Disability Discrimination Claims and Schools: Case Law Update

Nicola Braganza KC, Ollie Persey and Harry Harris

12 July 2024


GARDEN COURT
CHAMBERS

Disability discrimination claims against schools and academies: Upper Tribunal case law update

Ollie Persey, Garden Court Chambers

12 July 2024

What am I going to cover?

- The basics: sections 15 and 20 as applied through section 85 Equality Act 2010
- *SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC)
- *KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC)

Discrimination arising from disability

Section 15 Equality Act 2010
(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, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The key elements:

i. Whether the disabled person has been treated unfavourably;
ii. The reason for the unfavourable treatment;
iii. Whether that reason is something arising in consequence of the disabled person's disability;
iv. Whether the school knew, or could reasonably have been expected to know, that the person had the disability relied on;
v. If so, whether the school has shown that the treatment is a proportionate means of achieving a legitimate aim.

Reasonable adjustments duty

The key part of the reasonable adjustments duty is section 20(3), which provides that *"where a provision, criterion or practice ['PCP'] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

Schedule 13(2)(b) Equality Act 2010 provides that the reference in section 20(3) or (5) to a disabled person is:

i. in relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;
ii. in relation to a relevant matter within sub-paragraph (4)(b), a reference to disabled pupils generally.

The key elements:

i. Disability
ii. PCP
iii. Substantial disadvantage
iv. Comparator (not section 23 Equality Act 2010, but disabled pupils and non-disabled pupils)
v. Reasonable steps

SS v Proprietor of an Independent School: [2024] UKUT 29 (AAC)

The FTT materially erred in law in its consideration of some of the claimants' claims of failure to make reasonable adjustments contrary to ss 20, 21 and 85(6) of the Equality Act 2010 by not identifying the provision, criterion or practice (PCP) or the substantial disadvantage suffered by the child S before considering whether there had been an unreasonable failure to make adjustments.

The FTT;s conclusion that the child's subsequent permanent exclusion was justified for the purposes of s 15 of the 2010 Act was therefore also flawed as it relied in part on the Tribunal's flawed conclusion on the reasonable adjustments claims.

The FTT further erred in law i n relation to a claim of discrimination arising from disability contrary to s 15 and 85(2) of the Equality Act 2010 in relation to a refusal to provide an additional therapy dog session by regarding it as determinative that the session was not required to meet the child's needs as a disabled person, rather than considering whether the school's reason for refusing the session was 'something arising in consequence' of the disability.

The Upper Tribunal also gives general guidance on the duty to make reasonable adjustments and its relationship with the Education, Health and Care Plan framework in the Children and Families Act 2014 (see also

KTS v Governing Body of a Community Primary School: [2024] UKUT 139 (AAC)

The First-Tier Tribunal materially erred in law in its consideration of the claimants' claim of failure to make reasonable adjustments under sections 20, 21 and 85(6) of the Equality Act 2010 as it failed to determine whether the adjustments sought by the claimants were reasonable. The Tribunal also made a perverse finding of fact. The Upper Tribunal's decision gives guidance of general application on the reasonable adjustments duty and the approach that Tribunals should take to case management in claims under the Equality Act 2010.

Children and Families Act 2014 and reasonable adjustments (Stout principles)

Judge Stout set out principles over the two cases. Principles a-l are from *SS* (at [77]) and principles m-o are from *KTS* (at[38]), the latter *"deal more directly with the situation in the present case where the claimed reasonable adjustments overlap with the provision that is specified in the EHCP"*.

a) The EA 2010 contains no exception from the responsible body's duty to make reasonable adjustments for a pupil with an EHCP.
b) Nor is there any exception in the EA 2010 for independent schools like P, whatever their size and whatever the nature of the curriculum they normally follow.
c) Judge Ward in *A Multi Academy Trust v RR* [2024] UKUT 9 (AAC) has also recently confirmed that the duty applies to special schools as it is does to mainstream schools, notwithstanding that there are generally no non-disabled pupils at such schools with whom an actual comparison can be made for the purpose of establishing substantial disadvantage; the comparison in such cases must be with hypothetical non-disabled pupils. (**Hypothetical comparator**)

