driver with Irish Rail; these defences have probably helped keep the applicant safe in the past and could continue to keep him safe in the future if he returned to driving. However, he noted there were a number of key risks that had been highlighted for the applicant around his safety incidents. His conclusion was based on all of the evidence that has been presented as part of the report including the assessment tools, the interview and feedback from the applicant it is recommended that the applicant be given the opportunity to return as a train driver. And, Dr. Fletcher states that if the applicant did return to driving then he would need to undergo some extensive retraining given how long he has been away from the job. This retraining may be an ideal opportunity for the applicant to park and leave behind his own ways of driving and learn and develop a different and improved approach to driving the DART trains. He

stated that there were enduring concerns in Irish Rail about the applicant's suitability to return to driving given his history with Irish Rail. There were also concerns as to whether or not he is committed to change.

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

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

29. The court noted that the applicant is currently not carrying out train driving duties as he is being processed under OPS SMS 3.2 part of which includes the assessment for suitability for train driving with the occupational psychologist.

30. He also notes that in the applicant's case the Driver Development and Support System was close to being concluded when before his final conclusion, the applicant instituted the application.

31. The court accepts: -

(1) That the process under the Driver Development and Support System and Scheme was close to being concluded

(2) The court accepts that the occupational psychologist was not recommending that the applicant should immediately resume driving trains or that it would be appropriate to do so.

(3) Dr. Fletcher, in his supplementary report, recommended that the applicant should carry out a different role for a short period of six to nine months to give him an opportunity to build up trust with the company before returning to driving duties.

(4) The psychologist also recommended that the applicant would require extensive retraining before returning to driving duties, and recognised that his retraining could commence while carrying out another role other than DART driving.

**32.** The court is not satisfied to make any order with regard to the sequestration of the assets of the defendant having regard to its opinion that the order of Gilligan J. was being followed.

**33.** This Court is conscious of the absolute requirement for Iarnród Éireann to take the appropriate steps to ensure the safety of passengers. In all the circumstances the court will not make any order as the court is satisfied that the order of Gilligan J. has been followed by Iarnród Éireann. The court dismisses the applicant's application.