

Decision

Date of Birth: 2009
Appeal of: The Parents
Type of appeal: Disability Discrimination Claim
Against: The Responsible Body of School
Date of hearing: 2022
Persons present: The Parent *Parent*
The Responsible Body Legal Representative *RB Counsel*
The Responsible Body Witness *Head Teacher*

1. **Application** - This claim for disability discrimination, dated the 2022, is brought by the parents in respect of their child against the Responsible Body of School (the school).
2. The Parent represented themselves. The other Parent did not attend. The school was represented by Counsel.
3. **Evidence and Law** - In reaching our decision we have taken into account all of the evidence we have read and heard, sections 6 and schedule 1 of the Equality Act 2010, and the associated Guidance. The papers we have in this case are contained in a large number of separate bundles with separate numbering. Identifying where documents are has therefore been problematic but we have endeavoured to identify where the documents that we considered important are located.
4. **Preliminary Issues** – On a date in 2022 the Tribunal directed that a hearing should be listed to consider some preliminary issues in this case. Those were set out as follows:
 - a) Whether the Child has a disability within the meaning of the Equality Act 2010.
 - b) If the Child has a disability within the meaning of the Act, when was the first date that the school were aware of this fact.
 - c) Whether the claim has been brought out of time.
6. **Introduction** – The Child is 13 years of age and should be in Year 9 at school. The Child lives with their sibling and parents.
7. **The Parent's Case** - We note that in the application form in this case the Child's difficulties are described as follows:

“EXECUTIVE FUNCTIONING DEFECIT, HEIGHTENED SENSORY ISSUES, SOCIAL INTELLECTUAL INCAPACITY-SCORES AS EXTREMELY LOW. EXTREME BEHAVIOURS AT HOME, NEURODEVELOPMENTAL CO-MORBID MENTAL HEALTH PROBLEMS, IE. PSYCHOSES, EXTREME ANXIETY. LITTLE AWARENESS OF DANGER. TURNS DAY AND NIGHT AROUND, DOES NOT FUNCTION WITH DAY TO DAY ACTIVITIES, NOR TAKES ON AGE APPROPRIATE RESPONSIBILITIES. OBSESSIVE COMPULSIONS, CONCRETE IDEAS.”

8. The allegation of discrimination made is described in the claim form as follows:

“CONSTRUCTIVE EXCLUSION BY NOT ACKNOWLEDGING THERE WAS EVIDENCE OF SEND DESPITE MY PROVIDING EMAIL AFTER EMAIL OF EVIDENCE WITHIN AND OUTSIDE OF SCHOOL SETTING”

9. Disability discrimination claims had to be brought within six months of the date of the act of discrimination relied upon. The focus of attention therefore has to be upon the period between a month in 2021 and a month in 2022.

10. **The School's Case** – It has been submitted on behalf of the school that the parents have not provided adequate evidence to establish that the Child is disabled within the meaning of section 6 of the Equality Act 2010. Further, that the parents have not even identified, with expert evidence, the disability that the Child is said to have. Secondly, it was submitted that if the Tribunal considered that the Child is disabled, the school was first put on notice of this on or around a date in 2021 when the parents asked the School to treat the Child as though they have Autism (ASD). And thirdly it is submitted that the claim was filed on a date in 2022, but the last incident complained of by the Appellant was on a date in 2021 and that the claim is therefore out of time, and the parents have not provided any basis upon which the Tribunal can properly consider an application to extend time.

11. **The Law** – The Equality Act 2010 provides as follows:

Section 6. Disability

(1) A person (P) has a disability if—

(a) P has **a physical or mental impairment**, and

(b) the **impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities**.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1 Part 1

1 Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term. Substantial adverse effects Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

12. The question whether a person has a disability within the meaning of the Act (including whether it is likely to recur) must be considered at the time the acts complained of occurred, not the time of the hearing – see *Richmond Adult Community College v McDougall* [2008] EWCA Civ 4 and *DR v London Borough of Croydon* [2010] UKUT 387 (AAC).
13. **History** – In the papers (the Bundle of Documentation received following Directions dated 2022) we can see that the parents were raising concerns about the Child's behaviour from as early as a month in 2017. (The document is a letter referral from the Child's GP which outlines the history being provided at that time.)
14. On a date in 2020 the Child was to transition from their primary school to the School. The Parent emailed the School in mid 2020 saying the Child had difficulties at home and primary school. The School contacted the primary school and were told there were no issues seen at school, all were related to events occurring at home and referring to anxiety and mental health with CAMHS involvement.

