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Ref: **STE10158**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **31/01/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

LC and JC

Appellants:

-and-

THE EDUCATION AUTHORITY FOR NORTHERN IRELAND, NORTH EASTERN REGION

Respondent:

_____

STEPHENS J

Introduction

[1] I anonymise this judgment to protect the identity of a child.

[2] This is an appeal by case stated pursuant to Article 24 of the Education (Northern Ireland) Order 1996 by LC and JC who are the dedicated and deeply caring parents of a child, CC, from a decision dated 20 August 2015 of a Special Educational Needs and Disability Tribunal ("the Tribunal") about the educational needs of CC. The central issue for the Authority in making a statement of special educational needs for CC, and for the Tribunal in determining the appeal by CC's parents, was whether a special school ("School X") was an appropriate placement for CC in the light of her needs.

[3] Education and Library Boards are required to make and maintain statements of special educational needs and parents can appeal those statements to the Tribunal. A statement was prepared in relation to CC by the Authority which specified School X. Her parents appealed to the Tribunal contending that School X was not appropriate given CC's needs. The Tribunal in its written decision dated 20 August 2015 concluded that School X was an appropriate placement for CC under Article 16 of the Education (Northern Ireland) Order 1996. Article 24 of that Order allows an

appeal by way of case stated to the High Court. The parents requested, and on 9 November 2015 the Tribunal stated, a case for the opinion of the High Court. That case stated contained four questions as follows:

> "1. In finding that (School X) was an appropriate placement for (CC) did this Tribunal correctly apply the statutory test found in Article 16(4) of the Education (Northern Ireland) Order 1996?
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> 2. Did the Tribunal err in law by failing to consider all relevant evidence?
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> 3. Did the Tribunal err in law by giving manifestly undue weight to certain evidence?
>
> 4. Did the Tribunal fail to give adequate reasons for its decision?"

[4] The case stated came on for hearing on 20 April 2016. On behalf of the appellants it was contended that in respect of four issues the Tribunal had failed to determine what School X offered or what CC needed. On behalf of the respondent it was contended that those issues had been resolved by the Tribunal against the appellants and that was "implicit" from its judgment. In view of those conflicting submissions and the respondent's reliance on implicit, rather than express findings, the parties agreed that the Tribunal should be asked to answer a number of questions. That was done by letter dated 13 May 2016 and the Tribunal replied by letter dated 16 June 2016. The answers have not proved to be determinative of the case stated it still being contended on the part of the appellants that the Tribunal has failed to make factual findings resolving conflicts of evidence and accordingly could not have formed an assessment of what School X offers or of what CC needs. Accordingly, it could not have correctly applied the test as to whether School X is an appropriate school. In the alternative it was contended that the lack of express factual findings could mean that the Tribunal had arrived at an erroneous decision, failing to apply the correct test as to whether School X was appropriate for CC.

[5] On behalf of the appellants it was still submitted that the Tribunal had not resolved four issues so that the matter should be returned either to the Tribunal or to a differently constituted Tribunal. The appellants gave an undertaking in writing to this court dated 9 January 2017 that should this court find for the appellants and "as a result (refer) the case back to a Tribunal for rehearing, that (they) will only proceed at the said Tribunal on the grounds in respect of which the Court has found for (them)".

[6] The appellants were represented by Mr Eoghan Devlin and the Authority by Ms Roisin McCartan. I am grateful to counsel for the careful consideration which

they have given to the issues, for their assistance and for the tone of their submissions.

Legal Principles

[7] Article 16(4)(a) of the Education (Northern Ireland) Order 1996 provides in relation to a Statement of Special Educational Needs that:

> "(4) The statement shall— (a) specify the type of school or other institution which the board considers would be appropriate for the child."

The duty in Article 16(4)(a) is in practically the same terms as Section 324(4)(a) of the Education Act 1996 which applies in England and Wales. That section provides that:

> "(4) The statement shall— (a) specify the type of school or other institution which the local education authority consider would be appropriate for the child."