Stout principles continued…

d) If a child's parents have decided to place the child in an independent school other than the school named on the child's EHCP, and the local authority is treating its provision duty under s 42(2) of the CFA 2014 as discharged by making the school named in Section I available to the child, it does not follow that the independent school is not under an obligation, by way of a duty to make reasonable adjustments, to make any of the provision for that child that is specified in the EHCP. The duty to make reasonable adjustments applies (in slightly varying forms) in many spheres of life, including employment and service provision as well as education. The duty would be largely emasculated if it were an answer to a claim of failure to make reasonable adjustments for a respondent to say 'I am not going to make any reasonable adjustments because there are other employers / service providers / schools who will and the disabled person can go and work for them / use their services / attend that school' instead.

e) Although the responsible body of an independent school is not subject to the duty that applies to mainstream schools under s 66 of the CFA 2014 to secure that special educational provision is made for where it is called for by the pupil's special educational needs, the framework under the CFA 2014 is such that neither an independent school or a mainstream school are under a duty under that Act to secure that the provision in an EHCP is made for a child – that duty is on the local authority. However, the duty to make reasonable adjustments applies to all schools. The framework of provision under the CFA 2014 is relevant to considering what is reasonable by way of adjustments under the EA 2010, but it is merely one factor to consider, it carries no special weight.

Stout principles continued…

f) In all cases, it will be a question of considering what is reasonable in all the circumstances in the light of the nature and extent of the substantial disadvantage suffered by the child at the school the child attends, in comparison to non-disabled children.

g) The relevant circumstances to take into account will generally include the cost of the adjustments, how effective they will be, the independent school's resources, the reasons why the child is at the school and the nature and availability of support from a local authority through an EHCP. The Tribunal is likely to find it helpful to consider the Equality and Human Rights Commission Guidance on Reasonable Adjustments for Disabled Pupils (2019) (the EHRC Guidance) which identifies other factors that may be relevant in the particular case. Among other things, that guidance explains that, "The extent to which special educational provision will be provided to the disabled pupil under Part 3 of the Children and Families Act 2014" is a relevant factor in deciding whether it is reasonable for a school to make a particular adjustment, and notes, "It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than for a school with fewer resources". It needs hardly be said that some independent schools will have more financial resources than other independent schools, and the financial resources of independent schools are likely to be differently structured, and sometimes greater, than those of maintained schools.

Stout principles…

h) In some cases, the Tribunal may conclude that it is reasonable for an independent school to make no, or only limited, adjustments because they are not affordable or not likely to be sufficiently effective or because the substantial disadvantage could potentially be avoided by securing local authority-funded provision through and EHCP or by the child moving to the school named in the EHCP (albeit that the Tribunal will need to take into account that the child will thereby also lose what the parents are likely to see as the significant benefits of a private education). In other cases, it may be reasonable for the independent school to make the adjustment(s) sought even if the child's parents have the option of taking up the local authority-funded provision available to the child through the EHCP.

i) The focus under the EA 2010 must be on the reality. While it may be that more or better provision ought to be being made for a child by the local authority under an EHCP, if that is not in fact happening in a particular case, the Tribunal will need to decide whether it would be reasonable for the school (of whatever type, whether independent or maintained) to put that support in place. How long it may be necessary for a school to 'bridge a gap' of that sort will be a factor for the Tribunal to take into account in deciding what is reasonable.

Stout principles

j) It is only if appropriate support is already in place in the school in question through an EHCP, so that the child is no longer under a substantial disadvantage at that school, that the responsible body of a school is relieved of its duty to make reasonable adjustments. This point is also made in the EHRC's Guidance (although this is a passage in the Guidance that it is easy to misread as suggesting – incorrectly - that once an EHCP is in place the duty to make reasonable adjustments falls away):

"There is a significant overlap between those pupils who are disabled and those who have SEN.

Many disabled pupils may receive support in school through the SEN framework. In some cases, the substantial disadvantage that they experience may be overcome by support received under the SEN framework and so there will be no obligation under the Act for the school or local authority to make reasonable adjustments."

Stout principles

k) If the child is under a substantial disadvantage in comparison to non disabled pupils, the duty to make reasonable adjustments applies and the RB must fund all reasonable adjustments. It cannot require the disabled child or its parents to pay for the adjustments: EA 2010, s 20(7). If a parent volunteers to pay all or part of the cost, of course, that will be a factor to take into account in deciding whether the adjustment is reasonable.

