IN THE LEEDS COUNTY COURT Case 2YL85558

Between

DOUG PAULLEY

Claimant

and

FIRST GROUP PLC

Defendant

Judgment

1. Mr Doug Paulley brings his claim for damages arising out of alleged unlawful discrimination against him by the Defendant, First Group PLC. The Claimant was represented by Ms Casserley and the Defendant by Mr Hodgson. I am grateful to them both for their written and oral submissions and for the approach taken to the case.

2. The factual circumstances are not in dispute. Indeed, there was little further evidence over and above the statements made by the Claimant and on behalf of the Defendant. Such cross-examination as there was added little to the background facts of the incident that gave rise to the claim although that of Mr Birtwhistle, on behalf of the Defendant, was helpful in its elucidation of the Defendant's policy in communicating with its customers.

3. The relevant facts are simply put. On 24th February 2012 the Claimant, who uses a wheelchair for mobility purposes because he suffers from a neurological condition, was attempting to board a number 99 bus from Wetherby to Leeds leaving at 9.40am from the bus station; the bus being owned and operated and forming part

of the service provided by the Defendant, the bus company. It is the Claimant's case that he wished to travel on the bus but was unable to do so because the wheelchair space within the bus was occupied by a lady passenger with a pushchair in which there was a sleeping child. The driver of the bus, Mr Britcliffe, in accordance with what was the Defendant's policy, asked the lady to move (by folding her pushchair) in order that the Claimant, in his wheelchair, could use the wheelchair space. The lady refused. Mr Britcliffe did not consider that he could do any more or require the lady to vacate the space. He informed the Claimant that he would not be able to travel. The Claimant asked whether it would be possible for him to fold his wheelchair, store it elsewhere on the bus and sit in one of the ordinary passenger seats. The driver considered the request but took the view that it would be unsafe to store the folded wheelchair anywhere on the bus as the route to be taken by the bus was particularly winding and there was no means by which the wheelchair could be properly secured. The driver took the view that to accede to the Claimant's request would create a potential risk to the safety of his passengers. Accordingly, Mr Paulley was unable to take that particular bus and, instead, took the later bus, the 9.56. As a consequence, Mr Paulley missed the train which he was intending to take from Leeds Station to Stalybridge, where he had arranged to meet his parents for lunch. Having missed his train, he took a later service arriving an hour later than he had intended.

4. I heard evidence from the Claimant; Mr Britcliffe, the driver Mr Sheard, who is employed as a training development manager by the Defendant and Mr Birtwhistle, the Project Director of the Defendant. They all gave their evidence in an honest and straightforward manner and I have no reason to disbelieve any of them. As I have previously remarked, the facts were within a relatively small compass and were essentially not in dispute.

5. In asking the lady with the pushchair if she would move to accommodate the Claimant, in his wheelchair, in the designated wheelchair space, Mr Britcliffe was adopting the practice and policy as per his training. His understanding of that policy is set out at paragraphs 23 to 25 of his statement. *"Wheelchair users do not have priority over pushchairs/buggies. This is clearly identified within the policy of first*

come first served. I am aware that I can approach and ask passengers to move positions within the bus so as to make space available within the dedicated wheelchair/buggy area, but if they refuse I can do no more than ask."

This is the policy which was set out in the Defendant's website as at the date of the incident. It can be found at page 88 of the bundle

"Wheelchairs do not have priority over buggies, but to ensure all our customers are treated fairly and with consideration, other customers are asked to move to another part of the bus to allow you to board. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

As it transpires, by the date of this hearing and, according to Mr Birtwhistle,

"Because the wheelchair policy on the website did not reflect the policy adopted by First Group" the statement on the website was updated to that shown at page 89 of the bundle.

"Wheelchair users have priority use of the wheelchair space. If this is occupied with a buggy, standing passengers or otherwise full, and there is space elsewhere on the vehicle, the driver will ask that it is made free for a wheelchair user. Please note that the driver has no power to compel passengers to move in this way and is reliant upon the goodwill of the passengers concerned. Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus."

6. Although Mr Birtwhistle took the view that the new wording reflected a different approach from the old; in my judgment it was more a difference of form than of substance. Whether wheelchair users were given "priority" or not, the outcome was the same in each case namely that if the wheelchair space was occupied and if the occupier of the space refused to move when <u>requested</u> (my emphasis) then nothing more would be done to accommodate the wheelchair user and he would not be able to travel.

