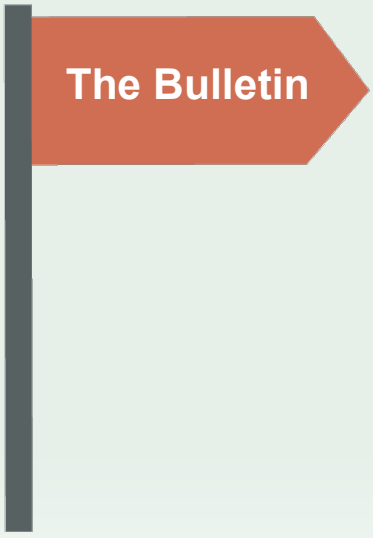
Health and Education Chamber
First-tier Tribunal for Scotland

The Bulletin



Edition 1

November 2018

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Foreword

May Dunsmuir

President

Dear members,

I am delighted to introduce you to our first Chamber newsletter, 'The Bulletin'. The Bulletin will be issued to you twice a year. It is intended to be an informative and thought provoking resource, where members can share their own views and read the views of others. I commend it to you and I hope you will enjoy the articles in our first edition, which explore a range of concepts from exclusion and disability to the impact of adverse childhood experiences (ACEs). Regular features will include an update from the In-house Convener for our Additional Support Needs jurisdiction and Chamber news from the Scottish Courts and Tribunals Service. Our editor, Deirdre Hanlon, has done an excellent job in co-ordinating such an interesting range of articles. She will undoubtedly be in touch with you in advance of our second edition but if you have an article of interest, please do get in touch before then.

Our first edition concentrates on the Additional Support Needs jurisdiction but in the future this will be expanded to include those jurisdictions which have yet to join us.

The Health and Education Chamber

The transfer of the Additional Support Needs Tribunals for Scotland (ASNTS) and the commencement of the Health and Education Chamber (HEC) has all gone as well as we hoped. We are firmly embedded into the First-tier Tribunal for Scotland. We now await the plans for the transfer of the remaining jurisdictions. The intention is that the *NHS National Appeal Panel for Entry to the Pharmaceutical Lists* (NAP) will transfer in April 2020; however, the Scottish Government consultation on pharmaceutical lists may impact on the decision to transfer this jurisdiction. I will keep members up to date on the state of play.

As I currently understand it, the intention remains for the *NHS Tribunal for Scotland* to transfer in April 2020. The transfer of each of the 32 *Education Appeals Committees* remains planned for April 2021.

I will keep you up to date in respect of each of the jurisdictions and you will undoubtedly learn more about them in future editions.

Additional Support Needs/Disability Case law

We have seen a recent flurry of case law, which will be of interest to us all. You will read in this edition about up to date developments in England with respect to exclusions involving children with a disability, more particularly, those whose condition gives rise to a tendency towards 'physical abuse of others'. The Upper Tribunal case of C-v-C is an important one, which, whilst not binding on us, may be persuasive in similar proceedings before our Additional Support Needs Tribunal.

The City of Edinburgh-v-C is also an important case, which again upholds the specialist nature of the Tribunal and confirms that deficiencies in a CSP can amount to discrimination.

Finally, we have recently received our first Upper Tribunal decision, refusing permission to appeal, which is referred to in this edition. This case reminds us to be cautious when adding what might be considered to be material matters to any 'concluding remarks', which are not intended to form part of the substantive decision.

Letter to the child

In recent training to legal members on 'tribunal craft and decision making', we explored drafting a letter to a child, which would explain the tribunal decision in accessible terms. This follows on from our consideration of this at our all member training in March. I want to explore this more, to decide if there is value in this and whether this would improve access to justice for the child, by involving her or him in the 'end to end' process.

I recently practised this in a case involving a 14 year old child, who was a party. On the motion of the parties, who had reached agreement, I decided the case alone. Along with the decision, which was drafted in reasonably brief terms, avoiding the import of verbatim statutory provisions wherever possible, I sent a one page letter to the child explaining my decision. Before I drafted the letter I sought advice from both representatives as to the child's written communication and understanding. I also asked how the letter should be sent and who would assist the child with its content.

I have received feedback from the child, who passed on her thanks to me for "taking the time to write to [the child] individually to explain the decision". The child's solicitor advised that the child found this very helpful and he thought it "really helped [the child] to feel like an important part of the process."

In discussion with partner agencies within *My Rights, My Say*, the new children's service, they were all agreed that this was a model of good practice and their hope is to see other legal members/tribunals adopt this approach in cases where children have been significantly involved (either as parties or in some other capacity).

It is my intention to sit on any child party cases over the next wee while to gain a sense of how the new rights are working in practice and I may consider a letter to the child again. Much will depend upon the particular circumstances. I will keep you informed of any interesting developments.

We are in the process of preparing our first Judicial Decision Making Toolkit for the benefit of all our members; and the legal member training will be given to our specialist members in 2019. I may prepare guidance on the letter to the child to coincide with the 'Toolkit'.

I hope you will find the Bulletin helpful as you develop your skill and expertise within the Chamber. A word of encouragement – the Bulletin is for all member types – legal and specialist. Please do read each article with your judicial hat firmly on, whatever your member type – it is of equal importance that our legal members understand the impact of adverse childhood experiences as much as our education/health and social work members understand the impact of developing law on exclusions and disability.

With my best wishes,

President
Health and Education Chamber, First-tier Tribunal for Scotland

Health and Education Chamber Update

Paul Stewart

Paul Stewart, Operations Manager for Glasgow with the Scottish Courts and Tribunal Service, takes us through some developments within the chamber and outlines plans for the months ahead.

The first half of the year has been a busy one for the HEC administrative team. From 1st April 2018 to 30th September 2018, we received 63 applications. This is slightly less than over the same period for 2017/18 (70), but still suggests that we will be in for another busy year.

There have been several operational changes within HEC over the last few months, including staffing changes. Julie Burton has left the team to work full-time within the Social Security Chamber. We wish Julie all the best in her new role. Katie Irvine will be joining the team and will provide casework and clerking support in her role. The team are also working to support the new documentary evidence pilot. This pilot will see the Respondent/Responsible Body prepare the 'bundle' for the hearing. This will apply to all references and claims involving City of Edinburgh, West Lothian, Perth and Kinross, and Aberdeenshire received on or after 1st August 2018. We have also been working closely with Elaine Forbes, our dedicated Improvement and Learning Officer to continue building the specialist knowledge within the team. We have recently developed and delivered a technical training module for staff that will boost active listening and telephony skills with a view to handling calls from children and young people.

Looking ahead to the rest of the year, we will continue working with Elaine on improvement activities within the jurisdiction. We are taking steps to bolster the clerking resource within ASN by providing new IT equipment to staff and multi-skilling other members of staff so that they can provide additional clerking support. The team are also looking forward to the completion of the dedicated ASN hearing facilities in the Glasgow Tribunals Centre and the opportunities this will provide for parties attending hearings.

