Case No: CO/4281/2003

NEUTRAL CITATION NUMBER: [2003] EWHC 3045 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 11 December 2003

Before :

THE HONOURABLE MR JUSTICE SILBER

- -

Between :

McA CATHOLIC HIGH SCHOOL	Appellant
- and -	
(1) CC (2) PC (3) SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL	Respondents

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

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John Friel (instructed by Taylor & Emett of Sheffield) for the Appellant
Sarah-Jane Davies (instructed by Treasury Solicitor) for the Third Respondent
The first and second defendants were not represented

- -

Judgment

Mr Justice Silber:

I Introduction

1. IC, who was born on 14 May 1990, attended McA Catholic High School in Doncaster ("the School"). Unfortunately, he suffers from autistic spectrum disorder. IC's parents, CC and PC, made a claim of disability discrimination against the School pursuant to the provisions of the Disability Discrimination Act 1995 ("the Act") and this was heard by the Special Educational Needs and Disability Tribunal ("the Tribunal"). On 14 July 2003 by a written decision dated 22 July 2003 ("the decision"), the parents' claim against the School was allowed solely on the issue of lack of pastoral support with the result that the School was ordered to produce an action plan to deal with the specific needs of children on the autistic spectrum or who had communication difficulties and that a mentoring system be also established.

2. The School has appealed against that decision and it, in common with the Tribunal, had been represented at the hearing of the appeal. The parents of IC, who are the first and second respondents to the appeal, have submitted helpful written representations supporting the decision but they have not been present or represented at the hearing. At the outset of the hearing, the School applied to amend their grounds of appeal. In the absence of opposition from the Tribunal, this application was granted.

II Statutory Framework

3. The relevant statutory provisions are set out in the Appendix to this judgment and so I will briefly summarise the framework but I will refer to the relevant statutory provision in greater detail when I consider the issues raised on the appeal. The Act makes it unlawful to discriminate against a person who has a disability which for the purposes of the Act means that "he has a physical or mental impairment which has a substantial long-term adverse effect on his ability to carry out normal day-to-day activities": section 1(1). It is common ground that IC has a disability for the purpose of the Act. By the Special Educational Needs and Disability Act 2001, the Act was amended so as to cover education and section 28A of the Act makes it unlawful to discriminate against disabled pupils. By section 28C, provision is made that disabled pupils are not to be substantially disadvantaged in comparison with pupils who are not disabled. By section 28L of the Act, there are provisions relating to the permanent exclusion from a school of a disabled pupil. Section 28I of the Act gives the Tribunal jurisdiction to hear complaints of discrimination.

III The Background to the Application to the Tribunal

4. In order to understand the grounds of appeal, I must now describe the background to the application which I take from the undisputed factual findings of the Tribunal. IC had had

a Statement of Special Educational Needs since March 2000 and he had been assessed as having problems in the area of social use of language, communication skills and imagination. Assessment by a speech and language therapist revealed an uneven profile of IC's language skills and very poor pragmatic language skills. Although his psychometric assessment indicated a level of functioning below the average level, his academic abilities were not a cause for concern and his teachers were said not to report any significant difficulties for him. IC was described to the Tribunal as a "well behaved child who can be quiet and hesitant [but] he was observed to have only a limited group of friends and interaction with a wider peer group is difficult for him".

5. The Statement of Special Educational Needs for IC referred to the need for his school to have access on an ad hoc basis to an Educational Psychologist and a teacher for pupils with communication difficulties who would provide information and advice on meeting IC's needs. IC became a pupil at the School in September 2001 and his transition "seems to have taken place without undue difficulties" as there was no evidence of any particular problems for him during the Autumn term. Thereafter, IC's behaviour at the School started to deteriorate and the School arranged for IC to be seen by an educational psychologist, Ms. Rachel Kershaw, who duly considered the matter.

6. In her written report to the School dated 13 March 2002, Ms. Kershaw noted the concerns from the staff about the effect of IC's behaviour on the rest of the class and his tendency to be alone at lunch and at break times. She made a number of recommendations to tackle these difficulties and these included the use of a buddy system to address socialisation difficulties and to promote "peer relationships", the use of direct questioning techniques in lessons, the production of subject - specific word banks and the repetition of instructions in lessons to help his understanding.

7. IC's mother was very supportive of these measures and, in particular, of the buddy system, which worked well for IC in Year 7. IC continued to struggle in science lessons and IC's mother was not sure that IC had received the extra help suggested by Ms. Kershaw in the form of subject-specific word banks or more individual support in science lessons. Subsequently, on 22 March 2002, the local education authority amended IC's statement to provide for five hours support per week from a Learning Support Assistant ("LSA") at the School, as well as ongoing monitoring, advice and support from a teacher for pupils with communication disorders.

8. At a meeting which took place on 5 July 2002, IC's mother requested that IC should receive ten hours support per week from a LSA. Mr. Toothill the leader of the Communication Difficulties Team ("CDT") at the LEA said at the meeting that he felt that IC's support were best coming from two or three LSAs if possible. Following this meeting, IC's Statement was further amended on 18 July 2002 so as to provide for ten hours LSA support per week for IC.

9. IC started Year 8 at the School in September 2002. A meeting took place on 4 September 2002 when consideration was given to IC's timetable to the groups that he would be in and to the lessons in which he would receive support. It was confirmed at that meeting that Mr. Toothill would be replaced by Ms. Melanie Whitney, as the representative of the CDT responsible for IC. IC's mother explained that she was unhappy about certain aspects of Mr. Toothill's support for IC. The new Head Teacher at the School, Mrs. Mary Lawrence explained during the meeting that IC's mother was informed about a quiet room, known as Room 30, which was provided at the School for children who needed more support and a safer space during lunch and break-times. The School believed that IC knew of this facility but that he had only used it once. IC's mother said that she had only become aware of Room 30 in November 2001 and she was not sure that IC had known that he could use it. It was also decided at that meeting that a multi-agency meeting would take place and that the date that was arranged for it was 23 October 2002, but it did not take place as IC's parents declined to attend for reasons that will become apparent in paragraph 18 when I record the events, which occurred just before that hearing.

