

DECISION OF THE TRIBUNAL

Claim: DDC 13 01 2015

Gender: Female

Aged: 17

Type of Claim: Exclusion from School

1. Details of the claim

1. A disability discrimination claim, dated 19th August 2013 was received by the Tribunal Secretariat in respect of the circumstances surrounding the pupils departure from school in March 2013. The claimant requests that the Tribunal:
 - a. make a formal declaration that the school unlawfully discriminated against the pupil
 - b. orders the school to issue a formal written apology to the pupil and to her mother, said apology to be in accordance with the SPSO guidance on apology; and
 - c. orders the school to undertake formal training for all school staff and to amend its Code of Conduct to make specific provision for the need to give consideration to circumstances where a pupil's disability gives rise to an apparent breach of discipline.

2. Summary of the decision

The Tribunal considers that there was no discrimination towards the pupil for the reasons hereinafter detailed. The claim therefore falls to be dismissed.

3. Procedural history

- 3.1 There was close case management of this case. There were several conference calls to discuss the witnesses and productions in the case and other procedural matters in the lead up to the hearing. Unfortunately a previous hearing fixed in January 2014 had to be cancelled at the last minute due to a bereavement. Thereafter there was some hope that parties could reach an agreed settlement. That did not come to pass but accounts for much of the delay between date of lodging and the date of this judgement.
- 3.2 Evidence was heard on 13th, 14th and 16th January 2015. Written submissions were provided by both parties. Thereafter, the Tribunal deliberated and reached this decision.

4 Summary of Evidence

- 4.1 The bundle consists of T1-31, C1-187 and R1-195. We considered and took into account all of this information in making our decision.
- 4.2 We heard oral evidence for the claimant from Witness A, Witness B, Witness C and the claimant. For the Responsible Body we heard evidence from Witness D and Witness E.
- 4.3 Witness A is a Consultant Child and Adolescent Psychiatrist. She has held that post since 2009. She has clinical involvement with THE YOUNG PERSON and a report and a supplementary report prepared by her were in the papers and read into evidence.
- 4.4 Witness B is a Consultant Clinical Psychologist who obtained his Ph.D in psychology in 1981. He had prepared a report which was in the papers (C168-187) which was in the papers and was read into evidence.
- 4.5 Witness C is an independent educational consultant specialising in additional support needs. He was previously Service Manager (ASN) for an education authority. He had prepared a report (C153-167) which was in the papers and read into evidence.
- 4.6 The Claimant is THE YOUNG PERSON's mother. She is also a Consultant Psychiatrist.
- 4.7 Witness D is Principal at School A. He has held that post since April 2011. He has been a teacher since 1986.
- 4.8 Witness E is Director of Pastoral Care at School A. She is a teacher of English and also Deputy Principal of School A.

5 Findings in fact

- 5.1 The parties, following a direction at case management, lodged an extensive Joint Minute of Agreed Facts and Disputed Issues (T23-30). The Tribunal records its thanks to parties for this helpful document, which did much to assist the hearing

of the case in a reduced time and to focus the matters in dispute. Agreed facts 1-20 (T23-25) shall be held to be repeated and incorporated herein, for the sake of brevity. We make brief additional findings below.

- 5.2 THE YOUNG PERSON previously attended School B, both as a day pupil and as a boarder. She then attended School C before being enrolled as a boarding pupil at School A. She was enrolled there by her mother on 15th August 2011. The claimant completed a “Student Health History and Consent Form” (R187) at that time.
- 5.3 THE YOUNG PERSON has Feingold Syndrome, dyscalculia and ADHD. The claimant did not mention either of these first two matters on the Student Health History and Consent Form that she completed on THE YOUNG PERSON’s admission to School A.
- 5.4 Feingold Syndrome is a rare genetic condition causing characteristic abnormalities and health problems. ADHD is associated with it. ADHD is a neurological disorder affecting the parts of the brain that deal with the control of executive functioning. It can cause difficulties with maintaining attention, organisation, sequencing and planning. It can make the sufferer subject to distraction and they can have memory difficulties and be more impulsive. Different individuals are affected in different ways.
- 5.5 Medical knowledge of ADHD has evolved in recent years. It used to be thought that girls with ADHD were not particularly impaired. There is now considerable evidence that such girls do have difficulty managing social situations, struggle with peer relationships and have poor self-esteem.
- 5.6 THE YOUNG PERSON Exhibited difficulties with self esteem, social anxiety and making friends at School A. School A did not relate these difficulties to her ADHD. School A provided THE YOUNG PERSON with support, advice and assistance in dealing with these issues.