Stout principles

l) In considering costs and resources arguments, it is for the Tribunal to assess objectively what is reasonable: see G4S (Cash Solutions) UK Ltd v Carroll [2016] IRLR 820 at [43]-[61] per HHJ Richardson. Mr Friel in this case relies on paragraph [37] of the judgment of Underhill J (as he then was) in *HM Land Registry v Benson* [2012] ICR 627 to argue that allocation of resources is a matter for the school. However, Benson is not directly relevant here: Underhill J was there dealing with the approach to be taken where cost is relied on by an employer as justifying indirect age discrimination under s 19 of the EA 2010. Underhill J at [34]-[37] of Benson determined that the Tribunal should have accepted that the employer's aim of balancing its budget was legitimate and then gone on to consider whether the measure adopted to meet that aim was proportionate having regard to the impact on the individual. Although there may not in practice be much difference between the analysis required for a reasonable adjustments claim under s 20 and that required when deciding whether indirect discrimination under s 19 is justified as a proportionate means of achieving a legitimate aim, it is important not to elide the two and what Underhill J said in *Benson* cannot simply be read across to a reasonable adjustments claim. That said, in deciding whether it is reasonable to make the particular adjustment, the Tribunal will need to give careful consideration to the school's evidence about its budget and how it has decided to allocate its resources, but the question of what is reasonable in the particular case is for the Tribunal to determine.

Stout principles

m) Where a child with an EHCP is attending the school named in that EHCP and that school is a maintained mainstream school (or other school or institution to which the duty in s 66 of the CFA 2014 applies), the school will be under a statutory duty, enforceable by way of judicial review proceedings, to "use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made". However, as already noted, that duty does not itself require the school to implement an EHCP, which remains the responsibility of the local authority under s 42 of the CFA 2014. Nor does it elevate the duty on the school to make reasonable adjustments under the EA 2010 to a duty use best endeavours: *RD and GD v The Proprietor of Horizon Primary* (SEN) [2020] UKUT 278 (AAC) at [68]-[71]. The duty to make reasonable adjustments is a duty that applies in the same way, and to the same standard, regardless of the nature of the school placement.

Stout principles

n) In most cases, provision that has been properly specified in Section F of an EHCP will also be provision that the duty to make reasonable adjustments under the EA 2010 will require a school to provide. This is because of the similarities in the legal provisions. The special educational provision specified in an EHCP is, by virtue of ss 21 and 37 of the CFA 2014 (as interpreted by *R (A) v Hertfordshire County Council* [2006] EWHC 3428 (Admin) at [25]-[27] and *Devon CC v OH* [2016] UKUT 0292 (AAC) at [38]), supposed to be the special educational provision 'reasonably required' by the child's special educational needs. 'Special educational needs' are in turn defined in s 20 by reference to the child having a learning difficulty or disability which presents them with 'significantly greater difficulty' in learning than the majority of others the same age or 'prevents or hinders' them from accessing the facilities generally provided for others. 'Disability' in CFA 2014 is the same as 'disability' under the EA 2010: see s 83(3). It can readily be seen therefore that, in most cases, what is specified in Section F will be provision that is also required by the duty to make reasonable adjustments because, by statutory definition, it should be the provision reasonably required to remove the disadvantage that the child is under in relation to their peers. The provision in Section F and the provision required by the duty to make reasonable adjustments will, in particular, normally be the same where the provision in the EHCP consists of teaching approaches, strategies and resources that would ordinarily be provided by a school from within its own resources. **That is not to say, though, that there will not be scope for argument in a particular case that, for example, the provision in the EHCP is out of date or unreasonable in some other respect, or that in fact the child is not at a substantial disadvantage in relation to that particular matter so that the duty to make reasonable adjustments does not arise**. **Further, where an EHCP makes provision for a child to receive support from another agency, it is unlikely to be reasonable to expect the school to duplicate that support** (see paragraph 6.31 of the Technical Guidance as updated in September 2023), but, as already noted at sub-paragraph i., it may be reasonable for a school to 'bridge a gap' in provision that ought to be provided by the local authority under the EHCP. However, in the ordinary course of events, a school that fails to implement the teaching approaches, strategies and resources specified in the EHCP as being required for the child is likely also to be failing in its duty to make reasonable adjustments under the EA 2010.

