Is gender segregation in mixed-sex schools inherently discriminatory?

Interim Executive Board of X School v Her Majesty's Chief Inspector of Education, Children's Services and Skills [2016] EWHC 2813 (Admin), November 8, 2016

Implications for practitioners

The English courts have been called upon for the first time to consider whether the segregation of pupils by gender in mixed-sex schools in and of itself amounts to discrimination. Jay J held that it does not. To those of us practising in discrimination law, who will be familiar with the seminal American civil rights case of *Brown v Board of Education* [1954] 347 US 483 in which the US Supreme Court put an end to racial segregation in schools by declaring that the doctrine of *'separate but equal'* had no place in the public school system because *'separate educational facilities are inherently unequal'*, the decision may seem instinctively surprising. The decision, however, turned very much on the evidence before the court, which was that there was no difference in the nature or quality of the education being provided to either sex, and nor was there evidence that the segregation was imposed on the basis of a presumed superiority of one sex over the other.

Facts

The claimant (C) is a voluntary-aided faith school which adopts a Muslim ethos. Its pupils are aged between four and 16 and, although a mixed school, boys and girls are completely segregated not only in lessons but also during breaks, clubs, activities, school trips and social functions from year five onwards. This is approved of by parents, though there was evidence before the court that at least some students disliked the fact that they did not have the opportunity to mix with peers of the opposite sex, and were concerned about their ability to interact with the opposite gender when they left school. There was no evidence that the girls received an education that was different from or inferior to the boys, or vice-versa.

The defendant (D), acting through Ofsted, carried out an inspection of the school and placed the school in special measures. It sought to publish a report in which it alleged that the practice of segregation was discriminatory. C obtained an injunction preventing the publication of the report and sought judicial review of D's decision on a number of grounds, although the principal issue in the judgment and of concern to practitioners was whether D was correct to say that gender-segregation, without more, falls foul of the Equality Act 2010 (EA).

The arguments

D claimed that the segregation of students amounted to direct discrimination contrary to s13 EA, which is prohibited in schools by s85 EA, save for where express exceptions apply, such as in the admission's policies of single-sex schools and in the context of sporting activities. Direct discrimination occurs where there is less favourable treatment of a person or persons because of a protected characteristic. D argued that although boys and girls were ostensibly treated equally, segregation itself was less favourable treatment because:

1. both boys and girls are denied the opportunity to choose to socialise with the opposite gender; this loss of a choice of companions and the loss of opportunity to learn to socialise confidently with the opposite gender constitutes less favourable treatment
2. the loss of opportunity imposes a particular detriment on girls because the female sex is the group with the minority of power in society
3. the very fact of segregation constitutes less favourable treatment of girls because it cannot be separated from *'deep-seated cultural and historical perspectives as to the inferiority of the female sex and therefore serves to perpetuate a clear message of that status'* [para 86]. D relied on *Brown v Board of Education* to advance that line of argument.

C argued that, absent any finding of differential treatment between the sexes, the restriction of interaction with the opposite sex amounts to equal treatment and is therefore *'the very definition of what discrimination is not'* [para 94]. It further submitted that the American line of authority was of no assistance as that could not be divorced from the particular circumstances of racial discrimination in the US in the 1950s, and in any event the unlawfulness of racial segregation is expressly stated in s13(5) EA, whereas the EA is silent in respect of segregation on the basis of other protected characteristics. Parliament had therefore taken the opportunity to highlight racial segregation as a special case.

High Court decision

Jay J was willing to accept that the loss of opportunity to associate with the opposite gender was capable of amounting to a denial of a benefit or facility and therefore could potentially amount to a detriment. He also accepted that it was clear that the segregation in this case was because of the protected characteristic of gender. The fact that the decision to segregate was motivated by religious belief was irrelevant (*R (E) v Governing Body of JFS* [2010] 2 AC 728; see Briefing 555).

But Jay J went on to say that the key question was '*is one sex being treated less favourably than the other?'* and concluded that they were not. The denial of the same opportunities to both groups, the boys and the girls, '*has equal value and impact, and is of the equivalent nature and character… On this analysis it cannot be said, in my judgment, that one sex is being treated less favourably than the other…there is symmetry between both contingents on either side of the line'* [paras 125-7].

Jay J considered that assistance could not be drawn from hypothetical comparisons with segregation on the basis of other protected characteristics, such as segregation of Muslims and Hindus who were otherwise apparently treated equally. He was willing to accept that this would amount to an *'egregious case of religious discrimination. The inference must be in any given case that the more powerful group was imposing its will on the weaker, with correlative express or implied disadvantages'* [para 130]. However, he did not find that to be the case on the instant facts. He observed that C's decision to segregate pupils was in an entirely different context to the racial discrimination that occurred in the US and South Africa, where there was a plain and obvious link between the mores and attitudes of those exercising majority power in society and the means which were customarily deployed in the field of education to impose a racist ideology. The segregation of pupils by sex in this school, however, was not a *'reflection of the mores and attitudes of wider society; it is only capable of being seen as a reflection of the mores, attitudes, cultures and practices of the faith groups who have been permitted to do it'* [para 142]. He said he would be slow to conclude that segregation in this Islamic school generated a feeling of inferiority as to the status of the female gender in the community, and D had not advanced a case that the school did segregate the sexes because they regarded the female gender as inferior.

Comment

This is a case of obvious public importance. Although the judge held that segregation without more was not less favourable treatment, it plainly is capable of being so if the effect of that segregation is to disadvantage one group, or if the reasons for the segregation are based on an assumption of superiority of one group over another.

D has been granted permission to appeal and it therefore remains to be seen if Jay J's decision will hold. Certainly, there are a number of points that could be made. First, the judge observed that although he had seen no evidence that the segregation of pupils by sex was disadvantageous, he had *'little doubt'* that educational experts would have much to say on the topic. He simply had not heard them *'within the four corners of this litigation'* [para 133].

Second, Jay J's decision turns on the fact that he identified the girl pupils as a comparator for the boy pupils and vice-versa. Having rejected C's submission that the court should *'not get too hung up on the question of comparator'* [para 102], he did not simply ask the question, what was the reason for the treatment and is that a legitimate basis for different treatment?

Third, it is clear that Jay J was willing to accept that segregation of Muslims and Hindus would be unacceptable because of the inescapable inference that the reason for the segregation would be the more powerful group wishing to maintain its position. Jay J was also willing to take judicial notice of the fact that women continue to be the group with minority power in society. It is therefore curious that the reason for the adoption of segregation was not given closer scrutiny. No rationale for the treatment was offered aside from vague references to religious belief.

Finally, the judgment did not grapple with the issue of whether the school may have been in breach of its s149 EA duty not only to advance equality of opportunity, but also to foster good relations between those who have and do not have particular protected characteristics. It is difficult to see how a policy of complete segregation could advance this goal. Whether this is an issue the Court of Appeal will grapple with remains to be seen. Watch this space.

Eirwen-Jane Pierrot
Barrister
Field Court Chambers
eirwen.pierrot@fieldcourt.co.uk