7. The sign on the bus relating to the wheelchair space is couched in terms which are entirely consistent with the "first come first served" policy. It is to be found at page 227 of the bundle. Mr Birtwhistle agreed that it was merely a request to those passengers, other than wheelchair users, who might be using/occupying the wheelchair space to "give up" the space "if needed for a wheelchair user". Mr Birtwhistle explained that the reason for the signs being by way of request rather than requirement was that the management had undertaken a review of the way in which the company communicated with its passengers. They had been told that they were being too directive so the approach was changed to one which was more "customer friendly". The sign was intended to be non-confrontational.

8. It is against that background that I consider the appropriate law. Save for one matter which I shall consider in due course, the parties were agreed as to the approach that should be taken. It is clear, and it is accepted by the Defendant, that the Claimant has a disability within the meaning of section 6 of the Equality Act 2010. That being accepted section 29 of the Act provides (so far as is material) :

29 Provision of services, etc.

(1)A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2)A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a)as to the terms on which A provides the service to B;

(b)by terminating the provision of the service to B;

(c)by subjecting B to any other detriment.

(3)A service-provider must not, in relation to the provision of the service, harass—

(a)a person requiring the service, or

(b)a person to whom the service-provider provides the service.

(4)A service-provider must not victimise a person requiring the service by not providing the person with the service.

(5)A service-provider (A) must not, in providing the service, victimise a person (B)—

(a)as to the terms on which A provides the service to B;

(b)by terminating the provision of the service to B;

(c)by subjecting B to any other detriment.

(6)A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

(7)A duty to make reasonable adjustments applies to—

(a)a service-provider (and see also section 55(7));

9. The duty to make reasonable adjustments is dealt with in section 20 of the Act. Sub-sections (3) to (5) set out the requirements comprised within the duty. In this case it is the first requirement (at subsection 3) which is accepted to be relevant. This provides:

(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.

Sschedule 2 of the Act, which applies to circumstances in which the act imposes a duty to make reasonable adjustments, provides at paragraph 2

The duty

2(1)A must comply with the first, second and third requirements.

(2)For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.

(3)Section 20 has effect as if, in subsection (4), for "to avoid the disadvantage" there were substituted—

"(a)to avoid the disadvantage, or

(b)to adopt a reasonable alternative method of providing the service or exercising the function."

(4)In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.

(5)Being placed at a substantial disadvantage in relation to the exercise of a function means—

(a)if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or

(b)if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

Finally, it being accepted that the Defendant is a service provider within section 29 of the Act and as such was under a duty not to discriminate against the Claimant in the provision of the service to the public of operating a bus service, section 21 of the Act provides that a failure to comply with any of the requirements amounts to discrimination against a disabled person.

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person

10. At paragraph 44 of her skeleton submissions Ms Casserley set out the step by step approach that the Court should adopt when considering the claim. Mr Hodgson on behalf of the Defendant did not disagree. That approach, which I shall adopt, is as follows:

a) does the Defendant have a provision criterion or practice?

b) if so, does this place disabled people at a substantial disadvantage in relation to the provision of the Defendant's service, access to and use of bus travel?

c) if so, are there reasonable steps that could be taken to avoid the substantial disadvantage?

d) if so, has the Defendant failed to take these steps?

(e) if so, has that failure resulted in the Claimant being subjected to a detriment (s.29(2)(c))

Taking each of these steps in turn:

Does the Defendant have a provision criterion or practice (PCP)?

In considering whether the Defendant had a provision criterion or practice the Claimant refers to the Code of Practice issued by the Equality and Human Rights Commission which states at 5.6

"The phrase 'provision criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a one off or discretionary decision."

The Defendant, for its part, refers to the case of ***Nottingham City Transport Limited -v- Mr Anthony Harvey (2012) WL 488 8957*** that

> "Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. Practice has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply."

The Claimant alleges three types of "provision, criterion or practice".

First, and primarily, the practice/policy of first come, first served in relation to pushchairs and wheelchairs occupying the wheelchair space on board its buses. Then (2) the practice of buying or in the alternative (3) deploying buses with space for only one wheelchair or pushchair when buses with space for both were now available.

