IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/224/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

DECISION:

Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides the decision of the First-tier Tribunal of 20 January 2015 (ref. no SE 353/15/00005) did not involve a material error on a point of law. This appeal is **DISMISSED**.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. But this does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation to the child.

REASONS FOR DECISION

Introductory remarks

1. No one could argue that the Appellants are unwilling to fight to secure a decent education for their daughter. However, I am going to ask them to reflect on whether it is helpful to expend so much effort on challenging their daughter's school's attempts to educate her. The present Equality Act 2010 claim has taken three years to resolve, involving two decisions by both the First-tier Tribunal and the Upper Tribunal, as well as an application to the Court of Appeal for permission to appeal against a decision of the Upper Tribunal. In tandem, further legal challenges were brought about the daughter's previous primary school and her local authority.

2. Before this litigation began, and afterwards, the daughter's school clearly made significant efforts to understand and deal with Mr & Mrs C's concerns about how her educational progress was assessed. These efforts were met with complaint after complaint. I cannot help but think that, if as much effort had been put into seeking to co-operate with the school as was put into challenging it, the daughter's education would have been enhanced.

3. The Equality Act 2010 is, of course, a vitally important piece of legislation for disabled pupils. It is not, however, some kind of special complaints procedure for parents who are dissatisfied with their child's education. To treat it as such is to misuse the hard-won rights conferred by the 2010 Act. Mr & Mrs C's conduct of this ultimately unsuccessful litigation has rarely taken the form of focussed arguments constructed by reference to the provisions of the 2010 Act. The effort that must have expended by the school in responding to Mr & Mrs C's claim, to say nothing of the worry caused to staff, has caused me concern.

4. The Appellants are referred to in these reasons and Mr & Mrs C. They are the parents of a child L in respect of whom Mr & Mrs C made claims of discrimination under the Equality Act 2010. The Respondent to this appeal is the Governing Body of a maintained secondary school. In these reasons, the Governing Body is referred to as "The School".

Background

5. L began her secondary education, at The School, in September 2014. The notes of a preceding meeting on 9 May 2014 with staff at L's primary school state:

> "[Mrs C] queried the security of the levels being provided for [L]. A discussion took place explaining how the levels will be reported at [the School]. [Mrs C] was provided with a copy of the PIVATS results".

6. 'PIVATS' refers to Performance Indicators for Value Added Target Setting. It is described as follows in a report provided by The School:

> "PIVATS…is used to monitor pupils whose performance is outside national expectations irrespective of their ages. It offers consistency in assessing pupil attainment at early developmental levels, and up to Level 4 in the National Curriculum in English, Maths, Science (and ICT). PIVATS measures

> attainment against key performance indicators and breaks down each of the P Scale or National Curriculum Levels into 5 stepping stones, e to a, that allow the tracking of pupil progress across that level."

7. It cannot, in my view, be disputed that PIVATS, which was developed by Lancashire County Council, was generally accepted by the teaching profession as an effective method of tracking the progress of pupils whose performance was outside national expectations.

8. The P-scales, referred to in paragraph 6 above, are to be found in statutory guidance issued in July 2014 and updated in June 2017. The guidance is called "Performance – P Scale – Attainment Targets for Pupils with Special Educational Needs".

9. I note the Department for Education announced on 14 September 2017 its intention to withdraw the P-scales statutory guidance. But this case is about the performance of The School in late 2014 and early 2015 when there clearly was a requirement to use P-scales, attainment of which by pupils was the purpose of PIVATS.

10. On 20 June 2014, Mrs C emailed a local authority educational psychologist:

> "…I need your help in ensuring [L's] statement has a full early annual review prior to leaving primary school. I need reassurance from you that all is well and is as it should be with her assessment, monitoring and reporting of progress because I don't think that it is. I need reassurance on [L's] SATS Year 2 and Year 6, on [L's] annual reports for a child with SEN and on [L's] year on year rate of progress. Please help me sort out this mess. I need to know that levels being reported to me are independent levels of **rking [*letters obscured in original*]. I need to know how P levels and PIVATS should be reported with an annual report. I need a full early annual review to address my concerns in relation to the reporting, assessment and monitoring of progress for a child with SEN and not just a two agenda review meeting."

11. An annual review meeting for L's statement of SEN was held on 15 July 2014 (i.e. the last review before her transfer to The School). The minutes of the meeting state "new targets would be set at [the School] at the first review meeting which would be approximately 3 weeks after the term started".

12. On 5 September 2014, the local authority educational psychologist emailed Mrs C:

> "I'm sorry that you felt your level of understanding about [L's] needs was not being acknowledged…I am very well aware of your levels of understanding and therefore there are no assumptions on my behalf that you do not understand [L's] cognitive ability or profile…You asked me to help understand [L's] pattern of progress and for my opinion about her ability to catch up with peers and about what I mean by surges, plateau and wash-out, and what data I had used to come to that conclusion. In summary, the difference between [L] and her peers is that whilst peers without her cognitive difficulties may forget details after focussed learning, [L's] problems embedding new knowledge means that she forgets conceptual explanations as well as details. Other children will retain the conceptual knowledge and build it on to existing schema and thus their learning is more linear and consistent, they can keep new knowledge and relate it to older knowledge and use it in different ways, thinking flexibly. [L] has been described as having an immature brain and she has problems with more 'higher order' thinking processes like reasoning, making comparisons and discriminations between data, making conceptual links, generalising and applying new knowledge onto older knowledge…."

