Health and Education Chamber
First-tier Tribunal for Scotland

The Bulletin

Edition 2

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Contents

Foreword

May Dunsmuir

President

Dear members,

The Bulletin

I hope you will enjoy this second edition of The Bulletin. There are a wide range of articles, which vary from the funding of cases before the Tribunal to the national framework: "Ready to Act", which is in place to support allied health professionals in their work with children and young people. I am confident that you will find The Bulletin a useful learning tool. I had been unaware of "Ready to Act" until now, and I am pleased that the expertise within our own membership can be utilised for our collective benefit. The office of the Children and Young People's Commissioner has written a helpful article on their first investigation into the rights of children and young people. I commend the reading of this to you. I sent a link to this report in one of my earlier updates and you will also find a link at the foot of the article. This is a very well drafted report, which is easy to read. The opening letter from a brother to his brother who has additional support needs is itself both moving and thought provoking.

Mediation features in this edition. A number of our cases are suspended pending mediation and it is helpful to read the focus of mediation from a number of perspectives. This is the first of further articles which will appear in The Bulletin.

The update on section 15 of the Equality Act 2010 (unfavourable treatment) is very helpful. It is clear from our member reviews that we will have to keep on exploring the range and extent of the 2010 Act. Members often raise this as an area for development. I will continue to include this in member training.

Our In-house Convener Digest focuses in this edition on the question of assistance being provided to parties by the tribunal. The Inner House judgement in the case of *JC-v-Gordonstoun Schools Ltd* is explored as is the practice and benefit of written submissions. This article is founded on recent tribunal decisions. I hope in this way, we are able to spread the range of growing expertise amongst the full

membership.

Our editor, Deirdre Hanlon, has again 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 third edition but if you have an article of interest, please do get in touch before then.

Our second 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 timescale for the transfer of the two NHS tribunals (*NHS Tribunal for Scotland* and *National Appeal Panel for Entry to the Pharmaceutical Lists (NAP))* has been delayed to April 2021. This will coincide with the transfer of each of the 32 *Education Appeals Committees*. (EACs).

I met with the Chief Pharmaceutical Officer earlier this year to discuss the plans for transfer and to share with her my vision for delivery of the NAP. I have scrutinised volume and type of cases in both NHS jurisdictions, which at present are low in number.

There is a growing level of interest in education authorities for the plans for transfer of the EACs. The EACs currently hear appeals on placing requests which do not involve children or young people with additional support needs; and appeals against exclusions.

It is my intention to model the EACs into a similar style of delivery as our current ASN jurisdiction. I wish to look at potential efficiencies in the hearing of exclusions, as the longer these remains undecided, the longer the child or young person remains out of school.

Child Parties

We have received four applications from three children in the last reporting year (1 April 2018 to 31 March 2019) – two claims from one child on two separate occasions and two CSP references from two individual children. I have sat on each of these cases in order to examine and experience how effective our practice, law and guidance are. I have issued a written decision without an oral hearing in one claim; the other is proceeding to an oral hearing in June. One of the references settled and the other has been suspended pending mediation.

I have circulated anonymised copies of my case conference call notes, for member

reflection, which I hope are proving helpful. As you know, I also intend to prepare a new Guidance Note on the hearing and the child.

GTC – 6th floor hearing rooms

I am delighted to announce that the Glasgow Tribunals Centre was formally opened on 13 May 2019 and one of our new hearing rooms is ready for use. This has been booked for the June hearing, involving the child party claim. I will update you on how these are working in practice. Three of our members visited recently as did a number of members of senior judiciary. Feedback has been very positive.

The Judicial Decision Writing Toolkit

The first draft of the Toolkit has been completed and I am grateful to Derek Auchie for his assistance in this. I will shortly issue you with the draft for your comment. It is important that the Toolkit is clear and covers the areas which commonly arise when drafting decisions. The aim is to produce consistency in style and to help us to adapt our reasoning so that it is succinct, clear, focused and relevant to the matter which has been decided.

I will revise and finalise the draft following the period of member consultation. Once it is formally issued, all members will be expected to comply with the standards of decision writing. This is the first Toolkit of its kind. I am confident you will find it exactly as it is stated, "a toolkit" and not a set of inflexible rules.

Please take the time to consider the draft and do send in your ideas if there is something missing or if the draft can be improved.

I have decided not to include guidance on the letter to the child within the Toolkit. This will be the subject of separate guidance.

I hope you will find The Bulletin helpful as you continue to develop your skill and expertise within the Chamber. A word of encouragement – the Bulletin is for <u>all</u> member types. Please read each article with your judicial hat firmly on, whatever your member type.