In my judgment the policy adopted by the Defendant at the material time of "first come, first served", whether as operated by the driver or as referred to by Mr Birtwhistle, whereby a non-wheelchair user occupying the wheelchair space on the bus would be requested to move but if the request was refused nothing more would be done is a provision or practice within section 20(3) of the Equality Act 2010. I shall consider whether the Defendant's approach to buying and deploying bus stock also satisfies the section 20(3) criteria in due course.

It having been found that the Defendant has a "provision criterion or practice" the next issue is whether such PCP places disabled people at a substantial disadvantage in relation to the provision of the Defendant's service, access to and use of bus travel? Substantial disadvantage is defined at section 212 of the Equality Act 2010 as meaning "more than minor or trivial". The disadvantage, if found to be substantial must be in relation to or in comparison with "persons who are not disabled". This issue requires consideration of what has been referred to as the comparator. The comparator must be someone to whom the practice also applies but who is not suffering under a disability.

It is here that the parties are not agreed. The Claimant submits the comparison must be between disabled people who are wheelchair users and those non-disabled people wishing to travel on the bus, who are not wheelchair users. It is submitted that non-wheelchair users would be able to board a bus, assuming that there are seats available. They would be able to sit on a vacant seat or use the wheelchair space, if not already occupied, as they wished. In such circumstances, it is submitted

that it is obvious that the disabled wheelchair user is at a disadvantage in comparison with such non-disabled passengers. The wheelchair user is unable to sit in a vacant seat and can only use the wheelchair space. Unless he has an enforceable priority over non disabled passengers for the wheelchair space he cannot travel.

The Defendant, on the other hand, argues that the appropriate comparator is not with any (my underlining) non-disabled user of the Defendant's bus service but, more particularly, non-disabled persons with buggies, prams and other necessary means of transportation who, like the wheelchair user, need or may need special provision to accommodate their journey. It is submitted that if "buggy users" are regarded as the appropriate comparator then no substantial disadvantage is caused to the disabled wheelchair user because each has the same opportunity to occupy the space based on who gets to it first. As Mr Hodgson puts it at paragraph 26 of his skeleton argument

> "It is clear that the Claimant is not at a disadvantage in comparison with non-disabled persons using the Defendant's service who have prams and/or buggies and require to use the designated space. It is a matter of record and agreed by the Claimant himself, that pram and/or buggy users have attempted to use this service and have been refused entry to a vehicle because the space is occupied. If persons with prams and/or buggies are considered to be the appropriate comparators (they being those to whom in either reality or theory the alleged practice would apply) then it is submitted that there is no evidence of a discriminatory practice or procedure".

And at paragraph 27

> "If and in so far as the practice or procedure of which the Claimant complained has application to others than the Claimant, it is those who use the designated space (pushchair and buggy users) and they are the comparator to whom in reality the alleged practice applies and it is submitted that there is no discriminatory practice when a comparison is drawn between the Claimant and the appropriate comparators."

In response, the Claimant submits that the Defendant's approach is to "distort the comparative exercise". It is submitted that the circumstances of the comparator do not have to be identical and the case of ***Fareham College Corporation Limited -v- Walters 2009 IRLR 991*** is cited in support. It is further argued that to hold otherwise would defeat the purpose of the disability discrimination legislation. It would deprive "the reasonable adjustment duty" of its efficacy.

11. I prefer the submissions of the Claimant. The comparison, in my judgment, must be with other non-disabled bus users and not non-disabled bus users with particular difficulties for those difficulties, unlike the difficulties faced by a disabled person in a wheelchair, are not protected by the Equality Act or similar legislation. I agree with the Claimant's submission that the approach suggested by the Defendant would be to distort the comparative exercise. It would not give the disabled person the protection which, in my judgment, the Act intends to give. Moreover, the disadvantage suffered by the disabled person in comparison to the persons using the bus service who are not disabled is substantial in that by reason of the practice adopted by the Defendant the disabled wheelchair user will be unable to travel on the bus and consequently, have to take/wait for the next bus alternatively take a different form of transport. In this particular instance the delay to the Claimant was approximately 30 minutes in arriving at his intermediate destination (Leeds bus station) because the bus he had to take and wait for took a longer time to get to the destination but also because he then had to take a later train therefore arriving at his eventual destination (Stalybridge) approximately one hour later than he had planned. In my judgment, however, the disadvantage is not to be gauged merely by reference to the time (number of minutes) that the disabled person is delayed but the fact that he is delayed at all by reason of his inability to take a bus upon which the non-disabled passenger was able to travel without difficulty.