Stout principles

o. It does not follow, however, that a claim for failure to make reasonable adjustments under the EA 2010 will necessarily be an appropriate way of enforcing a failure to make the provision specified in the EHCP. Informal resolution and, if necessary, mediation should always be the starting point. Judicial review proceedings may be more appropriate in some cases, particularly perhaps where there may be joint responsibility for the failure as between the local authority and the school. If a claim is brought under the EA 2010, consideration will need to be given to how a claim for reasonable adjustments needs to be approached. A claim of failure to make reasonable adjustments cannot be presented to the Tribunal as a generalised claim for enforcement of the EHCP. Just because provision is specified in an EHCP, that does not relieve the party bringing the claim of the need to frame it as a claim for reasonable adjustments, with all the elements required for a successful claim under EA 2010 as discussed above. Nor does it relieve them of the need to satisfy the initial burden of proof under s 136 of the EA 2010. In other words, the claimant still needs to adduce evidence of the PCP that has been applied, or the auxiliary aid that has not been provided, together with evidence of the disadvantage suffered and evidence from which the Tribunal could conclude a reasonable adjustment has not been made before the burden will pass to the responsible body to show that it has not failed to comply with the duty.

Unfavourable treatment and therapy dogs: *SS*

- Request for additional session with a therapy dog around the time of the disabled child's birthday was denied. The RB refused this request because of the child's behaviour the previous two weeks.
- FTT had concluded:

  "there is insufficient evidence to link access to the therapy dog and [S's] disability", that the session in question "was to be a 'one off' extra session" and, as such, refusing it did not constitute unfavourable treatment."
- *"It will be a question of fact for a Tribunal in each case whether that low threshold [for unfavourable treatment] is crossed, and provided the Tribunal has otherwise directed itself properly in law, it will only be susceptible to appeal if its conclusion is perverse in the particular case."* [47]
- Being provided with a benefit that could have been *more beneficial* is generally not unfavourable treatment, however, no reason in principles why refusal of treat could not be unfavourable treatment: *"Refusal of a treat is likely to be upsetting for a child. If the school was willing to arrange it as a birthday treat, and might have been willing to arrange something similar for another child, but refused in her case, it would be open to a Tribunal to conclude that the treatment was unfavourable."* [51]
- The FTT "*has not made any findings about the session being a treat or the impact on her of it not going ahead or considered whether not being permitted a treat amounted to unfavourable treatment. Rather, it has rejected her argument that the refusal to allow her the additional therapy dog session as a birthday treat was unfavourable treatment for the sole reason that the session was not required to meet her needs as a disabled person."* [52]

Unfavourable treatment and therapy dogs: *SS*

- The "*reasons in this case make clear that the Tribunal wrongly regarded the question of whether there was a link to S's disability as determinative of the unfavourable treatment question. It was not; indeed, in most cases it will be irrelevant to the question of whether the treatment is unfavourable. However, I would not go so far as to say that a link to disability is an irrelevant consideration in all cases at the first stage of deciding whether there has been unfavourable treatment. The fact that the session was 'just' a treat and not required to meet S's needs as a disabled person could be relevant objectively to whether the refusal of the session amounted to unfavourable treatment, but it was not determinative and the First-tier Tribunal erred in law in regarding it as being determinative.*" [55]

SS: A reminder of the importance of identifying PCP and substantial disadvantage

At [66]: *"At [44] of Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2017] ICR 150 Elias LJ (giving the judgment of the Court) held as follows (emphasis added):- 44. Mr Justice Langstaff P, giving the judgment of the EAT, rightly observed that when considering the question of reasonable adjustment,* ***it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it****. These observations of the President were approved by Laws LJ giving the judgment of the Court of Appeal in Newham Sixth Form College v Sanders [2014] EWCA Civ 734 para.9."*

