CDC case law update – January 2021

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases, either for families or public bodies. Where legal issues arise, specialist legal advice should be taken in relation to the particular case.

RD and GD v Horizon Primary [2020] UKUT 278 (AAC)

The Upper Tribunal upheld the decision of the First-tier Tribunal that a school's decision to place a pupil on a part-time table was not discriminatory under the Equality Act 2010. Although the FTT decision involved errors of law, the UT decided not to remake the decision.

Case Overview

This appeal concerned X, an autistic child with significant special educational needs and behavioural problems. On 17 July 2017, X's school ('the School') placed X on a part-time curriculum. In February 2018, the Local Authority agreed that X should attend a special school, but the new school could not give X a place for several months. The Appellants brought a disability discrimination claim against the School. The First-tier Tribunal ('FTT') dismissed this appeal, and the Appellants appealed to the Upper Tribunal ('UT') on multiple grounds.

(1) First ground of appeal: the time limit issue

The first issue was whether the FTT erred in excluding a period of time from the claim because this period was more than 6 months before the date the appeal was lodged.

In the FTT, the Judge who issued initial directions ('the Directions Judge') held that 'a claim for discrimination must be made within 6 months of the discrimination complained of (Schedule 17, Equality Act 2010)'. The UT held this was 'plainly not correct…the legislation does not sound an automatic death knell'. The general rule (under para.4(1) of Sch.17 to the 2010 Act) is that proceedings *may* not be brought after 6 months from when the conduct occurred. Per para.4(5)(b), conduct extending over a period is to be treated as occurring at the end of the period. Moreover, para.4(3) states that a Tribunal *may* consider a claim which is out of time. The UT held that if a Judge is given a discretion, s/he must exercise it (i) consciously and (ii) judicially.

The UT noted that there is nothing in the FTT Rules to say that a Tribunal cannot combine a case management directions hearing (which tells the parties who should do what and when) with a registration hearing (to clarify the issues) and a preliminary

hearing (which may dispose of a legal point). The Directions Judge must, however, keep firmly in mind the fairness requirements for the different functions. It is one thing to tell a party to do something by a certain date, but 'entirely another to decide a disputed legal point on which all or part of an appeal may hang without affording the parties a fair opportunity of making submissions on the matter'. That is what happened in this case. If the Directions Judge wished to take the time limit point as part of the registration process/case management hearing, he should have asked for submissions on this issue. He should then have decided whether the conduct extended over a period and if so, from when. The Directions Judge appeared, however, to be 'unaware' of para.4(5)(b) or to have 'ignored' it. Further, even if he found that it was not continuing conduct, he had a statutory discretion to extend the time limit. Yet, he did not refer to para.4(3).

The UT concluded that the Directions Judge had made 'errors of law of more than one dimension': he had stated the law incorrectly, overlooked relevant provisions and failed to give any adequate reasons. He had not given the Appellants an opportunity to address him on this disputed point, which led to a breach of natural justice and the Appellants' right to a fair hearing.

However, the UT held that this error did not carry over to the FTT at the substantive appeal. The FTT gave different reasons for excluding the period prior to 2 February 2018. The FTT held that the Appellants had agreed to the claim running from 2 February 2018: they had received an apology from the School and the School had made changes. The UT held that this was a rational explanation and, therefore, the FTT was entitled to exclude the earlier period.

(2) Second ground of appeal: dual consequences

The second issue was whether the FTT erred in law in failing to recognise that, for the purposes of s.15 Equality Act 2010, a consequence could have more than one cause, and by failing to identify a second operative cause of the asserted discrimination. One of the FTT's findings of facts was that 'X's part-time attendance was not because of his disability but because of the LA's delay in naming a specialist placement'. The UT considered that this was the problematic finding.

Discrimination under s.15 occurs (a) where a person (A) treats a disabled person (B) unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate way of achieving a legitimate aim.

The first question posed by s.15 is whether B has been treated unfavourably because of something arising in consequence of their disability. 'Arising' captures a wide range of connections: it may arise not only from the condition itself but also from the effects of the condition (*Urso v DWP*). The 'something' need not be the main or sole cause of

the unfavourable treatment but must have been at least a significant (more than trivial) influence (*Sheikholeslami v University of Edinburgh*). The UT held that 'it should have been obvious' to the FTT that the discrimination might have arisen from two causes. If it rejected one of these, it had to explain why it did not consider it to have sufficient causal potency. In basing its decision on an either/or choice without further analysis, the FTT erred in law. The UT Judge did not see how the FTT could have rationally reached its conclusion. There were two reasons for the School not putting X on a full-time timetable earlier: (i) his behaviour had not stabilised sufficiently, and (ii) he was awaiting a placement elsewhere.

The next question is whether the error was material. The UT Judge held that since the FTT went on to consider an alternative basis for finding that the School treated X proportionately, which he was able to uphold, the error was not material.

The UT stated that it was difficult to envisage a situation in which it is not a legitimate aim to protect staff and students from a pupil's uncontrolled, violent disruptive behaviour and to provide an environment that facilitated learning. It was key that the School had tried many techniques to effect a change in behaviour.