With my best wishes,

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

Health and Education Chamber Update

Paul Stewart, Operations Manager

Scottish Courts and Tribunals Service

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.

Since my last update in November 2018, the caseload of the Additional Support Needs jurisdiction has continued to increase and in total we received 113 applications during the business year. **This is an increase of 13 applications on last year (100) and is the highest number of applications that we have received in a single year since the former Additional Support Needs Tribunal for Scotland was established in 2005.**

In order to cope with this increased demand the Health and Education Chamber (HEC) administrative team continue to seek improved ways of working that benefit both those who access tribunals and the tribunal members. Some of the improvements we have made recently include utilising a centralised clerking team to assist in clerking an increased number of hearings. The team have also been preparing for the introduction of automated members fees and e-expenses for HEC members over the last few months. This has involved drafting and issuing guidance to all members on the new processes, updating internal guidance and standard operating procedures, and making changes to our case management system. We hope that these changes will streamline the process, make it more efficient and ensure prompt payment for work completed by members.

Since my last update there has also been a couple of staffing changes within the casework team. The team welcomed Meg Orr as a temporary casework support in January 2019. Meg is providing cover while Megan Wilkinson is on temporary promotion as our Senior Case Officer.

Looking ahead to the next business year, we are looking forward to the completion of the dedicated ASN hearing facilities being developed within the Glasgow Tribunals Centre, and the opportunities this bespoke environment will provide for parties attending hearings in Glasgow. The team will also continue to work closely with our colleagues in the clerking team to provide training on the HEC to new members of staff that will be joining them over the coming months.

Health and Education Chamber
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No Safe Place : Restraint and Seclusion in Scotland's Schools

Nick Hobbs, Head of Advice and Investigation

In December 2018 the office of the Children and Young People's Commissioner Scotland (CYPCS) published its investigation into restraint and seclusion in Scotland's schools. Nick Hobbs, Head of Advice and Investigation at CYPCS highlights of some of the report's key findings and recommendations:

This issue was identified as a priority for the office's first investigation based on careful consideration of the rights issues at stake, the implications of those rights being breached, the vulnerability of the children and young people involved, and the extent to which concerns have been raised through the office's advice function.

Restraint and seclusion may constitute serious violations of children's rights, including their right to be free from cruel, inhuman or degrading treatment or punishment, their right to respect for bodily integrity, and their right not to be deprived of their liberty. International human rights law sets out clear tests to be applied to determine whether restraint and/or seclusion will be lawful.

We therefore chose to focus the investigation on two main elements:

- The existence and adequacy of policies and guidance which reflect the law and the obligations of the State under international human rights instruments. These are an essential pre-requisite to accountability and redress.
- The extent to which incidents are recorded and reported. This is a critical means of ensuring that practice is appropriately monitored and scrutinised, as well as fully rights compliant.

Our investigation revealed a number of serious concerns including that in some local authorities, children may be subject to restraint and seclusion without any policy or guidance in place to support lawful and rights-compliant practice. Even where policies do exist, a lack of consistency creates the potential for significant variations in practice across local authorities and very few give meaningful consideration to the necessary human rights standards. We also discovered that, due to a lack of national recording, it is impossible to know with any degree of certainty how many incidents of restraint or seclusion take place each year, which children are most affected, how frequently and how seriously.

Our key recommendations are:

The Scottish Government should publish a human rights-based national policy and guidance on restraint and seclusion in schools. Children and young people should be involved at all stages of this process to inform its development.

Local authorities should record all incidents of restraint and seclusion in schools on a standardised national form. Anonymised statistical data should be reported to the Scottish Government.

Clear and consistent definitions of restraint and seclusion, linked to the human rights framework must be developed at a national level by the Scottish Government.

In January 2019, the Challenging Behaviour Foundation (CBF) and Positive and Active Behaviour Support Scotland (PABSS) published their own report on Restrictive Intervention which reinforces the concerns raised in our investigation. PABSS' Beth Morrison has reported over 400 cases of restraint and seclusion brought to her by families across Scotland, and her data suggests more than 60% of those children are aged seven or under.

We are in the process of individually analysing the local authority responses to our recommendations and will be publishing them in due course.

In its initial response, the Scottish Government advised it will do further work with local authorities before responding in detail to each recommendation. We have been clear that the primary responsibility to respect, protect and fulfil human rights rests with the State as the contracting party to international treaties**.**

In the case of the human rights issues raised in the investigation report this responsibility is owned by the Scottish Government and it is incumbent on Ministers to take action.

