ISLE OF WIGHT COUNCIL v PLATT [2017] UKSC 28

CASE COMMENT

Introduction

On 6th April 2017 the Supreme Court delivered judgement in this widely publicised appeal against the decision of the Divisional Court of the Queen's Bench Division of 13th May 2016. Lady Hale provided the leading judgement, which was agreed by Lords Neuberger, Mance, Reed and Hughes.

The decision is of importance to local authorities, schools and parents across England and Wales because it clarifies the meaning of regular school attendance. Parents may be prosecuted under section 444 of the Education Act 1996 for failing to ensure regular attendance. Prior to this decision uncertainty existed around the correct interpretation of the word *"regularly"* in this context. As will be seen, the Supreme Court has concluded that the term means in accordance with the school's rules. The consequence of this decision is that there is now greater certainty in this area. The decision emphasises the importance of ensuring regular school attendance, which is the responsibility of parents, and it will reduce the ability of parents to avoid conviction if prosecuted for failing to ensure regular attendance caused by unauthorised absence including by reason of term-time holidays.

Background

The case concerned the construction of section 444(1) of the Education Act 1996 and, more specifically, the meaning of the word *"regularly"* within the following provision:

"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."

Section 444(1) is a strict liability offence. There is also a more serious alternative offence, under section 444(1A), which applies where a parent *"… knows that his child is failing to attend regularly…"* in relation to which a reasonable justification defence exists under section

444(1)(b). Under section 444(8) a person guilty of an offence under subsection (1) is liable on summary conviction to a fine of up to £1,000. In respect of subsection (1A), a person guilty of an offence on summary conviction is liable to a fine of up to £2,500, or to go to prison for up to three months, or both.

The purpose of section 444 is quite plainly to ensure regular attendance, a duty which is imposed on parents by section 7 of the Act:

"The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—

(a) to his age, ability and aptitude, and

(b) to any special educational needs he may have,

either by regular attendance at school or otherwise."

Mr Platt had taken his daughter on holiday for a period of seven school days during term time without authorisation. The Local Authority issued a fixed penalty notice but Mr Platt failed to pay the required sum. The Local Authority therefore decided to pursue a prosecution under section 444(1). Following a trial, the Magistrates concluded that there was no case to answer because Mr Platt's daughter had achieved a 95% attendance rate before the holiday, and after it 90.3%, which they deemed to be regular. An appeal then occurred. The question for the Divisional Court was:

"Did [the Magistrates] *err in law in taking into account attendance outside of the offence dates (13th April to 21st April 2015) as particularised in the summons when determining the percentage attendance of the child?"*

The Divisional Court answered this question by concluding that the Magistrates had not got it wrong. At paragraph 16 of the judgement Lord Justice Lloyd Jones held:

"The offence is committed if a child fails to attend school regularly without lawful excuse. Absence on an unauthorised holiday of itself does not necessarily constitute an offence in all cases. Clearly an unauthorised holiday could lead to a finding that there has not been regular attendance. However, as Sullivan J made clear in C, that absence on unauthorised holiday will have to be considered in all the circumstances of the case including attendance over a wider

period than the period of absence… I do not consider that it is open to the authority to criminalise every unauthorised holiday by the simple device of alleging in the information that there has been no regular attendance in a period limited to the absence on holiday. If that were carried to its logical conclusion, it would be open to the authority to bring a prosecution under section 444(1) in respect of an unauthorised absence from school without lawful excuse of one day by limiting the period of irregular attendance alleged in the information to that one day. On the appellant's case, there could be no answer to such a charge."

The Department for Education ('DfE') and the local authority were unhappy with the decision and so appealed to the Supreme Court. The essential issue before the Supreme Court was: *"*[what] *is the meaning of "fails to attend regularly" in section 444(1) of the Education Act 1996."*

The judgement of the Supreme Court

As Lady Hale put it at paragraph 1 of the judgement, the question of what *"regularly"* means in context is not a straightforward one:

"There are at least three possible meanings of "regularly" in that provision: (a) evenly spaced, as in "he attends Church regularly every Sunday"; (b) sufficiently often, as in "he attends Church regularly, almost every week"; or (c) in accordance with the rules, as in "he attends Church when he is required to do so". When does a pupil fail to attend school regularly? Is it sufficient if she turns up regularly every Wednesday, or if she attends over 90% of the days when she is required to do so, or does she have to attend on every day when she is required to do so, unless she has permission to be absent or some other recognised excuse?"

Lady Hale then went on to analyse the three identified possible meanings of the word *"regularly"*: *"at regular intervals"*, *"sufficiently frequently"* and *"in accordance with the rules."*

"At regular intervals" was rejected by Lady Hale for the reason that *"it would enable attendance every Monday to count as "regular" even though attendance every day of the week is required. It would enable a child's attendance to be regular even if he was regularly late…"*

Lady Hale spent considerably more time analysing the appropriateness of the meaning *"sufficiently frequently"* but ultimately concluded that this meaning was not in accordance with the intention of Parliament. Her Ladyship provided ten separate grounds for her

conclusion, particularly focussing on the legislative history to section 444. The most important reasons why this meaning was rejected were predicated on the lack of certainty that would exist if it was applied, which would impact most detrimentally on parents, and on the strong policy reasons for rejecting it. At paragraphs 39 - 41 Lady Hale held:

"Eighth, and above all, this interpretation is far too uncertain to found a criminal offence. Over what period is the sufficiency of attendance to be judged? How much is sufficient? Does one take into account how good or bad the reasons for any previous absences were? If attendance over the whole school year, or over the period before the information is laid, is taken into account, how can the parent know whether taking the child out of school on any particular day will be an offence? How is a parent like Mrs C, contemplating taking her children on holiday, to know whether the local authority and the magistrates will consider that it was (a) acceptable because there were no other absences, (b) acceptable because the other absences were for good cause, or (c) unacceptable because of the length of the holiday, or (d) unacceptable because, given the number of days the child had already missed for good reasons, he should not have been taken on holiday too? (No doubt other permutations are available.) The point is that, on this interpretation, the parent will not know on any given day whether taking his child out of school is a criminal offence.

