Neutral Citation No. 2008 EWHC 389 (Admin)

Case No/642/2007

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

Royal Courts of Justice
Strand,
London WC2A 2LL

Before: Mr Michael Supperstone Q.C.
(Sitting as a Deputy High Court judge)

Date: 3 March 2008

BETWEEN:

THE GOVERNING BODY OF
X SCHOOL

Appellant

-and-

(1) SP
(2) SPECIAL EDUCATIONAL NEEDS AND
DISABILITY TRIBUNAL

Respondents

Hearing dates: 24 and 25 January, 2008

JUDGMENT

Mr James Goudie, Q.C. and Mr Peter Oldham	instructed by London Borough of Barking and Dagenham for the Appellant
Mr Nigel Giffin, Q.C. and Fiona Scolding	instructed by Fisher Meredith for the First Respondent

The Deputy Judge:

Introduction

1. This is an appeal under Section 11 of the Tribunals and Enquiries Act 1992 by the Governing Body of X School ("the School") against a decision of the Special Educational Needs and Disability Tribunal ("the Tribunal") that the School had discriminated against N, a pupil at the School, contrary to the Disability Discrimination Act 1995 ("the 1995 Act") in effecting certain fixed term exclusions on a number of occasions between November 2005 and June 2006.

2. At the outset of the hearing I made an order under s.39 of the Children and Young Persons Act 1933 to preserve the anonymity of the names of the First Respondent and her daughter who may be referred to as SP and N respectively, and the School may be referred to as X School.

Factual Background

3. N suffers from Attention Deficit Hyperactivity Disorder ("ADHD"), such as to amount to a disability within the meaning of the 1995 Act. This diagnosis was made in 2000 when she was referred to the North East London Mental Health NHS Trust ("the Trust") because she had attention and behavioural difficulties. At the time of the hearing before the Tribunal N, then aged 13 years and 6 months, continued to be supported by the Trust and was under the care of Dr Elhussein, Associate Specialist in Community Paediatrics.

4. In paragraph 2 of its decision the Tribunal noted that the School:

> "... is an LEA maintained secondary school in Dagenham with some 1,700 pupils on roll. ... In its last OFSTED report in 2004 the school received the highest assessment classifications in each assessed area. It was noted as enjoying productive partnerships with a number of organisations such as the DfES and the Specialist Schools and Academies Trust. The OFSTED report noted that "[learners] behave very well in class and elsewhere in the school, which has excellent ways of managing their behaviour. It deals with problems quickly in fair, consistent and positive ways. The integration into lessons of excluded learners and others with difficulties is very successful. The learning support unit manages and supports this process very well. ... . Neither [SP nor her representative] took issue with [the OFSTED report] conclusions so far as they related to most pupils on most occasions. Their submission was that on the occasions in issue N had been unlawfully discriminated against."

The Legislative Framework

5. The Tribunal has power to hear claims concerning discrimination against an individual on the basis of their disability by reason of their exclusion on a fixed term basis under s.52(1) of the Education Act 2002 by virtue of Sections 23 and following of the 1995 Act.

6. The 1995 Act, in so far as is material, provides as follows:

> **"28A Discrimination against disabled pupils and prospective pupils**
> (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body.
>
> (4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school whether permanently or temporarily.
>
> **28B Meaning of "discrimination"**
> (1) For the purposes of section 28A, 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.
>
> (2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if –
>
> (a) it fails, to his detriment, to comply with section 28C; and
>
> (b) it cannot show that its failure to comply is justified.
>
> (5) Subsections (6) to (8) apply in determining whether, for the purposes of this section –
> (a) less favourable treatment of a person, or
>
> (b) failure to comply with section 28C,
>
> is justified.
>
> (7) …., less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial.

(8) If, in a case falling within subsection (1) –

(a) the responsible body is under a duty imposed by section 28C in relation to the disabled person, but

(b) it fails without justification to comply with that duty,

its treatment of that person cannot be justified under subsection (7) unless that treatment would have been justified even if it had complied with that duty.

