

Neutral Citation No: [2023] NICty 4

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

ICOS No: 21/011186

Delivered: 16/11/23

IN THE COUNTY COURT FOR NORTHERN IRELAND

Between:

RUSSELL OLIVER KELLY

Plaintiff

AND

DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

Defendant

**Ryan Cushley BL (instructed by The Equality Commission for Northern Ireland)
for the Plaintiff**

Leona Gillen BL (instructed by the Departmental Solicitors Office) for the Defendant

HHJ GILPIN

[1] The plaintiff was born on 16 January 2004 into a farming family, the family farm being situated at Rosstown Road, Londonderry. It is a large farm extending to over 500 acres.

[2] The plaintiff's father, Thomas, and his older brother Ryan had attended the defendant's college for Agriculture, Food and Rural Enterprise ("the College") specifically its Greenmount Campus at Muckamore, County Antrim. The plaintiff wished to follow in their footsteps by attending there.

[3] This case concerns the college's refusal to offer the plaintiff a place on its City & Guilds Level 2 Technical Certificate in Agriculture at the Greenmount campus commencing in September 2020 ("the Technical Certificate").

[4] The plaintiff's case is that the college, in refusing to offer him a place on the Technical Certificate, unlawfully discriminated against him for a reason related to his disability and failed to make reasonable adjustments. The plaintiff's case therefore is that the college was in breach of the statutory duties imposed on the college by reason of Article 29(1) and (2) of The Special Educational Needs and Disability (Northern Ireland) Order 2005 ("the 2005 Order").

[5] From an early stage during the plaintiff's time in Primary School, difficulties he was experiencing in relation to literacy were noted. The plaintiff was provided with support from the Western Education and Library Board's service for children with specific difficulties in literacy. An eye test was also undertaken which revealed the plaintiff was colour blind.

[6] During the course of his P6 year the plaintiff was assessed by an education psychologist. This assessment revealed that the plaintiff's reading and spelling scores placed him in the lowest 1% of the population and some four years below his chronological age.

[7] On 24 July 2014, aged 10, the plaintiff was issued with a Statement of Special Educational Needs ("the Statement") which stated that the plaintiff's special educational needs arose from him having dyslexia.

[8] In September 2015 the plaintiff began his secondary level education at Lisneal College. The Statement was maintained throughout his secondary education.

[9] A report from Dr Broderick, a chartered educational psychologist, which is before the court sets out that the plaintiff's struggle with literacy continued during his time at Lisneal College and, as he became increasingly aware of his difficulties, he demonstrated a reluctance to attend school "where the work was challenging for him."

[10] Dr Broderick notes that in due course the plaintiff choose "practical subjects for his GCSE choices in order to try and reduce the amount of reading and writing that would be required."

[11] In relation to obtaining a qualification in English the plaintiff's then English teacher advised him to sit the Business and Technology Education Council's ("BTEC") Entry Level English exam ("Entry Level") instead of a GCSE in English. Seemingly his teacher considered that if the plaintiff attempted GCSE English, it would put at risk his chances of success in other subjects. In her evidence to the court the plaintiff's mother accepted that the courses the plaintiff choose were more "applied" in nature.

[12] At the time of choosing to study Entry Level rather than GCSE English the plaintiff and his mother's evidence was that they were aware that Entry Level would not meet the academic requirements of the college for the course the plaintiff wished to study, namely the Technical Certificate. They were however aware the college's admission's policy permitted "alternative evidence" to be considered for students, like the plaintiff, who had a disability when they were seeking admission.

The plaintiff's application dated 22 November 2019

[13] In relation to his desire to pursue his tertiary level education at the college on 22 November 2019 the plaintiff, with the assistance of his mother, submitted an application to be admitted to the college.

