Neutral Citation Number: [2010] IEHC 227

THE HIGH COURT

2007 258 CA

IN THE MATTER OF SECTION 28 OF THE EQUAL STATUS ACT 2000

BETWEEN

KIM CAHILL

APPELLANT

AND

THE MINISTER FOR EDUCATION AND SCIENCE

RESPONDENT

Judgment of Mr. Justice de Valera delivered on the 11th day of June, 2010

These proceedings concern the issue of whether the practice of annotation in the Leaving Certificate examinations is in breach of the Equal Status Act 2000 ("the Act"). The matter comes before the Court by way of an appeal on a point of law from the judgment of the learned Circuit Court Judge, Judge Hunt, dated 19th October, 2007. The said decision was made on an appeal by the respondent from the decision of the Equality Tribunal who had initially upheld the complaints of the appellant and another complainant.

The notation the subject of these proceedings was given to reflect that the appellant had not been assessed in respect of certain elements of a number of Leaving Certificate examinations. The reason the appellant had not been assessed on all elements of the relevant examinations was because she had requested and obtained an exemption from such testing on account of her dyslexia.

By virtue of the exemption from an element of the standard assessment in a number of subjects in the course of the examinations, the appellant's grades were determined on the balance of her work in each subject. In these proceedings, the appellant takes issue with the noting on her Leaving Certificate of the fact that she was assessed on all parts of the examination in each subject except spelling and written punctuation elements in English and spelling and some grammatical elements in other language subjects. The Certificate does not record that the appellant suffers from a disability although the appellant submits that it does in fact do so by implication.

The appellant initially brought her complaint before the Equality Tribunal alleging that the annotation of her Leaving Certificate amounted to discrimination against her as a disabled person contrary to various provisions of the Act. The Tribunal held that the annotation of the appellant's Leaving Certificate to reflect the elements of certain subjects not assessed as part of the examination taken by her amounted to discrimination by the respondent in the provision of a service to the appellant, contrary to s. 5(1) of the 2000 Act.

In an appeal against that decision, the Circuit Court set aside the finding of the Tribunal after a full re-hearing. It is against that Circuit Court decision which the appellant now appeals on a point of law. She has limited her claim for redress to two parts of the Tribunal's Order: that she be paid €6,000 by way of monetary compensation for the discrimination she alleges and that the respondent issue a new Leaving Certificate to her which does not disclose that she was not assessed on all of the elements of the subjects concerned.

Each of the grounds of appeal relied upon by the appellant alleges an error of law on the part of Judge Hunt, the learned Circuit Court Judge who heard the case, in the interpretation of the relevant provisions of the Act. One of the grounds involves an allegation that Judge Hunt erred in positing a subjective test for the provision of less favourable treatment, rather than an objective test.

The Appellant's Submissions

The appellant submits that the respondent's action in inserting a notation on her Leaving Certificate flagged that she had received an accommodation in her Leaving Certificate Examination and that that flagging identified her as a person with a disability and was discriminatory.

The appellant takes no issue with the giving of the accommodation – she herself sought the accommodation – but submits that the annotation to reflect that accommodation was discriminatory. Ultimately, it is the appellant's case that annotation of a person's Leaving Certificate results is or amounts to less favourable treatment of that person. She claims that the annotation stigmatises her as a disabled person and reveals the existence of her disability regardless of whether she chooses to reveal it or not in any given situation. It is therefore, she submits, a violation of her right to privacy under the Constitution and under the European Convention on Human Rights.

In her evidence to the Circuit Court, the appellant stated that the day on which she received her Leaving Certificate results was probably the most embarrassing of her life because those results were annotated to reflect that certain skills had not been tested. She said she felt great distress at this because she has wanted to keep her dyslexia private and was embarrassed that the notation of her results in that manner prompted questions from her peers which if answered by her would have revealed her difficulty. The appellant also argues that the Leaving Certificate examination is discriminatory in itself in that the provision of a standardised examination to a person like the appellant is inherently discriminatory.

It is submitted that the practice of annotation does not create a level playing field for students with disabilities and that the purpose of the Equality legislation requiring a service provider to make reasonable accommodation available to a disabled person is to enable the disabled person to participate in the relevant sphere on equal terms with a non-disabled person. The annotation, it is submitted, diminishes that equality.