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Exclusions and equality: how are they related and why do we fund these cases?

Nicola Manison

Nicola Manison, a solicitor with the Equality and Human Rights Commission (EHRC), explains the reasons behind the Commission's funding of recent successful legal challenges in cases involving children with a disability who are excluded from school.

School exclusions policies can, unintentionally, place disabled pupils at a disadvantage. A decision whether to exclude a child is often based on a policy or set of criteria that is applied equally to all pupils. Sometimes little consideration is given to the circumstances that led to the exclusion or how a particular condition that a child has may make them more vulnerable – disproportionally so compared with non-disabled children - to falling within the scope of the exclusions policy.

The Commission have been concerned that the Equality Act 2010 has not been properly applied in relation to disabled children when schools are deciding whether to exclude them, resulting in the excessive use of exclusion of the most vulnerable children.

A particularly notable occurrence is when a child with a diagnosis of Autism Spectrum Disorder (ASD) or similar disability becomes frustrated, in response to the stimuli around them or events in the classroom which are not well dealt with by staff, leading to the child hitting out and then being excluded from school for their behaviour.

In some of our funded cases, the child's distress tended to build up due to a lack of support by the school or (in one case) a recent withdrawal of support for the child.

The interventions made by the school did not de-escalate matters or were inadequate, leading to the child hitting out and ultimately being excluded for their behaviour.

For a child to be protected from disability discrimination by the Equality Act 2010 they must first meet the definition of disability set out in section 6. However, The Equality Act 2010 (Disability) Regulations 2010 list conditions which are specifically excluded from the definition. In particular, Regulation 4 excludes those whose impairment is a 'tendency to physical abuse of others'.

In the past, this exception was relied upon as a defence by schools facing discrimination claims. In one leading case[1], the Upper Tribunal held that a child with a diagnosis of ASD was not disabled for the purposes of the Act because of their

[1] X v The Governing Body of a School (SEN) [2015] UKUT 0007 (AAC)

tendency to physical abuse, despite accepting evidence that the behaviour concerned was a consequence of their ASD. Hence the school's decision to exclude the child for reasons relating to their behaviour (in turn related to their condition) could not be challenged under discrimination law.

This approach was problematic for a number of reasons. The exclusion from school of a disabled child often coincides with a failure to make reasonable adjustments, either to how the school supports the child or to their exclusions policy. In many cases, had reasonable adjustments been made, the need for exclusion may not have arisen.

A school's exclusion policy can also be indirectly discriminatory. In one of the exclusions cases the Commission funded, the tribunal found that an exclusions policy that applies equally to all pupils does not achieve a 'level playing field' and can lead to a higher proportion of disabled pupils, particularly children with ASD, being excluded. Such a policy is therefore indirectly discriminatory unless it can be justified as a proportionate means of achieving a legitimate aim.

On a strategic level, there are a number of considerations that EHRC takes into account when deciding whether to offer legal assistance. We provide legal assistance or funding for a case where we consider it will have wider impact and will test or strengthen the law. We also work within specific areas of concern identified in our three yearly Strategic Plan and annual Business Plan. At present, 'improving educational outcomes for children with special educational needs and disabilities' and 'addressing the education attainment gap in relation to exclusions' are strategic priorities for us.

In line with these priorities, the Commission funded a number of applications to the former Additional Support Needs Tribunal in Scotland (and similar proceedings in England) where the application and interpretation of Regulation 4 was at issue.

Most notable among the successes achieved through this work was the outcome of the recent appeal to the Upper Tribunal Administrative Appeals Chamber in England (*C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party)* (SEN): [2018] UKUT 269 (AAC), wherein it held that the application of regulation 4(1)(c) of the 2010 Regulations violated the rights of children with a recognised condition that makes them more likely to exhibit a 'tendency to physical abuse' not to be discriminated against under Article 14, read in conjunction with Article 2 of Protocol 1 (Right to Education), effectively dis-applying Regulation 4 in the circumstances of this case.

Although not strictly binding, this decision will be highly persuasive in similar proceedings before the First-tier Tribunal for Scotland (Health and Education Chamber) and it is analysed in more detail later in this Bulletin.

Excluding a child for behaviour arising from their disability is not only discriminatory and damaging to the individual, but has an adverse impact on the wider school community.

The successful cases we have funded have gone a long way to improve the lives of disabled children and their families.

Nicola Manison is a Senior Solicitor with the Equality and Human Rights Commission in Scotland.

City of Edinburgh Council –v- R

Donna Morgan

Donna Morgan, Legal Member, HEC, outlines the recent judgement following an appeal against a ASNTS decision. This article considers possible implications for education authorities and the Tribunal.

Introduction

City of Edinburgh Council v R is a case of great significance, not least because it is the last appeal from the Additional Support Needs Tribunal for Scotland to the Second Division of the Inner House of the Court of Session; the Additional Support Needs Tribunal for Scotland (ASNTS) having transferred to the Health and Education Chamber of the First-tier Tribunal for Scotland on 12 January 2018.

This decision reinforces the importance of education authorities responsibilities' in respect of Co-ordinated Support Plans (CSP). "Where it is needed, a CSP is an important part of the authority's educational responsibilities[1]." To the best of the writer's knowledge, this is the first case where a claimant sought to rely on the Equality Act 2010, rather than the bespoke remedies available under Education (Additional Support for Learning) Act 2004 concerning CSPs. Illustrating that the Equality Act is an appropriate tool to be used in conjunction with a failure to plan and provide an adequate and efficient education to those with additional support needs arising from disability. This is a case that will require to be considered carefully by authorities across the country to ensure they are not found to be discriminating against pupils by providing education in a way that cannot be accessed due to something arising from disability.

Background

This case was brought to the Inner House by City of Edinburgh Council in respect of a decision of the Additional Support Needs Tribunal for Scotland dated 7 April 2017 further to a claim by a parent of a teenage child with Autism Spectrum Disorder and mental health issues. As a result she had limited ability to engage in education without significant[2] support.

There is a protracted history, dating from 2014, in relation to the child's difficulties accessing education. Previous references were raised with ASNTS in respect of difficulties with drawing a timeous and suitable CSP.

[1] [2018] CSIH 20 XA41/17 para 10

[2] "Significant" is the word used by IHCOS and is of importance as it mirrors the legal test for a CSP contained within section 2 Education (Additional Support for Learning) (Scotland) Act 2004

The disability discrimination claim related to failures to provide adequate, effective education for the child such that amounted to discrimination in terms of the Equality Act 2010.

Oral and written evidence was provided to ASNTS from a number of sources in relation to the parent's averment of discrimination. During the course of the hearing the authority conceded that the CSP was inadequate.

Decision of the tribunal

The tribunal found that there was unfavourable treatment in terms of section 15 of the Equality Act 2010, and that there was a breach of duty in terms of section 85(2)(a) and (f) of the same Act; the education authority was ordered to apologise to the child and family in respect of the discrimination and other consequential orders were also made. The tribunal, in their decision, were critical of the CSP drawn, particularly, that there was only a single educational objective, "the child to return to full-time school education[3]" which was unlikely to be achieved within the life of the CSP (one year).

