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Oliver Hyams reports

APART FROM YET ANOTHER EDUCATION ACT (Education Act 2005), the main effects of which were described in 'School Rules'; (2005) 149 SJ 735, 17.06.05, the main developments of interest in the law of education during the past year have occurred in the reported cases.

Disability discrimination

In *R (D) v Plymouth High School* [2004] EWHC 1923 (Admin), [2004] ELR 591, Collins J decided that the Special Educational Needs and Disability Tribunal (SENDIST) had erred when it dismissed a claim by a school pupil that a requirement to fill in a medical information form in connection with a work placement was contrary to the Disability Discrimination Act 1995 (DDA 1995). The pupil had a visual impairment to which she did not like attention drawn. The school could have passed on the relevant information without the communication of the medical information. Collins J accordingly declared that the pupil had been the victim of unlawful discrimination contrary to the DDA 1995.

The decision of the SENDIST in *R (H) v Chair of the SENDIST* [2004] EWHC 981 (Admin) to strike out a claim of disability discrimination was overturned by Leveson J on appeal to the High Court, because the SENDIST had said that it would treat the application to strike out the claim as if it had been an application to strike out under r 3.4 of the Civil Procedure Rules 1998, but then considered the matter on the basis of the "vast" (paper) material before the SENDIST (para 6). Thus, what "transpired was in fact the determination of a preliminary issue on the papers alone without the benefit of witnesses being called to elaborate or to be the subject of cross-examination" (ibid). The "question of disability... was [not] one that was suitable for summary determination under reg 44 [of the relevant rules of procedure governing the SENDIST]" (para 34).

In *VK v Norfolk County Council* [2004] EWHC 2921 (Admin), [2005] ELR 343, Stanley Burnton J made a number of significant statements concerning the law of disability discrimination in the context of education. He said that a breach of s 19 of the Education Act 1996 (EA 1996), which requires (subject to limitations) a local education authority (an LEA) to make educational provision for school-age children who would otherwise not receive efficient education, will not automatically give rise to a breach of the DDA 1995 if the child in question is disabled (para 45). The appropriate comparison in that context is with children who are receiving a mainstream education in a school (para 39). A lack of resources would not in itself justify treating a disabled child less favourably than children who are not disabled (para 65), although "the resources available to an LEA may be taken into account in determining whether it had a material and substantial reason for its treatment of a disabled pupil" (para 64).

Special educational needs (SEN)

The case law concerning claims to the SENDIST under its first jurisdiction, namely that relating to the SEN of children of school age, continues to grow.

It is not clear from the report of Stanley Burnton's decision in *R (W) v SENDIST* [2005] EWHC 1580 (Admin), [2005] ELR 599, whether he was referred to the decision of the Court of Appeal in *Oxfordshire County Council v GB* [2002] ELR 8. However, Burnton J certainly analysed the cost to the LEA of the education of a pupil at two different establishments on "a marginal or additional cost basis". Thus if the LEA was already sending a taxi to one school and the pupil could be transported to school in that taxi for only a small additional cost, then that additional cost was to be compared with the cost of the other provision that was being contended for. This approach is open to the criticism that it ignores the possibility of the pupil who is already being transported in the taxi ceasing to attend that school at any relevant time.

The extent to which the SENDIST can – or should – take into account the social and / or health needs of a child was in issue in *W v Leeds City Council* [2005] EWCA Civ 988, [2005] ELR 617. There, Wall LJ stated (para 50) that the SEN of "a child with multiple needs who poses enormous challenges for those who have to attempt to care for him and provide him with education ... simply cannot be viewed in isolation; nor can his s 17 [of the Children Act 1989] needs; nor, for that matter, can his need for services provided by the health authority and CAMHS. A holistic approach is necessary, and inter-agency co-operation essential". However, Wall LJ (para 51) said the SENDIST is "a creature of statute, and its powers are limited to the areas of responsibility given to it by the Education Act 1996 and the consequential regulations... In a case such as the present, the tribunal, in my judgment, had to tread a delicate line between properly informing itself of the 'full picture' relating to C, and limiting its decision to a careful assessment of C's special educational needs within that full picture".

Supplementing reasons

One aspect of the decision of Stanley Burnton J in *VK v Norfolk County Council* that is not mentioned above was subsequently considered by the Court of Appeal in *Barke v SEETEC Ltd* [2005] EWCA Civ 578, [2005] ICR 1373, and was disapproved (at para 32). That aspect was the determination (in para 72 of VK) that the SENDIST cannot properly be invited to expand on its original written reasons. Accordingly, the SENDIST probably may properly be invited to supplement its written reasons.

However, in *R (C) v Admission Panel of Nottinghamshire County Council* [2004] EWHC 2988 (Admin), [2005] ELR 182, Beatson J quashed the decision of an independent appeal panel which rejected a parent's appeal against a refusal of admission, on the basis that the reasons were insufficient.

In contrast, in *R (H) v Independent Appeal Panel for Y College* [2004] EWHC 1193 (Admin), [2005] ELR 25, Newman J stated that the proper approach to take when a public body attempts to amplify its original reasons is that: "It is not permissible to provide reasons for a decision which go beyond the reasons already given [although] clarification and a measure of

elaboration on the reasons already given will normally be permissible." On the facts, he decided that the defendant independent appeal panel (IAP) had done the latter and not the former, and rejected the challenge to the sufficiency of the IAP's reasons for its decision. Owen J and the Court of Appeal took a similar approach in *W (A Minor) v IAP of London Borough of X* [2004] EWCA Civ 1819, [2005] ELR 223. Nevertheless, in *R (I) v IAP for G* [2005] EWHC 558 (Admin), Bean J, having been referred to both, quashed the defendant IAP's decision to dismiss the appeal, on the basis that the reasons given for the decision were insufficient. Bean J's refusal of permission to argue a number of other grounds relating to the role of the clerk, including that the clerk could not write the IAP's decision letter, is also of interest.

