MUSIC AS NOISE: THE APPLICATION OF THE CONTROL OF NOISE AT WORK REGULATIONS 2005 TO MUSICIANS ©

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1. INTRODUCTION

The recent case of *Goldscheider v Royal Opera House Covent Garden Foundation*[1] involved a viola player who was deemed to have suffered permanent hearing impairment, specifically the condition 'acoustic shock', during his employment. The case is only persuasive in Scotland, yet it is still noteworthy, as this is the first time that a musical organisation has been found responsible for hearing loss in a musician.[2] Some of the circumstances in this case are quite specific, as the hearing loss was the result of one rehearsal to a musician located in a cramped opera pit. Nonetheless, the case serves as a reminder to employers of musicians of their duty under the *Control of Noise at Work Regulations 2005* ("2005 Regulations"), including the duty to perform sufficient risk assessments and to take all reasonably practicable steps to reduce the risk of injury from noise.

2. THE FACTS

Mr Goldscheider claimed that his employer, the Royal Opera House ("ROH") breached its obligations under the 2005 Regulations. Mr Goldscheider's hearing was injured permanently while playing in the orchestra pit at a rehearsal of Richard Wagner's 'Die Walküre' on 1 September 2012. An entire brass section was seated behind Mr Goldscheider, with the principal trumpet's bell only ten inches away from his right ear.[3] The ROH had provided the claimant with custom moulded earplugs with a 9dB filter, and it was agreed the earplugs "provide[d] sufficient attenuation for his work".[4] Foam earplugs with up to 28 dB of attenuation were also available. These provided greater protection for short bursts of noise but "made it difficult to hear other instruments,… the conductor and his own instrument".[5]

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[1] [2018] EWHC 687 (QB).
[2] C. Coleman "Musician wins landmark ruling over ruined hearing" (28 March 2018) *BBC News* Available at: <https://www.bbc.co.uk/news/entertainment-arts-43571144> accessed 2 August 2018
[3] *Goldscheider* (n1) [133]
[4] *Ibid* [14].
[5] *Ibid* [14].

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The training provided by ROH advised employees to wear hearing protection, but actual practice was that the matter was left to the individual musician to use such protection as and when they thought it was necessary.[6]

In defence, the ROH argued that it had taken all reasonably practical steps to reduce the risk of injury, and that it should not be required to take steps which would "unreasonably compromise the artistic output of the orchestra".[7] They stated that they could not enforce the wearing of earplugs, as the pit was crowded and dimly lit.[8] In addition, the ROH alleged contributory negligence, in part because Mr Goldscheider (i) had not worn his hearing protection all the time and (ii) had not left the rehearsal when he knew the noise was causing him harm.[9] They also "denie[d] the existence of acoustic shock as a medically diagnosable condition" [10], contending that the claimant had coincidentally developed "an idiopathic condition, namely Meniere's disease"[11].

3. THE DECISION

The decision of Mrs Justice Davies was that the ROH had failed in its obligations under the 2005 Regulations. The risk assessment undertaken by the ROH was not sufficient, as it was "undated and uncertified,… [and] failed to take proper account of venue"[12], did not cover rehearsals[13] and did not "monitor… noise levels with a new orchestral configuration… chosen for artistic reasons".[14] Even after complaints were raised with management by the claimant and colleagues, there was no "live time noise monitoring"[15]. The ROH had failed to designate the orchestra pit as a Hearing Protection Zone[16], which would have made the wearing of hearing protection mandatory.[17] The consequence of this failure meant that the advice and instruction given on hearing protection was not suitable and sufficient[18]. In response to the contributory negligence defence, the judgement stated that Mr Goldscheider's use of the hearing protection was consistent with the advice given by his

[6] *Ibid* [52].
[7] *Ibid* [5].
[8] *Ibid* [71].
[9] *Ibid* [230].
[10] *Ibid* [5].
[11] *Ibid* [222].
[12] *Ibid* [155].
[13] *Ibid* [195].
[14] *Ibid* [219].
[15] *Ibid* [219].
[16] Reg 7.3, 2005 Regulations.
[17] *Goldscheider* (n1) [219, 220].
[18] *Ibid* [218-219].