The appellant takes issue with the manner in which the respondent has regarded the granting of accommodations as a "benefit" or as "special treatment" which leaves disabled students "in a position of advantage" over the general body of candidates. Contrary to this interpretation of accommodations, the appellant says that the respondent has misunderstood the statutory purpose behind the obligation to provide reasonable accommodation and that disabled students are at a disadvantage when compared to other students and therefore need the accommodations to level the playing field. In other words, the appellant is of the view that accommodations alleviate a disadvantage – which is not the same thing at all as conferring an "advantage". Eliminating a disadvantage is not putting someone in a better position than another – it is putting them in the same position and therefore rendering the position more fair overall – and it cannot be characterised as an advantage or a benefit. In this regard, the appellant claims the respondent's approach to the issue and the nature of accommodations has been entirely misplaced from the start.

A number of grounds of appeal were advanced on behalf of the applicant regarding the decision of the learned Circuit Court Judge. These may be summarised as follows:

I. In the interpretation of the concept of "less favourable treatment", the learned Judge erred in law in concluding that:

> a) candidates who receive an exemption are treated differently but not less favourably from those who did not, by virtue of the consequent annotation of their certificate results;
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> b) the said different treatment is not prohibited under the 2000 Act;
>
> c) less favourable treatment connotes treatment that arises due to a preference, and a preference arising on the basis of a whim, a caprice, unreasonableness, bad faith, illogicality, out of direct or indirect prejudice against the disabled.

II. In interpretation of s. 4(5) of the 2000 Act, the learned Judge erred in law in construing the provision in such a manner as to exempt the respondent in relation to the exercise of their discretion in providing for students with a disability or other special educations needs from the operation of the section.

III. In interpretation of the concept of "reasonable accommodation", the Judge erred in law in concluding that:

> a) the system of notation does not constitute a refusal to provide a reasonable accommodation;
>
> b) the reasonableness of accommodations fall to be judged by reference to the content and context in which they were provided and require that whatever decision is reached by the respondent, it must be based on the application of reason to the evidence and information available to those charged with devising a reasonable scheme of accommodation;
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> c) the test of what constitutes "reasonable accommodation" is whether it is at variance with reason and commonsense, based on irrelevant considerations or directed to an improper purpose;
>
> d) the decision to annotate constitutes a "reasonable accommodation" because it was based on a reasoned and reasonable process, wherein all of the arguments and evidence on both sides of the issue were canvassed;
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> e) it would not be reasonable to require the Department to provide waivers without annotation in the light of the evidence on this point.

IV. The Circuit Court Judge misinterpreted the true meaning of s. 5(2)(h) of the 2000 Act and erred in law in concluding that the system adopted by the respondent would be saved by an application of that provision thereby exempting sub-section (5)(1) from application to differences in treatment, provided for the principal purpose of promoting a *bona fide* purpose in a *bona fide* manner the special interests of a category of persons.

The appellant submitted that the Leaving Certificate Examination is inherently discriminatory. It was submitted that in applying a standardized testing to a student with dyslexia effectively tests that student's disability rather than their ability in the subject under examination. For these reasons, to make the examination fair, accommodations need to be granted and adapted so that the student with a disability is competing on a level playing field. The appellant is of the view that the practice of annotation means that the resulting Certificate is defaced and the student's achievements are demeaned.

The appellant submitted that the respondent was guilty of double discrimination against the appellant. The first discrimination is the failure to provide an examination system which permits a disabled person's ability to be measured in comparison to others without reference to their disability. The second act of discrimination is the annotation which it is submitted has the effect of suggesting that the result is not a real result or not as meritorious as the result of a student obtaining the same overall grade but without the annotation.

It is also argued on behalf of the appellant that the terms "reasonable accommodation" for the purpose of Irish anti-discrimination legislation is to be interpreted in a manner which gives effect to the requirements of EU law and in a manner consistent with international law protections. It is submitted that the phrase must have substantive meaning which promotes equality and that the requirements of "reasonableness" provided for by the 2000 Act are more akin to the negligence standard of "reasonableness" than the judicial review standard. The appellant referred the court to the decision of the Canadian Supreme Court in *Multani v. Commission Scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 265 in this regard. The appellant submits that the learned Circuit Court Judge erred in equating the requirements of "reasonableness" for the purpose of s. 4(1) of the 2000 Act, to which I will turn later, with the standard of reasonableness development by way of decisions in judicial review proceedings in the administrative law context.