[14] The plaintiff applied for two courses at the college namely:

- Level 2 Technical Certificate in Agriculture (“Technical Certificate”)
- Level 2 Work Based Diploma in Agriculture (“Work Based Diploma”)

[15] Both the Technical Certificate and the Work Based Diploma have the same academic entrance requirements namely:

- Two GCSE passes at Grade C or equivalent in English and Mathematics; or
- Three GCSE passes at Grade D or equivalent with subjects to include English and Mathematics

[16] In relation to the delivery of the two courses the essential differences between them are:

- The Technical Certificate is taught full-time over one year. The Work Based Diploma is taught part-time over two years with students attending college one day per week and working on a farm for a minimum of 21 hours per week.
- Teaching for the Technical Certificate is by way of different lecturers and instructors providing tuition on different subjects. The Work Based Diploma is taught by one dedicated lecturer and one dedicated instructor in smaller class sizes than are to be found in the Technical Certificate.
- Examination for the Technical Certificate is by way of externally set and regulated examinations. The Work Based Diploma involves no examinations rather evidence of competence is submitted by way of a portfolio.
- Students who embark on the Technical Certificate without having at least a Grade C in GCSE English have only one opportunity to obtain an equivalent qualification, Essential Skills in Information and Communication, while completing other examinations. There is however no limit to the number of times students on the Work Based Diploma can attempt the Essential Skills in Information and Communication qualification.
- Students on the Technical Certificate have a limited number of opportunities to re-sit examinations and assessments. There is however no limit on the number of times students on the Work Based Diploma can seek to submit an assessment.

[17] Both courses lead to the same qualification, a Level 2 Certificate.

[18] On completion of either the Technical Certificate or the Work Based Diploma a student can progress to a Level 3 course.

[19] The parties agreed the Work Based Diploma is more suited to students with practical aptitude.

[20] In his application to the college dated 22 November 2019 the plaintiff made it clear that he suffers from a disability noting that he has “severe dyslexia and is colour blind.”

[21] His application also set out that amongst the subjects he was then studying his English course was the BTEC Entry Level course rather than at GCSE level.

[22] The BTEC Entry Level English Course the plaintiff was studying was not such that if he had passed it would have been equivalent to a GCSE Grade D. The plaintiff would have needed to have been studying the BTEC Level One rather than the Entry Level course to offer him the possibility of an equivalent to GCSE Grade D. The Entry Level course the plaintiff was studying would only allow him to achieve the equivalent of a GCSE Grade E.

Advisory interview on 3 December 2019

[23] After submitting his application in November 2019, the plaintiff was invited to attend at the college’s Greenmount campus on 3 December 2019 for what the invitation termed an “advisory interview” to discuss “the courses applied for, the entry requirements and the process for allocating places.”

[24] The invitation, issued by way of an email dated 22 November 2019, stated inter alia that the college “welcomes applications from people with learning difficulties or disabilities.”

[25] On 3 December 2019 the plaintiff, along with his parents, attended at the Greenmount campus for the advisory interview. The intended interviewer, Irene Downey, was not able to carry out the interview but rather Lorna Christie, the course manager for the Work Based Diploma, conducted it.

[26] Lorna Christie spoke first with the plaintiff on his own and thereafter with both the plaintiff and his parents. Lorna Christie’s “Applicant Interview Record” noted the plaintiff disclosed his disability to her. Lorna Christie advised the plaintiff that due to the subjects he was currently studying he would not meet the minimum entry requirements for either of the courses he had applied for. In light of this, Lorna Christie advised the plaintiff that if he wished to pursue his first-choice course, the

Technical Certificate, he would have to achieve the Level One BTEC in Essential Skills rather than the Entry Level English course he was then studying.

[27] However, the plaintiff and his parents did not feel it was right for him to attempt the Level One course at that point in time.

[28] While the plaintiff and his parents accept that during the interview with Lorna Christie, they did discuss the plaintiff's general experience in farming and his involvement in the Young Farmers Club they were concerned the college was not properly following the parts of its own admissions policy that were applicable to an applicant, such as the plaintiff, who had a disability.

[29] Both the plaintiff and his mother described his upset during the interview at being told of how the college approached the entry requirements. However, Lorna Christie's recollection was that the plaintiff was quiet, something she did not regard as unusual, rather than upset.

[30] During that part of the interview when the plaintiff's parents were present, they made it clear they wanted their son to study the Technical Certificate and mentioned the possible future involvement of the Ulster Farmers Union and politicians to aid their cause. Ms Christie described the meeting as becoming unpleasant.

