



Neutral Citation Number: [2004] EWHC 2921 (Admin)

Case No: CO/3303/2004

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/12/2004

**Before :**

**MR JUSTICE STANLEY BURNTON**

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**Between :**

**VK**

**Appellant**

**- and -**

**(1) NORFOLK COUNTY COUNCIL**

**(2) THE SPECIAL EDUCATIONAL NEEDS  
AND DISABILITY TRIBUNAL**

**Respondents**

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**Sam Grodzinski (instructed by Alexander Harris) for the Appellant**  
**Jane McCafferty (instructed by Legal Services, Norfolk County Council) for the First**  
**Respondent**  
**Katherine Olley instructed by the Treasury Solicitor) for the Second Respondent**

Hearing dates: 11 and 12 November 2004

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**Approved Judgment**

**Mr Justice Stanley Burnton:**

**Introduction**

- 1 This is an appeal by VK, the mother of a 14-year old boy, JS, against the decision of the Second Respondent Tribunal dated 10 June 2004 dismissing her claim that he had been discriminated against within the meaning of the Disability Discrimination Act 1995 ("the DDA") in relation to the educational provision for him made by the First Respondent ("NCC") as the local authority responsible for his education under the Education Act 1996 ("the EA").
- 2 The appeal raises an important question as to the appropriate practice of this Court on an appeal against a SENDIST decision in which it is alleged or established that the tribunal's reasons were inadequate. Both the appellant and, interestingly and significantly, the SENDIST itself submitted that the lawfulness and validity of its decisions should be judged on the basis of its written reasons as sent to the parties; and that remission for its reasons to be supplemented was inappropriate. NCC submitted that this Court should adopt the procedure signalled by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, and adopted by the Employment Appeal Tribunal, of remitting decisions that were inadequately reasoned to SENDIST to enable it to supplement its reasons

**The facts**

- 3 It is common ground that JS is a disabled person within the meaning of section 1 of the DDA. The primary cause of his disability is a neurodevelopmental disorder. He has symptoms that have been variously labelled as dyslexia, dyspraxia, and DAMP, an unfortunate acronym for Deficits in Attention, Motor Control and Perception. His most significant weakness is in short term auditory memory, so that he finds it hard to retain information if presented orally. His literacy and numeracy skills are very weak. JS also has some physical disabilities, primarily gastro-intestinal and mobility problems. Nonetheless, and as confirmed by the Report prepared by NCC's Educational Psychologist dated 29<sup>th</sup> January 2003, JS has general conceptual and language skills that are above average for his age.
- 4 Prior to living in Norfolk, JS resided with his mother in Hampshire. Hampshire Local Education Authority had issued a SEN Statement in relation to JS in January 2000. It had last been amended in October 2002. The SEN statement issued by Hampshire LEA named a mainstream secondary school (Crestwood School) in part 4. JS received some individual support for his learning difficulties at that school, but only attended part time.
- 5 VK decided to move with JS to Norfolk on 15 November 2002 so as to be nearer to her parents. She gave NCC advance notice of her intention to move by email on 3 November. Shortly before her move, VK had lodged an appeal with the Special Educational Needs and Disability Tribunal against Hampshire LEA's alleged refusal to re-assess JS's needs. However in a letter of 9 December 2002, the NCC agreed to assess JS, with the result that the Hampshire appeal was withdrawn.
- 6 NCC's Educational Psychologist assessed JS on 29 January 2003.

7. Between 15 November 2002 and early February 2003 JS received no education. In early February 2004, NCC began to provide JS with education for 1¾ hours per week, consisting of ¾ hour divided equally between English and Maths and 1 hour of woodwork, provided through the Visiting Teacher Service (“VTS”) by a visiting teacher, Mr John Scott.
  8. On 10 March 2003 NCC issued a draft Special Education Needs (“SEN”) statement for JS. It was finalised on 21 May 2003. The statement did not name any school for JS to attend. Part 3 of the statement stated that whilst a school placement was being identified, JS should receive “individual support/contact time from the Visiting Teacher Service to total not less than 2 hours per week”.
  9. On 20 June 2003 JS’s mother lodged at the Tribunal:
    - (a) a claim under the DDA in relation to NCC’s discriminatory treatment of JS; and
    - (b) an appeal under section 326 of the EA against the contents of JS’s SEN statement
- In the disability discrimination claim VK complained (so far as is relevant to the present appeal) of NCC’s failure to provide any education for her son between November 2002 and February 2003, and of the small amount and inappropriateness of the educational support provided by it through its VTS. In summary, she complained:
- My son has received no educational support for the special needs therefore since arriving in Norfolk in November 2003.
10. On 30 June 2003, the amount of education provided by NCC was increased to 5½ hours per week. This lasted for a few weeks until the summer vacation, during which no education was provided.
  11. At the end of June 2003 JS issued Judicial Review proceedings seeking orders in relation to NCC’s duty under section 19. Those proceedings were withdrawn by consent on agreed terms on 20 October 2003. They are irrelevant to this appeal.
  12. On 9 October 2003 NCC issued a further SEN statement, naming (in part 4) Hethersett High School, a mainstream school with a Special Learning Difficulties Centre.
  13. The Tribunal hearings of the claim and the appeal referred to above first took place on 29 October 2003. The Tribunal dismissed the appeal against the contents of the SEN Statement. It accepted that Hethersett High School should be the named school. It also amended the Statement in respects that are irrelevant to the present appeal.
  14. It had been intended that the Tribunal would also deal with the claim under the DDA. At the outset of the hearing, however, the Tribunal expressed the view that it did not have jurisdiction to deal with this claim because JS was not a “pupil” within the meaning of section 3(1) of the Education Act 1996. That view was later accepted by the Tribunal to be wrong. In a decision dated 4 December 2003 (made by the President of the Tribunal, who had not participated in the October hearing) it found

that JS was receiving education otherwise than at school within the meaning of section 19 of the EA, so that he did fall within the scope of section 28F of the DDA

