

CO/5379/2004

Neutral Citation Number: [2005] EWHC 1580 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 4 July 2005

B E F O R E:

MR JUSTICE STANLEY BURTON

THE QUEEN ON THE APPLICATION OF W

(CLAIMANT)

-v-

(1) THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL

(2) THE LONDON BOROUGH OF HILLINGDON

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR D WOLFE (instructed by Douglas Silas Solicitors, Central House, 1 Ballards Lane, Finchley, London N3 1LQ) appeared on behalf of the CLAIMANT

MR A SHARLAND (instructed by Borough Solicitor, London Borough of Hillingdon, 3E/04 Civic Centre, High Street, Uxbridge UB8 1BW) appeared on behalf of the DEFENDANT

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE STANLEY BURNTON: This is an appeal by the claimant who is the mother of J from the decision of the Special Educational Needs and Disability Tribunal dated 5th October 2004. The appeal turns on a relatively circumscribed area of evidence before the tribunal and what, in the great picture, might have been regarded as a subsidiary issue before the tribunal. J was due to pass from his primary school, the name of which was Meath School, to a secondary school. There was a dispute as to the appropriate secondary school for J, having regard to his admitted special educational needs. The local authority contended that Penn School, which was a local authority school in I think Penn and presumably out of Hillingdon's area, could meet Jonathan's special educational needs. The claimant contended that J needed a waking day curriculum and that the appropriate school for him was St Mary's School which was a residential school.
2. The issues before the tribunal therefore were, at least in the first place, whether either or both of these schools could meet Jonathan's needs. There was then a secondary question, which ultimately was the decisive question, and that was whether, if both schools could adequately meet Jonathan's special educational needs, the additional costs of St Mary's School, where the school costs would be higher because it was a residential school, meant that those additional costs would amount to unreasonable public expenditure sufficiently great to justify the local authority's decision that Penn School should be the school identified in his Statement of Special Educational Needs as the school to which he should go for his secondary education.
3. The tribunal decided that both schools could indeed meet Jonathan's special educational needs. They gave reasons for that in paragraph B of their decision, and there is no appeal from that decision or relating to it.
4. The tribunal therefore had to consider the relative costs of the two placements. In both cases, there was an element of special transport (by which I mean transport other than ordinary public transport). In the case of St Mary's, the school itself provided some transport to specific locations, but there would be a cost of collecting and, on return, delivering J from and to that location. So far as Penn School was concerned, there would be the daily cost of transport from Jonathan's home to the school and back. It was common ground that that transport would be by way of what in argument was referred to as a taxi but presumably some form of either taxi or private car hire with a driver.
5. So far as the respective costs are concerned, the facts set out in the decision were as follows:

"7, the total annual cost to the LEA of a residential placement for J at St Mary's, including the costs of transport, is £34,590. That was undisputed.

"8, the total annual cost to the LEA of a day placement at Penn School was disputed. The annual cost of a day placement in isolation was undisputed at £21,299. The LEA submitted that to this figure should be added the cost of transport of £4,290 annually and the further cost of two

extended days that J would attend, of £1,000 annually. The total annual cost, according to the LEA's calculation, would be £27,289. The LEA further submitted that the difference of £7,201 would give rise to unreasonable public expenditure.

"9, the claimant accepted the stated cost of the day placement. She doubted that the costs of the extended days was as stated, although there was no challenge by way of evidence. She further submitted that J would require an escort. Her estimated costs of travel for J to attend Penn School were in the region of £10,000 for a taxi (based upon figures provided by her father, a taxi firm owner) and £3,900 for an escort (helpfully calculated by Mr Flower). Mrs Walker's submission, in short, was that the cost to the LEA would be greater if J was sent to Penn School than if he was sent to St Mary's."

