



DECISION

Date of Birth: 2004
Against : The Responsible Body of the School
Date of Hearing: 2021
Persons present: Parent *The Parent*
Parent Witness *Social worker*
Parent Witness *Family Therapist*

RB Representative *Barrister*
RB Witness *Headteacher of the School*
RB Witness *Chair of Governors of the School*

Introduction

1. This is the decision of a panel of the Special Educational Needs Tribunal for Wales in relating to the claim of the child. The child was born in 2004 and is the child of the Parent. The Parent brings this claim on behalf of the child.
2. The Claim is an allegation of discrimination and failure to make reasonable adjustments pursuant to Sections 15 and 20 of the Equality Act 2010. The Respondents are the Responsible Body of the school, a special school maintained by the County Council (the Local authority).
3. The child has learning difficulties and attachment disorder sensory modulation issues and the after effects of Early Developmental trauma, arising from the period before the child was adopted by the Parent at the age of 6 ½ .
4. As part of managing the child various issues. The child has a transitional object, in the child's case this is the child's teddy bear. For reasons which will become clearer later in this decision, the child's teddy bear is a soft toy.

5. The importance of the child's teddy bear to the child is described on pages 7 and 8 of the bundle. The child's teddy bear importance to the child is significant, ongoing and crucial to the child's ability to function on a day to day basis. The child's Parent described the child's teddy bear as being the child's voice.
6. The Claim was issued in December 2020 and was listed for hearing in March 2021.
7. In March 2020, the Welsh Government introduced wide ranging public health regulations to address a Coronavirus variant called Covid 19. Included in those measures were provision for a country wide lockdown. The lockdown provided amongst other things for school to close for all those other than the children of key workers. Other than for drop in days in June and July 2020, school remained closed until the beginning of the Autumn term in September 2021. The hearing of this claim took place as Wales continued through a third period of lockdown, introduced by Welsh Government in December 2020 to address a further surge in infection. School were again closed as a result of that lockdown.

Representation

8. The representation and attendees at the hearing before us are outlined at the beginning of this decision. The hearing was held remotely due to the ongoing pandemic. All parties and witnesses were able to participate in the hearing.

Issues that are agreed

9. It is agreed between the parties that the child enjoys the protection of the act and has a mental impairment which has a substantial and long

term adverse effect on the child's ability to carry out normal day to day functions.

Issues to be determined

10. It is the Parent's case that the school has discriminated against the child on the grounds of the child's disability.
11. The School state that they have not treated the child unfavourably but in any event can show that the treatment was a proportionate means of achieving the legitimate aim of protecting the health of all the school's pupils in light of the ongoing Covid 19 Public health pandemic.

Evidence Considered

12. We confirm that we have reviewed the digital bundle submitted. We have considered carefully the child's statement of case and the Responsible Body's Response.
13. We have also considered the Welsh Government Operating Guidance (page 76 of the bundle), the County Council Toolkit (page 155) and the Risk assessment prepared by the Headteacher.
14. We also heard oral evidence from the following witnesses: -
 - (i) The Parent
 - (ii) Social worker
 - (iii) Family Therapist
 - (iv) Headteacher
 - (v) Chair of Governors of the School
15. The Parent explained to us the extent of the child's difficulties. The Parent described in vivid detail how the pandemic had affected the child, how the child's anxiety levels have been made far worse by the pandemic and how the child's teddy bear was an important piece of the child's "safety net". The Parent described how the child's teddy bear

was used as a mechanism for processing some of the everyday challenges of life. The Parent told us how the child uses the child's teddy bear as a means of communicating with third parties, for example, the educational psychologist. The Parent told us how the child's teddy bear was akin to a prosthetic limb for the child and how the child's teddy bear is a replacement for something that the child does not have on the "inside". The Parent explained how the child's dependence on the child's teddy bear increased as the child's anxiety increased in all settings and how the child has regressed emotionally to such a degree that the child is unable to return to school. The child explained profoundly how incredibly distressed the child has become and how the Parent had tried a variety of mechanisms to see whether the child's teddy bear could be allowed to return to school with the child. The Parent explained how the child had purchased a transparent bag that could be wiped clean and that all that the child needed was to be able to see the child's teddy bear during the day. It is the Parent's case that the child does not need the bear to be in the child's hand but needs it to be within reach and that having it outside the classroom would not be sufficient. The Parent explained how the child's teddy bear had to physically go to school with the child and that having a "clean bear" in school would simply be insufficient. The Parent believed that it would be possible to accommodate the child's need without a detriment to other pupils and did not believe that the alternative suggestions made by the school were sufficient.