28C Disabled pupils not to be substantially disadvantaged

(1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that –

...

(b) in relation to education and associates services provided for, or offered to, pupils of the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.

(4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A.

28I Jurisdiction and powers of the Tribunal

(1) A claim that a responsible body –

(a) has discriminated against a person ("A") in a way which is made unlawful under this Chapter, or

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

may be made to the [appropriate tribunal] by A's parent.

(3) If the [appropriate tribunal] considers that a claim under subsection (1) is well founded –

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

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

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

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

Decision of the Tribunal

7. The material conclusions of the Tribunal were as follows:

"Disability and the causal link between N's ADHD diagnosis and the behaviour giving rise to her exclusions from school.

A. We were content that N's behaviour was more likely than not to be a part of her ADHD. To our knowledge this is a condition that is thought to affect about 1% of the school aged population and is one that is diagnosed when certain symptoms, from a range, are present to a particular degree. It is not a simple condition and it is hardly surprising, still less is it decisive, that Mr [G] and Ms [B] have not come across a child like N. Certainly Dr Elhussein seems to have written to Ms Ali in general terms. In our view that was likely to have been because the condition manifests through symptoms that occur differently in different individuals. We found nothing in the behaviour presented (and it is the behaviour that led to the exclusions that is important) that was beyond that which is part of ADHD. In particular aggressiveness and poor discipline are common and in so finding we have placed reliance upon research evidence such as that published by the BUPA Research Team in 2004 and freely available on the internet and elsewhere. Mr Oldham [appearing on behalf of the School] reminded us that the burden of proof here is upon the [first respondent] to prove disability. That is the case, but that she is disabled is not in dispute. Given the nature of the disability; that it is diagnosed as we say above; and that the behaviour is consistent with those symptoms we are content that the behaviour that has given rise to the exclusions agreed was part of N's ADHD.

B. We are fortified in this conclusion by the absence of other diagnoses or of any other explanation for the behaviour. N was presented to the Mental Health NHS Trust with attention and behaviour difficulties. She was diagnosed with ADHD and nothing else. It was not stated, for instance, that other factors were in play, such as environmental ones or that she had traits of other conditions.

C. Mr Oldham invited us to reach the contrary conclusion because N was aware of her difficulties. She knew right from wrong. She had moral awareness. With respect to Mr Oldham that appears to have been an entirely question-begging position. It assumes that the degree of self-awareness that N can exhibit is a contra-indication for ADHD which he accepts as properly diagnosed and, in any event, it would render useless those strategies that sufferers are introduced to in order to help them to deal with their condition. Further, even granting that N can reflect upon her disruptive behaviour on occasion, it does not follow that she could have done so in respect of the particular behaviours on the specific occasions in issue here.

The Responsible Body's knowledge of N's disability.

D. The Responsible Body were aware throughout the period during which the exclusions in issue took place that N was disabled and concede that she was disabled within the terms of section 1 of and Schedule 1 to the Act.

Less Favourable Treatment; whether others would be treated similarly; whether the treatment was justified for a material and substantial reason; and whether reasonable adjustments could have been made.

I. We were content that the exclusions were for reasons that relate to N's disability. She was excluded because of behaviour exhibited that arises out of her ADHD.

K. We were not content that the lengthy exclusion that took place in November 2005 was justified. With respect to the Responsible Body's witnesses their assertions that N was giving cause for concern for health and safety was not further explained, nor was it explained why the length of the exclusion was 16 days.

L. So far as the other instances of exclusion were concerned, they were all for disruptive behaviour and fell within the range that the school procedure allowed. N was behaving in such a way as to seriously undermine discipline and morale and it is evident from the staff log that she was causing real problems.

