No: 201903440/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA Crim 868

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 1 July 2020

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE WILLIAM DAVIS

MR JUSTICE FORDHAM

R E G I N A
v
CONNORS BUILDING & RESTORATION LTD

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Mr J Hodivala QC and Mr I Bridge appeared on behalf of the **Appellant Company**
Ms R Emsley-Smith appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE FLAUX:

Introduction and factual background

1. Following a trial before Her Honour Judge Brandon and a jury in the Crown Court at Liverpool, on 20 August 2019 the appellant company was convicted of a single count of failing to comply with section 2(1) of the Health and Safety at Work Act 1974. On 7 October 2019, the appellant was fined £20,000 and ordered to pay prosecution costs of £68,192.15 and a victim surcharge of £170. The appellant company appeals with the leave of the single judge against that conviction. The appellant company argues that the conviction is unsafe because the prosecution against it by the Health and Safety Executive ("HSE") should have been stayed as an abuse of process. The judge on 10 July 2019 had refused an application to stay. It is submitted that the judge erred in her decision to refuse the stay.
2. The facts of the offence were as follows. On 2 June 2017, an employee of the appellant company, Graham Daley, was working on a rip saw in the new joinery room, sawing a hardwood plank, when an offcut piece of timber kicked back and impaled his right leg, hitting a nerve and the main artery. He was taken to hospital by ambulance and underwent surgery to have the timber removed; he remained an inpatient for six days. He was unable to walk unaided for 16 weeks and was left with a limp and shooting pains which it is thought will continue for the rest of his life. He was unable to return to work until the end of August 2017 and was still taking painkillers for pain from suspected nerve damage at the time of the trial two years later.
3. Mr Daley had failed to lower the crown guard attached to the saw. He had also failed to use a stand provided to catch the timber as it emerged from the saw. At the trial it was agreed between the experts for the parties that the accident would not have occurred if he had used a stand and/or deployed the crown guard.
4. As a result of the injury, a report was made to the HSE which carried out an investigation into the incident. Catherine Lyon, an HSE inspector, visited the appellant's premises and obtained material which included the company's method statement and risk assessment for the joinery workshop. She was then appointed the investigating inspector. In April 2018, she completed her investigation and presented her report, which recommended prosecution, to the principal inspector of health and safety, Helen Jones.
5. The appellant had been invited to make representations and on 3 April 2018 its solicitors wrote a detailed letter to the HSE. They argued, by reference to the Enforcement Policy Statement ("EPS") and Enforcement Management Model ("EMM") of the HSE that, *inter alia*, the public interest for prosecution had not been met and that prosecution was not a proportionate response. The letter focused on the fact that the appellant company had a single customer, Scottish Power, that a re-tendering process was due and that if the company were prosecuted, Scottish Power would not renew the contract. In that event, it was contended, the company would become insolvent and the workforce, including Mr Daley, would lose their jobs.
6. Ms Jones gave evidence at the hearing before the judge. She said she had reviewed the information, including the appellant's solicitors' letter and, with the EPS, EMM and the Code for Crown Prosecutors in mind, had concluded that both the evidential and public interest tests were met and agreed with Ms Lyon that prosecution was a proportionate response. In cross-examination, Ms Jones said that she had taken into consideration when looking at the public interest test the point made by the appellant that the effect of

prosecution might be to shut the company down. She had also taken account of the previous exemplary health and safety record of the company, together with the evidence as to how the rip saw was being used on the day and the expert evidence.

7. After the appellant had been notified of the decision to prosecute, its solicitors wrote again to the HSE inviting reconsideration of the decision to prosecute, reiterating that the likely outcome was loss of the Scottish Power contract and the laying off of its 42 workforces. That letter was unanswered.

The ruling under appeal

8. In her ruling, the judge noted that Ms Jones had applied the EPS and the EMM and in doing so considered the "risk gap" which involves comparing the actual risk arising from the circumstances under consideration and the benchmark risk, that is controlling the risk to an acceptable standard. That comparison produces the risk gap which was assessed as being "extreme". This was on the basis that the potential consequence of kick back on the rip saw was serious personal injury such as occurred in this case. If the saw had been operated appropriately and there had been appropriate training and supervision, the risk of serious injury would have been negligible. The judge noted the prosecution case that the appellant had failed to meet well-known and established standards in the Approved Code of Practice for the Provision and Use of Work Equipment Regulations ("ACoP") available on the HSE website. In failing to meet those standards, there had been a serious breach which had resulted in serious injury.
9. The judge noted that the EMM advises inspectors that prosecution should be considered in a case where the risk gap is assessed as extreme. Inspectors are provided with another option, described as "Initial Enforcement Expectation" and in an extreme risk case this is an Improvement Notice. The prosecution submitted to the judge that an Improvement Notice could not have been served as the rip saw had been removed after the incident. The defence submitted that prosecution where this was an exemplar company and 40 jobs would be at risk was *Wednesbury* unreasonable and oppressive.
10. In the Decision section of her ruling, the judge said at paragraph 26, that the conclusion that there was an extreme risk gap was one which Ms Jones was entitled to reach in circumstances where a serious injury was caused and there was readily available guidance in the form of the ACoP establishing the requisite standard for controlling the risk. That conclusion is not challenged on appeal.
11. The judge concluded at paragraph 29 that in applying the public interest factors for or against prosecution, Ms Jones was entitled to conclude that there had been a serious breach of the health and safety regulations which it was in the public interest to prosecute. That being so, it was not for the Court to intervene in that decision, unless the prosecution amounted to an abuse of process and was oppressive and vexatious. Once the conclusion was reached that prosecution was in the public interest, paragraph 7 of the EMM made clear that the fact that there are alternative enforcement actions do not "fetter the discretion of the inspector" and paragraph 76 confirmed that the "prosecution may go ahead without recourse to alternative sanctions". The judge said in her judgment on the facts of the case and considering the totality of the evidence that the HSE would have been entitled to either issue an Improvement Notice or proceed to prosecution.
12. The judge found that there was no merit in the submission that the EMM, EPS or Code for Crown Prosecutors were not applied correctly or in a manner which was not justified on the evidence. She concluded that the decision to prosecute was not *Wednesbury*

unreasonable and that there was therefore no abuse of process. The question of oppression did not strictly arise, but she addressed it briefly. She referred to the evidence which Mr Connor, the managing director of the appellant, had given before her and to his clear impression that the company would lose the contract with Scottish Power if prosecuted, with the disastrous consequence of termination of employment of the entire workforce. She noted that no enquiries had in fact been made with Scottish Power as to the impact of a conviction. The company would be required to submit to a tendering process and although the judge accepted his evidence that he believed a conviction would result in the company being culled in that process, there was no evidence to confirm that that was the case or that, but for the conviction, the tender would be successful. His evidence highlighted other difficulties with the tendering process as a consequence of the ongoing uncertainty about Brexit. Mr Connor confirmed that no enquiries had been made as to alternative sources of work, saying they had been down that line before and it had not worked. The judge concluded that the submissions as to the potential consequence of a conviction were speculative and so there was no basis for concluding that if convicted the workforce would inevitably lose their jobs. She noted that in any case where a company was prosecuted, it was open to those with whom it did business to reconsider the business relationship. That was an ordinary potential consequence of conviction and could not be oppression.

The grounds of appeal

13. There are four grounds of appeal:
    (1) That the judge erred in concluding that the prosecution had fully complied with the EPS in reaching the decision to prosecute, in particular in failing to take any or adequate notice of the consequences of a prosecution for the appellant and its employees.
    (2) That the judge erred in finding that the closure of the appellant which would be the likely result of conviction was not oppressive.
    (3) That the judge erred in finding that the decision to prosecute was not *Wednesbury* unreasonable in the sense that it served no purpose and that it was very much against the public interest that the appellant cease to trade. No reasonable prosecutor could have made the decision to prosecute in possession of all the known facts.
    (4) The judge erred in concluding that the consequences of conviction for the appellant were properly matters of mitigation. The level of penalty was of no consequence as conviction would likely lead to loss of the Scottish Power contract and subsequent closure.

The EPS and the EMM

14. The grounds of appeal quote extensively from the EPS and the EMM. We have had regard to all the provisions to which reference is made but do not propose to set those out in full here. The only provisions to which we would make reference are as follows. Given the reliance now placed by Mr James Hodivala QC for the appellant on the fact that regulation by the HSE is governed by the Legislative and Regulatory Reform Act 2006, the Regulators Code 2014 and the Deregulation Act 2015, it is worth noting 1.6 of the EPS which provides:

> "1.6 This Enforcement Policy Statement is made in accordance with the

Legislative and Regulatory Reform Act 2006, the Regulators' Code 2014 and the Deregulation Act 2015."

15. So far as prosecution is concerned, the following provisions are relevant:

"13.0 Prosecution

13-l Prosecution is an essential part of enforcement, ensuring that where there has been a serious breach of the law, duty holders (including individuals) are held to account. This includes bringing alleged offenders before the courts in England and Wales…

14.1 In England and Wales, we decide whether or not to proceed with health and safety prosecutions. We use discretion when making this decision and we take account of the evidential stage and the relevant public interest factors set down by the Director of Public Prosecutions in the Code for Crown Prosecutors. No prosecution will go ahead unless we find there is sufficient evidence to provide a realistic prospect of conviction and that prosecution is in the public interest.

14.2 We expect, where sufficient evidence has been collected and it is considered in the public interest to prosecute, that prosecution should go ahead.

16.0 Public Interest

16.1 In both England & Wales, and Scotland we expect that, in the public interest, we should normally prosecute or recommend prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances in the (non-exhaustive) list apply:

[In that list, the only relevant circumstance is]
The gravity of an alleged offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it.

16.2 We also expect that, in the public interest, we should consider prosecution, or consider recommending prosecution, where following an investigation or other regulatory contact, one or more of the following circumstances apply:

It is appropriate in the circumstances as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, and conviction may deter others from similar failures to comply with the law; "

16. The EMM provides, so far as relevant, as follows:

"7 The EMM is a straightforward linear model and so cannot truly capture all the nuances and complexities of discretionary decision making in all circumstances. While the EMM provides a framework for driving consistency, it is crucial that inspectors' discretion is not fettered by artificially constraining all decisions to the EMM.

Prosecution

76 The EMM captures the principles of the EPS by providing a framework in which enforcement action is proportional to the breach of the law or per missioning documents and the associated risks. Where the circumstances warrant it, the EPS states that prosecution may go ahead without recourse to previous advice or alternative sanctions.

77 In practice, this will involve a combination of high risk and extreme failure to meet an explicit or clearly defined standard, which is well known and obvious. This is not affected by factors such as the duty holder's previous record, or other moderating duty holder factors specific to the circumstances of a case.

Public interest

105 As well as providing guidance on the evidential tests, the Code for Crown Prosecutors also applies a public interest test to prosecution decisions. In Scotland, HSE applies the principles of the EPS and the COPFS Prosecution Code in deciding whether to report offences to the Crown. The same principles of evidential sufficiency and public interest apply to all inspector enforcement activities.

106 There are competing demands on the finite resources available to HSE, and a balance has to be achieved based upon risk, potential outcomes, and public expectations. When considering public interest, inspectors are looking to satisfy themselves that the proposed action will produce a net benefit to the wider community in terms of reducing risks, targeting public resources on the most serious risks and the costs of pursuing a particular course of action.

108 Public interest is a difficult issue to assess. Inspectors should ask themselves what a reasonable person would expect from HSE in the circumstances. A further test is whether the particular decision could be justified in any public forum or inquiry."

The law on abuse of process

17. In the context of decisions to prosecute made by public prosecutors, it is well-established that the decision to prosecute is made by the CPS or other prosecuting body, not by the Court. Only in exceptional cases will the Court disturb the decisions to prosecute of an

independent prosecutor: see per Lord Bingham of Cornhill in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756. The proportionality of a decision to prosecute can only be challenged (save in a very exceptional case of which this is not one) through an application to the Court before which the criminal proceedings are being conducted to stay the proceedings for abuse of process, not by way of judicial review: see for example *Moss & Sons Ltd v CPS* [2012] EWHC 3658 (Admin) at [23].

18. In the case of independent prosecutors, it is also clear that to establish abuse of process it is not sufficient to establish a breach of the relevant guidance or policy. The defendant must go on and establish misconduct or oppression of the type explained in *Ex parte Bennett* [1994] 1 AC 42: see *R v A* [2012] EWCA Crim 434 at [84] per Lord Judge, CJ and [25] of the judgment of the Divisional Court in *Moss*.
19. That case involved a prosecution by the Gangmasters Licensing Authority, an agency established by the Gangmasters (Licensing) Act 2004 and thus an agency of the executive government not an independent prosecutor. The CPS had taken over the proceedings. At paragraph 29 of the judgment, the Court said:

> "It would, however, be highly undesirable if there was a different standard of review in abuse of process applications dependent upon whether the setting of a policy or guidance and the control of prosecutions were in the hands of an independent prosecutor such as the Director of Public Prosecutions or whether it was in the hands of an emanation of the Executive Government. There must nonetheless be a powerful argument that a court should apply a more stringent standard to prosecution policy devised and implemented by the Executive Government, as the deference to the Director of Public Prosecutions and other independent prosecutors is grounded on his constitutional independence of the Executive Government. Such a decision when not made by an independent prosecutor may be thought to be little different to other decisions of the Executive Government and therefore subject to the same standards of review."

20. Mr Hodivala QC submitted that, in that case, reference had not been made to either the Legislative and Regulatory Reform Act 2006 or the Regulators Code 2014. He relied upon the fact that by virtue of section 24 of the Act, the Code is intended to secure that regulatory functions are exercised with regard to the principles in section 21(2), namely that they are carried out in a way which is transparent, accountable, proportionate and consistent and should be targeted only at cases in which action is needed. He relied in particular upon two of the six principles set out in the Code, Principle 1, that regulators should carry out their activities in a way that supports those they regulate to comply and grow; and Principle 3, that regulators should base their regulatory activities on risk.
21. Although the grounds of appeal accepted at paragraph 12 (iv) and (ix) that it was not sufficient to establish abuse of process to show a breach of the relevant policy, but oppression must also be shown, Mr Hodivala QC sought in his written submissions to resile from that position and submitted that the additional requirement to show oppression would undermine the statutory purpose of the Legislative and Regulatory Reform Act 2006 and the Regulators Code. This submission was not pursued orally, which we consider was very wise. We note that, as Mr Hodivala QC accepted in his written

submissions, the submission is unsupported by any authority. We consider that the suggestion that a requirement to show oppression somehow undermines the intention of Parliament in enacting the 2006 Act is misconceived. There is nothing in the provisions of the statute dealing with regulators at sections 21 to 24 in general terms which bears specifically upon decisions by regulators to prosecute, let alone on the law in relation to abuse of process.

22. We observe that the argument based on the 2006 Act was not put forward to the judge. No reference was made before her either to the 2006 Act or to the Regulators Code. Nor was the purported significance of the Act or the Code foreshadowed in the grounds of appeal. The first time the submission was made was in the appellant's skeleton argument dated 22 June 2020. On the day before the hearing, Mr Hodivala QC served a supplementary skeleton contending that the "growth duty" upon which he relied was in fact set out in section 108 of the Deregulation Act 2015. The argument advanced is misconceived for reasons set out hereafter and none of this was put forward before the judge or foreshadowed in the grounds of appeal.
23. Like the Divisional Court in *Moss* we consider that it would be highly undesirable for a different standard of review in abuse of process applications to apply to challenges to decisions by the HSE to prosecute than apply to such decisions by the CPS. That is a point which is reinforced by the fact that, as both the EPS and the EMM make clear, in making decisions as to whether prosecutions are in the public interest, the HSE has regard to the DPP's Code for Crown Prosecutors. It would be anomalous if a different, wider standard of review applied to decisions to prosecute by the HSE than apply to such decisions made by the CPS or other prosecutorial bodies.
24. This analysis is also supported by *R (Barons Pub Co Ltd) v Staines Magistrates Court* [2013] EWHC 898 (Admin). That was a case involving local authority prosecution in the context of food safety and a statutory code of practice requiring enforcement policies to ensure that "enforcement action was reasonable, proportionate, risk-based and consistent with good practice": see paragraph 19. The Divisional Court applied *A* and *Moss* and held that the local authority's failure to follow enforcement policy would not be sufficient to constitute an abuse of process, the additional element of "oppression" was required in that context: see paragraphs 32 and 46-49. The Court included within oppression a "decision to prosecute ... made in circumstances that could be described as entirely arbitrary": see paragraph 48.

Was there a breach of the HSE's policies?

25. As Mr Hodivala QC said in his skeleton argument, the grounds of appeal come down to two essential questions: (i) was there a breach of the HSE's prosecution policies? and (ii) if so, was the judge's decision not to stay the proceedings an unreasonable exercise of her discretion?
26. In relation to the first question, he submitted that there were two breaches of the policy: (i) wholly inadequate regard to the business and the business consequences of the decision to prosecute and (ii) failure to pursue the least burdensome enforcement action, i.e. the requirement for proportionality. The former was reflected in 1.2 of the EPS which provides:

> "As a regulator, we use a wide variety of methods to encourage and support business to manage health and safety risks in a sensible and proportionate

> way and secure compliance with the law. In making these decisions, we will have regard to economic growth and the impact that our actions are likely to have on businesses."

27. It was also a facet of the statutory duty on the HSE under section 21(2) of the 2006 Act to exercise its discretion proportionately and to have regard to economic growth and the impact a decision to prosecute would have on businesses. Mr Hodivala QC accepted that this statutory duty cannot have any impact upon consideration of the evidential test by the regulator. In our judgment, that is an important concession. The assessment made by Ms Jones in considering the evidential test was that the risk gap was extreme and that this was a serious breach of duty which resulted in serious physical injury. That conclusion has not been challenged, nor could it be on the facts of the case.
28. In the supplementary skeleton served the day before the hearing, Mr Hodivala QC submitted that the "growth duty" on which he relies in fact derives from section 108 of the Deregulation Act 2015. He recognises that section 111(2)(b)(i) provides that the regulatory function referred to in section 108 does not include "a function of instituting or conducting criminal proceedings". He relies on paragraph 508 of the Explanatory Notes to the Act which states:

> "508. Subsection (2)(b)(i) expressly excludes from the definition of regulatory function the function of instigating and conducting criminal proceedings. However, this would not exclude the making of enforcement decisions prior to a decision to prosecute, such as a decision to investigate a matter or the reference to a prosecuting authority with a view to the prosecuting authority considering the commencement of proceedings in relation to the matter."

29. Mr Hodivala QC submitted that the decision to prosecute was not within the "instituting" of proceedings and was subject to the growth duty. In our judgment, that submission is unsustainable. Given that the decision which is criticised in the present case is the decision to prosecute the appellant, not some prior enforcement decision, the exception to the exclusion being referred to in paragraph 508 of the Explanatory Notes is clearly not applicable. The complaints in this case are not about "investigating" or "the reference to a prosecuting authority". They are squarely about the stage when the "prosecuting authority" is "considering" the "instituting" of "criminal proceedings", from which it follows that they are untrammelled by the growth duty in section 108. If there were any doubt about this conclusion, which there is not, it is made absolutely clear by paragraph 1.9 of the statutory guidance on the growth duty published in March 2017:

> "In the context of criminal proceedings by a regulator, the growth duty applies to all functions up to and including the decision to refer the case to a prosecutor to review whether criminal proceedings should be instigated. The functions of instituting or conducting criminal proceedings are excluded from the growth duty."

30. In any event, even if Mr Hodivala QC were right that Ms Jones was subject to the growth duty, this argument is misconceived for the reasons which follow. He submitted that Ms Jones had only given perfunctory consideration to the economic consequences of the

decision to prosecute and had not considered at all or sufficiently the consequences which the decision to prosecute would have on local unemployment. It seems to us that there are two fallacies in the appellant's argument. First, we agree with Ms Emsley-Smith for the prosecution that there is no basis for the contention that Ms Jones only gave perfunctory consideration to the economic consequences of a conviction. Her evidence which the judge accepted was that she had weighed in the balance the economic considerations of a conviction for the company alongside other public interest factors. Furthermore, despite Mr Hodivala QC's submissions, there was no failure on the part of the HSE to conduct further investigations as to impact. In other words, on the basis of the judge's findings, the HSE had faithfully complied with its own guidance, including 1.2 of the EPS. Even if Mr Hodivala QC were right that the HSE was under the growth duty under section 108 of the Deregulation Act 2015 in making its decision to prosecute, that adds nothing to 1.2 of the EPS which, as 1.6 states, is made in accordance with the 2015 Act.

31. Second, and more fundamentally, the factual premise underlying the submission that there was a breach of the HSE policy in failing to have regard to the economic consequences of a prosecution was that it would lead to the appellant losing the Scottish Power contract and the workforce becoming unemployed. The judge concluded that the submissions on this were speculative and there was no basis for concluding that the workforce would inevitably lose their jobs. That conclusion was open to the judge and, based on what we have been shown and what has been submitted, she was correct to reach that conclusion. Indeed, her view was subsequently vindicated. Despite Scottish Power being aware of the prosecution, the appellant was awarded one of the Scottish Power contracts for a further four years. The other contract was extended for a further two years, but there is due to be a tendering process commencing in about two months' time. Although Mr Hodivala QC relied upon a downturn in business as attributable to conviction, we are not prepared to accept generalised submissions to that effect. As the judge noted, one matter that may have had some impact on this company was the effect of Brexit.
32. Furthermore, as Ms Emsley-Smith points out, the mitigation submissions for the appellant were supported by a letter from its accountant which confirmed that the company has potential diversification options, including property development. Notwithstanding the level of the fine, the company has stayed in business and the workforce has been retained. As she said, the further contract from Scottish Power provides funds and breathing space for the company to diversify if diversification is required.
33. We can dispose of Ground 4 at this point. It is that the judge erred "in concluding that the consequences of conviction for the appellant were properly matters of mitigation". The appellant submits that this was an error because consequences – namely that "conviction would likely lead to loss of the Scottish Power contract and subsequent closure" – were relevant to abuse of process. This ground is based on a misreading of a paragraph which appears at the end of the judge's ruling. It came only after the judge had considered, in the context of abuse of process, the evidence as to the consequences of conviction, and after she had specifically rejected as speculative the submission that conviction would lead to closure. The judge made the point at the end of the ruling about the position looking forward in the proceedings. The point was that consequences were a matter for mitigation at any sentencing stage, rather than a matter to be raised before the jury at trial, and that

there would need to be a skeleton argument from the appellant were the contrary being suggested. There is nothing in this point.

34. The submission of Mr Hodivala QC in relation to the requirement for proportionality was that prosecution did not represent the "least burdensome" action which was appropriate in the circumstances. This requirement derived from Principle 1 in the Regulators Code, 1.1 of which provides:

> "Regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities1 and should assess whether similar social, environmental and economic outcomes could be achieved by less burdensome means."

35. Mr Hodivala QC also relied, albeit that it arose in a different context, on what was said about the test for proportionality as set out by Gross LJ at paragraph 32 of *R (Soma Oil) v Serious Fraud Office* [2016] EWHC 1471 (Admin).
36. He relied upon the judge's conclusion at paragraph 29 of her ruling that on the evidence the HSE could either have issued an Improvement Notice or proceeded to prosecution as demonstrating that the HSE had not adopted the least burdensome measure. He submitted that by prosecuting the HSE had departed from its own policy but had not sought to justify that departure.
37. The issue of what is proportionate depends upon the circumstances. We agree with Ms Emsley-Smith that a less burdensome response than prosecution would not have met the competing public interest considerations the HSE is required to consider. An Improvement Notice is primarily intended to prevent continuation of a breach, which was not the position here since the rip saw had been removed after the incident. Serving an Improvement Notice in the circumstances of this case would have failed to address the public interest considerations in prosecution where there was a serious offence causing serious harm, as indicated in the passages from 16.1 and 16.2 of the EPS which we cited above.
38. Mr Hodivala QC relied on the judge's observation that the HSE "would have been entitled to either issue an Improvement Notice or proceed to prosecution". This description of alternatives was made in the context of the judge discussing the statement in both the EMM and the EPS that "prosecution may go ahead without recourse to ... alternative sanctions". In any event, what the judge said was alongside her specific finding that "Ms Jones was entitled to reach the conclusion that there had been a serious breach of the health and safety regulations which it was in the public interest to prosecute". The judge was not finding that an Improvement Notice would have been an equally effective 'less burdensome' alternative, given the HSE's public interest assessment. We cannot see how it could have been. In any event, we agree with what was said by the Divisional Court in *Wandsworth LBC v Rashid* [2009] EWHC 1844 (Admin) at paragraph 33:

> "A finding that it would have been reasonable for the borough, in line with the policy, to take another course of action, does not necessarily lead to the conclusion that the course of action they took amounted to an abuse of process".

39. The same point can be seen in *Moss* where the Divisional Court held that the issuing of a Prohibition Notice would have been open to the local authority as an alternative to prosecution (see paragraph 42), but that did not mean that, in relation to "the issue of proportionality", there had been a breach of the guidance (see paragraphs 44-45).
40. It is no answer to that point to say, as does Mr Hodivala QC, that in the sentencing document the HSE put this case in Medium Culpability, Harm Category 3 in the relevant Sentencing Guideline. That categorisation was correct in terms of the Guideline, but it does not follow that this was not a serious breach causing serious injury so that the HSE's own policy pointed to it being in the public interest to prosecute.
41. We also agree with Ms Emsley-Smith that, given the need for consistency, which is one of the objectives of the 2006 Act, Ms Jones was right to regard the unemployment figures in a particular area as not being a public interest factor militating against prosecution. As she said, not only would different enforcement decisions based solely on economic conditions in a locality lead to inconsistency, but it would mean that workers in high unemployment areas would have less protection because HSE enforcement powers would be fettered.
42. We are quite satisfied that the decision to prosecute in this case did not breach any of: the duty under the 2006 Act, the duty under section 108 of the Deregulation Act 2015, the Regulators Code, the EPS or the EMM and that the judge was right so to conclude and to conclude that the decision was not Wednesbury unreasonable and that there was no abuse of process.
43. In those circumstances it is not strictly necessary to go on to determine whether the decision was oppressive, but the judge was rightly unpersuaded by the submissions that the company would be put out of business by the prosecution and we consider that the appellant does not begin to demonstrate oppression in the circumstances of this case.
44. The appeal is dismissed.