15. Within the bundle there is a document signed by a Doctor, clinical psychologist, dated the 2020. The Doctor appears to have been investigating the Child having “intrusive” thoughts. It contains the following:

“The Child reported that they did use to experience thoughts but no longer did.”

“The Parent reported that the Child no longer required reassurance and did not report any intrusive thoughts. The Parent described problems that appear to stem from more of a behavioural basis as opposed to any underlying mental health disorder.”

16. Information was passed from the Childs junior school to the School prior to the Child starting year seven. It is dated 2020. It stated as follows:

“The Childs Big concern - mental health- anxiety. Behaviour problems at home, possible underlying ASD/ADHD, difficult to tell. Anxiety. Under the care of paediatrician and CAMHS - been escalated during lockdown, also daily contact from school during this time where the Child has spoken about self harm and suicide. The Child is struggling now to take care of themselves (washing, brushing hair etc). School was going to get Resilient Families involved but CAMHS will support instead.”

17. Some special measures were put in by the School to support the Child to transition into the school. The Child had 1:1 meetings with the assistant head of year on Mondays and Fridays for a period.

18. At this time the Parent wanted the school to put in place a system of discipline for the Child to ensure that the Child took responsibility for things the Child was not doing at home, like cleaning their teeth, brushing their hair and getting dressed. The school began to be concerned about the number of emails being sent by the Parent. They spoke to the Parent, who did not indicate that there were any concerns beyond organisation at home. The focus from both parents therefore seems to have been difficulties with the Child at home.

19. Although the Parent reported that the Child was having some difficulties in coping with the transition to secondary school, the Child attended well and there were no issues raised about the Child while they was at school. The Childs presentation and functioning at school did not suggest to staff that they had any form of disability.

20. On a date in 2021 the Parent asked the School to treat the Child as though they are autistic.

21. On a date in 2021 a referral was made by the school to the neurodevelopmental team, which is an appropriate response in terms of investigating whether the Child may be autistic.

22. In Emails dated 2021, at page in the bundle (the Bundle of Documentation received following Directions dated 2022), there are references to a referral to

an Educational Psychologist. Guidance was sought by a member of staff in relation to this and other support was offered by a member of staff at the school. There is a report and a follow up from an EP within the documents we have, however, to which we will refer later.

23. In a chronology within the bundle (the Bundle of Documentation received following Directions dated 2022) there is a reference to a school referral as follows:

“School had confirmed on a date in 2021 that they had made a referral to NDT and were aware of concerns raised by the Parent regarding possible ASD.”

24. Since a date in 2021 the Child has not been at school. During 2021 the school made three separate applications to EOTAS (Education Otherwise Than At School). The third was accepted and a place made available for the Child.

25. The Parent sent an email to the school on a date in 2021. In it the Parent made reference to the Child's sleeping difficulties, made a request for intervention from an Educational Psychologist (EP) and also stated: *“...the system isn't set up to recognise children with autism & ADHD because their aggression is in the home, but it doesn't make it less real”*

26. The Parent also raised the possibility of OCD. At a page in the bundle (Doc 6) there is a letter from a Specialist Family Therapist, of CAMHS, dated a date in 2021. From that letter we note the following:

“The Child was seen for assessment in CAMHS on a date in 2019. The Child was referred in relation to queried OCD symptoms and behavioural difficulties.

Family therapy

“This commenced on a date in 2019, and continued until a date in 2021. A total of 12 sessions were offered, of which nine were attended, three were not of which two were not explained.

Initial sessions established that the work would offer support for the Parents, as the family felt the Child had no desire to engage and became distressed in sessions when they did. Family therapy took the form of child focused intervention, wherein although the young person is not the recipient of the treatment, they would be the beneficiary.”

“As the Parents continued to raise concerns about OCD, a referral was made to psychology. My colleague saw the Child and the Parent commencing mid 2020 for seven sessions ending at the end of 2020. The Doctor concluded the Child's difficulties did not meet criteria for OCD...”

“Following the pause in NVR work, we contracted again to focus for a specific number of sessions specifically to embed NVR principles and

plan how to apply the ideas at home. My recommendation was to set aside suspected medicalised causes for the Childs difficulties and focus instead on the relational impact. Essentially, we agreed to accept the Child as the Child, and to modify the Parents approach to parenting the Child. That was to allow the family to get the most out of the family therapy. Despite these fresh starts, unfortunately the Parents efforts seem to have proven unfruitful at that time. This effectively drew family therapy to a close on at the start of 2021.

