Neutral Citation Number: [2014] EWCA Civ 1573

Case No: A2/2014/0179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
Recorder Isaacs
2YL85558

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2014

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

- -

Between :

FIRSTGROUP PLC	**Appellant**
- and -	
DOUG PAULLEY	**Respondent**

- -
- -

Mr Martin Chamberlain QC & Mr Tim Johnston (instructed by **Burges Salmon LLP**) for the **Appellant**
Mr Robin Allen QC & Ms Catherine Casserley (instructed by **Unity Law Limited**) for the **Respondent**

Hearing dates : 11 & 12 November 2014

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Judgment

Lord Justice Lewison :

Introduction

1. This appeal has attracted some public interest, so it is important to be clear about the issue. It is not about whether non-wheelchair users should move out of the wheelchair space on a bus in order to accommodate a passenger in a wheelchair. Of course they should if that is possible. Nor is it about whether mothers standing in the wheelchair space with a child in a folding buggy should fold their buggies in order to make way for a wheelchair user. Of course they should if that is possible. Non-wheelchair users, unlike wheelchair users, will normally have a choice about which part of the bus to sit or stand in. Common decency and respect for wheelchair users should mean that other passengers make way for them. What is at issue is whether the bus company must have a policy to compel all other passengers to vacate the wheelchair space irrespective of the reason why they are in it, on pain of being made to leave the bus if they do not, leaving no discretion to the driver.

2. For the reasons that follow I have concluded that that is a step too far.

The facts

3. Mr Doug Paulley is a wheelchair user. On 24 February 2012 he arrived at the bus station at Wetherby at about 9.35 a.m. intending to catch the 99 bus to Leeds. According to the timetable, the bus was due to leave at 0936. The next scheduled buses were at 0956 and 1036 and then at 56 and 36 minutes past the hour. On arrival at Leeds he intended to catch the train to Stalybridge to meet his parents for lunch. The bus was already at the stand. It was a bus that was operated by a subsidiary of FirstGroup. It was equipped with a lowering platform and a wheelchair ramp. There is also a space provided for wheelchairs in the bus. When Mr Paulley attempted to board the bus the driver asked him to wait because the wheelchair space was occupied by a woman with a sleeping child in a pushchair. The driver asked her to move and to fold down her pushchair so that Mr Paulley, in his wheelchair, could use the space. She said that her pushchair did not fold down, and refused to move. Mr Paulley then asked whether he could fold down his wheelchair and use an ordinary passenger seat. The driver considered his request, but refused it, because there was no safe way of securing the wheelchair and the bus was to take a particularly winding route. Although Mr Paulley was a frequent bus user, this was the first time that he was unable to get on the bus because a pram or pushchair user refused to vacate the wheelchair space.

4. In consequence Mr Paulley had to wait for the next bus, which set off about a quarter of an hour or twenty minutes later. Because he took a later bus than he intended to, Mr Paulley missed his train at Leeds; and had to take a later train which arrived at his final destination an hour later than he had intended.

5. Mr Paulley sued FirstGroup for unlawful discrimination against him on the ground of his disability and succeeded before Recorder Isaacs, sitting in the Leeds County Court, who awarded him £5,500 in damages.

6. The case turned on FirstGroup's policy about wheelchairs and their users. What it said at the time of the incident was this:

> "As part of our commitment to providing accessible travel for wheelchair users virtually all our buses have a dedicated area for wheelchair users; other passengers are asked to give up the space for wheelchairs. … If the bus is full or if there is already a wheelchair user on board unfortunately we will not be able to carry another wheelchair user. … Wheelchairs do not have priority over buggies, but to ensure that 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."

7. By the time of trial the wording of the policy had changed to some extent and read, so far as material as follows:

> "As part of our commitment to providing accessible travel for wheelchair users virtually all our buses have a dedicated wheelchair area for wheelchair users; other passengers are asked to give up the space for wheelchairs. …
>
> 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 on the goodwill of the passengers concerned.
>
> Unfortunately, if a fellow passenger refuses to move you will need to wait for the next bus. "

8. The judge thought that the changes were immaterial. There was also a sign in the bus that read "Please give up this space if needed for a wheelchair user." The bus driver had followed the company policy, by asking the woman with the pushchair to move, but by taking her refusal no further. The evidence of Mr Birtwistle, FirstGroup's Projects Manager (UK Bus), was that "in the main" passengers comply with a request to give up the wheelchair space; but that did not happen on this occasion. Mr Birtwistle also explained why FirstGroup had adopted the policy that it did. He said that the company had carried out a review of the way it communicated with its customers, and found that it was putting up a number of negative prohibitory notices on buses. The view was taken that it would be better policy to adopt more customer-friendly notices, which were more pleasant and more engaging. The policy about the wheelchair space was designed to cause the customer to think "Somebody else needs this space. I will be reasonable. I will move away from it." It was intended to be non-confrontational and placatory.

The judge's judgment

9. The judge found that FirstGroup's policy was a "provision criterion or practice" (a "PCP") which placed Mr Paulley at a substantial disadvantage by comparison with non-disabled bus passengers. He went on to find that there were reasonable adjustments that FirstGroup could have made which would eliminate that disadvantage. Those reasonable steps were an alteration to the conditions of carriage which would *require* a non-disabled passenger occupying a wheelchair space to move from it if a wheelchair user needed it; coupled with an enforcement policy that would require non-disabled passengers to leave the bus if they failed to comply with that requirement. It is common ground that, as presently drafted, FirstGroup's conditions of carriage do not give a driver power to require (as oppose to request) a passenger to move out of the wheelchair space, or to leave the bus if he or she refuses to do so.

10. On very similar facts, in *Black and Others v Arriva North East Ltd* (1 May 2013) HHJ Bowers, sitting in the Middlesborough County Court, held that Arriva, who had a policy identical to that of FirstGroup, were not guilty of unlawful discrimination. Because the two cases came to different conclusions on almost identical facts, permission to appeal was granted in both cases. However the appeal in *Black* has since been withdrawn, so Mr Paulley's case is now the only live appeal.