10. Mrs. Lawrence told the Tribunal that the transition from Year 7 into Year 8 is quite a challenge for many pupils as they move from mixed ability groups into sets for each subject. The children were also set in their forms which meant that IC was in groups of lower ability children, which had the advantage for them of being small in size. A disadvantage of the setting system was that it became impossible to replicate the buddy system that had worked so effectively for IC in Year 7 as there were no children of the right calibre in IC's sets in Year 8 to carry out such a sensitive task. The three children who had previously performed that role had all moved into different classes from IC in Year 8. In addition, IC's groups did not always consist of the same children and there were accordingly additional changes of fellow pupils for him to adapt to and cope with.

11. By all accounts, IC's behaviour began to deteriorate during the Autumn term 2002. Mrs. Horton, the SENCO at the School gave an account to the Tribunal that IC's behaviour in terms could often be highly disruptive despite the presence of a LSA. Mrs. Lawrence, who had previous experience working with autistic children, told the Tribunal that she had been called out twice to the classroom to deal with IC when he had become difficult and her previous experience enabled her to calm and stabilise the situation with IC.

12. IC had particular difficulties with science. The method of teaching at the School required the children to work in groups; IC found it hard to cope with this method as he had a tendency to wander around the room and to touch the equipment and chemicals on the teacher's desk while the teacher was trying to help the other pupils. For those reasons, he had been removed from science lessons on two occasions as it was felt that he was presenting health and safety risks. He was then taught by the Head of Science on his own but this regime was perceived as a punishment by IC and by his parents.

13. The Tribunal recorded that IC was "capable of concentrating and producing good work in

lessons on some days [but that] there did not appear to be any particular pattern to his behaviour". He had LSA support for the equivalent of 16 out of the 25 hours of lessons that he received each week and he was usually taught in small groups with "work being differentiated for him". The School arranged for a number of LSAs to support IC as it was considered important that he did not develop a dependency on any one particular individual.

14. In spite of these efforts by the School to support IC in lessons, his parents were becoming increasingly concerned for his safety and welfare as he was reporting more bullying incidents, which were causing him a great deal of distress and anxiety. On 18 September 2002, IC had been found by a member of the staff in the playground during the lunch break curled up in a ball and he refused to move until his elder sister, who was a pupil at the School, came to assist. IC claimed that he had been attacked and kicked by another pupil. He said he was tired of being kicked and his mother described him as "very upset after this incident".

15. Another incident occurred on 2 October 2002 when IC claimed that he had been attacked by other boys in the toilets who pushed his head down a lavatory. In consequence, he ran out of the School to a local park and he eventually made his way home at 6.00 p.m. The School only informed IC's parents of his disappearance at 3.30 p.m. The School carried out an investigation into this episode but were unable to reach any conclusion as to who was responsible for the incident.

16. A consequence of this episode was that IC's parents asked the School to provide support for IC during breaks and lunch times. By a letter dated 18 October 2002, Mrs. Lawrence informed IC's parents that the School's resources were not sufficient so as to enable it to provide that degree of support. Mrs. Lawrence also referred in that letter to the arrangements in place for the monitoring of IC over the course of a School day by one of the LSAs. Mrs. Lawrence told the Tribunal that she had recognised that there was a need for extra support for IC at lunch and break times and that she had started instigating a process of requesting additional funds from the local education authority to provide this. This request was due to be considered at the annual review due in February 2003.

17. Mrs. Robinson carried out observations on IC on 8 October 2002. In her detailed report, she pointed out the difficulties that IC was having in conforming to the requirements of acceptable behaviour in the classroom as he was humming, making clicking noises, being distracting and annoying to other pupils, as well as often being unable to join in group work. Significantly, IC was also observed to be solitary and to be unable to interact with other children in physical education classes, at lunch time and at break times. She considered that IC was unable to initiate communication in a positive manner. In the corridor between classes, he was observed roaming up and down, searching and latching onto familiar faces and then barging others into corridor walls whilst laughing inappropriately. Mrs. Robinson's report suggested that IC's behaviour might be moderated if he was moved into a teaching group pairing with other children, who might

set him a better example and if there was "positive reinforcement of any successes".

18. The position therefore in early October 2002 was that IC's behaviour continued to present difficulties but IC's mother felt that his behaviour was caused by increasing anxiety on his part as a result of bullying and difficulties in lessons. A meeting was then held at the School on 14 October 2002 at which IC's mother explained that she was concerned about IC being given detentions after School and without proper notice. The Tribunal noted that from the correspondence and the evidence that "there was clearly a growing tension between the School and the parents over the best way to manage [IC]'s difficult behaviour". For that reason, IC's parents felt that another meeting with staff would not lead to any changes and so they decided not to attend the meeting that had been arranged for 23 October 2002, to which I referred in paragraph 10. Instead, they resolved to seek help through a mediation scheme.

19. A further bullying incident occurred on 12 November 2002 when a girl in Year 9 at the School was seen kicking and being verbally abusive to IC. The School wrote a letter to IC's parents explaining the events and it confirmed that the girl in question had been punished. She had admitted her misconduct but she said that she had been annoyed by IC. On 19 November 2002, Mrs. Horton saw IC jumping on the back of another boy which he repeated two or three times before responding to her call, but the other boy had ignored IC's actions and he had remained calm. Later during the same break, IC's nose had been cut after he was hit accidentally by another child who had been copying IC's hand-wafting but it seems that IC, who received treatment, did not appear to have been upset by this incident.