Exclusions from maintained schools

In *R (Q) v Wolverhampton City Council IAP* [2005] EWHC 277 (Admin), [2005] ELR 501, Newman J, as well as deciding that the reasons of the IAP were insufficient, but that insufficiency was 'cured' by later, supplementary reasons, considered the manner in which an IAP should decide whether a pupil who should not have been permanently excluded, should nevertheless not be reinstated. Newman J, in rejecting the challenge to the procedure, focused on the substance rather than the form of the matter, as did Bennett J in *S v Oxfordshire School Exclusion Appeals Panel* [[2005] EWHC (Admin) 53, [2005] ELR 533.

Human Rights

In *R (Williamson) v Secretary of State* [2005] UKHL 15, [2005] 2 AC 246, the House of Lords rejected a claim of a breach of Art 9 of the Convention as a result of the prohibition of corporal punishment in all schools. This was on the basis that the prohibition was "a legitimate and proportionate limitation on the practice of parents' religious beliefs" (per Baroness Hale, para 84).

The decision of the Court of Appeal in *R (SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] ELR 198, to allow the appeal of the pupil who insisted (contrary to her school's rules) on wearing a jilbab was controversial, not least because the court focused on the process by which the head teacher and the governing body should have arrived at their decision permanently to exclude the pupil rather than the appropriateness of the result of that process. The case has, it is understood, been appealed to the House of Lords.

A claim of discrimination contrary to Art 14 of the Convention, made on the basis that the claimant's exceptional abilities were not sufficiently catered for, was rejected on the facts in *S v SENDIST* [2005] EWHC 196 (Admin), para 38. In the course of such rejection, Elias J commented (in para 38): "I do not believe that a reasonable person would say that to distinguish the less able from the exceptionally able, and to assist the former in ways not extended to the latter, requires justification. There are obvious social and economic reasons why it may be thought desirable to use resources to help the less able but not the most able."

In *R v Leeds Magistrates' Court* [2005] EWHC 1479 (Admin), [2005] ELR 589, Davis J stated that it is necessary, if reliance is placed on Art 8 of the European Convention on Human Rights (the Convention) in relation to a prosecution for a breach of s 444 of the EA 1996, to focus on the facts of the individual case, "although certainly it is legitimate to have some regard to the generality of this type of case" (para 25).

Negligence

The case law concerning the liability in negligence of LEAs continues to grow. The trend towards the minimisation of liability and/or the damages payable in the event of liability having arisen, continues. In *DN v London Borough of Greenwich* [2004] EWCA Civ 1659, [2005] ELR 133, the Court of Appeal indicated the proper approach to take to the calculation of damages for negligence in relation to the provision of education. The court's careful analysis led to the conclusion that: "If, in the upshot, DN ends up with a total award similar in amount to the type of award now sanctioned in the 'wrongful birth' line of cases [ie, in the region of £15,000 at today's values], we would consider that justice would be done." (para 78)

In *Carty v London Borough of Croydon* [2005] EWCA Civ 19, [2005] ELR 104, while the Court of Appeal confirmed that an LEA may be liable vicariously for negligence on the part of an education officer employed by the LEA, Dyson LJ (with whose judgment Mummery LJ and Dame Butler-Sloss P agreed) commented that: "In the field of special education, there is a spectrum, at one end of which lie decisions which are heavily influenced by policy and which come close to being non-justiciable" and that: "In relation to such decisions, the court is unlikely to find negligence proved unless they are decisions that no reasonable education authority could have made." (para 26)

The upholding by the Court of Appeal in *Clarke v Devon County Council* [2005] EWCA Civ 266, [2005] ELR 375 of the appeal against the decision by the judge to award the claimant all of his costs despite the fact that his claim was only partly successful, and the rejection of the analogy with medical negligence cases in this regard, is a further factor that is likely to lead to a diminution in the number of viable claims of educational negligence.

Academic judgment

In *Higham v University of Plymouth* [2005] EWHC 1492 (Admin), Stanley Burnton J applied (but could be said to have extended the scope of) the ruling of the Court of Appeal in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, by holding that a decision that a medical student was not fit to practise as a doctor because of the manner in which he had acted as such a student was a question of academic judgment and therefore not justiciable.

European education law

The European Court of Justice's decision in *R (Bidar) v London Borough of Ealing* (C-209/03), [2005] ELR 404, extended the scope of Community law by holding that discrimination on the ground of nationality is unlawful in relation to the provision of education. However, the court also decided that it was permissible for the UK government to require that nationals of member states live for three or more years in the UK before being entitled to maintenance grants.

A history lesson

The year 2005 saw the House of Lords decide for the first time several questions concerning the effect of the School Sites Act 1841. That occurred in *Fraser v Canterbury Diocesan Board of Finance (No 2)* [2005] UKHL 65, [2005] 3 WLR 964, where Lord Walker, in para 29, commented that the "historical background to the 1841 Act and the facts directly relevant to this appeal reflect the slow and sometimes contentious development of universal elementary education in this country over two centuries". Lord Walker went on to give a brief overview of the early history of the law of education, which is in reality an aspect of social history. The implications of the House of Lords' decision are considered in detail in 'Returning Gifts', SJ (2005) 149 SJ 1512, 16.12.05, and it is accordingly sufficient here merely to record that the House of Lords stated that in its view the Court of Appeal's decision in *Fraser v Canterbury Diocesan Board of Finance (No 1)* [2001] Ch 669 was wrong (see para 59 of *Fraser (No 2)*).

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