IN THE CIVIL JUSTICE CENTRE AT BRISTOL

Case No: CO/4184/2018

Courtroom No. 15

2 Redcliff Street
Bristol
BS1 6GR

12.14pm – 12.44pm
Tuesday, 15th January 2019

Before:
THE HONOURABLE MRS JUSTICE JEFFORD DBE

B E T W E E N:

SOMERSET COUNTY COUNCIL

and

RS

MR T BRADNOCK appeared on behalf of the Applicant
MR P MASON appeared on behalf of the Respondent

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MRS JUSTICE JEFFORD:

1. This is an appeal by way of a case stated from the Taunton Deane Magistrates against a decision by them, on 25 July 2018, to acquit the respondent RS of an offence under Section 444(1) of the Education Act 1996. I should say at the outset that the matter concerns her daughter, and, therefore, in any reporting of this case steps should be taken to anonymise the identity of the respondent from which her daughter's identity would be obvious. I shall refer to the daughter as either 'the daughter' or 'the child' and not use her name in the course of this judgment.
2. The offence under Section 444(1) of the Education Act 1996 is as follows: 'If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence'. Subsection (2A) however provides that 'The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school at any time if the parent proves that at that time the child was prevented from attending by reason of sickness or any unavoidable cause'.
3. The outline facts of this matter are not in any significant sense in dispute and are helpfully set out in Mr Bradnock's skeleton argument for the County Council from which I take them. In summary, the daughter is a child of compulsory school age, and a registered pupil at a community school. During the period from 17 June 2017 to 9 March 2018 she attended school on 209 half day sessions out of a possible 252, the school taking registers both in the morning and the afternoon. Her attendance rate, therefore, amounted to 82.94%. Of her 43 absences, 6 were authorised on medical grounds, and the remaining 37 were unauthorised. The school's internal policy document determines that attendance becomes a cause for concern if it drops below 92%. The school, therefore, wrote to the respondent on 21 September 2017 expressing its concerns, requiring an improvement, and warning her of the fixed penalty procedure. No sufficient improvement was seen and a fixed penalty was issued on 15 November 2017. This was paid in part, but not in whole, and a summons was issued on 27 April 2018.
4. At trial the mother relied on the statutory defence in Section 444(2A). Her case divided the child's absences into two categories. The first category related to 32 occasions when the child was absent by reason of sickness. On these occasions she had not attended the school at all. The mother had notified the school by telephone that her daughter was ill. The second category was comprised of the remaining five occasions when the daughter had attended school but had done so late after the register had closed. It is not in dispute that no explanation was provided at the time, but subsequently, and at trial, the mother said that her daughter had deliberately attended late because she was suffering from anxiety. That anxiety related to a falling out with a fellow student whose mother also taught one of the classes that the daughter wished to avoid.
5. That was the general scope or nature of the defences raised. The Magistrates found that the 32 absences were instances in which the child had been prevented from attending through sickness. Although I refer to her as a child and she is, she is 14 years old, and the nature of her sickness was, in particular, that she suffers from heavy, and, no doubt, painful periods, and also suffered from ingrown toenails which had on a number of occasions become infected, and for which she had been treated with antibiotics.
6. The five absences when she was late were, as I have said, occasions when she said that she was suffering from anxiety about being in a class with a particular child that she had fallen out with, and with that child's mother, a teacher. The Magistrates in the stated case say this:

> 'We were satisfied that on the five occasions where the child had attended school late she did so because of her anxiety about being in a class with a

> particular child and teacher. We considered that at the time this amounted to the child being prevented from attending by reason of her sickness or an unavoidable cause. We took into account that much later the school recognised the causes of her anxiety and lateness and then addressed them in a way which meant that she did not have to be taught by the teacher in question'.

They continued:

> 'In relation to this part of the case we announce that the matter of lateness on five occasions was caused by the child's anxiety by her attendance at school for two subjects, and this prevented her from attending, and we accept that this was justifiable'.

They explained that in using the word, 'justifiable' they meant by reference to the defence of sickness or any unavoidable cause.

7. The first question posed by the Magistrates in the case stated at the behest of the County Council is this: 'In the absence of any medical evidence, such as a certificate or note from a doctor or other medical practitioner, expressly covering any specific individual unauthorised absence, were we entitled to find that all of the 32 unauthorised absences were due to sickness?' In my judgment the answer to that question is 'Yes'. The Act places the burden of proof on the defendant to prove that the child was prevented from attending by reason of sickness or any unavoidable cause. It is common ground that the standard of proof is the balance of probabilities. The Act does not prescribe any particular evidence that must be adduced by way of proof. It is, in my view, a matter for assessment of evidence in the normal way, and a matter for the Magistrates as a question of fact whether the parent has discharged the burden of proof on him or her.