12. Are there reasonable steps that could have been/be taken to avoid the substantial disadvantage and, if so, has the Defendant failed to take such steps?

13. At the outset of the hearing the Claimant alleged the following reasonable adjustments which could/should have been taken by the Defendant to avoid the

substantial disadvantage. Those adjustments are set out in the Particulars of Claim and the Claimant's Skeleton Submissions at paragraphs 51-78. They are as follows.

(i) insisting that the pushchair was folded;

(ii) allowing the Claimant to travel with his wheelchair folded;

(iii) giving wheelchair users priority;

(iv) make clear to other passengers that the wheelchair space is for wheelchair users and that they will be expected to vacate the space if needed, by having a clear policy on the issue and/or requiring First Bus drivers to warn passengers each time they board the bus that they will have to fold their buggies and/or vacate the bus if a wheelchair user wishes to board;

(v) ask and train First Bus drivers to persuade the passenger to move from the wheelchair area (and train them as to their duty to make reasonable adjustments);

(vi) requiring First Bus drivers to ask passengers to fold their buggies before they board the bus;

(vii) expressly instructing and/or training its drivers as to how best to accommodate both disabled persons and pushchairs;

(viii) offer other passengers onwards tickets;

(ix) refuse access to buggies, prams and pushchairs which cannot be folded;

(x) offer taxis to either the disabled passenger or passengers with buggies who leave the bus in order to vacate the disabled bay;

(xi) refuse to continue the bus journey until the passenger moves from the wheelchair space;

(xii) insist the passenger leaves the bus;

(xiii) allow both buggies and wheelchairs to use the wheelchair space together if they both fit;

(xiv) have an automated voice system informing passengers that they need to vacate/fold their buggies for disabled people.

14. Following the giving of evidence and before submissions I was informed that three of the proposed adjustments namely, the use of the automated voice system; allowing both wheelchair users and buggy users to use the same wheelchair space at the same time and allowing the folding of a wheelchair and its storage on the bus were no longer pursued. This was a proper course for the Claimant to take having regard to the evidence I had heard. In particular, the Claimant himself volunteered the view that he agreed with the driver that it would have been unsafe for his wheelchair to have been folded and stored somewhere on the bus. Similarly the use of an automated voice system, without more, would be unlikely to resolve the difficulty and remove the disadvantage whilst the space was not big enough for both wheelchairs and buggies to be accommodated in safety.

15. It became apparent as the hearing proceeded that the real adjustment alleged on behalf of the Claimant, and which the adjustments referred to above were all part of, was that the practice of "first come first served" or even that the wheelchair user should have "priority" over any other passenger, with a buggy or not, for the use of the wheelchair space (but as set out above, only following a request) did not give sufficient protection to the wheelchair user allowing, as it did, the non-wheelchair user to decide whether to agree to move. What was required was a clear practice/policy which not only paid lip service to the giving of priority to the wheelchair user but actually enforced such priority. To that extent the most comprehensive adjustment alleged by the Claimant was that it should be made clear to other passengers that the wheelchair space is for wheelchair users and that they will be <u>required</u> to vacate the space if needed. Once such a practice was put into effect with a proper system of notices, warnings and, if necessary, advertising then the culture will have changed and no non-disabled passenger who wished to occupy the space could be under any illusion that if there was competition for such a space with a wheelchair user, then they would either have to vacate the space by, for example, folding a buggy and sitting elsewhere, or by leaving the bus and taking the next bus available. The extent to which the adoption of such a policy would also require an insistence that pushchairs be folded or that passengers should be asked to fold their buggies before boarding the bus or that drivers should be trained to enable them to better persuade passengers to move from the wheelchair area would be a matter of degree. The most effective adjustment, which would remove

the disadvantage occasioned by the competition for the wheelchair space, would require a change in the first come, first served/request approach.

16. It was argued on behalf of the Defendant that it was not reasonable to require or expect the Defendant to take such a step to avoid the disadvantage. The thrust of the Defendant's argument is that such a policy would be likely to cause confrontations and difficulties between the wheelchair user, the non-disabled person with a buggy wishing to use the wheelchair space and the driver. It is said that there is no sanction that could be taken if the non-disabled passenger refused to move and that a refusal on the part of the driver to continue the bus journey until the passenger moved was "unreasonable and unnecessary". This would be disproportionate action which would lead to substantial inconvenience to other passengers, disruption to services and "potential disorder among passengers and drivers". It was submitted that the Defendant had no "power to force a passenger from a bus" unless there were circumstances suggesting potential criminal behaviour.