Nick Hobbs, Head of Advice and Investigation

www.cypcs.org.uk

Reducing Restrictive Intervention of Children and Young People Report

HEC and the funding of cases

Donna Morgan, Health and Education Legal Member

It is open to a party lodging a reference or claim within the Additional Support Needs jurisdiction to choose to be legally represented or not. Donna Morgan, legal member, takes us through some of the means of funding available for both advocacy and legal representation for appellants or claimants who wish to engage the services of either an advocacy worker or a solicitor.

References

Let's Talk ASN

Section 14A of the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) ("the 2004 Act") imposes an obligation on the Scottish Ministers to provide an advocacy service to a parent of a child; a parent of a young person who lacks capacity with additional support needs and young people with additional support needs wishing to make a reference to the First-tier Tribunal for Scotland Health and Education Chamber (HEC). The Act requires the service to be free of charge.

"Advocacy service" means a service whereby another person conducts discussions with or makes representations to the HEC or any other person involved in the proceedings on behalf of the appellant.

This service is currently provided by Govan Law Centre in conjunction with Barnardo's.

My Rights, My Say

Section 31A of the 2004 Act provides similar provision of a support service to be available free of charge, to children aged between 12-15 years, who seek to exercise their new rights in terms of section 3A, 3B and 3C of the 2004 Act.

The support service includes legal advice, assistance and information in relation to relevant rights.

This service is a partnership between Enquire, Cairn Legal, Children in Scotland and Partners in Advocacy.

Scottish Legal Aid Board (SLAB)

SLAB will make payment for certain advice and meet the cost of certain reports, however will not meet the cost of any step in proceedings due to the provision of advocacy service required of Scottish Ministers. This provision is means tested. There are therefore some appellants/claimants who will be ineligible for such provision due to their income and/ or capital position. Such appellants/claimants may be unable to obtain independent reports for example, because the cost of funding these privately is prohibitive.

Claims

Equality and Human Rights Commission (EHRC)

EHRC promotes respect, freedom, equality, dignity and fairness. They undertake and provide funding for certain cases to fulfil these objectives and this may include funding or taking forward cases before the HEC. The EHRC can provide legal assistance or funding for a case when they consider that it might have a wider impact and will test or strengthen the law, in line with their own strategic objectives. This funding has more commonly been provided to fund cases to higher courts in the past for further development of the law in this area.

EHRC are undertaking research to look at whether legal aid enables applicants to achieve justice.

https://www.equalityhumanrights.com/en/our-work-scotland/our-work-scotland/research-scotland/legal-aid-victims-discrimination-scottish

Scottish Legal Aid Board

Funding via advice and assistance and ABWOR (assistance by way of representation) is available for discrimination claims before the HEC, however, this is associated with all the usual rules and difficulties in obtaining legal aid and the solicitor later receiving full payment; such as persuading the legal aid board that the funding is necessary and that steps taken were required etc.

Private Payment

There are a select number of solicitors who practice privately in this area and take forward cases of this nature. It is a matter for each individual firm to determine their own fees in line with guidance and rules from the Law Society of Scotland. This can be costly.

Charitably Funded

There are charitable organisations who are funded or able to apply for funding for specific advancement of cases of this nature. Cases are generally funded to develop the law and practice in this area.

Introduction to the Mediation Process and Additional Support Needs

Graham Boyack, Director of Scottish Mediation

Graham Boyack, Director of Scottish Mediation, shares his views on the mediation process with a focus on additional support needs in education. This article is the first of several that will look to consider the mediation process from a range of perspectives.

Mediation: better conversations for better outcomes

When I was invited to write about mediation for the Chamber Bulletin my initial thought was about the impact mediation has made in the Additional Support Needs Tribunal and in cases that are mediated before they might even reach the Tribunal.

From my discussions with those involved in those mediations the key areas where mediation seems to really help are in maintaining relationships, being a creative way of resolving disputes and focusing on the parties.

Where issues arise with schooling and education it is very easy for disagreements to develop, particularly if it involves written communications. Written communications can often lead to different interpretation of tone and intent which can make disagreements worse.

Being able to have a facilitated conversation where there is someone to help you communicate better can help what is often a difficult conversation. Both schools and parents are often worried about falling out with each other and the support given by a mediator can help with that. They can also help to get to the issues underlying a disagreement which are often not those presented at the outset. A parent who had used mediation underlines the idea that what is presented isn't always what it seems when stating: *"I withdrew all my complaints, which were really more out of frustration".*

One of the strongest aspects in maintaining relationships can simply be understanding where someone is coming from and this is something that mediators will encourage parties to do. Even where a disagreement cannot be resolved the understanding created can be useful in parties managing their relationships going forward.

