Neutral Citation Number: [2017] EWCA Civ 2091

Case No: B3/2016/1248

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
Recorder Gasztowicz QC
Claim No.: 3YL64697

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2017

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE HAMBLEN
and
LORD JUSTICE NEWEY

- -

Between :

Mrs Rhonda Stewart	**Appellant**
(Now Rhonda White)	
- and -	
Lewisham and Greenwich NHS Trust	**Respondent**

- -
- -

Richard A Hartley QC and Myles Jackson (instructed by **JMW Solicitors LLP**) for the **Appellant**
Andrew P McLaughlin and Jimmy Barber (instructed by **Kennedys LLP**) for the **Respondent**

Hearing date : 30 November 2017

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. This is an appeal against the judgment of Recorder Gasztowicz QC of 2 March 2016 sitting in the Central London County Court whereby he dismissed the Claimant Appellant's claim for damages.

2. The claim was brought in respect of a back injury suffered by the Claimant when lifting an item of work equipment in the course of her employment with the Defendant as a Community Midwife. She alleged breach by the Defendant of the Management of Health and Safety at Work Regulations 1999, of the Manual Handling Regulations 1992 and of its common law duty of care.

The factual background

3. The Claimant was employed as a Community Midwife with the Defendant NHS Trust. On 28 May 2010, she suffered an injury to her back lifting an item of work equipment provided to her by the Defendant. The item was a plastic carry case containing an oxygen cylinder and paraphernalia needed at home births, referred to throughout the trial and judgment as an "Oxygen Box" ("the Box"). It was agreed between the parties that the weight of the Box was approximately 7.5kg - 8kg. The Box was a very frequently needed piece of equipment and was lifted and moved and carried all the time. The Claimant, like other midwives, regularly lifted the Box in the course of her employment and had raised no problems or complaints in doing so. There was no suggestion that it was reasonably practicable wholly to have avoided manually handling the box.

4. Miss Moulla, the Claimant's Supervisor, gave evidence that she had not carried out a risk assessment with regard to this manual operation as she had not considered it necessary to do so on the basis that the Box was designed to be lifted by the handle and had been in use for many years without problem or complaint.

5. As part of her induction upon her return to employment with the Defendant in 2009, the Claimant had been given training in moving and handling equipment. On 14 May 2009 she had been given a full day's training, and a half day 'refresher' had been provided on 6 May 2010. This training instructed her as to the best way to lift items, and that she should assess any load before attempting to lift it.

6. On the date of the accident, the Box was kept in the midwives' room, on the floor just inside the room. The Claimant "scooped" the Box up with her hands underneath it (rather than picking it up by the handle), though she accepted in her evidence that she did not know why she had done so.

7. The Recorder found that she experienced a "pull" to her back as she lifted the Box. This caused pain in her lower back and 'tingling' in her right leg which worsened over the following days. She reported the accident to her manager on 1 June 2010.

8. Since the accident, the Claimant has suffered ongoing back pain. It was later discovered that she suffered from a degenerative back condition which would have caused the onset of back pain at some stage even had the events of 28 May 2010 never occurred.

The legal framework

9. The Claimant's case was put on the basis that the lifting of the Box was a sufficiently hazardous operation to require a risk assessment under the Manual Handling Operations Regulations 1992 ("the Regulations").

10. Where "it is not reasonably practicable" to avoid the need for an employee "to undertake any manual handling operations at work which involve a risk of their being injured", Regulation 4(1)(b) imposes a duty upon the employer to:

> "(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.…".

11. Column 1 of Schedule 1 identifies the main factors as being: "The tasks" "The loads" "The working environment" and "Individual capability". Column 2 sets out a series of questions to be considered in relation to each of these factors.

12. The Health and Safety Executive ("HSE") has published Guidance on the Regulations. This includes a "Risk assessment filter" in Appendix 3. This filter applies where the load is easy to grasp, is held in a good working environment and where the activity is assessed as low risk. In such circumstances, if using the filter shows the risk is within the guidelines, the employer will not normally have to do any other form of assessment. If using the filter shows the activity exceeds the guideline figures then a more detailed assessment will need to be carried out, examples of which are set out in Appendix 4. As stated in paragraph 5 of Appendix 3: "The intention is to set out an approximate boundary within which the load is unlikely to create a risk of injury sufficient to warrant a detailed assessment".

