No claim for insufficiently favourable treatment

By Alex Leonhardt
3PB

McCue (as guardian for Andrew McCue) v Glasgow City Council [2023] UKSC 1

Lord Sales delivered the judgment of the Supreme Court in a claim, arising from Scotland but with relevance to England and Wales, relating to the application of sections 15 and 20 of the Equality Act in relation to the provision of public services.

The appeal was brought by the mother of a man with Down's syndrome, Mr McCue, on his behalf, in relation to the way in which Glasgow City Council had calculated the income available to him to contribute to the costs of the social care he received.

Lord Sales' judgment is a useful application of the general principle from ***The Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] UKSC 65*** – that a Section 15 claim must be based upon *un*favourable treatment, and not merely treatment that is insufficiently favourable – to challenges brought against public bodies.

He also applies a similar line of reasoning to a claim brought on the same facts as a failure to make reasonable adjustments, which may be useful for representatives to consider when considering how to frame such a claim (or respond to one).

Statutory and Policy Framework

The Social Work (Scotland) Act 1968 requires local authorities to provide social care assistance to be given to those adults who require it, having assessed their needs.

Section 87 of the Act allows for a local authority to recover from a person receiving assistance "such charge (if any) for it as they consider reasonable". That is limited by a requirement, at Section 87(1A), that if the local authority is satisfied that a person's income is insufficient for it to be reasonably practicable for them to pay the amount they would otherwise be charged, the

authority “shall not require him to pay more for it than it appears to them that it is practicable for him to pay”.

A policy document produced by the Convention of Scottish Local Authorities (a non-statutory body of which the local authority in this case was a member) notes that “failure to take Disability Related Expenditure […] into account as part of the financial assessment” could result in the statutory test at Section 87(1A) not being met.

The local authority’s own policy document on social care charging includes that “consideration will be given to representations to take into account other specific costs of living, eg. in relation to disability related expenditure”.

Factual Background to Claim

The local authority had assessed the appellant’s son as having needs under the Act, and there was no dispute on the adequacy of the support provided. The local authority had levied charges for those services.

The appellant had made representations in respect of various expenditures said to be expenditures resulting from Mr McCue’s disability that she says should be taken into account in calculating the amount of income he has available to him for the purposes of the Section 87 calculation. The local authority had largely rejected these representations.

The appellant issued a judicial review claim against the local authority on the basis that its failure to discount these costs from the income potentially available to Mr McCue to pay for his care costs was contrary to ss.15 (discrimination “arising from” a disability) and 20-21 (failure to make reasonable adjustment) of the Equality Act. There was no general public law challenge to the lawfulness of either the council’s policy or the individual decisions made.

Procedural History

The claim was dismissed in the Outer House of the Court of Sessions, for reasons which were not endorsed by the courts above and which are not necessary to set out here.

The appeal to the Inner House was dismissed on the basis that the appellant effectively sought to use the Equality Act to impose a positive duty upon the local authority to protect Mr McCue from having his ability to live a normal life being interfered with by reason of additional expenditure caused by costs associated with his disability, divorced from the statutory context

which determined the parameters of the charges which the local authority could levy. The policy document was not, it said, discriminatory: rather, it was itself a route through which the duties of the Equality Act were complied with.

When argued at the Supreme Court the appellant relied not upon the policy document but, rather, the particular decision made by the local authority in Mr McCue's case which the Court considered constituted a PCP. That decision concerned the reasons why particular items of expenditure, claimed to be disability-related, were not disregarded in calculating what it was practicable for Mr McCue to contribute to pay for his care.

The Section 15 Claim

In relation to the claim under Section 15, the court noted that that claimants must first identify treatment that is unfavourable. While a comparison to a non-disabled person may be helpful in doing so, it is fundamentally not a claim based upon a comparison to a non-disabled person.

The court referred to its decision in ***The Trustees of Swansea University Pension and Assurance Scheme*** in noting that a Section 15 claim cannot be based upon a failure to treat the claimant *sufficiently* favourably. In that case, an employee retiring early due to ill health received a lower pension than he would have received had he not reduced his hours prior to retirement due to disability-related ill-health. The employee's case was based upon a comparison to the pension he would therefore have received but for that reduction in hours. The Court had found that the relevant "treatment" was the granting of a pension, that it was only through his disability that he qualified for that at all, and there was therefore no unfavourable treatment.

The Section 15 claim in this case was dismissed on a similar basis: the scheme could have been more advantageous to the Claimant but he was not treated *un*favourably at all, by reason of something arising from his disability or otherwise.

The Court's consideration of those arguments will serve as a warning against seeking to use a Section 15 claim as an alternative to a public law challenge with a lower threshold for unlawfulness (not justified by means of being a proportionate means of achieving a legitimate aim, rather than *Wednesbury* unreasonable).

The Section 20-21 Claim

In analogous reasoning, albeit applied to the statutory language for a claim based upon a reasonable adjustments claim, the Court concluded that the PCP relied upon could not place Mr McCue at a substantial disadvantage because of his disability for the "simple reason" that it *only* applies to disabled people, and therefore no comparison of effect could be made between him and persons who are not disabled, as section 20(3) requires.

Again, the case serves as warning that the Equality Act cannot be used as a vehicle through which to undertake a general review of the adequacy of a public body's (or employer's) provision specifically for disabled people, through identifying a particular aspect of that provision which is purportedly insufficient as the PCP.

31 January 2023

Alex Leonhardt

Barrister
3PB

020 7853 8055
alex.leonardt@3pb.co.uk

3pb.co.uk