The additional support specified was (i) that the child would be medicated (in the writer's view, an education authority have no jurisdiction to dictate that a person requires to take medication and would not have power to ensure implementation as is their duty in relation to CSPs); (ii) a social worker would co-ordinate the child's additional support delivered by a team of professionals. The tribunal commented that neither of these provisions can be stated as an additional support: the deficit of the CSP being further exacerbated by the social worker, as co-ordinator, having little or no direct input with the child and limited knowledge in relation to the child's educational provision.

The tribunal held that the failure to provide an adequate CSP caused "a lack of strategic oversight and a failure to co-ordinate measures of support and reasonable adjustments which would help the child[4]".

This failure was said to go "to the very heart of the circumstances.[5]"

Appeal

The education authority appealed the decision to the Inner House. Criticising the ASNTS judgement, the appellant averred the tribunal erred in concluding that there was unfavourable treatment in terms of section 15 of the 2010 Act, and that there was a breach of duty in terms of section 85(2)(a) and (f)[6] that the tribunal failed to

[3] [2018] CSIH 20 XA41/17 para 3

[4] [2018] CSIH 20 XA41/17 para 4 (paragraph 11(46)) of the original judgement, not yet available.

[5] [2018] CSIH 20 XA41/17 para 5 (paragraph 11(50)) of the original judgement, not yet available.

[6] (2)The responsible body of such a school must not discriminate against a pupil—
(a)in the way it provides education for the pupil;
(f)by subjecting the pupil to any other detriment

make the necessary findings in fact to support its conclusions, did not provide adequate reasoning and failed to take account of evidence.

The Inner House dismissed these criticisms, confirming that the tribunal was specialist in nature and was more than entitled to conclude that the deficiencies in the plan would be detrimental to the child. The court further vindicate the ASNTS decision stating "It was a reasonable conclusion to draw[7]".

It was submitted by the appellant that "the CSP is a strategic planning document, not a way of providing education.[8]" The Inner House did not agree and saw "no error in the tribunal's view that the deficiencies in the plan will have impacted adversely on the education provided to the pupil.[9]" Moving forward, it will be interesting to observe whether or not this dictum is applied further by the Courts in relation to non-statutory planning documents.

An error was found by the Court in the original judgement in so far that there were no findings in fact detailing the disadvantage to the pupil. This was not found to be material to the overall decision.

It was averred on behalf of the authority that the tribunal had not detailed why they found that the authority had treated the pupil unfavourably "because of something arising in consequence of (the pupil's) disability.[10]"

Section 15(1)(a) Equality Act 2010 states: "(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability,"

The Inner House confirmed this allows a more remote connection, confirming that the cause of the unfavourable treatment does not require to be the disability. "Something" in this case was the delayed and inadequate the CSP. Whereas a person who is not disabled may require a CSP, in this case, there is no indication that the child would have required a CSP, but for the disability.

"It was the disability which resulted in the need for the CSP, and it was the CSP which was the unfavourable treatment.[11]"

There is no need for a comparator in these circumstances. The statutory test is met if "but for the disability, the disabled pupil would not have been subject to the unfavourable treatment[12]". That is to say that it would be no defence if the education authority maintained that children who do not have a disability but do meet the test of a CSP are treated equally unfavourably with respect to the degree of planning that goes into children's CSPs.

[7] [2018] CSIH 20 XA41/17 para 8
[8] [2018] CSIH 20 XA41/17 para 9
[9] [2018] CSIH 20 XA41/17 para 10
[10] Section 15(1)(a) of the Equality Act 2010
[11] [2018] CSIH 20 XA41/17 para 14
[12] [2018] CSIH 20 XA41/17 para 15

And finally,

"It appeared to the tribunal that where a pupil, in consequence of disability, has additional support needs such that the pupil requires a CSP in terms of section 2 of the 2004 Act then the failure by a responsible body to provide a CSP or the provision of a CSP which is not adequate, is unfavourable treatment in terms of section 15 (discrimination arising from disability) of the 2010 Act… and adversely affects how the responsible body provides education for the child in terms of section 85(2)(a) of the 2010 Act[13]".

This can and has in this case resulted in a finding of discrimination against the education authority. The appeal was refused.

(The full text of this judgement is cited as THE CITY OF EDINBURGH COUNCIL v R SECOND DIVISION, INNER HOUSE, COURT OF SESSION [2018] CSIH 20 XA41/17 A full copy can be obtained from www.scotcourts.gov.uk)

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[13] [2018] CSIH 20 XA41/17 para 17 (paragraph 11(41/2)) of the original judgement, not yet available.
Note: Similarities were drawn to the undernoted cases, which may be useful for further reading.

J sitting in the Employment Appeal Tribunal in Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893,

Simler J, also sitting in the Employment Appeal Tribunal, in Pnaiser v NHS England [2016] IRLR 170.

Aster Communications Ltd v AkermanLivingstone [2015] AC 1399; Baroness Hale of Richmond at paragraphs 18 and 19, and 10 Lord Wilson at paragraph 67.

Elias LJ in Griffiths v Work and Pensions Secretary [2017] ICR 160 at paragraphs 25 and 47-58.

Upper Tribunal for Scotland Decision

Deirdre Hanlon

Decision of The President of Scottish Tribunals, Lady Smith On An Application For Permission to Appeal to the Upper Tribunal Under The Tribunals (Scotland) Act 2014, Section 46(3)(B) (Ref: UTS/AP/18/0020)

The above (unpublished) decision from the Upper Tribunal is an important one for the Health and Education Chamber (HEC) and merits consideration by members. This is the first decision to come from the Upper Tribunal on permission to appeal from the HEC jurisdiction following the Additional Support Needs Tribunal for Scotland (ASNTS) moving into the HEC of the First-tier Tribunal for Scotland (FtT).

The appellant in this case sought permission to appeal to the Upper Tribunal against a FtT, Additional Support Needs, decision. This followed the tribunal rejecting an appeal in relation to a placing request decision for the appellant's son to attend an independent boarding school. The tribunal reached its decision after hearing two days of evidence and making a number of findings. The tribunal, in its decision, went on to make some observations emphasising the need for the respondent in the case to continue to provide for the child's needs in the future.

The appellant did not seek to challenge any of the tribunal's substantial findings however sought to appeal the decision on the basis of the tribunal's observations in their concluding remarks. It was argued by the appellant that these comments or observations amounted to substantial doubt being expressed by the tribunal regarding whether or not the child's future needs will be met.

The Upper Tribunal refused permission to appeal upon the basis that the appellant had not shown that an arguable point of law arose. Lady Smith states in her reasoning that it is clear that the tribunal had regard to the correct statutory tests and understood them correctly. This decision also concludes that insofar as the tribunal expressed concerns (in its concluding remarks), they amounted to no more than emphasising the need to continue to provide for whatever the child's needs prove to be.