To investigate further concerns including psychosis raised by the family, a mental state assessment was carried out in mid 2021. Please see letter dated mid 2021 from my colleague relating to that outcome. No indication of mental illness was found. Following this a Multidisciplinary Team meeting recommended community based work to support the family and discharge from CAMHS.”

27. It is clear from this letter that there was significant involvement and assessment from a psychological and psychiatric perspective between 2019 and 2021, but that no underlying disability was revealed. We note that the Child did not engage in some of the work. We note that relationships within the family and parenting became the focus.

28. A referral to social services was made in, it appears, mid 2022. It includes the following information from the school:

“I am increasingly and significantly concerned for both of the children. The behaviours we have experienced from the Parent are erratic, at times nonsensical and increasing. I feel that issues faced by the family and the level of engagement from the Parent with the school and with the children could have a significant and detrimental impact and effect on the social and emotional growth and development of both children.”

29. The notes of a Strategy Discussion held on a date in 2022 contains the following:

“The Child stays in two small rooms in the house no natural light, not eating and drinking properly.

The Child has not attended school for approximately one years.

The Child is currently open on a Care and Support plan basis due to concerns regarding their behaviour and parents management of this.

Parents are firm in their view that the Child has ASD and are reluctant to engage in any support that is not specifically targeted to ASD individuals.

Concerns linked to the Childs disabilities are all self reported from the Parent, professionals have not been able to engage with the Child.

An initial Child Protection Conference was held at the start of 2022 due to concerns that parents behaviour and responses to the Child are contributing to the Childs issues. The decision was made at that time not to register, due to a gap in the information available at that time.

On a date in 2022 children services received a telephone call from the Welsh ambulance service raising concerns regarding the situation at the home. Ambulance staff were so concerned regarding the home situation that they called social services from the address.

They had been called following the Child 'screaming' from their room. The Parent was concerned the Child had self-harmed – though there is no clear reason as to why the Parent suspected this. It transpired the Child had screamed due to frustration regarding making a costume.

When social workers attended and discussed the situation with family, the Parent began rolling on the floor crying.

Significant concerns surrounding the Parents presentation.

There are concerns that information reported by the family is not always consistent.

Concerns the situation at home is having a significant impact on the Child.”

30. In a report compiled under section 47 of the Children Act 1989 Social Services states as follows:

“Parents not accepting any form of help and support and have become preoccupied with wanting specialist help and stating that the Child has ASD, OCD and mental health issues. CAMHS have spoken to me at length regarding their involvement and the fact being that at the time of their involvement there are no mental health issues and parents need to change and adapt the way they respond to the Child.

The Child who is able to attend School, it is reported that there is nothing to suggest that the Child cannot attend a mainstream setting and the Child just needs to come to School.”

31. On a date in 2022 a request was made by the parents for a “parents evening call” in respect of the Childs “needs relating to autism”. The parents state that this request was ignored. This request needs to be seen in the context of the assessments and involvement of professionals described above.
32. The Child remains the subject of an assessment by the neuro development team, but as we understand the position that this is yet to be completed.

33. In the minutes of a Strategy meeting dated the 2022, attended by a number of professionals involved with the Child, it is confirmed the Child was referred to paediatrics for behaviour issues in 2013 and 2018 but was discharged. In the Bundle (the Bundle of Documentation received following Directions dated 2022), which appears to be a continuation of the minutes, the following information appears:

- i. *“The Childs predicted grades following primary school and first term of comp were A's and B's.*
- ii. *The Child engaged well in online sessions and there were no concerns in work produced. School described the Childs engagement with home learning over lockdown as excellent despite the reports of the Parent.”*
- iii. *“School have offered phased return, reduction in timetable and lots of other support when appropriate for the Child.”*
- iv. *All leading parties present (Children's Services, Health, CAMHS and School) agreed that a fabricated illness start needed to be explored- this would be led by health.”*

34. **Reports** – A Consultant Child and Adolescent Psychiatrist of CAHMS carried out an assessment of the Childs mental health on a date in 2022, and the Consultant discharged the Child. The Consultants report states:

“My impression is that the ASD assessment should be carried out as the outcome will be important to put in place a care package for ongoing support. There are currently behaviours suggestive of ASD, but the assessment will be challenging as some professionals views of the Childs early life presentation, including therapists from CAMHS, have not fully supported this diagnosis. On my visit I observed behaviours that would support the ASD assessment. I explained to the Parent that at present there is no role for CAMHS as the Child would not engage due to their views about the service and I am not sure what CAMHS would be able to offer at this stage anyways.”