M. We noted the range of options available to the school to assist them to deal with N. When asked which had been used on which occasion however we were simply told that they had been used without example. We considered it to be more likely than not that such strategies that had been tried had been tried in no more than a piecemeal way without analysis and there was certainly no clear analysis of N's good behaviour in order to learn from it. Further there had been no attempt to contact Dr Elhussein, or any outside agent (such as an educational psychologist) for guidance. In our view the responsible body ought to have contacted Dr Elhussein and other professionals for advice; analysed the causes of N's good behaviour with a view to learning from it; and formulated a plan which systematically utilised the various strategies devised for her. They amount to reasonable adjustments [that] could have been made.

N. We conclude finally that had the reasonable adjustments been carried out it would not have been justified to exclude N as a disabled child on the several occasions that she was excluded. To exclude her repeatedly for similar behaviour would only serve, in our view, to exacerbate her difficulties."

8. The Tribunal ordered as follows:

"1. We find that N was unlawfully discriminated against on 11 November 2005; and on 7 March, 19 April and 21 June 2006 by virtue of her exclusion from school on each of those dates.

2. We order that the governing body of X School shall:

- By no later than the end of the school term commencing January 2007 apologise in writing to N and her mother for the discrimination we have found proven.

- By no later than the end of the term referred to above undertake together with the senior management team of the school either refreshing or reviewing training in respect of their respective duties under the [1995 Act]. In any event this should include specific and distinct training and address the manifestations of ADHD and the varying needs of children diagnosed with it.

- By no later than the end of the term referred to above ensure that there is added to N's school file a note recording that [the Tribunal] has found the four fixed term exclusions detailed to have been discriminatory and that, consequently, they should not have been given. For the avoidance of doubt if N's file is no longer in the possession of Clack School the headteacher of her next school should be notified of this decision and sent a copy to be placed on N's file".

Grounds of Appeal

9. The Notice of Appeal contained 14 grounds of appeal, 8 of which were pursued at the hearing. In summary those grounds were as follows: there was no evidence to support the conclusion that the misbehaviour was for a reason related to the ADHD (Ground 1); the Tribunal's reliance on evidence not referred to by either party (in particular BUPA research) was unfair since the School had no ability to comment on it (Ground 2); the decision that there was "no other explanation for the behaviour" other than ADHD was irrational and/or ignored the School's case (Ground 3); misunderstanding of, and irrational approach to, the School's case on the issue of whether N knew right from wrong (Ground 4); the Tribunal's conclusion that there was no evidence to support the view that N was giving cause for concern on health and safety grounds was perverse (Ground 6); the criticism that the School had had no contact with outside agencies was perverse (Ground 8); the Tribunal's reasoning that N should not have been excluded repeatedly for similar behaviour was perverse and otherwise flawed (Ground 10); and the remedies ordered were not sought by SP (Ground 11).

10. It will be convenient to consider Grounds 1-4 together which are all concerned with the issue as to whether the reason for exclusion related to the disability. Ground 6 concerns *prima facie* justification in relation to the first, 16 day exclusion. Grounds 8 and 10 raise the issue of reasonable adjustments and can be considered together; and finally, Ground 11 concerns remedies.

Submissions

Grounds 1-4: Whether reason for exclusion related to N's disability

Ground 1: no evidence for the conclusion

11. Mr Goudie QC, who appeared on behalf of the School, submitted that the high point of the evidence in relation to causation was the letter of 2 March 2006 from Dr Elhussein which made general comments about ADHD and did not describe how it affected N. Further Dr Elhussein did not say that it caused the misbehaviour that led to the exclusions. Accordingly the Tribunal could not rationally have found that the less favourable treatment was for a reason which related to N's disability.

12. Mr Goudie commended the approach adopted by Mr Recorder Foskett QC in *Servite Houses v. Perry* (Unreported, 1 March 2004). A claim for possession of premises was based on the conduct of the tenant. One issue was "whether it can be said the Defendant's behaviour was caused by her disability." (second para 46). The Defendant suffered from epilepsy and took drugs to control it. At para 47 the Learned Judge said:

> "Dr Canning does not specifically answer the question whether, on the balance of probabilities, the Defendant's behaviour (or a significant part of it) is caused or materially contributed to by her epilepsy or by the effects of the drug regime in place to control it. ... However, whilst the possibility of a causal link cannot be excluded, I do not think that I am able to conclude on the basis of his report that the Defendant's behaviour is more probably than not caused directly by her disability." (Emphasis added).