The only difference between the two statutory provisions is the reference to the board in Northern Ireland and to the local educational authority in England and Wales. The duty both in Northern Ireland and in England and Wales is to specify an appropriate school for the child. That duty was considered by Lord Justice Thorpe in *C v Buckinghamshire County Council and the Special Educational Needs Tribunal* [1999] ELR 179. He stated that:

> "… it is clear from Section 324(4)(a) of the Education Act 1996 that the LEA has a duty to ensure that a child with special educational needs is placed at a school that is "appropriate." It is not enough for the school to be merely adequate. *To determine if the school is appropriate, an assessment must be made both of what it offers and what the child needs*." (emphasis added)

The application of this test required the Tribunal to assess (a) what School X offered and (b) what CC needs. If what School X offers matches the needs of CC then it is appropriate.

[8] *In the matter of an application by TCM a minor for judicial review* [2013] NICA 31 Morgan LCJ stated at paragraph [29]:

> "We can deal briefly with the argument that the tribunal erred in comparing the appropriateness of the two schools rather than concentrating on the statutory question of whether St Joseph's College was unsuitable. That submission was largely based on a

> sentence in the tribunal's decision that the needs of the child would be best met in St Columbanus College. The courts have often made it clear that a tribunal decision ought not to be subject to an unduly critical analysis. A more recent statement of the general principle in the context of employment tribunals can be found at paragraph 26 of the opinion of Lord Hope in *Hewage v Grampian Health Board* [2012] UKSC 37.
>
> > "It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis.""

Applying those authorities and in considering the judgment of the Tribunal and its answers to various questions I seek to adopt a generous interpretation without unduly critical analysis.

The four issues

[9] The appellants contend that the Tribunal failed to assess what School X offered and what CC needed in relation to four issues. For convenience I will deal separately with each of those issues in this part of the judgment, though there is a degree of interaction between them. For instance CC's needs for social and emotional development may impact on the degree to which she is exposed to the risk of infection, given that more contact with other pupils will fulfil one need whilst at the same time adversely affecting her need not to be exposed to the risk of infection.

Epilepsy Management Plan and Emergency Management Plan

[10] The appellants suggest that School X does not offer an epilepsy management plan and an emergency management Plan and that CC needs such plans, given her condition, which may require the urgent administration of epilepsy medication to deal with dystonic episodes or epileptic seizures. Accordingly, the issues which required to be resolved by the Tribunal were whether CC required an epilepsy management plan and an emergency management plan, and if so, whether School X offered such plans.

[11] The appellants asserted that an epilepsy management plan and an emergency management plan were not in place at School X. The Tribunal was asked by letter

dated 16 June 2016 as to whether it had found as a fact that a care plan could be put in place. The Tribunal replied as follows:

> "Yes, the Tribunal felt that a care plan could be put in place and it was only the resistance of (JC) signing off on one that has stopped an updated epilepsy management plan and emergency management plan being put in place."

The Tribunal was also asked what the reasons for its findings were and they replied:

> "The wealth of expert medical evidence unanimously agreed that any trained person could administer the rescue medicine especially a trained Health and Learning Assistant who was assigned solely to (CC). The panel were also convinced that while Buccomadazole is not specifically used for dystonia, it would do no harm during a dystonic episode, it in fact could well help."

The Tribunal was also asked:

> "What impact, if any, did the Tribunal's finding in this regard have on its decision that School X was an appropriate school within the meaning of Article 16(4) of the Education (Northern Ireland) Order 1996?"

The Tribunal answered:

> "If (CC) suffered another seizure, which has not happened since 2011, the rescue medicine would have to be administered, whichever school she attended."

The Tribunal then went on to consider the administration of rescue medication at an alternative school and continued in relation to School X as follows:

> "CC's Health and Learning Assistant, and very many other trained members of staff, would be able to (administer the rescue medicine)."

