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School not responsible for pupil attack on teaching assistant: council's successful appeal a reminder that failure in written risk assessment not fatal - causation is key

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The case against the Council

Sharon Durrant, a teaching assistant at one of the Council's schools, Clover Hill VA Infant School and Nursery, claimed damages for injuries sustained when a six year old pupil in her care became upset when segregated from the classroom by Ms Durrant and another member of staff. These included some physical injuries and, more notably, post-traumatic stress disorder.

The case for Ms Durrant was brought in negligence, including allegations of failures to make any suitable or sufficient risk assessment, to provide information on those risks, to take into account her capabilities when entrusting her with tasks, and to provide training. It was said that the area in which the incident happened, the so-called Sunshine Room, which was a calming down area for disruptive children, was an unsafe place of work in the circumstances. It was also alleged that the school had not properly applied its systems of monitoring and managing difficult pupils.

First instance trial and judgment

The trial took place over three days in January 2019. In oral evidence, Ms Durrant accepted that she was in fact fully trained and very experienced. Her case (which was not pleaded) became that there had been such serious behaviour from the pupil that he should have gone straight to Base (a special off-site mobile classroom facility) before the incident or, in the alternative, that he would have been "escalated" which would have *"created a different psychological atmosphere"*.

The judgment was not handed down until 18 December 2019, nearly a year after the trial was heard. In her judgment, the Recorder rejected a large part of Ms Durrant's evidence, finding she had been deliberately untruthful about her health, about complaints and concerning comments she claimed at trial to have made in the run up to the incident, and also about details of the actual incident. She held, in terms, that Ms Durrant had exaggerated the seriousness of the pupil attack. She found that her evidence was *"at times […] muddled and unclear"*. The judge found that the incident was unforeseeable and unprovoked. Conversely, she concluded that the Council's staff were extremely impressive.

Despite this, the judge concluded that the Council had been negligent in *"not fully, nor carefully, [implementing] the rather convoluted system for recording children's behaviour."* Because of this failure to record and report, the judge found that there had been *"no proper overall assessment of how to treat"* the pupil. She made a 40% finding of contributorily negligent.

The appeal

The Council appealed the decision, arguing that the judge had not made any findings of fact which supported her conclusions and that the 'but for' test had not been properly applied. It was entirely unclear what difference it would have made if the school had completed all written paperwork and recorded all of their actions. The Council argued that it would have made no difference to the outcome.

The Honourable Mrs Justice Foster agreed with the Council. She noted that the judge at first instance had accepted the evidence of the headteacher in its entirety. In doing so, she accepted her comment that:

> *"…because we were managing the risks … If we had completed that risk assessment, we would have been covering ourselves. However, we were doing everything that was on that form."*

In other words, filling in the paperwork would not have changed what happened. The only material reason to complete the form was *"protecting themselves with "process"".*

The appeal judge noted that *"the attack was unforeseeable and unprovoked"* and that *"crucially, nobody suggested anyone would have acted differently, or done anything differently with the benefit of hindsight".*

Taking into account the above, the appeal overturned the finding of negligence. Upholding the Council's appeal, Mrs Justice Foster said:

> *"I have come to the clear conclusion it is impossible logically to spell out a finding that any of the failures found were breaches of Norfolk County Council's obligations to Ms Durrant or that such caused the damage whether directly or indirectly suffered."*

Comment

The long-awaited appeal judgment was welcome news to Norfolk County Council and the hard working and impressive staff of Clover Hill School. Sometimes, it is more important for staff to do the right thing than to spend their precious and limited time recording what they have done, and the appeal judge recognises this critical need for any failure in process or recording to be causative of the harm. If the outcome would not have been different even if the appropriate, and often cumbersome, process been followed, then there can be no negligence.

A word of warning that these processes and procedures are in place for a good reason and, often, compliance with the process can shed light on issues and risks which would and should have led to a different outcome. Fortunately, this was not the case for Clover Hill School.

Completion of reporting, assessments etc. should always be a priority because help to identify risks and inform the decision-making in how to deal with those. However, if an incident has happened, and there is a gap in the paperwork, this appeal decision is a welcome reminder that is not necessarily fatal to the defence of the claim.

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