13. However, as Mr Giffin QC, appearing on behalf of SP, submits that is not the correct test. The proper approach is that identified by the Court of Appeal in the *London Borough of Lewisham v. Malcolm* [2007] EWCA Civ. 763.

14. The 1995 Act makes it unlawful for a person who manages any premises (a "landlord") to discriminate against a person with a disability who occupies those premises "by evicting [him] or subjecting him to any other detriment" (s.22(3)(c)). The principal issue in *Malcolm* was whether s.22(3)(c) applies to protect an occupier with a disability (schizophrenia) who has lost his security of tenure as a result of subletting the property, and against whom the landlord, having served a notice to quit,

brings possession proceedings. Arden L.J. formulated the relevant issue as follows: was the judge wrong not to hold that Lewisham's reason for starting possession proceedings, namely the subletting by Mr Malcolm, was "related" to his disability for the purposes of s.24(1)(a) of the 1995 Act? She concluded that "the judge should have held that there was an appropriate relationship between Mr Malcolm's subletting and his disability even though it was not shown that his disability caused him to enter into the subletting" (para 37). She said at para 101:

> "The requirement that a reason "relates to" a person's disability implies that there must be an appropriate relationship between the subletting and the disability. However, in my judgment, to identify what that relationship involves, it is necessary to embrace the breadth of the decision in *Novacold*. What followed from the decision in that case is that the disability need neither be the sole cause of any action nor a matter without which the action would not have occurred. Applying the decision in that case to this case, the court starts by looking at the matter from the position of the person who is performing the treatment, in this case, Lewisham, and its initial factual enquiry is: did Lewisham decide to take possession proceedings against Mr Malcolm because he had sublet? The answer to that question is clearly yes. Then, to ascertain whether there exists an appropriate relationship between the reason (subletting) and the disability (schizophrenia) the court must enquire whether the reason (Mr Malcolm's subletting) for the treatment (taking possession proceedings) engaged some aspect of his disability. If so, the reason was *related* to the disability."

Longmore L.J. agreed with Arden L.J. at para 133. Toulson L.J. "would not press [his] doubts as to the point of disagreement with the other members of the Court about whether there was the requisite link" (para 152, and see paras 148-151).

15. In my view, adopting the test in *Malcolm*, the submission that there was no evidence to support the conclusion that N's misbehaviour which led to the exclusions was for a reason related to ADHD fails. The material evidence was as follows:

(1) At paragraphs 7-10 of the Decision the Tribunal set out the behaviour that gave rise to the exclusions. At paragraph 11 the Tribunal noted that Ms Ali, SP's representative, "confirmed that she did not dispute the substance of the descriptions of N's behaviour".

(2) Dr Elhussein in her letter of 2 March 2006 described

"The core symptoms of ADHD [as] inattention, hyperactivity and impulsive behaviour. Children and young people with ADHD can display a range of symptoms. They can be fidgety, distractible and have concentration difficulties. They can have difficulties following routines and instructions and difficulties in sequencing tasks. They may have poor organisational skills and poor frustration tolerance."

Whilst these symptoms are not stated specifically to relate to N, they are written in the context of a letter concerning the diagnosis of N with ADHD and her condition.

(3) In para 8 of the Grounds on which the claim is opposed it is said that "The School does not have the medical evidence to support the contention that the extreme degree of abusive, disruptive, defiant and sometimes violent behaviour which [N] has consistently shown to staff and pupils ... is the result of her alleged disability." However, in her oral evidence to the Tribunal Ms Bates, N's key worker, explained that N was 1 of 18 pupils at the School with a diagnosis of ADHD. In para 4 of the Decision the Tribunal record that "she stated that N's behaviour could be more extreme than that of other children with the diagnosis although she also stated that others' behaviour could be as extreme as hers but N's was more extreme more often. She stated that she understood that children with ADHD were different from each other. There was not a single presentation". (The Tribunal did record the evidence of another witness, Mr [C], who said "he had not come across a child who exhibited the behaviour that N exhibited").