[31] After the interview on 3 December 2019 the plaintiff's evidence was that his upset persisted. His mother gave evidence of his reluctance to attend school, that he no longer attended the Young Farmers Club and that his eating became problematic.

Conditional offers issued on 5 December 2019

[32] Two days after the interview on 5 December 2019 the plaintiff received two conditional offers from the college, one for the Technical Certificate and one for the Work Placed Diploma.

[33] The conditionality of the offers for both courses was that the plaintiff would meet "... the entry criteria as set out in the CAFRE prospectus...." In essence the plaintiff would have to meet the stated academic entrance requirements which he could only hope to achieve if he changed to study Level One BTEC in Essential Skills rather than Entry Level English.

[34] The plaintiff's parents were unhappy with the manner in which the college had dealt with the plaintiff's application, and it would appear that following receipt of the conditional offers they consulted the Equality Commission for Northern Ireland as they were of the view that their son had been discriminated against due to his disability.

Plaintiff's parents letter dated 20 January 2020

[35] On 20 January 2020 the plaintiff's parents wrote to the college and set out their concern that the college in dealing with the plaintiff's application had failed to adhere to certain provisions of its published General Admissions Policy.

[36] In this letter the plaintiff's parents mentioned two sections of the General Admissions Policy dealing with the selection and entry criteria for "disabled applicants with special needs" namely:

"The college recognises that standard selection measures and procedures may not always allow applicants with special needs to fully demonstrate their competence in their chosen course and so will take into account alternative evidence, such as examples of previous work, additional references or evidence gained during interview to ensure fair and equivalent consideration.

[37] The college will also make reasonable adjustments to those entrance requirements which are essential for a programme but not attainable for reasons related to the special needs of individuals."

[38] The parents also mentioned in their letter one of the overall aims stated in the General Admissions Policy namely that:

"No candidate is excluded from entry to a programme by reason of ... disability..."

[39] The parent's contention was that those parts of the college's admissions policy they had quoted had been "totally ignored" by the college in dealing with the plaintiff's application.

[40] In their letter they cite examples of matters their son could rely on as "alternative evidence" referred to in the admissions policy. They asked that the plaintiff "be given concessions, due to his disability and special needs" and specifically asked that the college "reconsider the academic achievement of a GCSE Grade C in English as part of the Conditional Offer..." In her evidence in chief the plaintiff's mother said she never asked the college to waive its academic entrance requirements. This is patently incorrect.

College's letter dated 24 January 2020

[41] The college replied to the parent's letter in a letter dated 24 January 2020 signed by George Moffett, the Head of Agriculture Education. In his evidence he said that before drafting his reply he had spoken about the parents' letter to both his line manager James O'Boyle the Head of Educational Services and the Director of the college, Martin McKendry. The reply from the college in essence repeats its stance

that the conditional offers would become unconditional if the plaintiff achieved the minimum academic requirements.

[42] However, interestingly, the letter makes specific reference to a place being offered on the Work Based Diploma and notes this course provides a “solid foundation.” No such mention is made of the Technical Certificate though a conditional offer in identical terms had been made to the plaintiff for it.

14 May 2020

[43] On 14 May 2020 the plaintiff was notified that he had been placed 2nd in Northern Ireland in the Junior Young Farmers Competition.

Phone conversation 3 June 2020

[44] On 3 June 2020 the plaintiff’s mother telephoned George Moffett. Two days before, on 1 June 2020, George Moffett had received an email from The Public Services Ombudsman to whom the plaintiff’s mother had made a complaint about the college’s treatment of the plaintiff’s application. However, the plaintiff’s mother’s telephone call on 3 June 2020 was not in relation to the complaint made to the Ombudsman but rather to inform George Moffett that she had been in touch with the Equality Commission who had formed a view the plaintiff had been unlawfully discriminated against by the college.

[45] The plaintiff’s mother alleged that during this conversation with George Moffett he had discouraged the involvement of the Equality Commission in the matter. Mr Moffett denied he had done this. It is however common case that during this telephone call George Moffett offered to meet with the plaintiff’s parents as and when the restrictions imposed by the Covid pandemic allowed. During the telephone conversation George Moffett stated the college’s position that in its view the Work Based Diploma rather than the Technical Certificate would be the more appropriate course for the plaintiff to study.

