



Neutral Citation Number: [2019] EWHC 508 (QB)

Appeal Reference No: A36YM928

**IN THE HIGH COURT OF JUSTICE**  
**HIGH COURT APPEAL CENTRE LEEDS SITTING AT SHEFFIELD**  
**ON APPEAL FROM LEEDS COUNTY COURT**  
**ORDER OF RECORDER CLAYTON dated 1 MAY 2018**

Sheffield Combined Court  
West Bar, Sheffield S3 8PH

Date: 05/03/2019

**Before :**

**MR JUSTICE GOSS**

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**Between :**

**MR SHAUN COTTON**

**Appellant**  
**/Claimant**

**- and -**

**HELPHIRE LTD**

**Respondent**  
**/Defendant**

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**Mr Charles Feeny** (instructed by **Accident Advice Solicitors**) for the **Appellant**  
**Jayne Adams QC** (instructed by **DWF LLP**) for the **Respondent**

Hearing dates: 18th February 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GOSS

## **Mr Justice GOSS :**

1. Shaun Cotton, the claimant in the action and to whom I shall refer as ‘the appellant’, appeals with permission against the Judgment of Mr Recorder Clayton sitting in the Leeds County Court handed down on 1<sup>st</sup> May 2018 following a hearing on 28<sup>th</sup> February, 1<sup>st</sup>, 2<sup>nd</sup> and 20<sup>th</sup> March 2018, whereby his claim for damages for personal injury and consequential loss for occupational asthma as a result of exposure to chemicals and cleaning products and to exhaust fumes whilst employed by Helphire Limited (‘the respondent’) was dismissed. Each party is represented on the appeal by their trial counsel, Mr Charles Feeny for the appellant and Miss Jayne Adams QC for the respondent, and I am grateful to them for their written and oral submissions.

### Background

2. The relevant background may be shortly stated. The appellant was employed by the respondent or its predecessors from February 1999 until 2012 as a car valet, checker and driver. His case was that, in breach of the Control of Substances Hazardous to Health Regulations 2002 (“COSHH”) and negligently, he was exposed to substances that were hazardous to health. In consequence, he developed occupational asthma. He worked from two premises, initially in Wakefield and then, from 2006, in Leeds, from which time the respondent used a different valeting company, Autoclenz, though it was the appellant’s case that he still performed some valeting services at the new premises. He made no complaint, however, about his exposure to chemicals or fumes whilst working at Wakefield. The respondent’s case was it was not in breach of any regulation or duty of care, nor was the appellant exposed to fumes or chemicals that gave rise to any foreseeable risk of injury and his asthma was not caused by exposure to workplace substances.

### The trial

3. In support of his case, the appellant relied on his own evidence, together with evidence from his wife, Michelle Cotton, a driver with whom he worked, Gerry Pickard, Dr Peter Howard, a Consultant General and Chest Physician, and Michael J Walker, a Consultant Forensic Engineer. All, with the exception of Mr Walker, gave oral evidence at the trial in addition to their statements or reports. The respondent relied on Sara Moore, who worked in the same premises as the appellant at relevant times, and Dr Charles R K Hind, a Consultant Physician in General and Respiratory Medicine, both of whom gave oral evidence in addition to their statements and reports, and on Martin Stear, a Chartered Occupational Hygienist.
4. Although, as originally pleaded, the claim alleged a number of breaches of duty under Regulations and at common law, at trial the appellant principally pursued his case on the basis of a breach of Regulation 11 of COSHH. The substance of his case was that throughout the material period he presented with an asthmatic cough at work, which should have triggered a health surveillance pursuant to Regulation 11 that, in turn would have led to a medical examination or investigation that revealed he was asthmatic and thereby resulted in the respondents taking a number of measures, including the provision of personal protective equipment, or being taken off valeting duties.
5. The agreed technical evidence was that, given the small amount of substances used by way of cleaning agents in the valeting process and their intermittent use, any exposure

to chemicals and substances within the preparations that were hazardous to health (as, indeed, some were according to the manufacturers' data sheets) was probably well below the Workplace Exposure Limits. The respondent's case was that, in these circumstances, the appellant could only succeed on the basis that it had some sort of knowledge of the susceptibility of the appellant to the development or exacerbation of asthma; there was none and so the Regulation was not triggered or, therefore, breached.