(4) Mr [G] and Ms [B] were specifically asked what behaviour N had exhibited that was outside the range of that described by Dr Elhussein in her letter of 2 March 2006. In response they said that she could be openly defiant and stubborn (see para 4 of the Decision). However, the statement of special educational needs in respect of N produced in July 2006 that was in evidence before the Tribunal specifically refers to the need for "support to develop coping strategies to manage her feelings and responses to certain situations".

(5) As part of the formal assessment of N's special educational needs the London Borough of Havering prepared a Psychological Advice dated 10 April 2006

which was also before the Tribunal in evidence. At paragraph 6 it is noted that N can become "defiant and refuse to respond to the class teacher".

(6) Further evidence before the Tribunal included the School's Behaviour Support Plan dated July 2005 and the School's Educational Support Plan dated September 2005. The former refers to the fact that "N may often make inappropriate comments without actually realising the consequences of what she is saying. This can create conflict in both social and classroom situations." The latter refers to the fact that "she does not always understand instructions explaining how to do work and will therefore misbehave in order to detract from the fact that she doesn't know what to do". The Educational Support Plan notes, "She does not always know how to react in confrontational situations and so can react verbally" and "N can react in a very impulsive manner with no thought as to consequences"; if she becomes disruptive or refuses to do work "someone from SEN" should be sent for.

(7) In the light of the evidence set out above it cannot be said that there was no evidence on which the Tribunal could be satisfied that N's open defiance and stubbornness was ADHD related. Dr Elhussein noted in her report of 2 March 2006 that the behaviour of children not on medication can become "extremely difficult". N's medication was reduced in January 2006 (see letter dated 23 January 2006 from Dr Elhussein).

16. The Tribunal concluded that "N's behaviour was more likely than not to be a part of her ADHD" (Conclusion A). In my view that is not a conclusion that was unsupported by any evidence before the Tribunal.

Ground 2: reliance on evidence not referred to

17. Mr Goudie referred to the well-known passage in the speech of Lord Mustill in *In Re D. (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 at 603H – 604A that:

> "... it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is

lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer."

Applying that principle Mr Goudie submits that the Tribunal should have referred the research evidence such as that published by the BUPA Research Team in 2004 to the parties to give them an opportunity to deal with it.

18. Mr Giffin acknowledged that it was unfortunate that the Tribunal did not refer at the hearing to this research evidence. As Peter Gibson L.J. observed in *Richardson v. Solihull Metropolitan Borough Council* [1998] ELR 319 at 338:

> "Although the SENT is a specialist tribunal with members appointed for their expertise, it is important that SENT obeys the rules of natural justice and that the members should not give evidence to themselves which the parties have had no opportunity to challenge."

However, adopting the approach of the Court of Appeal in *Richardson*, Mr Giffin submitted that there had been no substantial wrong or miscarriage of justice in the present case arising from the Tribunal's failure to bring the research evidence to the attention of the parties.

19. The research evidence has not been produced and accordingly it is still not known what the Tribunal did in fact refer to. However, it appears that the Tribunal only placed reliance upon this evidence for the limited purpose of supporting their finding that aggressiveness and poor discipline were common in ADHD sufferers. Other evidence before the Tribunal supported this finding (see paragraph 15 above).

Ground 3: the decision that there was "no other explanation for the behaviour"

20. Mr Goudie submits that the Tribunal's view that N's behaviour must be caused by ADHD in the absence "of any other explanation for the behaviour" (para B) was irrational; alternatively the decision ignored the School's case that N's behaviour was very bad for reasons which were not related to ADHD and indeed no medical condition at all.