15. The discrimination claim was therefore re-listed and was heard by the Tribunal on 23 April 2004
16. At the outset of the hearing, a question arose as to the admission in evidence of reports on JS of John Mallen, an educational psychologist, dated 11 and 22 April 2004, which VK wished to put before the Tribunal. NCC did not object to their admission on grounds of their late appearance, but submitted that they were irrelevant to the discrimination claim. The Tribunal refused to accept the reports. There is a dispute as to what was said by the Tribunal, and in particular whether its decision to reject the reports was announced during the hearing, but in the event nothing turns on this.

### **The decision of the Tribunal**

17. The written decision of the Tribunal, incorporating its reasons, was issued on 10 June 2004. It held that VK's complaint was out of time in so far as it related to acts occurring before 21 December 2002 by virtue of the 6 month time limit in paragraph 10(1) to Schedule 3 of the DDA. There is no appeal against that part of its decision. VK's complaint in relation to subsequent acts of NCC was dismissed on the merits. The parts of the decision relevant to the issues on this appeal are set out in the Appendix to this judgment. In its reasons, the Tribunal referred to NCC as "the Responsible Body", abbreviated to "the RB", and to NCC's Visiting Teacher Service as "the VTS". In the Appendix, VK's and JS's names have been replaced by those initials.

### **The grounds of appeal**

18. The grounds of VK's appeal are as follows:
  - (a) The Tribunal misdirected itself in law, at paragraph g of its reasons, in requiring VK to establish that "the treatment JS received related *solely* to his disability" (italics added)
  - (b) The Tribunal misdirected itself in law in suggesting, at paragraph i of its reasons, that the relevant comparison for the purposes of the DDA was whether "all pupils whether disabled or not receive the same level of VTS".
  - (c) The Tribunal's decision under the sub-heading "Was the treatment justified?" is vitiated by inadequate reasoning and illegality. In particular, the Tribunal failed to explain on what basis it accepted that there was a substantial reason that was material to the circumstances of the case justifying the very low level of educational provision pending placement at a school
  - (d) In so far as the Tribunal did find that there was such justification, such a conclusion was irrational and unlawful. In particular, NCC could not lawfully have justified its less favourable treatment of JS (in the provision of a suitable education under section 19 of the EA) by reference to any issue of resources.

- (e) The Tribunal acted irrationally and unfairly in refusing to accept Mr Mallen's reports in evidence

### **The contentions of the Respondents**

19. Miss McCafferty, for NCC, submitted that the Tribunal asked itself the correct questions as a matter of law, and that Mr Mallen's reports had been irrelevant, and were correctly rejected by the Tribunal on that ground.
20. However, in relation to the grounds alleging inadequate reasons, she submitted that the proper course was to adjourn the appeal and to remit the matter to the SENDIST for it to provide additional reasons for its decision under the sub-heading "Was the treatment justified?"
21. The position of NCC in relation to the reasons appeal led to the appearance of Miss Olley on behalf of the Tribunal. The Tribunal was generally in agreement with NCC's case. Her submissions were restricted to the issue as to the facts concerning the exclusion of Mr Mallen's reports and, of wider importance, to the proposal of NCC that, if the Court considered the Tribunal's reasons in the present case to be inadequate, or arguably so, the appeal should be adjourned in order for the Tribunal to supplement its reasons. The Tribunal's considered view is that its decisions should stand or fall on their original reasons, and that remission to it for its reasons to be supplemented was inappropriate in the present case and would normally be so.

### **The statutory framework**

22. The EA contains no provision requiring a local educational authority to provide any particular education to individual pupils in a school. Section 13 requires a local educational authority to secure that "efficient primary education and secondary education are available to meet the needs of the population of their area"; section 13A requires a local educational authority to exercise its educational powers "with a view to promoting high standards"; and section 14 requires a local education authority to secure that sufficient schools are available for the area.
23. Section 19 addresses the needs of those who are unable (temporarily or otherwise) to receive suitable education at school. It does impose a duty directed at the individual child.

(1) Each local education authority shall make arrangements for the provision of suitable . . . education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them. . . .

(4) A local education authority may make arrangements for the provision of suitable . . . education otherwise than at school for those young persons who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.



(b) it cannot show that the treatment in question is justified.

(2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if—

(a) it fails, to his detriment, to comply with section 28C; and

(b) it cannot show that its failure to comply is justified...

(5) Subsections (6) to (8) apply in determining whether, for the purposes of this section—

(a) less favourable treatment of a person, or

(b) failure to comply with section 28C,

is justified

(6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection

(7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial

27 Section 28B applies to the duty of a local education authority under section 19 of the EA by reason of sections 28F and 28G of the DDA:

### **28F Duty of education authorities not to discriminate**

(1) This section applies to—

(a) the functions of a local education authority under the Education Acts; ...

