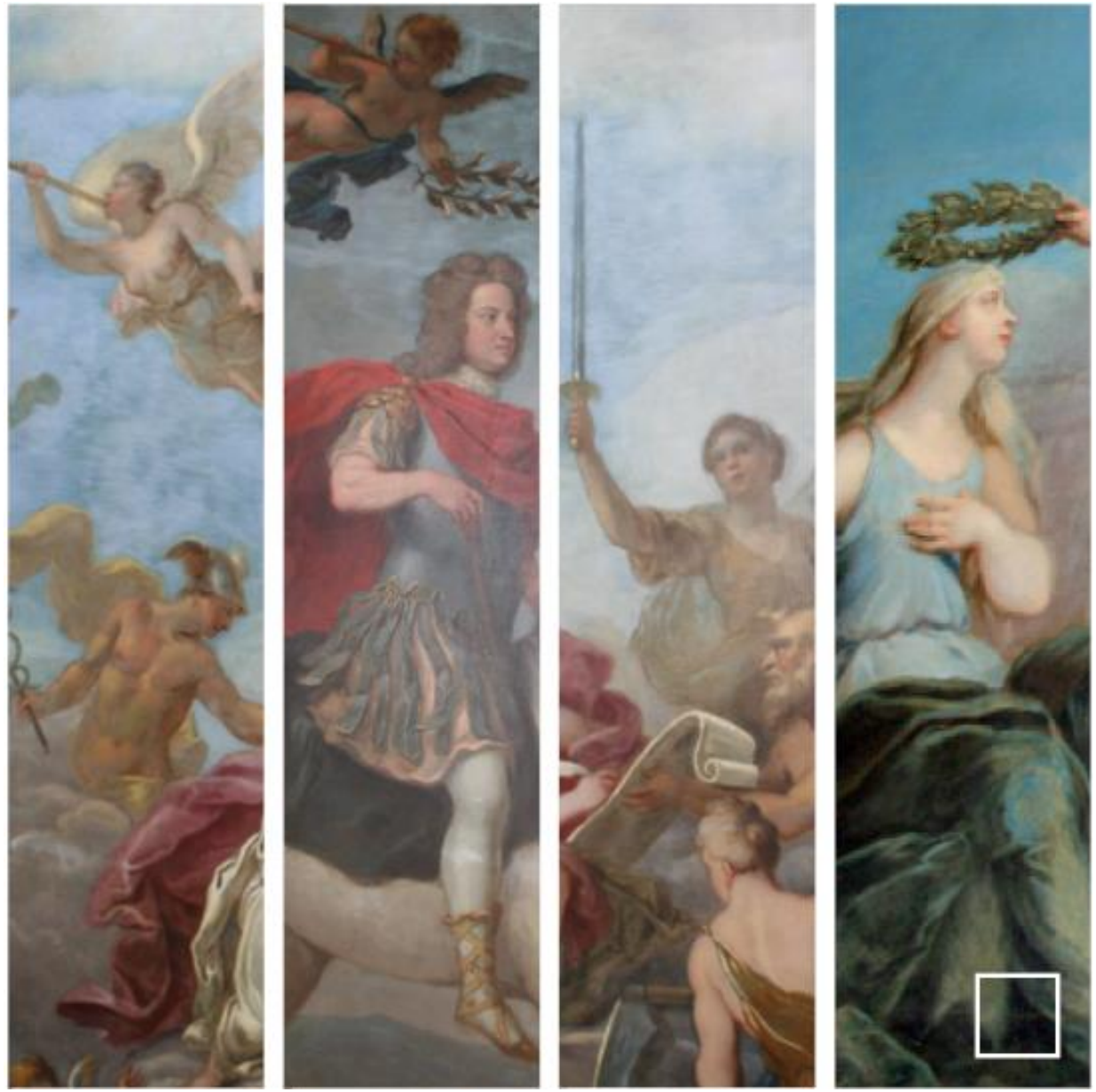

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Interesting and current issues arising in disability discrimination claims

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Interesting and current issues arising in disability discrimination claims

Overview
Reasonable Adjustments
Discrimination Arising: section 15
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Reasonable adjustments: Sch. 13 modifications (1)

- As the Upper Tribunal said in F-T v The Governors of Hampton Dene Primary School [2016] UKUT 468 (AAC), *"Care needs to be taken in applying the reasonable adjustments provisions to schools not to overlook the modifications made to section 20 by Schedule 13 to the [EqA 2010]"* (para. 42).