20. The next and most serious incident occurred on 26 November 2002 when IC was involved in a dispute with a Year 9 boy while they were having lunch in the dining hall. There was a dispute about who instigated the argument but during the course of the dispute, the two boys threw yoghurt and blows at each other. The other boy was swearing and was abusive to IC and the accounts given by other pupils indicated that IC came off worse physically. By the time teaching staff arrived, IC was curled up in a ball on the floor and attempts were made to comfort and reassure him. Other children were asked to move away and IC was given time and space to recover.

21. Mr. Nelson, who was at teacher at the School, stayed with IC and he said that IC suddenly got up stating that he was going to find the other boy to hit him. IC then walked around the School looking for the other boy. Mr. Nelson followed IC to ensure there would be no further incident. IC suggested at one point that this other boy might be in the Inclusion Unit and Mr. Nelson agreed that they should go there. He hoped that this would provide an opportunity to reassure IC and to calm him down in a quiet place. The Tribunal explained that Mrs. Lawrence ended up taking the lead role in trying to calm and pacify IC but his behaviour became more and more agitated as he was refused permission to leave the Inclusion Unit. During the period of 45 minutes whilst the School awaited the arrival of IC's parents, he became physically and verbally aggressive.

He threw objects at Mrs. Lawrence, overturned furniture and he tried to break a window. IC also grabbed Mr. Bowstead's tie and jerked his neck as well as taking Mr. Bowstead's pen and throwing it in his face. Mrs. Lawrence described her efforts to calm IC and she asked other people to leave the unit room, but in spite of her experience, Mrs. Lawrence found it impossible to persuade IC to modify his behaviour. At that time, IC was also complaining about his treatment at home alleging that his father beat him up and that his parents had confiscated his mobile phone on the previous evening.

22. On her arrival at the School, IC's mother, who was accompanied by her sister, was angry and upset because she felt that nobody at the School had taken proper notice of her concerns about the bullying suffered at the School by IC. She took IC away from School but he managed to evade her. He returned to the School shortly afterwards following which he wandered around the premises being both disruptive and violent. IC's mother was contacted again and she returned to the School where she had a heated exchange with one of the teachers during which she was quite abusive. IC's mother then left without IC. A decision was then made to exclude IC from the School for five days and a letter explaining this decision was delivered to the home of IC's parents during that afternoon. Eventually, IC was picked up by his father at 6.05 p.m. after several attempts had been made by the School to make arrangements for this to happen.

23. The parents of IC contend that IC's behaviour was a response to the effects of persistent bullying suffered by IC at school as he had never displayed such an aggressive outburst before at School. They considered that the failure of the School to provide a proper level of support for IC and to manage his difficulties was a key factor causing his behaviour. They pointed to IC's escalating levels of anxiety, the feelings of pressure experienced by him and his inability to manage his feelings, all of which were consequences of his autism, which they considered were matters that the School had failed to address or anticipate. The parents of IC also contended that the School had failed to make the necessary reasonable adjustments that were required if IC was to manage successfully the social and academic demands of School. After IC's exclusion on 26 November 2002, the School then extended the exclusion period to its maximum by 40 days in a letter of 3 December 2002.

24. In the meantime and partly because a Tribunal hearing was imminent in respect of IC's Statement, the School asked for a further psychological assessment by Ms. Kershaw, who duly saw IC on 12 December 2002. In addition, reports were obtained from IC's paediatrician and from a clinical pathologist. These reports were apparently prepared in the expectation that IC would rejoin the School at some stage.

25. On 13 February 2003, a letter was sent to IC's parents by Ms. Jane Finn, the Local Education Authority's Special Educational Needs Officer stating that whilst the fixed term exclusion was at an end and IC was still on the School register, he could not be admitted back at that stage as he was still making threats against the other boy and that it was felt that it would not be safe to readmit him.

26. Arrangements were then made for IC to attend RH, a special School with an autistic unit attached. IC has been excluded from that School after a similar outburst to the one in November 2002 during which he was pinned down by three teachers.

27. On 26 February 2003, IC through his parents made a claim of disability discrimination to the Tribunal which led to the decision under appeal. By the time of the Tribunal hearing, agreement had been reached that IC should be placed in the RO School, which is an independent School run by the National Autistic Society and his Statement was amended accordingly.

28. The Tribunal noted that they had been informed that this placement had broken down and that he had been excluded for a few days. IC was then refusing to return there but he was receiving home tuition. IC's parents wanted him eventually to return to a mainstream school.

IV The Decision of the Tribunal

29. It will be more appropriate to comment on the reasoning of the Tribunal when I turn to consider the challenges to their decision, but their decision was that they rejected all the complaints except that "there was discrimination against [IC] to the extent that he was not given the necessary personal guidance and support within the context of the School pastoral system as he required".

30. The relief that was given was stated by the Tribunal as being:-

> "The School is ordered to produce an Action Plan by half-term of the autumn term to deal with the specific needs of children on the autistic spectrum or who have communication difficulties to ensure that they are adequately supported on their transfer and admission to the School and on their transition into the next year group, with particular reference to the transition into year 8. Also that there is a mentoring scheme established and, wherever possible, that a buddy system is arranged for children who are socially isolated".