The Respondent's Submissions

The respondent submits that in all jurisdictions where exemptions are available to examination students, the nature and fact of the exemption is always made clear either by a specific note on the certificate or the presence on it of a blank space where the mark for the relevant exam component would normally be inserted. The appellant has been unable to point to any jurisdiction in Europe, the Americas, or anywhere else in the world that permits the exemption of a candidate from the assessment of a core construct or target skill in an examination but which prohibits the neutral annotation of the resulting certificate to reflect that fact. Nonetheless, the appellant argued that various general equality principles, culled from a miscellany of domestic, foreign and international legal instruments, somehow mandate an interpretation of the provisions of ss. 4 and 5 of the 2000 Act which has that effect in relation to the Leaving Certificate in this jurisdiction.

The respondent submits that the respondent cannot accept that extensively researched and deeply considered expert views as to the importance of correctness in writing can be cast aside, as was suggested on behalf of the appellant before the Equality Tribunal, in favour of the unsupported assertion that grammar, punctuation and spelling are of diminishing importance in the modern world, such that the alteration of the relevant curricula might be considered an appropriate, and therefore reasonable, accommodation.

While the respondent acknowledges that spelling, grammar and punctuation are problematic for persons with learning difficulties such as dyslexia, that fact alone cannot justify their removal from the relevant subject syllabuses.

The respondent submits that the excision of a core element of an exam is an accommodation granted by the respondent to a student whereby the testing of a core competency is affected or prevented. The respondent submits that the distinction between accommodations that affect the testing of core competencies and those that do not is both a valid and important one. Moreover, they submit that the distinction is an internationally recognised one.

The Circuit Court had before it the uncontroverted evidence of Dr. Braden, who is a contributor to the American Educational Research Association/American Psychological Association/National Council on Measurement in Education publication, *Standards for Educational and Psychological Testing*, 3rd edition, Washington D.C., 1999. In particular, Dr. Braden contributed to Chapter 10 of that book, entitled *Testing Individuals with Disabilities*. Dr. Braden's work over the past 20 years has focussed on the inclusion of students with disabilities in large scale public educational assessment enterprises primarily within the United States, but also in Australia, Greece, Turkey, Israel, Jordan and Canada.

When asked about the practice of exemption from a core element, or – as Dr. Braden termed it – "target skill", Dr. Braden was clear that assessment coupled with certificate annotation, or "flagging", was the appropriate approach. He said, in his evidence:

> "In situations in which certain skills are tested and an individual is exempted from those, I not only believe it is the right thing to do with respect to the individual to flag or indicate that you have exempted the individual, but I believe that the test developer is obliged to do so under both national and international standards."

The respondent highlighted the difference between access skills and target skills, a distinction explained by Dr. Braden in his evidence before the Circuit Court. Access skills are those required to access an examination, for example reading, writing and comprehension in written tests, or speech and hearing in oral tests. Target skills are the very skills that the exam is designed to test, for example knowledge in many written and oral exams. Where candidates are permitted to employ alternative access skills that do not alter or prevent the relevant target skills assessment, then there is no necessity or reason to flag or annotate any resulting certificate of attainment. However, where an accommodation does alter or prevent the assessment of target skills, then if the test is to maintain its integrity, either the nature of the accommodation must be reported or the accommodation must not be made.

As regards the matter of the embarrassment and distress caused to the appellant by the inquiries made as to the reason for the notations on her Certificate and described by her in her evidence before the Circuit Court, the respondent submits that the Leaving Certificate document is an item which is within the appellant's own possession and it is a matter for her to decide to whom she will show it. The document itself is in the appellant's private possession, it is not on public display – the matter of to whom it is disclosed is entirely within the control of the appellant.

In relation to the claim that Judge Hunt erred in law in positing a subjective test for the provision of less favourable treatment rather than an objective one, the respondent submits that the correct test had already been applied by Judge Hunt to the facts of the case in that portion of his judgment where he states as follows:

> "Nor in the overall sense do I find that there was less favourable treatment accorded to each of the claimants in this case, when viewed against the relevant comparators. As I have said, I take an overall view of the treatment afforded to the two claimants on the one hand, and to exam candidates undergoing the same examination with no disability, on the other."