35. It also contains the following reference to a self-stimulating behaviour by the Child:

“hand flapping, which is a behaviour I would not expect to see in adolescents with an ASD diagnosis, unless they had shown severe traits as a younger child.”

36. The Doctor report is dated 2022, and therefore postdates the events with which we are concerned. It does demonstrate, however, that there is still significant uncertainty as to whether in fact the Child has a disability and whether a diagnosis can be attached to any symptoms the Child has.

37. We have examined the reports from the Childs primary school and these are positive about the Childs performance at school, including the Childs ability to

socialise and have a friendship group. These cover years 4,5 and 6. They contain no indication of additional learning needs. The School mid-autumn term progress report at year 7 in the School shows the Child was achieving well, and we note the projected grades for the Child in year 7 which are A's and B's predominantly, with 1s and 2s for effort. We note that the Child's attendance in the 1st year at the School was initially 96%. During lockdown the Child responded well to lessons at home and the Child's attendance at those lessons was significantly higher than the average. In the third term of year 7 the Child's attendance began to drop off. During the first half of the term it was 56%, and in the second half of the term it reduced to 14%. The Child did not return into school in year 8.

38. In addition to the information and reports set out above we have a report from a trainee educational psychologist, under the supervision of an Educational Psychologist, dated 2022. This assessment did not involve the Child at all. It is largely based upon the reports of the Parent. There is some input from school regarding the BRIEF 2 (Behaviour Rating Inventory of Executive Function), but this is limited given that the Child had not been at school since the end of 2020, partly as a result of the Covid 19 lockdown. There was no triangulation from any other source, and in particular from the Child's primary school. The second assessment, the ABAS (Adaptive Behaviour Assessment System Third Edition (ABAS3)) is solely based upon the Parents report. We do not therefore consider that this is an adequate assessment of the Child, and hope that the neurodevelopmental team assessment will clarify the position in due course. At present, however, we do not think this report is reliable evidence to establish disability.
39. We have also been provided with a report by an Occupational Therapist, following a home visit carried out in early 2022. The visit did not involve the Child. All the information supplied came from the Parent. There was no triangulation. We again have concerns about the reliability of the conclusions arrived at as a result.
40. **Current Position** - We were told by the Parent that the Child continues to have severe problems. The Child has never attended EOTAS, which has been available to the Child from mid 2022. The parent says that the Child will only attend if they can wear a disguise, including a wig. It appears that the Child is having some education via home tutors, but does not feel able to attend at an educational institution at present.
41. **Analysis** - It has been very difficult from the written or oral evidence provided by the Parent to understand what the basis is for their criticism of the school. This can be seen from the initial application as set out in paragraphs 7 and 8 above. In terms of disability a number of diagnoses have been suggested to, and rejected by, professionals: for example psychosis has been examined and rejected, OCD has been examined and rejected, and mental health issues have been raised and rejected. There is still an outstanding neurodevelopmental team assessment, and we were told by the Parent that they understand there is a further 12 months to wait for this to be carried out.

42. In their evidence the Parent told us that what they initially wanted from the school was for it to “come on a journey with the Parent” to investigate what the problem was with the Child at home. There was no evidence at this time, from the papers and the information we have, that there was an issue at school. In particular, we note that self-care was not an issue at school, and checks upon the Childs organisation did not reveal that the Child was struggling. It may be that the Child was masking this, as suggested by the Parent but this only underscores that there was a lack of evidence demonstrating problems with organisation in the school setting. This of itself evidences that at the start of the Childs school career at the School there was no evidence of disability or “substantial impairment”. Neither were any flagged up during the Childs attendance at their primary school. The investigations which have taken place subsequently have not provided clarification to date.
43. As to the Childs behaviour at home, this is clearly beyond the educational remit of the school. It is difficult to understand what the Parent expected the school to do. The Parent was suggesting that there should be punishment by means of detention if the Child did not arrive at school on time, for example. It is difficult to understand how this would have improved the situation at home. It appears to be a request for parenting by proxy.
44. **Conclusion as to Disability** - What matters for this preliminary decision is whether it can be shown on the evidence that the Child had a disability, within the meaning of the Act, at the time of the alleged acts of discrimination. The Parent accepted at the hearing that the Parent was in difficulties establishing this. The Parent also accepted that they was in difficulties establishing that the school knew that the Child had a disability, as opposed to the matters the Parent was raising with the school, but which were not apparent at school.
45. We are concerned that the focus of the Childs difficulties appears to be at home. That is where the behaviours appear to have been occurring. We note the involvement of Social Services because of the concerns about the Child. We note that the Parent has asked for the Child to be assessed for mental illness (psychosis), OCD, ASD, Executive Functioning difficulties, sensory difficulties and issues about gender dysphoria. We note that although these have been rejected by professionals, some are still included as relevant within the claim form completed by the Parent. The Parent now asserts that the Child suffers from Pathological Demand Avoidance (PDA).
46. We have noted from the papers a suggestion that the possibility of Factitious Illness should be examined. The Parent, we thought, had a somewhat unusual affect when giving their evidence to us. We were concerned that the Parent seemed to be smiling and almost enjoying the experience, rather than displaying the degree of anxiety and nervousness we would anticipate of a parent in their position. We are not qualified to come to any conclusion as to whether this is of significance, or as to whether it is the Childs parenting that has been the primary driver of the Childs difficulties. We raise these matters as they were notable to us. They did cause us, however, to be concerned as to the reliability of the Parents evidence, both before us, and overall. It appears from the papers that the Parent has been the driving force behind this claim, and

