Neutral Citation Number: [2012] EWCA Civ 642

Case No: B3/2011/2127

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM CENTRAL LONDON CIVIL JUSTICE CENTRE**
**HIS HONOUR JUDGE COWELL**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2012

**Before :**

**THE RIGHT HONOURABLE LORD JUSTICE WARD**
**THE RIGHT HONOURABLE LORD JUSTICE LONGMORE**
and
**THE RIGHT HONOURABLE LORD JUSTICE PATTEN**

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**Between :**

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| **ALI GHAITH** | **Appellant** |
| **- and -** | |
| **INDESIT COMPANY UK LIMITED** | **Respondent** |

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(Transcript of the Handed Down Judgment of
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**Mr Muhammed Haque** (instructed by **Hafezis**) for the **Appellant**
**Mr Andrew Peebles** (instructed by **Plexus Solicitors**) for the **Respondent**

Hearing dates: 8th May 2012

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Judgment
As Approved by the Court

**Lord Justice Longmore:**

**Introduction**

1. Mr Ali Ghaith is an employee of Indesit Company UK Ltd ("Indesit"), the well-known suppliers of white goods such as washing machines, refrigerators and dishwashers. He was one of a number of field service engineers employed to visit homes to repair and maintain white goods previously sold to customers and he was provided with a van full of machine parts and he would drive that van around his designated area which was near Peterborough. Once a year Indesit arranged a stock taking of the equipment in his van and one such stock take occurred on 2nd March 2007. Mr Ghaith's supervisor, Mr Mark Leversedge, arrived on that day and they did the stock take together. The method used was that everything was taken out of the van, scanned and then noted on a computer record kept by Mr Leversedge on his hand-held computer. Large items, such as washing machine drums had to be lifted out and placed on the ground or on a trolley for examination; smaller items were lifted out and put in what has been called a "tote box" and then placed on the trolley. The majority (70%) of the lifting and moving was done by Mr Ghaith, while Mr Leversedge mainly occupied himself by doing the necessary scanning and recording of the relevant items.

2. This operation took most of the day, beginning at around 9.30 with 4 short breaks. All of a sudden at about 4.00 or 4.30 Mr Ghaith felt a severe pain in his back and he made a noise or gasp or something of a cry. He was stuck in a position holding a box Mr Leversedge took the box from him and put it on the trolley. The judge could only make limited findings about how the injury occurred. He said (para 20):-

> "My finding is that the injury must have occurred when the claimant was lifting something, not necessarily a heavy item but probably lifting awkwardly, whether the item was heavy or not. It probably was when he was moving a tote box, whether it was a small one or a large one, I don't know (it may well have been a small one), that is, from the floor to the trolley with some things in it. Again it is impossible to know what weight it was, the weight may not have been substantial. That I think is as far as I can take it in terms of findings of fact. I would go on to say the very fact that the claimant had been working for some hours probably did not itself cause the injury, though he thinks it did. But it may account for that moment of inattention giving rise to the awkward movement."

3. Mr Ghaith was able to continue working to finish the stock take but he was in some considerable pain. He was due to go on holiday to Egypt the next day and was able to do so. But when he returned he was unable to go back to work for many weeks. He has happily now recovered so far as possible. In fact he already had a somewhat weak back, although he had not previously revealed that fact to Indesit, when he began his employment. He has now sued Indesit for personal injury alleging a breach or breaches of the Manual Handling Operations Regulations 1992 ("the Regulations"). It is agreed that the injury Mr Ghaith sustained has accelerated the worsening of his back condition by about 2 years and that liability (if any) will not be more than £60,000.

4. Regulation 4 sets out the duties of the employer in the following way:-

> "(1) Each employer shall –
>
> a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or
>
> b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured –
>
> i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule;
>
> ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable; and
>
> iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on –
>
> (aa) the weight of each load …."

5. Stock taking is (as the judge held (para 32)) an inevitable part of the job of any employee who is entrusted with a van full of spare parts. If all the items are to be taken out of the van, there is (almost) inevitably a risk of injury in the course of lifting and moving them. Indesit were therefore as the judge held (para 35) under the obligation to make a suitable and sufficient assessment of the manual handling operations to be undertaken. Indesit claimed (and the judge held (para 41)) that they had done this by issuing a repair and maintenance risk assessment in August 2006 or a manual handling risk assessment in December 2006, which related to the loading and handling of tote boxes in loading and despatch areas. The first assessment related to the work done in people's homes. The second assessment noted the risk that tote boxes may be filled with too many heavy items and that the boxes are themselves stacked 4 high on pallets. There is an instruction that no box should exceed 25 kilos in weight and that each box should have a warning label to advise the handler to check the weight of the box before attempting to lift it.