Using a mediator can also be a creative way to help resolve a disagreement.

The mediator uses a series of techniques which help parties to identify what they really want rather than necessarily what they have said at the outset. The process by which the mediator does this involves looking at the future and helping to identify what's important for them.

Sometimes through this process things can be agreed that wouldn't be part of the remit of the Tribunal but are valued by those involved.

Sometimes this can be about ongoing communications as this is often at the root of disagreements.

The focus on what the parties want is an important part of why mediation works when disagreements arise around additional support needs. Parents most commonly say of mediation that they feel they have been heard for the first time. Whether that is the case or not, the fact that they feel that way is very important in then being able to move forward and agree how things will happen in the future.

As you might expect me to say, there are more areas where mediation could play a useful role. Alongside the traditional forms of mediation used in ASN disagreements I would also say that work Scottish Mediation has carried out on health complaints recently has been instructive as to the possibilities. We have simply facilitated meetings using mediation skills without necessarily seeking to resolve a disagreement. In some of those the result has been to agree a way forward and allow a further conversation to take place with a clearly focused purpose. In others it has helped parties to communicate and narrow the focus of their disagreement whilst building trust for future discussions.

As for the use of formal mediation in tribunal processes it's use in ASN disagreements and the work that was carried out over the past few years in the Housing and Property Chamber, shows us that it works and should be regarded as a key option that perhaps needs a nudge to be used more. Helping people to understand what it is and how it works and providing a clear route to the mediators would be a good start.

Equality Act 2010 Update on Section 15

Muriel Robison, Health and Education Legal Member

Muriel Robison, HEC legal member, in the first of a series of articles looking at section 15 of the Equality Act 2010, considers the scope and meaning of "unfavourable treatment".

Introduction

Those of us with long memories will recall the consternation following the judgment in *London Borough of Lewisham v Malcolm [2008] UKHL 43* when the House of Lords found that the disability related provisions in the Disability Discrimination Act 1995 gave much less protection to disabled people than had been understood. This left disabled pupils, who believed that they had been discriminated against by schools, relying on direct discrimination, requiring proof that the reason for any less favourable treatment was the disability itself, or on a failure to make reasonable adjustments.

The "discrimination arising from disability" provisions, now encapsulated in section 15 of the Equality Act 2010, were intended to fill the so-called "Malcolm gap". As the Explanatory Notes explain at [70] '*this section [was] aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity…..for a [respondent] to defend the treatment'.*

The language of section 15 however was new, and in particular, in order to establish liability, the claimant must show that: 1) they were subject to unfavourable treatment; and 2) that treatment is because of something arising in consequence of their disability. However, the claim will not succeed if the respondent can show that: 3) they had no knowledge of the claimant's disability, but 4) if they did, that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

In the first of a series of articles looking at section 15, and following the recent decision *Williams v Trustees of Swansea University Pension & Assurance Scheme* 2018 UKSC 65, the first to reach the Supreme Court on the interpretation of this section, this article considers the scope and meaning of "unfavourable treatment".

Unfavourable treatment

It might have been assumed that there would be little difficulty interpreting the term given its use has a "long pedigree" in the context of pregnancy discrimination, with little or no controversy over its meaning. However, in the disability context, the meaning is less clear.

As Lord Carnwarth, giving the only judgment in the Supreme Court in Williams noted,

"Section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant".

Given that the term is not defined in the Equality Act, what does the guidance say to assist a Tribunal seeking to answer these questions on the facts?

In Williams, it was generally accepted that a comparator no longer requires to be identified, that is "unfavourable" treatment is to be distinguished from less favourable treatment. Unlike direct and indirect discrimination, no comparative analysis is required (as is clear from section 23).

Giving guidance on the meaning of "unfavourable treatment", the Equality and Human Rights Commission Technical Guidance for Schools in Scotland states that the disabled person 'must have been put at a disadvantage' [5.44]. Clearly referencing the House of Lords decision of *Shamoon v RUC* 2003 UKHL 11, the guidance expands, "the courts have found that "detriment", a similar concept, is something about which a reasonable person would complain – so an unjustified sense of grievance would not amount to a disadvantage". The guidance continues, "it could include denial of an opportunity or choice, deterrence, rejection or expulsion**.**

A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently".

There are examples, such as school exclusion, were the disadvantage will be obvious and it will be clear that the treatment has been unfavourable. However simply being denied a choice – to study a particular subject for example - or an opportunity – to attend a school trip - is also likely to be unfavourable treatment. Sometimes, the unfavourable treatment may be less obvious. Even if a school thinks that it is acting in the best interests of a disabled pupil, for example by removing them from mainstream class to avoid being bullied, it may still be treating that pupil unfavourably, since intention is irrelevant.