6. Mr Flower, referred to in the last of those paragraphs from the decision, is an educational psychologist who had prepared a report on J which was before the tribunal.
7. In paragraph B of its reasons, as I have already mentioned, the tribunal gave its reasons for rejecting the contention that J required a waking day curriculum. In doing so, it decided not to rely on the evidence of Mr Flower which was based on what the tribunal described as "a very short observation lasting some 45 minutes", and was, on any basis, based on a very modest observation of him from which to make reliable recommendations as to his educational requirements.
8. The relative costs of the two placements were addressed in paragraph C, which reads as follows:

"So far as the cost of placement is concerned, we accept the evidence of the LEA in its entirety. The costs provided were based upon actual costs chargeable to them. Mrs Walker's evidence to the contrary was speculative. In particular, we did not accept that J's requirement for an escort would have the effect upon costs that she stated, but that too was suppositional. In any event, we were not persuaded that an escort was necessary. An assertion that J needed adult supervision because he could be violent was based upon nothing more than supposition, as finally accepted by the claimant. Further, such behaviour on the part of J had not been the experience of Meath School."

9. In paragraph D, the tribunal concluded as follows:

"Taking all of the circumstances into account, including J's travelling time, his two extended days and Mrs Walker's clear representation, we were of the view that the additional cost to the LEA of a placement at St Mary's school rather than at Penn School, being £7,290, would amount to unreasonable public expenditure."

10. Thus, ultimately the calculation of the cost of transport was crucial to the decision of the tribunal.
11. Mr Wolfe's principal criticism of the decision of the tribunal focuses on the last three sentences of paragraph C. One of the crucial issues was whether an escort was necessary and, if so, what the cost of that requirement would be. An escort would only be necessary if J's behaviour while in a car or a taxi was such as to justify it. The tribunal clearly considered that there was nothing to indicate a need for such an escort. In fact, as is common ground, while travelling to and from his primary school, the Meath School, J had been accompanied by an adult escort; that (explained the LEA) was not because he had demonstrated any violent or other behaviour indicating the need for an escort, but because it was the standard policy of the LEA to provide an escort for children who attended primary school by reason of their age. So far as secondary school was concerned, an escort would be provided only if necessary and, as I have said, that would depend on the expected or anticipated behaviour of a child if unescorted in a vehicle with other children and only a driver.
12. The reasons given by the tribunal would seem to indicate that there was no evidence of any proclivity to violence on the part of J. The tribunal had before it a very large bundle of documents, I am told that there were more than 500 pages, and it is one of the disadvantages of proceedings such as those before the tribunal and indeed an appeal of this kind that one does not necessarily know what reference was made to any particular item in such voluminous evidence.
13. But there were two documents which referred to violence of one kind or another. The first, and perhaps the most important, was contained in the Annual Review dated 5th March 2004 from Meath School relating to J. It is the Class Teacher's Report. Generally speaking, it is very positive about J, referring to him as "a good-natured, co-operative member of class, generally working well, cooperating when he is working with an adult as part of a small group".
14. At page 2 of that report, however, his class teacher said this:

"He is sensible and co-operative towards adults and responds well to reminders about getting on with his work or tidying up. However, he can become cross or frustrated on occasion and he will sometimes resort to hitting himself or talking to himself. He is usually easily distracted from this behaviour by comments or help from an adult."
15. The second item of evidence relied on by Mr Wolfe on behalf of the claimant is the report of Mr Flower. This part of Mr Flower's report does not set out his own assessment but purports to set out information obtained from the staff at the Meath School. The relevant passage is as follows:

"They [that is to say the staff at the school] noticed that J displays a considerable number of autistic type behaviours including a rigid literal understanding of language, very poor social understanding and an inability to make friends. He is very isolated and does not play with the

other students. If supported by an adult, he can play with students he likes. With students he does not like, he has a violent reaction. At Meath School, this reaction is pre-empted because the staff know the likely trigger points in the peer group. There is concern that this behaviour may be a problem at his next school if it is not quickly sorted out."