6. The issue of diesel fumes came to nothing and no significance was or could be attached to it. The Recorder found that there was no evidence to support any finding that they added to any 'irritant-load' in relation to the appellant's condition and there is no criticism of that finding.
7. It was common ground between Dr Howard and Dr Hind that the appellant had a constitutional history of atopic (allergic) asthma. There were conflicts in the evidence as to the appellant's working conditions, though they were relatively minor, the state of his cough during the relevant period and, most significantly, the cause of his asthma. The Recorder, after reviewing the evidence in some detail, found that

“the appellant ... was unreliable with dates and events (something which he readily accepted in evidence) ... tended to exaggerate what he saw as problems, and there was an element of trying to fit facts to his claims. ... Sara Moore gave much more measured and reliable evidence.”
8. He added that where there was a conflict between them, he preferred her evidence. The Recorder later observed

“it is quite a striking feature of the case that the appellant makes no complaint at all about his exposure to chemicals or fumes while working at Wakefield, because ... his manager at Wakefield ... was extremely strict about health and safety.”
9. There was no record of any complaints about the lack of protective equipment at Leeds.
10. Sara Moore (whose evidence was accepted by the Recorder) gave evidence that she took over responsibility for COSHH training in Wakefield and the appellant had been fully trained there, but that when they moved to Leeds the primary responsibility for COSHH compliance in relation to valeting was with Autoclenz, the appointed valeters. They produced the data sheets for products they were using, the risk assessments were reviewed by Head Office, copies were held on the branch file and reviewed every year. Staff training, including risk assessments, was an ongoing process.
11. The appellant was a heavy smoker and had been for many years. Sara Moore said he had always had a cough, which was constant throughout the day. She described it as a 'smoker's cough' and it didn't change or get worse. He never complained that his cough was anything to do with work or ever raised a problem about health and safety issues.
12. Dr Howard's evidence was that the appellant contracted irritant induced occupational asthma by reason of low dose unprotected exposure for long periods before the typical features of asthma appeared. He based this opinion on the following features. First,

that the substances to which the appellant was exposed were known to cause the condition. Second, there was a latent interval between exposure and development of the symptoms. Third, those symptoms were occupationally related. Fourth, although there is generally resolution or improvement once the exposure ceases, in some 5% of cases some occupational asthma sufferers do get worse.

13. Dr Hind was of the opinion that the appellant did not have work related asthma but had constitutional asthma which was eventually triggered to its chronic state by a severe chest infection in January 2011. He accepted that, by reason of his hyper-active airways, he was susceptible to irritation, which may have been as a result of levels of occupational exposure below approved levels, but he did not agree that his asthmatic condition was caused by chemical irritation at work. He based this conclusion on the evidence as to the levels or concentrations of the cleaning agents, the lack of improvement in symptoms once exposure ceased and, most significantly, the medical contemporary records which contradicted the appellant's assertion that his persistent chest symptoms began in 2005.
14. The Recorder reviewed the evidence of Dr Howard and Dr Hind and made findings in relation to it, specifically preferring the evidence of Dr Hind to that of Dr Howard where there was a conflict of opinion. He found that the appellant had a persistent but unchanging cough throughout the relevant period and that he suffered from a serious viral upper respiratory tract infection in January 2011 that persisted for several months and now had a heightened sensitivity, and that, taking account of the agreed level of exposure of the appellant to any hazardous substances, there was no basis for a finding that the appellant suffered from work related symptoms prior to January 2011.

### The appeal

15. The relevant grounds of appeal are that
  1. The Recorder failed to make sufficient findings and/or failed to appreciate the consequences of appropriate findings on two critical issues in the case; that is
    - a) that the appellant was suffering from a persistent cough whilst working for the respondents; in effect the agreed factual evidence.
    - b) The cough was a manifestation of the appellant's underlying asthmatic condition caused by chemical irritation at work; in effect the agreed medical evidence.
  2. The Recorder wrongly synthesised the effect of regulation 11 of CSHH, so as to convert the issue of breach of regulations into one of negligence as opposed to the correct legal approach which would involve analysing the precise terms of the statutory duty on the facts of the case. Had the Recorder taken the correct legal approach, he could only have concluded that there was a breach of regulation 11 in circumstances in which the appellant was displaying a respiratory symptom at work in the face of exposure to chemical irritants.
  3. The Recorder expressed a preference for the medical evidence of Dr Hind as to the appellant's work-related symptoms being those of transitory irritation only, whilst failing to appreciate that this aspect of Dr Hind's evidence, as

acknowledged by him, was subject to a factual premise that the appellant had not shown any work-related symptoms prior to December 2010. If, as the Recorder had to find on the evidence, the appellant was suffering work-related symptoms for a period of years prior to December 2010, the premise of his evidence was not sustainable and therefore neither was his evidence on this issue.

