

**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2019] SC EDIN 08

PN801/18

JUDGMENT OF SHERIFF R D M FIFE

in the cause

PAUL MCCALLION, residing at 3 Mitchell Court, East Kilbride, Glasgow, G74 1QY

Pursuer

against

WARBURTONS LIMITED, Sholto Crescent, Righead Industrial Estate, Bellshill

Defenders

**Pursuer: Henderson; Thompsons, Edinburgh
Defender: Thomson; BLM, Glasgow**

Edinburgh, 11 February 2019

[1] A proof in this action proceeded on 29, 30 and 31 January 2019. Damages were agreed at £25,000 inclusive of interest to 29 January 2019 in terms of a joint minute. The proof was restricted to liability.

[2] The pursuer claims damages following an accident at work on 29 September 2016 when he had completed a maintenance repair on a machine in a secure room. As the pursuer descended from the machine to ground level he stepped on an uneven surface of waste loaves of bread ("bread") which was piled to a significant height and covered the entire floor surface. The pursuer's left knee gave way on the uneven surface and he sustained injury.

[3] In addition to the pursuer evidence was led from 5 witnesses, all employees of the defenders:

1. Scott Bracken, mechanical maintenance engineer;

2. Pat Hughes, mechanical engineer;
3. Thomas Brown, mechanical engineer;
4. Zsolt Racz, electrical engineer;
5. Ian Thurston, electrical engineer/engineering processing manager.

[4] The sheriff, having resumed consideration of the cause finds the following facts to be admitted or proved.

[5] The pursuer is a very experienced mechanical engineer. He has been employed with the defenders at their premises in Bellshill for about 12 years.

[6] At 19.00 hours on 29 September 2016 the pursuer commenced a shift. As a maintenance engineer the pursuer carried out preventative, planned and reactive maintenance of production machinery.

[7] At about 19.10 hours the pursuer received a tannoy call to attend a breakdown in the Plant 2 cooler ("P2 cooler") at the exit/in-feed room ("the room"). The pursuer was expected to go to the P2 cooler immediately, to fix the fault and restart the P2 cooler as quickly as possible so as to minimise disruption to the production process.

[8] The P2 cooler is a large machine which, as part of the bread production process, cools hot loaves of bread. There are two loader conveyors for hot bread and one unloader conveyor for cooled bread. Once unloaded the bread is then sliced, packaged and dispatched. A production run can be around 7000 loaves.

[9] The P2 cooler has a lower and upper loader conveyor and a top unloader conveyor each at different heights from the floor. The lower loader conveyor was at a height of about 19-20 inches above the floor; the upper loader conveyor at a height of about 4 feet above the floor; and the top unloader conveyor at a height of about 6 feet above the floor.

[10] As part of the production process bread moves along the conveyors. There are pusher bars at each of the three conveyors. The pusher bars load and unload racks with waiting bread. The pusher bars push in and push out bread.

[11] The P2 cooler very regularly required to be repaired and restarted because racks for the bread had stopped in the wrong place on the unloader conveyor and the unloader conveyor became jammed with bread. The pusher bar for the unloader conveyor was then out of alignment with the sensor for the unloader conveyor so would not allow the machine to restart until the pusher bar was re-set and in the home position.

[12] The floor of the room was about 14 feet in length with a width varying from about 4 feet to 5.5 feet. The floor was made of aluminium checker plate.

[13] The usual means of access to the room and the P2 cooler by maintenance engineers was through a security door using a key obtained through a secure system.

[14] The pursuer, together with another maintenance engineer Zsolt Racz, passed by the control system for the P2 cooler en route to the room. The digital display on the control panel showed a fault, that the unloader pusher torque limiter had tripped. That was the fault the pursuer was expecting to repair on the P2 cooler. The pursuer and Mr Racz then proceeded to and entered the room.

[15] As at the date of accident the common practice for carrying out this repair was for a maintenance engineer to climb up the front of the P2 cooler to the top unloader conveyor, pull the drive belt for the top unloader conveyor and manually move the rack back into the correct position. The maintenance engineer would manoeuvre the pusher bar to the home position in line with the sensor on the top unloader conveyor so that the sensor knew it was safe for the P2 cooler to be restarted. The maintenance engineer would then descend the machine, leave the room and return to the control panel to restart the machine. The repair

would normally take no more than a few minutes. This practice of carrying out the repair was known to management.

[16] There was no written procedure for carrying out this repair to the P2 cooler as at the date of accident.

[17] Production 6/10 was a risk assessment for the P2 cooler dated 23 July 2014. The pursuer had not seen that risk assessment prior to the accident. That risk assessment did not cover the operation of restarting the P2 cooler.