(3) In discharging a function to which this section applies, it is unlawful for the authority to discriminate against—

(a) a disabled pupil; or

(b) a disabled person who may be admitted to a school as a pupil....

(7) “The Education Acts” has the meaning given in section 578 of the Education Act 1996.

### **28G Residual duty: supplementary provisions**

- (1) Section 28B applies for the purposes of section 28F as it applies for the purposes of section 28A with the following modifications –

- (b) references to a responsible body are to be read as references to an authority;

- (7) “Authority” means-

- (a) in relation to England and Wales, a local education authority;

- 28 The jurisdiction of the tribunal for present purposes is conferred by section 28I:

**Jurisdiction and powers of the Tribunal**

- (1) A claim that a responsible body –

- (a) has discriminated against the person (“A”) in a way which is made unlawful under this Chapter, or

- (b) is by virtue of section 58 to be treated as having discriminated against a person (“A”) in such a way,

may be made to the Tribunal by A’s parent.

- (2)

- (3) If the Tribunal considers that a claim under subsection (1) is well founded –

- (a) it may declare that A has been unlawfully discriminated against; and

- (b) if it does so, it may make such order as it considers reasonable in all the circumstances of the case.

- (4) The power conferred by subsection (3)(b) –

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

- (b) does not include power to order the payment of any sum by way of compensation

29. Since the future education of JS had been the subject of the Tribunal’s decision of 29 October 2003, the only relief that could be granted by the tribunal on the disability discrimination claim was a declaration under section 28I(3)(a)

- 30 The procedure of the SENDISTs is the subject of the Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002 (“the Procedure Regulations”). Regulation 33 imposes conditions on the reception of late written evidence. It is unnecessary to set it out. Regulation 36 provides, so far as relevant, as follows:

**Decision of the tribunal**

36. - (1)

(2) The decision of the tribunal may be given orally at the end of the hearing or reserved and, in any event, whether there has been a hearing or not, shall be recorded forthwith in a document which, save in the case of a decision by consent, shall also contain, or have annexed to it, a statement of the reasons (in summary form) for the tribunal's decision, and each such document shall be signed and dated by the chairman

(3)

(4) Every decision of the tribunal shall be entered in the records.

(5) As soon as may be the Secretary of the Tribunal shall send a copy of the document referred to in paragraph (2) to each party, accompanied by guidance, in a form approved by the President, about the circumstances in which there is a right to appeal against a tribunal decision and the procedure to be followed

(6)

(7) Every decision shall be treated as having been made on the date on which a copy of the document recording it is sent to the parent (whether or not the decision has previously been announced at the end of the hearing)

**Discussion**

31. On analysis, the grounds of appeal raise the following questions:
- (a) Was the Tribunal entitled to reject Mr Mallen’s reports as irrelevant?
  - (b) Did the Tribunal correctly apply the substantive law applicable to this case?
  - (c) Is its decision sufficiently reasoned?
  - (d) If its decision is insufficiently reasoned, should it be remitted for it to supplement its reasons?

### **The rejection of Mr Mallen's reports**

32. By far the greater part of Mr Mallen's first report, dated 11 April 2004, consisted of his assessment of JS. He was also asked to consider whether, in effect, he considered that NCC had complied with its duty under section 19. His answer to this question was general in its terms. He described NCC's response to JS's needs as "pitifully inadequate", and the amount of teaching he had received as "minimal". He said:
- "JS's needs were known and the appropriate response was to provide him with a specialist teaching in literacy and numeracy and this could have been provided by the County Peripatetic Learning Support Service."
33. These passages were relevant to the discrimination claim. They comprise less than half a page in a 14-page report. The remainder of that report was relevant only to the issues concerning JS's SEN statement. Had I been sitting on the Tribunal, I should have admitted the report. However, the lack of particularity in the relevant parts of the report, together with the nature of the issue before the Tribunal as to NCC's justification for its treatment of JS, would have resulted in its being given little weight.
34. Mr Mallen's short second report, dated 22 April 2004, was directed to JS's future educational needs, and was irrelevant to the discrimination claim, which was concerned with his past educational treatment.
35. As will be seen, I have concluded that the decision of the Tribunal must be quashed for other reasons. Having regard to the relative unimportance of Mr Mallen's report, I should have been most reluctant to have quashed the decision on the ground only of the Tribunal's rejection of his evidence.

### **Did the tribunal correctly apply the law?**

36. Where, as in the present case, it is accepted that a child is disabled, the questions that arise under section 28B of the DDA are deceptively straightforward:
- (a) What is the treatment which is the subject of the disabled person's complaint?
  - (b) Who are the "others" to whose treatment the disabled person's treatment is to be compared?
  - (c) Is the treatment received by the disabled person less favourable than that received by those others?
  - (d) If so, is that for a reason which relates to his disability?
  - (e) If the answer to (d) is affirmative, has the responsible body shown that the treatment in question is justified?

Justification of less favourable treatment is to be determined (where subsection (6) does not apply) in accordance with subsection (7). In many cases, the principal question to be addressed by the tribunal is likely to be justification.