employer.[19] Moreover, Mr Goldscheider's professionalism meant that he "would not easily have left a rehearsal"[20]. While Mrs Justice Davies conceded that Mr Goldscheider "should have left the rehearsal earlier", there was nothing to indicate that this "would have prevented the injury".[21] The injury was deemed to fit "the finding of acoustic shock"[22], the "defendant's contention [of] Meniere's disease… [was] stretching the concept of coincidence too far"[23], and was caused by the Principal trumpet playing in his right ear at the rehearsal.[24]

4. ASSESSMENT OF THE LIKELY IMPACT OF THE JUDGEMENT

The type of injury incurred in this case is significant. The law firm Eversheds Sutherland notes that this case is "the first to compensate for acoustic shock".[25] There has thus far been an "absence of reported cases of acoustic shock amongst professional musicians".[26] In general, musicians will welcome the fact that this case highlights their employers' obligation to better adhere to the 2005 Regulations in order to prevent workplace-induced hearing injuries. Hearing problems are quite prevalent in the industry.[27] This case may help them overcome their fear of "losing their jobs" as a result of "complaining about noise".[28]

Most musicians are self-employed[29], however, many still feel worried about complaining as it could affect whether they are employed by an organisation in future. In addition, self-employed musicians would only be able to claim for an injury like acoustic shock, which is sustained at one rehearsal, rather than hearing loss resulting from noise exposure

[19] *Ibid* [220].
[20] *Ibid* [234].
[21] *Ibid* [235].
[22] *Ibid* [228].
[23] *Ibid* [224].
[24] *Ibid* [229].
[25] Eversheds Sutherland (International) LLP "Time to tune in to the risks of acoustic shock" (Lexology 23 July 2018) available at: <https://www.lexology.com/library/detail.aspx?g=f6a7aa2d-984f-4fd6-9ee6-4b30013bc89e> accessed 2 August 2018
[26] *Goldscheider* (n1) [223].
[27] A study with a large sample size found that professional musicians are four times more likely to develop 'noise induced hearing loss' and 57% more likely to develop tinnitus than the general population. T. Schink, G. Kreutz, V. Busch, I. Pigeot, W. Ahrens "Incidence and relative risk of hearing disorders in professional musicians" (2014) Vol 71 *Occupational & Environmental Medicine* 472
A study of orchestral musicians found that they "suffer from a high rate of tinnitus and hyperacusis" when compared to the general population. E. Toppila, H. Koskinen, I. Pyykkö "Hearing loss among classical-orchestra musicians" (2011) Vol 13, Issue 50 *Noise & Health* 45-50
[28] *Goldscheider* (n1) [27].
[29] "The vast majority of musicians (94%) work freelance for all or part of their income." Musicians Union "The Working Musician" (2012) available at: <https://www.musiciansunion.org.uk/Files/Reports/Industry/The-Working-Musician-report> accessed 5 August 2018

from many gigs with multiple employers over a longer period of time. The practical result is that freelance musicians will have to take personal responsibility for looking after their own hearing. It is hoped that, armed with this judgement, they will feel empowered to speak to employers about excessive noise. Employers can no longer afford to ignore such complaints, as they could be liable.

The case contains important points for employers of musicians, key among these being the need to perform a meaningful risk assessment and to reduce risk so far as reasonably practicable. Artistic considerations should not outweigh health and safety considerations. Risk assessments should be meaningful, for instance by "specifically consider[ing] the level, type and duration of exposure to noise".[30] Rehearsals should be included in risk assessments as well as the performances. Any new set-up of musicians should be tested for noise levels.

The number of options available to reduce the risk of injury were more limited in the circumstances of this case than is normal in other musical environments. An orchestral pit is limited in height and is usually cramped, with players close together. Since space and visibility of the conductor is limited, some solutions to reduce the risk of injury were not possible, such as creating space between the sections or using acoustic screens, which are large and not transparent. In other situations, there will be more options that are reasonably practicable to reduce the risk of injury.