21. In my view this criticism is not well founded. The Tribunal noted at para 12 of the Decision that "Mr Oldham submitted that [N's] moral understanding should lead [the

Tribunal] to conclude that her bad behaviour was deliberate and such as she could control if she wished. It did not arise from her ADHD". That submission was considered by the Tribunal in their conclusions at para C (see para ... above). Further the Tribunal (in the last sentence of para A of their conclusion) set out their reasons for their decision that the behaviour that led to the exclusions was part of N's ADHD. In any event, the Tribunal's decision that there was "no other explanation for the behaviour" other than ADHD only "fortified" their primary conclusion, set out in para A of their conclusions, that N's behaviour "was more likely than not to be a part of her ADHD". For the reasons I have give at paragraph 15 above there was evidence to support that conclusion.

Ground 4: approach to issue of whether N knew right from wrong

22. It is said that the Tribunal misunderstood the School's case on the issue of whether N knew right from wrong. The School accepted that she suffered from a disability, but that because N knew right from wrong that tended to show that her bad behaviour was not caused by ADHD.

23. The answer to this point is made by the Tribunal in the last sentence of para C of their conclusions: "Even granting that N can reflect upon her disruptive behaviour on occasion, it does not follow that she could have done so in respect of the particular behaviour on the specific occasions in issue here". As Mr Giffin correctly, in my view, submitted, if a person has a medical condition that makes him act impulsively without thinking about the consequences, the fact that he knows right from wrong may not assist to restrain him.

Ground 6: *Prima facie* justified

24. Mr Giffin accepted that there was evidence before the Tribunal that N's behaviour was giving cause for concern for health and safety. Indeed as the Tribunal noted at para 16 of the Decision Mr Grant, Headteacher of the School, gave evidence that "N's behaviour was extreme, unprecedented and such as to give serious concern for her and others' health and safety". There was other evidence before the Tribunal to this effect. Mr Giffin submits, and I agree, it is difficult to think that the Tribunal when writing in para K of their Decision that the assertions that N was giving cause for concern for health and safety was "not further explained" that the Tribunal had overlooked what

they had recorded at para 16 of the Decision. It is more likely that the Tribunal did not consider that the explanation that was given was good enough to justify the exclusion for 16 days. This view is supported by the Notes of the Tribunal's deliberations.

25. In any event the matters dealt with in paragraph K are only material to the conclusion that the first 16 day exclusion was not even prima facie justified. Even if that conclusion was wrong it would not by itself affect the decision of the Tribunal that all the exclusions were unjustified by reason of the failure of the School to make reasonable adjustments. The Tribunal also based paragraph K upon their conclusion that they were not satisfied about the reasons for the length of the exclusion.

Grounds 8 and 10: Reasonable adjustments issue

Ground 8: contact with outside agencies

26. Mr Goudie argued that the criticism that the School had made "no attempt to contact Dr Elhussein, or any outside agent (such as an educational psychologist) for guidance" (para M) was perverse. It was said that the School was in contact with Dr Elhussein; it received his reports and could raise matters with her. Further the School's Behaviour Support Plan dated July 2005 stated that another agency, Havering ADHD Support Group, was involved.

27. A further criticism of the Decision was that para M which sets out in the Tribunal's view what the responsible body ought to have done, concludes with the sentence, "They amount to reasonable adjustments [that] could have been made". The Tribunal does not make a finding that what was done does not amount to reasonable adjustments.

28. In my view these criticisms are misplaced. The Tribunal accepted that the School had adopted some strategies. However, the Tribunal considered "it to be more likely than not that such strategies that had been tried had been tried in no more than a piecemeal way without analysis and there was certainly no clear analysis of N's good behaviour in order to learn from it". This was the inference that the Tribunal drew from the evidence that is set out at paras 17-18 of the Decision. In my view on the basis of that evidence the Tribunal was entitled, with their specialist knowledge, to reach the

conclusion that "such strategies that had been tried had been tried in no more than a piecemeal way".