It is perhaps worth us all reflecting on the purpose or use of such observations or concluding remarks when they do not relate directly to the tribunal's findings, following this appeal. Whilst permission to appeal was refused, it appears that the appellant in this case sought to challenge the tribunal's decision solely on the basis of such remarks. Members might want to carefully consider the appropriateness of the inclusion of such observations in the future as it is clear from this case a challenge may be brought from such comments alone, albeit unsuccessfully.

Deirdre Hanlon Editor and Legal Member HEC

My Rights My Say

Iain Nisbet

Iain Nisbet, solicitor, introduces "My Rights My Say", the new children's support service funded by the Scottish Government.

As of January 2018, amendments to the Education (Additional Support for Learning) (Scotland) Act 2004 introduced new rights for children aged 12-15 years with additional support needs to directly make use of many aspects of the 2004 Act which had previously relied upon their parents to do so.

These rights include the right to request assessments, additional support and (where appropriate) a Co-ordinated Support Plan. They also include the right to access mediation (alongside a parent), independent adjudication and the Tribunals.

As a result, the Additional Support Needs Tribunal may soon be hearing cases brought by 12 to 15 year olds in relation to:

- Co-ordinated Support Plans;
- Post-school Transition duties;
- Disputes regarding capacity or wellbeing assessments of the child.

To assist children to make use of these new rights, the Scottish Government is required to fund a children's support service. This service is called ***My Rights, My Say*** and provides a range of services to support the implementation of these new rights:

1. advice and information about these children's rights (provided by Enquire);
2. direct advocacy to support children to use their rights (provided by Partners in Advocacy);
3. support to ensure that children's views are heard in formal processes (provided by Children in Scotland); and
4. legal representation to support children making a reference to the Tribunal (provided by Cairn Legal).

The support service is available to children seeking to exercise their own rights, but also to children who prefer to allow their parents to do so on their behalf. This

ensures that the child's voice is at the heart of the legal process, whichever route the case takes.

From a tribunal's point of view, a case involving a child aged 12-15 years may already be receiving support from My Rights, My Say, in which case the child is likely to have an advocacy worker already. Where the child is the appellant, they will also have a legal representative. For cases involving this age range of child where My Rights, My Say are not yet involved, we would hope that the Tribunal service would refer the parent or child to us.

Where the case is a placing request appeal, the legislation and therefore most of the support service does not apply. However a reference to the children's participation part of My Rights, My Say can still be made at the request of the authority or the Tribunal itself – and will be provided by Children in Scotland.

The Tribunal may also be called upon to determine a dispute about whether a child has the capacity to exercise their rights and/or whether doing do would adversely affect their wellbeing.

As a service, we would regard the fact of being approached and instructed by a child in relation to their statutory rights as strong evidence that the child has capacity to exercise them. We also regard the "respected" SHANARRI indicator as particularly relevant to the question of wellbeing.

My Rights My Say is designed to support children and young people with an additional support needs to better understand and access their rights and have their views heard.

The extension of rights is a welcome one, but one which comes with its own challenges. My Rights, My Say are keen to work with the Tribunal, education authorities and others to ensure that children are as involved as possible in important decisions about their additional support needs. Our hope is that this becomes part of a broader approach which goes beyond the boundaries of the specific legal decisions and rights within the legislation and instead sees children accepted as true partners in their own education.

Iain Nisbet is a consultant solicitor at Cairn legal specialising in education law. He is author of the Additional Support Needs Blog which provides information and views about education law and policy and related topics;
www.additionalsupportneeds.co.uk

School Exclusions and Children with Disabilities

Muriel Robison

Muriel Robison, HEC Legal Member, considers the application of the Equality Act 2010 (Disability) Regulations 2010 in light of the recent English Upper Tribunal decision in C & C v The Governing Body of a School (SEN)[2018] UKUT 269.

As highlighted in the EHRC's article on school exclusions, many children with disabilities such as autism and ADHD may find that in certain circumstances they are not entitled to the protections of the Equality Act. While not all children or young people with these conditions will meet the definition of disability set down by the Equality Act[1], even those who do may find that the protections do not apply to them because of the provisions of the Equality Act 2010 (Disability) Regulations 2010[2]. This sets out certain excluded conditions including "a tendency to physical…. abuse of other persons"[3].

While this provision applies to all claimants, it is of particular significance for education claims in the Additional Support Needs Tribunal (the Tribunal) [4], given that children with ADHD or autism may, when feeling anxious or stressed, lash out at others around them at school. While this aggressive behaviour may be intrinsic to their underlying disability, because of the exception and how it has been interpreted, if the reason for the exclusion from school is because of that behaviour, then in respect of that manifestation their claim could not succeed (although they may still be protected in respect of other effects of their disability).

In an EHRC supported case in the High Court sitting in England, which has come to be known as "the first X case"[5] it was argued that if the exclusion applies to symptoms or manifestations of an otherwise protected impairment (such as ADHD or autism)[6], it would unjustifiably narrow the scope of protection. However, Mr Justice Lloyd Jones concluded that this provision covers both a freestanding condition and the symptoms or manifestations of an underlying impairment/protected impairments.

This view was endorsed by the Upper Tribunal in "the second X case"[7], which went on to give guidance as to how Tribunals should approach the issue of whether a

[1] J C v Gordonstoun Schools Limited 2016 Scot (D) 1915
[2] SI/2010/2128
[3] at regulation 4(1)(c)
[4] Such claims are now pursued in the First-tier Tribunal Health and Education Chamber (Additional Support Needs)
[5] X Endowed Primary School v SENDIST and Mr and Mrs T and the National Autistic Society [2009] EWHC 1842 (Admin)
[6] given conflicting decisions of the EAT Murray and Butterfield
[7] X v The Government Body of a School (SEN) [2015 UKUT 0007 Administrative Appeals Chamber

child has a tendency to physical abuse of other persons, such as to be excluded from protection[8].

This led a Special Educational Needs Tribunal[9] in England in the case of L, a child with autism, anxiety and pathological demand avoidance who was excluded for one and a half days because of his aggressive behaviour, to dismiss his disability discrimination claim because the reason given for the exclusion was as a result of his "tendency to physical abuse". On appeal, the Upper Tribunal[10] held that, in the case of children at least, these provisions of the regulations are incompatible with the European Convention on Human Rights, Article 2 Protocol 1 which provides that "no person shall be denied the right to education" read with Article 14 (that the Articles of the Convention should be interpreted without discrimination), such that the offending words of the Regulations require to be read out or disapplied.

Leaving aside questions whether this is the correct interpretation of the law[11] and whether this decision is binding in Scotland[12], and assuming that this decision is highly persuasive in absence of any obvious reason not to follow it, what is the significance of this decision for those involved in additional support needs education in Scotland?