The respondent therefore submits that this taking into account of students with dyslexia, such as the appellant, on the one hand and students with no disability on the other shows that the correct test was employed by the learned Circuit Court Judge in the consideration of whether there was less favourable treatment of the appellant in the manner in which her Leaving Certificate was annotated.

The Legislation

Section 5(1) of the Act provides that a person shall not discriminate in the provision of a service. The service at issue in this case is the certification of educational accomplishment by examination at the end of the secondary school cycle.

Section 5(2)(h) of the Act states:

> "Subsection (1) does not apply in respect of:-
>
> > (h) differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a *bona fide* purpose and in a *bona fide* manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those interests."

The respondent submits that s. 5(2)(h) applies to exemptions provided for the purpose of promoting the special interests of mildly dyslexic examination candidates. It is submitted on the respondents behalf that the Department introduced the exemption and annotation system because it was felt this was reasonably necessary to promote the special interests of dyslexic examination candidates. The appellant's case appears to be, however, that an undisclosed exemption without any annotation is what is reasonably necessary to protect those interests and that those interests are not protected by the act of annotation but rather are harmed by it.

Section 3(1)(a) of the Act provides that discrimination shall be taken to occur where a person is treated "less favourably" than another person is, has been or would be treated on a specified ground. In this case, the appellant is a person with a disability and it is alleged that she has been treated less favourably than a person who is not suffering from the same or any disability in the manner in which her Leaving Certificate has been annotated.

Section 4 of the Act provides that the definition of discrimination shall include a failure or refusal by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself of the service. Section 4(1) states:

> "For the purposes of this Act, discrimination includes a refusal or failure by the provider of a service to do *all that is reasonable to accommodate the needs of a person with a disability by providing special treatment facilities*, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service." (Emphasis added)

Also of relevance is s. 4(5) which provides as follows:

> "This section is without prejudice to the provisions of sections 7(2)(a), 9(a) and 15(2)(g) of the Education Act, 1998, in so far as they relate to functions of the Minister for Education and Science, recognised schools and boards of management in regard to students with a disability."

Section 7(2)(a) of the Education Act, 1998 provides:

> "Without prejudice to the generality of sub-section 1, each of the following should be a function of the Minister –
>
> > (a) to provide funding to each recognised school and centre for education, and to provide support services to recognised schools, centres for education, students, including students who have a disability or other special education needs and their parents, and as the Minister considers appropriate and in accordance with this Act."

The appellant submits that the respondent has breached s. 4(1) of the Act. It is submitted that the failure to find or to consider an alternative to notation as a means of certifying educational achievement in a language subject constitutes a failure to provide reasonable accommodation. The appellant is of the view that the accommodation of the granting of an exemption is ineffective if notation remains necessary to ensure a level playing field. They say that one defeats the purpose of the other, in that the notation negates or wipes out the assistance given by the accommodation and that the respondent is therefore giving with one hand but taking away with the other. The appellant submits that s. 7(2)(a) of the Education Act 1998, creates a positive duty on the respondent which he is required to exercise in a constitutional manner in accordance with law. The duty imposed by s. 7(2)(a) of the 1998 Act involves the duty to provide support services to persons with disabilities. The duty to make reasonable accommodation under s. 4(1) of the 2000 Act is subject to a limitation specified in s. 4(2) which provides that a failure to provide reasonable accommodation will not be discriminatory if the making of the accommodation in question would give rise to more than a nominal cost. However, the duty contained in s. 7(2)(a) of the 1998 Act to provide support services to persons with disabilities is not so constrained or limited and therefore the appellant argues that that section is couched in stronger terms than s. 4 of the 2000 Act and imposes a greater obligation on the Minister to comply with his duty to provide reasonable accommodation. The appellant referred the court to a number of helpful UK authorities relevant to the issue of reasonable accommodation and how it might be interpreted by the courts in the absence of a concrete definition in the relevant statute. In light of this case law, the appellant submits that the duty to make reasonable adjustments under equivalent UK legislation has been interpreted expansively to promote maximum accessibility.