6. A new risk assessment was made in May 2011. This did single out stock taking as a separate activity and recommended (1) that heavy weights should be left in the van and scanned there and (2) that lifting and moving of items out of the van should be shared between the service engineer and supervisor and scanning should only take

place after that removal. It also records that the stock take was a process which took 2 hours to complete, "although there are no time constraints to this activity".

**The Judgment**

7. Having made his findings of fact in relation to how the accident occurred, the judge accepted (para 33) that the risk of injury during stock taking had to be assessed. He then considered Mr Ghaith's argument that the assessment which had been done took no account of the risk of injury incurred from repetition of the lifting movements throughout the process. This part of the judgment echoes the rival arguments of the parties about how the accident occurred; Mr Ghaith said the back injury happened because he had been repeating the same sort of movement for several hours which was too long, while Indesit argued that the injury occurred when Mr Ghaith was lifting two tote boxes at once when he should only have been handling one such box at a time. The judge rejected Indesit's versions of events and, although there is a respondent's notice which seeks to resurrect that version (if the judge's findings as to injury are set aside) that would be impossible for this court to do, not having heard the evidence. The judge did not accept Mr Ghaith's account either, although he did say (as already quoted) that the length of time over which he had been doing the handling required by the stock taking may have accounted "for that moment of inattention giving rise to the awkward movement". The judge was obviously doing the best he could on the evidence and I would not be minded to set aside his findings on how the injury occurred. One is just left, therefore, with the finding that, because Mr Ghaith had been handling and lifting for a long time, a moment's inattention caused him to lift or move a tote box awkwardly, causing an injury to a back which was already somewhat vulnerable.

8. Having held that an assessment was necessary, the judge then held (para 41) that the December 2006 assessment was suitable and sufficient within Regulation 4(1)(b)(i). Mr Peebles for Indesit says that Mr Kostyrka, Indesit's Health and Safety Officer, actually relied on the August 2006 assessment for this purpose but no doubt Indesit is entitled to rely on either or both of the assessments. That, as the judge appreciated (para 37), was not the end of the matter because, even if the assessment was sufficient, it was necessary to consider whether Indesit had taken appropriate steps to reduce the injury from manual handling operations to the lowest level reasonably practicable pursuant to Regulations 4(1)(b)(ii). As the judge also appreciated (para 33), even if he had held the assessment to be defective, that would not necessarily be the end of the matter since the inadequacy of a risk assessment could only ever be an indirect cause of an injury.

9. So the judge (para 45) considered whether Indesit had taken steps to reduce any injury to the lowest level reasonably practicable and he then considered Mr Ghaith's contentions (1) that he should have been given more training than he had been, (2) that the risk could have been reduced if the lifting and moving had been shared equally with Mr Leversedge and (3) that the stock taking should have been conducted over two days. He decided that none of those steps would have made any difference and concluded simply (para 46):-

> "The claimant had been trained, he knew how to lift, and it seems to me there is nothing more that could have been done on the part of the defendant. So I am not satisfied that it can be

said that the injury which the claimant suffered was caused by a breach of any particular provision in Regulation 4. I think that is the end of my judgment."

**Submissions**

10. Mr Muhammed Haque for Mr Ghaith submitted:-

    i) that it was for the employer to demonstrate that the risk of injury was at the lowest level reasonably practicable, not for the employee to suggest things which the employer should have done but did not do;

    ii) that the judge failed to recognise that the burden of proof was on Indesit to show that they had reduced the risk of injury to the lowest level reasonably practicable;

    iii) that, in practice, the burden is almost impossible to discharge and had not been discharged in this case;

    iv) that, in addition to the matters which the judge considered, the stock taking could and should have been conducted over a shorter period (e.g. 2-3 hours) or, if longer, with appropriate breaks and/or the heavier items could and should have been checked in the van;

    v) so far as relevant, that neither the August nor the December 2006 assessments were suitable or sufficient.

11. Mr Peebles submitted:-

    i) that it was relevant to decide whether the 2006 assessments were suitable and sufficient and the judge was correct to hold that they were;

    ii) that such assessments rightly decided that any relevant risk of injury could be alleviated by training (which had been provided) and Indesit were, therefore, in a strong position to defend itself under Regulation 4(1)(b)(ii);

    iii) that, in practice, there is an evidential burden on a claimant to suggest steps which could relevantly have been taken to reduce the risk of injury;

    iv) no steps had been suggested which would, in fact, have made any difference;

    v) therefore the obligations of the 1992 Regulations had been complied with.