The most important consequence is that Education Authorities cannot assume that such exclusions will not be scrutinised by the Tribunal, since there is no blanket removal from the protection of the Equality Act in respect of exclusions of disabled pupils for reasons of physical violence. It does not however mean that schools will never be able to exclude pupils who may have exhibited physical violence, rather that the justification for the decision to exclude will come under scrutiny.

Schools dealing with pupils in these circumstances will be under an obligation to comply with the requirements of the provisions of the Equality Act, and thus the school will require to address whether it requires to make reasonable adjustments which may reduce the risk of the physically aggressive behaviour, and if exclusion is resorted to notwithstanding, to explain why exclusion was justified and proportionate in the circumstances[13].

A claimant will be able to argue that the exclusion is unfavourable treatment because of something arising in consequence of the child's disability[14]. Although there can be

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[8] Paras 115 to 121

[9] FtT Heath Education and Social Care Chamber (Special Educational Needs and Disability)

[10] In a case also supported by the EHRC, C &C v The Government Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN) [2018] UKUT 269 (ACC),

[11] It is understood that there is to be no appeal

[12] considerations which are outwith the scope of this short article

[13] While direct discrimination cannot be justified, exclusions which may well amount to less favourable treatment in this context are unlikely to be because of the disability itself. The implication of the Upper Tribunal decision is that 4(1)(c) would be applied only to free standing conditions which in any event are not generally recognised as disabilities, and which would still be excluded.

[14] Section 15(1)(a) Equality Act 2010

a question of how close the association of the disability needs to be to the unfavourable treatment, often it will be clear that the reason for the exclusion, while not the disability itself, is the manifestation of physical violence, which arises in consequence of the disability.

The Education Authority will not however be liable if it can "show that the treatment is a proportionate means of achieving a legitimate aim"[15]. This objective justification question involves a balancing exercise, and one factor to be weighed in the balance is any failure to make reasonable adjustments, in which case it is unlikely that any unfavourable treatment could be justified.[16]

A tribunal may therefore consider it appropriate to determine first whether or not there has been a failure to make reasonable adjustments. The key question here is what steps are "reasonable" in the circumstances. While the Equality Act does not further define "reasonable", some guidance is given in the EHRC's Code of Practice[17], but "ultimately the test of the 'reasonableness' of any step…..is an objective one and will depend on the circumstances of the case"[18].

For children with challenging behaviour, autism or learning difficulties, reasonable steps may well include:

- providing the child with a channel of communication, for example use of peer support or other methods of communicating wants and needs;
- providing structure and predictability to the child's day, for example by the use of visual timetables, careful prior explanation of changes to routines and clear instructions for tasks;
- using a carefully designed system of behaviour targets drawn up with the child and linked to a reward system which, wherever possible, involves parents or carers;
- ensuring that staff are briefed on potential triggers for outbursts, warning signs which may indicate potential behaviour change, and effective ways of heading off trouble at an early stage" [19].

[15] Nor will liability arise if the school did not know (or could not be expected to know) that the pupil was disabled.

[16] Where there is a link between the reasonable adjustment required and a claim of discrimination arising from disability, the Employment Appeal Tribunal has held that any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' (Dominique v Toll Global Forwarding Ltd EAT/0308/13); but that it is unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified (see Dominique case and General Dynamics Information Technology Ltd v Carronza UKEAT/0107/14 as well as the EHRC Code of Practice para 5.21).

[17] EHRC Services Code of Practice, paras 7.29 to 7.40

[18] EHRC Employment Code of Practice, para 6.29

[19] House of Lords Committee Report, The Impact of Equality Act on Disabled People (2016), quoting examples adapted from the Special Educational Needs and Disability Code of Practice (January 2015)

Unlike previous incarnations of the disability discrimination legislation, a failure to implement what is deemed to be a reasonable adjustment cannot be justified, so that a respondent would be liable for that failure.

The failure to make reasonable adjustments will in all probability also result in a respondent being unable to justify any unfavourable treatment.

If there is found to be no failure to implement such adjustments as were reasonable in the circumstances, then consideration will still require to be given to whether the expulsion (the unfavourable treatment) is a proportionate means of achieving a legitimate aim. It will not be difficult to envisage a legitimate aim for expulsion, which may well be to protect other pupils and staff from violent behaviour. The focus is however likely to be on the proportionality question. What factors should be taken into account in such circumstances?

The guidance in the second X case to determine whether a pupil is protected at all may well have some relevance at this stage of the analysis, for example the extent of the violence; whether the child knew what they were doing was wrong; whether there was a misuse of power; the child's stage of development and the frequency or regularity of the incidences of physical violence. In addition, questions such as the extent to which alternatives had been considered will also be relevant.

A claimant may also bring a claim of indirect discrimination[20], where it is argued that the Education Authority's practices disproportionately adversely impact on those sharing the impairment in question, which given the higher rates of exclusions, may well again require justification.

The issue of disability status is a threshold question. It simply places a requirement on an organisation to give thought to their obligations under the Equality Act. Surely there are few who would question the value of that exercise if it operates to limit expulsions of pupils with ASN.

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[20] Section 19 Equality Act 2010

"Scotland the World's First ACE-Aware Nation #ACEAwareNation"

Hazel McKellar

Hazel McKellar, General Member within HEC, has been learning about Adverse Childhood Experience (ACE). Following her recent attendance at a major conference, Hazel provides us with an introduction to the term ACE and the importance of being ACE aware as well some thoughts on how we might all approach this topic.

Conference Reflections

Over the last 18 months, I have been learning about Adverse Childhood Experiences or ACEs, the short and long term impacts and how to become a trauma-informed person. Some of you may have very recently read articles in the press, heard radio interviews or watched TV programmes on this subject. A number of such programmes were produced to coincide with a conference held in Glasgow on 24th and 25th September, by almost 2500 delegates. I was supported to attend the conference by NHS Forth Valley. It was amazing, like no conference I've ever been to before, more like a rally actually!

Scientific findings on ACEs were first published in the US in 1998 and first used in Scotland in 2007. ACE awareness in Scotland is not new, however progress in getting the message out has been slow. Other countries are now conducting their own research and Scotland has contributed to further research on ACEs and trauma-informed practice. In particular, NHS Health Scotland established the Scottish ACEs Hub in 2016, which was followed by the publication of the report 'Polishing the Diamonds: Addressing Adverse Childhood Experiences in Scotland'[1] by the Scottish Public Health Network. From this a momentum for awareness and change has developed.

The accepted definition of ACE is given as "Intro-familial events or conditions causing chronic stress responses in the child's immediate environment. These included notions of maltreatment and deviation from societal norms".[2]

Categories of ACEs are abuse, neglect and household adversity, and include domestic violence, living in care, criminality, loss of a care-giver and substance misuse in the home.