- 37 On this appeal there was, surprisingly, a dispute as to (a), the identification of the treatment in question. The identification of the treatment to which the complaint relates is crucial. On it also depends the identification of the comparator to whom and the comparison to which question (b) relates.
- 38 In his skeleton argument, Mr Grodzinski accepted that the Tribunal correctly identified the nature of the treatment in question in paragraph (a) (i) and (ii) of its decision. No difficulty arises in relation to (i), the failure to identify an appropriate school. It is in relation to (ii), the alleged inadequate provision of VTS, that the issue arises. Miss McCafferty cogently submitted that since the treatment complained of was the amount of VTS given to JS, the comparison required by section 28B must be with others in receipt of VTS. This led Mr Grodzinski to change his position, and to submit that the substance of VK's complaint was that the education received by JS had been inadequate and inappropriate, and it was that, rather than the amount of VTS that JS received, that should be regarded as the treatment in question. On that basis, the comparison to be made was, he submitted, with a pupil who was entitled to receive suitable education under section 19.
- 39 On this issue, I reject Miss McCafferty's submission. The substance of VK's complaint, as summarised in paragraph 9 above, was that NCC had provided inadequate education for her son. The treatment in question was the educational provision made for him. In my judgment, the comparison required by section 28B of the DDA in relation to the period during which JS was not at school was not to other children who were not at school who were receiving VTS, but who were not excluded or at Key Stage 4, (i.e., the comparison made by the Tribunal in paragraph i). It must be either to those children who were the subject of arrangements made by the local education authority under section 19 (as Mr Grodzinski submitted) or to other children who were receiving a mainstream education at school. Of these two possible comparisons, I think that it is the latter that is appropriate. They are persons to whom the reason for the unfavourable treatment does not apply.
- 40 That it is right to reject the Tribunal's comparison is confirmed by more general considerations. If the comparison made by the Tribunal was appropriate, a Responsible Body could avoid a finding of discrimination by providing an inadequate level of VTS for all pupils who were unable to attend school. Many of those would be disabled pupils. No disabled pupil could complain that he had been discriminated against in comparison with any other pupil. To consistently discriminate against all pupils who are unable to attend school – i.e. unjustifiably to provide a less adequate education for them is to discriminate against them.
- 41 This conclusion is consistent with the judgment of the Court of Appeal in *Clark v TDG Ltd (trading as Novacold)* [1999] IRLR 318. In his helpfully informative judgment, with which the other members of the Court agreed, Mummery LJ gave two examples of the comparison to be made where there is a complaint of discrimination within the meaning of the DDA. He referred to the statement made on the second reading of the Bill for the DDA by the Minister for Social Security and Disabled People:

interpretation of s.5(1), it would follow that s.20(1), which is in the same terms, would have to bear a meaning inconsistent with the specific statement of the Minister on the intended effect of those provisions

68 Consider his example. If no dogs are admitted to a café, the reason for denying access to refreshment in it by a blind person with his guide dog would be the fact that no dogs are admitted. That reason 'relates to' his disability. His guide dog is with him because of his disability

69 On the Novacold interpretation of the comparison to be made, the blind person with his guide dog would *not* be treated less favourably than the relevant comparator, i.e. 'others', to whom that reason would not apply, would be sighted persons who had their dogs with them. There could not therefore be any, let alone prima facie, discrimination. But the Minister specifically stated that this would be a prima facie case of disability discrimination, i.e. less favourable treatment, unless justified. It could only be a case of less favourable treatment and therefore a prima facie case of discrimination, if the comparators are 'others' *without dogs*: 'that reason' for refusing access to refreshment in the café would not apply to 'others' without dogs.

70 The same point can be made on the example given in the Code of Practice on Rights of Access issued by the Secretary of State at para. 2.12:

'A waiter asks a disabled customer to leave the restaurant because she has difficulty eating as a result of her disability. He serves other customers who have no difficulty eating. The waiter has therefore treated her less favourably than other customers. The treatment was for a reason related to her disability – her difficulty when eating. And the reason for her less favourable treatment did not apply to other customers. If the waiter could not justify the less favourable treatment, he would have discriminated unlawfully.'

71. It is clear from this example that the comparison to be made is with other diners who have no difficulty in eating and are served by the waiter, and not with other diners who may be asked to leave because they also have difficulty eating, but for a non-disability reason, e.g. because the food served up by the waiter is

disgusting. This interpretation of s.20(1) provides support for Mr Clark's interpretation of s.5(1). The reason for his dismissal would not apply to others who are able to perform the main functions of their jobs; he has been treated less favourably than those others. He was dismissed for not being able to perform the main functions of his job. The 'others' would not be dismissed for that reason

