Browne Jacobson

Equalities Act - dependent SEN appeal dismissed

On 11 May 2022, the Upper Tribunal returned its decision on an appeal which concerned the interface between special educational needs (SEN) provision under the Children and Families Act 2014 and obligations under the Equality Act 2010.

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To plead the EQA 2010, or not to plead the EQA 2010 — that was the question. The Upper Appeal Tribunal considers the interplay between the Children and Families Act 2014 and the Equality Act 2010.

On 11 May 2022, the Upper Tribunal returned its decision on an appeal which concerned the interface between special educational needs (SEN) provision under the Children and Families Act 2014 and obligations under the Equality Act 2010.

Andrew Cullen, who is a Barrister at Browne Jacobson, represented the Respondent. After hearing submissions from both parties, Upper Appeal Tribunal Judge Rowley dismissed the Appellant's appeal.

It was submitted on behalf of the Appellant that the provisions of the Children and Families Act 2014 ("the CFA") and provisions of the Equality Act 2010 ("the EQA") were inextricably linked.

The Appellant placed reliance upon several paragraphs of the SEND code of practice to support this proposition. In particular, the Appellant pointed to the fact that the CFA itself required users to turn to the EQA to interpret the meaning of "disability", a term which is used throughout Part 3 of the CFA.

A dual duty

The Appellant's chief submission was that where a child is disabled, a dual duty may arise. First, there may be a duty to make special educational provision for that child; second, there will be a duty not to discriminate against, harass, or victimise the child and a duty to make reasonable adjustments.

The Appellant sought to utilise paragraph 1.35 of the SEND code of practice to demonstrate that when special education provision is reviewed by the Tribunal, the Tribunal should also consider the reasonable adjustments and access arrangements required for the same child or young person under the EQA.

Distinct regimes which deal with distinct issues

In counterpoint, the Respondent argued that the CFA and the EQA should not be blended to form hybrid actions: those provisions are distinct regimes which deal with distinct issues.

It was further submitted by the Respondent that if Parliament had intended for SEN appeals to deal with EQA matters, such as discrimination allegations, then provision would have been made within the CFA or the SEND Regulations 2014.

As regards to the applicability of the SEND code of practice, the Respondent argued that the code did not explicitly, or implicitly, provide the First Tier Tribunal with powers to make determinations under the EQA.

Claims are routinely brought against schools, not local authorities

It was also noted by the Respondent that EQA claims are routinely brought against schools, not local authorities; if the Appellant's contention was correct, there would be instances where appellants would be required to bring two respondents into proceedings, which would inevitably complicate already complex hearings.

Upper Appeal Tribunal Judge Rowley accepted that there was a degree of interplay between the two regimes. However, the Learned Judge accepted the Respondent's submissions that the two regimes were entirely distinct and that the Appellant had not advanced a persuasive or impressive argument as to why the EQA ought to be imported into SEN appeals brought under the CFA.

The Learned Judge was equally not persuaded by the Appellant's contention that the SEND code of practice endorsed the proposition that SEN appeals could incorporate EQA arguments; on this issue, the Learned Judge preferred the Respondent's submissions on the correct interpretation of paragraph 1.35 of the SEND code of practice.

A welcome decision

This decision will be a welcome one for local authorities and schools. Had the Appellant been successful in this appeal, appellants and claimants would have been straining upon the start to seek to utilise EQA arguments into SEN appeals, and conversely SEN appeal arguments in EQA claims.

To this, we can also say that hearings under both regimes would have been made considerably more complex, with multiple respondents, multiple hearing days, and multiple issues for the Tribunal to determine. When appellants come to submit their appeals under the Children and Families Act 2014, this decision provides a salutary reminder that they should not plead EQA arguments.

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