One issue with the judgement is that Mrs Justice Davies found that section 7(3)(b) of the 2005 Regulations, on the wearing of hearing protection in a Hearing Protection Zone, is not subject to the concept of reasonable practicability. This approach is too rigid for the circumstances of the case. One should consider the text in section 6(1) and (2) as applying generally to all of the 2005 Regulations. The relevant summary of section 6 is that if the risk from exposure to noise cannot be eliminated, then it should be reduced to as low a level as is reasonably practicable by implementing measures which are appropriate to the activity. Flexibility is necessary within many musical organisations, as musicians are unlikely to be able to wear hearing protection all the time, due to the detrimental effect on their musical output. "The inability to hear properly affects the subtleties and nuances which are fundamental to the ability of a professional musician to play at the highest standards."[31] As a result of the judge's approach, the judgement states that the ROH should have stringently imposed the wearing of hearing protection in the orchestral pit[32]. This decision lets employers

[30] *Goldscheider* (n1) [193].
[31] *Ibid* [51].
[32] *Ibid* [197].

fulfil their duty simply by telling their employees they must wear earplugs. If an employee chooses not wear the earplugs, in order to attain the highest musical quality, then the employer would not be liable for any resulting injury. This seems patently against the purpose of the legislation.

5. CONCLUSION

The outcome of this case is a positive start to encourage musical organisations to better consider how to reduce the impact of the musical 'noise' on their employees. Musicians will hopefully feel more able to complain about excessive noise now that musical organisations are clearly not exempt from the 2005 Regulations. The music industry needs to face up to the fact that it has to comply with its statutory duty to protect its employees from extreme noise like that encountered by Mr Goldscheider. Employers need to protect their employees' hearing by adopting all measures reasonably practicable to reduce the risk of injury. Despite the fact that the majority of musicians would not technically be employees, or 'workers' (to use the employment law parlance), but would be classed as self-employed, one would hope that any organisation would be more careful in their treatment of independent contractors, after the recent spate of gig economy cases which have expanded who can be classed as a 'worker'.[33]

Artistic considerations need to bend a little to the rights of musicians. How much bending depends to a large extent on the specific circumstances. Whether hearing protection affects quality may vary by the genre of music and the reputation of the musical organisation. The music industry might be wary of adopting a mandatory requirement for hearing protection that would jeopardise the overall quality of the musical experience for some musical organisations. If hearing protection cannot be worn at all times, there should be a greater emphasis on delivering satisfactory information, advice and training and on implementing all other organisational and technical measures that are reasonably practical.

One final word is that courts should be mindful to balance the needs of the musicians against whether imposing the statutory duty on the employer is fair, just and reasonable, as

[33] "A group of Hermes couriers have won their fight to be treated as workers instead of independent contractors… The judgment mirrors verdicts in cases brought against Uber, Addison Lee, City Sprint, Excel and eCourier, where judges have ruled that the staff should be given the legal classification as 'workers'". H. Siddique "Hermes couriers are workers, not self-employed, tribunal rules" *The Guardian* 25 June 2018 available at: <https://www.theguardian.com/business/2018/jun/25/hermes-couriers-are-workers-not-self-employed-tribunal-rules> accessed 5 August 2018

set out in the test in *Caparo v Dickman*[34]. The *Goldscheider* case should not signal open season on musical organisations, many of which operate on a precarious financial footing. Consideration should be given to the impact on an individual musical organisation's finances. If subsequent cases awarded similar compensation[35], one could imagine that some ensembles could be put out of business as a result. However, it is suggested that the circumstances of this case are so specific, the injury occurring during the course of one day's rehearsals of Wagner as a result of an entire brass section sitting right behind a person in an over-crowded orchestral pit, that it is unlikely that cases on this subject matter will proliferate.

[34] [1990] 2 A.C. 605. The duty of care principle continues to develop. For the most recent update, which only affects public authorities, especially the police, see *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4.
[35] He was awarded £750,000. D Gale "Viola player wins Royal Opera House case for hearing damage" 28 March 2018 available at: <https://www.theguardian.com/culture/2018/mar/28/viola-player-wins-royal-opera-house-case-for-hearing-damage> accessed 6 August 2018