Phone conversation pre-results in August 2020

[46] In August 2020 before the plaintiff’s examination results were known George Moffett contacted the plaintiff’s mother to arrange a date to meet. In this conversation George Moffett reiterated that the college considered the appropriate course for the plaintiff to be the Work Based Diploma.

Examination results

[47] On Thursday 20 August 2020 the plaintiff received his examination results. The plaintiff achieved, 3 Grade Bs and 3 Grade Cs at GCSE. Other achievements through the Prince’s Trust which equated to a further 2 GCSE’s. Amongst his results the plaintiff obtained a Grade C in his GCSE mathematics.

[48] In relation to English, the plaintiff achieved a Grade 3 in Entry Level English. This Grade 3 in Entry Level English being equivalent to a Grade E in GCSE English.

[49] Therefore, as a result of his examination results, the plaintiff met all of the academic entrance requirements to gain entry to the college for either the Level 2 Technical Certificate or the Level 2 Work Based Diploma with the exception of the requirement to attain at least a Grade D, or equivalent, in GCSE English.

[50] In short, the plaintiff's results fell short of the college's academic admission requirements because he did not have a qualification in English to the requisite standard.

[51] George Moffett's evidence was that it was on 20 August 2020 that a decision was taken to offer the plaintiff a place on the Work Based Diploma and not to make an offer to him for the Technical Certificate. George Moffett said that, while he had met with James O'Boyle and Martin McKendry in relation to what offer should be made, ultimately the decision was one taken by him. James O'Boyle's evidence was that he was not involved in this decision making process while Martin McKendry's evidence was that his principal involvement was in a subsequent review process.

[52] No notes were made of any discussions or reasoning in relation to the plaintiff's application on receipt of his examination results and the decisions taken.

[53] While the evidence given on behalf of the college in relation to who took the decision about the making or otherwise of offers is conflicting, I am satisfied that George Moffett played the significant role.

[54] His evidence was that in reaching the decisions he considered "alternative evidence" which he said was assessed on a subjective basis.

[55] His evidence was that the alternative evidence he considered was that:

- The plaintiff had significant practical experience in farming;
- The plaintiff's learning style, gleaned from a consideration of the applied nature of the courses he had chosen to study in secondary school, was of an applied nature; and
- The plaintiff has been awarded 2nd place in Northern Ireland in the Junior Young Farmers Competition 2020

[56] James O'Boyle confirmed in evidence that prior to reaching the decisions he did in relation to the making of offers he did not assess the extent of the plaintiff's disability but rather relied on the college's previous experience of disabled students taking its courses.

[57] George Moffet said it was his view that the plaintiff would succeed on the Work Based Diploma and by implication that he would not have succeeded on the Technical Certificate. The evidence of James O'Boyle was supportive of this when he spoke of the past experience of students who had achieved a Grade D in English but nevertheless struggled on the Technical Certificate.

Meeting on Friday 21 August 2020

[58] A meeting with the plaintiff's parents was arranged for Friday 21 August 2020.

[59] Prior to this meeting Martin McKendry, the Director of the college had received a telephone call from the Vice-Principal of the plaintiff's secondary school, Lisneal College, advocating on the plaintiff's behalf.

[60] On 21 August 2020, the day after the plaintiff received his examination results, the plaintiff's parents attended the college and met with George Moffett and James O'Boyle, the Head of Educational Services.

[61] This meeting was recorded by the plaintiff's mother, with the permission of the defendant. It was made clear by the college during this meeting that it was prepared to offer the plaintiff a place on the Work Based Diploma, but it would not be offering a place on the Technical Certificate.

Post offer events

[62] On 26 August 2020 the plaintiff's mother wrote to Martin McKendry asking that he review the decisions made and to offer the plaintiff a place on the Technical Certificate rather than the Work Based Diploma.

