Disability Discrimination in Schools: recent case law on the duty to make reasonable adjustments – *A Multi Academy Trust v RR* [2024] UKUT 9 (AAC)

By Katherine Anderson
3PB

A Multi Academy Trust v RR is an appeal that considered issues around the application of the test in section 20(3) of the Equality Act 2010 as modified by schedule 13, particularly in its application to special schools. A father had brought a claim of disability discrimination in the First-tier Tribunal against the responsible body for the special school his child attended.

The duty to make reasonable adjustments is explained in general terms in section 20 of the 2010 Act, but section 20(3) is modified in its application to schools by Sch. 13, para 2 of the Act. Where the relevant matter is provision of education or access to a benefit, facility or service, section 20(3) as modified reads:

"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".

The Technical guidance for schools in England issued by the Equality and Human Rights Commission states that a school's duty to make reasonable adjustments "is an anticipatory one owed to disabled pupils generally, and therefore schools need to think in advance about what disabled pupils might require and what adjustments might need to be made for them."

However, there are relatively few authorities providing an interpretation of the 2010 Act in relation to disability discrimination in schools.

In *Multi Academy Trust v RR* the claimant complained about the school's planning during the Summer Term for his child's transition to Year 10 the next September. The First-tier Tribunal found that the school carried out some transitional planning in respect of pupils moving from one year to another but there was no evidence to demonstrate that an individual documented plan was prepared. The First-tier Tribunal held, "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…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)."

Upper Tribunal Judge Ward commented, at [28], that by adding in the schools context the words "disabled pupils generally", the legislator was making clear that in that context it is the impact of the provision, criterion or practice ('PCP') on a *group* of pupils, rather than on a particular individual pupil, which falls to be examined. Schedule 2 of the

Act makes a similar modification to s.20(3) in the context of reasonable adjustments required in the provision of services and exercise of public functions, so he derived some assistance from *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin), a case concerning the provision of services, to which schedule 2 accordingly applied.

In *Rowley*, Ford J held, at [24], that the reasonable adjustments duty has to be considered by by reference to the needs of the relevant class [*Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191] §31]. The focus is on barriers which "impede persons with one or more kinds of disability", and "with particular kinds of disability" (**Roads** §11; *Finnigan* §31). This class-based comparison triggers 'an anticipatory duty'. Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take are reasonable steps to overcome barriers that may impede people with different kinds of disability" (Code 7.24); "the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the

service …" (Code §7.20); the service-provider "has to anticipate the reasonable steps necessary to ensure that disabled persons generally, or of a particular class, will not be substantially disadvantaged". It is thus "important … to keep in mind the distinction between (anticipatory) changes which are applicable to a category or sub-category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis", and to focus on the former (*Finnigan* §36). As for what is the relevant 'class', Ford J held that 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).

Ward J accepted that defining the group for this purpose will often be difficult, given the multitude and potential combinations of causes of disability (at [29]). Further, it may not always be easy for those pursuing a claim to amass sufficient evidence about the impact on others. A comparison is then required of the effects of the PCP on pupils who are disabled with the effects on "persons who are not disabled" (at [30]).

In a special school, there will be few, or even no, suitable comparators, i.e. "persons who are not disabled".

However, Ward J did not accept (at [31]) that the comparator group would be those who were not disabled *in the same way*: firstly, there is no reference in section 20(3) as modified by Sch. 13, para 2 to those who "share a protected characteristic", secondly, it would be "inconsistent with the purpose of the Act in terms of removing barriers adversely affecting disabled people in comparison with able-bodied people", and thirdly, he considered the difficulty of making an effective comparison with others who are disabled, but in differing ways, in view of the widely varying causes of disability. He adopted the view of Fordham J in *Rowley* at [25], whose preference was to compare the relevant group – or sub-group – of disabled people with people who are *not disabled*, on the basis that this reflected the statutory language (s.20(5)), fitted with the Code (at §7.13), which stated that the disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have *"*a" disability"), and avoided the risk of introducing "invidious comparisons with those who may have other disabilities, disadvantages and needs (for which different reasonable adjustments may also be necessitated)." Apparently he did not think that ***MM***, in which the Court of the Appeal spoke at [59] of a comparison between mental health patients and "those not so disabled [meaning "in the same way"]" was binding authority.

He also did not accept that the comparator must be in the same institution. He rejected (at [40), the 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. In his 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. Moreover, when the 2010 Act was passed, there was a change from referring to "pupils" as the appropriate comparator to "persons" in schools cases other than those relating to admission to the school (where "person" obviously referred to someone who was on the outside).

