Neutral Citation Number: [2024] EWCA Crim 627

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202300689/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 22 May 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CHEEMA-GRUBB DBE
HIS HONOUR JUDGE DENNIS WATSON KC
(Sitting as a Judge of the CACD)

REX
V
W.M. MORRISONS PLC

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Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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MR R MATTHEWS KC and MR C FERGUSON appeared on behalf of the Applicant
MR R ATKINS KC and MR M JACKSON appeared on behalf of the Crown

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**J U D G M E N T**

1. LORD JUSTICE WILLIAM DAVIS: On 2 February 2023 in the Crown Court at Gloucester, WM Morrisons Supermarkets was convicted of three offences:

   Count 1. Failing to ensure, so far as is reasonably practicable, the health, safety and welfare at work of employees, contrary to section 2 of the Health and Safety at Work Act 1974.

   Count 2. Failing to carry out a suitable and sufficient assessment of the risks to the health and safety of employees, contrary to the Management of Health and Safety at Work Regulations 1999.

   Count 3. Failing to review any assessment of the risks to the health and safety of employees, contrary to the Management of Health and Safety at Work Regulations 1999.

2. On 17 March 2023 the company was fined £3.5 million on count 1. No separate penalty was imposed on counts 2 and 3.

3. The company applied for leave to appeal against those convictions. Leave was refused by the single judge. The company now renews its application for leave to appeal.

4. The company is represented by Richard Matthews KC and Craig Ferguson. The Respondent Prosecutor is represented by Richard Atkins KC and Mark Jackson. All counsel appeared at the trial. We are grateful for the written and oral submissions that we have received.

5. The company is a well-known operator of large supermarkets. It operates a supermarket in Tewkesbury. In October 2014 Matthew Gunn (who was then aged 27) was employed at the store. He had begun work there in 2004. He had suffered from epilepsy since he was a young child. However he did all that he could to live as normal a life as possible. The company, knowing of his disability, was willing to employ him.

6. Matthew Gunn suffered from two types of seizure. They varied in severity. Typically he

would lose his sight for a minute or two and become unsteady on his feet. The more serious type of seizure would involve him shaking and then collapsing. Whatever the severity, the seizures would come on without warning. His symptoms had deteriorated over time.

7. By October 2014 Matthew Gunn was employed as a shelf replenisher in the grocery section of the store. He had worked for a time in the canteen before it was determined that it was not safe for him to work in an environment with cookers and deep fat fryers.
8. Every employee at the store was subject to company rules set out in an employee handbook. One rule related to what an employee had to do with their personal property whilst at work. All employees were provided with a locker into which they were required to put their personal property. They were not allowed to keep with them money, cigarettes or mobile telephones. The lockers were in an area on the first floor, accessible by a staircase. Employees would place their property in the relevant locker at the beginning of each shift and then go about their work, principally on the ground floor of the store. At the end of the shift they would collect their belongings. If an employee wanted to have access to personal property during any break during their shift they would go up to their locker and fetch it. In short, the employees would have to go up and down the stairs on every occasion that they needed to go to their locker. The stairs were not faulty in any way, nor did they fail to comply with relevant regulations relating to staircases. However there was a large void down into the stairwell, as we have observed from photographs provided to us.
9. The company was well aware of the issues created by Matthew Gunn's epilepsy. From time to time his working environment was reviewed by reference to his disability. In particular, on 10 June 2014 there was a meeting between Matthew Gunn, his mother, the

store personnel manager and the store occupational health officer. In the course of the meeting, which was described as a formal occupational health assessment, Mrs Gunn raised her concerns about the stairs and the risk to her son should he have a seizure whilst on the stairs. The occupational health officer appeared to share those concerns. She suggested that Matthew Gunn's locker could be moved to the ground floor, there being room for that to happen. Self-evidently that would have removed the necessity for Matthew Gunn to go up the stairs. It was left that the company's group health and safety officer would be contacted about moving the locker. Whether any contact was made is not known. What is clear is that the locker was not moved.

