



First-tier Tribunal Special Educational Needs and Disability

DECISION

Appeal No: EH850/ [REDACTED]
[REDACTED]
Against: Governing Body of Hythe Primary School
(the Responsible Body)
Concerning: [REDACTED] (born [REDACTED])
Hearing Date: 17 July 2019

Tribunal Panel: Judge Clive Dow
Mrs Carol May (Specialist Member)

Attendance

Mrs O [REDACTED] attended and presented her own case. She was supported by Ms [REDACTED]. Ms [REDACTED] attended as a witness.

The Responsible Body was represented by [REDACTED] Solicitor. Ms [REDACTED] [REDACTED] (Chair of Governors), [REDACTED] [REDACTED] [REDACTED], (Head Teacher), and [REDACTED], (SENCO), all attended as witnesses.

The Claim

1. Mrs [REDACTED] claims under Section 85 Equality Act 2010 (EA 2010) that her son [REDACTED] was subject to unlawful discrimination on grounds of disability by the Responsible Body, Hythe Primary School. The claim was received on 20 February 2019.

2. The Responsible Body accept that [REDACTED] has a disability within the meaning of section 6 EA 2010 and did so at the material times, albeit he was not diagnosed with Autism Spectrum Condition (ASC) until November 2018.

3. The order of Judge Brayne dated 1 April 2019 identified the claim as relating to:

- a. [REDACTED]
[REDACTED]
[REDACTED]
- d. Failure to visit or contact [REDACTED] after he refused school in October 2018;
- e. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

4. [REDACTED]

5. The remedy sought is a finding of disability discrimination; an apology to [REDACTED]; a direction that the Responsible Body updates its policies; and that its staff undertake training in ASC and mental health awareness.

6. The Responsible Body has expressed its regret that [REDACTED] did not remain at Hythe Primary School. However, the Responsible Body maintains the position that it supported [REDACTED], made all adjustments that were reasonable at the time and that all sanctions applied were proportionate to the legitimate aim of maintaining discipline in the school. In sum, the Responsible Body denies discriminating against [REDACTED] on grounds of his disability.

Preliminary issues

7. Neither party sought to adduce late evidence.

8. At all times the Tribunal remained mindful that Mrs O [REDACTED] is a self-representing litigant. We were careful to set out the law and procedure at the start of the hearing and to check her understanding when helpful to do so. We relied on our inquisitorial powers to make sure that we had a complete picture of all the material evidence.

The Law

9. The EA 2010 sets out a number of different ways in which disability discrimination can be established. They are listed in section 25(2), and comprise direct discrimination under section 13, discrimination arising from disability under section 15, indirect discrimination under section 19, and putting a pupil to a substantial disadvantage by failing to make a reasonable adjustment to avoid that disadvantage under section 21.

10. In the initial case directions dated 1 April 2019, the Tribunal identified that the elements of the claim relating to sanctions or exclusions were best considered on the basis of discrimination arising from disability under section 15, namely that the Responsible Body treats the pupil unfavourably because

of something arising in consequence of their disability. If that link is found, the burden shifts to the Responsible Body to demonstrate that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

11. Section 20 EA 2010 imposes a duty on the Responsible Body to make reasonable adjustments where a provision, criterion or practice puts a disabled pupil at a substantial disadvantage in relation to a relevant matter in comparison with pupils who are not disabled. The Responsible Body must take such steps as it is reasonable to avoid the disadvantage. Where the Tribunal finds that it was, or would have been, reasonable for the Responsible Body to make adjustments and it has failed to do so, then under Section 21(2) EA 2010 the Responsible Body will have discriminated against the disabled pupil.

12. Some elements of Mrs C's claim could be considered as both unfavourable treatment or a failure to make a reasonable adjustment. Where that was possible, we considered those elements under both headings.

Background

13. is years old. At the relevant time he was years old and in Year at Hythe Primary School. He had shown some social and emotional difficulties throughout his school attendance and was on the SEN register. found it difficult to make or maintain friendships and was resistant to change. During the relevant period, his sensory difficulties and anxiety became more pronounced; he became more obsessive about routines and preserving personal space. He sometimes acted impulsively or inappropriately, for example by taking it upon himself to physically enforce rules that he thought other pupils were infringing. He was on a CAMHS waiting list as it was suspected he may have an Autistic Spectrum Condition (ASC).