The legal framework

11. Much of the legal framework is common ground. The bus with which we are concerned is a public service vehicle which is required to comply with Schedule 1 to the Public Service Vehicle Accessibility Regulations 2000. Paragraph 2 of that Schedule requires a bus to be fitted with not less than one wheelchair space of specified dimensions on the lower deck of the bus, which complies either with paragraph 3 or with paragraph 4 of that Schedule. The bus in our case complied with paragraph 4. That paragraph also envisages that a folding or tip-up seat may be placed in the wheelchair space; but there must be a sign on or near such a seat which states "Please give up this seat for a wheelchair user". The bus must also carry a sign adjacent to the wheelchair space which conforms with the diagram in Part II of the Schedule. That diagram simply shows a representation of a person in a wheelchair. It does not require that sign to say in addition "Please give up this space for a wheelchair user"; although the sign on the bus in our case did. Schedule 2 to the Regulations also deals with more general matters of accessibility for disabled persons. Paragraph 3 provides that there must be not less than four seats designated "as priority seats for use by disabled passengers." There must also be a sign on or near a priority seat "indicating that disabled persons have priority for the use of that seat." Thus whereas the regulations give explicit priority to disabled persons who wish to use the priority seats, they do not give similar priority to wheelchair users who wish to use the wheelchair space.

12. In addition to the physical characteristics of buses, legislation also enables regulations to be made about the conduct of drivers and passengers. The enabling provision in section 25 of the Public Passenger Vehicles Act 1981 enables regulations to be made authorising a driver or, at his request, a police constable to remove a passenger infringing the regulations.

13. The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 ("the Conduct Regulations") were made under these powers. Our attention was drawn to a number of regulations. Regulation 5 (2) provides:

> "A driver, inspector and conductor shall take all reasonable steps to ensure that the provisions of these Regulations relating to the conduct of passengers are complied with."

14. Regulation 6 (1) provides that no passenger shall:

> "(b) put at risk or unreasonably impede or cause discomfort to any person travelling on or entering or leaving the vehicle …
>
> (d) smoke … in or on any part of the vehicle where passengers are by a notice informed that smoking is prohibited…
>
> (k) remain on the vehicle, when directed to leave by the driver, inspector or conductor on the following grounds:
>
> (i) that his remaining would cause the number of passengers exceeding the maximum seating capacity or standing capacity …
>
> (ii) that he has been causing a nuisance; or
>
> (iii) that his condition is such as would be likely to cause offence to a reasonable passenger …"

15. Regulation 6 (2) provides that:

> "Subject to paragraph (3), a passenger on a vehicle who has with him any article or substance mentioned in paragraph (4) or any animal—
>
> (a) if directed by the driver, inspector or conductor to put it in a particular place on the vehicle, shall put it where directed; and
>
> (b) if requested to move it from the vehicle by the driver, inspector or conductor, shall remove it."

16. The articles or substances mentioned in paragraph (4) include "any bulky or cumbersome article".

17. Regulation 8 (2) provides that any passenger on a vehicle who contravenes any provision of the regulations "may be removed from the vehicle by the driver… or, on the request of the driver, … by a police constable."

18. The Regulations were amended in 2000 under powers conferred by the Disability Discrimination Act 1995 to deal with wheelchair users. Regulation 12 as inserted by the amendments provides that:

> "(2) If there is an unoccupied wheelchair space on the vehicle, a driver and a conductor shall allow a wheelchair user to board if—
>
> (a) the wheelchair is of a type or size that can be correctly and safely located in that wheelchair space, and
>
> (b) in so doing, neither the maximum seating nor standing capacity of the vehicle would be exceeded.
>
> (3) For the purpose of paragraph (2), a wheelchair space is 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 vacate it by moving to another part of the vehicle."

19. Regulation 12 (4) requires the driver to ensure that "before the vehicle is driven… any wheelchair user is correctly and safely positioned in a wheelchair space." In addition a bus driver has duties to help wheelchair users to board and alight and, where appropriate, to fit wheelchair restraints.

20. When the Conduct Regulations were amended the Government issued written guidance about their application. The introduction said that the Government was "committed to comprehensive and enforceable civil rights for disabled people. Achieving a fully accessible public transport system is a key element of that policy". Dealing with the wheelchair space the guidance said:

> "**A wheelchair user must only be carried if there is a wheelchair space available and the seating and standing capacity of the vehicle will not be exceeded**.
>
> Because buses often carry more seated and/or standing passengers when the wheelchair space is unoccupied the opportunity for a wheelchair user to travel may depend on other passengers and how full the vehicle is at the time. If there is space available and the seating and standing capacity will not be exceeded when the wheelchair space is occupied then any passengers in the wheelchair space should be asked to move. This may not be practical if, for example, the vehicle is nearing its capacity or passengers with baggage or a baby buggy are using the space."

21. I would infer that the government took the view that this guidance struck the right balance between the interests of wheelchair users on the one hand, and other passengers on the other. It is clear both from regulation 12 (3) (b) and the guidance that passengers cannot be required to leave the bus to make way for a wheelchair user, because a wheelchair space will be treated as occupied if passengers or their effects cannot be moved to *another part of the vehicle*. FirstGroup's policy follows this

government guidance. It is also to be noted that the duty created by regulation 12 is a duty imposed on the driver. It is not a duty imposed on passengers. It is right to say, however, that this guidance pre-dated the introduction of the duty to make reasonable adjustments which is now contained in the Equality Act 2010. But it is also right to say that the guidance has not been withdrawn or amended.

22. The Equality Act 2010 now governs cases of alleged discrimination on the ground of a protected characteristic. Disability is one such characteristic. Section 6 (3) of the Act provides:

> "In relation to the protected characteristic of disability—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

23. It is common ground that Mr Paulley is disabled, because he has a physical condition which requires him to use a wheelchair. It is also common ground that that is his "particular disability". So we are concerned with disadvantages faced by wheelchair users rather than people with other kinds of disability (such as those who are visually impaired, or those who can walk with mobility aids).