He concluded (at [50-51] that the nature of PCPs imposed in a school context is that they are likely only to be applicable to those attending school and the comparison to be made under the Act in a case such as this was 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 a hypothetical comparator is permissible. In his view, this interpretation flows from the wording of the Act and its legislative history "and avoids the startling consequence of excluding, substantially or in some cases totally, pupils at a special school from bringing reasonable adjustment claims."

However he did consider that the First-tier Tribunal had erred in law because it was unclear, when it referred to "disabled pupils generally" whether it meant any and all disabled pupils, or some sub-set of them and if so, what sub-set, and if it meant that the PCP in operation across the school would place "similarly disabled children" at a substantial disadvantage, there was no evidence of the impact on anyone who was disabled other than SR. He further considered that the FtT had erred in law by making a comparison with non-disabled "pupils" without indicating what it meant: the fact that the Responsible Body's school may have few or none leaves open comparison with hypothetical non-disabled pupils elsewhere but it was not evident that that was the comparison the FtT was making, nor was there any evidence 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 even if the content might well be different.

Commentary:

Ward J stated in his judgment that some assistance may be derived from the consideration of "reasonable adjustments" in the employment context, provided due allowance is made for the fact that in employment cases the wording of section 20(3) is not modified in the same way, and he proceeded on the basis that the reasonable adjustments duty in the schools context has more in common with the duty required in the provision of services and exercise of public functions. However, a school's relationship with its pupils, or even its potential pupils, is clearly very different from the relationship of, say, a bus operator and a member of the public who boards, or tries to board, one of its buses. It is unfortunate, perhaps, that that the judgment in *A Multi Academy Trust v RR* said little about the reasonable adjustments duty in schools when it is the specific needs an individual disabled pupil, or potential pupil, that fall to be considered.

A "special school" is defined in section 35 of the Education Act 1996 as a school in England that is "specially organised to make special educational provision for pupils with special educational needs" which is (a) maintained by a local authority, (b) an Academy school, or (c) a non-maintained special school. The reasonable adjustments duties of the responsible bodies on schools imposed by section 85 of the Equality Act 2010 applies to schools maintained by a local authority, independent educational institutions (other than special schools), alternative provision Academies that are not an independent educational institutions, and special schools not maintained by local authorities. It follows from the judgment in *A Multi Academy Trust v RR* that the responsible bodies of special schools which are caught by these definitions will need to consider not only how the arrangements at the school will meet the special educational needs of their pupils and prospective pupils, they also need to consider how those arrangements might disadvantage their pupils and prospective pupils in comparison with non-disabled pupils at mainstream schools.

This would seem to serve the overall purpose of the 2010 Act, which Ward J considered in *A Multi Academy Trust v RR* at [24]: to enable the disabled to enter as fully as possible into everyday life, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public so far as reasonably practicable.

However, it may be argued that the judgment in *A Multi Academy Trust v RR* does not help to clarify the intersection of the reasonable adjustments duty in schools with the framework provided by Part 3 of the Children and Families Act 2014. For example, in practice, the SEN framework may result in provision which could also be viewed as auxiliary aids and services under the 2010 Act. In *RD and GD v The Proprietor of Horizon Primary (Responsible Body) (SEN)* [2020] UKUT 278 (AAC) Lane J observed at [68-71] that the responsible body of a school to which section 66 of the 2014 Act applies has a duty to its pupils with special educational needs to use its 'best endeavours' to see that 'the special educational provision called for' by them is made, but it would make no sense for lift this provision and place it wholesale into the Equality Act 2010, which is based on proportionate response. In *RB v Calderdale MBC* (SEN) [2022] UKUT 136 (AAC) Rowley J concluded that a Tribunal dealing with an appeal under section 51 of the 2014 Act concerning section F of a child or young person's EHC plan does not have to consider the reasonable adjustments required for that pupil under the Equality Act 2010. However, in light of the judgment in *A Multi Academy Trust v RR*, it may be argued that any discussion of what a child or young person 'reasonably requires' in terms of special educational provision will need take place alongside considerations of any disadvantage which relevant arrangements might place that pupil under in comparison with non-disabled pupils at mainstream schools.

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Katherine Anderson

Barrister
3PB

0117 928 1520
Katherine.anderson@3pb.co.uk

3pb.co.uk