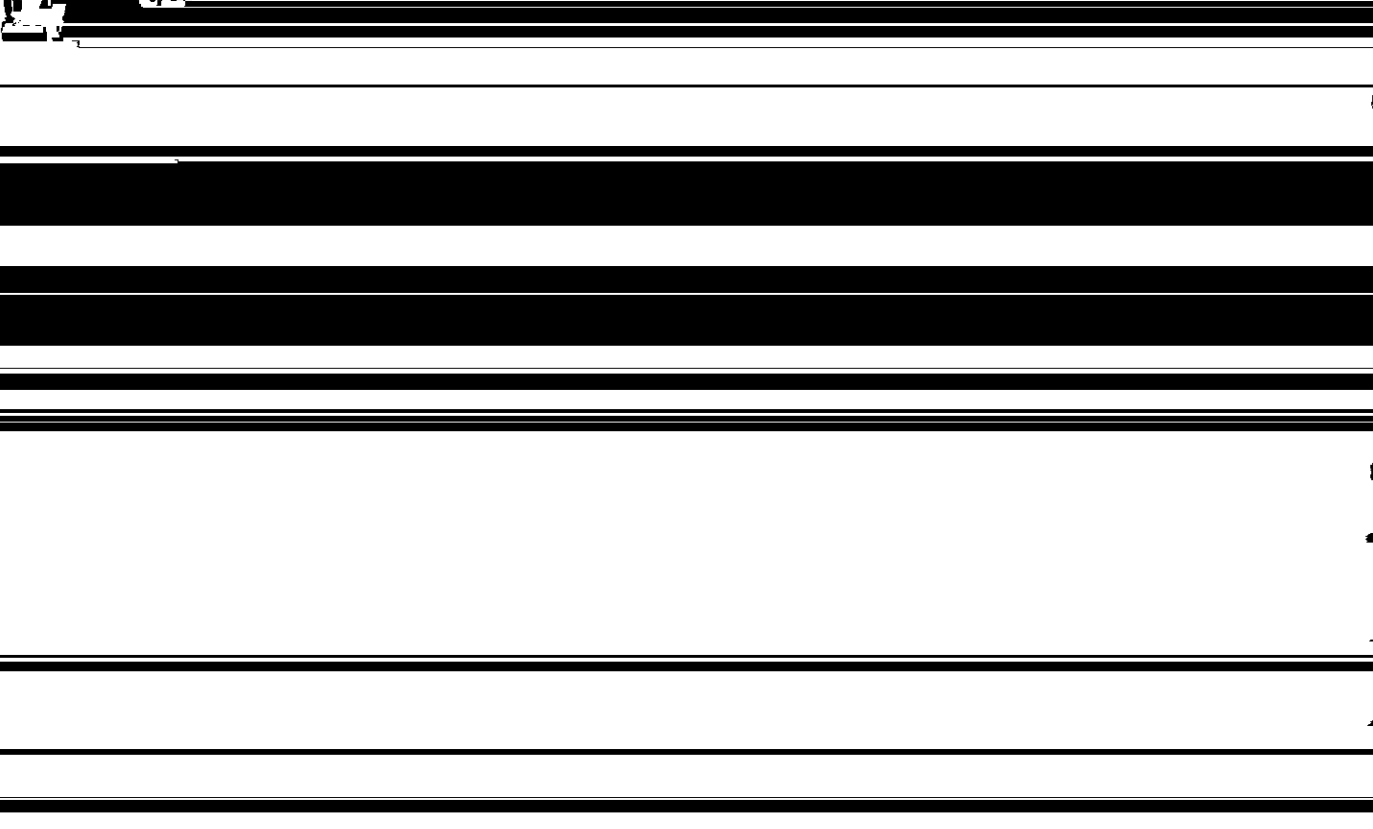
72. However, that does not necessarily mean that Mr Clark has been discriminated against. It is open to Novacold to show that the dismissal is justified, just as it would be open to the café proprietor to justify the exclusion of dogs, including guide dogs with their blind owners

42. To compare the education provision received by JS with that received by other pupils who received VIS is akin to comparing the blind person with a dog who wishes to enter a café with other persons with dogs, rather than with the customer without a dog. It is the latter comparison which is required by the DDA. Similarly, to pursue the potentially dangerous analogy further, it seems to me that children who are the subject of special arrangements under section 19 are the equivalent of the other persons with dogs. The average customer without a dog is the ordinary pupil who does not require arrangements under section 19
43. *McA Catholic High School v CC, PC and another* [2003] EWHC 3045 (Admin) was an appeal by a school against the decision of a SENDIST that it had unlawfully discriminated against a disabled pupil who had been excluded by reason of his disorderly behaviour, which was due to his disability. The Tribunal had compared his treatment (i.e. his exclusion) with that of a pupil whose behaviour was not disorderly. The School contended that the appropriate comparison for the purposes of section 28B was between the complainant and a non-disabled pupil whose behaviour was similarly disorderly. Silber J rejected the school's contention, relying on settled law in the employment context. I entirely agree with the analysis and the decision of Silber J.
44. The Tribunal in the present case referred to the *McA* case at paragraph j of its reasons, but it would seem that it may not have correctly understood and applied it
45. However, it follows from this analysis that a breach by a local education authority of its duty under section 19 of the EA in relation to a disabled pupil is not of itself unlawful discrimination under the DDA. As Miss McCafferty put it, section 19 is a gateway to the DDA, because it provides for one of the functions of a local education authority to which section 28F applies; but that is the only relevance of section 19 under the DDA. If Parliament had intended a breach of section 19 in relation to a disabled pupil to constitute discrimination under the DDA, it would have been easy so to provide in terms. Furthermore, if the appropriate comparison were with a pupil who is lawfully provided with a suitable education under section 19, any breach of section 19 in relation to a disabled pupil would necessarily constitute discrimination. But discrimination involves a comparison between the actual treatment received by the disabled person and the actual treatment received by the relevant others, rather than the treatment that the relevant others ought as a matter of law to receive. If we take, as a hopefully unlikely example, a local education authority that fails to provide suitable

education to all its pupils at school, including those disabled pupils at school who are the subject of section 19 arrangements, the latter would not be the subject of discrimination unless their education, even if it did not amount to suitable education, was worse (i.e. they were treated less favourably) than that of their non-disabled colleagues

- 46 That is not to say that most cases in which a local education authority fails to comply with its duty to a disabled pupil under section 19 of the EA will not also constitute discrimination under the DDA. In practice, tribunals are likely to focus on the issue of justification, as envisaged by the Court of Appeal in *Novacold*. By reason of the special provision in section 28B(7), the hurdle to be surmounted by a local education authority in order to establish justification is not a high one.