29. Further whilst there had been some contact between the School and Dr Elhussein and an outside agent, the School had made no attempt to contact Dr Elhussein or any outside agent (such as an educational psychologist) "for guidance". Again the Tribunal was entitled to make this finding on the evidence.

30. The key point made by the Tribunal in para M is that the School had not "formulated a plan which systematically utilised the various strategies devised for [N]". I accept Mr Giffin's submission that such a plan needed to be informed by an analysis of the causes of N's good behaviour with a view to learning from it; and that expert advice from independent professionals was needed to assist with the exercise.

Ground 10: repeated exclusion for similar behaviour

31. On behalf of the School it was argued that the Tribunal's reasoning that N should not have been excluded repeatedly for similar behaviour was perverse. At para N the Tribunal concluded that to exclude her repeatedly for similar behaviour would only serve "to exacerbate her difficulties".

32. In support of this submission Mr Goudie referred to *Governing Body of Olchfa Comprehensive School v IE and EE* [2006] ELR 503 where the Tribunal decided that the child's exclusion was "justified in terms of the order and discipline within the school, and for the health and safety of other pupils and staff". Section 28B(1)(b) of the 1995 Act (the defence that the treatment was justified) required a balancing exercise: the responsible body had to show that the unfavourable treatment was justified in all the circumstances, including the interests of the school and the disabled pupil. In *Governing Body of Olchfa Comprehensive School* Crane J. said at p.514:

> "... almost never will it be possible to establish that reasonable steps would have prevented exclusion. However, s 28B(8) does not require such proof. It makes it necessary, if there has been a failure to take reasonable steps, to establish that otherwise justified treatment remains justified despite the failure."

33. Mr Giffin accepts that the issue of justification is to be considered "in the round". However, the Secretary of State's most recent Guidance "Improving Behaviour and Attendance Guidance on Exclusions from Schools and Pupil Referral Units" indicates how difficult it may be to prove justification if reasonable steps have not been taken. At para 50(d) in response to the question "Can the exclusion be justified?" it is stated:

> "An exclusion of a disabled pupil for a reason related to their disability can only be justified if there is a "material" and "substantial" reason for it **and** the headteacher can show that there were no reasonable steps that could have been made to avoid the exclusion. Maintaining order and discipline in the school may well be a material and substantial reason if there was a specific incident that gave rise to the exclusion. The headteacher will also have to show that reasonable steps were made in response to the pupil's disability. This could include differentiating the school's general disciplinary or behavioural policy to take account of behaviour which is related to a pupil's disability; developing strategies to prevent the pupil's behaviour; requesting external help with a pupil (e.g. requesting a statutory assessment) and staff training …".

Para 51 continues:

> "… Schools will be required, in disability discrimination claims, to demonstrate that their actions are justified and that there are no reasonable adjustments to their policies and practice they might have made to prevent the incident which led to the exclusion".

34. In my view the Tribunal was entitled on the evidence to conclude in para N that "had the reasonable adjustments been carried out it would not have been justified to exclude N as a disabled child on the several occasions that she was excluded". I agree with Mr Giffin's submission that if an approach of the kind set out in para M had been followed, it would have been sensible to give it an opportunity to work, rather than engage in a number of short exclusions of an essentially penal nature. It would also have been relevant that, if a proper approach had been taken, the misbehaviour leading to those exclusions may not have occurred. In any event this was a factual assessment for the Tribunal to make.

Ground 11: remedies

35. Mr Goudie submitted that parties should be given an opportunity to deal with what may be proposed by way of remedy before remedies are ordered. He referred to the recent Court of Appeal decision in *D v Independent Education Appeal Panel of*

Bromley London Borough [2007] EWCA Civ. 1010 where the questions of justification for exclusion and the reasons for opposing reinstatement were dealt with together, rather than separately. The Court of Appeal held that dealing with those matters at the same hearing was not intrinsically wrong, but the questions gave rise to two separate issues which ought to be separately addressed, otherwise the parents would not know the case they would have to meet. Longmore LJ. said at para 4 that:

> "It is of the essence of natural justice that a party to proceedings does know what case he has to meet".