Ninth, and this is the reason why the local authority have appealed and the Secretary of State has intervened in support, there are very good policy reasons why this interpretation simply will not do. It is not just that there is a clear statistical link between school attendance and educational achievement. It is more the disruptive effect of unauthorised absences. These disrupt the education of the individual child. Work missed has to be made up, requiring extra work by the teacher who has already covered and marked this subject matter with the other pupils. Having to make up for one pupil's absence may also disrupt the work of other pupils. Group learning will be diminished by the absence of individual members of the group. Most of all, if one pupil can be taken out whenever it suits the parent, then so can others. Different pupils may be taken out at different times, thus increasing the disruptive effect exponentially.

Finally, given the strictness of the previous law, Parliament is unlikely to have found it acceptable that parents could take their children out of school in blatant disregard of the school rules, either without having asked for permission at all or, having asked for it, been refused. This is not an approach to rule-keeping which any educational system can be expected to find acceptable. It is a slap in the face to those obedient parents who do keep the rules, whatever the cost or inconvenience to themselves."

As to the *"in accordance with the rules"* meaning, at paragraph 42 Lady Hale held that this was the appropriate meaning to apply:

"All the reasons why "sufficiently frequently" cannot be right also point towards this being the correct interpretation. The Divisional Court was clearly worried about the consequence that a single missed attendance without leave or unavoidable cause could lead to criminal liability. However, there are several answers to this concern."

Her Ladyship went on to explain that there are many instances in criminal law where a minor or trivial breach can lead to criminal liability, in relation to which *"… the answer in such cases is a sensible prosecution policy. In some cases, of which this is one, this can involve the use of fixed penalty notices, which recognise that a person should not have behaved in this way but spare him a criminal conviction. If such cases are prosecuted, the court can deal with them by an absolute or conditional discharge if appropriate."*

Furthermore, it was noted that the aim of the provision was to *"… bring home to parents how important it was that they ensured that their children went to school"* and that criminal statutes should be interpreted in such a way that ensures certainty *"… and in a way which enables everyone to know where they stand, to know what is and is not an offence"* which the alternative meanings did not achieve.

At paragraph 48 Lady Hale concluded:

"I conclude, therefore, that in section 444(1) of the Education Act 1996, "regularly" means "in accordance with the rules prescribed by the school". I would therefore make a declaration to that effect. To the extent that earlier cases, in particular Crump v Gilmore and London Borough of Bromley v C, adopted a different interpretation, they should not be followed."

Analysis

This decision will come as a relief to schools and local authorities across England & Wales. The meaning to be attributed to the word *"regularly"*, the subject until now of much contention, means *"in accordance with the rules prescribed by the school."*

Schools will need to adopt clear, transparent and accessible attendance policies and will need to ensure that reasonable steps are taken to bring them to the attention of parents (which in the majority of cases is likely to be happening in any event). Schools will also need to ensure that their policies are applied in a consistent manner to all parents and are in accordance with the DfE's School Attendance Guidance.

The decision should also be welcome news to those acting as magistrates adjudicating over section 444 prosecutions, which arise in high volume. The removal of ambiguity in this area, and the conclusive nature of the Supreme Court's decision, should provide much needed clarity for decision makers.

The adopted interpretation of the word *"regularly"* ensures the most certainty, although it is accepted that this may well result in harsh decisions for those who take unauthorised term-time holidays. It is difficult to escape the fact that under the Supreme Court's judgement parents are in better position to know where they stand. The law requires that parents must ensure that their children attend school on every day that the school requires in accordance with its published rules. Absence without authorisation may lead to the commission of an offence which is likely to result in a fixed penalty notice which, if not paid, may result in prosecution.

Parents must, therefore, act with caution in respect of any anticipated unauthorised absences. They should familiarise themselves with the school's attendance policies. If a need for absence arises, this should be addressed directly with the school. Schools have a limited power to grant a leave of absence under Regulation 7 of the Education (Pupil Registration) (England) Regulations 2006 (as amended). Leave must not be granted unless the school considers that there are exceptional circumstances justifying it. This is a matter of discretion for the school.

In such circumstances parents will need to make an application to the school to seek authorisation for absences to avoid such absence being treated as unauthorised. The application should be sufficiently detailed and, if appropriate, supported by evidence to enable the school to exercise its discretion in the parent's favour. However, such authorisation will only be granted exceptionally which will depend on the individual facts and circumstances. Leave for holidays will usually be refused given the stance provided in the DfE's School Attendance Guidance:

"*Head teachers should only authorise leave of absence in exceptional circumstances. If a head teacher grants a leave request, it will be for the head teacher to determine the length of time that the child can be away from school. Leave is unlikely, however, to be granted for the purposes of a family holiday as a norm."*

If parents remove their children from school in unauthorised circumstances such as a term-time holiday, then they may be issued with a fixed penalty notice which could lead to a prosecution. The most obvious step for parents to take to avoid prosecution is to pay the fine within the timeframe stipulated within the notice. Under the Education (Penalty Notices) (England) Regulations 2007 (SI 2007/1867) (as amended) the amount of the fine will be £60 if paid within 21 days or £120 if paid within 28 days of receipt of the notice. If this is not done, and parents are summoned to appear before a Magistrates' Court under a section 444(1) or (1A) offence, then legal advice should be sought.

Alexander Line

Outer Temple Chambers

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