It is not the application of the general policy to the disabled person that is unfavourable, but that policy's specific effect on the individual. A policy might be applied to all pupils but it matters not that such treatment would be equally detrimental to a person without a disability. Thus, the treatment need not be directed specifically at the disabled person but the policy may have specific adverse effects on a disabled pupil. A pupil may be disciplined in line with the school disciplinary policy, but that might have specific adverse effects on a pupil who

uncharacteristically loses her temper because of severe pain caused by her disability. A school which has a policy of banning pupils from school trips and after-school activities if they swear or abusive to staff, may treat a pupil with Tourette's Syndrome unfavourably if they prevented from attending. A school may have a policy of not allowing pupils who are behind with their homework to attend swimming lessons, but this may be unfavourable treatment of a disabled pupil.

Lessons from the Williams case

Although this is a case in the employment context, some valuable lessons can be learned about the meaning of "unfavourable". This case concerned a claimant who took ill-health retirement aged 38 at which time he became entitled to a pension, payable immediately without any actuarial reduction for early receipt. However, his pension was based on his final salary, which had been reduced to reflect the fact that latterly he had been working part-time (as a reasonable adjustment because of his disability). The pensions of those who retired suddenly following a heart attack or stroke would be calculated on the basis of their full-time salary.

Mr Williams argued that the only reason his pension was reduced was because of his disability. Had he not been disabled, he would have continued to work full-time. Relying on the EHRC Code, the Employment Tribunal found for the claimant, concluding that "unfavourable" should be interpreted in line with "detriment" and should be given a broad meaning to include financial or economic disadvantage.

The Employment Appeal Tribunal overturned the decision of the Employment Tribunal, highlighting the difference between "less favourable treatment" and "unfavourable" treatment. Langstaff P stated that " 'less' invites evidence to be provided in proof of "less than whom"; "un…" is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial…..in this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability". Significantly, contrary to EHRC guidance, he suggested that unfavourable could not be equated with detriment, and concluded that "treatment which is advantageous cannot be said to be "unfavourable" merely because….it is insufficiently advantageous".

Although the decision of the EAT was upheld in the Court of Appeal and the Supreme Court, Lord Carnwarth was of the view that "…in most cases….little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a 'subjective/ objective' approach. While the passages in the Code of Practice….cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section…."

Despite the low threshold, in this case, having first identified the 'treatment', that is the award of a pension, he concluded that there was nothing intrinsically unfavourable or disadvantageous about that. Had the claimant not been disabled, he would not have been entitled to a pension at all.

Lord Carnwarth endorsed the conclusion of Bean LJ at the Court of Appeal that, "The *Shamoon* case is not authority for saying that a disabled person has been subjected to unfavourable treatment….simply because he thinks he should have been treated better".

Significantly, Lord Carnwarth also concluded that the claimant had impermissibly sought to make a comparison, that is with another disabled member of the pension scheme with a different medical history, who would be further advantaged because of the particular circumstances of their disability.

Conclusions

Some lessons then from the Williams case: no comparative analysis is required, so comparisons cannot be made with someone with a different disability; unfavourable treatment can be equated with disadvantage and detriment; and any suggestion that it is a wholly objective test must be assumed to be wrong. The test is objective, with a subjective element.

Perhaps the most important point to note is that, although Williams illustrates the limits of the scope of "unfavourable" treatment, the threshold is relatively low threshold. The outcome of any case is likely to turn on the subsequent stages of the test, i.e. the question whether the treatment is in consequence of the disability and whether it was justifiable.

Even where there is unfavourable treatment, a claimant must show that there is a connection between whatever led to the unfavourable treatment and the disability. This has proven to be more difficult than first appears, as will be discussed in the next article.

“Ready to Act”

Lesley Sargent, Health and Education Specialist (Ordinary) Member

Lesley Sargent, HEC [ordinary] member, reflects on the current national framework; “Ready to Act” which is in place to support Allied Health Professionals (AHPs) in Scotland in their work with children and young people (CYP). Lesley spoke with Pauline Beirne, AHP National Lead for CYP, on her thoughts on how this framework is shaping services for Children and Young People.

‘Ready to Act’; how Allied Health Professionals are transforming services for Children and Young People

The Children and Young People (Scotland) Act 2014 is designed to further the Scottish Government's ambition to make Scotland be the best place to grow up in by putting children and young people at the heart of planning and services and ensuring their rights are respected across the public sector. Scottish Government has published statutory guidance on Part 3 (Children's Services Planning) which provides local authorities and health boards with information and advice about how they should exercise the functions conferred by the Act.