36. The order of the Tribunal as to remedies contained three elements: first, an apology; second, training; and third, a note to be added to N's school file.

37. There is no basis for challenging the apology that was ordered. It is clear from the Notes of the hearing that Mr Oldham, on behalf of the School, made submissions, however brief, on the "issue of apology". In my view the Tribunal was entitled to make the order that it did in this respect.

38. Mr Goudie said nothing about the note that was ordered to be put on N's school file and I can see no reason for disturbing that part of the order.

39. The real issue on this ground related to the order as to training. Mr Giffin accepted that the terms of the order differed from what was sought in the Claim Form and what was asked for by SP's representative in a Case Statement of 20 September 2006. However, in reaching my decision on this issue I take into account the following matters:

(1) The Notice of Claim dated 4 May 2006 requested that "training to be given to Board of Governors on the governing role and how to remain impartial on hearings. For all teachers to be made aware of the practice of exclusion and advice and training in dealing with this and strategies on how exclusion can be dealt with".

(2) SP's representative in a Case Statement dated 20 September 2006 stated that "Teaching staff just need to be given advice on strategies for dealing with ADHD symptoms ....teaching staff have been informed about strategies, however, ... all teachers are not using these strategies when dealing with [N] and the Headteacher is still continuously excluding for behaviour related to her ADHD" (p.4). Further, at p.7 of the letter it is said that "the Headteacher and other teachers of the school do not have an adequate understanding of ADHD and are not sympathetic or tolerant to how the condition affects [N]. They display impatience and annoyance at [N] and are very quick to impose official and unofficial exclusions upon her in order to control her ADHD".

(3) In the Grounds on which the claim is opposed dated 22 September 2006 the School do not address the issue of remedies.

(4) Training is a remedy commonly ordered by Tribunals in discrimination cases (see, for example, *Governing Body of F Primary School v Mr & Mrs T and the Special Educational Needs and Disability Tribunal* [2006] ELR 465 and *Governing Body of Olchfa Comprehensive School v. IE and EE* [2006] ELR 503).

(5) One remedy, namely an apology, was raised before the Tribunal (see para 37 above). The Tribunal's Notes of the final submissions on behalf of the School contain the words: "Remedy – no longer there so what can be done by way of order – issue of apology – for reasons not appropriate". There was therefore the opportunity for the School to address the issue of training, if the School had chosen to do so.

(6) The terms of the Tribunal's order require the Governing Body of the School together with the senior management of the School to refresh or review training in respect of their respective duties under the 1995 Act. This should include specific and distinct training to address the manifestations of ADHD and the varying needs of children diagnosed with it". SP indicated at the hearing that N would not be returning to the School and it may have been in

those circumstances that the Tribunal did not limit the training to persons who had been dealing with N.

40. Mr Goudie submitted that no training was required and suggested that the School will review the management of training and is better placed to do so. Mr Giffin was not adverse to the terms of the order being adjusted if there was a sensible reason for doing so. In my view it was proper for the Tribunal to make the order as to training in the terms that it did. Neither Mr Goudie nor Mr Giffin submitted that it should be reformulated in any specific terms and I do not consider it would be appropriate for me to reformulate this part of the order, nor do I propose in all the circumstances to remit this matter to the Tribunal.

41. The only amendment that I do need to make arises from the requirement that the Governing Body of the School do what was ordered "by no later than the end of the school term commencing in January 2007". I shall amend the time by which the apology shall be given and the note on N's school file added; they shall be done by no later than the start of the summer term 2008. I order that the time by which training be completed be amended to the end of the summer term 2008.

Conclusion

42. In my judgment the Tribunal has committed no error of law. Accordingly for the reasons I have explained, this appeal must be dismissed.