13. As explained by Hale LJ in *Koonjul v Thameslink Healthcare Services* [2000] PIQR P123 the employer's duty under Regulation 4 only arises where there is a real risk of injury. As she stated at pp126-127:

> "…there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that in making an assessment of whether there is such a risk of injury the employer is not

> entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after their employees' safety which they might not otherwise have.
>
> However, in making such assessments there has to be an element of realism. As the guidance on the Regulations points out in Appendix 1 at paragraph 3 ... a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort.
>
> It then goes on to give numerical guidelines for the purpose of providing an initial filter which can help to identify those manual handling operations deserving more detailed examination.
>
> It also seems clear that what does involve the risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved."

The judgment

14. The Recorder dismissed the claim, holding that the failure to carry out a risk assessment did not amount to a breach of the Regulations.

15. He found that the Guidance filter assessment provides approximate indications of the weight at which a detailed risk assessment is unlikely to be necessary [29]. Above the specified weights, the Guidance suggest a detailed risk assessment [30]. However, these are guidelines rather than mandatory statutory categories and are intended to be read in a common sense way having regard to the actual situation [31].

16. Given the nature and weight of the Box, the Defendant was not required to make a risk assessment beyond the instinctive formation of the view that the Box was safe if properly handled [36]. The Claimant had failed to prove that an assessment of the type not carried out was required [38].

17. The Claimant failed to lead any evidence to show a risk assessment would have resulted in anything different [40]. The Recorder dismissed suggestions by the Claimant's counsel that the Box could have been stored on a table, or had a wheeled container, or could have had two smaller cylinders rather than one large one as simply possibilities [45]-[47].

18. In view of the Claimant's degenerative lower back condition, she could just as easily have suffered injury using the vacuum cleaner or lifting a small piece of holiday luggage [56]. Lifting the Box was not unsafe for a normal person but, given her degenerative lower back condition, was unsafe for the Claimant [57].

19. When assessing quantum, the Recorder concluded that the injuries were all caused by the accident on 28 May 2010 and concluded that he would have taken as his basis of assessing quantum of general damages, a mid-point period of 39 months of advancement caused by the injury [65]. General damages were on this basis assessed at £12,000. Special damages were not assessed.

The grounds of appeal

20. The Claimant appeals on the following grounds:

(1) The Recorder misdirected himself as to which party bore the burden of proving whether or not a risk assessment ought to have been undertaken;
(2) The Recorder mistakenly held that a risk assessment was unnecessary;
(3) The Recorder wrongly refused to find that the Defendant had failed to take proper steps to reduce the risk of injury to the lowest level reasonably practicable;
(4) The Recorder mistakenly applied the law on the issue of proving causation;
(5) The Recorder misdirected himself when finding that the injury was not caused by a breach of the Regulations but by the Claimant's degenerate back condition. He confused "vulnerability" and "period of acceleration" with "causation".

Grounds 1 and 2 – the need for a risk assessment

21. At [38] the Recorder stated:

> "It is for the Claimant to satisfy me on the balance of probabilities that a risk assessment of a type not carried out was required and I am not satisfied as to that here."

22. The Claimant submits that the Recorder misdirected himself when holding that the Claimant bore the burden of showing that a risk assessment was required and ought instead to have found that the Defendant bore, and had failed to discharge, the burden of showing that an assessment was not required.

23. It is submitted that this was a case in which there was a real risk of injury as borne out by the Recorder's finding that the Box weighed between 7.5 and 8kg, contrary to the Defendant's pleaded case that it weighed 6.4kg. The Guidance suggests that when lifting a load, which is easy to grasp with both hands and weighs 7kg or more, off the floor to mid-calf height, a detailed risk assessment is necessary.