13. The email went on to describe how L could be helped to overcome her particular learning difficulties and identified the evidence relied on by the author in arriving at her education conclusions about L. The email then concluded:

> "You raise a lot of points…around targeting and measurement…I am not very familiar with the criteria for what constitutes a move from Level 2 to Level 3 in writing (this is School's responsibility) but I have looked at them and there is a lot of focus on demonstration of practical skills…and less higher order processes…Her presentation is complex and it is better to discuss properly and at length face to face – it will be good to talk more when we meet on the 17th September".

14. L started attending The School at the beginning of the September 2014 term. On 5 September 2014, i.e. when L had been attending the school for no more than a few days, Mrs C emailed a response to the email sent by the educational psychologist earlier that day:

> "…I just want simple data to give me an overview of progress, how that progress has been achieved, what that means for [L] and how and what that progress has been based on and judged. I want to know what a "surge" means for [L] and what a plateau means for [L] and what a "drop" means for [L]. I want to see the objective data that has been collated to enable this type of judgement. There is none…
>
> Basically, I want straight easy answers. If [L's] learning pattern is not linear or a smooth learning curve, I want to know what it is and how that has been achieved – that's all. Is that really too much to ask? I haven't even seen a graph. I've been refused graphs, the Chair of Governors refuse to calculate a rate of progress for me. Instead, I have been referred to your report on p.6 for a "rate of progress". I can't see it – can you tell me what it is for all subject areas and how that rate of progress proves that the interventions have had a positive impact on [L's] rate of progress?"

15. The notes of a meeting between Mrs C and the School's SEN Department, dated 17 September 2014, included:

> "meeting opened with discussion about progress and representation, including systems used at [the School] such as the annual cycle of reporting to parents and 4 assessment opportunities during the year"

16. On 17 October 2014, Mrs C emailed The School complaining that she had recently been supplied with assessment data for Maths, ICT and Music but not for English and Science, and requesting an explanation.

17. The notes of another meeting at The School, dated 23 October 2014, included:

- "[Mrs C] brought in concerns over [L's] levels as reported on the VLE [virtual learning environment]. Agreed that the data appeared confusing…the agreement was that the school would amend the data as appropriate";

- "discussed progress with being able to graph [L's] progress using PIVATS and indicated that this would be possible after T2 [term two]"

18. In written submissions to the First-tier Tribunal, The School gave reasons for not having provided Mrs C with levels of attainment in all subjects:

> "At the meeting [on 23 October 2014], it was discussed and agreed that it may not be helpful to share without discussion the levels awarded in subjects other than English, Maths, Science, Music, PE, Art and Tech…
>
> The rationale for that decision as explained at the time, is that in a number of Subjects, Teachers are adapting their methods of assessing [L's] knowledge and understanding and the levelling of her attainment in a way that better reflects her recall and understanding of concepts, and which with support, avoids the sole assessment of independent work which would reflect attainment at much lower levels. This information is readily available to [Mrs C] and Teachers are more than willing to discuss this in detail directly when requested.
>
> School consider this a reasonable adjustment for [L] that enables her to demonstrate skills that might be under-estimated by the regular means of assessing and reporting attainment and progress, is personalised to her needs, and importantly, gives [L] the opportunity to experience a sense of success and achievement.
>
> [The School] is aware that alternative assessment frameworks exist, such as BSquared as referred to by [Mrs C], but consider that the PIVATS assessment is fit for purpose and is used effectively by Teaching Staff in School".

19. On 27 October 2014, Mrs C emailed The School stating that she had spoken to the creators of BSquared who informed her it had been updated to reflect the new National Curriculum. She had also spoken to staff at Lancashire County Council, who created PIVATS, and was informed:

> "The PIVATS have not yet been updated for the new curriculum and although steering committees are being held to address the issue of updating the PIVATS there is no time scale as to when this will be done. Therefore would it be possible to reconsider the use of PIVATS at this point in time, as they are not up to date for the new curriculum assessment and do not cover all curriculum areas."

20. On 5 December 2014, the Department for Education issued an updated statutory framework for the national curriculum at key stages 3 and 4 (i.e. the secondary curriculum). I suspect Mr & Mrs C have these changes in mind when they argue The School's use of PIVATS was not aligned with the new National Curriculum. I say that because their written submissions to the First-tier Tribunal included the argument that, in September 2014, The School "will have been aware…there were changes coming to the national curriculum". In those same submissions, Mr & Mrs C argue PIVATS was not updated until September 2015.

21. In December 2014, The School supplied Mr & Mrs C with:

- a document entitled '4 plus 1 questions'. In response to the question 'what have we tried?', the answers included 'assessment of progress using PIVATS', and to 'what have we learned?', 'all areas of PIVATS skills need to be assessed at each assessment point to enable meaningful graphical representation of progress';

- a Pupil Centred Plan, which identified a range of outcomes and what needed to be done to achieve them.

22. Mr & Mrs C's Equality Act 2010 claim was made on 16 February 2015. Strictly speaking, subsequent events are irrelevant. But I shall summarise certain of them because they form part of the context to the observations I make below in these reasons.

23. On 6 March 2015 the School wrote to Mr & Mrs C. The contents of the letter included:

- "as requested, I am enclosing a copy of the MidYIS Individual Pupil record for [L] and, if you find it helpful, am also including a link below to the supplementary information available on the CEM website that supports the interpretation of the standardised scores. This information helps to inform [L's] teachers around her performance in each of the areas assessed…";

- "I can confirm that I have already provided you with copies of all the information we hold on file for [L]"

> "…when assessment is completed at each of the assessment points throughout the year, it is not customary for either TA notes or PIVATS performance indicator sheets to be kept on file, rather the PIVATS levels are recorded on our assessment systems and reported to Staff and Parents accordingly."