[63] Martin McKendry replied by a letter dated 28 August 2020 in which he stated that he had discussed the plaintiff's application with George Moffett and James O'Boyle. He made it clear the college would not be offering the plaintiff a place on the Technical Certificate but remained of the view that the Work Based Diploma was "the most appropriate course for Russell at this stage." Martin McKendry's evidence was that while he was not involved in the initial decision to offer the plaintiff a place on the Work Based Diploma rather than the Technical Certificate, he had on receipt of the letter of 26 August 2020 reviewed the decision. He said alternative evidence concerning the plaintiff, notably his experience in farming and his 2nd place in Northern Ireland in the Junior Young Farmers Competition 2020, was considered by him as part of his review.

[64] On 1 September 2020 Martin McKendry then received a letter dated 27 August 2020 from the Principal of the plaintiff's secondary school, Lisneal College, in which he also sought to advocate that the plaintiff be offered a place on

the Technical Certificate. In his reply dated 4 September 2020 Martin McKendry wrote:

“Our decision to not admit Russell to the Level 2 Technical Certificate course has been made solely on the basis that he does not meet the minimum entry criteria. This is the same process that has been applied to all applicants for this course and is in no way related to Russell’s dyslexia and colour blindness.”

[65] In a later memorandum dated 27 October 2020 Martin McKendry prepared for the Executive Minister with responsibility for the college he summarised the reasons for the decisions made by the college:

[66] The plaintiff did not meet the entry requirements for the Technical Certificate. The court notes that no mention is made of alternative evidence being considered.

[67] The plaintiff’s academic ability which was of “an applied nature” aligned better to the Work Based Diploma.

“Equality legislation does not permit the college to reduce the minimum academic requirements for any applicant.”

[68] The plaintiff choose not to accept the offer of the place on the Work Based Diploma at the college commencing in September 2020.

[69] However, the plaintiff later proceeded to gain further academic qualifications and has now met academic requirements for the Technical Certificate. He started studying for the Technical Certificate in September 2023.

Changes to the admissions policy

[70] In relation to the college’s admissions policy, it would appear that because of issues the plaintiff’s application had raised, its admissions policy for the following academic year was amended in relation to its “Selection and entry criteria” for disabled applicants.

[71] The September 2020 policy, applicable in the instant case, provided that in determining an application “alternative evidence” to academic requirements would be taken into account in determining an application.

[72] The September 2021 policy, after addressing an issue of reasonable adjustments, stated in bold “However, academic entry requirements will not be waived.” It made no mention of the consideration of “alternative evidence.”

Proceedings

[73] By a pre-action letter dated 24 November 2020 the Equality Commission wrote to the college. In this letter it was alleged that the college had throughout the admissions procedure subjected the plaintiff “to acts of disability discrimination” and sought that the college would provide “a written admission of liability or other proposals” within a specified time otherwise legal proceedings would issue.

[74] Legal proceedings did then issue with an Ordinary Civil Bill being served on 9 February 2021.

[75] I heard oral evidence in the matter over the course of two days, received a written statement of certain agreed background facts and also received written submissions from counsel. I am grateful to counsel for their assistance throughout this case.

The limitation point

[76] In this case the defendant argues that the plaintiff’s case has been brought outside the applicable limitation period and therefore should be dismissed.

[77] Paragraph 5 of Part II of Schedule 2 of the Special Educational Needs and Disability (NI) Order 2005 provides:

“5. (1) A county court shall not consider a claim under Article 31 unless proceedings in respect of the claim are instituted before the end of the period of six months beginning when the act complained of was done.

(2) ...

(3) A court may consider any claim under Article 31 which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of sub-paragraph (1)-

(a) ...

(b) any act extending over a period shall be treated as done at the end of that period; and

(c) ...”

[78] In arguing that the plaintiff’s claim is out of time the defendant has made submissions that the six-month period provided for in para 5(1) runs from at least

the date of the plaintiff's advisory interview on 2 December 2019 but arguably from 22 November 2019 being the date he submitted his application to the college.

[79] As the Civil Bill was not served until 9 February 2021 the defendant argues it "was presented grossly out of time."