10. In addition to this formal meeting, the company at this time was aware of problems being experienced by Matthew Gunn on the stairs because work colleagues expressed their concerns to managers at the store. There were occasions when colleagues found Matthew on the stairs having had a seizure.
11. The company's procedures provided for person specific risk assessments. According to those procedures they were mandated for any employee with a disability. We have seen examples of such assessments in respect of other employees. No such assessment appears to have been carried out in relation to Matthew Gunn.
12. On 25 September 2014 Matthew Gunn fell from the stairs onto the floor of the stairwell. No one was with him when this happened. The reasonable inference is that he had had a seizure which caused him to fall. He suffered very serious head injuries. Despite expert medical treatment he died from those injuries on 7 October 2014.
13. The prosecution case at trial was that the health and safety of Matthew Gunn was put at risk because he was required to use the stairs in order to get to his locker. He was someone whose disability meant that using the stairs created a danger of falling from the

stairs. There was a reasonably practicable step which could have been taken, namely, to place the locker somewhere on the ground floor. The prosecution case further was that there should have been a risk assessment in relation to Matthew Gunn. That assessment should have been reviewed from time to time. No such assessment was ever produced in the course of the criminal proceedings by the company. Therefore the only sensible conclusion was that none existed.

14. In very brief terms, the defence case was that an employee with epilepsy was not exposed to a relevant risk. Any risk to which such an employee was exposed when using the stairs arose from a routine activity associated with life in general. It was not compounded or altered by work activities. The company had no duty under the 1974 Act in relation to use of the stairs vis-a-vis Matthew Gunn beyond that owed to all other employees. The stairs were safe for ordinary use. In that event there was no breach of duty. Since there was no relevant work place risk to which employees with epilepsy were exposed, there was no requirement for any risk assessment to be carried out or reviewed.

15. At the trial a submission of no case to answer on all counts was made on behalf of the company. The company relied on the propositions we have just rehearsed. The judge ruled that there was a case to answer. She concluded that there was a prima facie case of a relevant risk to an employee suffering from epilepsy. The evidence demonstrated that there were reasonably practicable steps which could have been taken to remove the risk. Since there was a risk, a risk assessment was required.

16. In her route to verdict given to the jury the judge posed five questions in relation to count 1. First, did the stairs expose employees with epilepsy of the severity as suffered by Matthew Gunn to a risk to their health and safety? Second, was any such risk one that arose from a routine activity associated with life in general? Third, if it was such a risk,

was it compounded or significantly altered by work activity? Fourth, was the risk to which Matthew Gunn was exposed a relevant risk? Relevant risk was defined in the written legal directions as a risk materially related to the activities of the employer. The written directions further required the jury to find that the risk was not fanciful or trivial. Fifth, had the company done all that was reasonably practicable to ensure the safety of Matthew Gunn?

17. The route to verdict in relation to counts 2 and 3 asked the jury to consider whether the company had a duty to undertake and review a risk assessment to Matthew Gunn.

18. In his written submissions, Mr Matthews argues that the judge erred in allowing the case to go to the jury. As the judge directed the jury, a relevant risk for the purposes of health and safety legislation is one that is materially related to the activities of the employer. Here, the risk was the risk that an epileptic member of staff would fall from the stairs due to their medical condition. That condition was not an occupational health condition. It was incapable of being materially related to the company's activities. The risk of falling on stairs was an everyday risk that epileptic people face all the time. The staircase in this instance presented no risk to ordinary users of it. It is argued that it cannot be sensibly suggested that vulnerable employees should be restricted from the use of a staircase of this kind.