Children's physiological systems are still developing the capacity to cope with fear, terror, anger, sadness and uncertainty. If children have to endure adverse experiences without adult help, their biological and self-regulatory systems develop

[1] A full copy of this report can be obtained from www.scottishrecovery.net

[2] Kelly-Irving M, Lepage B, Dedieu D, Bartly M, Blane D, Grosclaude P, et al. "Adverse childhood experiences and premature all-cause mortality, European Journal of epidemiology" 2013; 28(9);721-34

in a fragile way. Children who have experienced adversity are more likely to need external help as adults to handle emotions, therefore more likely to come to rely on smoking, drinking, drugs, unhealthy foods and physical rather than verbal communication. Whilst ACEs happen across all socio-economic groups; living in poverty is an ACE in itself and brings additional stressors for families. Feeling excluded is a symptom of trauma and adversity. The effects of childhood adversity don't just manifest in behavioural or social ways. Even in the absence of using unhealthy coping strategies, if untreated, ACES can triple the lifetime risk of heart disease and lung cancer and cause a 20 year reduction in life expectancy. The higher the number of ACEs a person has lived through, the greater the likelihood of poor outcomes.

Yet, poor outcomes are not inevitable and this was very much the focus of the conference. We heard from a paediatrician, a head teacher, a company director, a campaigner who has lived experience of a number of ACEs, the First Minister and Deputy First Minister, a developmental psychologist, a retired detective chief superintendent. Everyone stressed the need for all of us to use ACEs knowledge to foster compassion within our culture – in our families, with colleagues, with people we engage with in the course of our work. Those addressing the conference shared evidence of improved outcomes for children, young people and care-givers when agencies in all sectors, families and community groups work collaboratively to build relationships. The science is showing that compassion can be transformative, and that relationships should be central to public policies and spending decisions.

Many things struck me during the conference. John Swinney, Deputy First Minister, spoke of the government programme for 2018-19, including the vision that all children grow up loved, safe, and respected so that everyone can realise their full potential. He said that "loved" isn't a very governmental word but that it should be and it is now.

John Carnochan, a retired Police Detective Superintendent involved in the establishment of the Violence Reduction Unit, spoke of us all needing to know about ACE's in order that we can discuss trauma and make children's lives better.

ACE's involve all of us and we don't need a reason or a strategy to do the right thing.

So what for us, as Tribunal members? We can all invest in self-care and show kindness and compassion to others. Consider what has happened to children, and what has happened to adults when they were children, listen to people's story, build on the assets of them as individuals, as a family and of their community.

If you would like more information on anything I've mentioned, contact me, search on any of the publications or people or have a look on social media – there is a very animated discussion underway in Scotland as we become an ACE-Aware nation.

Hazel McKellar was appointed as a General Member to the ASNTS in 2010. Qualified in Speech and Language Therapy since 1995, she has worked across a range of services on a UK-wide basis and is currently involved in direct therapy and the provision of training amongst other things, for parents, carers and practitioners working with pre-school children.

In-House Convener Digest

Derek Auchie

Derek Auchie, HEC/Additional Support Needs Tribunal In- House Convener and Legal Member, provides us with a useful commentary on some issues that have arisen recently both out with and within the jurisdiction, discussing possible implications for the Tribunal.

This article will be a regular one and will discuss process questions which might have a practical impact on the conduct of future cases. There are several sources of these questions. Some have arisen in previous cases within the HEC/Additional Support Needs jurisdiction, e.g. in published decisions, from enquiries to me as In-house Convener (IHC) or from policy/practice activity, again in my role as IHC. Some have arisen in other Tribunal or court jurisdictions and might apply to future HEC cases. The non-HEC cases discussed here are Employment Tribunal cases; in future I intend to include cases from other jurisdictions too.

Ability, aptitude and the fullest potential principle

These tests apply explicitly in two placing request grounds of refusal. [1]

> **Ability**: being able; the capacity to do something or perform successfully.
>
> **Aptitude**: potential to acquire a skill; a natural talent or ability for something, especially one that is not yet fully developed. [2]

Taking these definitions, it looks like ability is about current capacity; aptitude is about what would be possible if the conditions were right. This distinction is important since a child may be able to perform a range of tasks, but his/her aptitude may be much greater and may not be being met.

This meaning of 'aptitude' ties into the legislative definition of 'school education' as including that directed to the development of the child to his/her 'fullest potential'. [3]

This leads onto another thought. Consideration of ability and aptitude (as they are defined above) is not restricted to cases where those words are used explicitly as part of a test; they play a role in other placing request grounds, e.g. the respective suitability ground. For instance, the likelihood that a school can meet the additional support needs of a child with a particular level of ability and aptitude is one relevant

[1] 2004 Act, Sch 2, para 3(1)(b): education provided is not suited to age, aptitude or ability of the child and in connection with para 3(1)(g), presumption of mainstream breach ground (the relevant words appearing s.15(3)(a) of the Standards in Scotland's Schools etc Act 2000).
[2] *Encarta World English Dictionary*, 1999 (Bloomsbury Publishing).
[3] 2004 Act, s.1(2).

consideration in a suitability assessment.[4] This seems to flow from a common sense interpretation of the concept of suitability in this context. However, at least from the perspective of aptitude (and probably ability too) this interpretation flows also from the 'fullest potential' principle referred to above.

In addition, and using the 'fullest potential' principle again, the question of ability and aptitude could be considered at stage two in a placing request case (when considering whether it is appropriate in all of the circumstances to place the child even where at least one ground of refusal exists). [5]

Taking this train of thought further still, the concepts of ability and aptitude could be relevant to a CSP case, especially a content one: considering the aptitude and ability of the child (among other factors), should the added/altered wording sought appear in the CSP in order to allow the child to fulfil his/her full potential? That is a question which could form part of the task of deciding on content, especially in the absence of a specific test for CSP content cases.

What we find, then, is that these meanings require to be considered in cases where the grounds of refusal which employ the words are used. They may be implicit as factors in the tests which don't mention them, due to the fullest potential principle.

Equality Act remedies

It is clear from the growing body of 2010 Act claims that the Tribunal is thinking creatively around appropriate remedies when a relevant breach of the Act is found to have occurred. I want to highlight a few points around remedies.

First of all, although the power to make a remedy is a wide one, it is perhaps not as wide as it at first seems. The Tribunal may make such order as it thinks fit, but this power is, in particular, to be used in order to obviate or reduce 'the adverse effect on the person of any matter to which the claim relates' (my emphasis). [6] This means that an adverse effect on anyone else, or on pupils in a similar position generally, will not justify a remedy. This arose in a case where the child had, by the time of the tribunal decision, moved to another school. In such a situation a remedy aimed at, for example, school staff training would not alleviate or avoid any adverse effect on the child.

While the leaning towards the adverse effect on the person is one which is stated only to be a particular aim of any remedy, from the wording it would be reasonable to expect the courts to treat anything which went beyond such a purpose with particular care. Such a remedy might involve exceeding the powers in that provision and would therefore be unlawful.

[4] Such an assessment is necessary for the commonly used ground of refusal which includes a 'respective suitability' assessment of the two schools under consideration: 2004 Act, Schedule 2, para 3(1)(f)(iii).
[5] See 2004 Act s.19(2), (4A) and (5).
[6] 2010 Act, Schedule 17, Part 3, para 9(3)(a).

