

No role for the Public Sector Equality Duty in disability discrimination claims brought against academy trusts? (GP v The Lime Trust and EHRC)

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Local Government analysis: When determining whether an Academy Trust had discriminated against a pupil on the grounds of disability, the First-Tier Tribunal (FTT) was not required to consider whether the Trust had complied with the Public Sector Equality Duty. Justification for differential treatment, as a proportionate means of achieving a legitimate aim (within the meaning of section 15 of the Equality Act 2010 (EqA 2010)), did not rely upon demonstrating that the Trust had considered its duties under EqA 2010, s 149. Written by Hannah Lynch, barrister at St Pauls Chambers.

GP v Lime Trust and EHRC [2023] UKUT 77 (AAC)

What are the practical implications of this case?

A party bringing a claim for disability discrimination against the proprietor of their child's school, cannot rely upon alleged failure by the school (if its proprietor is a public authority), to comply with the public sector equality duty (EqA 2010, s 149), when arguing that the school has failed to justify discrimination against their child (on the grounds that it is a proportionate means of achieving a legitimate aim).

The public sector equality duty applies to 'public authorities', which includes, among others, local authorities and the 'proprietor of an Academy', by virtue of the relevant parts of EqA 2010, Sch 3. Independent schools, not being public authorities, are not bound by the PSED.

The Upper Tribunal's (UT) judgment makes clear that, where a family wishes to bring a challenge to their child's maintained/Academy school on the basis of failure to comply with the PSED, the proper route (as per EqA 2010, s 113) is to bring a judicial review claim.

What was the background?

The appellant brought a claim for disability discrimination against the proprietor of her son's school, relating to arrangements put in place for pupils in summer of 2020. GP's son was not permitted to return to in-person learning at the school when it partially re-opened in June 2020, but neither was he able to access online learning resources made available by the school. The Trust had carried out a risk assessment in respect of the appellant's son returning to the school in June 2020; and had concluded that he would not have been able to keep himself and others free from coronavirus (COVID-19) infection and therefore that the risk of him physically returning to the school was too great. The Trust accepted, before the FTT, that allowing GP's son to return to school in June 2020, had amounted to treating him unfavourably for the purposes of sections 15(1)(a) and 85(2) Equality Act 2020 (EqA 2020). The Tribunal concluded, however, that such unfavourable treatment was a proportionate means of a achieving a legitimate aim: such aim being to ensure that those pupils and

staff returning to the school would be safe from the risk of coronavirus transmission in school. The appellant appealed to the UT, on the ground that the Tribunal erred in law in its application of the Public Sector Equality Duty (as set out at EqA 2010, s 149) to her son's case. The appellant argued that the public sector equality duty was relevant to whether discrimination could be justified under EqA 2020, s 15 and therefore the failure by the respondent to carry out an Equality Impact Assessment where the appellant's son was considered, would render the Trust's decision not to permit the appellant's son's return, so flawed that it could not be justified under EqA 2020, s 15.

What did the court decide?

The tribunal was not required to determine, on the disability discrimination claim before it, whether the respondent was in breach of its EqA 2010, s 149 duties, for the following reasons:

- the case law upon which the appellant relied did not support her argument that, as a principle of law or a matter of statutory construction, a proper assessment of whether the Trust had discriminated against the appellant's son (here under EqA 2010, ss 85(2) and), had to include an determination of whether the EqA 2010, s 149 duty had been met or not [paras [27]–[31]. There was no ratio of a superior court which bound the UT to accept the appellant's construction of the Equality Act para [37]
- *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 was in fact authority against the appellant's main argument, because it established that: (i) a breach of the relevant equality duty did not mean that indirect discrimination could not be justified; and (ii) it showed that justification for indirect discrimination could arise otherwise than in terms of compliance with the relevant equality duty paras [37]–[42]
- EqA 2010, s 149 applied only to public bodies, whereas a number of persons or bodies who were not public authorities were subject to duties not to discriminate against other people—for example, an independent school. It must follow from this that the justification under EqA 2010, s 15(1)(b) (whether discrimination could be justified as a proportionate means of achieving a legitimate aim) should apply-and be either made out or not-independently of any consideration of EqA 2010, s 149 para [43]
- EqA 2010, s 113, and its associated provisions, provided that challenges to a public authority's (non)compliance with its public sector equality duties may be brought by way of judicial review. By virtue of s EqA 2010, s 116 and EqA 2010, Sch 17 Pt 2, in the present case a claim could only be made to the FTT for discrimination arising from disability being founded on sections 15 and 85 Equality Act, not for breach of the EqA 2010, s 149 PSED paras [47]–[51]
- this result did not amount to an absurd construction of the legislative scheme, for the reasons set out at paragraphs [51]–[56] of the judgment

Case details

- Court: UK Upper Tribunal (Administrative Appeals Chamber)
- Judge: Upper Tribunal Judge Wright
- Date of judgment: 22 March 2023

Hannah Lynch, barrister at St Pauls Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

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