19. Orally, Mr Matthews developed those submissions. He said the 1974 Act is the starting point for any consideration of an employer's duties. The regulatory scheme which has been introduced pursuant to the Act is extensive and serves to explain the general duty in section 2. For instance, and at the risk of over-simplification, a staircase used as a means of access is required to meet the terms of the relevant building regulations. If it does so, it will be a safe means of access. Mr Matthews argues that the term "control measures" is

a term of art within the regulatory framework. Proper consideration of that framework as it applied in this case should have led to the conclusion that, in so far as required, such measures had been taken.

20. He submitted that, in relation to risk assessment, the Management of Health and Safety at Work Regulations 1999 set out a comprehensive framework for the provision of such assessment. That framework does not include person-specific risk assessments.

21. Mr Matthews also submits that the duty created by section 2 of the 1974 Act did not involve any duty to review and identify measures arising from the risk which came from Matthew Gunn's use of the stairs. This was an issue to be considered as part of reasonable adjustments as required by the Equality Act 2010. In that context a person-specific risk assessment was not required. The proper route was reasonable adjustments, a process which involves the consent of the disabled employee.
Mr Matthews suggests, at least as a possibility, that, were a disabled employee to be treated differently, the company potentially would be open to a finding of unlawful discrimination. He argues that the ambit and overlap of the 1974 Act and the Equality Act provisions is a matter of law on which the judge ought to have ruled. In her failure to do so, and in leaving the matter to the jury, that left an issue of law to be determined by the jury which was wrong in principle.

22. In terms of authority, Mr Matthews relies in particular on R v Porter [2008] EWCA Crim 1271. In that case the duty arose under section 3 of the 1974 Act but the general principles set out in Porter apply equally to section 2. The context was a private school at which a very young child fell from steps leading down to a playground. The child suffered a head injury which required hospital treatment. It was an injury from which a full recovery could have been expected. The child tragically died in hospital due to an

infection.

23. Mr Matthews relies on various passages in the judgment of the court. At paragraph 13 the court referred to the expert evidence in that case:

> "... insignificant risks could be ignored, such as those arising from routine activities associated with life in general. He [the expert] pointed out the many risks to which young children are exposed at home and stressed what he regarded as the important feature that nothing had been identified in the construction or placement of the steps which showed that they in themselves constituted a risk of injury."

24. This court considered that the expert evidence was well founded. Mr Matthews says that it is apposite to this case.

25. In relation to the counts relating to risk assessment, Mr Matthews argues that there was no evidence called by the prosecution that demonstrated that a suitable risk assessment had not been conducted or reviewed.

26. With due deference to Mr Matthews' detailed arguments, our view is that this case was relatively straightforward. The fact that the staircase was safe for use by most members of the work force at the company did not alter the fact that it presented a risk to the safety of Matthew Gunn. He was employed by the company to work at the store. The company rule required him to use the staircase to gain access to his locker, which he was obliged to use to store his personal belongings. One can readily see why the rule existed. A store such as that operated by the company would wish to restrict the items in the possession of their employees whilst at work. Using a staircase might be a routine activity associated with life in general. In our view it was compounded here by the requirement placed on Matthew Gunn to use a staircase at his place of work for the purpose we have described. Going to his locker was a work activity. We say in passing it might also be said that the

existence of a large void down to the stairwell meant that use of this staircase was for Matthew Gunn more than routine activity.

27. We accept that the staircase did not present a risk to almost all members of staff at the store. In our judgment that is not the point. It created a material risk to the health and safety of Matthew Gunn. Section 2 of the 1974 Act imposes the duty on an employer to ensure the safety of "all his employees". If one or more employees are put at risk by the way in which the employer operates the business the duty arises. The issue of reasonably practicable steps then has to be considered. There can be no question but that such steps could have been taken in this case which were not. They would not have involved restricting the use of the stairs by a vulnerable employee; rather they would have involved allowing the employee to carry out his work activity without putting him at risk of falling from the stairs. We regard that as a perfectly sensible suggestion.