16. In cross-examination, the issue of a sealed plastic bag was discussed. The Parent explained that the child could not cope with anybody else touching the child's teddy bear and that the child was of the view that the biggest risk from the bag was to the child and themselves. The Parent described to us the measures the child themselves had taken to protect themselves and the child during the pandemic.
17. In relation to the suggestion contained in the Local Authority's response to the claim that the child would be able to visit the child's teddy bear during the day, the Parent did not recall that offer being

made and, in any event, did not consider that this option would have been appropriate and would have made any difference. The Parent explained that it was about the child's teddy bear making sure that the child was safe and not the other way around. The Parent did not deny that the offer had been made by the school and conceded that they may have missed it during the course of communications.

18. The Panel then heard from the child's Social Worker. The Social Worker confirmed the child's difficulties and concurred with the Parent that the child's needs were very unusual. The Social Worker had been the child's Social Worker for two years and had been meeting with the child regularly before and after lockdown. The Social Worker was able to tell us how bears are used therapeutically with the child and that the child is able to speak to others, including the Social Worker, through the child's teddy bear. The Social Worker described how the child's difficulties have become more pronounced over the last twelve months and that if the child had to deal with anything of any difficulty, the child needed to speak through the child's teddy bear. The Parent explained that the best way of describing the child's dependence on the teddy bear was to consider it as though one was communicating with a younger child.

19. In cross-examination, the Parent confirmed that they had not seen the child in a classroom but was familiar with the classroom situation. The Parent accepted that they did not have knowledge of the needs of the children in the child's class and did not suggest that their information or knowledge was better or superior to that of the school.

20. The Parent accepted that they had no particular expertise in Covid-19 risk management or public health.

21. The Panel then heard from the Family Therapist, who was the child's Play Therapist. The child's Play Therapist described the work that had been done with the child and the importance of the child's teddy bear to

the child. The Play Therapist described how dependence on the child's teddy bear had escalated and it was the Play Therapist's view that the child would not manage without the child's teddy bear in school. The child's Play Therapist confirmed that prior to the commencement of pandemic measures, the school had been in communication with them, had been open to suggestions and the child's Play Therapist had been involved in meetings. The Play Therapist recognised that the needs of the child were difficult and that it would be a massive challenge to get the child back to school. The Play Therapist confirmed that the Play Therapist was not familiar with the Local Authority guidance and was not in a position to challenge it.

22. We then heard evidence from the Headteacher. The Headteacher confirmed the contents of the Risk Assessment and explained the way the school managed, in particular, replacement items and how potential transmission was avoided by having items in school and items at home. There were some children at the school who had walking frames which would be regularly cleaned and sterilised at school. Those would not leave school and the children would be safe from any risk. The Headteacher explained how the twelve months had been a period of constant and intense pressure and how they and the staff had worked tirelessly with a priority of keeping everybody safe and minimising risk. The Headteacher explained that the school dealt with the most vulnerable children in society where the risks are 'sky high' – if the children at the school contracted the virus, it could be fatal. This is particularly true for children at the school who have life-limiting conditions (page 149).

23. The Headteacher explained the practical difficulties in allowing the child's teddy bear into the classroom. The Headteacher told us that there had been difficulties in the past and other children in the class would not appreciate why the teddy bear was around. This could cause friction as other children were also prevented from bringing soft toys into the classroom. The teddy bear was in the cupboard prior to

the pandemic because of the behaviour of other children in the class and the children in the class would be unable to understand the significance of the child's teddy bear to the child. The children would see the teddy as a soft toy that could be played with rather than a transition aid.

24. The Headteacher confirmed that it was their understanding that a member of school staff had made the suggestion of leaving the child's teddy bear in reception during a telephone conversation to discuss the catch up days in June.

25. When Chair of Governors of the School was called to give evidence, they confirmed that the Governing Body had ratified the school's Risk Assessment and they emphasised the concerns should one child have caught the virus from any item. In relation to the offer made by a member of school staff in June in relation to leaving the child's teddy bear in the reception area, they accepted that this should have been formalised in correspondence.