8. The County Council argues that this amounts to finding the defence made out on the say so of the parent, and would make the prosecution of any parent impossible, and, as Mr Bradnock put it, giving the Act a purposive construction, it must require that there be medical evidence in support of the case that the child was prevented by sickness from attending on any particular occasion. However, in my view, that argument is simply wrong. It is not the case that to find or to answer this question in the affirmative means that the defence is made out on the say so of the parent. It is a question for the Magistrates or for any other court of assessing evidence. In this case the Magistrates had before them the evidence of the mother whom they found to be a credible witness. She had called the school on each occasion of absence. It is apparent that she had made arrangements for doctors' appointments during holiday times to minimise the effect on school attendance, and, no doubt, these were matters that they bore in mind, as well as the manner in which she gave her evidence, in finding her to be a credible witness.

9. They also had evidence from a general practitioner in the form of a letter from the child's medical practice, and the supporting printout of the child's medical history and appointments. These taken together evidenced the fact that she did suffer from the two conditions which were principally relied upon as the sickness that had prevented her from attending school, namely, heavy periods and period pain, and ingrowing toenails, and the records set out the steps that have been taken in terms of prescription of drugs and so forth by the medical practice in these respects.

10. It is right that the doctor's letter made no particular comment on whether on any particular occasion the child had been prevented from attending school by reason of these conditions or any other conditions, but did opine that it was not uncommon for people to require time

off from school or work in relation to both conditions.

11. Taking all those matters together there can be no doubt that there was evidence before the Magistrates on which they were entitled to come to the conclusion that they did, and it seems to me, as I have said, wrong to argue that what was necessary, as a matter of law, was a medical certificate or other medical evidence which related each absence to a particular sickness.

12. I emphasise and repeat that that does not mean, and, indeed, the facts of this case evidence that it does not mean, that the say so of the parent will always discharge the burden of proof. It is possible to envisage innumerable situations in which the evidence adduced by the parent does not stand up to scrutiny and is not thought by the court to meet the relevant test. That was not this case, but that was a question of fact for the Magistrates.

13. In saying all of that I also bear in mind the practicalities of the situation. It will frequently not be possible to get medical evidence of the reasons for a child's absence on every single occasion. Doctors have enormous demands on their time. It is well known that getting doctors to make house calls is difficult, and it is common sense that, in circumstances where someone is sick, they do not always take up the time of general practitioners by attending for an appointment to obtain a certificate of illness.

14. Those practicalities are, it seems to me, recognised by the school's own rules and regulations in that in relation to authorised absences the rules provide that the school may request proof of a medical condition if a student has more than three days illness or attendance of below 92% with prior warning. In other words, it appears that the school's policy is not on every occasion to seek proof of a medical condition, and, indeed, later in the school's policy, under the heading 'Illness, medical, and dental appointments', the rules provide that if the authenticity of illness is in doubt schools will consult with the school health service or the student's GP, and proof of medical advice will be sought from the family. Therefore, again, that seems to me to recognise the practical difficulties that would ensue if, in every instance of absence, the relevant defence could not be made out unless there were medical evidence relating to that particular absence.

15. For all these reasons it could, in my view, not be right that any particular evidence would have to be brought before the Magistrates to establish that the child was prevented from attending through sickness, and for all those reasons the answer to the first question is, as I have said, 'Yes'.

16. The second two questions while similar seem to me to raise slightly different issues, and I take them together. They relate to the five late attendances. The first question posed by the Magistrates is this: 'In the absence of any medical evidence from a doctor or other medical practitioner in relation to the five late attendances were we entitled to conclude that the child was prevented from attending by reason or sickness or any unavoidable cause?' Then, I will call it question three, numbering sequentially, 'On the basis of our findings of fact regarding the five late attendances were we correct in concluding that the child was prevented from attending school by reason of sickness or any unavoidable cause?'

17. I have some difficulty with these two questions because the Magistrates did not specify, as I have set out, whether they found that the child was prevented from attending through sickness or prevented from attending by some other unavoidable cause. That poses a particular difficulty in answering question three, and identifying what the findings of fact are which underline the question asked. If the Magistrates found that the child's anxiety amounted to a sickness that prevented her attending, then, at first blush it may seem inconsistent to find as a matter of law that medical evidence was required to support that finding - inconsistent that is with the conclusion I have reached on question number one. It would seem, again, to be a question of fact for the Magistrates, as in the case of physical

illness, and it might seem that to reach a different conclusion would draw an arbitrary distinction between physical and mental health conditions.

18. Mr Bradnock on behalf of the council, however, makes the point that there was evidence before the Magistrates of the other medical conditions, but not of anxiety as a medical condition or sickness. Anxiety is something that everyone suffers from at some time, but only in some cases does it amount to a sickness. Whilst a lay person is capable of deciding whether someone has a sickness like a cold, a lay person is not so capable when it comes to matters such as anxiety.