At [70]: "*In this case, as is clear from the relevant parts of the First-tier Tribunal's decision set out above, in particular [81]-[83] where the First-tier Tribunal stated in terms "As we have found that the RB made all adjustments that were reasonable … we do not have to consider the step-by-step approach set out in the law", the First tier Tribunal deliberately did not take the approach that the EAT in the Environment Agency v Rowan and the Court of Appeal in Griffiths held was necessary. It did not identify the PCP that applied in relation to each of the claims of failure to make reasonable adjustments. It did not identify whether S was substantially disadvantaged (i.e. whether S was placed at a more than minor or trivial disadvantage) by any particular PCP and, if so, what the nature and extent of the disadvantage was. As such, it was not in a position properly to assess whether the RB had complied with its duty to make reasonable adjustments. It therefore in principle erred in law and its decision on the reasonable adjustments claims should be set aside unless the error was not material"*

[71] "*it seems to me that the only reasonable adjustments claims where the Tribunal's error was not material are those where the facts found by the Tribunal were such as to preclude the reasonable adjustments claim succeeding in any event"*


GARDEN COURT
CHAMBERS

Disability discrimination claims against schools and academies: Upper Tribunal caselaw update

Ollie Persey and Harry Harris, Garden Court Chambers

12 July 2024

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

Facts

- RR's son, LR was a pupil going into Year 10. He had an EHCP and attended a specialist provision that supported pupils with moderate learning difficulties and additional complex needs with a wide range of need profiles.
- Part of RR's claim against the Responsible Body was that there had been a failure to prepare SR for the transition into Year 10 (SR's EHCP at Section F contained provision to carefully plan and and document a transition programme).
- The FtT found that, during the Summer Term, although there had been some planning for SR's transition to Year 10, there was no single document containing a transition plan for him.
- Additionally, the FtT found that the school had sent an email on 7 July 2021 to the parents/carers of all pupils at the school, which did not mention the individual needs of pupils in respect of transitioning or that a specific transition plan would be drawn for them

FTT's decision

The FTT found that:

"99. Whilst the Responsible Body clearly carries out some transitional planning in respect of pupils moving from one year to another, no evidence was presented to us to demonstrate that an individual documented plan was prepared, we consider that this places disabled pupils generally at a substantial disadvantage compared with non-disabled pupils. The lack of a documented transition plan referring to a pupil's particular needs, means there is a lack of certainty and clarity as to the support which will be in place during transition and how that support will be organised.

100. In terms of the reasonable adjustments to be put in place to avoid the substantial disadvantage to which we have referred, this should have been the use of a planned and documented transition plan. The failure to do so leads us to conclude that the Responsible Body were in breach of Section 20(3)."

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

Appeal to the UT

- The submissions of the Responsible Body before the UT were:
  - That the FtT had misapplied the requirement in the modified s.20(3) test for the substantial disadvantage to have been experienced by "disabled pupils generally";
  - The FtT did not identify the comparator group by reference to which it held the FtT had experienced "substantial disadvantage"; and
  - That the FtT was inadequate in its reasoning.

- The thrust of the Responsible Body's submissions were that the FtT and Upper Tribunal are constrained by authority to accept that a PCP must be capable of being applied to the comparator, which it was argued should be interpreted meaning that the comparator must be in the same institution (i.e. attending special school). Mr R contended that the comparator group would be those who are 'not disabled in the same way'.

Legal framework

- Pursuant to s.85 (6), the responsible body of a school to which s.85 applies has a duty to make reasonable adjustments. As per s.85(7)(c), s.85 applies to a special school not maintained by the local authority.

S.20

- S.20 sets out in general terms the duty to make reasonable adjustments
- S.20(3) provides:

  'The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'

- S.20(3) is modified by Schedule 13 Education: reasonable adjustments

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

- **Schedule 13 Part 2** provides:

'(3) For the purposes of this paragraph—

(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

(b) the reference in section 20(3) or (5) to a disabled person is—

(i) In relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;

(ii)in relation to a relevant matter within sub-paragraph ***(4)(b),*** *a reference to* ***disabled pupils generally****.*

(4) In relation to each requirement, the relevant matters are—

(a) deciding who is offered admission as a pupil;

(b) provision of education or access to a benefit, facility or service.'

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

- The provision of a transition plan falls within the 'provision of education' for the purposes of §2(4)(b) of Schedule 13

- Modified s.20(3) therefore reads as follows:

  - "The first requirement is a requirement, where a provision, criterion or practice applied by or on behalf of the responsible body puts **disabled pupils generally** at a substantial disadvantage in relation to provision of education or access to a benefit, facility or service in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage".