[80] The plaintiff submits that while discrimination against him began on 3 December 2019, the date of the advisory interview, it continued until 21 August 2020 when the decision was made to offer him a place on the Work Based Diploma and not a place on the Technical Certificate and that time does not start to run until the August date.

[81] I am satisfied that the plaintiff's claim has been brought in time. Para 5(4) makes it clear that for the purposes of determining the start date for the six months window in which to serve proceedings, any act extending over a period shall be treated as done at the end of that period. One of the acts complained of by the plaintiff occurred on 21 August 2020 and so with proceedings being served on 9 February 2021 they are brought in good time.

[82] If I am wrong about that, I would nevertheless, given all the circumstances of this matter, have exercised the discretion afforded to me under para 5(3) that it is just and equitable to consider the plaintiff's claim.

[83] The locus classicus on the issue of 'just and equitable' extension of time is *British Coal Corporation v Keeble & others* [1997] 1 IRLR 338 where the Employment Appeal Tribunal set out five matters the court should have regard to when considering this issue:

- (a) the length of and reasons for the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued had co-operated with any requests for information.
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

[84] In the instant case the plaintiff submits that he did not know of the final position of the college as to his admission to the Technical Certificate until 21 August 2020 and therefore any delay in issuing proceedings was caused by the college "keeping the door open" until that August date. In addition, the plaintiff also

submits with his proceedings being served when they were, namely early in 2021, there will be no effect on the cogency of evidence. I find the plaintiff's submissions on this issue to be persuasive.

The plaintiff's claim

[85] The plaintiff advances his claim in two ways:

(i) Less favourable treatment for a reason related to the disability

[86] The plaintiff claims the college in dealing with his application for the Technical Certificate course treated him less favourably for a reason related to his disability and the college cannot show there is justification for doing so.

[87] Article 29(1) of The Special Educational Needs and Disability (NI) Order 2005 provides,

“... a responsible body discriminates against a disabled person if-

- (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
- (b) it cannot show that the treatment in question is justified.”

[88] The effect of the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, which remains good law in Northern Ireland, means in the instant case that the plaintiff must prove facts from which the court could conclude that a comparator namely:

- a non-disabled person; or
- a person with a different disability to the plaintiff

would be treated more favourably than the plaintiff i.e. offered a place on the Technical Certificate course despite the comparator not attaining the requisite academic standard.

[89] The plaintiff's case is that in the course of seeking admission to the Technical Certificate course he was treated less favourably for a reason related to his disability than other applicants who either:

- did not have a disability; or

- did not have the same disability as he did

[90] The plaintiff alleges that at the meeting on 21 August 2020 James O'Boyle suggested that applicants with a disability of dyslexia did not require the college to make adjustment to its academic entrance requirements but that when he gave his evidence to the court James O'Boyle had indicated such adjustments had been made for other applicants. However, as a finding of fact I do not accept this was the position of James O'Boyle. Rather I am satisfied James O'Boyle's position, and indeed that of the college as an institution, is that the college did not adjust academic standards for any applicant for the Technical Certificate.

[91] Furthermore, the plaintiff submits that James O'Boyle had a "one size fits all" approach to disability and his decision regarding the plaintiff's application to be admitted to the Technical Certificate was in part based on how other applicants who had a "learning disability" had managed during their time at the college. The plaintiff submits this approach coupled with the fact the college did not make any formal assessment of the plaintiff's disability meant he was treated less favourably on for a reason related to his disability than other persons.

[92] In the absence of an actual comparator in this case the plaintiff relies on two hypothetical comparators from which he suggests the court can conclude disability related discrimination in comparison to them namely:

- an applicant for the Technical Certificate with the same qualifications as the plaintiff but who does not have a disability; and
- an applicant for the Technical Certificate with the same qualifications as the plaintiff but who has a different disability from him

[93] On the basis of my factual findings I am satisfied that for both of the two hypothetical comparators the plaintiff relied on the situation would have been the same namely that the college would not have offered them a place on the Technical Certificate due to not having the requisite academic requirements.

[94] The witnesses for the college were clear that as regards the Technical Certificate, no-one who failed to meet the academic standards would be offered a place on that course. I accept that evidence. They explained that the reason for this was grounded on the academic nature of this course, its style of teaching and its methods of examination.