24. The Claimant submits that the Recorder interpreted the Regulations in a manner contrary to their purpose of ensuring the identification and reduction of foreseeable risk by the employer. Paragraph 30 of Appendix 3 of the Guidance states that:

> "The use of the guidelines does not affect the employer's duty to avoid or reduce the risk of injury where this is reasonably practicable. The Guideline figures, therefore, should not be regarded as weight limits or approved figures for safe lifting. They are an aid to highlight where detailed assessments are most needed. Where doubt remains, a more detailed risk assessment should always be made".

25. In all the circumstances, if the Recorder had properly directed himself to the evidence and the Regulations, he ought to have found that a detailed risk assessment was necessary, or that the Defendant had failed to discharge the burden of proving otherwise.

26. The Defendant submits that these grounds wrongly pre-suppose that the Claimant had satisfied the Recorder that there was a real risk of injury. In fact, he was not so satisfied and in those circumstances no detailed risk assessment was necessary.

27. I agree with the Defendant that on a proper analysis of the Recorder's judgment he was finding that there was no real risk of injury. At [36] the Recorder found that:

> "Given the nature, design and weight of the box or carry case involved here and the absence of any complaints, suggestion or evidence of any sort that it had posed any difficulties for midwives of any age, the vast majority of whom were women, over a number of years of regular use, I am not convinced, on the balance of probabilities, that any risk assessment beyond the implicit formation of a view that it was safe if properly handled was required by the Defendant. That is effectively what Mrs Moulla described as the position here."

28. The Recorder was there finding that no detailed risk assessment was required. This was necessarily on the basis that there was insufficient risk of injury to require such an assessment.

29. In relation to the risk of injury the Recorder noted at [36] that there was no evidence that handling of the Box had given rise to any difficulties or complaints over many years of regular use, including by women midwives of the age of the Claimant and older. He considered and found that this was not a risky operation for any normal person. At [50] he stated that:

> "The reality of the position is ... unbeknown to both the Claimant and the Defendant the Claimant unfortunately had a pre-existing degenerative back condition which was triggered by lifting a ... carry case which would not have been a risky operation or not reasonably safe for any normal person to lift from the floor whether with or without training."

30. The Recorder found that this conclusion was "fortified" by a consideration of the Guidance. At [37] he found that:

> "I am fortified in this view by the fact that the box was likely to be mid lower leg height at least for most employees and at the top end on the 7kg category or bottom end of the 13kg category for women on the guidelines diagram at Appendix 3 to the guidelines at which a detailed risk assessment is said to be unlikely to be necessary. These are not mandatory statutory categories which

> suddenly change from 7kg to 13kg with attendant legal implications but rough guidelines in relation to which this box if picked up by the handle was likely to be at mid lower leg height at least. It weighed at most 8kg and was equipped with a purpose-built handle to enable it to be more easily picked up."

31. The Recorder found that the Box was "designed to be lifted using the handle on the top of it" [32] and that the Claimant "agreed it was...obvious that the handle was there to lift it by" [41]. This was why the Box "was likely to be mid-lower leg height at least for most employees" and therefore "at the top end on the 7kg category or bottom end of the 13kg category at the top end". Appendix 3 of the Guidance states that an "intermediate weight can be chosen if the hands are close to a boundary between the boxes", which is what the Recorder found. An intermediate weight would be 10kg, which is in excess of the 7.5-8kg weight found. At weights within the Guidance "you do not normally have to do any other form of risk assessment". On the Recorder's findings, the weight of the Box was well within "the approximate boundary within which the load is unlikely to create a risk of injury sufficient to warrant a detailed assessment".

32. The Guidance did therefore provide support for the Recorder's overall conclusion on the evidence that there was no real risk of injury. That was a factual conclusion which he was entitled to reach on the evidence and with which this court should not interfere.

33. If there was no real risk of injury then there was no duty on the Defendant as alleged under Regulation 4 and grounds 1, 2 and 3 of appeal fall away. In those circumstances, the questions of whether the Recorder also dismissed the claim on causation grounds, and whether or not he was right so to do (grounds 4 and 5), do not arise.

Conclusion

34. For the reasons outlined above I would dismiss the appeal.

Lord Justice Newey:

35. I agree.

Lord Justice Longmore:

36. I also agree.