The UT stated that whether treatment is proportionate is ultimately a matter of judgment for the specialist Tribunal hearing the appeal. The exercise is not mathematical: some factors may seem to be of great importance when looked at individually but lose force when seen in the light of others. Full-time education may seem very important in principle, but a Tribunal may reasonably consider that the pupil's emotional well-being would be at undue risk under the pressure of a full-time timetable, or that the balance lay in favour of protecting others by adopting a part-time timetable. Specialists may have advised that a part-time timetable was important for the child's health and well-being. Any of these factors could help bolster a decision that the treatment by way of a part-time timetable was proportionate, and there may be many other factors.

The UT accepted that the FTT gave adequate reasons for finding that the School's treatment of X was proportionate to its aim. The School took numerous reasonable steps to reintegrate X slowly into school, such as diverting staff, a 1:1 teaching assistant and drawing up a reintegration plan.

The Appellants' submission referred to a requirement that the School make full provision for X's special educational needs. The UT rejected this: it is the Local Authority's responsibility to secure the educational provision in an EHC Plan (s.42 Children and Families Act 2014). A Responsible Body has a duty to use best endeavours to see that the special education provision called for is made under s.66 CFA. This does not require a Responsible Body to implement an EHCP. The duty is to see that provision is made, not to make provision itself. However the duty to use

best endeavours is a high one. The UT reasoned that it would make no sense to lift this provision and place it into the Equality Act, which is based on proportionate response. This would mean that a mainstream school would be required to put in place the very high level of provision required by an EHCP designed for the facilities and funding of a special school.

(3) Third ground of appeal: reasonable adjustments

The third issue was whether the FTT made an error of law in respect of s.21 Equality Act by failing to establish a basis sufficient in law under s.20 for imposing a duty to make reasonable adjustments on the School.

s.20(3) provides that where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take reasonable steps to avoid the disadvantage. The Appellants had to make out each of these elements. It is not sufficient to assert that the victim was substantially disadvantaged, or that an adjustment should reasonably have been made, without identifying the PCP. However, the Appellants did not identify a PCP. The FTT identified the PCP as 'the SEND Policy', but the UT held that this effort failed: the FTT made no findings about what the policy was. The failure to make findings and to give reasons constituted an error of law and was unfair to the School.

The FTT proceeded to find that the School had made reasonable adjustments, for the same reason it found that the School had shown their treatment of X to be proportionate.

The UT declined to follow *F-T v The Governors of Hampton Dene Primary School* [2016] UKUT 468 (AAC) (in which the UT decided that 'excluding' a pupil from full-time education was an act on which a finding of discrimination could be made) because of the way the judge dealt with s.2 Education Act 1996 in the context of the Equality Act. s.2 requires a pupil of the appellant's age to receive full-time suitable education. In *F-T*, the UT Judge found this requirement to be of central importance and imported this significance into claims under s.15 Equality Act involving pupils placed on a part-time timetable. In the present case, the UT reiterated that proportionality requires the Tribunal to look at each factor individually and in the context of other factors, and then decide whether there was a balance between the means and ends. The Judge did not consider it appropriate for the UT to label a factor as of 'central importance' and thereby give it a predetermined weight. Nor did the Judge see justification for seeking to assign the special weight a factor may have in one legislative regime to a completely different regime. The UT should not impede the specialist Tribunal's judgment by imposing a pecking order on fact-sensitive matters.

The UT concluded that the two errors of law made by the FTT (failing to consider (i) whether the time limit could be extended and (ii) whether the discriminatory treatment had more than one cause) were not material to the overall outcome of the appeal and therefore the decision of the FTT was not set aside.

What this means for children, young people and families

This decision emphasises that importance of parties being given the opportunity to address Tribunals on disputed points. It also reinforces that, where a disability discrimination claim is based on conduct extending over a period, the statutory time limit, in effect, runs from the end of that period. Importantly, the decision emphasises that there is a statutory discretion to extend the time limit, which judges should consider this conscientiously and not assume that older matters are time barred.

When bringing a disability discrimination claim under s.21 Equality Act, parents and / or young people must identify the policy, criterion or practice that puts the disabled person at substantial disadvantage. It is not enough to merely assert that the individual was substantially disadvantaged or that a reasonable adjustment should have been made.

This all emphasises the 'technical' nature of discrimination claims (by comparison with many appeals in relation to EHC Plans) and the need for parents and young people to get specialist advice before bringing such claims. Importantly, legal aid is available for discrimination claims, although many families will not be financially eligible for legal aid. However, all families can seek advice and support from their local Independent Advice and Support Service and / or charities such as IPSEA and SOS!SEN.

Implications for local authorities and other public bodies

This decision provides a number of important points of clarification regarding discrimination claims in the school context. For instance, it emphasises the importance of the principle of multiple causation: individuals may experience discrimination based on multiple causes, and Tribunals should analyse the causal potency of each of these. Further, it was stressed by the UT that the proportionality analysis involves consideration of a number of factors, looked at together rather than individually. Factors should not be given a predetermined weight, nor should their importance in one legislative regime be imported into another regime.

The decision clarifies the duties of schools. It is the duty of local authorities, not schools, to make full provision for pupils' special educational needs. Schools are under a duty to use best endeavours to see that special education provision is made, not to make that provision themselves. This more limited duty is potentially relevant to claims of discrimination against schools, as in this case.

If schools are seeking to rely on limitation defences to discrimination claims, they ought to highlight to the Tribunal the discretion to extend time and explain why in their view the Tribunal ought not to extend time in the particular case.