

# Student Exclusion – Successful Appeal Meaning of Reinstatement

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## Background

A common dilemma in schools, particularly with the greatly increased commitment to inclusion, is attempting to reconcile two important, but sometimes competing, interests. The first interest is that of students with special needs, particularly in being included in the life of school community to the maximum extent consistent with those special needs. The second interest is that of other members of the school community. In many circumstances, steps taken to meet the special needs of a particular student, even where they involve at one level ‘inconvenience’ to other members of the school community, will actually be beneficial not only to the student with special needs but to other members of the school community, especially students. In some circumstances, however, there will be a clear conflict. This is particularly so where the special needs characteristics of a student leads to behaviour which puts at risk the safety and health of other students or staff.

An obvious, and commonly used, method of attempting to reconcile these interests is the introduction of special arrangements. Those special arrangements may involve some restrictions on the extent to which a student with a tendency to violent behaviour participates in the life of the school, the justification for that restriction being the health and safety interests of others.

## The Principal Issue

On 27 February 2003, the House of Lords handed down a decision in which it considered these issues in the context of determining whether the arrangements put in place in such circumstances in a particular English school had, or had not, resulted in the student being ‘reinstated’, as was required by statute. The decision is entitled *In re L (a minor by his mother and litigation friend) (Appellant)* (2003) 1 All ER 1012. The decision can be read at the House of Lords web site at <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030227/inrel-2.htm>.

## The Statutory Context

Under the *School Standards and Framework Act 1998* (UK) the parent of a pupil at a maintained school is entitled to appeal against a decision of the governing body of the school not to reinstate a pupil who has been permanently excluded from the school by the head teacher. That appeal lies to an independent appeal panel.

Section 67(4) of the Act provides –

Where on such an appeal the appeal panel determines that the pupil in question should be reinstated, the panel shall either –

- (a) direct that he is to be reinstated immediately, or
- (b) direct that he is to be reinstated by a date specified in the direction.

For the purposes of this case note, the relevant issue is that L, the appellant to the House of Lords, and the subject of an immediate reinstatement direction, conducted his case on the basis that the governors and the head teacher were in breach of this statutory obligation because he had not been ‘reinstated’, given the special arrangements put in place on his return to the school.

## **The Special Arrangements**

The basis on which L had been permanently excluded was alleged involvement with others in a violent assault causing significant injury to a fellow pupil (though important aspects of the allegations were disputed by L). The head teacher, after the panel had determined that L should be reinstated immediately, wrote to L's parents in these terms:

Further to our discussion of Tuesday, 20 March, I am writing to provide details of [L's] reinstatement into the [...] School.

Given the circumstances which I outlined to you at our meeting specific arrangements are being made to provide for [L's] education at the School.

I have a duty to the health and safety of all children in the School and in the light of this I have arranged with the Local Education Authority that [L] has alternative provision made for his transport to and from School. For the week beginning 26 March this will comprise a dedicated taxi from your home to the School and back.

[L] will be provided with work and a teacher in a room isolated from the mainstream of the School. He will not return to the classroom but will be taught privately. He will not be allowed to circulate with other pupils at any stage in the school day.

[L] should report directly to the reception area of the School on Monday morning and on each morning thereafter. He must not mix with pupils or students at any point in the school day, including the start and finish of the school day.

On L's return to school he was given a document bearing the name of the school and the signature of the head teacher which read as follows:

Requirements relating to the conduct of [L] upon his return to [school]

1. All work will be under supervision in the Parlour at the reception area of the school.
2. There will be no contact at all with other members of the school community at any time in the course of the school day or in the journey to and from school.
3. Morning breaks and lunch breaks will be spent in the parlour. Provision will be made by the school for lunch.
4. The only toilet facilities to be used are in the reception area.
5. In the event of a fire drill [L] and his supervisor will go to the area outside the school chapel.

6. [L] is to report directly to the main reception area immediately upon arrival at the school. Other entrances may not be used.