17. In considering what is a reasonable step for a service provider to take in order to make adjustments which would have the effect of avoiding the disadvantage to the disabled person, the Claimant makes reference to the Code of Practice issued under the Act and particularly to paragraphs 7.29 and 7.30. The Code states that

> "What is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case. It will vary according to:
>
> (i) the type of service being provided;
>
> (ii) the nature of the service provider and its size and resources; and
>
> (iii) the effect of the disability on the individual disabled person;
>
> (iv) however, without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:

(a) whether taking any particular steps would be effective In overcoming the substantial disadvantage that disabled people face in accessing the services in question

(b) the extent to which it is practicable for the service provider to take the steps

(c) the financial and other costs of making the adjustment

(d) the extent of any disruption which taking the steps would cause

(e) the extent of the service provider's financial and other resources

(f) the amount of any resources already spent on making adjustments

(g) the availability of financial or other assistance."

The Claimant also relied upon dicta of Sedley LJ in ***Roads -v- Central Trains Limited 2004 EWCA Civ 1541*** and in particular at paragraph 13

> "If on the other hand there is a range of solutions, the fact that one of them, if it stood alone, would satisfy section 21(ii)(d) may not be enough to afford a defence. This is because the policy of the act, as I would accept, is what it was held to be by Mynors CH (albeit by way of restricting the duty) in Re Holy Cross, Pershore (2002) Fam 1 paragraph 105 'to provide access to a service as close as is reasonably possible to get to the standard normally offered to the public at large'. While therefore the Act does not require the court to make nice choices between comparably reasonable solutions, it makes comparison inescapable where a proffered solution is said not to be reasonable precisely because a better one in terms of practicality or of the legislative policy, is available. That was

this case."

Here the Defendant says that their policy of giving "priority" to wheelchair users albeit on a "first come, first served" basis which allowed the non-disabled passenger the final say whether to accede to a request to move or not was sufficient having regard to the difficulties occasioned by a policy which was in the way of a requirement to move which would be enforced if there was a refusal. Again, it was submitted by the Defendant that the problems or potential problems inherent in requiring a non-disabled user of the wheelchair space to vacate the space were such as to render such an adjustment unreasonable. "What", asked Mr Hodgson rhetorically, "do you do if the driver asks the passenger to vacate the space and the non-disabled passenger says 'No'." He says there is a difference in terms of enforcement between such a passenger and a person who, for example, contravenes bus policy by smoking on the bus or eating a foul smelling portion of takeaway food. He further asked "do we want a culture where from the disabled person's perspective a parent with a child is removed from the bus to allow access for a wheelchair user". Mr Hodgson also relied on the provisions of the Public Service Vehicles (Conduct of Drivers, Inspectors and Conductors and Passengers) Regulations 1999 as amended as being of assistance to the court when considering the reasonableness of any proposed adjustment. In brief, the regulations referred to make it a criminal offence if a driver does not allow a wheelchair user to use an unoccupied wheelchair space but that a wheelchair space is to be regarded as occupied if

"(a) there is a wheelchair user in that space; or

(b) passengers or their effects are in that space, and they or their effects, cannot readily and reasonably be vacated by moving to another part of the vehicle."

It is submitted by Mr Hodgson that this provision does not require a wheelchair space to be made available to a wheelchair user if another passenger is using it and that such regulation does not require the driver to enforce a requirement that the passenger vacates the space before the wheelchair user is allowed/able to use it. This, he argues, is a clear indication that when considering reasonableness the step proposed by the Claimant is a step too far.