“Ready to Act” (Scottish Government, 2016) [1] is the national framework developed in response to the provisions outlined within the CYP (Scotland) Act to support the development of an allied health professions' (AHP) children and young people's (CYP) community across Scotland.

What impact has Ready to Act had to date on AHP practice and service delivery?

Ready to Act (2016) is the first Scottish Government strategy to have AHPs working with CYP as its focus. It was written in consultation with parents and CYP about the kind of services needed to support the wellbeing outcomes of CYP in Scotland. Ready to Act is about collaborative, compassionate practice and creating a culture of improvement based on trust and shared values.

The five ambitions of Ready to Act set out clear priorities for service delivery which are key to achieving improved partnership working and shared outcomes across

1 https://www.gov.scot/publications/ready-act-transformational-plan-children-young-people-parents-carers-families/

agencies. To date, the biggest impacts of Ready to Act in practice have been:

~ changing how practitioners think about their decisions through a move away from problem-focused requests for help with CYP to a solution-based focus on impact and outcomes;

~Improving access to professional support where it is most needed;

~child centred outcomes focused on reducing the impact of challenges, in keeping with the World Health Organisation focus on function and lived life experience (WHO ICFCYP);

~maximising resilience in and reducing risk to CYP through increased prevention and early intervention activity; and

~supporting a collaborative approach to focus on wellbeing outcomes for CYP.

AHPs in CYP services across Scotland have formed a multi-professional community with a shared ambition to deliver transformational change to meet the needs of CYP in Scotland. This is a journey with a long-term commitment to shifting the culture of practice where each area is at different stages in implementing the Ready to Act ambitions, as reflected in the interim report, "Ready to Act: interim report on implementation and recommendations" (Scottish Government 7th November 2018 [2])

In what ways is Ready to Act delivering change that is truly transformational?

True transformation requires a willingness to be radical in our thinking about how best to deliver services and to collaborate with a focus on early intervention and prevention. This has required us to consult with each other about how young people are impacted, respect one another's contributions and ensure that those closest to young people are enabled to use practitioner knowledge to maximum benefit.

Where services collaborate and innovate in this way there is evidence that real change can be achieved (Northern Alliance Report 2018 [3]).

Ready to Act provides a framework of shared ambitions for services to consider how best to improve access to support through provision of universal, targeted and individual care opportunities.

Transformational change is very hard in the types of organisations we work in with

2 https://www.gov.scot/publications/ready-act-action-interim-report-implementation-5-ambitions-allied-health-children-young-people-community-ascotland-recommendations-2020/

3 https://northernalliance.scot/2018/07/northern-alliance-raising-attainment-in-literacy-language-and-communication-end-of-year-report-july-2018/

systems and processes that can get in the way of people getting the help they need.

Ready to Act has allowed practitioners and leaders to consider and challenge some of our most closely held beliefs about what a good service is. We want to simplify how people access support and change the culture of referral to one of open access where people are able to request help for themselves. One example is a telephone service that anyone can call to talk to a professional who can provide reassurance and signpost them to local supports.

Ready to Act refers to the development of a national AHP community of practice. How has this been instrumental in delivering on the key ambitions?

The Community of Practice (COP) is where information about improvement, change ideas and resources are made available to all AHP practitioners across Scotland. It contains links to local AHP practice examples, enabling us to share knowledge and information and keep a national focus on the ambitions outlined in Ready to Act. The COP is part of a wider commitment to increasing access to information and support strategies for CYP and others in Scotland.

Bumps to Bairns and KIDS GG&C are two examples of great work demonstrating what can be achieved with a national portal:

https://bumps2bairns.com

https://www.nhsggc.org.uk/kids

Other services have developed websites with on line information, resources and supports for families and others involved with CYP, e.g.:

http://www.knowledge.scot.nhs.uk/ahpcypcommunity.aspx

https://www.facebook.com/NHSLothianAHP (or google @NHSLothianAHP)

Do you perceive any specific challenges for AHPs in delivering outcomes for these ambitions?

There are many challenges for AHPs delivering the outcomes Ready to Act aims to achieve, the most important of which is a focus on relationships. Building trusting relationships and collaborating to achieve shared expectations is critical to creating CYP-centred services.

Another challenge for services is gaining permission to innovate to provide supports that interrupt the intergenerational cycle.

We need data that evidences the value of early intervention and prevention and measures that demonstrate the impact of providing different kinds of supports in communities. This requires a move away from a focus on input as a measure of success to look at meaningful outcomes for CYP and their families.