[18] The pursuer had not received dynamic risk assessment training prior to the accident but he was very experienced in dynamic risk assessment which he described as an initial risk assessment.

[19] The pursuer climbed up the front of the P2 cooler at the rear of the room to the top unloader conveyor and moved the rack back to the correct position. With the assistance of Mr Racz, who had separately climbed up the front of the machine at the front of the room, the pursuer pushed and manually repositioned the unloader pusher bar to the home position in line with the sensor. The pursuer then descended the machine at the rear of the room to floor level. Mr Racz separately descended the machine at the front of the room to floor level.

[20] There was always some bread on the floor when maintenance work was being carried out. This could be from 2-3 loaves up to the whole floor being covered such that the floor could not be seen. The defenders' management were aware of bread regularly being on the floor of the room.

[21] At the time of the pursuer's accident there was bread in the room to a level of about one layer. The bread covered about 50% of the floor area and about 50% of the floor area was

clear of bread. The pursuer did not have to stand on bread to reach the far end of the room in order to access the P2 cooler.

[22] The pursuer descended the P2 cooler from the top unloader conveyor to the lower loader conveyor. The pursuer then lowered his left leg to the ground, placing his left foot on the floor which had an even surface and not covered with bread. The pursuer brought up his right leg over the pusher bar from a kneeling position in order to lower his right leg down to the floor and placed his right foot on the floor. As he did so the pursuer shifted weight on his left knee sustaining injury. The accident happened while the pursuer's left foot was on the floor.

Findings in fact and in law

[23] The pursuer has failed to prove on a balance of probability the accident on 29 September 2016 happened as averred on record.

[24] The pursuer has failed to establish fault on the part of the defenders on the balance of probability.

[25] The defenders are entitled to decree of absolvitor.

[26] The pursuer is found liable to the defenders in the expenses of the cause as taxed.

Mr Angus MacLean, consultant orthopaedic surgeon, is certified as a skilled witness. As addressed at the conclusion of the proof sanction is granted for the employment of junior counsel for the action.

Note

[27] The location of the accident, the description and operation of the Plant 2 cooler and the reactive maintenance task being undertaken by the pursuer at the time were not in issue. The circumstances in which the pursuer sustained injury were disputed.

[28] The main issues to be determined on liability were (a) what bread was on the floor at the time of the pursuer's accident and (b) what was the position of the pursuer's left foot at the time of the accident. There were competing accounts of the amount of bread on the floor between the pursuer and Mr Racz.

Submissions

[29] Parties submitted written submissions at the conclusion of the proof which were expanded upon at a hearing. I refer to the written submissions for their terms.

Pursuer

[30] The motion for the pursuer was to grant degree for £25,000 with expenses. There was a sharp dispute on the facts. The pursuer was a credible and reliable witness. The pursuer's evidence of the amount of bread on the floor and his account of the circumstances of the accident should be accepted. The accident occurred when the pursuer came down from the P2 cooler and that as the pursuer brought down his left leg to the floor, his left leg stood on waste bread which covered the floor to a significant height. The pursuer's left knee gave way and the pursuer sustained injury. The pursuer should be preferred to the evidence of Mr Racz who gave a stilted performance as a witness.

Defenders

[31] The motion for the defenders was to grant decree of absolvitor in favour of the defenders with expenses. The onus of proof was on the pursuer. The pursuer had given a different version of the incident at proof to the version of events given within 5 days of the incident. The correct version was accurately recorded in the agreed minutes of the investigation meeting on 4 October 2016, production 6/5/11. The incident did not happen at height but at ground level. The pursuer's left foot was on the ground at the time of the incident. The witness Mr Racz should be preferred to the pursuer.

The Law

[32] Parties were agreed as to the law. The pursuer claims damages at common law. The duties incumbent on the defenders as employers were to take reasonable care, to provide a safe place of work and to devise, institute and maintain a safe system of work. The defenders required to carry out a suitable and sufficient risk assessment for the task of re-setting the P2 cooler following a breakdown. The defenders required to supply suitable work equipment and provide adequate training and instruction for the purposes of health and safety to employees.

Liability issues

(a) *what bread was on the floor at the time of the pursuer's accident?*

[33] On record the pursuer averred at statement of facts 4:

“...the pursuer discovered that the floor of the room was covered in loaves which had come off the production line...”

and

“...the pursuer made to go down to floor level... and as his left foot was positioned standing on bread lying on the floor the pursuer’s left knee gave way as he moved as his left foot was not positioned securely on the floor surface...”