18. The Claimant submits that the Defendant's approach overstates/exaggerates the extent of the difficulty in changing the culture and enforcing the wheelchair user's priority to use the wheelchair space. Having a priority policy in place which lacks the teeth to enforce the policy is no effective policy at all because, in the final analysis the non-disabled pushchair/buggy user can decide not to vacate the space and so disadvantages the disabled wheelchair user by requiring him to take the next bus. The Claimant submits that it is just not right to say that there is no power in the Defendant to require a non-disabled passenger with a buggy who refuses to vacate the space to do so. Moreover, once there was sufficient understanding of the change in policy there would be no real likelihood of difficulty because everybody would know where they were. Moreover, the Claimant does not have to establish that the adjustments proposed would work only that they are potentially reasonable. At which point, it is submitted, the burden of proof shifts to the Defendant. It is for the Defendant to show that the adjustment proposed is not a reasonable one for it to have to make. As to the reliance by the Defendant upon the Public Service Vehicle (Conduct of Drivers, Inspectors and Conductors and Passengers) Regulations 1999 as amended and in particular regulation 12 the Claimant submits that this cannot affect the obligations of the Defendant under the Equality Act. It is a specific provision requiring a driver to permit a wheelchair user to board and access the wheelchair space if certain conditions are met but there is an enormous difference between imposing a criminal sanction upon a driver and the obligation upon a service provider not to discriminate by a failure to take reasonable steps to adjust a present policy which is having the effect of substantially disadvantaging a disabled person.

19. The evidence of Mr Birtwhistle was of assistance in relation to this important issue. The effect of that evidence was not that the Defendant did not wish to change its policy so as to require the non-disabled passenger from using the wheelchair space but because the Defendant believed, rightly or wrongly, that it would not be able to enforce such a policy. He told me that

> "In common with all bus operators there was a problem. If they make a request and if the non-disabled passenger refuses, there

> is no sanction we can take to remove that passenger. We have no power under the law to do this."

Importantly, he told me that "if we had a power under law" we would use it. Similarly, there was no reason why the signs which were in the form of a request could not be worded differently so as to make it clear to all passengers that wheelchair users not only had priority but that such priority would be enforced. He agreed with the theoretical proposition put to him by Miss Casserley that had a robust approach been taken to requiring the non-disabled passenger with the buggy to leave the space on that occasion then the Claimant could have got on board the bus that day. He said, however, that in practice the position may well have been different, for example, as to whether the buggy would fold up or whether the parent was prepared to fold the buggy and eject the infant. He seemed to think that the Defendant was unable to introduce terms and conditions into its contract with passengers that required such passengers to give up/make available the wheelchair space and that there could be sanctions if such passenger refused. However, in answer to me, he said that

> "As far as I'm aware there is no reason why our conditions of carriage should not incorporate a term that makes it clear that a "non-wheelchair passenger" who is asked to move from a wheelchair space is required to do so and if such person refuses they can be asked to vacate the bus."

20. I was told by Ms Casserley and it was not challenged by the Defendant that there were a number of other bus companies, for example Lothian and London Transport, which had adopted a priority policy with teeth, namely that a non-disabled passenger was not merely requested to move from a wheelchair space but was required to do so.

21. Whether a particular adjustment is a reasonable one for a service provider to have taken is a matter for the court considering the issue objectively. In my judgment there is little doubt that had the practice suggested by the Claimant been in force on 24th February 2012 then Mr Paulley would have been able to travel rather than having to leave the bus and wait until the next bus was due to leave the Wetherby

bus station. The practice suggested by the Claimant, namely that the system of priority given to wheelchair users should be enforced as a matter not of request, to any non-disabled user of the wheelchair space, but of requirement is, to my mind, a reasonable one. It could be incorporated into their conditions of carriage so that any non-disabled non-wheelchair using passenger could be obliged to leave the wheelchair space if requested to do so because a wheelchair user needed to use it; just as there are conditions of carriage which forbid smoking, making a nuisance or other "anti social" behaviour on the pain of being asked to leave the bus then a refusal to accede to a requirement to vacate the space could have similar consequences. In my view, once the system had been advertised and in place there would be unlikely to be caused any disruption or confrontation as all passengers would know where they were. Although such a policy might inconvenience a mother with a buggy that, I am afraid, is a consequence of the protection which Parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies. I agree with the Claimant that the 1999 Regulations do not really assist the court in determining whether the proposed adjustment suggested by the Claimant is reasonable or not.