24. The School also supplied Mr & Mrs C with:

- a summary report of L progress for 2014/15, using the PIVATS scheme. Attainments for the three terms of that academic year were identified together with progress charts in reading, writing, speaking, listening, applying Maths, number, space and measures, scientific enquiry, life processes, materials and physical processes;

- a detailed report, dated 10 March 2015, entitled 'New Group Reading Test Digital Individual Report for Teachers';

- a set of detailed forms entitled 'review feedback request: TA's'. The report identified, for each type of teaching assistant support provided, 'impact of support provided measured against current desired outcomes/targets' and 'any further comments, including next steps'.

25. Mrs C's input into a statement of SEN annual review, dated 31 March 2015, included:

- "The reasons I can't link any improvements in [communication and interaction] to the schools strategies for [L] is that evidently, the school is following planning arrangements for an EHC Plan and not a statement of SEN. There appears to be no short-term SMART targets or success criteria identified to relate specific [speech and language] intervention strategies to and no evaluation of the success of strategies noted";

- "I have also been denied access to PIVAT Performance Indicator sheets as the school did not alter its recording customs to place such records on file enabling the sharing of crucial data";

- “I do not know anything about the memory interventions being used, I do not see clear targets in this respect or success of any memory intervention [L] has been working on”;

- “If could be that she has lost some prior learning [in relation to literacy] which caused the backward movement in grade, but we don’t know that because I have no PIVAT Performance Indicators or TA monitoring records to tell me”;

- “She is reported as working within level 1 in numeracy however homework book reports accessing level 3 work. This is why I need access to all PIVAT Performance Indicator sheets as I know what [L] can and cannot do”;

- “Please can I have access to all PIVAT Performance Indicators for all subjects so I know what is going on for my daughter;

- “I don’t understand how [L] can be getting higher scores in science that literacy or speaking & listening. I notice an increase in Physical Processes from a 1Ab in T2 to a 2ab in T3. This is phenomenal – up a full level in one assessment period. Also it is important to note, scientific enquiry and life processes grades have not moved in three assessment terms which is a red flag to me. I need those PIVAT Performance Indicators to see if there has been any movement at all in those areas but not enough to generate an increase in level”;

- “[L’s] assessment and monitoring of progress is not robust enough to meet her needs. There were several progress anomalies swiped out of the Annual Review in July 2014. These anomalies still exist…I want to be told the truth behind the stonewalling of information in relation to the assessment, monitoring and reporting of progress for my daughter. I know what the truth is and I want a teacher to tell me…”.

26. The report of the subsequent annual review included, within the monitoring section, use of the PIVATS assessment framework. The notes of the review meeting itself describe the most recent PIVATS assessments. In relation to Mrs C’s concern that she had not been sent the PIVATS performance indicators, the notes state “these are not sent out routinely as they do not form part of the PIVATS reporting process, but school can evidence that we are aware and have record of the areas that [L] is not achieving and succeeding in”.

27. On 2 April 2015, Mrs C emailed The School:

> "I've just read the school's OFSTED report which states "students with lower starting points, disabled students and those who have special educational needs make progress in line with similar groups of students nationally". Please could you advise what source of comparative data the school uses for [L]? I do not know what [L's] progress is like in comparison to similar groups nationally. Please could you provide me with that data so that I can see how well she is progressing in comparison to others of a similar category of need as her. This would be really useful and informative information to me".

28. On 11 June 2015, Mrs C emailed the local authority educational psychologist complaining "there has been **no analysis over time** of [L's] progress". The email also asked the local authority to inform her "what expected progress/outcomes have you advised the school to expect" and "the sources of data that have been used to help analyse over time [L's] needs thus far". The email asserted that The School did not know the sources of data and ended:

> "what data has the local authority categorised to date to ensure compliance with its equality duty for children with Special Educational Needs and Disabilities or isn't there any?"

29. The educational psychologist's emailed response of 11 June 2015 stated:

> "…the educational psychology service does not hold national and local normative data about children with special educational needs who are assigned to categories for comparison.
>
> Our work always focusses on individual children with analysis over time and in context, of lots of different sources of data".

30. The report of a SEN statement annual review (meeting held on 31 March 2016) records September 2014 Key Stage 2 teacher assessments for September 2014. For January 2015, the report gave PIVATS values.

31. On 6 October 2016, Mrs C emailed the local authority. The email began "What do you not understand? We will say it again…the person centred planning approach to

which you admit the school is using, sits within a separate legal framework and cannot align with legal approaches to a statement of SEN". Mrs C went on to assert by email that "a PCP does not focus on national curriculum progress and provision it focusses on outcomes the two approaches are vastly different" and "it is discrimination on behalf of the school and council who need to work together to get things right for [L]".

The claim

32. Mr & Mrs C made their Equality Act 2010 claim against The School on 16 February 2015. They also brought a 2010 Act claim against L's former primary school and a statutory appeal against the local authority's refusal to amend the contents of L's statement of SEN. The claim against the primary school argued their assessment and monitoring arrangements "have been insufficient to meet her needs adequately and it has now caused problems upon transfer to [the School]".

33. Mr & Mrs C's notice of appeal against L's statement of SEN stated "Documents to support the appeal are from the DDA claim". This was obviously intended as a reference to an Equality Act 2010 claim but did not identify which claim – the claim against the former primary school or against The School. The Equality Act 2010 claim made against The School was that "there are no specific monitoring arrangements in place" so that Mr & Mrs C were unable to track L's progress. However, by the time of the present First-tier Tribunal hearing, the parties agreed that there were 'three heads of claim':

(1) the School's alleged failure to provide Mr & Mrs C with access to transferred school records;

(2) the School's alleged failure to provide speech and language therapy and occupational therapy;

(3) the School's alleged failure to made reasonable adjustments by using an inappropriate and out of date assessment tool.

34. These reflect the Upper Tribunal's identification of the issues when it allowed Mr & Mrs C's appeal against the First-tier Tribunal's initial decision to strike out Mr & Mrs C's Equality Act 2010 claim against The School. The First-tier Tribunal's statement of reasons says Mrs C described the third head of claim as her main point. This is not

surprising because, on the face of it, heads one and two contain no obvious allegation of discrimination.

Proceedings before the First-tier Tribunal

35. Initially, the First-tier Tribunal struck out Mr & Mrs C's Equality Act 2010 claim on the ground that it did not have a reasonable prospect of success. Mr & Mrs C successfully appealed against the strike-out decision to the Upper Tribunal. Upper Tribunal Judge Hemingway decided that the First-tier Tribunal's decision involved an error on a point of law by failing to deal with Mr & Mrs C's arguments concerning alleged inappropriate use of "an assessment tool" and flaws in measuring L's progress.

36. The Upper Tribunal set aside the First-tier Tribunal's strike out decision and remitted the case to the First-tier Tribunal for reconsideration. Mr & Mrs C sought permission to appeal to the Court of Appeal against the Upper Tribunal's disposal of the proceedings. The Court of Appeal refused permission and found that Mr & Mrs C's application was totally without merit.

37. On remittal, the First-tier Tribunal did not strike out the claim. Instead, it directed a hearing. Mr & Mrs C attended the hearing and gave oral evidence. They informed the Tribunal that the remedy sought was an apology from The School's Governing Body. The School produced as witnesses their head teacher and SEND Co-ordinator, who was not the co-ordinator in post at the date of Mr & Mrs C's February 2015 claim.

38. According to the First-tier Tribunal's statement of reasons, Mr & Mrs C argued:

- L's educational progress needed to be "captured on a tracking mechanism that allows them to assess and analyse her progress";

- The PIVATS scores identified for L were linked to the 'old' National Curriculum levels, statements of SEN under the Education Act 1996 and the Code of Practice issued under the 1996 Act rather than the Code of Practice issued under the Children & Families Act 2014 (that Act replaced statements of SEN with Education, Health and Care Plans but its implementation has been phased in). I note this is an exact opposite of the complaints made to The School during 2015 after the Equality Act 2010 claim was made;

- Rather than PIVATS, they "would prefer [L's] small steps of progress to be measured using the BSquared assessment tools or possibly CASPA [Comparison and Analysis of Special Pupil Attainment]";

- PIVATS did not allow them to track and made sense of L's progress;

- They believed The School had not provided them with all information held about L;

- The School had made a conscious decision not to use a suitable assessment tool updated to meet the requirements of the new curriculum, which was direct discrimination.

39. And the Governing Body argued:

- All information about L in their possession had been supplied to Mr & Mrs C;

- They had implemented the recommendations of the most recent speech and language therapy (SLT) report including employment of a higher level teaching assistant who was also a trained speech and language therapist;

- They were implementing the recommendations of the most recent occupational therapy (OT) report;

- They would seek further SLT and OT assessments if considered necessary;

- "At parental request a special PIVATS 'flight path' was created for [L] in all the PIVATS components by the data manager which was a very labour intensive exercise at a busy time. The school would implement any updated PIVATS assessment which would change in line with future National Curriculum Levelling Changes";

- L's PIVATS scores were now aligned with the new National Curriculum and "the new levels looked at outcomes in line with the Children & Families Act 2014".

40. According to the First-tier Tribunal's statement of reasons, the oral evidence included:

- “At [The School] all students are tracked four times each year against their Key Stage 2 raw scores, with the exception of KS3 practical subjects where the school used their own base. [L] was working at below level 3 so [the School] has implemented the use of PIVATS a system to inform setting for pupils of all ages whose performance is outside national expectations. The tool is derived from Lancashire and used by schools nationally”;

- “[The School’s headteacher] confirmed that [L] was the only child in the school for whom PIVATS was used as the assessment tool to inform them of the need to modify the curriculum, methods of teaching best suited to her needs and assessment. All pupils had an annual hour-long Pupil Centred Review which, in [L’s] case, would include a review of her PIVATS assessment but took a holistic view of each child and looked at a range of factors, for example emotional well being and self esteem”;

- “[Mrs C] was…concerned that the PIVATS scores were linked to the “old” National Curriculm levels, although [the headteacher] said that they were now aligned with the new National Curriculum.

41. The First-tier Tribunal made the following findings:

- None of the SLT or OT reports recommended direct SLT or OT;

- All recommended SLT and OT strategies “were in place and that targets were set”;

- The evidence did not support the argument that PIVATS prevented L from accessing education or an education-related benefit, facility or service;

- Mr & Mrs C’s case “showed a level of confusion” about PIVATS. Its purpose is to measure L’s small steps of progress and it is distinct from National Curriculum levels which measures delivery and the SEN statement whose purpose is to specified the necessary educational provision’

- The School tried to accommodate Mrs C’s request for a graphical representation of progress and “provided copies of modified PIVATS charts for [L] across all subjects”;

- There was no evidence, apart from Mrs C's suspicion, that The School had withheld records from Mrs C.

42. The Tribunal concluded:

(a) there was no evidence that L was treated less favourably due to her disability. But, if she was treated less favourably, it was not due to her disability. The claim of direct discrimination was rejected;

(b) since no records had been withheld, nor therapy wrongly denied, the claims based on those assertions were bound to fail;

(c) in relation to the PIVATS claim, its use amounted to a Provision, Criterion or Practice and the adjustment sought was use of a different assessment tool;

(d) use of PIVATS was a reasonable adjustment, its use justified because L's level of cognitive functioning called for progress to be measured differently than child without that level of cognitive functioning. The School did not fail to discharge its duty to make reasonable adjustments to avoid a potential disadvantage.

43. On the basis of those conclusions, the Tribunal decided the School did not breach any duty owed to L under the Equality Act 2010.

Legal Framework

44. It is not disputed that L is disabled for the purposes of the Equality Act 2010 (2010 Act).

45. Part 6 of the 2010 Act is concerned with education. Within Part 6, section 85(2) requires the responsible body (in this case, the Governing Body) of a school "not to discriminate against a pupil":

> "(a) in the way it provides education for the pupil;
>
> (b) in the way it affords the pupil access to a benefit, facility or service service;
>
> (c) by not providing education for the pupil;
>
> (d) by not affording the pupil access to a benefit, facility or service;

(e) by excluding the pupil from the school;

(f) by subjecting the pupil to any other detriment.";

46. Section 85(6) of the 2010 Act provides that "a duty to make reasonable adjustments applies to the responsible body" of a maintained school.

47. Direct disability discrimination occurs where person A, because of person B's disability, treats person B less favourably than person A treats or would treat others (section 14(1)).

48. Under section 15(1) of the 2010 Act, another type of disability discrimination occurs where:

(a) person A treats person B "unfavourably because of something arising in consequence of" person B disability; and

(b) person A cannot show that the treatment of person B is a proportionate means of achieving a legitimate aim".

49. Below, I refer to this type of discrimination as 'consequential discrimination'.

50. Section 19 of the 2010 Act provides for indirect disability discrimination. This occurs where person A applies to person B a "provision, criterion or practice" which is discriminatory in relation to person B's disability. Section 19(1) provides that a provision, criterion or practice is discriminatory in relation to B's disability if all the following conditions are met:

(a) person A applies the provision, criterion or practice to persons who are not disabled (or would so apply it);

(b) the provision, criterion or practice puts a person with whom person B "shares the characteristic" (disability) "at a particular disadvantage when compared with persons with whom B does not share" the characteristic (or would put the person at such a disadvantage);

(c) the provision, criterion or practice puts person B at that particular disadvantage (or would do so);

(d) person A cannot show that the provision, criterion or practice is a “proportionate means of achieving a legitimate aim”.

51. Closely allied to the concept of indirect discrimination is the duty under section 20 to make reasonable adjustments. Section 21(1) provides that a failure to comply with a section 20 requirement “is a failure to comply with a duty to make reasonable adjustments”. And section 21(2) provides that such a failure is itself a form of discrimination. Section 21(6) provides that “a duty to make reasonable adjustments applies to the responsible body of…a school”.

52. In applying the reasonable adjustments provisions to schools, care needs to be taken not to overlook the modifications made to section 20 by Schedule 13 to the Equality Act 2010. Below, these modifications are underlined. Under section 20 the reasonable adjustments obligation is comprised of three separate requirements. The second is concerned with physical features and is not relevant in this case, nor is the third requirement which is concerned with provision of auxiliary aids.

53. The first requirement is “a requirement, where a provision, criterion or practice applied by or on behalf of the responsible body puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”. Here, “substantial” means “more than minor or trivial” (section 212(1)).

54. Section 20(3) applies where the relevant matter is provision of education or access to a benefit, facility or service. In such a case, 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”.

55. Section 136 of the 2010 Act, headed “Burden of Proof”, provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

56. The reference to “the court” in section 136(2) includes the First-tier Tribunal (section 132(6)).

57. Schedule 17 to the Equality Act 2010 provides for the enforcement of the duties owed to disabled pupils:

(a) a claim that a responsible body “has contravened” Chapter 1 of Part 6 because of a person’s disability may, in English cases, be made to the First-tier Tribunal (Schedule 17(3));

(b) proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred (Schedule 17(4)(1)) although “the Tribunal may consider a claim which is out of time”.

Proceedings before the Upper Tribunal

58. Following an oral hearing, I granted Mr & Mrs C permission to appeal to the Upper Tribunal on two grounds. I refused permission to appeal on eight other grounds.

59. The grounds on which permission to appeal was granted are:

(1) arguably, the First-tier Tribunal erred in law by failing to apply, or gave inadequate reasons to demonstrate that it had applied, the ‘reverse burden of proof’ provisions in section 136 of the Equality Act 2010;

(2) Mr & Mrs C argued the First-tier Tribunal failed to investigate which PIVATS model was in use during the dates to which their claims relate. Upper Tribunal Judge Hemingway, in allowing the Mr & Mrs C’s appeal against the First-tier Tribunal’s initial decision to strike out their claim, noted that the issues included whether the

Governing Body used an inappropriate and out-of-date assessment tool. In subsequently dismissing Mr & Mrs C's claims, the First-tier Tribunal found that "the evidence does not support that the use of PIVATS prevented [L] accessing her education or access to a benefit, facility or service". Arguably, the Tribunal's reasons were inadequate. Did the Tribunal find that the PIVATS tool used was not out-of-date or did it find that, even if it was out-of-date, its use did not prevent [L] accessing her education?

60. In their written response to The Appeal, The School argue:

- Mr & Mrs C failed to establish "on their case at its highest that there was a prime facie case of discrimination, which, had it been established would have placed the burden of proof on the Respondent to Reverse";

- In the alternative, even if a prima facie case of discrimination was established, Mr & Mrs C "have failed to establish what detriment and/or unfavourable treatment, if any, [L] has suffered, particularly when the evidence suggested that [L] was performing well and was socially settled";

- At no point did Mr & Mrs C identify any disadvantage for L "and indeed what reasonable adjustment was required to alleviate and/or remove the disadvantage".

61. Extending over 29 typed A4 pages, in summary Mr & Mrs C's written reply argues:

- Section 136 was clearly an issue before the First-tier Tribunal yet was not referred to at all in the Tribunal's statement of reasons. This amounted to a denial of the right to a free trial under Article 6 of the European Convention on Human Rights;

- The guidelines in *Burton v Investec Securities Ltd* [2003] ICR (1205) were not followed. The Tribunal did not consider whether Mr & Mrs C had proved, on a balance of probabilities, facts from which it could conclude a contravention of the Equality Act 2010. At this stage, a tribunal should consider what inferences could be drawn from the facts and, in doing so, assume there is no adequate explanation for them. If a prima facie case is established, the burden shifts to the Respondent to prove the treatment in question was in no sense on the grounds of disability;

- Mr & Mrs C supplied the First-tier Tribunal with extensive documentary evidence that evidently established a prima facie case/s of discrimination namely:

    - The School had directly discriminated against L because of her disability by “failing to secure appropriate methods of assessment to set targets and integrate L into the whole school method of assessment and reporting of progress, this denying access to her education”;

    - The School had indirectly discriminated against L by “failing to take steps to make a reasonable adjustment to the custom and practice of how the school tracked and monitored progress for L, especially L’s cognitive functioning against the objectives in her Statement of Special Educational Needs”;

- the written reply contains pages and pages of argument in support of the above. I have of course read them all but only refer here to what seem to me to be the main points:

    - there was clear evidence that “all was not going well with the integration of the assessment method”. The reply refers to a letter written by The School which states they “set clear targets to measure progress wherever possible but this can be a challenge in some cases and, if so, The School prefers to respond in a needs-driven rather than assessment-driven way”. This undermined The School’s argument that PIVATS fit for purpose and being used effectively by teaching staff;

    - PIVATS does not align nor extend to all school subjects so how could it be considered fit for purpose and an appropriate assessment method;

    - The School failed to explain why they failed to co-ordinate with the local authority to transfer L from a statement of SEN to an Education, Health and Care Plan. This resulted in a “conflict of monitoring arrangements” which The School failed to address, instead proceeding with use of the inappropriate PIVATS;

- The School failed to explain why it rejected suggested use of other assessment tools such as BSquared;

- L's Pupil-Centred Plan demonstrated "real concern" about assessment, shown by the Plan's statement that "staff may need to develop appropriate assessment tools in other subject areas that can accurately assess [L's] level of attainment and progress. This called for the Governing Body to establish an assessment committee "rather than individual staff members trying to recreate a sophisticated assessment tool unsupported";

- The above arguments were also relied on in relation to Ground 2. Given the evidence referred to in the written reply, it "seems bizarre" that none of it was referred to by the First-tier Tribunal when explaining why it rejected the argument that The School's use an out-of-date PIVATS and did so inappropriately;

- In reply to The School's appeal response, Mr & Mrs C argue:

  - "how on earth can [The School] make the claim that [L] was performing well when the evidence tells us that they did not keep track of the PIVAT PERFORMANCE INDICATOR SHEETS on record?". They rely on The School's letter of 6 March 2015 which states that "it is not customary for either TA notes or PIVATS Performance Indicator Sheets to be kept on file, rather the PIVATS levels are recorded on the assessment systems and reported to Staff and Parents accordingly". This amounted to indirect discrimination through a failure to adjust The School's custom and practice in tracking arrangements;

  - "how could [The School] know [L]s was performing well without historical or comparative data"? Mr & Mrs C rely on an allegation that The School were not supplied with L's full primary school file although I note that, in December 2014, a member of The School's staff informed Mrs C that she thought the full file had been requested but, if not, it would be. The reality is that The School were confused and did not know how to assess, set targets and evaluate [L's] disability. At this point, the reply strays into criticism of a March 2015 OFSTED report;

- The School cannot rely on a legitimate aim to justify direct discrimination or a failure to make reasonable adjustments. To the extent that a legitimate aim may be relevant, The School have completely failed to demonstrate such an aim;

- The School misunderstand their case. They do not argue it was obliged to use their preferred assessment tool. Their argument concerns "the appropriateness of the method chosen and whether that method was fit for purpose";

- The School's suggestion that Mr & Mrs C had prolonged this litigation was vigorously rejected. Delays have been caused by failures to apply the law correctly. The Court of Appeal's refusal to grant Mr & Mrs C permission to appeal against Upper Tribunal Judge Hemingway's disposal of their earlier successful appeal was singled out for particular criticism. The Court of Appeal violated their Article 6 right to a fair trial by failing to give any reasons for concluding their appeal was totally without merit, and also failed to appreciate the distinction between a school and a Local Authority.

62. Neither party requested a hearing of this appeal.

Conclusions

Preliminary points

63. At the outset, I have two important points to make.

64. Firstly, Equality Act 2010 duties are not contravened simply because a parent is dissatisfied with the education provided to a child with special educational needs. It is a misuse of the Act to use it as a vehicle to ventilate un-focussed grievances about a child's education. However well-intentioned, this is quite wrong since it must be obvious that anticipating the stigma attached to a finding of discrimination may cause school staff and governors genuine anxiety.

65. I am quite satisfied that Mr & Mrs C have sufficient understanding of the Equality Act 2010 to understand it is not some special form of complaints procedure. I say that because Mr & Mrs C have pursued two Equality Act 2010 claims and one statutory

appeal against the contents of L's statement of SEN in the last two to three years. Those have led to at least five determinations by the First-tier Tribunal, four appeals to the Upper Tribunal and one application to the Court of Appeal for permission to appeal against a decision of the Upper Tribunal. In the present proceedings, Mr & Mrs C have supplied a number of lengthy written submissions, replete with case law citations.

66. At no point have Mr & Mrs C set out what may properly be called a structured case by reference to the provisions of the Equality Act 2010. Their initial 'claim' was comprised of no more than two sentences that simply asserted that The School had no specific monitoring arrangements in place. The parties agree that became a 'reasonable adjustments' claim, and a claim relying on alleged non-disclosure of records and non-provision of services. The latter two claims could not, on any reasonable view, have possibly disclosed discrimination contrary to the Equality Act 2010.

67. The second point is that, on an Equality Act 2010 claim, the First-tier Tribunal's analysis is historical. A claim is made in respect of past events. They are, in the words of the 2010 Act, the "conduct complained of". In this respect, Equality Act 2010 claims are very different to statutory appeals in relation to statements of SEN under the Education Act 1996 and Education, Health and Care Plans under the Children & Families Act 2014. On a statutory appeal, the Tribunal is required to consider the appropriateness of a statement or plan at the date on which it decides the appeal (in the case statements of SEN, see the High Court's decision in *Wilkin v Goldthorpe (Chair of the SEN Tribunal)* CO/1251/97), and in the case of EHC Plans, see the Upper Tribunal's decision in *Gloucestershire County Council v EH* [2017] UKUT 85 (AAC).

68. L had been attending The School for five to six months when Mr & Mrs C brought their claim. Everything that happened after February 2015 was irrelevant on the Equality Act 2010 claim. Yet the last three years of this litigation have been marked by Mr & Mrs C's ongoing criticisms of The Schools performance. All this has been an unnecessary distraction.

Did the First-tier Tribunal err in law?

69. The First-tier Tribunal's decision did not involve a material error on a point of law.

70. The first ground of appeal concerns the ‘reverse burden of proof’ provision in section 136 of the Equality Act 2010. The Tribunal’s statement of reasons makes no mention of section 136. In the circumstances, it did not need to.

71. Section 136 applies where “there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred”. I am satisfied there were no such facts, nor was it even arguable that there were such facts in this case. That is why the First-tier Tribunal did not err in law by omitting to deal with section 136 in its statement of reasons.

72. In relation to the withholding of records and non-provision of therapeutic services heads of claim, I decide there were no relevant section 136(2) facts, nor was it even arguable there were such facts, for the following reasons:

(a) the withholding of records and non-provision of services claims were close to non-starters from the outset. But, in any event, the Tribunal made positive findings that no records had been withheld nor had any required services not been provided. It was entitled to make those findings. In fact, I do not see how it could have decided otherwise;

(b) The First-tier Tribunal’s appeal file extends to more than 600 pages. Much of the content is comprised of school records. All Mr & Mrs C relied on was “a suspicion” that some records had been withheld. Of course, if anything has been withheld, they will not know what it is but they did not argue that non-disclosed records were referred to or even hinted at in the disclosed records. I have not been able to identify any such reference or hint. This is why, in my view, the First-tier Tribunal was bound to find that the factual basis for the withholding of records aspect of the claim was not made out;

(c) the only information, as opposed to records, that the evidence indicates was not provided concerned P-scale performance indicators. However, they are set out in publicly available statutory guidance;

(d) Mr & Mrs C did not identify any evidence that showed therapeutic provision specified in L’s statement of SEN, or otherwise agreed to be necessary, had not been provided by The School during the first five to six months of L’s attendance. On

the contrary, as in my view the First-tier Tribunal rightly found, the evidence indicated that all therapeutic-related provision had been provided;

(e) section 136(2) 'facts' do not exist in a vacuum. They must be facts of a particular type namely facts on which the tribunal "could decide, in the absence of any other explanation, that a person contravened the provision concerned". So the facts must disclose a possible contravention of some provision of the Equality Act 2010. Even if Mr & Mrs C's factual claims were made out, I do not see how they would have disclosed an arguable contravention of some provision of the 2010 Act. On what basis could the tribunal have found that records were withheld or services not provided because of L's disability? The answer is that there was not even an arguable basis for a finding of direct discrimination. On what basis could the tribunal could have found that, in withholding records or not providing services, L was treated unfavourable because of something arising in consequence of her disability? The answer is that there was not even an arguable basis for a finding of consequential discrimination. And, in relation to the reasonable adjustments duty, on what basis could the tribunal have found that The School adopted a provision, criterion or practice which involved failing to disclose records to parents or refusing to provide necessary therapeutic-related services? The answer is that there was not even an arguable basis for a finding that the School either failed to comply with a reasonable adjustments duty or committed indirect discrimination.

73. What, then, of the argument that there were facts on which the tribunal could have decided that The School's use of PIVATS involved a contravention of a provision of the Equality Act 2010? I note the following in relation to this head of claim:

(a) it can only be a claim that, during the *first five to six months* of L's attendance, The School's inappropriate use of PIVATS contravened a provision of the Equality Act 2010. Unless an assessment procedure is obviously flawed, defects will not become apparent until the procedure has been in operation for a period of time. Given the nature of educational assessment, a search for section 136(2) 'facts' was always going to face an uphill struggle;

(b) I can identify no evidence that begins to show that, during the first term of L's attendance, The School's assessment procedures were defective let alone a contravention of the Equality Act 2010. Mrs C has written reams of letters criticising The School's assessment procedures but what is absent is any concrete evidence

that L's educational progress was mis-assessed during her first few months of attendance;

(c) The School was required to follow the Department for Education's statutory guidance "Performance – P Scale – Attainment Targets for Pupils with Special Educational Needs". The guidance was issued in July 2014 but my understanding is that it was not altered in direct response to the December 2014 change to the secondary National Curriculum. The first update after publication was in 2017;

(d) Mr & Mrs C have placed much reliance on the argument that The School's use of PIVATS was flawed because it was not aligned with the 'new National Curriculum'. They did not identify what they meant by the 'new' National Curriculum but it seems to me that the secondary National Curriculum was not updated until 5 December 2014. Even if The School did not instantly modify PIVATS, I do not see how that could possibly amount to direct or indirect discrimination or a failure to make reasonable adjustments. But, in any event, the P-scales guidance – which PIVATS sought to implement – remained constant throughout the period to which Mr & Mrs C's claim relates;

(e) before the First-tier Tribunal, Mr & Mrs C criticised The School's use of PIVATS because it was, they said, linked to statements of SEN and the Code of Practice issued under the Education Act 1996. It should have been linked to the Code of Practice issued under the Children & Families Act 2014 (the Act which replaces in England statements of SEN with Education, Health and Care Plans). This overlooks that, during the period to which the claim relates, L did not have an EHC Plan. She had a statement of SEN.

73. Taking those features of the PIVATS claim into account, in my determination there were no facts on which the Tribunal could have decided The School's use of PIVATS contravened a provision of the Equality Act 2010, nor was it even arguable that there were such facts. I arrive at that conclusion for the following reasons:

(a) Mr & Mrs C produced no evidence or cogent argument to indicate that, during L's first few months at The School, her educational progress was mis-assessed;

(b) the argument that The School's use of PIVATS was flawed because it was not aligned with the new National Curriculum is weakened, if not undermined, by the chronology of governmental updates to the secondary curriculum and the P-Scales;

(c) of itself, PIVATS is a recognised method of assessing the educational progress of a certain group of pupils. It is not as if it was something cobbled together by The School itself;

(d) there was a quantity of documentary evidence that indicated that, during the period to which the claim relates, The School was actively turning its mind to the best way of assessing L's progress. Mr & Mrs C did not dispute the genuineness of this evidence;

(e) even if The School's use of PIVATS was flawed, there was no evidence at all to support the argument that these flaws were adopted because L was disabled (i.e. direct discrimination). I stress that I do not find that The School's use of PIVATS was flawed, that is simply an assumption for the sake of argument;

(f) even if The School's use of PIVATS was flawed, on the evidence that could not have been because of something arising in consequence of her disability (consequential discrimination). The evidence did not suggest that L was in substance mis-assessed during the relevant period (i.e. unfavourably treated). But, even if she was, I struggle to see how this could properly be said to have been because of something arising in consequence of her disability. Again, I stress I do not find The School's use of PIVATS was flawed. I simply make an assumption for the purposes of argument;

(g) I do not in fact think the First-tier Tribunal correctly applied section 19 of the Equality Act 2010 (indirect discrimination). The Tribunal found that PIVATS itself was a provision, criterion or practice (PCP) for the purposes of section 19 (indirect discrimination). I do not think that is right. The PCP was the school's standard method of assessment. PIVATS could not have been the PCP because it was not used for non-disabled pupils (see section 19(1)). If anything, PIVATS was the means by which The School sought to avoid indirect discrimination because use of standard assessment methods would arguably have put L at a particular disadvantage. In my view, the Tribunal could not possibly have found that use of PIVATS amounted to indirect discrimination;

(h) finally, there is the reasonable adjustments duty. As modified by Schedule 13 to the Equality Act 2010, section 20(3) of the Act applies where "a provision, criterion or practice [applied by a Governing 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". For Mr & Mrs C to have succeeded, the tribunal would have needed to find that PIVATS, as used by The School, put disabled pupils generally at a substantial disadvantage. There was simply no evidence on which the tribunal could properly have found that The School's use of PIVATS put disabled pupils generally at a substantial disadvantage. Evidence that L had been mis-assessed during her first term was absent. PIVATS itself is a recognised assessment tool for pupils with a similar cognitive profile to L. The argument that The School failed to align PIVATS with the new National Curriculum carries little weight given the chronology of updates to the secondary curriculum and the P-scales statutory guidance.

74. Finally, ground 2. In the light of my conclusions above, I am satisfied that, even if the First-tier Tribunal's treatment of the argument that PIVATS was out-of-date was flawed, that did not amount to a material error on a point of law.

75. For the above reasons, this appeal is dismissed.

(Signed on the Original)

Mr E Mitchell
Judge of the Upper Tribunal
15 February 2018