Legal Provisions Considered

26. Section 15 of the Equality Act 2010 provides as follows:

Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

27. The burden of proving the first part falls on the Claimant. The claimant must satisfy the Tribunal to the civil standard of proof namely on the balance of probabilities.

28. The burden of proving the second part is on the Responsible Body.
The standard is again the civil standard namely on the balance of probabilities.

29. Section 20 of the Equality Act 2010 provides as follows:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

Analysis

30. The evidence presented by the child's Parent in their claim and orally clearly demonstrated that the child has a number of very acute needs which require a significant degree of intervention and support. The

Parent was compelling in describing the impact that the child's needs has on a daily basis – not only on the child's life but also on their own. We cannot fail not to have been impressed by the Parent's passion and commitment for their child. The evidence of the Social Worker and the Therapist was also profound in setting out the child's needs, how intense and difficult they are to meet. It is certainly the case that allowing the child's teddy bear to enter school would be important for the child as the evidence clearly established that the child, at this time, is wholly dependant on the child's teddy bear to express to the outside world the child's anxieties and needs. The Parent in their evidence suggested that the child's teddy bear could enter school and be in a purpose built bag. The Parent suggested that this would be enough for the child.

31. What was missing in the Parent's evidence however was a recognition that each child who attend the same school as the child are treated in the same way – no child is allowed to bring items from outside into the classroom. The Parent's evidence did not suggest to us why the School was wrong in taking the approach that it did and in that respect their evidence was weak. At no point did the Parent challenge the risk assessment not suggest that it was defective in any way. The Parent's accepted during their evidence that they had no expertise in Covid 19 in risk management or infection control. This is to their credit. The sole basis of the Parent's case that the school discriminated against the child. There was no evidence to support it nor, perhaps more importantly, to contradict the Responsible Body's case that the measures were not for a legitimate aim.

32. The evidence presented by the Responsible Body was strong. It was evidence that was not challenged by the presence of alternative evidence that we could prefer. The Headteacher presented the Tribunal with a clear audit trail of the risk assessment and also the adjustments that the school was able to make. The risk assessment incorporated the Welsh Government guidelines from September 2020

and also relied upon the specific guidance provided to the Local Authority schools, guidance which specifically refers to a prohibition on soft toys being appropriate during the current pandemic. The risk assessments were thorough, detailed and up to date.

33. The Headteacher clearly articulated their rationale for the prohibition, but their evidence did not rely on this as sole defence against the Claim. The Headteacher was able to justify why soft toys were treated differently and presented to us a clear argument as to why the child's teddy bear could not be allowed into the class room. We found the Headteacher's concern about Covid in the context of a Special school and how contracting Covid 19 could be fatal in any one child to be particularly persuasive.
34. In their evidence, the Headteacher was clearly able to explain why "soft objects" such as the child's teddy bear were treated differently to other educational aid such as hearing aids or computers. It was clearly explained how children who required access to such devices were able to leave a set in school. By leaving items in school for use in school, the risk of transmission and contamination was much reduced. The set left in school was capable of regular disinfecting and cleaning. As the child's teddy bear was a soft toy who had a special meaning to the child, it was clearly inappropriate in the Parent's view for there to be a "school" the child's teddy bear and a "home the child's teddy bear". As a soft toy, it would be wholly impossible for the toy to be washed and cleaned as often as hard objects, including walking aids, wheelchairs and other objects were cleaned.
35. The offer for the child to visit the child's teddy bear outside the class during the day at any time was in our view a genuine one.
36. The Tribunal are wholly satisfied in this case that the Claimant has not persuaded us that there was discrimination. We find as a fact that Every child in the school was treated the same and subject to the same

restrictions. We find that the child was not treated unfavourably to any other child in the school because of something arising in consequence of the child's disability. Other children with transition aids were treated the same with reasonable adjustments in place. These reasonable adjustments were not acceptable to the child or the child's Parent. We cannot find whether the proposal was communicated to the Parent in June 2020 or not. We find however that even if the adjustment was communicated, the Parent would not and does not consider the adjustment to be a reasonable one. With respect we do not agree with the Parent for reasons set out later in this decision

37. Even if the school had treated the child unfavourably, we would have then needed to consider the issue of whether the treatment was a proportionate means of reaching a legitimate aim. We deal with this issue in this decision for the sake of clarity and completeness.