14. Mrs C was a regular correspondent with the school about needs. It is relevant context that she expressed concerns about Miss's treatment of when she was his class teacher in Year. Mrs C sought additional support for and a range of adjustments to policies to enable to cope with the school environment and access the curriculum. It is common ground that the Responsible Body did make some adjustments for needs during Year, including providing him with an individual workstation in the classroom and a dedicated spot on the carpet. He was also permitted to line up at the front or back of the line and the school sometimes allowed him to use an MP3 player to help him concentrate.

15. At the start of Year was placed in Mr's class. Early in the new term Mr went on a period of paternity leave. Miss was brought in to cover. Mrs C wrote to the headteacher expressing concerns about how this would impact on. While attendance throughout the period of cover was good, Mrs C found more resistant to going to school. On 2 October 2019 refused to

attend school. A reintegration plan was agreed between the school and Mrs C [redacted] on 10 October 2018 which included further adjustments and a phased return to school attendance. The next day, Mrs C [redacted] asked for school staff to meet with [redacted] outside school to help rebuild his positive perception of school. This request was refused. [redacted] did not attend school for a month from 2 October, although that period included a weeks' half-term holiday. During this period of his absence the school changed its recording of his absence from 'ill' to 'unauthorised'. [redacted] began to attend school on a part-time basis from 2 November 2018. However, on 16 November 2018 [redacted] stopped attending again. The register records unauthorised absence from 19 November to 7 December 2018 when [redacted] was removed from the roll.

The Evidence

16. In advance of the hearing the Tribunal carefully read the bundle consisting of 396 pages. We also read an additional statement from Ms [redacted], which was omitted from the bundle in error and supplied by Ms [redacted] during the hearing.

17. The oral evidence is summarised below together with our findings on each of the allegations. The hearing clarified and updated parts of the written evidence and the decision records such of the oral evidence as is necessary to explain our decision.

18. The facts relating to each allegation are described in both the Claim (p. A1) and the Response (p. C1). To the extent necessary to identify the issues and place both the evidence and our findings in context, we briefly summarise each incident under its heading and the positions of the parties.

19. We considered the elements of the claim in the same order that they were presented on the claim form and dealt with in the Responsible Body's response.

[redacted]

were short of staff and they could not be expected to add off-site visits to their duties. Thirdly, Miss [REDACTED] did understand and believe that [REDACTED] was finding it very difficult to attend school. As a result, she did not want school staff to encroach on [REDACTED] safe-space. Fourth, she did not think meetings would have resulted in [REDACTED] coming to school. Finally (and even if all the other concerns had been overcome) it was the school's policy, as advised by the Local Authority, that they should not meet with a child outside of school because it was the parent's responsibility exclusively to ensure that a child attended school.

Tribunal's Findings with Reasons

58. We accepted Mrs C [REDACTED] submission that [REDACTED] school refusal was a direct result of his disability and there was a realistic possibility that some form of direct intervention by school staff at home or at another place outside school would have accelerated [REDACTED] return to school. We also accepted that intervention with one or more home visits could have made a difference to the overall chances of his reintegration being successful. By not meeting the request, we were persuaded that the Responsible Body placed [REDACTED] at a substantial disadvantage

59. We carefully considered whether it was reasonable to expect the Responsible Body to adjust its attendance policy and meet with [REDACTED] outside school at least once to build trust and reinforce in [REDACTED] mind the idea that support was available to help him cope. We found the Responsible Body's evidence and submissions for not doing so were somewhat insubstantial and contradictory. We found it perplexing that the Responsible Body could simultaneously accept that [REDACTED] school refusal was based on a perceived breakdown in trust on his part, while rejecting the opportunity to help rebuild that trust. Equally, it was reasonable to trust Mrs C [REDACTED] judgement that a meeting outside school would be helpful over any external advice that it might infringe [REDACTED] safe-space.