19. With some hesitation I have come to the conclusion that the Magistrates could not properly have concluded that anxiety amounted to a sickness that prevented attendance without some medical evidence to support that proposition, which was not before them. It is important in my view that the verb is 'prevented'. It is not sufficient in law that anxiety, whether a sickness or not, should cause a person not to want to go to school, and be anxious about doing so. It is necessary to prove that it prevents them from doing so

20. It is, of course, important that schools do not underestimate the impact of a child's mental wellbeing on the child's educational development. Indeed, in this case, the school did in due course act to protect the child, but that is not the same as saying that a bare assertion of difficulties in attending because of a mental condition fall within the statutory defence, either amounting to a sickness or one that prevents attendance. Therefore, as I have said with some hesitation, I have come to the conclusion that a distinction is to be drawn, and that the Magistrates could not properly have concluded that anxiety amounted to a sickness that prevented attendance without some medical evidence.

21. So far as the second limb is concerned, the same follows. They could not reach the conclusion that anxiety amounted to an unavoidable cause that prevented the child's attendance without such evidence. In any case, it does not seem to me that anxiety itself would necessarily prevent attendance rather than merely make attendance difficult or unpleasant. I can envisage that there may well be circumstances in which anxiety would prevent attendance, but I find it difficult to see how that conclusion could have been reached without any evidence beyond that which was apparently before the Magistrates.

22. Therefore, the answer to the second question is, 'No' and in consequence question number three does not arise.

23. That brings me to question four posed by the Magistrates, which is this: 'If we were wrong to find that the child was prevented by reason of sickness or an unavoidable cause from attending school on time for the five late attendances, but these were the only unauthorised absences, should we have convicted the respondent?' I will not recite the balance, but in short the point was that if only those attendances were taken into account then she would have had a 98% attendance rate.

24. Although that might cause one to hesitate in saying that she had not attended school regularly as a result of those late attendances, it is, in effect, common ground between the council and the respondent that the answer to this question is, 'Yes' and that is because, 'regularly' within the meaning of the Act has been construed by the Supreme Court in the decision in the *Isle of Wight Council v Platt* [2017] UKSC 28. In that decision, well known as the case concerned with taking children on holidays during term time, the court had to consider particularly the meaning of the word 'regularly'. Lady Hale, who gave the judgment of the court and with whom the other Lords agreed, identified three possible meanings of the word 'regularly'. She rejected the first two, and concluded that the proper meaning of the word 'regularly' was in accordance with the rules of the school. At paragraph 48 she concluded that in Section 444(1) of the Education Act 1996, 'regularly' means 'in accordance with the rules prescribed by the school'.

25. In this case the rules of the school require a child to attend school on time, to arrive at registration punctually, for both morning and afternoon sessions, and to sign in at reception if late. The register is closed at 9.30am. Thereafter, lateness counts as an unauthorised absence. It is stated that the register is taken at the start of the afternoon session, though the time for lateness in that respect is not specified.

26. The effect simply is that the rules of the school require the pupil to register on time, and if the pupil does not then that is treated as an unauthorised absence. That seems to me to be entirely consistent with the decision in *Platt*, and has the effect that the five latenesses did amount to unauthorised absences within the school's rules and to a failure to attend regularly, that is, in accordance with the school's rules.

27. It is submitted on behalf of the respondent that what I might call a practical approach should be taken. Mr Mason submits that realistically the County Council would not have taken action and prosecuted the mother if the only thing in issue were the five latenesses. That may be right. They might not have done that and they might instead have satisfied themselves with the application of the school's rules in respect of lateness, which would have imposed at least some detention on the child. However, the position is that the respondent has been prosecuted in relation to those matters, and, therefore, in my judgment, the answer to the fourth question is that the respondent should have been convicted in respect of those instances.

28. The last question it seems to me does not then strictly speaking arise, but I will mention it for completeness. The last question was this:

> 'In relation to lateness on five occasions caused by the child's anxiety by her attendance at school does the fact that we use the words, "justifiable reason" and did not use the exact wording of Section 444(2A), "sickness or any unavoidable cause" in the pronouncement of our reasons mean that our decision is invalid?'

That argument has not been seriously pursued by the council, and I would not have found in the council's favour on that matter. It does not seem to me that the use of the word, 'justifiable' was doing any more than stating in the Magistrates' view that the child had been prevented from attending by reason of her anxiety. That was simply a different way of putting it. It is a semantic point and would not have invalidated the decision.

29. However, in any event, given my decision on the second question the issue does not arise.

End of Judgment

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This transcript has been approved by the judge.