4. The Recorder in assessing both the issues of breach of duty and causation placed excessive weight on the agreement between the engineers/occupational hygienists that the appellant's exposures would not have exceeded the workplace exposure limits and would not have been considered foreseeably hazardous in the context of an average individual. Given the agreement that the appellant was a susceptible individual and that he was suffering from workplace irritation over a period of years, this evidence had only marginal relevance to the case that the Recorder had to consider.
16. In his oral submissions on behalf of the appellant, Mr Feeny argues that the Recorder erred in emphasising that the level of exposure did not exceed prescribed levels and his findings of fact lacked clarity and detail, particularly in relation to the symptoms the appellant was displaying during his employment and whether or not it was a smokers' cough. He emphasised, rightly, that the doctors agreed that the appellant could develop asthma by reason of exposure to levels below those prescribed by the Regulations and he should have found on the evidence that the appellant was coughing over the whole period and not accepted Dr Hind's evidence. In relation to Regulation 11 he submits that there should have been a finding that the appellant was suffering from an adverse health effect whereby the requirements of Regulation were instantly passed 11(2)(b).
17. In response, Miss Adams QC submits that the appellant's arguments are not supported by the factual findings and are based on a misinterpretation of the evidence of Dr Hind. The Recorder rejected the evidence of the appellant in relation to the extent of the exposure to fumes and the timing and progress of the development of his symptoms and was entitled to do so on the evidence. He found that Sara Moore's evidence to the effect that the appellant had had a cough that didn't change, never got any worse and about which he never complained in terms of chemicals was supported both by his wife and the medical notes. His condition got worse after he left work and following the severe infection in January 2011. Dr Hind did not agree that the appellant had an asthmatic cough but maintained he had a constitutional asthma that was triggered to its chronic state by that severe chest infection. The Recorder was entitled, argues Miss Adams QC, to find as he did on the evidence and that, upon those findings, there was no basis for a conclusion that the appellant had any work-related symptoms prior to January 2011. For the same reason, she submits, the findings of fact determined that Regulation 11 was not engaged, there being no basis for it being appropriate for health surveillance to be carried out.
18. The relevant parts of Regulation 11 are
  - “Regulation 11 Health Surveillance
  - (1) Where it is appropriate for the protection of health of his employees who are, or are liable to be, exposed to a substance hazardous to health, the employer shall ensure

that such employees are under suitable health surveillance.

(2) Health surveillance shall be treated as appropriate where

—  
...

(b) the exposure of the employee to a substance hazardous to health is such that –

(i) an identifiable disease or adverse health effect may be related to the exposure;

(ii) there is a reasonable likelihood that the disease or effect may occur under the particular conditions of his work; and

(iii) there are valid techniques for detecting indications of the disease or effect,

and the technique of investigation is of low risk to the employee.”

19. Mr Feeny’s position is that all the criteria for the carrying out of health surveillance were met on the findings that the Recorder should have made, based on the evidence of Sara Moore that she was aware of the appellant coughing all the time.
20. Miss Adams QC submits that the duty under Regulation 11 refers to the action to be taken on the premise of the appellant having workplace symptoms. Further, as Dr Howard accepted that the evidence for low dose chemicals causing irritation was controversial and not published in the period in question, it could not be said that any reasonable employer in the period about which the appellant complains (2006-2010) should have known that low level irritant substances would give rise to an identifiable disease or adverse health effect. She also relies on the Appendix to the Code of Practice and the references to guidelines for occupational asthma and the characteristics of an asthmatic attack, which were absent. So, there was, on the Recorder’s finding, no evidence of work-related symptoms which should reasonably have triggered surveillance and, therefore, no legitimate criticism of his findings in relation to a breach of statutory duty or of his conclusion that there was none. In any event, his findings on causation could not be overcome.

### Conclusion

21. I am not persuaded by the appellant’s grounds of appeal. For the reasons advanced by Miss Adams QC, on the evidence before him, the Recorder was entitled to make the findings that he did in relation to the appellant’s condition and working conditions over the relevant period and to prefer the opinion of Dr Hind over Dr Howard for the reasons that he gave. On Dr Hind’s evidence the appellant did not contract irritant induced occupational asthma. There was no substantive failure by the Recorder to make findings nor are the bases of his findings unclear. Although the appellant had a cough over the relevant period, it was far from agreed medical evidence that it was a

manifestation of the appellant's underlying asthmatic condition or that it was caused by chemical irritation at work, for the reasons that he gave.

22. In my judgment, on the evidence and in the light of the justifiable findings to which the Recorder made, the claim under Regulation 11 was not made out. There was no basis for a finding of liability, not least given the failure of the appellant to establish causation.
23. Accordingly, the appeal is dismissed.