[12] It was suggested that the Tribunal based its conclusions on the training which could be given to a Health and Learning Assistant, rather than that there was in place a trained assistant. The contention was that at the date of the Tribunal's decision, a correct assessment of School X was that it did not offer a trained assistant and that accordingly that School X, as at that date, did not offer what CC needed. It was not suggested that there would be any delay or difficulty in training an assistant. I consider that it is clear from the Tribunal's answers and from their earlier

judgment that what School X offered was the ability in an appropriate timescale to train an assistant and that is what CC needed. So in that respect what School X offered matched what CC needed.

[13] The answer from the Tribunal also makes it clear that all that was preventing an epilepsy management plan and an emergency management plan being put in place was the signature of CC's father, JC. The Tribunal's judgment also provides the explanation that the parents were insisting on administering the rescue medication themselves which meant that the management plans were still not signed off. It is not necessary to decide whether JC's signature is a pre-requisite to such plans being put in place, as it is clear that School X offers those plans and that the plans that it offers meets CC's needs.

[14] In relation to this issue I consider that the Tribunal has matched CC's needs to what School X offers. In relation to this issue I answer the first question in the case stated "Yes" and the remaining questions "No".

Physical interaction

[15] The appellants gave evidence before the Tribunal that continuing physical interaction provided by conductive education was one of CC's needs for educational development. Their evidence was that the level of physical interaction which was required by CC was both continual and prolonged. They also asserted that the physical interaction provided by School X did not meet CC's needs. Again this raises two issues for the Tribunal's determination namely:

(a) does CC have a need for physical interaction provided by conductive education; and

(b) if so then does School X offer such physical interaction?

[16] The Tribunal in that part of its decision dated 20 August 2015 entitled "Statement of Reasons" did not address those two questions. Accordingly following the hearing on 20 April 2016 the Tribunal was asked by letter dated 13 May 2016 a number of questions. I set out both the questions and the answers. They were as follows:

> "(a) Did the Tribunal find as a fact that intensive physical interaction on a continual and prolonged basis is an educational need for (CC) or not? What were the reasons for this finding?
>
> Answer. The Tribunal found that physical interaction is an educational need for (CC). Intensive, continual and prolonged are not helpful words, indeed continual and

prolonged contradict each other. The reasons for the finding was the evidence given by JC and by (another witness) and the fact that CC was brought to the hearing every day and we could see how she would need physical interaction.

(b) Did the Tribunal find as a fact that School X did not place primacy upon the focus of education being physical, as asserted by the appellants or not? What were the reasons for this finding?

Answer. (The principal of School X) was quite clear in her evidence re physical interaction. She also had an Occupational Therapist and a Physiotherapist on site. When (JC) queried whether staff could put (CC) in a walking frame, (she) indicated that she hoped to progress CC to this point successfully as she had with other pupils.

(c) What impact, if any, did the Tribunal's findings at (a) and (b) above have on its decision that (School X) was an appropriate school within the meaning of Article 16(4) of the Education (Northern Ireland) Order 1996?

Answer. (School X) is equipped, in our opinion, to provide (CC) with the physical interaction she requires."

[17] The answers have to be seen in the context of the issues before the Tribunal which had before it the facilities at School X which included physiotherapy and occupational therapy. The contrast was with conductive education. I consider that the Tribunal found as a fact that the physical interaction was an educational need for CC. They did not consider that intensive continual and prolonged interaction was necessary. If the level of physical interaction provided by conductive education was needed then they could not have concluded that the level of physical interaction at School X was what CC required. The finding of the Tribunal was that School X is equipped to provide CC with the physical interaction she requires.

[18] In relation to this issue I consider that the Tribunal has matched CC's needs to what School X offers. In relation to this issue I answer the first question in the case stated "Yes" and the remaining questions "No".

Class size and grouping

[19] The appellants gave evidence before the Tribunal that CC, in large groups, found it very difficult to focus and that if she was in an environment with a lot of noise she was unable to concentrate on the task in hand. They also gave evidence that CC required to have a smaller group. In addition the appellants gave evidence that "the population of a classroom at School X is likely to cause considerable difficulties to CC, inter alia, in having her educational needs met, because of the class size and structure (namely, that classes are grouped by age as opposed to ability)".