As regards the alleged breach of s. 4(1), the respondent asks in a rhetorical fashion what failure to provide special treatment actually occurred in this case? They say that it is evident that the appellant applied for and received an exemption by way of special treatment and that that exemption was not available to the general body of candidates. They say this special treatment placed the appellant in a position of benefit compared to the general body of candidates, rather than in a position of strict equality with them. The appellant, on the other hand, says the exemption did not confer any benefit but rather it simply removed or alleviated a disadvantage in order to make the examinations fair. The respondent argues that the annotation of the appellant's certificate to the effect that certain assessments had not been carried out as a natural consequence of the exemption was in any event reasonably necessary and was inextricably bound up with the provision of the relevant exemption/special treatment.

On the meaning of "less favourable treatment", Hunt J. made the following observation in the course of his judgment after the Circuit Court hearing of this case:

> "In my view, different treatment is not synonymous with 'less favourable' treatment. If different treatment is what is prohibited by the legislation then it would have expressly said so. The question that I have to ask myself is, can it be said that the different treatment consisting of the application of a statement of fact, that essential portions of the examination were not undertaken, means that the treatment is 'less favourable'?
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> Having considered the matter at length, I do not think that this can be the case. The objective of equality cannot be served by pretending that different things are the same. It seems to me that the objective of equality is served by the prevention of discrimination and by mandating and directing the taking of all reasonable steps to ensure that the fact of a disability does not prevent a disabled person from participating in all aspects of social, economic and educational life."

The learned Circuit Court judge went on to observe that the concept of "less favourable treatment" could be linked to a preference arising on the basis of a whim, a caprice, unreasonableness, bad faith, illogicality, irrationality or prejudice. The appellant submits that this constituted an error of law on the face of the judgment in that there is nothing in the 2000 Act to limit the definition or interpretation of "less favourable treatment" in this way and that the motivation for the treatment is immaterial – it is the consequences for the person affected which matter. The respondent says that nothwithstanding those particular observations on the part of the Trial Judge, the decision of the Circuit Court had already at that stage identified the correct interpretation of "less favourable treatment" in the course of the paragraph judge quoted above and so the later comments regarding bad faith are not material and were not determinative of the issue.

Decision

The issue for this Court to determine is whether the system of providing exemption from elements of certain Leaving Certificate courses accompanied by an indication that such elements have not been assessed amounts to "unfavourable treatment" of those students who seek and obtain such exemptions or whether it amounts to a failure to provide "reasonable accommodation" for such students.

Put another way, the court must decide whether the appellant in this case was entitled to an exemption without annotation or whether the granting of the exemption, with annotation, was a breach of the Act.

The appellant in this case sought and received an exemption. The exemption brought with it the fact of annotation. The appellant sought the exemption but did not seek (or want) the resulting annotation and claims that the annotation was discriminatory in that it identified her as a person with a disability. However, it appears to me, on the basis of the evidence, that one cannot have an exemption of the type sought and obtained by the appellant in this case without some indication that such an exemption has been given. Such a scenario would be unacceptable. No legal system anywhere in the world, according to the evidence, considers some form of accommodation without some indication of the accommodation having been made. The fact that the assessment of a fundamental skill was affected by the granting of the accommodation in this case is significant. For example, the position would be different, if the nature of the accommodation extended to the appellant was, for example, additional time for the completion of the paper and nothing more than that. Such accommodation does not impede or prevent or alter the assessment of a fundamental skill such as spelling, grammar and punctuation in the way that the accommodation afforded to the appellant in this case did. Not to have mentioned that an accommodation of the type granted here was given could adversely affect the integrity of the Leaving Certification examination process. The accommodation granted in this case was, in all the circumstances, a reasonable accommodation and it follows that an annotation to reflect that accommodation was also reasonable. Moreover, it was necessary that the reputation of the examination be preserved.

The Leaving Certificate is relied upon by academic institutions, potential employers, training authorities and many others with a legitimate interest in the nature and level of a person's academic achievement at post-primary level. All candidates for the examination, including the appellant, have a legitimate interest in the uniform application of the rules and procedures of the examination to all candidates. In its supervision of the Leaving Certificate examination system, the Department of Education and Science does not merely act as a supervisor for legitimately interested parties but also as a guarantor of fairness and equality to all Leaving Certificate candidates.