[95] I am satisfied the reason the plaintiff was not offered a place on the Technical Certificate did relate to his disability, but he was not treated less favourably than a hypothetical comparator.

[96] However, if I am wrong about that I am satisfied that his treatment would have been justified given my findings as to the academic nature of the Technical Certificate and the plaintiff's particular disability.

[97] I therefore do not find the plaintiff has made out his claim based on less favourable treatment for a reason related to his disability.

(ii) Failure to make reasonable adjustments

[98] Article 29(2) of The Special Educational Needs and Disability (NI) Order 2005 provides:

“... a responsible body also discriminates against a disabled person if it fails to comply with a duty imposed on it by Article 30 ... in relation to the disabled person.”

[99] Article 30(1) provides:

“Where-

- (a) a provision, criterion or practice, other than a competence standard, is applied by or on behalf of a responsible body,
- (b) it is a provision, criterion or practice relating to—
 - (i) the arrangements it makes for determining admissions to the institution, or
 - (ii) ... and
- (c) that provision, criterion or practice places disabled persons at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the responsible body to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.”

[100] The basis of this aspect of the plaintiff's claim is that the college failed to apply its admissions policy and to make reasonable adjustments to its entrance requirements in circumstances where the academic requirements were not attainable by the plaintiff due to his disability.

[101] The plaintiff says the college failed to consider how the plaintiff could demonstrate “competence and or equivalence to the academic entrance requirements through other means.”

[102] The defendant submits that, while Article 30 of the Order imposes a duty on it to make reasonable adjustments to inter alia, “the arrangements it makes for determining admissions ...,” this expressly states it applies to “a provision, criterion or practice, other than a competence standard...” [emphasis mine]

[103] The defendant relies on Article 29(11) of the Order which defines a "competence standard" as being one that includes an academic standard applied by or on behalf of a responsible body for the purpose of determining whether or not a person has a particular level of competence or ability, in support of its position that the duty in Article 30 to make reasonable adjustments does not apply to an academic standard.

[104] At the time the plaintiff sought admission to the Technical Certificate the college in essence provided two routes for this to happen for a disabled student either:

- they could meet the academic requirements; or
- on the basis of “alternative evidence, such as examples of previous work, additional references or evidence gathered during interview...”

[105] I am of the view that, while there is a duty on a body such as the college to make reasonable adjustments if a provision, criterion or practice relating to arrangements for admission places a disabled student as a substantial disadvantage, Article 29(11) of the Order makes it clear this does not apply to an academic standard and thus the first route for admission noted above this does not fall within the reach of the duty to make reasonable adjustments under the 2005 Order.

[106] However, in the instant case given the plaintiff’s disabilities, the second “alternative evidence” route was also applicable.

[107] It does seem to me the “alternative evidence” route falls within the scope of being “a provision, criterion or practice” relating to the arrangements the college made for determining admission to it.

[108] That being so the court must consider whether the “alternative evidence” route placed the plaintiff as a disabled applicant at a substantial disadvantage in comparison to an applicant without a disability or without his disability. Given that the “alternative evidence” route was an additional route for gaining admission to the college, that was not open to an applicant without a disability, I do not find it placed a disabled person at a substantial disadvantage compared to a non-disabled applicant.

[109] The availability to the plaintiff of the “alternative evidence” route was not detrimental to him. In fact, it was the opposite in that that route was only liable to be considered as an option in order to take account of the fact that he had a disability that affected his ability to attain the academic standard.

[110] However, if I am wrong about that, I am satisfied in the instant case the college made such adjustments as were reasonable in the circumstances in that the college, taking into account the plaintiff’s particular disability and the enhanced academic nature of the Level 2 Technical Certificate, offered him a place on the Work Based Diploma which also led to a Level 2 qualification. The plaintiff’s desire to follow his father’s and brother’s footsteps and study for the Technical Certificate did not mean that the college was obliged to offer a place on that course as a reasonable adjustment. Given my factual findings the offer that was made by the college complied with its duty to make a reasonable adjustment.

[111] Therefore, in my view the plaintiff fails on both limbs on which he advances his case.