Disability discrimination: recent cases

Rachel Holmes | 9 July 2015

Two recent cases have helped clarify the scope of the disability discrimination provisions in the Equality Act 2010 (and subordinate legislation).

What does it mean to have a disability?

The first case, *PP v Leicester Grammar School*, concerned a girl ("C") who was diagnosed with mild dyslexia and Mears Irlen syndrome, a condition that causes difficulties with fine vision tasks such as reading. Her parents brought a case to the First Tier Tribunal ("the FTT") claiming that Leicester Grammar school had discriminated against her because of her disability. The FTT dismissed the claim on the basis that C was not disabled within the meaning of the Equality Act 2010.

Essentially, a person has a disability for the purposes of the Act if s/he has a physical or mental impairment that has a "substantial and long-term adverse effect" on his/her ability to carry out normal day-to-day activities. The Act fineses the definition:

1. the effect of an impairment will be "substantial" if it is "more than minor or trivial";

2. a person will be deemed to have a disability (and therefore be protected by the Act) if s/he is receiving treatment to correct an impairment, and it is likely that it is only the treatment that is preventing the impairment from having a substantial adverse effect, but;

3. in the case of a visual impairment, the person will not be deemed to have a disability to the extent that it is corrected by spectacles or contact lenses.

The FTT’s decision

On the evidence, the FTT found that C's dyslexia did not amount to a disability because it did not have a "substantial" adverse effect on her. It also held that Mears Irlen syndrome was an impairment of her sight that was corrected by tinted spectacles. Consequently, the deeming provision, mentioned in bullet point (2) above, did not apply, and C's Mears Irlen
syndrome was not to be treated as having a substantial adverse effect on her.

The parents appealed to the Upper Tribunal ("the UT").

The decision of the UT

C's parents argued that the FTT had:

- applied the wrong test to reach its conclusion that C's dyslexia did not amount to a "substantial" impairment;
- made an error of law in holding that the principle in bullet point (3) applied to Mears Irlen syndrome and/or its treatment through the use of tinted spectacles.

The UT agreed with the parents on the first point. Although the FTT did not expressly set out the test it was using, its reasons showed that it was assessing C's degree of impairment by comparing her performance to that of her peers. A case decided under the Disability Discrimination Act 1995 (which defined disability in a similar manner) showed that, when assessing the effect of a condition, the comparison is not with the population at large; what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how s/he would carry it out if not impaired.

The UT found that the FTT was correct on the issue of C's Mears Irlen syndrome and its treatment. There was no indication that Parliament intended the reference to visual impairment correctable by spectacles (or other prescribed items) to be restricted to short- and long-sightedness.

Differences between the Disability Discrimination Act 1995 and the Equality Act 2010

The UT referred the question of whether or not C's dyslexia had a substantial adverse effect on her abilities back to the FTT. However, because the case relied on in the FTT (and analysed in the UT) was based on the Disability Discrimination Act 1995, it took the view that it would be wise to offer direction on the Equality Act 2010 to the FTT that would be deciding whether or not C was disabled.

The Equality Act 2010 introduced the definition of "substantial", according to which an impairment will be substantial unless it is "minor or trivial". The UT quoted a 2013 judgment of the Employment Appeal Tribunal, which elaborated on this:

"Once [a claimant] has established that there is an effect, that it is adverse, that it is an effect upon his ability…to carry out normal day-to-day activities, a
tribunal then has to assess whether or not it is substantial...the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial."

Dealing with pupils who have a tendency to physical abuse

The second case is X v Governing Body of a School. Here, the UT was asked to consider the ambit of regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010 ("the 2010 Regulations), which states that certain "conditions" are not to be treated as impairments (and so will not constitute disabilities that are protected by the Equality Act). The conditions are:

(a) a tendency to set fires;
(b) a tendency to steal;
(c) a tendency to physical or sexual abuse of other persons;
(d) exhibitionism; and
(e) voyeurism.

S, an autistic girl, began attending the School in May 2012. After the local authority issued a statement of SEN in August 2012, the School allocated teaching assistant support to her. It provided extra support following an incident in which she was physically violent towards other children and staff members, but went on to exclude her several times after she was violent on a further six occasions over a three-month period. (There were other incidents of violence, but the School did not feel they warranted exclusion.)

S's parents withdrew her from the School in May 2013, but commenced proceedings against the School, claiming that it had discriminated against her by failing to make reasonable adjustments for her, in breach of the Equality Act 2010.