24. FirstGroup is a public service provider. Accordingly it falls within section 29 which provides:

> "(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."

25. In addition as a public service provider, FirstGroup has a duty to make reasonable adjustments: section 29 (7). That duty is described by section 20, which so far as material 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."

26. The word "substantial" means "more than minor or trivial": section 212 (1).

27. The applicable Schedule in this case is Schedule 2, paragraph 2 of which provides:

> "(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."

28. Again, it is common ground that paragraph 2 (2) is, on the facts of this case, concerned with wheelchair users generally, rather than any wider class of disabled persons.

29. Section 21 provides:

> "(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.
>
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

30. It follows, therefore, that if FirstGroup has failed to comply with its duty to make reasonable adjustments in relation to Mr Paulley it will have discriminated against him.

Discussion

31. It is now common ground that FirstGroup's policy of asking (rather than requiring) a non-wheelchair user to vacate the wheelchair space if a wheelchair user wants to occupy it, is a provision, criterion or practice (a "PCP") within the meaning of section 20 (3). It is also common ground that in considering whether Mr Paulley had suffered a substantial disadvantage the correct comparator is a non-wheelchair user (rather than non-disabled persons with buggies or prams). The third area of common ground

is that the duty to make reasonable adjustments is anticipatory and operates by reference to wheelchair users as a class rather than to Mr Paulley personally: *Roads v Central Trains Ltd* [2004] EWCA Civ 1541; (1994) 104 Con LR 62 at [11]; *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191; [2014] 1 WLR 445 at [31].

32. In *Finnigan* at [29] the court emphasised the importance of defining the PCP. The PCP:

> "… represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments."

33. The judge described the PCP as follows:

> "… the policy adopted by [FirstGroup] at the material time of "first come first served", … 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…"

34. I have considerable reservations whether this was a correct description of the PCP. The PCP as described by the judge is not a policy applied to everyone, because if a non-wheelchair user (e.g. a mother with a buggy or a person with heavy luggage) wishes to occupy the wheelchair space no one is asked to move to accommodate him or her. It is a policy that is only applied where a wheelchair user wishes to occupy the wheelchair space when it is occupied by a non-wheelchair user. Non-wheelchair users are taken on a strictly "first come first served" basis only. Thus the PCP as described by the judge already incorporates at least one adjustment intended to comply with FirstGroup's statutory duty. A better way of posing the question would, I think, be to describe FirstGroup's PCP as operating its buses on a "first come first served basis" and then to ask whether the modification to that PCP, namely to request but not to require non-wheelchair users to vacate the wheelchair space when a wheelchair user wants to use it, is an adjustment that went far enough to comply with the duty to make reasonable adjustments. In the end, however, a reformulation of the PCP in this way does not matter to the outcome of the appeal.

35. The next question is whether that PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled." Again, as mentioned, it is now common ground that the comparator is any non-wheelchair user (rather than non-disabled persons with buggies or prams). On that question the judge accepted the submission on behalf of Mr Paulley which he summarised as follows at [10]:

> "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 as they wished. In such circumstances, it is submitted that it is obvious that the disabled wheelchair user is at a disadvantage in comparison which such non-wheelchair users. 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."

36. The question is not simply whether a disabled person is at a substantial disadvantage to a non-disabled person. The question is whether the identified PCP *puts* him at that disadvantage. Thus I agree with the EAT (Langstaff J presiding) in *Nottingham City Transport v Harvey* (2012) UKEAT/0032/12, [2013] Eq LR 4 at [17] that:

> "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A (1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

37. The disadvantage perceived by the judge was that the wheelchair user, unlike the non-disabled person, could not sit in a vacant seat, but could only use the wheelchair space. Despite the powerful contrary reasoning of Arden and Underhill LJJ, I still have difficulty in seeing how the particular disadvantage that the judge identified is caused by the PCP. Had the wheelchair space already been occupied by a wheelchair user, Mr Paulley would have been at the same disadvantage, if there was room on the bus for non-disabled passengers to board. The disadvantage, as it seems to me, stems from a combination of the design of the bus and the duty imposed on the driver by regulation 12 (4) of the Conduct Regulations not to allow a wheelchair user to travel except in the wheelchair space. The PCP, as described by the judge, is designed to alleviate (albeit not to eliminate) that disadvantage. However, this difference between us does not alter the outcome of the appeal.

38. If there is a disadvantage caused by the PCP the next question is whether that disadvantage is substantial. On that question the judge said at [11] that the result of the PCP was that the 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 my judgment 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."

39. Mr Chamberlain QC submitted that the judge had allowed himself to be over-influenced by the particular delay that Mr Paulley suffered. It is true that in this paragraph of his judgment, the judge did refer to Mr Paulley's particular experience, but the way in which he ultimately characterised the disadvantage was more generally

expressed in the last of the sentences I have quoted. I agree with Underhill LJ that the chance of the disadvantage materialising is a highly relevant factor, but Mr Paulley's evidence was that although he was a frequent user of buses, this was the first time that he had encountered this difficulty. I am not at all sure that I would accept the proposition that *any* delay is a substantial disadvantage. Whether that is so might well depend on the frequency of buses on any particular route. On the route with which we are concerned, buses were scheduled to run at intervals of 20 minutes and 40 minutes, depending on when in the hour a passenger wished to board. Although there is still the question whether the disadvantage is caused by the design of the bus and the duty imposed on the driver rather than the PCP, I am not prepared to overturn the judge's evaluation of substantiality on the facts of this case. There is no reason to suppose that Mr Paulley's wait for the next bus was atypical.

40. The judge then turned to the question of what would be a reasonable adjustment. On that question he held at [21]:

> "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 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 that parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies. I agree with the Claimant that the [Conduct] Regulations do not really assist the court in determining whether the proposed adjustment suggested by the Claimant is reasonable or not."