- Sch. 13 para. 2(2) makes it clear that only the first and third requirements under s.20 EqA 2010 apply. Therefore, there is no duty to make reasonable adjustments to physical features – but there is a duty on schools to prepare an accessibility plan (Sch. 10 para. 3 EqA 2010) and a duty on local authorities to prepare an accessibility strategy for their maintained schools (Sch. 10 para. 1 EqA 2010).

Reasonable adjustments: Sch. 13 modifications (2)

Sch. 13 para. 3 and 4 provide as follows:

(3) For the purposes of this paragraph –

- *the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;*
- *the reference in section 20(3) or (5) to a disabled person is –*
  - *in relation to a relevant matter within sub-paragraph 4(a), a reference to disabled persons generally;*
  - *in relation to a relevant matter within sub-paragraph 4(b), a reference to disabled pupils generally.*

(4) In relation to each requirement, the relevant matters are –

(a) deciding who is offered admission as a pupil;

(b) provision of education or access to a benefit, facility or service.

Reasonable adjustments: Sch. 13 modifications (3)

- Therefore, in cases involving schools providing education or access to a benefit, facility or service, s.20(3) should be modified as follows:

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.

Reasonable adjustments: Sch. 13 modifications (4)

- Applying the same principles, s.20(5) should be modified as follows:

The third requirement is a requirement, where disabled pupils generally would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(*pace* para. 47 of the decision in the F-T case).

Reasonable adjustments: Sch. 13 modifications (5)

- What is the effect of the 'disabled pupils generally' or 'disabled persons generally' modification?
  - Roads v Central Trains Limited (2004) 1 Con LR 62, CA, held that the inclusion of the words 'disabled persons generally' creates the following double test for substantial disadvantage:
    - *"first (in paraphrase), does the particular feature impede people with one or more kinds of disability; secondly, if it does, has it impeded the claimant?"*
  - The meaning of the term 'disabled pupils generally' or 'disabled persons generally' has not yet been resolved by the courts, whether in relation to Part 6, Part 3 or any other relevant Part of the EqA 2010.
  - Does it mean that the duty to make reasonable adjustments does not apply to disabled pupils with rare conditions?

Auxilary Aids: s.20(5): an underused provision? (1)

- S.20(3) claims are complex and often difficult to succeed on. In particular, identification of the PCP can be tricky.
- Often in schools claims, the Claimant will make a s.20(3) claim and argue that a reasonable adjustment would have been to provide an auxiliary aid and/or auxiliary service.
- The definition of 'auxiliary aid or service' is very broad:
  - *"The duty in relation to the provision of auxiliary aids and services generally means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff."* (Technical Guidance for Schools in England, para. 6.18)
- Why not bring a s.20(5) claim?

s.20(5): an underused provision? (2)

- What is the legal test for a s.20(5) claim?

The third requirement is a requirement, where disabled persons generally / disabled pupils generally would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to deciding who is offered admission as a pupil / 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 provide the auxiliary aid.

- Where a claimant is arguing that any one of a number of auxiliary aids or services would have helped, how should that be fitted into the legal framework? What about when a claimant is arguing that a combination of auxiliary aids or services provided together would have helped?

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Discrimination Arising From Disability: Section 15

15 (1) 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.

(2) Sub-section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 15: Guidance on Approach

Pnaiser v NHS England and Coventry City Council

[2016] IRLR 170 EAT

a. Was there unfavourable treatment and by whom? There is no question of a comparison.
b. What caused the treatment or what was the reason for it?
c. The focus of the enquiry is on the conscious or unconscious reason or cause of the treatment, not the motive for it.
d. Was the reason or a reason for the treatment "something arising in consequence of B's disability"?