The FTT's findings

The FTT accepted that S's autism constituted a disability but dismissed the parents' claim on the basis that the School's reason for excluding S was because of her "tendency to physical or sexual abuse of other persons", which was not to be treated as an impairment. It held that Regulation 4(1) excluded S's behaviour from the protection of the Equality Act 2010 even though it was a symptom of her autism.

Questions before the UT
The parents appealed, claiming that the FTT had made various legal errors. The UT focused on the following questions:

(1) Does regulation 4(1) of the 2010 Regulations apply to children under the age of 18?

(2) Does regulation 4(1) apply where the named conditions arise in consequence of a disability that is already protected under the Equality Act 2010?

(3) What does it mean to say that someone has a "tendency" to "physical abuse" of other persons?

**Does regulation 4(1) apply to children?**

The parents contended that it does not. There were several strands to their argument but the UT rejected them all. The regulation applies to both adults and children.

**Does regulation 4(1) apply where the conditions specified arise as a consequence of a protected disability?**

The parents argued that the exceptions in regulation 4(1) only apply to 'freestanding' conditions, not to conditions that are symptomatic of a protected disability.

The Court ruled on this issue in a case in 2009, finding that the exclusions applied both to freestanding conditions and to conditions that were manifestations of an underlying protected impairment. Although that case was decided under the Disability Discrimination Act 1995, the provisions in the 1995 legislation were materially the same as those of the 2010 Regulations, and the UT saw no reason to reach a different conclusion.

**What is the meaning of "a tendency to physical … abuse of other persons"?**

The UT held that the terms are context-sensitive and that it would be inappropriate to define them, but offered some interpretative guidelines:

1. Parliament had chosen to use the phrase "physical abuse" rather than "physical violence". From this it can be inferred that although there must always be an element of physical violence, that alone may not be enough to meet the definition. The greater the level of physical violence, the more readily it will fall within the definition of "physical abuse";

2. It is not necessary for the perpetrator to know that what they are doing is wrong, but the conduct must be volitional: if the conduct is something akin to a spasmodic reflex, in will not fall within the definition;
3. Where there has been coercion or a misuse of power on the part of the perpetrator, a much lower level of physical violence may suffice to meet the definition. Conversely, a finding of physical abuse in the absence of such factors is likely to require careful justification;

4. Although regulation 4(1) applies to children, a child's stage of development must be taken into consideration when deciding whether or not the child has a "condition" such as to bring his/her behaviour within the remit of the regulation;

5. It is not necessary for physical abuse to be manifested frequently or regularly. It may be that the tendency is only triggered in certain circumstances, but is still present at other times. The legislation is less concerned with whether a particular incident constitutes abuse as it is with whether it indicates a tendency to abuse.

The UT took the view that although the FTT was correct to apply regulation 4(1) to S, it had not examined the meaning of "physical abuse". To that extent, it made an error of law.

The UT set aside the FTT's decision and substituted its own. It held that:

1. S was disabled within the meaning of the Equality Act 2010;

2. Although the incidents occurred over a fixed period of time, and despite the fact that she was only six years old at the time (with no suggestion of any power abuse or coercion on her part), they indicated that S had a tendency to physical abuse. There was a significant element of violence in her conduct and her behaviour was volitional, consisting of frequent, sustained attacks on staff and other pupils;

3. Even though the tendency to physical abuse arose as a result of S's autism, the school excluded her on account of the violent behaviour caused by that tendency, which – by regulation 4(1) of the 2010 Regulations – is not to be treated as an impairment for the purposes of the 2010 Act.


Conclusions

When schools are asked to make reasonable adjustments for a pupil, the question may arise as to whether the pupil is disabled. If they are not, then the legal duty is not triggered. The PP case illustrates that a school cannot refuse to make adjustments on the basis that the pupil concerned appears to be performing well by comparison with his or her classmates, but must ask how the pupil would fare without the impairment. This inevitably involves a degree of speculation, so may not be an easy question to answer – and

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there may, of course, be sound reasons for going beyond the strict legal obligations in order to help a pupil who is struggling. Still, knowing the correct test may help schools reach a decision on what can be a difficult and sensitive issue.

The X case helpfully confirms that a tendency to physically abuse others (or the other conditions listed in regulation 4(1) of the 2010 Regulations) will not amount to a protected impairment, even where it is a symptom of an underlying disability that is protected. The decision also offers a useful steer on how to decide whether behaviour amounts to “physical abuse” or indicates a “tendency”.

As always, please contact your usual adviser if you have any concerns about your school’s obligations towards pupils with disabilities.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

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