The appellant's level of attainment in the spelling and punctuation elements of English and the spelling and grammar elements of her other language subjects has not been tested at Leaving Certificate level. There are a wide range of accommodations available in the Leaving Certificate examination to a person with dyslexia. These include the use of a tape recorder, the use of a word processor, access to a reader, access to a scribe, access to a separate examination centre and the granting of additional time. The nature of an accommodation in any given case is important in terms of whether or not annotation will be required in the resulting certificate. Some accommodations will require annotations and others will not. That is not discriminatory, that is a matter of common sense and a reasonable approach to take to the issue of accommodations generally.

In jurisdictions where exemptions are available the nature and fact of the exemption is always made clear either by a specific note on the certificate or the presence on it of a blank space where the mark for the relevant subject would normally be inserted. The appellant has been unable to point to any other jurisdiction that permits the exemption of a candidate from the assessment of a fundamental matter in the examination but which prohibits the neutral annotation of the resulting certificate to reflect that fact.

As for the appellant's contention that the Leaving Certificate exam is itself inherently discriminatory, I cannot accept that proposition. It may be a standardised examination, which in fact is its purpose, but it has not been shown to be an inflexible standardised examination or an unreasonably standardised one. Indeed, the evidence shows that there are several accommodations available for individuals who may need them, thus providing a flexibility in the administration of the various tests. The evidence before the Circuit Court and before this Court on appeal showed there is no reasonable alternative approach to the testing of spelling that would permit a non-standardised spelling test.

I have no doubt that the inclusion of the annotation on the plaintiff's Leaving Certificate can be a difficulty for her but it is a necessary consequence of the accommodation she received. I am also of the view that the annotation was reasonable, particularly in light of the internationally recognised practice in this area. In reaching that conclusion, I have regard to the extensive case law relied upon by the appellant on the constitutional protection of equality rights. Nowhere in that case law is there any suggestion to the effect that equality rights must be absolutely guaranteed without limitation in the name of reasonableness even in cases where the requirements of reason and common sense require the taking of some action which may not be to the complete satisfaction of the person asserting them, in this matter the plaintiff. It appears to me to be a question of balance and that the contention advanced on the part of the appellant invites the court to embrace an unreasonable definition of "reasonable accommodation" which tips the balance too far in favour of the appellant to the detriment of other parties with a legitimate interest in the fair and equitable administration of the Leaving Certificate examination.

I accept the respondent's submission that the deletion of the appropriate annotation from the appellant's Leaving Certificate would constitute a misrepresentation to any person invited to consider or to rely upon that document and that the appellant's marks in the relevant subjects include and reflect an assessment of relevant fundamental skills. If I were to accept the appellant's contention it would amount to the court finding that a Leaving Certificate should have been furnished to the appellant which did not reflect the fact that certain aspects of various subjects had not been assessed. I accept the respondent's submission that any absence of notation of an accommodation having been made which resulted in certain matters not being assessed would call the integrity of the examination into question. Indeed, not being assessed in respect of a fundamental or core skill by virtue of having obtained an accommodation and then this fact not being reflected in the resulting Certificate would negate the value of that Certificate. It is after all a document which is a record of achievement and which occupies an important place in the educational system of this country and abroad in that the examination the results of which it records is and always has been recognised as a substantial and important one in a person's educational life. It must stand for something and in my view it is this – to record the level of achievement of an individual at the conclusion of their secondary level education. If a person has not been assessed in respect of the spelling, grammar and punctuation elements of an examination this should, indeed must, be reflected in the resulting Certificate and the practice of annotation operated by the Department of Education and Science is reasonable in this regard.

I am satisfied that the respondent acted at all times in accordance with international best standards in the annotation of the appellant's Leaving Certificate and that any failure to record an accommodation that alters the assessment of fundamental elements of a subject would adversely affect the integrity of the testing process – it would essentially defeat the purpose of having examinations in the first place. I am equally satisfied that the learned Circuit Court Judge did not err in law in his thorough assessment of the meaning of "less favourable treatment" or in any other respect as advanced on behalf of the appellant and I accept the respondent's contention that Judge Hunt applied the correct test under s. 3 of the 2000 Act.

Accordingly I dismiss the appeal.