**The law in relation to the Regulations**

12. This is not virgin territory. In Egan v Central Manchester NHS Trust [2009] ICR 585 a nurse used a mobile hoist to transport a patient into a bath. When she was manoeuvring the forks of the hoist underneath the bath, the hoist snagged on a plinth under the bath and caused the nurse to suffer a jerking injury to her back. No risk assessment in relation to mobile hoists had been carried out but the judge held that the accident would have occurred even if there had been an adequate and sufficient risk assessment. This court held the requirement in Regulation 4(1)(b)(ii) was separate

from and additional to the requirement to carry out a risk assessment in Regulation 4(1)(b)(i) (although they were related requirements). It also held that the burden of proof was on the employer to prove that it had taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. Smith LJ (with whom Sedley and Keene LJJ agreed) said:-

> "20. It is clear from the judgment that the judge did not give separate consideration to regulation 4(1)(b)(ii). In my view, he should have done because the requirements of that regulation are separate from the additional to the requirement to carry out a risk assessment. Of course, the two are related, in that, a risk assessment will show the employer what steps it ought to take in order to reduce the risk of injury to the lowest level reasonably practicable. Also, if an employer has carried out a careful and thorough risk assessment and has taken all the steps which appeared from that assessment to be appropriate to reduce the risks involved to the lowest level reasonably practicable, the employer would be in a strong position to defend itself under regulation 4(1)(b)(ii).
>
> 21. However, where, as here, no risk assessment has been carried out, the judge ought to focus on the regulation which imposes a duty to take positive action to reduce risk, regulation 4(1)(b)(ii). The judge would approach that regulation on the basis that, once it has been shown that the manual handling operation carries some risk of injury, the burden of proof is on the employer to plead and prove that it has taken appropriate steps to reduce that risk to the lowest level of reasonably practicable.
>
> 22. Accordingly, in my view, it was not sufficient merely for the judge to examine whether a risk assessment would have made any difference. Having said that, the questions Judge Tetlow asked himself did more or less cover the same ground as would have been covered by a separate consideration of regulation 4(1)(b)(ii). It is true that the judge did not refer to the burden of proof and it appears to me, from his reference to the lack of particularity in the claimant's pleading, that the judge may, in his own mind, have placed the burden on the claimant. If he did, that would have been wrong. I accept, of course, that, in practice, if a claimant wants to allege that there were steps which could and should have been taken and the employer says there were none, there will be an evidential burden on the claimant to advance those suggestions, even though the legal burden will remain on the employer. So, although it was not in my view correct, the judge's approach was capable of leading him to the right conclusion. The question is whether or not his assessment of the various suggestions was right, bearing in mind that the claimant had established that the operation in question carried a risk of injury

> and it was therefore for the employer to show that it had taken appropriate steps to reduce that risk to the lowest level reasonably practicable."

**The Assessments**

13. The difficulty with Indesit's case under this head is that, on their face, neither the August nor the December 2006 assessments dealt with stock taking at all. The August assessment described the workplace as

> "Consumers' Homes & Retailers"

and the Task/Activity as

> "Repair and Maintenance of Domestic Appliances."

It identified 13 hazards one of which was "Manual Handling" including "strains and sprains from lifting, pulling, pushing and general handling of appliances and component parts". It then described the control measure as, inter alia:-

> "Manual handling training provided for all engineers."

14. This is not an assessment of manual handling in relation to stock taking. Manual handling of equipment at the homes or premises of consumers or retailers will be considerably less risky than at a stock taking because of the number of items which will be involved and the period over which manual handling of such items will take place.

15. The December assessment described the workplace as

> "Loading & Despatch Areas"

and the Task/Activity as

> "Loading and Handling of Tote Boxes."

Although this was the assessment which the judge regarded as complying with regulation 4(1)(b)(i), it is in fact even less relevant to stock taking because, although the tote boxes no doubt will contain a number of items, it is unlikely that at a particular loading or despatch area anything like the full complement of items in a van will be loaded or despatched at any one time. It is also clear that the hazards identified are confined to the manual handling of tote boxes rather than larger items of equipment. Training was once again emphasised.

16. The relevant feature of stock taking is, of course, the risk of injury to the back (or other parts of the body) due to handling items of equipment over what may be a lengthy period. That risk is just not addressed in the 2006 assessments.