16. Mr Wolfe submits that the reasons given by the tribunal for rejecting Mrs Walker's evidence and case on the costs are inadequate but, more importantly, the evidence to which I have just referred (that is the school report and the extract from Mr Flower's report) are inconsistent with the last part of paragraph C or rather that the last part of paragraph C would indicate that the tribunal either ignored or misunderstood that evidence. If that is so, the question then arises whether the decision of the tribunal should be quashed.
17. For the LEA, Mr Sharland submits that the reasons given by the tribunal in paragraph C were entirely adequate, and that read favourably, as they should be, and bearing in mind that summary reasons are sufficient, the reasons are indeed sufficient, the result was rational and does not give rise to any good reason to interfere with the decision of the tribunal.
18. I have to say that I have not found this issue entirely easy and my mind has wavered during the course of the hearing. I also have to say that, to my mind, the source of the difficulty with this part of the decision of the tribunal is that it did not set out clearly what were the issues as to cost before the tribunal and the evidence on those issues.
19. The first issue was what would be the cost of transport to Penn School, assuming no escort. The LEA submitted that the figure was £4,290 annually, with an additional £1,000 for the two extended days that J will attend. The basis of the calculation of the £4,290 is not set out in the decision. I have not seen any document that was put before the tribunal which showed any calculation.
20. It was suggested on behalf of the LEA that the £4,290 is a share of the cost of -- let us call it -- a taxi between Penn School and J's home and the area about it. It is relatively clear that there were other children from the same vicinity as J who would be going to Penn School in any event. I say that not because that appears clearly in any part of the decision, but because there is a reference to sharing in an e-mail received by the claimant from the LEA shortly before the hearing.
21. Mr Sharland suggested that the figure of £4,290 was, if there were to be four students, one-quarter of the cost of transport. If that is so, assuming that the other three children and the vehicle would in any event be going to Penn School, that was an incorrect figure to put before the tribunal.
22. The appropriate basis for the comparison of costs to be incurred by an LEA as between two different educational establishments is a marginal or additional cost basis; that is to say, if, for example, there is already a vehicle travelling between the vicinity of J's address and Penn School with three children, and the cost of that transport is £20,000 a year, and there is no additional cost for taking a fourth child, the cost of the transport to

Penn School for the purposes of the tribunal's decision is zero. It follows that to take in such a case a quarter of the cost of the transport is an error.

23. However, I have nothing before me to show that that was the basis on which the £4,290 was in fact calculated. For all I know, the transport is provided by a transport company which charges on a per capita basis. I therefore decline to regard the figure of £4,290 as not being an accurate figure for the purposes of the tribunal's decision. That discussion of itself demonstrates some need for greater clarity as to the basis of cost examined by a tribunal and reflected in the tribunal decision.
24. The next issue that was before the tribunal was whether an escort would be required and, if so, what the cost of the escort would be. There were two elements of cost to be addressed: the cost of the escort as a person (that it seems was accepted would be £3,900 a year, a figure calculated by Mr Flower); then there was a second question as to whether, if an escort were required so that J's journey to Penn involved not an additional passenger but two additional passengers, an additional vehicle would be required. If the maximum capacity of a vehicle were five persons, including the driver, and if there were already three pupils travelling to Penn School, clearly two additional passengers would mean an additional vehicle, unless there was another vehicle available which could take more than five persons.
25. That there was discussion before the tribunal as to whether or not an additional vehicle would be necessitated by the provision of an escort appears not from the decision itself, not from any description of the issues in the decision and not from the reasons given by the tribunal, but from Mrs Walker's grounds of appeal.
26. Of course a decision such as this is intended to be read by informed parties (that is to say, parties who have been present at the hearing and have an appreciation of the issues that were addressed), but it is also to be read, in the event that there is an appeal, by this court. It is necessary for the court to be able to see sufficiently what issues were addressed and how they were resolved by the tribunal. It is not possible, as I have already stated, from the decision itself to see that there was argument about the number of vehicles that would be required. It would have been relatively simple for the tribunal to have set out the issues in the way I have suggested, namely (1) what would be the cost of transport if J were to go without an escort? (2) what would be the cost of an escort? (3) would an additional vehicle be required and, if so, what would its costs be? Had those issues been set out, one would have seen, I suspect with some ease, how the tribunal came to its decision.
27. It was I think Mrs Walker's contention that there would be an escort plus J that led to her contention that there would be costs of travel of £10,000.
28. The next question that came for decision was whether an escort was in any event required. Before doing so, I should address the two sentences in paragraph C:
29. "Mrs Walker's evidence to the contrary was speculative. In particular, we did not accept that J's requirement for an escort would have the effect upon costs that she stated, but that too was suppositional."