28. We do not consider that Porter is of the assistance to us that Mr Matthews submits. After a detailed review of the evidence, the conclusion of the court at paragraph 23 was:

> "In our view the evidence in the instant case was all one way. There was no evidence on which a jury properly directed could reasonably conclude that this child was exposed to risk by the conduct of this school. All the evidence suggested there was no risk, other than the risk that every time a child was left other than closely supervised that that child might go unsupervised down a flight of stairs. No one sensibly suggested that in every school or public building to which young children have access a child must be 'constantly supervised' (to use the words of the judge) when the child chooses to go downstairs."

29. The facts here were entirely different. There was ample evidence that the conduct of the company exposed Matthew Gunn to a real risk. In our judgment Porter establishes no principle beyond stating that a real risk must be real rather than fanciful for the duty to arise. As was said in R v Chargot [2009] 1 WLR 1, Porter was an exceptional case. The

court in Porter set out some factors which shall be considered in determining whether a real risk existed, such as whether there had been previous accidents or relevant incidents. The court did not attempt to provide an exhaustive list of factors, nor shall we. For our purpose it is sufficient to note that the event that led to Matthew Gunn's death was one that had been feared by his mother, by his work colleagues and by the company's occupational health officer, all those fears being made known to the company.

30. We do not consider that the questions posed to the jury required them to address any issue of law. The notion that Matthew Gunn's position in terms of his health and safety at his place of work was a matter to be considered under the provisions of the Equality Act 2010 is not tenable. The preamble to the 2010 Act sets out its purposes. It is concerned with how strategic government decisions must be made in order to reduce inequalities. It deals with discrimination and victimisation by reference to particular characteristics. It provides for information to be published in relation to equal pay between men and women. At no point is it concerned with the safety of persons in the work place. The Act does not refer to the Health and Safety at Work Act which had been in force for more than 35 years at the coming into force of the 2010 Act. Even its more limited predecessor, the Disability Discrimination Act 1995, post-dated the 1974 Act by over 20 years.

31. The grounds of appeal relating to counts 2 and 3 depend upon the proposition that because the prosecution did not call positive evidence that no risk assessment had been carried out, the case on those counts could not be proved. We consider that to be a bold submission given that the defence case, as it appeared from the defence statement, was that no assessment had been carried out because none was necessary. The jury heard from experts on both sides on this issue. As a matter of fact both said they had not seen

nor been provided with any risk assessments. The jury in our view was entitled to infer that there had been no risk assessment conducted or subsequently reviewed. The relevant issues were left to the jury in proper form to allow them to determine whether the counts were made out.

32. In his closing submissions, Mr Matthews said that this application gives rise to a fundamental point of general public importance. Whilst this case concerns section 2 of the 1974 Act, the provisions of section 3 and 4 are in similar terms relating to persons who are not employees. The proposition is that, if we find as a matter of law that the risks to someone suffering from epilepsy, as arose in this case, fall within the health and safety legislation, that will have far-reaching effects.

33. Mr Matthews makes that submission from the point of view of someone whose expertise in the field of Health and Safety Law is unrivalled. Therefore with respect to him and with some degree of diffidence we disagree. We have reached the conclusion we have by applying the ordinary English meaning to the terms of section 2 of the 1974 Act. The situation which faced the company in this case was unusual. It does not create any general precedent. The *overriding* duty in section 2 is explained and expanded in the regulatory regime. That does not mean that a particular set of facts must fall within that regime for the overriding duty to apply. Section 2(2) sets out particular matters to which the jury relates. That subsection begins with these words:

> "Without prejudice to the generality of an employer's duty under the preceding subsection, matters to which that duty extends include in particular ... "

34. There then follow the particular matters. We emphasize the words "the generality" of an employer's duty.

35. The single judge set out his reasons for refusing leave to appeal. They mirror those that

we have given, albeit rather more concisely. We have set our reasons out in more detail, out of deference to both counsel but in particular Mr Matthews who has argued the case before us. However we agree with the single judge's conclusions. It follows that we refuse this renewed application for leave to appeal.

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Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk