SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 20
XA41/17

Lord Justice Clerk
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by Lord Malcolm

in the appeal to the Court of Session under schedule 17, part 3, paragraph 11 of the Equalities Act 2010

by

THE CITY OF EDINBURGH COUNCIL

Appellant

against

R

Respondent

in respect of a decision of

the Additional Support Needs Tribunal for Scotland
dated 7 April 2017

Appellant: McKinlay; City of Edinburgh Council
Respondent: Stobart; Drummond Miller LLP

23 March 2018

[1] This appeal concerns a decision made by the Additional Support Needs Tribunal for Scotland in response to a claim made by the mother of a teenage child with a severe disability. Her mental health and behaviour deteriorated significantly in the summer of 2013, and she began to refuse to go to school. She had not attended school regularly since

December 2013 and not at all since 22 December 2015. Her difficulties arose from a diagnosis of autism spectrum disorder and mental health issues, which significantly limited her ability to benefit from, or meaningfully engage with education, unless given significant support. In April 2014 her mother requested assessment for a co-ordinated support plan (CSP) in terms of section 2 of the Education (Additional Support for Learning) (Scotland) Act 2004. Subsequently proceedings were raised in respect of a failure to provide a CSP, and the tribunal issued a direction requiring that a finalised CSP be issued no later than 6 January 2016. On that date the City of Edinburgh Council, as education authority and responsible body, issued a finalised CSP. The tribunal found it to be inadequate and the authority was required to amend it by 11 November of that year.

[2] The present appeal relates to claims that the authority failed to make reasonable adjustments in respect of the child's education, all in terms of the Equality Act 2010; such failures amounting to discrimination on the grounds of disability in terms of the Act. It was contended that the authority had failed to provide an adequate and effective education. Evidence was heard from a number of witnesses involved in the child's education and in providing support for her, and also from her mother. It was agreed on behalf of the authority that the revised plan remained inadequate, but this was said to follow inevitably from the child being out of school for a lengthy period. It appeared to the tribunal that where a pupil, in consequence of disability, has additional support needs such that she requires a CSP, then a failure by the authority to provide an adequate plan is unfavourable treatment in terms of section 15 of the 2010 Act (discrimination arising from disability). The delay, followed by the inadequacies of both plans, constituted discrimination arising from the pupil's disability. The discrimination occurred in the way the authority provided education for the child (section 85(2)(a)), and it subjected her to a "detriment" in terms of

section 85(2)(f). The authority knew of the disability and there was no legitimate aim served by its conduct. The authority was instructed to issue an apology, and other consequential orders were made for the purpose of remedying the defaults.

[3] The tribunal explained that the plan of November 2016 set a single educational objective, namely that the child returned to full-time school education. It specified that the required additional support to achieve this was (a) a consultant psychiatrist specialising in child and adolescent mental health would provide anti-depressant medication and attend planning meetings, and (b) a social worker would be the lead professional for the team around the pupil. Under reference to paragraphs 10-17 of annex 2 to the decision, regard was had to the requirements of section 9(2) of the 2004 Act and the terms of the relevant code of practice. It was "clear from the paucity of the educational objective … that the CSP is not adequate". The tribunal doubted that the additional support mentioned in the plan would secure the educational objective. Medical help could not be co-ordinated in terms of a CSP, and the doctor himself was not confident that the treatment was helping the pupil. The provision for a social worker to lead the team was not an additional support in terms of the Act, it being no more than an administrative role.

[4] The tribunal held that the "problem" in the case was not a failure to make reasonable adjustments, but the absence of an adequate CSP. This resulted in "a lack of strategic oversight and a failure to co-ordinate measures of support and reasonable adjustments which would help the child" (paragraph 11(46)). The authority had not explained why the plan made no mention of the support which had been provided, for example by the supply of a virtual learning environment for the pupil, and educational support from a visiting teacher. As to the CSP, the evidence demonstrated that the sole educational objective was

unachievable. The plan should have identified "stepped objectives" towards a return to school.

[5] The tribunal's conclusions were expressed as follows at paragraphs 11(50-52):

> "It appeared to the tribunal that the failure to provide an adequate CSP is not simply a technical or administrative failure, but is a failure that goes to the very heart of the circumstances of this case. A CSP which set out a series of appropriate and adequate educational objectives and identified suitable, appropriate and adequate measures of additional support and the professionals who should provide those additional measures of support would provide a structure within which the young person's planning meetings (YPPM) could operate more effectively. In due course, if necessary, the minutes of the YPPM meetings could be compared with that adequate, comprehensive CSP to ascertain what, if any, progress the responsible body was making towards the suitable adequate education objectives identified in the CSP.
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> The child is entitled in terms of the 2004 Act to an adequate CSP. The tribunal is satisfied that, in failing to provide the child with an adequate CSP, the responsible body has treated the child unfavourably and subjected her to detriment in terms of section 85(2)(f) of the 2010 Act.
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> The child is entitled to an adequate CSP in terms of the 2004 Act setting out adequate educational objectives and additional measures of support and specifying the professionals to provide those measures. The tribunal is satisfied that, in failing to provide an adequate CSP – in failing to identify adequate objectives and measures – the responsible body has failed to provide the strategic oversight and structure for the YPPM to operate in and that, in doing so, it has treated the child unfavourably and discriminated against her in the way it provides education for the child. The nature of the unfavourable treatment in the way that the responsible body provides education to the child arises from the failure to identify adequate educational objectives and measures referred to above. The YPPM is chaired by a social worker who has very limited direct involvement with the child and whose own service – social work – has very limited involvement with the child. He is not an educationalist. Accordingly, it can only hamper him in chairing the YPPM that appropriate step by step educational objectives have not been identified by the responsible body, nor have adequate additional measures of support been identified by the responsible body. Effectively, he and the YPPM is being denied a useful over-arching strategy which would inform the decisions taken at the YPPM about engagement with, and educational provision for, the child. Accordingly the tribunal is satisfied that the responsible body has discriminated against the child in terms of section 85(2)(a) of the 2010 Act."

[6] The authority has appealed against the decision to this court. The grounds of appeal can be summarised as follow. The tribunal was in error in concluding that there was

unfavourable treatment in terms of section 15 of the 2010 Act, and that there was a breach of duty in terms of section 85(2)(a) and (f). Furthermore the tribunal failed to make the necessary findings in fact to support its conclusions. It did not provide adequate reasons. There was no evidence of a lack of co-ordination and strategic oversight, nor of inefficient YPPMs. The tribunal ignored the evidence of the support provided and the adjustments made for the pupil.

[7] In submissions, the grounds of appeal were elaborated upon as follows. Under reference to *Trustees of Swansea University Pension and Assurance Scheme and Another* v *Williams* [2015] ICR 1197, the tribunal failed to identify the hurdle, difficulty, or disadvantage which the inadequate CSP created for the child as a disabled person. The tribunal had been unpersuaded by various claims of a failure to provide reasonable adjustments under section 14 of the 2004 Act. In short, no unfavourable treatment had been established. Having regard to the above summary of the tribunal's decision, and having read it in full, we see no merit in these criticisms. The difficulties caused by the deficient CSP were clearly articulated.

[8] It was submitted that, in any event, the tribunal failed to make findings in fact such as would support the view that the inadequacies in the plan resulted in a lack of strategic oversight and a failure to co-ordinate measures of support and reasonable adjustments which would assist the child. Reference was made to the fact that evidence was led from people who had attended the YPPMs. We do not accept this submission. As a specialist body the tribunal was more than entitled to conclude that the deficiencies in the plan would have these consequences. It was a reasonable conclusion to draw given the failure to provide the responsible persons with an appropriate educational objective or objectives supported by the expression of sensible and practical means to achieve the desired result.

[9] It was submitted that the identified deficiencies in the plan and their consequences did not amount to a failure to provide education for the pupil in terms of section 85(2)(a). The tribunal had not upheld the claim that its duties under section 14 of the 2004 Act had been contravened (paragraph 11(35)). Education had been provided in various ways, for example, through the virtual learning environment and from a visiting teacher. The CSP is a strategic planning document, not a way of providing education. There were no findings in fact such as would support a breach of this provision.

[10] We are satisfied that this submission takes too narrow a view as to the scope of the duty not to discriminate "in the way (the authority) provides education for a pupil." Where it is needed, a CSP is an important part of the authority's educational responsibilities. Reference can be made to paragraph 11(50) of the decision (quoted earlier). The CSP should set out the educational objectives for the child and the measures necessary for their fulfilment. Reference can be made to section 9(3) of the 2004 Act. We identify no error in the tribunal's view that the deficiencies in the plan will have impacted adversely on the education provided to the pupil. In any event, we doubt whether the court would have been entitled to substitute any different opinion of its own for that of the specialist body entrusted with making these decisions. We see no need for any findings in fact over and above those made by the tribunal.

[11] With regard to the requirement in section 85(2)(f) not to discriminate "by subjecting the pupil to any other detriment", it was submitted that again there are no relevant findings in fact as to support the finding of a breach of this provision. No disadvantage to the pupil is identified.

[12] We accept that it is not clear that the finding of a breach of this provision added anything of materiality to the tribunal's decision. The tribunal did not specify any

additional detriment over and above that discussed in terms of subsection (2)(a). However, any flaw in this regard is of no real importance to the decision overall. In other words, if this finding is an error, or subject to challenge, it is not material to the ultimate order.