47 The third question to be considered under section 28B(7) is whether the person's



person's treatment was less favourable than that received by others. It is a question that the Tribunal in the present case did not expressly consider. It may have assumed that the answer was clearly affirmative, since otherwise it would have been unnecessary for it to consider any other question; but the structure of the decision is too confused to enable me to draw that inference with any confidence. It is a more difficult question in the present context than might at first blush appear. The question is not whether the treatment of the disabled person was different from that of others: it is whether it was less favourable. Education at home is different from education at school, but it is not necessarily less favourable to the pupil (as indeed many parents who have educated their children at home claim). No education (of which VK complained in the period until early February 2003) is certainly less favourable than the education provided to ordinary pupils. The question whether the education provided thereafter was less favourable would, I think, normally be assimilated to the question whether it was sufficient and appropriate.

- 48 The fourth question to be considered by the Tribunal was whether JS's (I assume unfavourable) treatment related to his disability. It considered it in their reasons under sub-heading (iii). Mr Grodzinski's submission was that it incorrectly answered that

4(1) of the 1975 Act; section 2(1) of the 1976 Act. Had the model of the earlier Acts been intended by the legislation to have been adopted when the 1995 Act came to be framed, one might have expected to see section 5(1) speaking of treatment "on the ground of" the disabled person's disability or perhaps "by reason that" the claimant was disabled. However, instead (and it can only have been deliberate) the 1995 Act uses the expression "for a reason which relates to the disability". Whilst everything done "on the ground" of the disability or by reason of it would inescapably fall within that phrase, the need for the reason merely "to relate to" the disability can only, in our view, be wider and more inclusive than the use of the 1975 and 1976 Act models would have suggested

- 51 In the *McA* case, that statement of the law was accepted by Silber J to be applicable in the context of section 28B. He said, at paragraph 42 of his judgment:

Miss Davies points out that in answering (this question), it should be noted that the expression "for a reason which relates to the disabled person's disability in sections 5(1)(a) and 28B(1)(a) has broadened the descriptions of the causative links from the links used in other discrimination Acts. It therefore includes causative links wider than those which would have fallen within the expressions of "on the ground of" or "by reason of" the disability: *Rowden v Dutton Gregory (a firm)*

52. However, Miss McCafferty submitted that a perusal of the Tribunal's decision as a whole shows that it did not apply the incorrect and unduly restrictive test suggested by the first sentence of paragraph g of its reasons.
- 53 I confess that on this point, as on others, I find the Tribunal's reasons confusing. I do not understand what the Tribunal meant in the second sentence of its paragraph g. Paragraphs h and i of its reasons do not relate to the question they appear to address, namely whether the reason for JS's treatment related to his disability. If the Tribunal held that JS's treatment was not related to his disability, it is not easy to see why it proceeded to consider the issue of justification, as it clearly did in paragraph k.

### Justification and the adequacy of the Tribunal's reasons

56. Justification is used in a special sense in the context of section 28B. A responsible body is not required to establish that it was correct to treat a disabled person unfavourably as compared with others. It is sufficient for it to establish that "the reason for (the less favourable treatment) is both material to the circumstances of the particular case and substantial" "Material" in this context requires a stronger connection than "relevant": Arden LJ in *Post Office v Jones* [2001] EWCA Civ 558, [2001] IRLR 384 (which concerned the identically worded provisions of section 5 of the DDA) at paragraph 36. "Substantial" does not require elucidation for present purposes.

57. In *Post Office v Jones*, the Court of Appeal approximated the test of justification to a *Wednesbury* reasonableness test: see Pill LJ at paragraph 26 and Arden LJ at paragraph 41:

"If, however, the employer's reason is outside the band's responses which a reasonable employer might have adopted, the reason would not be substantial."

The Court of Appeal was, I think, seeking to elucidate the meaning of "substantial", but not seeking to replace the statutory words.

58. The Tribunal referred to the judgment in *Jones* at paragraph k. It is tempting to infer from this that it must have applied the appropriate statutory test.