Secondly, an issue which arises in such cases is specificity of the remedy. The general approach should be that any remedy should be specific and compliance with it should be measurable.

The problem with generally worded remedies is that it might be difficult for the Responsible Body to implement them, or there might be arguments following the case over what implementation means. Taking apology letters, it might be useful for the broad content of the apology to be specified: what is it that the RB is apologising for? Further, there is guidance available from the Scottish Public Services Ombudsman's office on how to make a good apology and that can be referred to in the remedy as the guidelines to be followed in framing the apology communication. [7]

Where the remedy is to undertake training, the precise nature of the training should be made clear – training on what? The people (or category of people) who are to be trained should be specified too. Also, the volume of training (where possible) should be stipulated. A deadline for the completion of training should be stated too. Where the training will need to be repeated for others in future, or where refresher training is required, again this should be made clear.

Sometimes a remedy might require a change in policy documentation or the development of a new policy document. In such cases, the nature of the change/new document should be specified and again a deadline for the implementation of the change needs to be stated.

Thirdly, in some cases it might be wise to consult with the parties on the terms of certain proposed remedies. In such cases, the tribunal could indicate to the parties that it has decided that discrimination in breach of the Act has occurred and that it wishes to consult the parties on remedies. This can be done in writing or on a telephone conference call with the Legal Member (or a combination of both), and certain proposed remedies can be framed and discussed. This may seem like prolonging the process, but if meaningful, fair and realistic remedies are to be framed, a form of consultation may be necessary. Another approach may be to indicate the general terms of the proposed remedies and ask the parties to agree on a form of words for the purposes of making the eventual wording specific.

Fourthly, a remedy in an Equality Act case could be one which connects with a CSP or a placing request. So, failure to implement a CSP might constitute a breach of the 2010 Act. Alternatively, a tribunal recently held that the failure of an education authority to set an earlier deadline than the general statutory one for the granting of a placing request where there were transition issues, represented disability discrimination.

Consolidating hearings

Increasingly commonly parties are lodging more than one reference/claim in respect of the same child at the same time. This might be a CSP reference/placing request

[7] See the SPSO website at www.spso.org.uk in their 'Leaflets and guidance' section. The document is called 'SPSO Guidance on Apology'.

reference and an Equality Act claim, for instance. There could even be a placing request and CSP reference lodged concurrently. Where there is likely to be an overlap in evidence between the two cases, (especially where that overlap means that there are witnesses common to both), it would seem sensible to consider consolidation. What is important to note here is that the Tribunal Rules 2018 provide for consolidation of hearings not of cases. [8] This means that separate directions to manage each of the two cases will still be needed. Technically, separate bundles are needed too, although the case management powers of the Legal Member are certainly wide enough to direct the production of a single bundle to include all papers for both cases, and indeed this would seem sensible.

The test for consolidation of hearings is where each case involves the same child or young person or where each case involves a decision on substantially the same issue.

In a recent instance, I had to consider a request to consolidate four related cases in relation to two siblings, each having a placing request and Equality Act claim. The rules don't specifically cater for this (not surprisingly), but with some consideration, it was possible to achieve consolidation of the hearings on all four cases.

Of course, any such decision must be taken in the context of the overriding objective. One factor here is whether, for reasons of fairness, the cases should not be consolidated. This might apply where it is thought that a tribunal could be influenced unduly in deciding on one case by evidence to be led in relation to the other. Fairness might require each case to be decided by a different panel. The rules require that both parties are heard on a proposal to consolidate before a decision is made, so that would be the point at which to raise any fairness question (even just for the purpose of excluding the possibility of unfairness).

There is another tricky issue which may arise in relation to consolidated hearings: should all evidence be relevant to both cases? This should not be an issue where the reason for consolidation is that both cases involve a decision on substantially the same issue. [9] Where instead the consolidation is due only to the same child or young person featuring in both cases, careful consideration may have to be given to identifying the evidence which is to be relied upon for each case. That is something the tribunal must be clear about after hearing from the parties. That may mean using certain evidence for one case and not the other. If this might prove intellectually (and from a fairness point of view) challenging, then that might suggest that the hearings should not be consolidated.

Finally, where there are two cases for which the hearings are not consolidated, but they are related, they require to be treated entirely separately, even if there is a shared tribunal member(s) (as happened recently). There can be no 'bleeding' of evidence from one case to the other; the common member should, in fact, desist

[8] Rules 30 and 76.

[9] Having said that, where there is a 2010 Act claim and a placing request reference, certain facts might be relevant to both, but the legal tests are different: is the issue to be decided 'substantially the same'? Possibly not.

from even indicating to the other tribunal members in case B that there exists a related case A. In such a situation, each case must be decided as a sealed unit.

Provisional views on an argument or case

Employment Tribunal (ET) case law exists which makes it clear that a tribunal can go quite far down the line of indicating the likelihood of success of a particular argument (or indeed a whole case) and not fall foul of the rules on apparent bias. The utility of such a step is clear. The tribunal may wish to encourage the parties to agree settlement of a case, or to reduce the scope of the dispute (such as by dropping a placing request refusal ground or an Equality Act discrimination argument or a plea to make a particular amendment to a CSP).

The key in such interventions is to make it clear that any view on the merits of a case (or part of it) is being expressed *on a provisional or tentative basis*. In *Roberts v Carlin* [10], the Employment Appeal Tribunal (EAT) rejected a bias argument aimed at the comments of the Employment Judge to the effect that the employer had, in order to succeed, 'a very steep hill to climb' before then encouraging settlement discussions. This comment was made following the employee's evidence. The EAT held that it was clear that this view was being expressed tentatively, and so the apparent bias test was not met.

In another case, the chairman in the hearing made preliminary comments referring to the employer's treatment of the employee as 'appalling' and encouraged settlement. These comments were made after most of the evidence was completed and before a two-month adjournment for a further witness to attend. Peter Gibson LJ in the Court of Appeal stated:

> "I have some difficulty in understanding why a strongly expressed view cannot be a provisional view, leaving it open to the party criticised to persuade the tribunal as to why that view was wrong and why the party's conduct was justified. Of course the more trenchant the view, the more the attachment of the label 'preliminary' may need scrutiny to see whether the view was truly preliminary and not a concluded view." [11]

It seems to me that if a provisional view is to be expressed on a case or ground or argument, it is best to do so as early as possible. However, Legal Members should take care if considering doing so at a point earlier than the hearing and should, if doing so, express a preliminary view only on a legal point, and assuming that any facts are found in favour of the party to whom the comments are directed. This is because the facts are found by the tribunal as a panel. Even on purely legal issues, the panel decides, but there may be such a clear difficulty for one party on a point of law that a provisional view would assist to focus the mind of the party perceived to be in difficulty.