41. When the judge referred to "any non-disabled user of the wheelchair space" what he meant was any non-wheelchair user. That is clear from his statement that he was approving the practice suggested by Mr Paulley, which he had described in those terms in paragraph [15] of his judgment. It is also important to stress that the PCP that the judge endorsed differentiated only between wheelchair users and non-wheelchair users. Any non-wheelchair user would have to leave the wheelchair space if a wheelchair user wanted to use it. It would not matter why the wheelchair space was occupied by a non-wheelchair user; how many other passengers were occupying the wheelchair space; whether the bus was otherwise full or not; or where the bus was on its route. In addition under the PCP approved by the judge no discretion is given to the driver. Mr Allen QC argued that the judge was not deciding what PCP FirstGroup

should adopt: all that he was deciding was that the PCP that FirstGroup had in fact adopted was not good enough. Although it is true that the judge deferred consideration of the terms of any injunction that he might grant, in my judgment he decided the point of principle in the way that I have described. It is that point of principle which triggered the grant of permission to appeal and it is that point of principle which we should decide. I must also point out that the arguments on the appeal were limited to the question whether the judge was right to endorse the PCP that he did. There was no Respondent's Notice and no argument directed to some alternative and more limited form of PCP that FirstGroup should have adopted.

42. It is common ground that the question whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable. The focus is on the practical result of measures that can be taken: *Royal Bank of Scotland v Ashton* UKEAT/542/09; [2011] ICR 632 at [24]. It is also common ground that the duty to take steps to change a PCP if it puts disabled persons at a substantial disadvantage (a) is a forward-looking duty and (b) is owed to disabled persons generally. Since it is a forward looking duty it must, so far as it can, anticipate the kinds of situations in which the PCP falls to be applied. Thus it needs to cater for situations other than those which Mr Paulley himself encountered.

43. In deciding what are reasonable steps the Code of Practice issued by the Equality and Human Rights Commission is not only an admissible guide but also a matter to which the court must have regard. It says at paragraph 7.29 that what is a reasonable step "depends on all the circumstances of the case." In the following paragraph it goes on to say:

> "However, without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:
>
> - Whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
>
> - The extent to which it is practicable for the service provider to take the steps;
>
> - The financial and other cost of making the adjustment;
>
> - The extent of any disruption which taking the steps would cause;
>
> - The extent of the service provider's financial and other resources;
>
> - The amount of any resources already spent on making adjustments; and
>
> - The availability of financial or other assistance."

44. These considerations are well supported by the case law. Thus to take the first of the bullet points, in *Lancaster v TBWA Manchester* UKEAT/0460/10/DA at [46] the EAT (Slade J presiding) said:

> "… in our judgment an adjustment which gives a Claimant "a chance" to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive."

45. This is not a threshold test. The prospects of success in achieving the desired objective are to be weighed in the balance against the cost and difficulty of making the adjustment.

46. In addition, so far as the fourth bullet point is concerned, as Buxton LJ said in *Roads* at [42]:

> "Steps might be unreasonable for a person to take if they unreasonably impact on third parties."

47. Taking the first two bullet points in the Code of Practice, FirstGroup submitted that the PCP approved by the judge would neither be effective nor practical. Although FirstGroup accepted that, like some other bus companies, it could modify its conditions of carriage to require non-wheelchair users to vacate the wheelchair space if a wheelchair user wanted to use it, a mere modification of the conditions of carriage (which passengers generally do not read) would achieve nothing without legal powers to enforce them.

48. This argument raised the question whether modified conditions of carriage could be enforced via the Conduct Regulations. It is in my judgment clear that regulation 12 (2) imposes no duty at all on passengers (as opposed to the driver), and the duty imposed on the driver does not allow him to turn passengers off the bus. Mr Allen argued that all passengers have a duty under regulation 6 (1) (b) not unreasonably to impede any person travelling on or entering the bus. If a non-wheelchair user refused to vacate the wheelchair space when a wheelchair user wanted to use it, that would be a breach of regulation 6 (1) (b), and under regulation 8 (2) a person who contravenes the regulations may be removed from the bus by the driver or at his request by the police. The problem with reconciling this regulation with the PCP approved by the judge is that it only applies where the passenger in question *unreasonably* impedes a wheelchair user. Almost by definition, a person who refuses to vacate the wheelchair space when asked to do so will have a reason which (at least to them) seems to be a reasonable one. In addition, to the extent that this regulation can apply, it does not support the judge's approval of a PCP which brooks of no exceptions. Mr Allen's second suggestion was that under regulation 6 (2) a driver could direct a passenger to place a bulky article (in this case a buggy) somewhere else on the bus, and that if that direction were not complied with then again there would be a breach of the regulations which would empower removal of the passenger under regulation 8 (2). I am not at all sure that it would be right to describe a buggy in which a small child is

sitting or sleeping as a bulky article even if the buggy on its own might be so described. But even if it could be, the power to remove a passenger who refuses to comply with such a direction does not include power to remove the child. A mother with a child in a buggy may also be accompanied by another child, not in a buggy, who also could not lawfully be turned off the bus. Moreover, as Mr Chamberlain pointed out in reply, where the regulations make specific provision with how the clash between wheelchair users and non-wheelchair users is to be regulated it would be wrong to interpret provisions designed for a very different purpose to override that careful calibration of competing interests.

49. In my judgment the judge was wrong to dismiss the Conduct Regulations as having no real relevance to what he was asked to decide. We have seen that he took the view that to require a passenger to leave the bus following a refusal to vacate the wheelchair space was equivalent to ejecting a passenger for smoking, making a nuisance or other anti-social behaviour. But smoking is prohibited by regulation 6 (1) (d) of the Conduct Regulations; removing a passenger for causing a nuisance is expressly sanctioned by regulation 6 (k) (ii); and other anti-social behaviour (if not itself a nuisance) is likely to amount to unreasonably causing discomfort to other passengers, which is prohibited by regulation 6 (1) (b). Thus in each of the judge's suggested comparators the conduct in question is expressly prohibited by the Conduct Regulations, and the police can be called in aid of the driver under regulation 8 (2). In these cases the driver can truthfully say that the passenger is breaking the law. If that moral suasion does not work, there is in addition a remedy which does not entail the driver himself having to remove a passenger. The evidence before the judge (which he accepted) was that if persuasion did not work the driver would call the police, rather than himself manhandling a passenger off the bus. The underpinning of the Conduct Regulations is, in my judgment, of the first importance in assessing whether an adjustment to the PCP would be effective.