Section 15: Guidance on Approach

e. Causation is an objective question and does not depend on the thought processes of the alleged discriminator.

f. The knowledge requirement in section 15 is focussed on the alleged discriminator's knowledge of disability and not on the "something arising in consequence of disability."

g. It does not matter which order these questions are addressed.

Unfavourable Treatment

Williams v Swansea University Pension and Assurance Scheme [2015] ICR 1197 EAT

Langstaff J para.28

Unfavourable is not to be equated with the concepts of "detriment" or "less favourable treatment" which are used elsewhere in the Equality Act 2010.

Treatment which is advantageous cannot be said to unfavourable treatment merely because it could have been more advantageous or because it was insufficiently advantageous.

Section 15: Two stage test of causation

Stage One

Has the “something” arisen in consequence of disability?

Stage Two

Was the unfavourable treatment because of that “something”?

The “something” needs to be an operative cause but not the sole cause of the treatment. It must have been a more than trivial influence.

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Section 15: Knowledge

- EqA does not require actual or constructive knowledge of the precise diagnosis of disability in each case.
- It requires actual or constructive knowledge of the facts constituting the disability
- i.e. that the individual is suffering from a physical or mental impairment which has a substantial and long term adverse effect on that individual's ability to carry out normal day to day activities.

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Section 15: Justification

- It is the outcome of the decision-making process that must be justified rather than the process itself.
- The Court will balance the discriminatory effect of the act/omission complained of against the reasonable needs of the Respondent.
- The Court will weigh up the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the Respondent's proposal. The proposal must be objectively justified and proportionate.

Section 15: Justification

Akerman- Livingstone v Aster Communities Ltd [2015] UKSC 15

Supreme Court identified a four stage approach to determining whether or not unfavourable treatment is objectively justified:-

- Is the objective sufficiently important to justify limiting a fundamental right?
- Is the measures rationally connected to the objective?
- Are the means chosen no more than is necessary to accomplish the objective? Could alternative measures with less discriminatory effects have met the legitimate objective?
- Is the disadvantage caused to the Claimant proportionate to the aims pursued?

Perceived Discrimination

Within section 13 EqA

Depends on whether A perceives B to have an impairment with the features set out in the legislation

Not whether A perceives B to be disabled as a matter of law:

CC Norfolk v Coffey UKEAT/0260/16/BA

e.g. refusal to admit because organisation wishes to avoid the operation of duty to make adjustments where no definitive diagnosis of a relevant impairment or condition

When is a school not a school? (1)

- Mostly, the relevant part of the Equality Act 2010 for schools in relation to their pupils is Part 6 (Education).

- Section 85(2) EqA 2010 requires the responsible 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;

(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".

When is a school not a school? (2)

- *"access to a benefit, facility or service"* is drawn broadly: e.g. para. 6.60 of Schools Technical Guidance – England:

"A school's obligation to pupils covers everything that a school provides for pupils and goes beyond just the formal education it provides. It covers all school activities such as extracurricular and leisure activities, afterschool and homework clubs, sports activities and school trips, as well as school facilities such as libraries and IT facilities."

When is a school not a school? (2)

- BUT when a pupil is accessing a benefit, facility or service as a member of the public, the relevant part of the Equality Act 2010 is Part 3 (Services and Public Functions) and the claim has to be brought in the County Court.

- Example: a school has a swimming pool and opens it to members of the public on Saturdays. X swims in the pool as a pupil during the week and as a member of the public on Saturdays. She claims she has been discriminated against in the same way on every occasion she swims in the pool. Does she have to bring concurrent claims in the FTT(SEND) and County Court?

- Also, when a school is providing a service to parents, the relevant part is Part 3.

When is a school not a school? (4)

- Another wrinkle in the law: nurseries.
- Nursery schools maintained by a local authority and nursery education provided by any school (either maintained or independent) have the same obligations as schools and are governed by Part 6 of the Equality Act.
- Private nurseries are covered by Part 3 of the Act as service providers, as are preschools, SureStart children's centres and other early years education providers.