6 DISPUTED ISSUES

“Disability” in terms of the Act

- 6.1 The Claimant’s position is that THE YOUNG PERSON has a disability in terms of section 6 of the Equality Act 2010 (hereinafter “the 2010 Act”).
- 6.2 The Respondent’s position is that they are not in a position to say whether THE YOUNG PERSON was disabled in terms of the 2010 Act at the material time, meaning that this is a matter that is to be adjudicated on.
- 6.3 Section 6(1) of the Equality Act 2010 states that:

“A person (P) has a disability if (a) P has a physical and mental impairment and (b) the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities.”

6.4 It was accepted by School A that the young person had a mental impairment, namely ADHD. In the view of the Tribunal it was clear that any effect of the mental impairment would be long term, as Feingold's Syndrome and ADHD are life long diagnoses. Thus, whilst recognising that the full circumstances are relevant it seems to us that the question in dispute is whether the mental impairment caused a substantial and adverse effect upon THE YOUNG PERSON's ability to carry out normal day to day activities.

6.5 The claimant's position was that it did. They submitted that the effects of these impairments are set out in more detail in Witness A's report dated 3 October 2013. The Tribunal considered the information there (C8) which states: "When I met THE YOUNG PERSON in July 2013 she was not on any medication and her ADHD symptoms were very apparent. She had difficulty with concentration and following conversations. She was easily distracted by noises and also by her own thoughts, which would sometime (*sic*) lead her off on a tangent to what was being talked about (*sic*). She was forgetful within the conversation.....Although she managed to sit for some time she was noticeably restless and fidgety. She was rather impulsive in her conversation, often interrupting others and also including information that was not relevant to the conversation. She would also include at times information about herself that was too personal.....In summary, I think that it is very likely that her ADHD symptoms and cognitive difficulties would have impacted significantly on her ability to carry out the typical tasks that would be required of her within the school setting."

6.6 In contrast School A pointed to Dr G's Report, which we note is dated 28 January 2010 (C68) and submitted that it does not state that the constituent requirements of the Equality Act were satisfied (at that time) in relation to THE YOUNG PERSON. Whilst recognising that the issue for the Tribunal is whether the Act's requirements were satisfied in March 2013, we note that the Report states (C71): "There were no indications with me (*sic*), in the classroom or from what the young person's teachers had to say, of effects associated with ADD or ADHD. the young person's work habits and attention control were good. Other than Feingold's syndrome, there were no indications of conditions or syndromes which can affect young people in education. Tthe young person's overall presentation was within the wide range that is average for her age."

6.7 We have had regard to the document "Technical Guidance for Schools in Scotland" produced by the Equality and Human Rights Commission. This gives general guidance and refers to the HM Government Office for Disability Issues Guidance. That states (Pg 34 D3) "In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

6.8 The Claimant gave evidence that THE YOUNG PERSON had been awarded a personal independence payment due to her personal care needs. She gave

evidence that THE YOUNG PERSON needs to be encouraged to wash and needs to have her personal toileting supervised. She indicated that THE YOUNG PERSON was on the contraceptive pill as she would be unable to cope with menstruation. She gave evidence that THE YOUNG PERSON could manage her own medication, with assistance. She gave evidence that THE YOUNG PERSON could probably cook pasta and soup but would also do things like leave a polythene bag on top of the cooker. She said that THE YOUNG PERSON lost her passport two days before going on holiday and could not tell the time accurately or manage her own money. She gave evidence that THE YOUNG PERSON would frequently wander off in shops and has difficulty in planning and executing work. She felt that THE YOUNG PERSON would need a lot of support to live independently as an adult. In her written statement (C125, para 25) she says: "She has difficulty planning and executing anything other than relatively simple tasks- we always, at home, given (*sic*) her serial instructions and rarely more than two steps at a time.....It was not until recently that I noticed I still watch her very carefully when crossing the road- my husband still insists on holding her hand as he does so as she could easily misread oncoming traffic and run out."

6.9 This was very much at odds to the evidence from Witness E. She points out (R177 para 2) that the fact that students are residential means that staff know them incredibly well. Later, (R180, para 33) she states: "The Claimant states at paragraph 20 that the young person is unlikely to have had the intellectual capacity or emotional maturity to make informed decisions about her behaviour and the consequences. I strongly disagree.....My personal observations of the young person also did not suggest that she lacked the capacity in either respect." In her oral evidence when asked if THE YOUNG PERSON had difficulties with day to day tasks Witness E said: "Apart from struggling with self-esteem and anxiety "no". THE YOUNG PERSON got to lessons, went for five days on an ocean going yacht....." She was not aware of THE YOUNG PERSON having any difficulty telling the time or with hygiene or personal care. In relation to crossing the road she said: "If she couldn't cross the road it would be pretty worrying as between her House and school she would have to cross the road. She would go into town and on cinema leave. There was never any concern."

6.10 The particular report card (R20) dealing with the ocean going yacht states: "the young person has made an excellent contribution to the voyage. She quickly settled in to life on board and established herself as an energetic and enthusiastic team member....".

6.11 We observe that we require to consider the position in respect of THE YOUNG PERSON without taking into account the effect of any medication. There was some evidence about the specific medication the young person was taking but none about the effects upon the young person had she not taken that medication. Thus we are unable to make any findings in fact in that regard.

6.12 Having considered all of the evidence it is our view that THE YOUNG PERSON cannot be said to have an impairment which substantially and adversely effects her ability to carry out normal day to day activities. Our overall impression of the evidence from the school was that THE YOUNG PERSON went about her normal day to day activities in an entirely normal fashion, as evidenced by the fact that she was able to go on cinema outings without any special considerations, was able to live in a boarding school setting without any special considerations and was able to go on an ocean going voyage and apparently do everything required of her there. The only aspect in which the school acknowledged any effect on THE YOUNG PERSON was in relation to her social skills. Having considered all of the evidence we are not satisfied that such effects were substantial, in that, in our assessment of the evidence as a whole, THE YOUNG PERSON's social skills were in the normal range, albeit at the low end of that range.

6.13 That is sufficient to deal with this claim; as no finding of discrimination can flow where we have decided there is no disability. However, in deference to the careful submissions and the clear importance of the matter to the claimant we shall briefly give our views on some other disputed matters.

Causation

6.14 We were not satisfied that THE YOUNG PERSON's actions arose in consequence of her disability.

6.15 The Claimant referred us to the EHRC Technical Guidance at para 5.45, which states "This means that there must be a connection between whatever led to the unfavourable treatment and the disability." and at 5.46 "The consequences of a disability include anything that is the result, effect or outcome of a disabled pupil's disability."

6.16 As the solicitor for School A put it in his submission: "The Tribunal requires to determine whether it is possible to say that the reason for the young person's behaviour was *because of* her ADHD or whether this was something that would have happened irrespective of it. That is not an easy task. The expert evidence did not say that this must be the case. Even if pupils with ADHD are more likely to engage in risky or ill advised behaviour, can the Tribunal conclude that this was the reason for her conduct in this case? The other pupil did not have ADHD and equally engaged in the act.

6.17 The reasons we were not satisfied of the causal link between THE YOUNG PERSON's ADHD and the sexual act that caused her dismissal are:

i/ the element of planning. It is clear from the emails between THE YOUNG PERSON and her sexual partner (R100-113) that this was not a chance encounter, where impulsivity (a known symptom of ADHD) took over. Rather the couple engaged in a lengthy email correspondence and planned the meeting in the music department. The correspondence also suggests that they planned to engage in some form of sexual behaviour.

ii/ Witness E's evidence was of THE YOUNG PERSON having had three relationships with boys while at the school. The school's view was that these were positive relationships with suitable boys. In our view they demonstrate THE YOUNG PERSON's ability to engage in relationships that were not out of the ordinary; it cannot be said that her ADHD caused her to have poor judgement in dealing with boys as a general rule

iii/ The Claimant was aware that THE YOUNG PERSON had had sex with a boy during study leave at his home in Easter 2012. She did not subsequently suggest to the school, when she told them of this or previously, that this act was linked to THE YOUNG PERSON's ADHD. That suggests that she took the view that having sex *per se* was not a consequence of THE YOUNG PERSON's ADHD.

Did the school's actions in requiring an immediate departure from the school amount to a breach of section 15 of the Equality Act?

6.18 The school's position in submissions was, as follows: "Section 15(1) states that:

"A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

the young person's behaviour breached the school rules. The outcome following that breach had to take account of all the circumstances. Dealing with adolescent behaviour is complex particularly in a boarding school with 13-18 year olds. The school's rule, as set out above, is clear in prohibiting sexual intercourse between pupils. Expulsion is not a necessary outcome and the Principal has discretion to take all the circumstances into account. The fact that the young person had previously broken this rule (and not suffered such a detriment) demonstrates this.

In this case, the facts are clear. the young person had been given a large amount of support and assistance (from both disciplinary and non-disciplinary perspectives) in an attempt to help her avoid any further breach of the school rules, in connection with sexual relationships. She was given guidance as to the reason for the rule and the school's approach to sexual misconduct.

Despite the numerous warnings and support (and knowledge about sexual misconduct and the consequences), the young person decided to have sex with another pupil in a teacher's study (a music practice room). She had previously been told that she should not enter this area.

the young person had been given a large number of chances to adjust her behaviour and to comply with the school's approach. the young person knew that further sexual misconduct could result in her expulsion."

6.18 The Claimant's position is, as follows:

"It is not accepted that having little room to move disciplinarily amounts to a legitimate aim. In the first instance, as set out above, the Equality Act 2010 requires reasonable adjustments to disciplinary policies and procedures which would provide the necessary room to manoeuvre. Further, the Code of Conduct sets out the penalties for "acts of sexual intimacy" or instances of students being found "having, or having had, sexual intercourse". It states that this "may result in expulsion" and "they are likely to be expelled".

The EHRC Technical Guidance, at para 5.35 defines "proportionate" as meaning "appropriate and necessary". It was neither appropriate, nor necessary, to require the young person's immediate withdrawal from school. The alternative measure of rustication until the end of term to allow her to continue her studies and sit her exams would have achieved the legitimate aims the school sought to pursue while minimising the detrimental impact on the young person and allowing her family to plan a transition to a new school in a more measured way."

6.20 The view of the Tribunal is that, even if we had made a different decision on the matters above we would still not have considered that the effective expulsion of THE YOUNG PERSON was discriminatory. In our view the nature of the conduct, when put in the context of a mixed sex boarding school, had to result in expulsion. Such was the punishment for every other pupil found having sex in school thus the punishment was proportionate. The legitimate aim is maintaining standards of discipline and the health, safety and welfare of pupils.