[34] In evidence the pursuer described the scene which confronted him and Mr Racz at the door of the room. Both of them saw a huge amount of bread covering the entire floor area up to a minimum of the lower loader conveyor, a height of about 19-20 inches, an uneven surface, with the height of the bread being up to 26-28 inches towards the wall. The pursuer said it was “an unbelievable depth of bread.”

[35] On at least a couple of occasions in evidence the pursuer used the expression “wow!” to describe the reaction of himself and of Mr Racz to the scene in front of them in the room. There was so much bread on the floor that when the pursuer opened the door some of the bread tumbled out of the room. The pursuer described an extraordinary scene or as put by him “it was unheard of”.

[36] The pursuer said the level of the bread was so high he could not push the bread to one side and that he had no option but to go over the top of the bread from the entrance to the room to the rear of the room in order to reach the front of the P2 cooler where he intended to climb up the machine. The pursuer gave an elaborate description of his route. The bread was so deep the pursuer was trudging, like steps in snow, to cover the distance of about 12 feet to access the machine, holding on to parts of the machine to get his balance.

[37] In cross examination the pursuer made some attempts to depart from his earlier description of the level of bread on the floor: “most of the bread was 20 inches high” ... “I’m not saying all the bread was 20 inches high” ... “most of the bread was at the lower level of the conveyor but there could be hollows and indents” ... but the pursuer was unconvincing by what he said.

[38] Mr Racz gave a different description of what he saw in the room. There was bread on the floor to a level of about one layer to the left-hand side of the floor but a clear path to the right-hand side. The bread covered some 50% of the floor. Mr Racz could see 50% of the floor. On entering the room there was an initial area of about 4 feet x 4 feet where Mr Racz accessed the P2 cooler. The bread covered 50% of that floor area. There was then a narrower corridor of floor adjacent to the machinery and structure of the P2 cooler extending for about 6 feet. There was hardly any bread on the floor in that area. There was then a further area of about 4 feet x 4 feet where the pursuer accessed the P2 cooler. That area of floor was covered with bread to the extent of 50% with one layer of bread. These two accounts of bread on the floor cannot be reconciled. It is necessary to consider what other evidence was available as to which account was the more likely.

[39] Counsel for the pursuer sought support for the pursuer's account from the medical report for Mr MacLean, consultant orthopaedic surgeon, dated 30 September 2017, production 5/2/6. The terms of that report were agreed. Under the heading "circumstances of accident" the pursuer had told Mr MacLean he had to stand on waiting bread which was 2 feet deep. That account was given by the pursuer some 13 months post-accident and did not assist the court in determining what bread was on the floor at the time of the accident.

[40] There was another source of evidence being the Copy Accident Investigation Minutes – Meeting 4 October 2016 ("the minutes"), production 6/5/11. Paragraph 4 of a Joint Minute of Admissions for parties ("Joint Minute") states:

"That 6/11 of process is a record of an accident investigation meeting held on 4 October 2016 and accurately records what was said".

[41] The accident occurred on the evening of Thursday 29 September 2016. That meeting took place on Tuesday 4 October 2016, about five days later. While in evidence the pursuer

disagreed with aspects of what was recorded of the meeting that was not explored further given the agreement as to the accuracy of the minutes recorded in the Joint Minute tendered by counsel at the start of the first day of proof.

[42] The following statements are recorded in the minutes:

- The floor was covered in bread;
- I stepped down onto the bread;
- There was bread on the floor;
- You said that the floor was uneven with the bread;
- Your left leg was stationary on the floor; the floor was uneven with bread.

[43] The pursuer's account in evidence was inconsistent with the agreed accurate record of what he said had happened, at a meeting within days of the index accident. The pursuer accepted the description of the accident in the minutes was not the same as what he had said in evidence. The pursuer's position was that the minutes of the meeting were wrong.

[44] The minutes are consistent with the evidence of Mr Racz, that there was bread on the floor but not as described by the pursuer. Mr Racz was a credible and reliable witness.

[45] If the scene confronted by the pursuer on the evening of the accident was as described by him in evidence that would have been recorded in the minutes. The pursuer's evidence of what bread he saw on the floor at the time of the accident was unconvincing and not credible. That account is rejected as not credible or reliable. The agreed minutes and the evidence of Mr Racz about what bread was on the floor are preferred where inconsistent with the evidence of the pursuer.

[46] Accordingly, on a balance of probability, while there was bread in the room to a level of one layer that bread only covered 50% of the floor area and 50% of the floor area was clear

of bread. There would have been no difficulty for the pursuer to clear bread had that been necessary in order to gain access to the P2 cooler.