V The Grounds of Challenge

31. Mr. John Friel, counsel for the appellant, raises a substantial number of issues, which can conveniently be summarised as follows:-

(a) Whether the Tribunal had jurisdiction to determine the complaint of the parents of IC ("Issue A - the Jurisdiction Issue")
(b) The characteristics of the comparator against whom IC had to be compared ("Issue

B - the Comparator Issue")

(c) Whether the decision of the Tribunal is flawed because of the comments made by it on the exclusion issue in paragraph 3 of its Reasons ("Issue C - the Paragraph 3 Exclusion Issue")

(d) Whether the Tribunal was entitled to reach its decision that there was discrimination against IC because of the lack of personal guidance and support within the School's pastoral support system ("Issue D - the Pastoral Support Issue")

(e) Whether the Tribunal acted unfairly in failing to raise the issue of the lack of pastoral support with Mrs. Lawrence at the hearing ("Issue E - the Fairness Issue")

VI Issue A - the Jurisdiction Issue

32. Mr. Friel contends that the Tribunal did not have jurisdiction to hear the parents' complaint because section 28I(2) of the Act excludes the Tribunal from hearing claims to which, among other provisions, section 28L of the Act applies.

33. Insofar as is relevant to the issue under consideration, section 28L of the Act applies to a claim in relation to an exclusion decision where there has been discrimination in a way which would be unlawful under the education discrimination provision in the Act but where arrangements have been made under a specific statutory provision enabling an appeal to be made against that decision by the parents of the public concerned. The relevant specific statutory provision to which I have just referred provides, insofar as is material to the present issue and with my italicised emphasis added, that:-

> "A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body .. not to reinstate a pupil who has been *permanently excluded* from the School maintained by the authority".

34. This provision is to be found in section 67(1) of the School Standards and Frameworks Act 1998 ("the 1998 Act") which has been repealed in Section 52 of the Education Act 2002 ("the 2002 Act"), which has been enacted in its place, deals with the exclusion of pupils and provides for regulations relating to exclusion. The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002 SI 2002-3178 ("the 2002 Regulations") were made pursuant to section 55 of the 2002 Act and they set out procedures for dealing with exclusion. Rule 6(1) of the 2002 Regulations contains a provision identical in all relevant aspects to that set out in the last paragraph and found in section 67(1) of the 1998 Act.

35. Counsel were unable to produce the statutory instruments which would determine which of those two provisions applies, but it is common ground first that it does not matter because both of the provisions are the same and second that the only question raised on this issue is whether IC was "permanently excluded" from the School. Mr. Friel contends that IC was "permanently excluded" and therefore the Tribunal did not have jurisdiction

while Miss. Sarah-Jane Davies for the Tribunal contends that he was not "permanently excluded" with the result that the Tribunal did have jurisdiction.

36. I have come to the clear conclusion that the correspondence establishes that IC was never "permanently excluded". On 26 November 2002, the School wrote to the parents saying that IC had been excluded "for a fixed period of 5 days". By a further letter to the parents of 3 December 2002, the School stated that they had decided to extend IC's exclusion from School with effect from 4 December 2002 "for a fixed period of 40 days". The parents duly appealed against that decision and the appeal was heard at a meeting held on 7 January 2003. The Governing Bodies Discipline Committee of the School upheld the exclusion and it explained that the exclusion period "will give time for support and advice on [IC's] reintegration into [the School] at a future date" [216].

37. On 28 February 2003, the local education authority wrote to the parents, pointing out that IC was "no longer excluded from the [School] as his fixed term exclusion has come to an end". The letter pointed out that IC's name was still on the School's roll and it stated that the Department of Education and Skills had advised that "it is not in the interests of IC or the School for IC to return to the School at the time, but a permanent exclusion would not be appropriate". It was quite clear from this correspondence that IC was not permanently excluded from the School and therefore Mr. Friel cannot rely on the exclusion from the Tribunal's jurisdiction set out in section 28L of the Act. Thus, the Tribunal had jurisdiction to hear the claim.

VII Issue B - the Comparator Issue

38. Mr. Friel contends that the Tribunal erred on the comparator point when it said:-

> "1) The first matter to be considered in determining whether or not there has been unlawful discrimination against IC is to establish whether the less favourable treatment complained of is for a reason relating to the child's disability. This was denied by the School which put forward its case on the basis that firstly, there had been no less favourable treatment as a child without any disability but manifesting the same behaviour would have been excluded permanently from the outset……
>
> 2) In light of the Code of Practice we do not consider this to be correct approach to the questions that have to be asked. The question of less favourable treatment has to be answered in comparison with the school population as a whole who have not misbehaved".

39. The basis of the discrimination allegation is that the School discriminated against IC because "(a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat *others to whom that reason does not or would not apply* and (b) it cannot show that the treatment in question is justified"; section 28B(1) of the Act with italicised emphasis added. The issue that has to be considered is what are the characteristics of the "others to whom that reason does not or would not apply". Mr. Friel contends that the comparator has to be a person who is not disabled but who behaves badly while Miss. Davies says that the proper comparator is somebody who is not disabled and who behaves properly. This was the approach of the Tribunal.

40. The thrust of Miss. Davies' contentions is that section 28B(1) is materially in the same terms as the corresponding provisions of the Act dealing with employment discrimination and which are set out in section 5(1)(a) of the Act. She submits that the case law relating to section 5(1)(a) on employment discrimination is applicable by analogy to the education discrimination provision in the same Act, with which this appeal is concerned.

41. Miss. Davies says that applying that logic, section 5(1)(a) and therefore section 28(B)(1)(a) gives rise to two questions of which the first is whether the applicant was (for example) dismissed (or excluded) for a reason which relates to his disability. The second is if the answer to the first question is in the affirmative, whether the employers (or the School) treated the applicant less favourably than they would treat others to whom that reason does not or would not apply.

42. It is settled law that in the employment context, the first of these questions is a question of fact: Clark v. TDG Limited (Trading as Novocold Limited) [1999] ICR 951 at 961H. Miss. Davies points out that in answering the first question of fact, it should be noted that the expression "for a reason which relates to the disabled person's disability" in sections 5(1)(a) and 28B(1)(a) has broadened the descriptions of the causative links from the links used in other discrimination Acts. It therefore includes causative links wider than those which would have fallen within the expressions of "on the ground of" or "by reason of" the disability: Rowden v. Dutton Gregory (a Firm) [2002] ICR 971 at 973E-974A.