50. Leaving aside the Conduct Regulations, and assuming that the conditions of carriage were modified as the judge suggested, a breach of those conditions would amount to a breach of contract. The normal way of obtaining redress for breach of contract is by judicial process. But plainly it is impractical to expect a bus company to sue a passenger who declines to vacate the wheelchair space. It might be expressly said in conditions of carriage that if a passenger refused to vacate the wheelchair space on being required to do so, that passenger's licence to be on the bus would automatically be revoked with the consequence that that passenger would thereafter be committing a trespass to goods. But conformably with the PCP endorsed by the judge such a term would have to provide for revocation even if the passenger in question had a reasonable reason for declining to move. If (and it is quite a big if) such a term survived the Unfair Terms in Consumer Contracts Regulations 1999, the revocation of the licence might attract a self-help remedy. Since any such trespass would be an entirely civil matter (and outside the Conduct Regulations) the police would not intervene. It would thus be up to the driver to exercise such self-help remedies as might be available. Ex hypothesi the passenger in question has already refused to move despite having been requested to do so. If the driver attempted to manhandle a recalcitrant passenger off the bus he would be exposed to the risk of committing a common law battery, not to mention the real risk of confrontation. I agree with Mr Chamberlain that it would not be reasonable to require a bus company to instruct its drivers to expose themselves to that risk.

51. Would more prescriptive signs have done the trick? The judge was shown conditions of carriage produced by other bus companies which used stronger language; and he placed some reliance on them at [20]. But the judge had accepted Mr Birtwistle's evidence that FirstGroup's research had shown that the company achieved better results with more customer-friendly signage and that negative prescriptive signage produced a worse outcome; yet he did not consider that evidence in his assessment of the effectiveness of the adjusted PCP that he endorsed.

52. Mr Allen did, I think, recognise that the bright line test endorsed by the judge (wheelchair user or non-wheelchair user) needed some modification. The example he gave was of a driver finding someone injured in a road accident who needed to be taken to hospital as an emergency. In such a case, he said, the injured person should not be turned out of the wheelchair space to make way for a wheelchair user; and the wheelchair user would not expect him to be. The problem here is that once there has been a modification of the bright-line rule, difficult questions of fact and degree will arise. How pressing is the emergency? What about the mother with a child in a buggy taking the child to keep a hospital appointment? Must the driver interrogate the mother about the seriousness of the child's condition? Depending on the answers does that count as an emergency? What about the blind passenger in a priority seat, whose guide dog is in the wheelchair space? What about the bus that is already full, with standing able-bodied passengers filling the wheelchair space?

53. As soon as the bright-line policy that the judge endorsed is modified, the driver will in effect have to adjudicate between competing claims to the wheelchair space. Mr Chamberlain gave other examples: a disabled person with a child in a buggy who could not hold the child while travelling; a disabled person sitting in the seat adjacent to the wheelchair space who needs that space to accommodate a walking frame. Other realistic examples can be imagined. A bus driver is simply not equipped or trained to make the necessary adjudications; and it would, in my judgment, be unreasonable to require him to do so.

54. Again I think that Mr Allen realised that if the PCP endorsed by the judge ceased to be an absolute policy, it would be difficult to defend. When Underhill LJ suggested to him in the course of argument that a possible adjustment to the PCP would be to require the driver to use his best endeavours to persuade unwilling passengers to vacate the wheelchair space, Mr Allen said that such a policy was, in effect, impractical because it would beg too many questions. That, no doubt, is why the judge endorsed an absolute non-discretionary PCP. But an absolute policy of that kind would, in my judgment, be unworkable in practical terms.

55. The fourth bullet point in the Code of Practice refers to disruption to others. Although the judge refers to inconvenience to mothers with buggies, the adjustment that he found to be reasonable would apply to *any* non-wheelchair user. So if, say, five or six able bodied passengers were standing in the wheelchair space adoption of the policy described by the judge would require all five or six to be turned off the bus, perhaps mid-way through their journey, to make way for the wheelchair user. Likewise if a family with their heavy luggage were occupying the wheelchair space they would be required to leave the bus. Nor does the adjustment that the judge found to be reasonable give the driver any discretion. Thus if the passenger occupying the wheelchair space has a particular reason to take that particular bus (e.g. like Mr Paulley to catch a train, or to keep a doctor's appointment) the new policy would

require them to be turned off the bus willy-nilly even if the wheelchair user was in no particular hurry. Likewise if a non-wheelchair user is required to leave the bus, he or she may be left in an unfamiliar location. Since such a passenger may also be disabled (e.g. blind), the extent of the disruption may be extreme, whereas for the wheelchair user waiting at the bus stop the likelihood is that he will at least be in a location that is familiar to him.

56. Finally I must comment on the judge's statement that inconvenience to mothers with buggies is "a consequence of the protection that Parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies". This was, in my judgment, a misapprehension. What Parliament has given by way of protection (over and above the Conduct Regulations) is a right to reasonable adjustments. What is a reasonable adjustment depends, among other things, on the impact of the adjustment on others. They do not need to have any particular protection in order for the impact on them to be given weight. The judge seems to me to have thought that the needs of wheelchair users trumped all other considerations. If that is what he meant, I respectfully disagree.