[20] The evidence before the Tribunal was that at School X the class size was between 6 and 8 pupils and was based on age rather than ability so that the pupils in each class were of mixed abilities.

[21] In its judgment the Tribunal recorded the evidence of the principal of School X as including the following:

> "The class size of between 6 and 8 pupils worked very well. The rationale was about inclusion but each child was treated as an individual."

It was suggested to the principal, on behalf of the appellants, that a class of 6-8 would give rise to seizures/absences and that CC simply would not learn. The principal referred to the earlier evidence given by another witness that CC enjoyed being in a class with two other children. She did not anticipate that 6-8 children would cause difficulty. She stated that all pupils at School X have severe learning difficulties so they are not segregated by ability. In order to develop both socially and emotionally School X starts to gently teach pupils to tolerate more than one on one teaching and learning. The principal believed that it would be beneficial to CC to gradually try and get her to tolerate more noise etc but if a pupil became distressed, they can be moved or worked with in a quieter environment. She had become aware over the past few hearings that CC enjoys music, which is noisy.

[22] The issues were whether CC needed a smaller class size and/or a class grouped according to ability and if so whether School X offered such a facility.

[23] The answer to the second issue is straightforward in that School X did not offer such a facility so that the only issue for the Tribunal's determination was whether CC needed a smaller class size and/or a class size grouped according to ability. The Tribunal in that part of its decision dated 20 August 2015 entitled "Statement of Reasons" did not address that issue. The Tribunal was asked further questions by letter dated 13 May 2016 and replied on 16 June 2016. The questions and answers were as follows:

"(a) Did the Tribunal find that as a fact that the population of a classroom at (School X) is likely to cause considerable difficulties to (CC) inter alia in having her educational needs met for the reasons asserted by the appellants or not?

Answer. No in (the evidence of the principal of School X she) referred to (another witness's) evidence that CC enjoyed being in class with two other children. (The principal) did not anticipate a classroom of 6-8 with CCs own (Health and Learning Assistant) would cause CC difficulty. (The principal) further stated that all the pupils at School X have (severe learning difficulties) so they are not segregated by ability. (The principal) believed that especially in view of the fact that she enjoyed music therapy which is noisy, it would be beneficial to CC to gradually get her to tolerate more noise etc but stated that if a pupil became distressed they could be moved into a quieter environment.

(b) What were the reasons for the Tribunal's findings at (a) above.

Answer. "(The evidence of a witness) that CC enjoyed being with two other children."

(c) What impact, if any, did the Tribunal's finding in this regard have on its decision that (School X) was an appropriate school within the meaning of Article 16(4) of the Education (Northern Ireland) 1996.

Answer. I refer to the answers to (a) and (b)."

[24] I consider that the Tribunal found as a fact that the classroom size at School X was not likely to cause considerable difficulties for CC. I consider that to be a finding that she did not need a smaller classroom size and/or a classroom grouped according to ability.

[25] In relation to this issue I consider that the Tribunal has matched CC's needs to what School X offers. In relation to this issue I answer the first question in the case stated "Yes" and the remaining questions "No".

Infection

[26] The appellants gave evidence before the Tribunal that CC has precarious health and that were she to suffer a fairly standard infection it could have disastrous consequences. They stated that in the past CC required admission to Paediatric ICU because of a cold or a chest infection. The appellants contended that as a consequence her needs were for "an infection free environment", not literally, but rather meaning that the School X would have to operate a strict rule that if any pupil or member of staff had a minor infection that the pupil or member of staff would not attend, regardless as to how minor the infection was. Accordingly, the issues for determination by the Tribunal were what did School X offer in relation to protection against the risk of infection and what did CC need given all the rest of her needs.

