

The Power of Refusal to Register: F v Responsible Body of School W [2020] UKUT 0112 (AAC)

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Summary

1. The Upper Tribunal (“UT”) held that a refusal by the First-tier Tribunal (“FtT”) to register part of a disability discrimination claim, on the basis it had been insufficiently pleaded, is capable of being done under the broad case management powers in rule 5 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008/2699 (“the HESC Rules”) in appropriate cases, but only if done on a sufficiently defined basis and accompanied by procedural safeguards. These were lacking in this case, and the UT allowed the Appellant’s appeal.

Background

2. The Appellant, F, has a diagnosis of autism and a dermatological condition which makes his autism hard to manage. He requires a high level of support. With the assistance of his mother, he brought a claim against his former school, following a series of incidents in February and April 2019 (including allegations of F being placed on a reduced timetable, a failure to provide sign language and a failure to communicate about his needs), culminating in his exclusion. Grounds of claim were submitted which made complaints of direct discrimination (s13 Equality Act 2010 (“EqA”)), indirect discrimination (s19 EqA), discrimination arising from disability (s15 EqA), and a failure to make reasonable adjustments (s20 EqA).
3. The matter came before an FtT judge on the papers, for the purpose of identifying the issues and case management directions. The legal basis for these directions was stated to be rules 5 and 6 the HESC Rules. The judge identified the only two issues as being F’s exclusion, and the allegation that F was placed on a reduced timetable from March until 1 April 2019. It stated that the exclusion was most appropriately brought under s15 EqA and that the issues of whether there has been sufficient communication around F’s

needs could be dealt with as part of whether the Responsible Body had acted proportionately. Therefore the only claim registered was a s15 claim.

4. F's solicitors applied for the directions to be varied, so as to include a claim for reasonable adjustments distinct from the exclusion, highlighting that these allegations had been set out in the grounds of claim. This application was refused by the FtT on the basis that the reasonable adjustments claim was not drafted with sufficient precision. This decision was appealed by F to the UT on three grounds:
 - (a) Both FtT judges had failed to direct themselves to the correct legal test for registration. As the concept of 'registration' is not set out in the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") or the HESC Rules, the best analogy was the power to strike out the whole/part of proceedings where there was no reasonable prospect of success;
 - (b) The judge who had refused to vary the directions on the basis that the claim was insufficiently pleaded, had erred by not allowing F's representatives to make representations or amend the claim;
 - (c) The decision not to vary was irrational, as relevant considerations were not taken into account and/or sufficient weight was not granted to those considerations.

Decision of the Upper Tribunal (UTJ Ward)

5. Given the COVID-19 pandemic, the hearing took place remotely, and was the first of the Administrative Appeals Chamber to do so.
6. The UT reviewed the relevant legal framework, including the 2007 Act and the HESC Rules. It also considered the equivalent Employment Tribunal Rules and the former SENDIST rules.
7. Having considered these, and the submissions of the parties, the judge reached the following conclusions:
 - (a) The uncertainty and ambiguity around the refusal to register, and lack of clarity as to the test for it, was a powerful indicator that the decision was unlawful. It could not be inferred from the HESC Rules what the test might be and the FtT has other powers (such as requiring a party to amend a document, requiring submissions on an issue, or strike out) to deal with cases that are not clearly pleaded [30-31];

- (b) While it is imported for unmeritorious cases to be weeded out, caution must be taken in cutting off discrimination cases at too early a stage (citing *Anyanhwu v South Bank Students Union* [2001] UKHL 14). The decision not to register had exclude parts of the claim without the necessary procedural safeguards [34-36];
 - (c) There was a lack of fairness in this case as, in the original order, it was not explained why the reasonable adjustment claim could not continue, and the second order was made without giving F the opportunity to make representations or amend the pleadings (citing *R v Home Secretary ex p Doody* [1994] 1AC 531 at 560 in relation to fairness) [37-39];
 - (d) The case management power in Rule 5 (which is widely expresses) may allow for the power to refuse to register, however the procedural shortcomings in this case meant that the decision was an error of law [43-45].
8. Having reached this conclusion, the judge suggested that the FtT and/or Tribunal Procedure Committee may wish to consider whether any amendment to the HESC Rules is desirable to include express provisions governing registration (similar to the Employment Tribunal Rules), or whether the matter can be dealt with relying on the rule 5 power, supplemented by a more developed procedure and greater clarity via practice directions and/or practice statements [47].
9. The UT also provided some guidance on the use of the registration power, considering that the FtT lawfully may:
- “(a) provide indicative guidance as to the judge’s views of the issue in a case;
(b) operate the strike-out provision in the HESC Rules in accordance with their terms;
and
(c) operate according to defined principles, and with appropriate procedural safeguards, a registration system, which may have the effect of screening out some cases, or parts of cases which might, later in proceedings, have been the subject of an application under rule 8.”* [48]
10. The UT substituted its decision for that of the FtT, so that the claim be registered with the inclusion of the reasonable adjustment claim. It left the FtT to make any further orders in relation to further and better particulars [49].

Comment

11. This judgment will be a welcome clarification for claimants, particularly those who act in person. Following the calls from the UT, we await further guidance from the FtT or Tribunal Procedure Committee as to the registration process.

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