Postscript

57. In *Black* HHJ Bowers gave detailed consideration to a large number of more limited PCPs that a bus company might adopt. They included stopping the bus and refusing to go further if a non-wheelchair user refused to vacate the wheelchair space. He concluded at [86] and [87] of his judgment that such a refusal would have been a disproportionate reaction in a case where the passenger refusing to move had reasonable grounds for the refusal, and the bus company provided a regular bus service at frequent intervals. He also held that such a reaction would have escalated the situation into one of conflict and would have caused considerable inconvenience to other passengers. It might also have amounted to a breach of contract by the bus company as against those other passengers. These arguments were not deployed before us and the judge in our case did not consider them. I mention them for the sake of completeness.

58. Apart from the one point of substantive difference between us I also agree with the judgments of Arden and Underhill LJ. I would endorse what Arden LJ says at [80] not, as she explains at [81], as a matter of legal obligation but as a matter of common sense.

Result

59. I would allow the appeal.

Lord Justice Underhill:

60. I agree that this appeal should be allowed. My reasons on the central issue are the same as those given by Lewison LJ, but I respectfully differ from him on one point on the route to that issue.

61. In any claim based on an alleged failure to comply with the "first requirement" under section 20 of the 2010 Act it is essential correctly to identify the PCP which is said to give rise to the disadvantage relied on. In the present case that needs a little care. It

may be natural to focus on the policy which is being challenged – that is, what the Judge identified as FirstGroup's policy of "requesting but not requiring" non-wheelchair users to vacate the wheelchair space. But, as Lewison LJ points out at para. 34 of his judgment, that approach is problematic because that policy does not itself disadvantage a disabled person as against a non-disabled person so as to fall within the terms of sub-section (3): the complaint is that it does not go far enough. The answer to the problem appears from the passage from the judgment of this Court in *Finnigan* quoted at para. 32 of Lewison LJ's judgment: the PCP "represents the base position before adjustments are made to accommodate disabilities … [and] … by definition, therefore, … does not include the adjustments". That may mean that the PCP is a somewhat notional or artificial construct, since if it was (so to speak) adjusted from the start there will never as a matter of fact have been a practice of the kind complained of; but it is nevertheless clear that this is the correct approach. I accordingly agree with Lewison LJ that in this case the relevant PCP is the notional pre-adjustment policy of allowing spaces generally, and in particular the wheelchair space, to be occupied by whoever got there first.

62. Once that point is reached, I do not share Lewison LJ's difficulties, as explored at paras. 35-39 of his judgment, about whether the PCP as so defined "puts a disabled person at a substantial disadvantage … in comparison with persons who are not disabled". At the risk of being over-elaborate, I would analyse the position as follows.

63. The starting-point is the principle, emphasised by both parties in their submissions before us, that, as Lord Dyson says in *Finnigan*, at para. 32 (p. 454 A-B):

> "… the duty to make reasonable adjustments is anticipatory. It is owed to disabled persons at large in advance of an individual disabled person coming within the purview of the public authority exercising the relevant function."

It follows, as he goes on to say at para. 36 (p. 454 G-H), that:

> "It is important … to keep in mind the distinction between (anticipatory) changes to a [PCP] which are applicable to a category or sub-category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis. The duty to adjust a [PCP] is to be judged by reference to the former, and not the latter."

Thus the questions (a) whether a given PCP puts disabled persons generally at a substantial disadvantage in comparison with non-disabled persons and (b) whether, if so, the defendant has failed to take reasonable steps to avoid that disadvantage are to be decided by reference to the disadvantage suffered by the relevant class of disabled person rather than by the individual claimant. The question whether, if such a breach is established, it constitutes a breach "in relation to" the claimant – see section 21 (2) of the Act – is separate and comes later. That is well illustrated by the fact that in *Finnigan* this Court reversed the finding of the County Court judge that there had been no breach of duty but dismissed the appeal on the basis that in the circumstances of the claimant's case the breach had caused him no detriment.

64. Applying that approach to the facts of this case, it seems to me that disabled wheelchair users would plainly be disadvantaged, as compared with non-disabled persons, by a policy which simply allowed use of the wheelchair space by whoever got there first. That is because such a policy would have the potential – i.e. whenever someone else *had* got there first – to deprive the wheelchair user of his or her chance to travel, whereas it would normally have no impact on the non-wheelchair user, who can, unless the bus is full, simply sit or stand somewhere else. I acknowledge Lewison LJ's point that in one sense this state of affairs results from the design of the bus – i.e. from the fact that there is limited space for wheelchairs – together with the regulations prohibiting the carriage of wheelchairs except in the wheelchair space. But I do not think that that means that the (notional) PCP of "first come first served" does not cause the disadvantage in question – or, to use the statutory language, that it does not put wheelchair users at that disadvantage. Like all causation questions, the answer is conditioned by the context in which it arises. In the present context I would regard the fact that the bus is designed with a single wheelchair space as simply a background circumstance. The cause of the identified disadvantage would be the policy which the company had (notionally) chosen to adopt about how that space was to be used.

65. The final question (as regards this aspect) is whether the disadvantage caused by a policy of first come first served would be "substantial". On analysis that comprises two distinct questions – first whether there would be a substantial risk of the (comparative) disadvantage occurring – that is, of the disabled wheelchair user not being able to travel on a particular bus because the wheelchair space was occupied, while the non-wheelchair user could; and secondly whether, if that happened, it would constitute a substantial disadvantage. As to the first, it is clear from the evidence that the chance of the disadvantage occurring would be substantial: the wheelchair space is quite often occupied by buggies, and sometimes also by people standing, and of course at this stage of the argument the assumption must be that they will not be asked to move. (It is true that it is necessary to ignore cases where the bus is full, because in those cases the disadvantage is the same for the non-wheelchair user; but it is plainly not the case that the wheelchair space is only occupied by buggies or other passengers when there is nowhere else on the bus.) As to the second question, it may not in every case be a substantial disadvantage for a wheelchair user to be unable to board a particular bus – there might, to take an obvious example, be another bus on the same route already pulled up at the same stop. But the important point is that we are concerned with the position of disabled wheelchair users generally, and there will on any view be cases – I suspect the great majority – where the inability to travel on a particular bus will cause sufficient delay and inconvenience to constitute a substantial disadvantage.