[27] It was asserted before me that the evidence from the Principal of School X was that if another pupil had a minor infection that child could still attend School X and accordingly this policy increased the risk of an infection to CC. It is not possible from the judgment of the Tribunal to say whether it found as a fact that School X did allow pupils or members of staff who had a minor infection to attend. Rather in its judgment the Tribunal recorded, without resolving, the evidence in relation to chest infections. It stated that JC gave evidence that CC had ceased to suffer from travel sickness but that she picked up infections very quickly and would be more likely to pick up an infection from other children in School X than she would with two other pupils in the school which she is presently attending. The Tribunal also recorded the evidence of the principal of School X that "in regard to infections she stated that cleanliness was very important in the school, both in regard to the actual buildings and the equipment used however there was always a chance of infection unless a child was completely isolated. If a child became unwell, School X would phone the parents and arrange for that child to be taken home." There was also evidence from Dr Troughton, Community Consultant and Paediatrician who was questioned on behalf of the appellants about CC's vulnerability to infection if she attended School X. Dr Troughton stated that CC would definitely be more vulnerable to infection but that she had a good ability to fight infection and that alone was not enough to say she should not go to School X.

[28] The Tribunal in that part of its decision dated 20 August 2015 entitled "Statement of Reasons" did not address the issue of minor infections either by resolving the differences between, for instance, the evidence of JC and Dr Troughton or at all. Nor did the Tribunal expressly address the issues as to what School X offered and what CC needed. Accordingly, by letter dated 13 May 2016 the Tribunal was asked questions in relation to the issue of infection. That issue was defined in the letter as follows:-

> "The appellants asserted at the Tribunal that (School X), by not having a policy that all members of staff and pupils who have the symptoms of any illness such as colds and flus regardless of how minor will

> not attend the school, will mean that (CC), by reason of her susceptibility to infection and the serious consequences that such infection would have for her, would not have her needs met either educationally or medically."

It can be seen that the appellants' assertion contains a number of factual propositions.

(a) That School X did not have a policy that all members of staff and pupils who have symptoms of any illness such as colds or flu, regardless of how minor will not attend the school.

(b) That CC has susceptibility to infections.

(c) That if CC has an infection there would be serious consequences for her.

(d) That absent the policy in (a) above CC would not have her needs met at School X.

[29] It is understandable that when the Tribunal was asked whether it found as a fact that the appellants' assertion was correct or not that the answer "No" would not clarify exactly the part or parts of the assertion with which it disagreed. The Tribunal was asked that question and did answer "No". It then added that:

> "The principal of School X gave clear evidence that should anyone develop symptoms during the school day arrangements would be made for them to be sent home. Symptoms can develop at any time of the day or night. It would be impossible for School X or any other school to have a policy like this."

The Tribunal was also asked the reasons for its finding and what impact, if any, did its finding have on its decision that School X was an appropriate school within the meaning of Article 16(4) of the Education (Northern Ireland) Order 1996? The Tribunal answered both those questions by reference to its earlier answer.

[30] I do not consider that the answers given by the Tribunal to this issue demonstrate its reasoning. The addition to the answer "No" suggests that it is impossible for School X to have a policy that all members of staff and pupils who have the symptoms of any illness such as colds and flus regardless of how minor will not attend the school. Accordingly, from that part of the addition it could be suggested that the Tribunal has determined that School X does not offer such a policy. However, the earlier part of the addition suggests that School X does offer such a policy because of the reference to the clear evidence of the principal that

should anyone develop symptoms during the school day arrangements would be made for them to be sent home. The other side of the equation are CC's needs. The Tribunal does not state that it prefers the evidence of Dr Troughton and on that basis that CC does not need the degree of infection free environment suggested by the appellants as she has a good ability to fight infection and/or also taking into account her other needs.

[31] In relation to this issue I do not consider that the Tribunal has matched CC's needs to what School X offers. In relation to this issue I answer the first and third questions in the case stated "No" and the remaining questions "Yes". I refer the matter back to the Tribunal as presently constituted solely in relation to this ground. It will be a matter for the Tribunal to decide whether it wishes to hear any further evidence or to receive further submissions in order to determine this issue.

Conclusion

[32] I refer back to the Tribunal in relation to one issue.