60. While the policy premise that it is primarily or even wholly a parent's responsibility to ensure a child attends school may be sound in law and in principle, the outright rejection of any support from the school appears to us unreasonable and not borne out by the approach of other schools. We take notice that for good reasons, schools of all types regularly support children and their families in overcoming barriers to attendance. It was unreasonable not to agree to meet with [REDACTED], thereby making an exception to the general policy on absence because his absence was a consequence of his disability and his non-attendance was a serious impact on his learning.

61. We accepted that it might have been practically difficult to arrange such any visit immediately, but this alone did not make it reasonable to reject the possibility out of hand. Equally, while we accepted that it may have been frustrating to receive a further request from Mrs C [REDACTED] almost immediately following the reintegration meeting, that frustration did not justify a decision to refuse her request.

62. On balance, we considered it was a reasonable adjustment to its absence policy for the Responsible Body to agree to meet with [REDACTED] outside the school environment at least once in order to try and rebuild his confidence to attend school. The failure to make that reasonable adjustment did amount to discrimination within the meaning of section 21(2) EA 2010.

63. We also found that recording [REDACTED] absence as unauthorised did place him at a substantial disadvantage: it was a permanent record that invited the inference that he was in some way at fault for not attending school. Given Miss [REDACTED] acceptance in her oral evidence that [REDACTED] school refusal was as a result of his disability and her adoption of the views of the primary behaviour team about why neither [REDACTED] GP nor CAMHS had certified him sick, it followed that it was also reasonable to expect the Responsible Body to make an adjustment to its absence recording policy so as not to record his absence as unauthorised. The failure to make that reasonable adjustment did amount to discrimination within the meaning of section 21(2) EA 2010.

64. This part of the claim succeeds.

[REDACTED]

Conclusion and Remedy

113. Having carefully considered each element of the claim, we conclude that the Responsible Body did discriminate against [REDACTED] on the grounds of his accepted disability in two of the nine instances before us. Our finding in each instance was made with the benefit of a detached consideration of the issues, was finely balanced and made on a strict interpretation of the law, as we are required to do.

[REDACTED]

[REDACTED]

116. We recall the Upper Tribunal’s guidance in *ML v Tonbridge Grammar School* [2012] UKUT 283 on the remedies that might be appropriate when a child has left the school and in *Gayhurst Community School v ER* [2013] UKUT 558 on when it is appropriate to order an apology. In the present claim and based on our observations in the preceding paragraphs about the Responsible Body’s efforts in good faith to meet [REDACTED] needs, we consider that it is not appropriate to order the Responsible Body to apologise.

117. Since [REDACTED] has left Hythe Primary School, we are cautious about whether Mrs C [REDACTED] has sufficient interest in the enforcement of any Order that required the Responsible Body to undertake training or update its policies. On balance, we are persuaded that having effectively brought her claim as a matter of principle and in the interests of other disabled children, she does have sufficient interest. We therefore require the Responsible Body to update its policies and arrange training in accordance with our Order below.

DECISION:

1. [REDACTED]
2. The Responsible Body discriminated against [REDACTED] on the grounds of his disability contrary to section 85(2) and section 21(2) of the Equality Act 2010 in that it failed to make reasonable adjustments to its absence policy by recording his absence from 18 October 2018 as 'unauthorised' and by failing to visit or otherwise make contact with him during his absence.

ORDER

3. The Responsible Body is to write to the Tribunal, copied to the claimant, by **12:00 noon on 31 October 2019** confirming that it has reviewed and updated its behaviour policy and its absence policy so as to ensure equal treatment for disabled pupils.
4. By **31 October 2019** the Senior Management Team at Hythe Primary School, (including the SENCO if not a member of the Senior Management Team) shall attend a training course of at least a half day duration on the definition of special educational needs and the overlapping category of disabled pupils, and on school's duties generally towards disabled pupils and the avoidance of discrimination. The training is to be conducted by an external training consultant with knowledge and experience of schools' duties to disabled pupils under the Equality Act 2010.

Signed



Clive Dow
Tribunal Judge

Date: 05 August 2019