62. Most importantly, no reasons at all are given under sub-paragraph (v), “Was the treatment justified?”, but only a conclusion and a result. One is left to seek the Tribunal’s reasons elsewhere.
63. The only reference to the lack of any VTS until February 2003 is in paragraph 19 of the facts. That refers to the VTS co-ordinator having stated in evidence that the reason was a lack of resources. A lack of resources cannot justify in law a failure by a local education authority to fulfil the duty imposed by section 19 of the EA: see *R (Tandy) v East Sussex County Council* [1998] AC 714. Mr Grodzinski submitted that it follows that a lack of resources cannot be a material and substantial reason for less favourable treatment for the purposes of section 28B of the DDA. Miss McCafferty submitted that a lack of resources may constitute a material and substantial reason for less favourable treatment. Both parties asked me to address this issue in my judgment, even if it were not essential to the determination of this appeal.
64. I have found the answer to this question difficult, but in the end I have concluded that Mr Grodzinski’s submission must be rejected. It tends to equate the question of discrimination under section 28B in relation to a child who cannot attend school with the question whether the local education authority is in breach of section 19 of the EA. The DDA does not expressly so provide. Moreover, as mentioned above, the inclusion of the section 19 in the functions of a local education authority to which section 28B applies does not incorporate section 19 into the DDA. Secondly, Mr Grodzinski’s submission is inconsistent with his submission that the relevant comparison under section 28B is with those children who are at school. Resources are a relevant factor to be considered by a local education authority in determining how to comply with its statutory duties to such children. It follows that the resources available to a local education authority may be taken into account in determining whether it had a material and substantial reason for its treatment of a disabled pupil.
65. However, this does not mean that a local education authority can simply point to a lack of available resources within its VTS to justify its treatment. That would permit wholesale discrimination. If the authority has not adequately resourced its VTS, and has no good explanation why it has not done so, it will be unable to establish that it had a material and substantial reason for its less favourable treatment of the disabled person. What constitutes a good reason for this purpose, which must be a substantial reason within the meaning of section 28B, is best left to determine on the facts of a case in which the relevant facts have been investigated. In the present case, there is nothing in paragraph 19 of the Tribunal’s decision to indicate that this issue was properly addressed, and there is no finding of the Tribunal on it.
66. The second period of complaint so far as VTS is concerned was between early February and its increase to 5.5 hours per week from 30 June 2003. During that period JS received 1.75 hours of VTS a week. That is not obviously adequate. One would have expected a finding that NCC kept the amount of VTS received by JS under review, and an explanation as to why it was not until the end of June that it was increased to 5.5 hours, and why that amount of VTS was selected. The nearest one gets to this question being addressed is in paragraph 21 of the facts. That describes NCC’s general approach, but does not address how it was applied in the case of JS.
67. It follows that the Tribunal’s decision is inadequately reasoned. Unless it is remitted to the Tribunal for it to supplement its reasons, it must be quashed.

68 I add that VK filed a witness statement in which she stated that she did not understand the Tribunal's reasons for rejecting her claim. In general, such evidence is irrelevant and inadmissible. Whether the reasons given by a tribunal for its decision are adequate is to be determined by the court, objectively, and independently of the subjective understanding of any of the parties.

### **Remission to the Tribunal**

69 As mentioned above, Miss McCafferty relied on the decision of the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, and the practice of the Employment Appeal Tribunal, in support of her submission that this Court should remit the decision under appeal to the Tribunal for it to supplement its reasons.

70 The High Court has no statutory power to remit the present appeal to the Tribunal and to require it to supplement its reasons. No such power is included in Part 52.10 of the CPR. In my judgment, express statutory authority would be required for this Court to have the power to compel a tribunal to supplement its reasons. There is none.

71 The lack of such a power is not fatal to Miss McCafferty's submission. I could adjourn the hearing of this appeal and invite the Tribunal to supplement its reasons. Although, having regard to the submissions made on its behalf before me, the Tribunal would be reluctant to do so, I suspect that it would comply with such an invitation.

72 However, I have no doubt that in the present case it would be wrong to remit the decision to the Tribunal for it to supplement its reasons, and that it would be inappropriate to do so on most appeals from the SENDIST in which inadequacy of reasons is alleged.

73 Regulation 36 of the Procedure Regulations requires the reasons for the decision of the tribunal to be contained in, or to be annexed to, the document in which the decision is recorded "forthwith" on the making of the decision. Regulation 36(5) requires the Secretary of State to send a copy of the decision, with the reasons, to each party "as soon as may be". It would be inconsistent with these statutory requirements to permit the reasons for a decision to be substantially supplemented subsequently

74 Miss McCafferty accepted that these provisions of the D. J. D. 1.1

The present is a case in which there is such a duty.

75. Subsequent elucidation of reasons given at the time will be regarded more tolerantly (see *R (H) v Ashworth* [2001] EWHC Admin 901 at paragraph 56), but the reasons that would be required of the Tribunal in the present case are

76. The circumstances of the cases considered by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* were very different from the present. In those cases, there was no statutory requirement for reasons to be given as part of the notification of the decision. In addition, *English v Emery Reimbold & Strick Ltd* concerns appeals that are subject to an application for permission at the permission stage. At that stage, it is possible for the appeal court to give the first instance tribunal an opportunity to supplement its reasons before the substantive hearing of the appeal takes place. In a case such as the present, it would be necessary to adjourn the substantive appeal, with attendant delay and the real possibility of a further hearing being required in any event.

77. The practice signalled in *English* has been adopted by the EAT and found beneficial: see, e.g. *Pepper v Commission* [2004] JPL 125.



11 Upon arrival in Norfolk, the RB agreed at VK's request to carry out a statutory reassessment and as an interim measure VK agreed to home tuition from the Visiting Teaching Service (VIS)

12 Mrs Hiles, Education Officer with the RB, explained to the Tribunal that the RB could not identify a school

then took account of the mother's wishes, including the placement at Eccles Hall School. The RB decided

offer VTS earlier than February, but due to the demands of the service and the referral and due process this was not possible.