behind suggestions that the Child has a diagnosable disability. Other professionals have raised concerns about the Parents approach. If what the Parent says is unreliable, it calls into question the information about the Child and their functioning.

47. Taking all of the evidence available to us into account, including the Parents evidence, and bearing in mind that the burden of establishing that the Child had a disability at the time that the alleged discrimination occurred lies on the parents, we have been unable to conclude that the Child did have a disability at that time. Indeed, upon the evidence that we have we are not persuaded that there is sufficient evidence to establish that the Child has a disability now. It may be that further investigations will reveal that the Child does have a disability, and we acknowledge that as a possibility. That does not assist us now, however.
48. In addition, we have had great difficulty from the evidence that we have in establishing what acts of discrimination are alleged, and when these are said to have occurred. This is important as it is when the acts occurred that we have to judge whether the Child had a disability. We have also had in mind that if the Parent could establish a continuing course of discriminatory conduct on the part of the school, then the normal six-month time limit would not apply. Unfortunately, the evidence we have comes nowhere near supporting such a course of conduct.
49. **Did the school know that the Child had a disability?** Given our primary conclusion that disability has not been established here we do not need to consider the other preliminary issues. For the sake of completeness, however, we think it is appropriate that we do so.
50. It is not clear from the way that this claim has been put, which sections of the Equality Act 2010 are relied upon by the parents. Some of the sections of the Act require knowledge of the existence of the disability to found liability on the part of the school. The information that was provided to the school was confusing and contradicted by what the school saw of the Child. The Child appeared to be a bright child who was capable of achieving good grades. The Childs attendance at school prior to the Covid 19 lockdown was good. The Child applied themselves to remote lessons better than their peers. The Childs behaviour at school was not a concern when the Child was in attendance. The Parent did not confirm the difficulties suggested by the Parent when they were asked for their view in 2020. The school received no expert evidence to confirm disability at the relevant time. (The earliest expert reports are dated early 2022). The Parent had been sending the school emails, but we do not find that these constituted, or contained, any sufficient evidence to establish that the Child had a disability, particularly in the context that the school were seeing no evidence of disability at school.
51. **Claim Brought in Time** – In terms of the timing of allegations, and whether they have been raised within time in this claim, it is very difficult to understand from the way that the Parent has put the claim when precisely events are alleged to have occurred. The Parent seems to be alleging that the school did

not enquire sufficiently, and did not engage with them appropriately. Precisely what omissions are alleged to have occurred, or when, is difficult to understand. We can see from the evidence that there are a number of occasions that the school did take steps to assist, by offering one-to-one support upon transition, ELSA, THRIVE and access to the wellbeing officer, for example. It also made safeguarding referrals, with the Parents knowledge, to see if other support could be obtained via Social Services. It made three referrals to EOTAS. We cannot, on the basis of this evidence, establish a clear timeline for the alleged acts of discrimination, save that from early 2021 the Parent asked the school to treat the Child as though they had ASD. The school responded to this by completing a neurodevelopmental team referral and sending it home for the parents to complete on a date in 2021. Once it had been completed the referral was forwarded on a date in 2021. That seems to have been an appropriate response which was clearly approved by the parents at the time in that they engaged with the process.

52. Although we do not need to consider the issue, given our other conclusions, we have concluded that it has not been established by the parents that this claim has been brought within the statutory time limit, and neither has any evidence been provided as to why it has not been brought within time so as to allow us to extend time.

ORDER: Claim dismissed

Dated November 2022