The Upper Tribunal gives guidance on the burden of proof in s.15 disability discrimination claims

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B v St Dominic's Grammar School: [2025] UKUT 048 (AAC)

The Upper Tribunal has once again taken the First Tier Tribunal firmly by the shoulders and given it a thorough lesson in how to handle Equality Act 2010 claims properly.

Upper Tribunal Judge Stout, in particular, is on a roll. She started with **SS v Proprietor of an Independent School: [2024] UKUT 29 (AAC)** by giving guidance on how Tribunals should approach s.15 disability discrimination claims, particularly the low threshold for 'unfavourable treatment'. She also critiqued the First Tier Tribunal for materially erring in law in its consideration of the claimant's claims of failure to make reasonable adjustments contrary to ss 20, 21 and 85(6) of the Equality Act 2010 by not identifying the provision, criterion or practice (PCP) or the substantial disadvantage suffered by the Claimant before considering whether there had been an unreasonable failure to make adjustments. Judge Stout also gave important general guidance on the duty to make reasonable adjustments and its relationship with the Education, Health and Care Plan framework in the Children and Families Act 2014, particularly in the context of independent schools.

She then followed swiftly with **KTS v Governing Body of a Community Primary School: [2024] UKUT 139 (AAC)** where, once again, the First Tier Tribunal had erred in how it considered the Claimant's reasonable adjustments claims. The First Tier Tribunal failed to determine whether the adjustments sought by the Claimant were reasonable. The Tribunal also made a perverse finding of fact. Judge Stout took the opportunity, like in SS, to give guidance of general application of the reasonable adjustments duty, this time with a slant towards mainstream/maintained schools, and the approach that Tribunals should take to case management in claims under the Equality Act 2010.

Somewhat done (for now) with the macro approach to s.15 and s.20/21 Equality Act claims, Judge Stout turned to the finer detail of s.15 in **B v St Dominic's Grammar School: [2025] UKUT 048 (AAC)** in particular the role of s.136 (the burden of proof).

By way of reminder, Section 15 of the Equality Act 2010 sets out as follows:

> ***15 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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

Section 136 provides:

> ***136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

In St Dominic's, Judge Stout is particularly interested in the application of the burden of proof to section 15. This, she noted, was specifically addressed in South Warwickshire NHS Foundation Trust v Lee and ors (UKEAT/0287/17/DA), a decision of Eady J at [28-30], [49-50].

In Judge Stout's view, Eady J was saying that section 136 directs the Tribunal to apply the shifting burden of proof in section 15 claims both to the question of what the reason was for the unfavourable treatment and to the question of whether that reason was objectively causally connected to the claimant's disability. If there are facts from which a Tribunal could decide what the reason was, and that there was a causal connection to the disability, then (applying the old approach from the case of Igen v Wong [2005] ICR 931 that Eady J paraphrases in

[50]), the burden shifts to the respondent prove that in fact the treatment had "*nothing whatsoever*" to do with the disability.

Judge Stout goes on to observe that Eady J's decision in South Warwickshire seemed to contain an unclear approach to *which* parts of section 15 are on the Claimant to prove, pursuant to the burden of proof requirements of section 136 and which parts were on the Respondent.

Judge Stout also sets out that although the shifting burden of proof formally creates a two-stage test (as HHJ Tayler in Field v Pye and Co [2022] EAT 68 noted at [33], and in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054), she also acknowledges that Tribunals do not necessarily have to conduct their analysis in two distinct stages. They may, if the circumstances clearly justify it, proceed directly to determining the Respondent's reason for the treatment. Yet she urges caution in taking this approach, particularly where there is evidence suggestive of discrimination. If a Tribunal chooses to bypass the first stage, it should clearly explain its reasoning, ensuring that evidence potentially indicative of discrimination is adequately considered and addressed, else it may stray into illegality.

The key part of the St Dominic's judgment, in relation to section 136, are:

> "[30] As can be seen, Eady J thus directs the Tribunal to apply the shifting burden of proof both to the question of what the reason was for the unfavourable treatment and to the question of whether that reason was objectively causally connected to the claimant's disability. If there are facts from which a Tribunal could decide what the reason was, and that there was a causal connection to the disability, then (applying the old approach from the case of Igen v Wong [2005] ICR 931 that Eady J paraphrases in [50]), the burden shifts to the respondent prove that in fact the treatment had "nothing whatsoever" to do with the disability.
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> [31] Having re-read Eady J's decision in the South Warwickshire case in the course of writing up this decision, it did strike me that the last part of [50] of her judgment where she says that the burden passes to the respondent to demonstrate that its decision to withdraw the conditional offer had nothing whatsoever to do with the "something" could be read as suggesting that the shifting burden of proof applies only to that element and not also to the causal connection between "the something" and the claimant's disability. However, that is not what she says at the start of the paragraph, and it seems to me that she only focuses on the "something" at this point because that is what was in issue in that case. Neither party in this appeal has sought to argue that the burden of proof

should be applied differently to these two liability elements in a section 15 claim and, as I have noted, on the face of the statute, section 136 applies to both elements. Further, I observe that it is implicit in the Supreme Court's decision in Essop and ors v Home Office [2017] UKSC 27, [2017] ICR 640, that the shifting burden of proof also applies to the causation requirement in indirect discrimination claims as the Supreme Court in Essop held at [32] that, in a case where a prima facie causal link had been established between the provision, criterion or practice and the disadvantage, it would nonetheless be open to the respondent to show that there was no causal link between the two in a particular individual's case. I therefore proceed, as the parties did, on the basis that the shifting burden of proof applies to all the elements necessary to establish liability under section 15."

In short, once a Claimant has presented enough evidence indicating both the reason for their unfavourable treatment and a causal link between that reason and their disability, the burden shifts to the Respondent. It then becomes the Respondent's responsibility to show that the treatment had "*nothing whatsoever*" to do with the claimant's disability.

Judge Stout confirms this approach is consistent with EAT case law and clarifies that the shifting burden applies equally to establishing the reason for the treatment and the causal link to disability. Both parties to the Appeal had, interestingly, agreed that the shifting burden of proof applied equally to both parts of the test under section 15 (else we may have seen this case go to the Court of Appeal, which we may yet).

Judge Stout also emphasises at [44] that Tribunals must avoid overly simplistic (or even prejudicial) interpretations of disability-related behaviour. She highlights that even deliberate or apparently intentional behaviour such as physical aggression by a child with autism can still be directly connected to the underlying disability. She says, "The fact that the physical behaviour is conscious, deliberate and/or retaliatory does not of itself mean that it is not causally connected to the disability."

Tribunals should therefore avoid relying on subjective assumptions about motivation, commonly adopted by schools when asserting that such (mis)behaviour represents a deliberate "choice" and instead draw upon expert evidence and/or their own expertise to determine whether behaviour arises from disability.

Judge Stout's direct and robust Equality Act judgments continue to provide Tribunals and practitioners with clear guidance. St Dominic's provides further clarity on how all parts of section 15 are to be interpreted, and, if the guidance is properly followed, it should ensure

greater consistency in applying the shifting burden of proof to both the reason for unfavourable treatment and the causal link to disability under section 15. Tribunals now have a framework to properly handle these claims, particularly in avoiding confusion stemming from previous case law. Difficulty, nonetheless, remains in how well Tribunals will accurately navigate and apply Judge Stout's decisions.

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