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

Discussion of the issues

- Summary of legislative purpose at §24-25
- UTJ Ward confirmed with reference to relevant authorities that the impact of the PCP which fell to be examined was on a group of pupils, rather than on a particular individual pupil, but not all disabled pupils.
- Cited *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin)[§24] at in full – Fordham J's consideration of the need to consider the reasonable adjustments duty by reference to the needs of the relevant class, and the difficulties that can entail:

> *'By replacing "a disabled person" (s.20(5)) with "disabled people generally" (Schedule 2 §2(2)) in the test of comparative substantial disadvantage, Parliament ensured that the test is not individualised but class-based […]*
> *In the Code, where reference is made to "people with different kinds of disability" (§7.24), examples given include: "people with dementia"; "people with… mental health conditions"; "people with … mobility impairments"; but also "visually impaired people who use guide dogs"; and "visually impaired people who use white canes" (§§7.24 and 7.25 […] In Finnigan, the Court of Appeal had spoken of the relevant group as being "deaf persons" and "deaf persons as a class" (§§31, 33 and 39).*
> *In MM the Court focused on "mental health patients" (§66). In [R(VC) v Secretary of State for the Home Department [2018] EWCA Civ 57] the Court focused on "mentally ill detainees" (§153). In my judgment, the most reliable and authoritative guide is the idea of "people disabled in the same way",*
> *derived by the Court of Appeal in VC at §153 from Supreme Court authority (citing Paulley v FirstGroup plc [2017] UKSC 4 [2017] 1 WLR 423 §25). That approach identified "wheelchair users" – not 'people who are mobility-impaired'– as the relevant group.'*

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

Discussion of the issues

- UTJ Ward at §§32-34 set out why Mr R's submission that the comparator was people not disabled in the same way was unlikely to be the legislative intent, and that, with further reference to Fordham J in *Rowley,* in general terms comparison is to be with persons who are not disabled (§34)
- The Responsible Body relied upon *Ishola v Transport for London [2020]* EWCA Civ 112 at [36]:

  'To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course… that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.'
- UTJ Ward clarified that, regarding the cited paragraph of *Ishola*, its significance is that a PCP must be capable of being a comparator, but *Ishola* does not consider what the limits, if any, are on who may constitute that comparator.
- UTJ Ward confirmed at §37 that the proper comparator is context-specific.

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

Discussion of the issues

- §§39-40

> *'Mr Cullen also submits that the interpretation he invites me to adopt is supported by the wording of the modifying provision to s.20. In his submission the requirement imposed by the added words that a PCP be "applied by or on behalf of the responsible body" carries with it an implication that the comparator must be someone to whom the responsible body could apply the PCP. He does not shy away from the consequence that for a large number of special school pupils, his interpretation would mean that they would be denied the possibility of bringing reasonable adjustment claims. He notes, though, that that does not remove all claims under the Act from special school pupils; claims for direct discrimination, victimisation and harassment would still be open to them.*
>
> *I do not accept that interpretation. Whilst I accept that the Act does withhold its protection from certain characteristics in certain limited circumstances, such as those in s.85(10), it would be an extraordinary interpretation, and one wholly inconsistent with the overall purpose of the legislation as summarised at [23] above, which denied pupils at a special school who are disabled the right to bring a reasonable adjustments claim, purely because they were attending a special school rather than a mainstream one. I am unable to draw the implications from the words "applied by or on behalf of the responsible body" which Mr Cullen suggests. In my view those words exist so as to ensure that a responsible body only has to make reasonable adjustments in respect of a PCP, the imposition of which it controls. It says nothing about the comparator.'*

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

- UTJ Ward found that the wording of ”persons who are not disabled” rather than “pupils who are not disabled” in the modified s.20(3) supported this conclusion.
- And stated at §50:
  - *‘It is accepted that a comparator may be hypothetical (see Ishola). The nature of PCPs imposed in a school context is that they are likely only to be applicable to those attending school and in my view the comparison to be made under the Act in a case such as this is with a non-disabled child about to move to a new school year with new demands. In a mainstream school, there may be a comparator within the school. In a special school that is less likely, but “person” is wider than “pupil” and so hypothetical comparator is permissible. Comparison with such a child would be consistent with Smith and Archibald, as the PCP leading to moving to a school year without a clearly-defined Transition Plan is the claimed disadvantage experienced by SR.’*