(b) what was the position of the pursuer's left foot at the time of the accident

[47] On record the pursuer averred at stat. 4:

“...he then climbed down towards the ground and as his left foot was positioned standing on bread lying on the floor the pursuer's left knee gave way as he moved as his left foot was not positioned securely on the floor surface”.

[48] In evidence the pursuer described being ready to go down to the floor from standing on the lower loader conveyor, putting his left leg down, that he could feel his left leg going through the bread, that he felt a crunch, that he actually cried out and had a tear in his eye, that he was just in agony, that his left knee just gave way, that his right knee was taking the strain and that he could hardly put any pressure on his left knee as it was so painful.

[49] In expanding on that description the pursuer said in evidence:

- I had to stand on the bread
- I went to stood on loaves
- My left leg was in contact with lots of bread, deep bread, hard, soft, just piles and piles of bread...
- I knew I wasn't on the floor despite my weight
- I just went to bring my right leg down and I felt my (left) knee tearing
- I was at the lowest point, on bread...

[50] There were no witnesses to the actual accident. The minutes, production 6/5/11, recorded the following:

- I stepped down onto the bread
- I was on the deck. There was bread on the floor;

- My left leg was on the ground, my right leg was kneeling and...
- Where were you? Left leg on ground. My right leg was kneeling and I was bringing it up and then I heard a click.
- (LM – Lorraine Macmillan HR assistant - stands up and demonstrates to Paul) Did you have your left leg stationary on the ground and you were pulling your right leg up and you went over on the left side of your leg and then you heard a pop? Yes
- (LM stands up and demonstrates to Paul) Can I clarify again Paul? Your left leg was stationary on the floor, the floor was uneven with bread. You brought your right leg up as you were kneeling your weight shifted to the left and then you heard a pop... Yes

[51] There are inconsistencies in the pursuer's account of what was recorded at the meeting on 4 October 2016 with his account in evidence. These inconsistencies cannot be reconciled. I have already concluded the pursuer was not credible or reliable as to the amount of bread on the floor at the time of the accident. In the course of that meeting the pursuer repeatedly agreed his left foot was on the ground, on the deck, on the floor. The minutes recorded that on 2 separate occasions in the course of the meeting the pursuer confirmed to management his left foot was on the floor.

[52] In submissions counsel for the pursuer referred to the pursuer bringing his left foot down to the ground and then coming into contact with bread. I have rejected any such suggestion as not credible. The minutes are agreed as accurate. That account of the position of the pursuer's left foot recorded at the meeting some 5 days post-accident is to be preferred. At the time of the accident the pursuer's left foot was stationary on the floor.

[53] There was also the evidence of Ian Thurston, the engineering and processing manager, who spoke to the pursuer shortly after the accident when the pursuer was in the workshop receiving treatment from the first aider. Mr Thurston asked the pursuer what had happened. The pursuer told Mr Thurston he had just stepped down onto the floor when his leg gave way. The pursuer made no mention to Mr Thurston of the state of the floor, that the whole of the floor was covered with bread to a height if between 19-20 inches and up to 26-28 inches. Mr Thurston was a credible and reliable witness. I have rejected the evidence of the pursuer about where his left foot was placed at the time of the accident as neither credible nor reliable.

[54] The pursuer had his left foot on the floor of the room when the accident happened. There was bread on the floor in the room which would have been uneven but only to the extent of about 50%. The pursuer has not proved on a balance of probability he sustained any injury to his left knee when he was standing on bread. The pursuer sustained injury as he brought up his right leg from a kneeling position on the lower loader conveyor over the pusher bar in order to lower his right leg down to the floor. It was the shifting of weight to the left leg during that manoeuvre, while the pursuer's left leg was on the ground, that caused the injury to the left knee and not as averred by the pursuer on record.

Decision

[55] In order to succeed the pursuer required to prove that (a) the accident happened as set out in the pleadings, (b) the pursuer sustained injury, and (c) the accident was caused by the fault of the defenders.

[56] In all the circumstances and for the reasons stated the pursuer has failed to prove on a balance of probability the accident on 29 September 2016 happened as averred on record. The pursuer has failed to prove fault on the part of the defenders. The action has failed.

[57] The defenders are entitled to decree of absolvitor. Parties were agreed expenses should follow success. The pursuer is found liable in the expenses of the cause as taxed. Mr Angus MacLean, consultant orthopaedic surgeon, is certified as a skilled witness. As addressed at the conclusion of the proof sanction is granted for the employment of junior counsel for the action.