66. The upshot of all that is that we must start from a notional, pre-adjustment, PCP which put disabled wheelchair users at a substantial disadvantage compared with non-disabled persons. The adjustment which FirstGroup made to that PCP was to have a policy that wheelchair users should be given priority as regards the use of the wheelchair space, with that policy being given effect to by signs asking non-wheelchair users to give up the space if it was needed for a wheelchair user reinforced by a request from the driver if necessary. In this context the word "request" does not mean simply asking a favour: the driver is conveying to the non-wheelchair user that they *ought* to move because the space is meant for wheelchair users and they have

priority. The issue is whether section 20 (3) required FirstGroup to go further by having a policy that the non-wheelchair user should be not only "requested" but "required" to move – the essence of that distinction being that a "requirement" will if necessary be enforced whereas a "request" will not.

67. On that issue I agree with Lewison LJ's reasoning and conclusion at paras. 41-56 of his judgment. The Judge's distinction breaks down when one tests what it means in practical reality. As Lewison LJ demonstrates, the criminal law (in the form of the Conduct Regulations) gives the company – in practice the driver – no reliable means of enforcing any "requirement"; still less would introducing an explicit contractual term in the conditions of carriage do so. In truth a "requirement" has no more teeth than a "request". To hold that FirstGroup was in breach of its duty to make reasonable adjustments because it did not have a policy of enforcing a requirement to vacate the wheelchair space is in those circumstances unsustainable.

68. I have considered whether the duty might nevertheless have required FirstGroup to go further than it did, even if not as far as the Judge held: might there not be a half-way house between a policy of "mere" request (though, as I say above, the request in this case conveys a sense of obligation) and one of enforcement in every case? I would certainly hope and expect that, other things being equal, a driver whose first request to a non-wheelchair user to vacate the wheelchair space was refused would not simply shrug his or her shoulders and go back to the cab, and that there would normally be some attempt at further persuasion or pressure (possibly even including a threat not to proceed with the journey until the space is cleared – though this risks seriously inconveniencing other passengers). But I would be very uneasy about concluding that a bus company was in breach of its duty under section 20 (3) of the Act unless it had a policy that positively required drivers to reinforce the basic request by one or more of those means. The sting is in my earlier qualification "other things being equal". The circumstances in which such a refusal is encountered are liable to vary enormously. In most cases further attempts at persuasion or pressure would be appropriate, but in some they might not be: as Lewison LJ has illustrated, there will be cases where it would be obviously unreasonable to expect the person occupying the space to vacate it, and there would be others where the question of whose need was the greater was at least debatable and where it would not be fair to expect the driver to have to make a decision. Also, the temperaments and experience of different drivers are bound to vary: some would handle such a situation well, but others might find it difficult to cope with. It would be unrealistic for a company to have a policy which prescribed calibrated responses covering the whole range of possible situations. The most that such a policy could sensibly do would be to encourage drivers to go as far as they thought appropriate in the circumstances – in legal language, "use their best endeavours" – to induce the recalcitrant passenger to reconsider his or her initial refusal; and for myself I would have thought that it was good practice to have such a policy and to ensure by appropriate training that it was understood by drivers. But there is in reality no very deep gulf between a policy so expressed and one, like FirstGroup's, which does not in terms go further than saying that the passenger should be asked to move. Putting it that way does not mean that the request has to be made only once; and in practice drivers who have the necessary confidence and experience are unlikely to give up at the first refusal merely because the policy does not say in terms that they should do more. Legal liability ought not to depend on whether an employer has chosen to use specially emphatic language in expressing his policy. (I

would add that, if this were the touchstone of liability, tricky questions of causation would be bound to arise: how much harder would the driver have tried if the policy had explicitly encouraged him to use his best endeavours ? and would the recalcitrant passenger really have moved as a result of such extra efforts to persuade or cajole them?) In the end, however, I need not express a final view about any such half-way house, since this was not the basis on which the Judge decided the case.

69. I should make brief reference to materials which appeared in the bundle showing that Transport for London have recently run a campaign with a view to educating the public in London about the importance of giving priority to wheelchair users, and specifically priority over buggies: there were apparently both posters and more emphatic signage in the buses themselves. But the Judge did not decide the case on the basis that FirstGroup was obliged to try harder than it had to educate public opinion; nor did Mr Allen advance submissions to that effect. I need only say that, while campaigns of the kind apparently run by Transport for London seem to me admirable, it does not follow that the fact that other operators have not, or not yet, conducted such a campaign constitutes a breach by them of the reasonable adjustment duty.

70. It has to be accepted that our conclusion and reasoning in this case means that wheelchair users will occasionally be prevented by other passengers from using the wheelchair space on the bus. Sometimes there will be a reasonable justification for that happening; but sometimes there will not. I do not, however, believe that the fact that some passengers will – albeit rarely – act selfishly and irresponsibly is a sufficient reason for imposing on bus companies a legal responsibility for a situation which is not of their making and which they are not in a position to prevent. In the present state of the law something must still be left to the good sense and conscience of individuals.

Lady Justice Arden:

71. Most people today would agree that a person with a mobility impairment who has to use a wheelchair should still have access to as many opportunities as possible. Parliament indeed requires that service providers, such as bus companies, must make reasonable adjustments to accommodate disabled people. That duty means that bus companies must take reasonable steps to avoid any "substantial disadvantage" to disabled people when travelling by bus: see Equality Act 2010, sections 20, 21 and 29(7) and schedule 2, paragraph 2, set out by Lewison LJ in paragraphs 25 to 29 of his valuable judgment, above.

72. I agree with Lewison LJ that the PCP is the rule that passengers can use the wheelchair space on the bus on the basis of "first come first served", and that this constitutes a substantial disadvantage to wheelchair users for the reasons he gives (paragraphs 34, and 26 and 39, above).