A Multi Academy Trust v RR [2024] UKUT 9 (AAC)

- However, UTJ Ward did conclude that the FtT had erred in law by providing inadequate reasons by making a comparison with non-disabled "pupils" without indicating what it meant - the fact that the Responsible Body's school may not have many or any non-disabled pupils means that it is possible to consider a comparison with hypothetical non-disabled pupils elsewhere. but was is not evident that that was the comparison the FtT was making (§53).
- There was also no evidence before the FtT about the effect of a lack of a documented transition plan on a hypothetical non-disabled pupil moving to a new stage in their education (§54).
- The FtT decision was set aside insofar as relevant to the decision against the Responsible Body, with issues to be addressed including defining who constitutes "disabled pupils generally" for the purpose of the modified s.20, given SR's various conditions; establishing an evidential base not only for the impact of the claimed PCP on him but on others in that group; and considering how to approach the evidential aspects regarding the impact on the (very possibly hypothetical) nondisabled comparators as "persons who are not disabled" (§55).

LW v Proprietor of Broughton Hall Catholic High School [2023] UKUT 301 (AAC)

- Appeal involving rule 8 strike out of a claim, and when 'notification' of the striking out takes place.
- The Claimant before the FtT was ordered to file an attendance form, but stated that she did not receive the order. Subsequently the Claimant found representation, and the attendance form was provided, albeit several weeks out of time. By this point the 28-day period set out on the order after which the claim would be automatically struck out had passed. The Claimant's representative was therefore notified that the claim had been automatically struck out some weeks before. The Claimant's representative made a Request for Change immediately, requesting reinstatement of the claim.
- FtTJ McCarthy found that as the Claimant did not apply within the statutory 28 days (from the date as specified on the order concerning automatic strikeout) for the claim to be reinstated, and because she did not provide a reasonable explanation why she failed to do so, there was no good reason to either extend time or reinstate the claim.

LW v Proprietor of Broughton Hall Catholic High School [2023] UKUT 301 (AAC)

- Under rule 8 of the FtT's Rules:

  "(2) The proceedings, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction would lead to the striking out of the proceedings or that part of them.

  […]

  (6) If the proceedings, or part of them, have been struck out under paragraph (2) or (4)(a), the applicant may apply for the proceedings, or part of them, to be reinstated.

  (7) An application under paragraph (6) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party."

- The power to strike out cases must be exercised in accordance with the overriding objective.

LW v Proprietor of Broughton Hall Catholic High School [2023] UKUT 301 (AAC)

UTJ Ward emphasised that indicated that rule 8(7) refers to a **notification** of a striking out that has occurred.

> *'14. In the present case, Judge McCarthy considered that the 28 day period started from when the automatic strike out took effect, even though the fact that it had done so was not notified until 19 April. I do not consider that "notification of the striking out" in rule 8(7) can be read so as to apply to a notification (in this case, the order of 14 February) of a striking-out which had not yet happened at that point and which if there was compliance never would.*
>
> *15. Although various other matters are canvassed in it, Judge McCarthy's reasoning for refusing reinstatement appears in the final paragraph of the first page of his Order: "As the claimant did not apply within the statutory 28 days for the claim to be reinstated, and because she has not provided a reasonable explanation why she failed to do so, there is no good reason to either extend time or reinstate the claim."*
>
> *16. As I consider that the judge has misconstrued rule 8 in finding that time ran from the earlier date, the reasoning quoted above, which stands or falls on the date from which time runs, cannot stand.'*

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

Key Facts

- A is autistic and was being taught individually and away from class in a community special school, following an escalation of challenging and inappropriate physical behaviour. After five injuries were sustained by staff caused by A between 19 January and 02 February 2021, a decision was made by the School on 02 February 2021 that A could no longer attend the school site to receive his education. That decision was implemented from 03 February 2021. On 08 February 2021 that decision was conveyed to the Respondent parents by the School Headteacher.
- On 3 March 2021, a section 20 Children Act 1989 agreement was made between the relevant Local Authority and the Respondent parents. On 06 April 2021 A was moved to a children's care home in Southend-on-Sea, which is a large distance from the School. It was agreed by the parties at the Tribunal hearing that this care home was not suitable for A. The LA subsequently decided that A required a 52-week residential placement, funded by Education, Health and Social Care.
- The Respondents presented their claim to the Tribunal on **10 November 2021.**