20. We heard from Ms Swinburn that all VTS students, (other than pupils who are excluded from school and Key stage 4 pupils) are offered one session of 1.75 hours a week initially until the staff feel that the child is capable of being integrated into other sessions. We heard from John Scott, VTS teacher, that JS's needs did not fall within the needs of pupils attending group sessions and so individual home tuition was continued and group sessions were not an option.
21. Norfolk's approach to working with pupils who are school phobic is to use a small steps approach:
- Gradually introducing the pupil to a tutor in familiar surroundings, such as the home
  - Then moving them to a setting outside the home
  - Gradually increasing the amount of tuition
  - Moving towards a school type setting and eventually into the school

This approach is the same used for all pupils with school phobia, whether they have a disability or not. Although at the time of commencement of VTS no school had been identified, it was agreed that the process would be appropriate for JS. This is a well established approach which experience indicates has the best chance of success.

22. We heard from Ms Swinburn that the RB wanted to be sure that reintroduction would be successful which is why JS was not introduced to groups which could have increased the hours. We heard that the LEA were concerned that if they did not get the placement right it may set JS back still further.
23. We heard that JS's admission to mainstream school was skilfully engineered and that professionals working with JS considered that it could have quite easily broken down.

24. ...

25. ...

26

27. Although Mr Grodzinski, counsel representing VK, did not formally abandon any claim relating to the RB failing to make reasonable adjustments in respect of JS's disability, the Tribunal concluded that this was not established on VK's behalf.

**Tribunal's conclusions, with reasons**

We carefully considered the written evidence submitted to the Tribunal, the evidence given at the hearing, the submissions made to us and the Disability Rights Commission's Code of Practice for Schools. We consider that in determining how the provisions of Part 4 of the Disability Discrimination Act 1995 (DDA) should apply, it is appropriate that we should have regard to authoritative decisions interpreting largely (identical) provisions in other parts of the DDA. The issues to be addressed and our conclusions are:

- A. In relation to the alleged acts of discrimination we must address four questions in relation to each of the Acts or series of acts referred to
- i. What is the treatment complained of?
  - ii. What is the reason for the treatment?
  - iii. Did the reason relate to JS's disability?
  - iv. If so, would the RB have treated in the same way someone else to whom that reason did not apply?

Those are matters which VK must establish.

- B. In addition, there is the question:

- v. Was the treatment justified?

This is for the Responsible Body to prove

- (i) What is the treatment complained of?

- a. The treatment complained of is (i) failure to identify an appropriate school for JS or any school within a reasonable period of time (ii) Pending that placement the inadequate provision of VTS by the LEA.

- (ii) What is the reason for the treatment?

- b. The RB could have placed JS in accordance with Hampshire's statement of special educational needs. In

which case Hethersett School would have met the criteria. Instead, at VK's request, and faced with a mass of information and a child with complex and persistent needs, the RB carried out a statutory assessment. On completion of the assessment they considered VK's choice of school. They named Hethersett School in the statement. VK was also afforded details of the schools in her area.

- c. The process of identifying an appropriate school for JS did by necessity take time in view of the extensive information that has to be assimilated, assessed and commissioned.
- d. We are satisfied from the evidence presented to us that the reason for JS's treatment, in relation to both complaints were his complex and persistent needs relating to his emotional, social, medical and educational difficulties.
- e. Faced with the mass of information, and with the agreement of VK the LEA carried out a reassessment and offered the VTS until a school had been identified and JS was ready to attend.
- f. VTS was offered initially until a school was identified and once identified until JS was ready to attend. Following the assessment a school was identified and the small steps approach was adopted to ensure a successful re-integration into mainstream school. We are satisfied that JS could not cope with group VTS.

(iii) Did the reason relate to JS's disability?

- g. We are not persuaded by VK that the treatment JS received related solely to his disability. JS's disability contributed to the tapestry of JS's special educational needs but was not fundamental to his treatment.
- h. It was appropriate, in view of JS's complex needs, not to place him at Wayland School but to carry out an assessment. Once a school was identified, because of JS's SEN difficulties, he was gradually introduced to the school.
- i. Moreover, to have introduced him more quickly, may have jeopardised his re-integration into the mainstream school. It is quite clear that all pupils, whether disabled or not receive the same level of VTS, unless they have been excluded from school or are at Key Stage 4. He was not included in the group sessions as the RB

considered such a placement may have jeopardised the small steps approach

(iv) If so, would the RB have treated in the same way someone to whom that reason did not apply?

j. JS's disability contributed to his special educational needs. We had regard to "*M School v CC, PC and another* [2003] EWHC 3045". On the basis of this decision we are satisfied that a pupil without JS's difficulties would not have been treated in the same way. The very reason for his treatment was his complex special educational needs, including his disability and particularly his history of school attendance and school phobia.

(v) Was the treatment justified?

k. We had regard to *Jones v Post Office* [2004] EWCA Civ 558. We are satisfied that the RB treatment was entirely justified given JS's complex social, emotional, physical, medical and educational history.

l. We are satisfied that JS was not discriminated against within the meaning of the DDA.