38. The whole world has been changed in the last 12 months since the onset of the Covid 19 Pandemic. It has affected each and every person in the world in different ways. Schools and school children have been especially impacted. WHO figures in February 2021 suggested COVID-19 has had an unequal impact on disabled people who have been among the hardest hit in terms of deaths from the virus. 6 out of 10 people who have died with COVID-19 are disabled. The impact on special schools has therefore been particularly acute with the pressures on school leaders being immense. The Headteacher in their evidence was clear in saying that infection with the virus could have been fatal to any pupil at the school. This statement is of itself the most compelling we heard during the hearing. Measures which would have been considered extreme in February 2020 would be considered routine in 2021. The priority has and will continue to be to keep people safe. Schools around Wales were closed. The action of the school were wholly legitimate.

39. We are wholly satisfied and find as a fact on the evidence before us that the purpose of the school adopting the measures it did was to protect the health of its pupils, the parents of its pupils and of the school's staff. We find the measures taken both proportionate and necessary to meet the legitimate aim of preventing the spread of a once in a century virus. The measures were in accord with Welsh Government guidance and Local guidelines.
40. It seems to us that the school would have fallen into error by allowing the child's teddy bear into the class room – ignoring the specific guidance given by the County Council. Such action would have placed the children in the class at risk that was in our view too high.
41. Further, it seems to us that had the school allowed the child's teddy bear into the class room, the school would have been failing to take into account the guidance given to it by the Local authority policy documentation. At page 166 of the bundle, it explicitly states that soft toys had to be removed from the classroom as part of hygiene practice. Whether the child's teddy bear would have been in a bag or not would not have complied with this document – which, although not binding is certainly persuasive upon the Responsible Body.
42. For the sake of completeness, the panel has also considered the duty to make adjustments under Section 20 of the Equality Act.
43. On the basis of our analysis relating to Section 15 discrimination, we are satisfied on the balance of probabilities that the requirements to make a reasonable adjustment does not arise in this case. It does not appear to us that the child was placed in a substantial disadvantage in comparison to a person who is not disabled. The child could have taken the child's teddy bear to school and could have left the toy in reception with the transition toys of any other pupil. The child would also have been able to travel to school with the child's teddy bear.

44. Even if it were the case that there was a substantial disadvantage, we are wholly satisfied that the adjustments proposed by the school in relation to allowing the child's teddy bear to come into the school building and being accessible to the child or providing a "school" the child's teddy bear were reasonable, given the extreme circumstances the school found themselves in. That sought by the Parent would not have been reasonable in our view because it would have involved taking steps that may have put the health and safety not only of the child but also of other pupils and staff members at risk. It seems to us that this would in fact have been unreasonable.

45. We would also wish to consider one matter and that is the comment made on page 143 of the bundle that the claim was bound to fail. Whilst we appreciate that responding to a claim of this nature does involve a significant amount of preparation in difficult and challenging times, the Tribunal Rules do not have a Summary procedure to determine cases. There is a very good reason for that. Each and every Claimant is entitled to be heard. It is a right to a fair trial which is enshrined by the Human Rights Act 1998. The Claimant raised important issues. Whether the claim was "bound to fail" was not for the Responsible Body or for the County Council to determine. That was a determination for this panel. It seems to us whilst the Claimant has failed to establish their case, it was quite proper that we were asked to consider it particularly given the fact that it appears that there have been no cases considering whether public health provided a defence to a claim of discrimination arising out of disability.

Conclusion

46. For those reasons, we have concluded that the school has not discriminated against the child and accordingly the Claim is dismissed.

Post Script Note

47. Whilst this part of the decision does not form part of our reasons, the panel wished to place a number of matters on record.

48. Firstly, the Tribunal very much hopes that the Local authority will work intensely with the child and the child's Parent to meet the child's educational needs and ensure that appropriate provision is made. We would encourage the Local authority when identifying an appropriate placement to obtain input from the school and from the Social Worker and the Family Therapist who are very clearly attuned and aware to the child's very profound needs.

49. Secondly, the panel wishes to commend the school for their hard work with all pupils and parents in what has been exceptional times.

50. Thirdly we would wish to commend the Parent for their commitment to the child. The child is very fortunate in having a parent who is wholly committed to ensuring that the child's needs are fully met, and the panel was moved by the valiant efforts of the Parent of a significant period of time to meet their child's well being and welfare needs in all its forms.

51. Finally, and perhaps most importantly, the Tribunal wishes the child well for the future.

Order:

The Claim shall be and hereby is dismissed.

Dated: March 2021