73. However, I respectfully disagree with Lewison LJ when he holds in paragraph 37 above that it is the bus design and legal duty on the bus driver, and not the PCP, which "put" wheelchair users at a substantial disadvantage. I agree with Underhill LJ that it is the PCP which "puts" the wheelchair user at substantial disadvantage for the following reasons:

i) Parliament's use in section 20(3) of the Equality Act 2010 (set out in paragraph 25 above) of the plain English word "puts", rather than the legal terms "causes", is a signal that the court should adopt a practical and purposive approach to this provision. So the court should interpret and apply section 20(3) in such a way that the court's review of the defendant's compliance with the duty to make reasonable adjustments is a real and effective one. The interpretation preferred by Lewison LJ prevents that review taking place and so does not achieve that result.

ii) The adoption of a practical and purposive approach involving asking and answering the statutory question: does the PCP put the wheelchair user at a substantial disadvantage? If the PCP is responsible for the substantial disadvantage to any extent which is not trivial, then, as I see it, the court answers that question: yes.

iii) I read the holding of Langstaff J in *Nottingham City Transport v Harvey*, quoted by Lewison LJ at paragraph 36 above, that the claimant must show "a" causative link between the PCP and the disadvantage, as consistent with my conclusion. He does not say that the PCP should be the sole or dominant cause of the disadvantage but merely that the disadvantage "must arise out of" it.

iv) Because we must ask and answer the statutory question in a practical and purposive way, we should put on one side a technical approach, including an inquiry into competing or dominant causes. These might (depending on the circumstances) be relevant if we were dealing with the legal concept of causation.

74. As Lewison LJ explains, the bus company must anticipate use of its services by wheelchair users. The law therefore requires it to take reasonable steps to avoid the serious disadvantage to wheelchair users in advance of the wheelchair user seeking to travel. So the duty is a "muscular" one. It is not enough for the bus company to try to balance the needs of wheelchair users and other passengers. In practice the Equality Act 2010 may mean that disabled persons must receive preferential treatment.

75. Now, as Lewison LJ has explained, buses must be designed so that they have at least one space for a wheelchair. This allows wheelchair users to use buses for what, for many, will be the first time. But, as I see it, because there is only one space, bus companies have to be proactive in dealing with the problem that it may not be free when the wheelchair user wants to get on.

76. Bus companies will be very aware that, since low-floor buses were introduced, many more people want to take baby buggies and pushchairs on to buses and to use the wheelchair space. Others may want to use the space too. In some situations there may be no other place for them safely to travel.

77. The bus company is faced with the problem that, as Lewison LJ has explained with care and clarity, Parliament has not given bus drivers any power to compel a person to move from the wheelchair space. A rule of "wheelchair first in the wheelchair space" would not carry the force of law. In those circumstances, in my judgment, the duty to make reasonable adjustments does not require the bus company to have such a rule.

78. The position would be no better if tickets could be, and were, issued on terms that passengers would move along or off the bus to allow wheelchair users to use the wheelchair space. It would still not be possible in practice to compel passengers to move if they chose not to do so.

79. That does not mean that the bus company is free to do nothing. The best must not be the enemy of the good. As the EAT explained in *Lancaster v TBWA Manchester* (Slade J presiding), the court must critically examine all the relevant facts and see whether adjustments can be made even in part. (Lewison LJ sets out the passage from *Lancaster* on which I base this point in paragraph 44 of his judgment, above).

80. So the bus company must take all reasonable steps short of compelling passengers to move from the wheelchair space. We have not had argument on this but provisionally I consider that the bus company must provide training for bus drivers and devise strategies that bus drivers can lawfully adopt to persuade people to clear the wheelchair space when needed by a wheelchair user. Bus drivers have to use their powers of persuasion with passengers who can move voluntarily. The driver may even decline for a short while to drive on until someone moves out of the wheelchair space. There is no risk of liability to such passengers in requesting them (firmly) to move, if they can, because if they cannot safely do so, they will not do so. The bus company should also have an awareness campaign and put up notices designed to make other passengers more aware of the needs of wheelchair users. It might also have to conduct surveys to find out when people are likely to travel and what their needs are so that it can do what it can to provide an appropriate number of buses for everyone.

81. These steps are only common sense, and no-one has suggested that FirstGroup does not do these things. They are not part of Mr Paulley's case: he has limited his case to requiring the bus company to require people to get off the bus when necessary so that a wheelchair user can get on.

82. No-one has suggested that any changes could be made in bus design. Some changes might be relatively minor, such as more fold-up seats or space for folded buggies. No doubt any change would be costly and that would have to be taken into account. In any event, there is no evidence that the bus company has not considered whether any improvements like these could be made.

83. The result of this appeal might have been different if Mr Paulley had shown that on his route there were always buggies in the wheelchair space so that he was effectively deprived of the opportunity of travelling by bus as Parliament had intended. However, that is not this case. As Lewison LJ explained, Mr Paulley had not previously had difficulty in accessing the wheelchair space because there was a buggy in the way.

84. Because I have reached this conclusion, I do not need to consider further the rights of any passenger asked to get off a bus to allow a wheelchair user to use the wheelchair space. He presumably would be entitled to the return of his fare at the least. Mr Pauley's case was that this could all be dealt with in the conditions on which the appellant issued the ticket. However, that takes no account of the fact that the terms would have to be reasonable under the Unfair Terms in Consumer Contracts Regulations 1999 (1999/2083).

85. It follows from the judgments of this court that the proper remedy for wheelchair users is to ask Parliament to strengthen the powers of bus drivers so that they could, for instance, require people to vacate the wheelchair space, or create new duties on other passengers, or to campaign for a different design of buses. In that way, a greater number of wheelchair users would be able to use the wheelchair space.

86. I do not underestimate the difficulties of travel for wheelchair users or their frustration at the pace of change. It is obvious that, as one wheelchair user has said, for them the world was not built with a ramp. However that might be, the only question for the court is whether it would be reasonable for the appellant to have to adopt the policy proposed by the respondent. For the reasons given above, and, subject to the above, in my judgment, my answer to that question in the current circumstances is no.

87. I would also allow this appeal.