30. That I think was a reference to her suggestion that the requirement for an escort would mean an additional vehicle and therefore there would be a very great increase in transport costs as against that which would be incurred without an escort.
31. I turn now to the question whether the tribunal dealt adequately with the need for an escort. There was no evidence before the tribunal that J had ever been violent during the course of travel to the Meath School. Against that, he had always been accompanied by an adult; so that the inference to be drawn from that was not the inference that might otherwise have been drawn.
32. The tribunal stated that the assertion that J needed adult supervision because he could be violent was based upon nothing more than supposition. If I ignore the following words of that sentence, it is difficult to reconcile that passage with the two items of evidence relied upon by Mr Wolfe.
33. It is true that Mr Flower referred to second-hand evidence that J, with students he does not like, has a violent reaction, and a violent reaction is not necessarily the same as violence, although it may be. That evidence suffered from the weakness that the source of the information was not named and its meaning unclear. Nonetheless, it is evidence I should have expected the tribunal to address, particularly having regard to the next sentence in Mr Flower's report, which is that at Meath School that violent reaction is pre-empted because the staff know the likely trigger points in the peer group.
34. The school report does not refer to violence toward any other student, and that in itself might have been a reason for disregarding what Mr Flower had to say. But it does refer to J sometimes resorting to hitting himself when he is cross or frustrated. Violence of a child to himself may be such as to justify an escort; no doubt much depends on the frequency and the type of violence concerned. One would, however, on any basis, expect a tribunal to address that evidence and form some sort of view as to its effect. I do not find any reference to that evidence in the decision. To the contrary, there is a statement that such behaviour on the part of J had not been the experience of Meath School. If that is a reference to his behaviour while travelling to and from Meath School, that is entirely accurate. But that is not quite what the last sentence says. The experience that is referred to is of Meath School, and I would read that as being the experience of Meath School of his behaviour at the school, and that did indicate a tendency to violence at least to himself.
35. There are, finally, the six words which I have not referred to in the penultimate sentence of paragraph C, "as finally accepted by the claimant", and the difficulty I have with that is to understand what was accepted by the claimant, given that her concerns did have the support of the two items of evidence to which I have referred.
36. I said earlier in this judgment that my mind had wavered in this case, and I am by no means assured that the tribunal did not properly address the evidence before it, but its reasons do not indicate that it did. The reasons indicate to me that they disregarded those items of evidence to which I have referred and, if that be the case, they arrived at their decision without having regard to that evidence, they rejected Mrs Walker's

evidence without having it in mind and regrettably I find that the decision should be set aside.

37. MR WOLFE: I am grateful, my Lord. In which case I would ask for an order that the appeal be allowed, the decision be quashed and remitted back to a fresh tribunal for consideration, in accordance with the discussion we had just before lunch, and for an order that the authority pay the appellant's costs, to be assessed if not agreed.
38. MR JUSTICE STANLEY BURNTON: I do not think you can oppose any of that, can you?
39. MR SHARLAND: I am not seeking to, my Lord. I am very grateful.
40. MR JUSTICE STANLEY BURNTON: Thank you very both very much. As I indicated, although the point was short, I did not find it straightforward.
41. MR WOLFE: In the light of that, I also need a public funding assessment.
42. MR JUSTICE STANLEY BURNTON: Of course. Thank you.