6.21 However, in our view the procedures that took place at School A should be criticised in two respects. In the first place we do not consider it appropriate that the Principal took the decision to ask THE YOUNG PERSON to leave without first giving THE YOUNG PERSON and/ or the claimant a chance to make representations. This is a simple matter of natural justice. There are occasions when a parent or pupil may have something very relevant to offer in mitigation and this cannot be considered where no opportunity to put it forward is afforded

before the decision is made. In the second place we consider that much more effort and consideration should have been given to ensuring that THE YOUNG PERSON's exams were not affected.

Did the school's application of its disciplinary policy amount to unlawful indirect disability discrimination in terms of section 19 of the Equality Act?

- 6.22 Had we made different decisions above we would have been minded to answer this question in the affirmative. As the claimant puts it in submissions:

"The provision, criterion or practice in question is the school's Code of Conduct (especially as it refers to relationships) and the way in which this is and was operated in practice by school staff and governors. Specifically, the Code of Conduct makes no allowances for any conduct which may have arisen in consequence of a disability – indeed the section on equal opportunities makes reference only to race equality and gender equality. Furthermore, the Principal and Chair of Governors both make clear that the school have deliberately chosen to treat the young person in exactly the same way as non-disabled students and that they believe this is the right thing to do.

Section 19(2) provides that a provision, criterion or practice is discriminatory if A applies it to persons with whom B does not share the characteristic; it puts persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.

The Code of Conduct applies to all pupils at School A. In not taking account of the impact that a disability may have on a pupil's behaviour, it places pupils with a disability at a particular disadvantage when compared with non-disabled pupils....."

- 6.23 With this submission we respectfully agree.

Did the school fail to make reasonable adjustments in terms of section 20 of the Equality Act?

- 6.24 We find it difficult to answer this question in light of our overall view. However, as the duty to make reasonable adjustments requires a school to "take reasonable steps to avoid substantial disadvantage where a provision, criterion or practice puts disabled pupils at a substantial disadvantage" we take the view that, in light of the lack of any mention of disability in the schools Code of Conduct, we would have answered this question in the affirmative.

Did the school subject the young person to an unlawful detriment in terms of section 15 of the 2010 Act by telling her house mates the circumstances leading to her departure?

6.25 The claimant's submission on this aspect was:

"School A unlawfully discriminated against the young person in terms of Section 15 of the Equality Act 2010 by subjecting her to a detriment – that is, by breaching her privacy and announcing sensitive personal information regarding the circumstances leading to her departure to other pupils and staff. The Chair of Governors advances the "well-being of other pupils affected" without elaborating on why such a grave breach of privacy was required in order to achieve this. This was not a proportionate means of achieving a legitimate aim."

6.26 In contrast the school submitted:

"The communication was made in a sensitive way, to a select group of students and to underline the need for respect of the school's rules. That is the approach the school adopts in all cases where a pupil leaves the school in these circumstances. The communication was made both in the young person's and the other pupil's (ie the boy's) houses. It was not a formal announcement as such but something communicated during discussions with the housemates.

the young person's disability was unconnected with the school's actions in this regard. The communication was made to avoid further rumours and to protect the young person. It would have been made irrespective of any disability (where the circumstances were the same) and as such her alleged disability was irrelevant in the decision to communicate the decision."

6.27 We accept the school's submission in that the communication was unconnected to the young person's disability. Nevertheless it was the view of the Tribunal that the announcement made (in both cases) was entirely inappropriate and was not justified by any legitimate aim.

Closing remarks

6.28 It follows that the claim shall be dismissed. We consider that this claim raised important questions of interpretation and we can understand the claimant's upset and distress at the loss of her daughter's ability to take exams. It seems to us that there are lessons to be learned for School A (and other schools, who could easily find themselves in a similar situation.) We were impressed with the Principal and Director of pastoral care at School A and are confident that they will ensure a change in things such as the Code of Conduct with all due haste.

6.29 We wish THE YOUNG PERSON and her family all the best for the successful conclusion of her education. Finally we again record our thanks to the solicitors involved in this case and commend their excellent presentation of the facts and arguments.