Any final thoughts or comments?

Ready to Act is a platform for changing the culture of practice. It requires committed compassionate leadership across services and organisations with a long -term commitment to achieving wellbeing outcomes for CYP in Scotland.

We need to work out of our silos across CYP services to deliver to the shared ambition of making Scotland the best place to live and grow up. This isn't possible for any one service or organisation to achieve independently. We need to maximise our collective capabilities and ensure CYP are central to decisions that impact on their lives and that our outcomes meet their needs for their lived life experience.

A Tribunal member since 2010, Lesley currently works within the NHS as a paediatric Speech and Language Therapist where she is a service lead supporting children and young people with a wide range of communication needs in both clinical and education settings. Her work involves children, young people and adults with social communication difficulties .

In-House Convener Digest

Derek Auchie, Health and Education Chamber Legal Member and In-House Convener

Derek Auchie, HEC In-House Convener and legal member, considers the role and implications of the tribunal providing assistance to parties.

Tribunal assistance

In a few recent cases, the question of assistance provided to the parties by the tribunal has arisen.

The starting point is the overriding objective in rule 3 of the Rules of Procedure[1]. Of particular relevance is rule 2(2)(c) which defines dealing with cases 'fairly and justly' as including:

> *"ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of his or her case without advocating the course he or she should take."*

General points

1. The tribunal is not inquisitorial in nature. That was recently confirmed by the Inner House. In general terms, this means that it is not for a tribunal to actively become involved in the preparation or presentation of a party's case. The Inner House states the position as follows:

> "*The function of Additional Support Needs Tribunal for Scotland was to hear the case that parties chose to put before it, make findings in fact and to decide the case in accordance with the relevant law. It was not part of its function to inquire into any case which the claimant might have but did not lead evidence about or advance in submission."* [2]

2. This basic position applies whether or not the parties are legally represented. It is well established that a party litigant (a party who is not legally represented) should, in some respects, be handled differently from one who is (this is something

[1] The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, Schedule to SSI 2017/366, rules 2 and 3.

[2] *JC v Gordonstoun Schools Ltd*. 2016 S.C. 758 2016 S.L.T. 587.

to be discussed another time), but the fundamental approach of the tribunal (as stated at point 1 above) applies to all parties, whether represented or not.

3. The obligation to assist a party in presenting its case is not the only way in which the duties in rule 2(2)(c) may be met (the word 'includes' is used), and therefore the focus should be on the two component parts: (a) equal procedural footing; and (b) able to participate fully. These component parts might apply not only in relation to the presentation of the case, but might also apply, for example, in decisions on adjournment requests, on document requests, on hearing scheduling decisions, indeed on any contentious decision around the management of a case. It is important to note that unlike the first branch of this provision, the second branch is about full participation, not equal participation. These are different concepts.

4. The reference to 'equal footing' would allow the tribunal to take into account a situation in which a party would (if a certain course of action is taken/not taken by the tribunal) be at a disadvantage in comparison with the other party, whether that is in relation to, for example, access to expertise or requiring further time to prepare. The reference to 'footing' would appear to be to the position of the party, that is to say the context in which they find themselves. It suggests a general disadvantage, for example due to lack of representation or lack of access to material or resources.

Missing evidence

One area of difficulty lies around assistance by the tribunal where there is something missing from the case. Where that missing content is in the evidence, the tribunal should tread very carefully indeed in considering whether to do anything about this.

The case law is clear on the point that it is not for the tribunal to secure evidence the parties have not chosen to present, nor to ensure that adequate evidence is obtained by the parties.[3] I would go further. I would argue that the tribunal has a duty not to do this. To do so is to fall into the trap of 'advocating the course a party should take' which is explicitly to be avoided. This might mean that a party loses an argument due to not having led adequate evidence on it. This could lead to the use of the burden of proof to decide the point.

[3]See the J*C* case, above and also *McNicol v Balfour Beatty Rail Maintenance Ltd.* [2002] EWCA Civ 1074; [2002] I.C.R. 1498; [2002] I.R.L.R. 711; applied in the Inner House in *Malcolm v Dundee City Council* 2017 S.L.T. 1008. Although these latter two are Employment Tribunal (ET) cases, the principle is a general one affecting all judicial bodies.

Missing argument

Where the missing input is in relation to a legal argument, the position is more difficult. There are various types of situation which could arise.