Failure to keep any of these requirements will be considered a serious breach of school discipline and will result in permanent exclusion

L did not participate in classes at the school but spent the school day in a room about 10 feet square. At first L was the only pupil in that room. He was later joined by another pupil who had also been excluded over the same incident and whose appeal had also succeeded. L was told that apart from toilet breaks he was to remain in the room throughout the day. He was not permitted to speak to, or associate with, any other pupil, [apart from the pupil who subsequently joined him in the room] or to staff members save for his supervisor and any other staff member who wished to visit him. He took his examinations in a different room. He was not allowed to participate in communal acts of worship. A retired teacher was engaged to supervise him and also taught him that teacher's specialist subject. Apart from this, he received no face to face tuition although teachers in other subjects set work and marked it.

Both majority and minority judges observed that it was agreed that but for the refusal of the existing teaching staff to teach or supervise L, L would have been reintegrated into the classroom setting.

## The Majority

Lord Hobhouse of Woodborough noted that, '*by common consent and the unchallenged finding of fact*' of the trial Judge no question was raised that the school had acted in bad faith or that the purported reinstatement was '*a sham*'.

He noted that the essence of reinstatement was the reinstatement of the pupil/school relationship and that it was this relationship which had been terminated by the permanent exclusion and which was required to be reinstated. Reinstatement was not '*a mere formality*' but involved '*the resumption of a relationship and status which carried with it duties and rights*'.

As a background to his decision-making, Lord Hobhouse noted that a school was '*a complex organic entity*' whose function was to provide education and that it was essential to achieving this objective that the various human beings involved worked successfully together as an educational entity, adding –

The teaching of the pupils has to be a collective activity in which the teachers and pupils interact successfully and individual pupils do not obstruct or imperil the education of others. It is a truism that one or two disruptive pupils can prevent the remainder from enjoying their right to a proper education; the assertion of a liberty by one may involve, for others, the denial of their rights. Similarly each pupil has the right to a safe environment; the assertion of a liberty by one or more pupils to socialise with and inflict violence on or to victimise or bully another will involve denial of the rights of that other. The responsibility of teachers and the head teacher are owed to the body of pupils as a whole not merely to an individual pupil in isolation. The duties, including the duty to educate and to preserve safety, are underpinned by the more basic duty to maintain discipline. This is a duty of each teacher within his sphere of activity and of the head teacher overall. Part of the duties of the head teacher is punishment in support of the maintenance of discipline.

But the practical considerations do not stop there. The head teacher's freedom of action is circumscribed by the limitations upon the resources he has at his disposal. Constraints may arise from the school premises he is provided with, the number and quality of teacher, his ability to incur additional expenditure, the demands of the curriculum, the timing of examinations. Further, he is dependent upon the cooperation of the teaching staff. If a particular course of action is going to lose him that essential cooperation, he is going to have to make difficult choices balancing his responsibilities towards the pupil body as a whole and his own belief in that particular course of action. The duty of the head teacher in such cases is to draw upon his own professional skills and experience and make the responsible decisions within the constraints to which he is subject.

Lord Hobhouse characterised the complaint of L as being about *'the quality of the education which he was receiving after he had been reinstated'* and that it was *'wrong to treat a requirement of reinstatement as involving a judgment on the quality of the education and managerial decisions which the school makes after resuming its relationship with the pupil'*. He noted that a student who had committed a serious discipline offence for which he had been thought to merit permanent exclusion may, when that solution was not permitted, still have to receive special treatment. He noted that trust may have been destroyed, that the capacity and inclination to disrupt may be undiminished and that the risk of physical injury to others may still exist. He expressed the view that the introduction of a suitable regime to address appropriately such concerns when no permanent expulsion was proposed was *'wholly outside the scope of the scheme of the Act'* governing exclusion and reinstatement.

Lord Scott of Foscote also referred to the organic structure *'with a number of constituent parts'* and that the method of reinstatement of an expelled student as a member of an organic body such as a school *'may require the relationship of the pupil with each of these constituent parts and the expected or likely interaction between them to be taken into account'*.

Lord Scott noted that two extremes had been discussed in argument. One was that the pupil *'must be restored to the status quo ante in all respects'* and the other was that *'all that would be needed would be a formal reacceptance by the school of responsibility for the pupil by, for example, replacing his name on the school roll'*. Both of these extremes were rejected by him.