17. The judge accepted the evidence of Mr Kostyrka, Indesit's Health and Safety Officer, that there were no separate risks arising out of the repetition of the lifting operations and that risks arising from the way things are lifted could be dealt with by training. It may well be that there were no separate risks arising from repetition as such. Lifting

and moving of items of different weight is, no doubt, not inherently repetitive in the sense that repetitive strain injury can, for example, be sustained by shorthand typists or computer operators. But lifting and moving items of equipment of different weights over a long period is a different matter. It is not the repetition but the length of time which the operation of stock taking takes which, to my mind, eluded the judge when he held that the 2006 assessments were suitable and sufficient.

18. It is noteworthy that by May 2011 Indesit had come to realise not merely that stock taking needed a separate assessment but that such assessment assumed or decided that the process should take no more than 2 hours.

19. For these reasons, I cannot agree that there was any suitable or sufficient assessment of the relevant risk by Indesit, who cannot therefore rely on Smith LJ's dictum that, if such an assessment has been carried out and if the steps recommended by such assessment have been taken, the employer will be in a strong position to defend itself under regulation 4(1)(b)(ii).

**Appropriate steps to reduce risk to lowest reasonable practicable level**

20. Here there is no doubt that the onus is firmly on the employer to show that he took all reasonable practicable steps to reduce the risk. It is a burden that is inevitably difficult to discharge. Of course it is, as Smith LJ says, open to an employee to suggest ways in which the risk could have been reduced (and Mr Ghaith has done so) but there is no obligation on the employee to do so.

21. In paragraph 45 the judge considered various precautions which could have been taken but he omitted properly to consider what, to my mind, is the most obvious precaution namely that there should be regular breaks of reasonable length in the stock taking operation for the benefit of the employee and perhaps also the supervisor. This is an obvious precaution and is reasonably practicable.

22. The judge did consider whether re-training should have been provided and whether the lifting should have been shared between Mr Ghaith and Mr Leversedge as a 50/50 basis rather than a 70/30 basis, but he understandably did not think much of those suggestions. He then did consider a suggestion that the operation should have been conducted over two days but thought that would not have made any difference. If by that he meant that having regular breaks meant that the operation would take 2 days and that no difference would have resulted I can only say that I disagree with him. But I cannot see that it would be necessary for the operation to be spread over 2 days; if it were necessary then so be it. The puzzle is that the May 2011 assessment thinks the operation should take only 2 hours. This is, at any rate, strong support for the suggestion that there should be a break after 2 hours or so, if the operation is likely to last substantially longer than that.

**Causation**

23. This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the

injury would still have occurred e.g. if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury.

**Contributory Negligence**

24. On the basis that Indesit are to be liable, Mr Peebles argued, on the basis of the judge's finding that a moment of inattention had given rise to the awkward movement which caused the injury, that Mr Ghaith had contributed to his loss and that there should be some deduction from the quantum of Indesit's liability. A momentary inattention will not usually justify any finding of contributory negligence, at any rate so long as the claimant is not in charge of a dangerous machine such as a motor car. I would not make any deduction in this case.

**Conclusion**

25. I would therefore allow this appeal and remit the matter to the County Court for an assessment of quantum.

**Postscript**

26. It is a great pity that Indesit did not pursue the option of mediation rightly encouraged by Toulson LJ when he gave permission to appeal. Mr Peebles informed us that it was not pursued because the costs had already exceeded the likely amount in issue. This is an inadequate response to this Court's encouragement of mediation since a full day in this Court will inevitably result in a substantial increase in costs. Indesit's reaction is all too frequent and the Court has, since April of this year, decided that any claim for less than £100,000 will be the subject of compulsory mediation. It is devoutly to be hoped that such mediation will mean that these comparatively small claims will not have to be adjudicated by this Court so frequently in future.

**Lord Justice Patten:**

27. I agree.

**Lord Justice Ward:**

28. I also agree.

29. I fully endorse Longmore LJ's postscript. When this Court grants permission to appeal, it does so because there is a real prospect of success. That does not mean that the appeal *will* succeed, but it does mean that the appeal is by no means hopeless. That should tell both parties that there is still all to play for. If they have any sense, they will therefore heed a recommendation to mediate because the costs of mediation are likely to be exceeded by the costs of the appeal by a significant margin. It is not enough, as Mr Peebles suggested, that there had been some attempt in the correspondence between solicitors to settle the case. The opening bids in a mediation are likely to remain as belligerently far apart as they were in correspondence but no-one should underestimate the new dynamic that an experienced mediator brings to the round table. He has a canny knack of transforming the intractable into the possible.

That is the art of good mediation and that is why mediation should not be spurned when it is offered.