(a) Where an argument in the reference/claim is not addressed during submissions

This is likely to arise most commonly in written submissions. Here, the tribunal should ask the party who made the argument to confirm if it wishes to address it in submissions. The tribunal should not simply assume that it has been dropped. While this will lead to a delay, the delay need not be for long. The trouble is that if the offer is taken up, the other party will require time to respond and so a further round of submissions is necessary. This could be avoided in a case where, from the evidence, it seems to the tribunal that a particular line of argument has not been concentrated upon. The question of whether it is to be covered could be discussed prior to the written submissions being ordered. Alternatively, parties could be asked to specify in their written submissions any points raised in the case statements which they do not intend to insist upon.

In a complex case, the tribunal could seek an undertaking from the parties that it need only deal with any points raised in submissions. If the parties agree, then the tribunal may proceed on that basis.

This would at least ensure that particular attention is paid to the preparation of written submissions. Indeed, this could apply to oral submissions too.

The danger in assuming that a particular argument has been dropped is that this could lead to an appeal/review application on the basis that it was assumed that the point, having been raised somewhere, should be dealt with.

(b) Where a legal argument is available but has never been made, and where if made it might affect the outcome of the case

This is more difficult. Here, the tribunal has spotted a legal argument which could have an impact but the party who would benefit from it has not made it. If it is a brand new line of argument (a different case from the one being put) the case law suggests that the tribunal should not raise it and should decide the case only on the basis of the arguments put.[4] Where it is not a whole new point, but springs from an argument already made, the tribunal could justify asking the parties to address it. This would be especially so where the party who has missed the point is not legally represented. The tribunal should not proceed to address it without giving the parties an opportunity to comment upon it.

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[4]Birmingham City Council v Laws EAT 030/06 and Margarot Forrest Care Management v Kennedy EATS 0023/10, again both ET cases.

(c) Where a legal argument which is part of a statutory test is not addressed by one or both parties

This arose in a recent Tribunal case. Where the argument is one which is an essential one, i.e. one which needs to be determined in order to decide the case, the tribunal should consider inviting the party who has failed to address it to do so. It would be wrong for the tribunal to simply decide the issue on the basis of the other party's submissions on the point. Where neither party addresses it, both should be asked to do so.

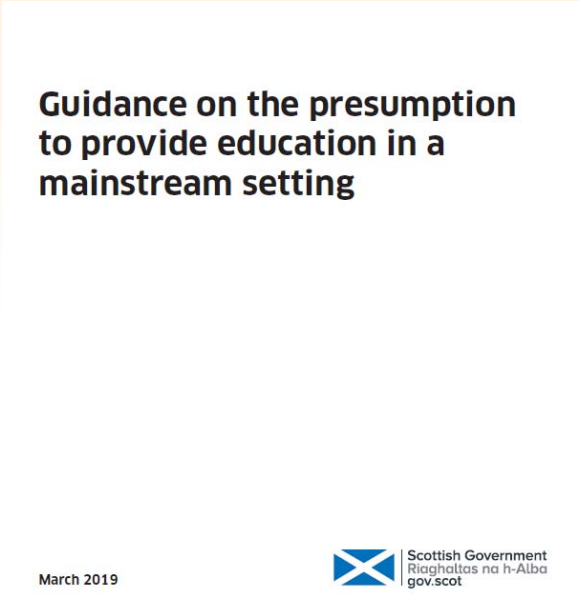
This all leads to a more general point of practice around written submissions. It might be useful, especially in complex cases, for the tribunal to work with the parties at the end of the evidence to agree a structure and broad content headings for submissions. This could be constructed via a series of questions for the tribunal to answer. This would avoid a situation where something is missed. It might also avoid the need for a routine second round of written submissions, where each party may comment on the other's initial submissions.

The final point is this: oral submissions can be a way to avoid some of these pitfalls. Again (as with party litigant issues), I will save a discussion on the merits of both forms of submissions for another day.

UPDATES

New Guidance on the Presumption of Mainstreaming can be found here:

https://www.gov.scot/publications/guidance-presumption-provide-education-mainstream-setting/



DATES FOR YOUR DIARY

Thursday 5 September 2019

HEC Members' Training (Evening) (Ordinary)

Wednesday 2 October 2019

HEC Members' Training (Evening) (Legal)

Thursday 19 March 2020

All Members' Conference

Member Contributions to the Bulletin

Members are encouraged to contribute to the Bulletin and should contact Lynsey Brown at HEChamberPresident@scotcourtstribunals.gov.uk if they wish to contribute in any way. Any contributions must be typed in Arial, font size 12, with justified margins, and with all necessary references set out as a foot note. Please note that all contributions may be subject to editing. Our next publication will be in **November 2019** and any contributions must be submitted no later than **mid-September 2019.**

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