43. The second question that has to be answered requires a comparison between the treatment of the applicant and of others "to whom that reason [for the treatment in question] does not or would not apply". Miss. Davies points out that those others are not required to be in the same circumstances as the disabled person. By way of example, she points out that where the reason for dismissing an employee is his inability to perform the main functions of his job, the proper comparator is not another employee who is unable to perform the main functions of his job but for a reason not connected to disability. The proper comparator, she submits, is an employee who is able to perform the main functions of his job. The comparators in the employment provisions are in Mummery LJ's words "persons who would be capable of carrying out the main functions of the job": Clark v. TDG (Trading as Novocold Limited) [1999] ICR 951 at pages 962D-F, 963C-F and 965B-A and 968C-D.

44. This, Miss. Davies says, leads to the conclusion that the proper comparator for IC is a pupil who is neither disabled nor badly behaved. Mr. Friel accepts that Miss. Davies has accurately summarised the position in respect of discrimination in employment but he says that the position is different in respect of education. He contends that guidance can be obtained by the provisions in section 28L, which refer to exclusion decisions. He also seeks to obtain some assistance from the Department for Education and Employment Circular (10-1999) *LEA and Social Inclusion: Pupil Support*.

45. I consider that the when the legislature introduced, as is common ground, provisions for discrimination in education which are identical to those which had been in force in the discrimination in employment provision in the same Act, they intended that both sets of provisions should be construed in the same way. After I had reached that conclusion, I came across Lord Reid's relevant comment that "where Parliament has continued to use words of which the meaning is settled by decision of the court, it is to be presumed that Parliament intends the words to continue to have the same meaning" (London Corporation v. Cusack-Smith [1955] AC 337, 361). Thus, the comparator should be selected in education discrimination claims in the same way as the courts had established that they should be chosen for employment discrimination. I could not find anything in the provisions relied on by Mr. Friel to suggest that this intention should be displaced.

46. There is an additional reason why I consider that Miss. Davies is right and that the Tribunal adopted the correct approach. The Act also provides for a Code of Practice on disability discrimination to be issued by the Disability Discrimination Commission and a Code of Practice for Schools ("the Code") was duly issued. By virtue of section 53(6) of the Act, where a provision of such a code appears to be relevant to a Court, Tribunal or other body hearing any proceedings concerned with disability discrimination, it must take that provision into account. In Example 5 10C in the Code, it is said that in the case of a pupil with Tourette's disease, who was banned from a school trip because of her abusive language, "the comparison has to be made with others who did not use abusive language".

VIII Issue C - the Paragraph 3 Exclusion Issue

47. At the forefront of Mr. Friel's submission were complaints about paragraph 3 of the Tribunal's reasons in which it stated that:-

> "As a matter of comment, it also seems rather disingenuous of the School to argue that they treated IC more favourably than a pupil without a disability as he was not excluded permanently, when in fact he was excluded for the maximum of 45 days and then not allowed to return to the School. We considered the duration of other fixed term exclusions from the School during 2002/3 and noted that the next longest was for 14 days for aggressive behaviour. Most were for less than five days and there were no

permanent exclusions. IC would therefore appear to have treated less favourably therefore than other children whose behaviour has led to a fixed-term exclusion".

48. Mr. Friel points out that there are a number of serious errors in this paragraph. First, he says it was wrong to accuse the School of being disingenuous for arguing that it treated IC more favourably than pupils without a disability as he, unlike those other pupils, was not excluded permanently. The true position was, as I have explained, that he was excluded for a period of 45 days and then with the concurrence of his parents, he was not allowed to return to School. Second, the Tribunal compared IC's exclusion for 45 days with the next longest exclusion which was 14 days for aggressive behaviour. Mr. Friel points out that no other child had been violent to staff and this was an extreme incident, that his was not a fair comparison and was irrational.

49. Miss. Davies does not seek to justify the comments made in paragraph 3 but she submits that any errors in this paragraph do not effect the validity of the decision. She points out correctly that the Tribunal started this paragraph with the words "as a matter of comment". In my view, what followed in that paragraph did not form any part of the Tribunal's reasoning because it did not relate to the issue of discrimination in the lack of pastoral care, which was the only complaint of IC's parents, which succeeded and the only finding under challenge on the appeal.

50. The finding of the Tribunal on the pastoral point issue was that a number of complaints against the School were made by the parents of IC. The only finding against the School was that "there was discrimination against [IC] "to the extent that [IC] was not given the necessary personal guidance and support within the context of the School pastoral system as he required". That conclusion is totally independent and discrete from any discussion in Paragraph 3 about the exclusion decision. It is noteworthy that the Tribunal did not find that the School had discriminated against IC in respect of the exclusion referred to in Paragraph 3 per se. Thus, even if the statements in paragraph 3 are incorrect, that error was irrelevant to the finding on which the School lost and those statements in that paragraph do not provide any ground for impugning the decision which was based on different evidence and made for different reasons from the matters covered in Paragraph 3.

IX Issue D - The Pastoral Support Issue

51. Mr. Friel contends that the Tribunal erred in the way it reached its decision that there was discrimination against IC on the basis that he was not given the necessary personal guidance and support within the context of the School pastoral system. He criticises the finding of the Tribunal that there was no evidence that there were any specific arrangements to ensure IC was assisted during the transfer from Year 7 to Year 8. Mr. Friel points out that Mrs. Lawrence had given evidence first that there were reasons why

the buddy system could not continue in Year 8 and second that there was in place in Year 8 specific pastoral arrangements to support IC. He explained that Mrs. Lawrence had a meeting with the parents on 5 July and 4 September 2002 and that she had called a further meeting on 23 October 2002 for the purpose of reviewing the progress of IC and to have the learning support hours on the Statement of Special Educational Needs reviewed by the local authority. This meeting did not, as I have already explained in paragraph 18, take place because the parents refused to attend it for the reasons that I have already outlined.

52. Mrs. Lawrence also pointed out that Mrs. Horton was very supportive of IC and that the School has made substantial arrangements for helping him. In particular, she said that the School had made arrangements for monitoring IC at break and lunch times. Mr. Friel complains that the Tribunal failed to make findings on the parents' failure to attend the meeting on 23 October 2002.

53. Miss. Davies points out that the Tribunal did not fail to have regard to the case for the School. The Tribunal commented in paragraph 11 of its Decision that the failure to replicate the buddy system was "regrettable". In any event, the decision of the Tribunal did not depend upon the provision of a buddy. The Tribunal was, however, influenced by the effect on IC of specific changes that took place in the transition from year 7 to year 8; these entailed the changes in class composition, the effect of setting the pupils as well as the difficulty that autistic children commonly have in adapting to change. The Tribunal accepted that the School clearly provided much support during lesson time with a substantial number of LSAs involved, but the Tribunal was concerned with the problems that arose in unstructured times.

54. The Tribunal drew attention to the report of Mrs. Robinson who, as I have explained, had observed IC in October 2002. She noted that he tended to hover at break times on the fringes of the groups as he travelled around the yard and that he did not appear to latch on to anyone in particular, spending some of the time on solitary pursuits, such as spinning around and jumping around. Mrs. Robinson thought that IC appeared to be responding to an "inner" set of instructions. Similar behaviour by IC was observed by her at lunchtime. She also noted strange behaviour by IC in the corridor before lessons with him roaming up and down the corridor and then barging familiar faces into the corridor walls. The Tribunal concluded that they felt that IC's "experience in the playground was a source of difficulty for him". The Tribunal considered that IC needed support during those unstructured times. Although the Tribunal considered that the School provided adequate support for IC "during lessons", it was troubled that "there was no evidence that any specific arrangements were made to ensure that IC was assisted during the transition from Year 7 to Year 8, which was difficult for all children but autistic children had the additional difficulty of commonly finding it hard to adapt to change".

55. The Tribunal pointed to a number of factors, such as that IC was entitled to make use of Room 30, the School's quiet room, although it was left up to him to decide whether to do

so which he did on one occasion. Another point of importance to the Tribunal was that there seems to have been "no one person to act as a mentor for him or in whom he could confide". This contention was disputed by the School who pointed out that Mrs. Horton was an experienced special needs coordinator, who is "excellently placed to take responsibility for [IC's] education and to support his special needs" [131]. The Tribunal was entitled to conclude, as it must have done, that Mrs. Horton was not a person to whom IC could turn and who would help him in unstructured times.

56. Contrary to Mr. Friel's submissions, the Tribunal did note and consider as "clearly regrettable" that IC's mother did not attend the meeting on 23 October 2002 as that "might have been an opportunity to take stock".

57. The Tribunal also considered but rejected the School's contention that the problems with IC flowed from the refusal of his parents to attend the meeting on 23 October 2002 on the grounds that the problems had been apparent for some time and that the School "underestimated and perhaps overlooked the extent of [IC's] growing difficulties" (paragraph 11). I agree with Miss. Davies that this was tantamount to a finding that the cooperation of IC's parents was not material.

58. In its decision, the Tribunal did not specifically refer to the statutory regime, but its decision was totally consistent with it when it is read in a common sense way and as a whole. Section 28C of the Act requires a school to "take such steps as is reasonable for it to have to take to ensure that (b) in relation to education and associated services provided for, or offered to, the pupils at the School by it, disabled pupils are not placed at a substantial disadvantage in comparison to pupils who are not disabled". The Tribunal considered this point in paragraph 6 of its Reasons. It considered possible adjustments consisting with the provision of support for IC during unstructured times (paragraphs 9 and 10 of its Reasons) and the making of arrangements to assist IC in the transition from year 7 to year 8, which included provision of a mentor and active pre-planned management of his behaviour (paragraph 10 of the Reasons). The Tribunal concluded that the School had failed to take reasonable steps as were required by section 28C(1)(b) by failing to give IC the necessary personal guidance and support within the context of the School pastoral system.

59. In reaching that conclusion, the Tribunal did not overlook, but in fact rejected, the School's contention that the problem for the School in providing additional pastoral support for IC was an issue of resourcing, but instead held that it was one of "planning and organisation". The Tribunal considered that there had been sufficient information for the School to have made the necessary adjustments and thus it rejected the question of resources as not a substantial reason for the failure.

60. In my view, there was ample evidence on which the Tribunal was entitled to conclude as it did that first, "more active pre-planned management of [IC] would in our view have

helped and made a difference", second, that IC "was not given the necessary personal guidance and support within the context of the School pastoral system as he required" and third that "the problem [for the School] was not so much one of resources but of planning and organisation".

61. I am quite satisfied that these conclusions were open to the Tribunal on the facts and I am unable to accept Mr. Friel's criticism. Indeed, it must not be forgotten that two members of the Tribunal have special qualifications and experience which would have enabled them to reach their conclusions based on the evidence adduced.

X The Expert Evidence Issue

62. Mr. Friel complains that the Tribunal erred when it said in paragraph 2 of its reasons that "we neither heard nor received any expert evidence to suggest otherwise [namely that IC's aggressive and impulsive behaviour were not all part of his disability]". He contends that Mrs. Lawrence, the Head Teacher at the School, was formerly a Head Teacher of a mainstream school with a special unit for autistic children. She had told the Tribunal that in her experience, violence of the nature of IC was not typical of an autistic child. Mr. Friel says that her evidence constitutes expert evidence as does a record of the views of Dr. Ward at a meeting held on 22 January 2003 in which she explained that the 'challenging' secondary School environment was a nightmare for IC.

63. Miss. Davies contends that neither Mrs. Lawrence nor Dr. Ward gave expert evidence that IC's behaviour on 26 November 2002 or at any other time was unconnected with his disability. Mrs. Lawrence recalled in a witness statement made after the hearing in front of the Tribunal that her evidence at the Tribunal was that autistic children are not normally violent but I consider that general statement by Mrs. Lawrence does not amount to evidence that IC's violent behaviour was unrelated to his disability. Mrs. Lawrence also contends that her evidence and that of Dr. Ward to the Tribunal indicated that it was not just IC's autistic condition but that it was the fact that he could not cope with his environment that was largely responsible for the decline in his behaviour. Miss. Davies points out that this contention is consistent with the Tribunal's finding that IC's behaviour was related to his disability on the basis that his inability to cope with his environment was itself related to his disability. In any event, the view now expressed by Mrs. Lawrence that IC's behaviour was unrelated to his autism does not appear to be consistent with the School's considered view expressed in his written response to the complaint of the parents to the Tribunal, in which it wrote that "[IC's] behaviour is due to his autism".

64. On the basis of all that material, I conclude that Mrs. Lawrence's evidence does not suggest that IC's behaviour was not part of or related to his disability. In addition, although Mrs. Lawrence had a great deal of experience of dealing with autistic children, I also have some doubts as to whether the Head Teacher of a school can be regarded as

being sufficiently independent in a claim against her school so as to be regarded as an "expert" in that dispute, but that is not a matter in respect of which I need to come to a conclusion.

65. Turning to Dr. Ward, the School appeared to be referring to the views recorded in the notes of the meeting of 22 January 2003, but Miss. Davies contends that there is nothing in those notes which shows that Dr. Ward expressed the view that IC's behaviour on 26 November 2002 was unrelated to his autism. Dr. Ward stated at the meeting that it was not the School's fault that the transfer of IC to that School and the large "challenging secondary environment was a nightmare". I agree with Miss. Davies that it was open to the Tribunal to find that IC's behaviour was related to his disability on the basis of his inability to cope with his environment, which was itself related to his disability. If I had been in any doubt, I would have reached the same conclusion because, as I have explained in paragraph 42 above, a broad approach has to be taken to whether a reason is "related to" the disability.

XI Issue - The Fairness Issue

66. Mr. Friel contends that Mrs. Lawrence could herself have given additional evidence about the pastoral support that was given to IC but the Tribunal failed to raise this issue with her at the hearing but that instead it used its own expertise to reach its own decision. He stresses that Mrs. Lawrence could have drawn attention to other actions taken by Mrs. Horton, the Special Educational Needs Coordinator to show the pastoral support that was given to IC.

67. I am unable to accept that complaint because it is clear from the parents' Notice of Claim to the Tribunal that they were complaining, among other things, that IC's disruptive and difficult behaviour was caused by his disability and about the "School's failure to manage him at School" [67]. This raised the issue of support for IC, including pastoral support.

68. Indeed, the School in its Statement of Case to the Tribunal answered that point by setting out all the steps taken by it to manage IC's disability. Mrs. Lawrence's witness statement shows that the School put forward detailed evidence of all the steps that it had taken to assist and to support IC. It is also noteworthy that in her witness statement commenting on the Tribunal's decision, Mrs. Lawrence explains that pastoral support that was in place for IC and she refers specifically to Mrs. Horton's responsibility. Mrs. Lawrence stated that indeed the Tribunal asked IC's parents whether there were efforts made by the pastoral system at the School to support IC.

69. In my view, the School was plainly aware and on notice that the nature and extent of the pastoral support and guidance provided for IC was an important issue. They had every opportunity to address this in their evidence to the Tribunal and they actually adduced

some evidence on this. I believe that with the benefit of hindsight, Mrs. Lawrence now realises that she could perhaps have put further material before the Tribunal, but that, I suspect, is the view that many witnesses have after they have given evidence. The stark fact is the issue of pastoral support was undoubtedly an issue which the School must have appreciated the parents had raised in their complaint to the Tribunal and that the Tribunal would have to consider. Thus, I reject the complaint on this point.

Conclusion

70. It is clear that Mrs. Lawrence and others at the School are disappointed with the decision of the Tribunal, even though the School succeeded on many issues. As I explained to Mr. Friel, this Court does not act as an appeal on questions of fact from the Tribunal, but it only looks for errors of law. Notwithstanding Mr. Friel's far-reaching submissions, my conclusion is that there are no such errors so that the decision of the Tribunal cannot be impugned and that this appeal must be dismissed.

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MR JUSTICE SILBER: A copy of the draft judgment has been circulated. I have incorporated the comments made by the parties. The appeal will be dismissed.

Can I just mention one point about it: it is that I made an order that, in spite of what appears on the listing in the papers, that it is the name of the school, M School that can be disclosed, but not the name of the defendants which should be listed as CC and PC. You will see that the child who is referred to is referred to as IC.

So, if you can, when you report it, or if you do report it, bear that in mind. Copies of the judgment, if you want them, will be ready very shortly. It raises an important point about disability discrimination in schools.

It was also agreed by the parties that the appellant should pay the costs of the Special Educational Needs and Disability Tribunal, such costs being summarily assessed at £3,564.