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

- AA & RA (the Respondent parents) argued that the decision to stop providing A with on-site education from 03 February 2021 amounted to discrimination arising from disability pursuant to section 15 of the Equality Act 2010, and particularly that the Appellant could not show that the treatment of A was a proportionate means of achieving a legitimate aim under section 15(1)(b).
- Before the FtT, the Appellant raised a preliminary point relating to the time limit for presenting the claim.
- The findings of the FtT summarised at §20 were:

  'The Tribunal concluded that the failure to provide on-site education was a continuing act because it continued to be in place on and after 11 May 2021, within the period of six months before the date on which the claim was presented. The Tribunal considered that it had uncontested evidence that the School continued to be named in Section I of A's EHC Plan and had remained named in that plan at the date of the hearing. The Tribunal concluded that in all the circumstances the claim was in time in respect of the decision of 02 February 2021 not to provide on-site education to A, an action which continued on a constant basis beyond 11 May 2021.'

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

- Regarding the substantive claim, the FtT concluded that the aims of the Respondent were not achieved by proportionate means.
- Permission to appeal was granted by the UT on two grounds
  - **Ground 1**: the Tribunal erred by finding that the decision taken by the Appellant, for A not to attend the School premises, was a continuing act, as opposed to an act with a continuing consequence. In so doing, the Tribunal erred in its conclusion that it had jurisdiction to determine the claim.
  - **Ground 2**: even if the Tribunal had been entitled to conclude that the decision taken by the Appellant, that A not attending the School premises, was a continuing act, on the facts the continuation of that act had only been intended to operate for 10 weeks. The Appellant's ability to facilitate A's return to the School was then overtaken by events beyond the Appellant's control. The Tribunal failed to recognise that the ending of the continuing act after 10 weeks (or at the earlier point that A was moved to the care home) rendered the claim outside of its jurisdiction.

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

- See §§31-44 for a useful overview of the authorities re time limits and conduct extending over a period
- The Appellant relied primarily on a distinction principally explored within the employment tribunal jurisdiction between a **one-off act with continuing consequences** and **conduct extending over a period**.
- UTJ Freer found on Ground 1 that, although the Tribunal's reasoning was summary on the time limit issue, they had evidence before them as to A being kept out of school (a letter from the headteacher) as well as the knowledge that the School was named at Section I of A's EHCP, and on this basis came to the conclusion that there was a conduct extending over a period. Therefore, up to 6 April 2021, UTJ Freer found that it was not an error of law for the FtT to reach that decision (§§55-56).

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

- *'§60 If an analogy is made with the employment jurisdiction, A's circumstances up to 06 April are more akin to a disciplinary suspension. However, that said, the employment authorities produce general principles, and any comparison must be applied with caution as clearly there are substantial legal and practical inter-relationship differences with special educational needs and disability in schools.*

- *§61 Indeed, in many circumstances the difference between conduct extending over a period and a one-off act with continuing consequences* ***may be such a fine line that, properly reasoned, a Tribunal would not err in law whichever side of that line the decision fell****.'*

The Governing Body of School T -v- AA & RA [2023] UKUT 311 (AAC)

- Regarding appeal Ground 2, i.e. from the date that A was placed into a children's care home around 30 miles from the School, the FtT was aware that all parties had at this point accepted that that School could no longer be part of A's EHCP, despite continuing to be named at Section I.

- UTJ Freer found that it was an error of law for the Tribunal to conclude from the facts that there was a conduct extending over a period by the School once the Respondents had entered into the Section 20 Agreement with the Local Authority, the decision had been taken that the School was no longer an appropriate placement, and A had been placed at the care home (§67). There was no conduct extending over a period by the School after 06 April 2021 and it was an error of law for the Tribunal to conclude that there was. The time limit for the School's potential liability therefore started to run from that date.

Thank you

020 7993 7621 | info@gclaw.co.uk | @gardencourtlaw