[13] The final submission for the authority merits greater consideration. It was contended that there had been no identification of the basis for the conclusion that, in terms of section 15(1)(a) of the 2010 Act, the authority had treated the pupil unfavourably "because of something arising in consequence of (the pupil's) disability." At the appeal hearing it appeared that both counsel considered that this provision meant that the delay/inadequacies in respect of the CSP required to be caused or contributed to by the pupil's disability, as opposed to, for example, by a lack of adequate resources, systemic failures, or sheer carelessness on the part of the authority. It was submitted that the tribunal did not address the cause of the unfavourable treatment. (Counsel for the mother submitted that the onus was on the authority, and it had not presented any non-discriminatory cause for the unfavourable treatment.)

[14] In our view the suggested approach involves an erroneous construction of the wording in section 15(1)(a), which states:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability,"

The building blocks are:

(a) the authority treating the pupil unfavourably (this is satisfied); and

(b) the cause of this being something arising in consequence of the pupil's disability.

No doubt the wording in the second part was carefully chosen. If the intention was that the disability must be a cause of the treatment being unfavourable, this was a curious way of expressing it. In the present case the "something" was the delayed and then inadequate CSP. While as a generality a CSP can be required in respect of a pupil without a disability, in the context of this claim, if the pupil had not been disabled there is no reason to suppose that there would have been a CSP. It was the disability which resulted in the need for the CSP, and it was the CSP which was the unfavourable treatment.

[15] *Blackstone's Guide to the Equality Act*, third edition, states (paragraph 3.23) that the legislation is aimed at cases "where the reason for the (unfavourable) treatment is not the disability itself, but something which arises in consequence of the disabled person's disability." This contradicts the proposition that the cause of the treatment being unfavourable has to be the disability. A more remote connection is sufficient. *Blackstone's Guide* continues to the effect that any detriment can amount to unfavourable treatment, irrespective of how others are treated. There is no need for a comparison with the treatment of non-disabled people. Treatment common to the disabled and non-disabled can, in the case of the former, amount to discrimination if, in the circumstances of the case, the treatment arises in consequence of the disability. So if, but for the disability, the disabled pupil would not have been subject to the unfavourable treatment, then, on the face of it, the statutory test is met.

[16] Echoing another passage in *Blackstone's Guide*, the tribunal observes that "it is the thing which arises in consequence of the disability which must have caused the treatment." Examples are figured such as absences from work, and behavioural or capability issues. Thus, even if a disabled person is being treated in the same way as non-disabled people, for example by being disciplined as a result of absences or careless work, discrimination can

occur in terms of section 15(1)(a). If a CSP had been required of the authority in respect of a non-disabled pupil, then the fact, if it be the fact, that whatever caused the deficiencies in the present case would have operated to the same disadvantageous effect on that person's education, this will not allow the authority a defence to this disabled pupil's discrimination claim.

[17] Overall it is sufficient that the authority knew of the pupil's disability, subjected her to unfavourable treatment because of a CSP which was required because of the disability, and, in terms of subsection 1(1)(b), cannot show that the treatment was "a proportionate means of achieving a legitimate aim" (there was no suggestion of a legitimate aim). Our conclusion is that the tribunal did not err in its findings in paragraphs 11(41/2):

> "It appeared to the tribunal that where a pupil, in consequence of disability, has additional support needs such that the pupil requires a CSP in terms of section 2 of the 2004 Act then the failure by a responsible body to provide a CSP or the provision of a CSP which is not adequate, is unfavourable treatment in terms of section 15 (discrimination arising from disability) of the 2010 Act… and adversely affects how the responsible body provides education for the child in terms of section 85(2)(a) of the 2010 Act."

[18] We have reached the above view on the basis of an interpretation of the statutory wording. We are reassured to note that our decision is consistent with the careful analysis provided by Laing J sitting in the Employment Appeal Tribunal in *Hall* v *Chief Constable of West Yorkshire Police* [2015] IRLR 893, and that of Simler J, also sitting in the Employment Appeal Tribunal, in *Pnaiser* v *NHS England* [2016] IRLR 170. We respectfully endorse the observations of both learned judges as to the background to and proper construction of section 15 of the 2010 Act. We also note that those decisions, and our analysis, sit comfortably with the discussion of section 15 in *Aster Communications Ltd* v *Akerman-Livingstone* [2015] AC 1399; Baroness Hale of Richmond at paragraphs 18 and 19, and

Lord Wilson at paragraph 67. Reference can also be made to the comments of Elias LJ in *Griffiths* v *Work and Pensions Secretary* [2017] ICR 160 at paragraphs 25 and 47-58.

[19] For the above reasons the appeal will be refused.