[10] Appeal No UKEAT/0183/09/DA, 17th December 2010.
[11] *Southwark London Borough Council v Jiminez* [2003] EWCA Civ 502; [2003] ICR 1176 at para 38.

Case management powers

In another recent employment case[12], the EAT had to consider the scope of its general case management rules. A 'litigation friend' is the equivalent of a curator *ad litem* in Scotland. Both offices involve a court/tribunal appointed lawyer to represent the interests of a party who no longer has capacity to instruct a lawyer. The EAT had to consider whether the Employment Tribunal's decision to appoint a 'litigation friend' was competent.

The answer is that such an appointment is competent, despite the lack of a specific power in the rules to make one. The EAT held that the general case management powers were sufficient to take what is quite a significant step in the process. Although the Employment Tribunal case management rules are not worded in the same way as the HEC case management rules, they are not dissimilar. Both sets of rules provide wide discretion to the Tribunals to regulate their own procedure.[13]

This case justifies a broad interpretation of the case management and general provisions of the 2018 Rules. It is important to note here that the lists of examples of areas on which directions can be made[14] is illustrative only and not prescriptive. This is clear from the wording of those rules, as well as from the general power to regulate procedure.[15]

The question of whether this case insofar as it relates to the appointment of a 'litigation friend' is relevant for the HEC is a matter for consideration another time.

For the moment, the more general point about the ability to make bold case management decisions is worth emphasising.

Apparent bias by conduct

Staying with ET case law, there are some examples of cases where an allegation of unfair treatment of a party, witness or representative has been made. Again, such an argument is difficult to sustain as a bias one (although such conduct could be regarded as unprofessional and found a complaint).

Frustration around how a case was being presented by a Barrister boiled over and on more than one occasion the Chairman put his head in his hands. That, alongside some comments, were not deemed to amount to apparent bias in the context of that case.[16]

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[12] *Jhuti v Royal Mail Group Ltd*. [2018] ICR 1077.

[13] For the ET, see rules 2, 29 and 41 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237); for the HEC, rules 2, 3 25, 50, 71 and 96 of the 2018 Rules.

[14] Rule 25 for references, rule 71 for claims.

[15] Rule 50 for references, rule 96 for claims.

[16] *Aziz-Mir v Sainsbury's Supermarkets plc* UKEAT/0415/07/JOJ, 10th December 2008. For a case on hostility towards a representative which again did not amount to bias see *Kidd v The Commissioner of Police* UKEAT/0191/17/RN, 6th February 2018.

Body language of a tribunal member was a feature of a bias argument in *Ross v Micro Focus Ltd*.[17] The EAT approved some 'ground rules' for tribunal members in this area, summarised below:

- Tribunal members should avoid overt signs of friendliness or hostility towards either party or representative.
- The Legal Member can be firm with a representative or witness, but at all times should act respectfully and courteously.
- Tribunal members should minimise demonstrative reactions to evidence or submissions (whether by facial expression, gesture, the making of noises or body language) except in the form of direct questions.
- Tribunal members should avoid 'asides', comments and remarks, unless posing a direct question. [18]

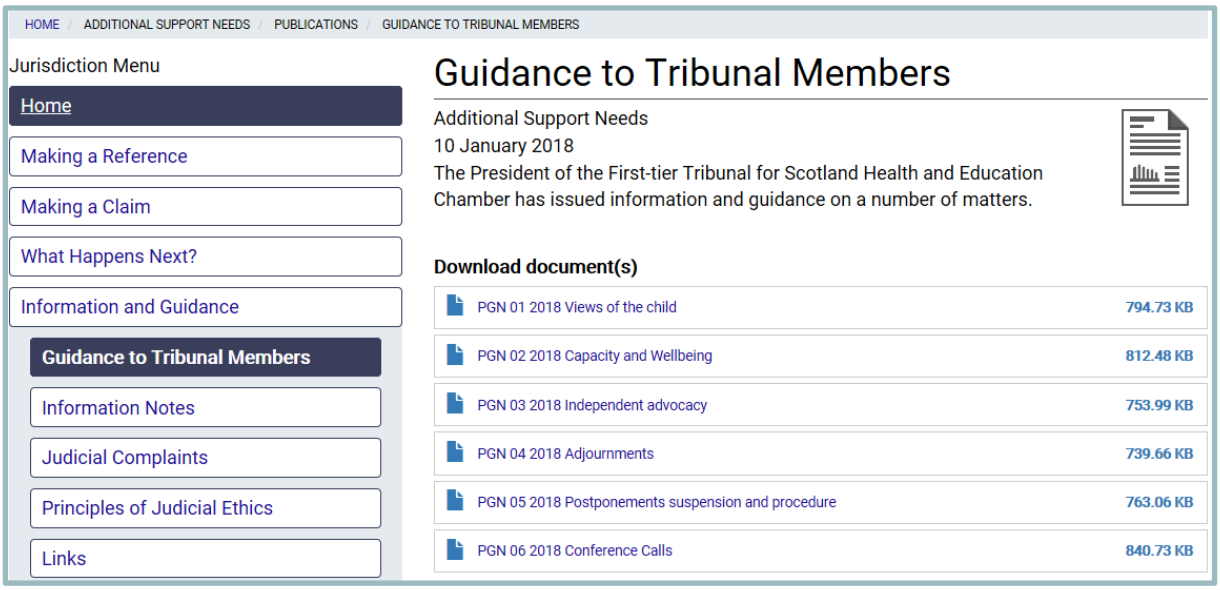
These ground rules are equally applicable in any judicial setting and remind us of the need for a 'poker face' at all points during the hearing, however strongly we may feel about the evidence or argument being presented.

Derek Auchie is In-house Convener with the Health and Education Chamber. Derek started his professional career as a litigation solicitor appearing in the civil and criminal courts. In 2002, he moved into academia, teaching evidence and dispute resolution. He moved to the University of Aberdeen in 2012, where he is a Senior Lecturer in the School of Law. Derek has published on tribunal and court practice, evidence and arbitration. He has been appointed as arbitrator and mediator, and is a Fellow of the Chartered Institute of Arbitrators and of the Higher Education Academy.

[17] UKEAT/0304/09/SM, 18th November 2009.
[18] [2009] UKEAT 0304, 18th November 2009 at paras 37-38 of the decision.

List of President's Guidance Notes

The President's Guidance notes are published on the ASN section of the Tribunal's website, on this page: https://www.healthandeducationchamber.scot/additional-support-needs/publications/42



The President of the First-tier Tribunal for Scotland Health and Education Chamber has issued information and guidance on a number of matters. These are linked to below, however if you are unable to access either these links or the webpage above, copies can be emailed to you.

PGN 01 2018 Views of the child **794.73 KB**

PGN 02 2018 Capacity and Wellbeing **812.48 KB**

PGN 03 2018 Independent advocacy **753.99 KB**

PGN 04 2018 Adjournments **739.66 KB**

PGN 05 2018 Postponements suspension and procedure **763.06 KB**

PGN 06 2018 Conference Calls **840.73 KB**