APPENDIX

1. The Tribunal has jurisdiction to consider complaints of disability discrimination by virtue of the Disability Discrimination Act 1995 ("the Act"), which provides, so far as material, as follows:

> 28A Discrimination against disabled pupils and prospective pupils
> (1) It is unlawful for the body responsible for a school to discriminate against a disabled person -
> (a) in the arrangements it makes for determining admission to the school as a pupil;
> (b) in the terms on which it offers to admit him to the school as a pupil; or
> (c) by refusing or deliberately omitting to accept an application for his admission to the school as a pupil.
> (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body.
> (3) The Secretary of State may by regulations prescribe services which are, or services which are not, to be regarded for the purposes of subsection (2) as being -
> (a) education; or
> (b) an associated service.
> (4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school, whether permanently or temporarily.
> (5) The body responsible for a school is to be determined in accordance with Schedule 4A, and in the remaining provisions of this Chapter is referred to as the "responsible body".
> …

2. The Act also provides a definition of discrimination.

> 28B Meaning of "discrimination"
> (1) For the purposes of section 28A, a responsible body discriminates against a disabled person if -
> (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
> (b) it cannot show that the treatment in question is justified.
> (2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if -
> (a) it fails, to his detriment, to comply with section 28C; and
> (b) it cannot show that its failure to comply is justified.
> …
> (5) Subsections (6) to (8) apply in determining whether, for the purposes of this section -
> (a) less favourable treatment of a person, or

(b) failure to comply with section 28C,

is justified.

(6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection.

(7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial.

(8) If, in a case falling within subsection (1) -

(a) the responsible body is under a duty imposed by section 28C in relation to the disabled person, but

(b) it fails without justification to comply with that duty,

its treatment of that person cannot be justified under subsection (7) unless that treatment would have been justified even if it had complied with that duty.

3. The duties of a school are explained.

28C Disabled pupils not to be substantially disadvantaged

(1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that -

(a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and

(b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.

(2) That does not require the responsible body to -

(a) remove or alter a physical feature (for example, one arising from the design or construction of the school premises or the location of resources); or

(b) provide auxiliary aids or services.

…

(4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A.

…

4. The jurisdiction of the Tribunal is specific.

28H Tribunals

(1) The Special Educational Needs Tribunal -

(a) is to continue to exist; but

(b) after the commencement date is to be known as the Special Educational Needs and Disability Tribunal.

(2) In this Chapter -

"the Tribunal" means the Special Educational Needs and Disability Tribunal, and

"the Welsh Tribunal" means the Special Educational Needs Tribunal for Wales.

…

28I Jurisdiction and powers of the Tribunal

(1) A claim that a responsible body -

(a) has discriminated against a person ("A") in a way which is made unlawful under this Chapter, or

(b) is by virtue of section 58 to be treated as having discriminated against a person ("A") in such a way,

may be made to the appropriate tribunal by A's parent.

(2) But this section does not apply to a claim to which section 28K or 28L applies.

(3) If the appropriate tribunal considers that a claim under subsection (1) is well founded -

(a) it may declare that A has been unlawfully discriminated against; and

(b) if it does so, it may make such order as it considers reasonable in all the circumstances of the case.

(4) The power conferred by subsection (3)(b) -

(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates; but

(b) does not include power to order the payment of any sum by way of compensation.

(5) Subject to regulations under section 28J(8), the appropriate tribunal -

(a) for a claim against the responsible body for a school in England, is the Tribunal,

…

28L Exclusions

(1) If the condition mentioned in subsection (2) is satisfied, this section applies to a claim in relation to an exclusion decision that a responsible body -

(a) has discriminated against a person ("A") in a way which is made unlawful under this Chapter; or

…

(2) The condition is that arrangements ("appeal arrangements") have been made -

(a) under section 52(3)(c) of the Education Act 2002, or

…

enabling an appeal to be made against the decision by A or by his parent.

(3) The claim must be made under the appeal arrangements.

(4) The body hearing the claim has the powers which it has in relation to an appeal under the appeal arrangements.

(5) "Exclusion decision" means -

(a) a decision of a kind mentioned in section 52(3)(c) of the Education Act 2002;

…

(6) "Responsible body", in relation to a maintained school, includes the discipline committee of the governing body if that committee is required to be established as a result of regulations made under section 19 of the Education Act 2002.

(7) "Maintained school" has the meaning given in section 28Q(5).

5. Section 52 of the Education Act 2002, which deals with exclusion of pupils, provides so far as material as follows:

52 Exclusion of pupils

(1) The head teacher of a maintained school may exclude a pupil from the school for a fixed period or permanently.

(2) The teacher in charge of a pupil referral unit may exclude a pupil from the unit for a fixed period or permanently.

(3) Regulations shall make provision -

(a) requiring prescribed persons to be given prescribed information relating to any exclusion under subsection (1) or (2),

(b) requiring the responsible body, in prescribed cases, to consider whether the pupil should be reinstated,

(c) requiring the local education authority to make arrangements for enabling a prescribed person to appeal, in any prescribed case, to a panel constituted in accordance with the regulations against any decision of the responsible body not to reinstate a pupil, and

(d) as to the procedure on appeals.

…

(5) In subsection (3), 'the responsible body' means -

(a) in relation to exclusion from a maintained school, the governing body of the school, and

…

…

(10) In this section 'exclude', in relation to the exclusion of a child from a school or pupil referral unit, means exclude on disciplinary grounds (and 'exclusion' shall be construed accordingly).

…

6. The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002, SI 2002/3178, made pursuant to section 52 of the Education Act 2002, prescribe cases in which the local education authority is required to make arrangements for enabling a prescribed person to appeal for the purposes of s 52(3)(c). They provide, so far as material, as follows:

6 Appeals against permanent exclusion of pupils

(1) A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body under regulation 5 not to reinstate a pupil who has been permanently excluded from a school maintained by the authority.

…