Lord Scott's analysis involved examining as a first step whether there had been compliance with the direction for reinstatement and secondly, whether the school then treated the student in a manner consistent with that status. He expressed the view that the school did so.

Lord Walker of Gestingthorpe expressed the view that the arrangements were *'undoubtedly severe'* and that he thought the severity was *'ill advised'*, but rejected that it was humiliating or degrading (as had been submitted by senior counsel for L). He emphasised that no attack had been made on the good faith of either the head teacher or the governors and it was they who had the responsibility of managing L's return to the school in the interests of L, the other pupils and the whole school community. He concluded that the decision, though ill-advised and depriving L of any normal contact with his fellow pupils, was not *'so extreme of so disproportionate as to go beyond the limits of their managerial and pastoral discretion'*. Accordingly, the majority held that reinstatement had occurred and dismissed the appeal.

## The Minority

The principal decision here was that of Lord Bingham of Cornhill, with whom Lord Hoffmann agreed. Lord Bingham commenced his consideration of the meaning of *'reinstatement'* by reference to the dictionary definition, which was to reinstall or re-establish a person or thing in a place, station or condition or to restore to, or in a proper state. He then observed that in an employment law context, reinstatement is *'to replace him in the position from which he was dismissed'* and *'so to restore the status quo ante the dismissal'* and that the person must be put back *'in law and in fact'* in *'the same position as he occupied...before the employer terminated his employment'*.

Lord Bingham later observed that it would be absurd and impractical to insist that a pupil's regime after reinstatement should be identical to that before exclusion in every minute particular, but that the pupil *'must be substantially reintegrated in the social and educational life of the school'* and that *'nothing short of that will do'*.

Lord Bingham noted the strictness of the regime and the extent to which L was isolated from participation in the life of the school. He observed that L suffered from no physical or emotional disability which prevented his reintegration and that this was accepted, in effect, by the head teacher.

Lord Bingham considered that an important factor was the decision of the teachers and the teaching unions not to teach or supervise L and he considered that but for that he would have been reintegrated into the ordinary classroom life. He considered that L was *'either reinstated or he was not'* and that there is no room for a conclusion that he was *'reinstated to the greatest extent possible in the circumstances'*.

Lord Hoffman indicated in his short judgment that he agreed with the decision of Lord Bingham and with his reasons, but added some comments of his own, particularly in relation to the significance of the position adopted by the teachers and the teaching unions. He observed that there was a conflict between the scheme of the 1990 Act and the right of teachers to take lawful industrial action but that *'I do not think it is helpful to wish it away by an interpretation of 'reinstatement' which merely empties that notion of practical content'*.

## Conclusion

Whilst the precise terminology used in any particular document, and the overall context in which the decision is being made will always be vital, there are some important indications in this judgment as to appropriate approaches to determining whether arrangements do, indeed, constitute reinstatement.

All judges agreed that reinstatement was not a mere formality but involved the restoration of a relationship, and all agreed that decision-makers must act in good faith and that the arrangements must not be a sham. All agreed that the arrangements after reinstatement need not be precisely the same as those before but the minority judges were clearly influenced by the extent to which the arrangements differed from those before reinstatement and required that the pupil must be substantially reintegrated in the social and educational life of the school, and by the impact of the teachers' position.

The majority placed considerable emphasis upon the right of the decision-makers to take into account a range of factors, including the needs and interests of others, and placed more emphasis on permitting the decision-maker freedom of action given the constraints and limitations, whereas

the minority emphasised more strongly the requirement of substantial return to the position from which the student had been excluded prior to reinstatement.

The majority though finding that reinstatement had in fact been effected, seem to leave open the possibility of a legal remedy in respect of the quality of the education provided, emphasising that a judgment on the quality of the education provided is a different issue to determining whether reinstatement had occurred.

This was clearly a borderline case, in which the differing conclusions resulted from different weight being attached to the competing considerations. Schools called upon to make such difficult decisions would be well advised to ensure that, in the absence of some compelling consideration to the contrary and in the absence of a disability preventing reintegration, as full a reinvolvement in the social and educational life of the school as is compatible with the interests of others, should be attempted.