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Universities, Colleges, FE and HE Settings

Who is Protected?

- Prospective students
- Students
- Former students (in limited circumstances)

What Is covered?

- Admissions
- How Education is provided
- Exclusion

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Universities, Colleges, FE and HE Settings

How education is provided includes:

- Curriculum design and teaching
- Assessment and examinations
- Facilities including lecture halls, libraries and IT
- Leisure, recreation, entertainment and sports facilities
- Welfare services
- Disciplinary, grievance and other procedures

General Qualification Bodies: section 96 EqA 2010

It is unlawful for such bodies to discriminate:

- In the arrangements made for deciding upon whom to confer a relevant qualification
- As to the terms on which it is prepared to confer a relevant qualification
- By not conferring a relevant qualification
- By withdrawing the qualification
- By varying the terms on which a person holds the qualification
- By subjecting a person to any other detriment

General Qualification Bodies

Reasonable Adjustments

The appropriate regulator may specify that a GQB is not subject to a duty to make reasonable adjustments in respect of particular PCPs or should not make specified adjustments

Before doing so the regulator must have regard to:

- The need to minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities;
- The need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of the person on whom it is conferred;
- The need to maintain public confidence in the qualification.
- Section 96 (6)- (8).

Remedy in the FTT(SEND) (1)

- Schedule 17 Equality Act 2010 deals with enforcement of discrimination provisions relating to disabled pupils. Sch. 17 para. 5 provides as follows:

"(1) This paragraph applies if the [First-Tier] Tribunal finds that the contravention has occurred.

(2) The Tribunal may make such order as it thinks fit.

(3) The power under sub-paragraph (2) –

(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;

(b) does not include power to order the payment of compensation.

Remedy in the FTT(SEND) (2)

- What if the pupil has left the school?

ML v Tonbridge Grammar School [2012] UKUT 283, Upper Tribunal Judge Rowland (para. 21):

"I also have some doubt as to whether it would be appropriate to make any of the envisaged orders, other than a declaration or an order requiring a formal written apology to be made, against a school if the claimant's child had left the school, because the claimant would not then have sufficient interest to enforce the order. It seems to me that the words "on the person" in what are otherwise words of inclusion in both section 28I(4)(a) of the 1995 Act and paragraph 5(3)(a) of Schedule 17 to the Equality Act 2010 make it plain that Parliament had in mind the making of orders that would prevent further unlawful discrimination in relation to the particular child concerned."

- Is this the correct interpretation of Sch. 17 para. 5(3)(a)?
- In any event, it seems that Judge Rowland's views as expressed in that paragraph are not binding on First-tier Tribunals.

Remedy in the County Court (1)

- Section 119 EqA 2010:

…

(2) The county court has power to grant any remedy which could be granted by the High Court—

(a) in proceedings in tort;

(b) on a claim for judicial review.

…

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

Remedy in the County Court (2)

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Injury to feelings

- Following Durrant v Chief Constable of Avon & Somerset Constabulary [2017] EWCA Civ 1808 (a race discrimination claim by a member of the public against the police, brought in the County Court), it is clear that damages for injury to feelings in the County Court will be calculated using the Employment Tribunals Presidential Guidance on awards for injury to feelings.

- The Presidential Guidance increases the *Vento* bands for claims presented on or after 11 September 2017 as follows:
  - **Lower band: £800 to £8,400** (less serious cases)
  - **Middle band: £8,400 to £25,200** (cases that do not merit an award in the upper band);
  - **Upper band: £25,200 to £42,000** (the most serious cases)
  - **Exceptional cases:** can exceed £42,000

Remedy in the County Court (3)

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Injury to feelings

- Note: these figures incorporate the *Simmons v Castle* uplift of 10%, following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879.

- In respect of claims presented before 11 September 2017, there is now a complicated formula for calculating the Vento bands: see paragraph 11 of the Employment Tribunals Presidential Guidance. However, note that the Court of Appeal ignored this in Durrant and decided to use the post-11 September 2017 Vento bands for a claim brought several years before 2017.

Thank you

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