22. As I have found that there were reasonable steps that could have/could be taken to avoid the substantial disadvantage suffered by the Claimant the final issue is whether that failure resulted in the Claimant being subjected to a detriment, see section 29(2)(c) of the Equality Act 2010. Detriment is not defined in the Act but is referred to in the Code of Practice at paragraphs 9.7 to 9.9. It is unnecessary for me to recite those paragraphs in full for there can be little doubt that the delay suffered by Mr Paulley amounted to more than an "unjustified sense of grievance". He was fully justified in his complaint. He had had to get off one bus, wait for another which took longer than the first to get to his destination which in turn was further from the station than he had originally envisaged and, as a consequence, he had missed the train he had intended to take. The Defendant argued in Mr Hodgson's Skeleton Argument that the Defendant cannot be blamed for Mr Paulley missing his train as he clearly left it "tight" but, with respect to Mr Hodgson, that is to miss the point. In fact, Mr Paulley was not cross-examined on the "tightness" of his travel arrangements but, in any event, in my view a person is entitled to rely upon bus and train timetabling to enable him to make travel plans and does not expect or should not

have to expect that he is unable to travel as he intended because, as a disabled person, he is unable to take the bus that he planned to take.

23. Before turning to the question of damages and injunctive relief, I should say a word about the further alternative provision, criterion or practices submitted by the Claimant as being relevant to this claim. I only need deal with these matters briefly having regard to my earlier findings. However, I do not consider that the failure of the Defendant to purchase and/or deploy buses which can accommodate both wheelchair users and mothers/passengers with buggies is a provision, criterion or practice within the meaning of the Act. Moreover, without the policy which I have found was reasonable for the Defendant to have adopted, ie that of requiring a space on the bus to be dedicated to wheelchair users and in respect of which they had not only priority but a right to occupy, the deployment of buses with spaces for both would not be an answer to the problem because there would be nothing to prevent a buggy user from occupying the wheelchair space and refusing to vacate when asked.

Damages

24. I have been helpfully referred to the authorities on the assessment of damages in such cases; primarily *Vento -v- Chief Constable of West Yorkshire Police (2003) ICR 2008* and the updating of the bands set out in *Vento* in *Da'Bel -v- National Society for Prevention of Cruelty to Children 2009 UK EAT* and some further examples of first instance awards of damages. I take all those cases and the leading authorities into account. This was a claim for injury to feelings and not for any consequential or other medical condition or personal injury. Such allegations were not pleaded nor, save for remarks made by the Claimant, was there any evidence. I say this because Mr Paulley, in his evidence, told me not only of the delays he had been subject to (the hour which he arrived late) but that the whole affair/incident had an impact on his confidence. He said he was having difficulties getting access to buses before this and having confidence issues anyway. The difficulties inherent in travelling as a disabled wheelchair using person stressed him out. I must gauge where this case lies in the bands referred to in *Vento*. This is not a case where the Defendant behaved in a high-handed, malicious or insulting manner. Indeed, on the contrary, I

consider that the driver, Mr Britcliffe, acted in a courteous and professional manner throughout and, for the avoidance of doubt, I consider that the Defendant would have liked, if it had felt able to do so, to have required the lady with the pushchair to move so as to accommodate the Claimant. In my view this was not a case which can properly be stigmatised as serious and as such belongs in the lowest band but at the top end of that band. In my judgment the appropriate award of damages for the injury to Mr Paulley's feelings is £5,500.

25. As for injunctive relief, I am not prepared to make any order at this time. I intend to adjourn the application for injunctive relief to await argument, if necessary, in due course following directions given by the court. I do this for one simple reason. I expect First Group PLC to take on board the lessons to be learned from this judgment and to adapt its practices, in whichever way it considers appropriate, having regard to the obligation to meet its responsibilities under the Equality Act 2010 and commercial considerations. I believe that the Defendant is, in the first instance, the best person to decide how to put the lessons to be learned into practice. I shall therefore adjourn that aspect of the remedy in this case for 6 months, a period which in my view is ample, to see whether and what steps are taken. In the first instance, (i) the Claimant should draft an order reflecting this judgment for my approval (ii) the matter should be listed before me for directions in 6 months (if, at that time, the parties agree that no such directions are required then there will be then be no order on the application for mandatory relief). Unless, within 7 days of the receipt by each party of this judgment, I receive an application for the issue of costs to be considered , the order for costs shall be that the Defendant pays the Claimant's costs to be the subject of a detailed assessment if not otherwise agreed. If such application is made, submissions on the issue of costs are to be made in writing to be submitted to the court within 4 weeks of the date of this judgment.

Paul Isaacs

Recorder

16th September 2013