Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

SUMMARY OF THE DECISION

The Tribunal finds that the responsible body:

i) has discriminated against the child contrary to the Equality Act 2010, Chapter 1, Part 6; and
ii) is ordered to furnish the claimant with a written apology within four weeks of the date of this judgment, which complies with the current guidance set down by the Scottish Public Services Ombudsman.

REASONS

Introduction

1. This is a claim under the Equality Act 2010 made by The claimant, lodged on May 2017. Although the Tribunal was made aware that Solicitor for claimant was liaising with the responsible body's representatives, the claim was not in fact resisted by the responsible body, as no response form was ever submitted. Ultimately, parties requested that the claim should be determined on the papers alone, without the need for an oral hearing.

2. Regrettably, this case has had a long procedural history, which explains why consideration is only now being given to the determination of the claim.

3. The claimant alleged that her son, “The child” (born 2004), had been discriminated against contrary to the disability discrimination provisions of the Equality Act. The case statement included 81 pages of supporting evidence. It stated that The child had been diagnosed with certain impairments, namely diabetes, ADHD, facial ticks and vitiligo. He is insulin dependent and requires assistance with every aspect of daily living.

4. At that time, The child was attending School A. The claimant alleged that certain actions, and in particular mismanagement and failure to manage The child’s diabetes, amounted to unlawful disability discrimination. The claimant initially sought a statement that discrimination had occurred; a written apology; training to be provided to school staff; policies to be development and placement and payment for The child to attend diabetic camp.

5. Although it was not stated in terms in the case statement, it is apparent that the claimant is arguing that The child has been discriminated against because of a failure to make reasonable adjustments, in terms of section 21 of the Equality Act 2010. It is not clear from the papers whether the claimant was also claiming direct discrimination in terms of section 13 of the Equality Act or discrimination arising from disability in terms of section 15 of the Equality Act.

Procedural history

6. While the respondent’s response was due on 29 June 2017, on 30 June 2017 the representative for the responsible body sought a suspension for two weeks for settlement, and this was unopposed. Two further extensions for settlement were granted, to 25 September 2017, but it did not prove possible to agree settlement terms.

7. The responsible body therefore wrote to the Tribunal by letter dated 3 October 2017, confirming that they were not resisting the claim, admitting certain failings and invited the Tribunal to determine the matter without a hearing.

8. Due to an administrative oversight, that letter was not dealt with at the time by the allocated convener.

9. Subsequently, on 23 November 2017, Solicitor for claimant for the claimant wrote to the Tribunal advising that the child had moved to secondary school where it was claimed the discrimination was continuing, and seeking permission to amend the claim. The views of the responsible body were sought, and in an e-mail dated 28 November the responsible body set out reasons why they strongly objected to the amendment. Solicitor for claimant set out her response to those objections in an e-mail dated 5 December 2017.

10. Parties were informed by e-mail dated 11 December that the request to amend was refused by the convenor on the grounds that it was not appropriate to amend the claim because the factual matrix had altered entirely, beyond the assertion by the claimant that discrimination was continuing. Parties were advised that "due to an administrative error, the respondent's letter [of 3 October 2017] was not considered by the convenor at the time of receipt, in terms of rule 27. Consideration therefore requires to be given to how that outstanding claim should be dealt with, given that the question is now effectively academic. The convenor understands that both parties wish the matter to be disposed of, without a hearing, on the basis of the statements contained the letter of 3 October 2017, and that would mean that the Tribunal would make a declaration that the responsible body has contravened Chapter 1, Part 6 of the Equality Act, for the reasons set out in that letter. Clearly in the event that any of the factual background set out in that case is relevant to any new claim, that can be included in any [new] case statement. The convenor would assume that if at all possible an opportunity should be given for the internal complaint to be dealt with before another claim is lodged, although recognises that this is a matter for the claimant".

11. Solicitor for claimant responded on 10 January 2018, setting out the procedural background to the case and stating that the Appellant still sought the undernoted in terms of the case statement:

    a. Declare that the Respondent unlawfully discriminated against The child
    b. Ordain the Respondent to adhere to the Health Care Plan for The child.
    c. An apology to The child and the claimant;
    d. Staff training by a diabetes specialist, particularly focusing Carbohydrate Counting;

e. Training to be provided to school staff
f. Policies to be developed to ensure progressive approach to managing diabetes within the school ;
g. The claimant seeks a good will gesture from the authority in order to make amends, a donation to Diabetes Scotland.

12. Solicitor for claimant stated that the claimant was content with the respondent's proposition that the matter should be dealt with without an oral hearing. She asked for the matter to be decided on the papers currently before the Tribunal. She indicated that she understood that the judgment would relate only to the difficulties arising within the primary school. The claimant reserved her position in relation to the lodging of a further claim in respect of her assertion that the discrimination is continuing in secondary school.

13. However, since the remedies sought appeared to go further than the case statement originally set out, the convener asked the responsible body (again) for their views on the e-mail of 11 December 2017 and the e-mail of 10 January 2018 from the claimant.

14. Unfortunately, there was a delay in responding, for the understandable reason that the solicitor employed by the responsible body who had originally dealt with the claim had moved on, and the case was transferred to a new solicitor.

15. The respondent replied by e-mail dated 21 January 2017, in the following terms: "Having reviewed the correspondence from the Appellant, I confirm that the Respondent continues to invite the Tribunal to decide the Claim without a hearing, as per i) their letter of 3 October and ii) the Appellant's email of 10 January. The Respondent confirms that their letter of 3 October sets out their position, namely that they admit there were failures by the school and offers the remedies contained within the letter. In addition, we note the terms of the email of 11 December, setting out the convenor's view that it was not appropriate to amend the claim. Accordingly, we are content with the Appellant's request that the judgement deals solely with the difficulties arising within the primary school".

Tribunal's decision

16. Although the responsible body did not resist the claim, and asked for the claim to be dealt with on the basis of the papers already submitted by the claimant, the responsible body offered “the remedies contained in that letter", that is the letter of 3 October 2017.

17. In particular, in the letter of 3 October 2017 the respondent confirmed that the claim was not resisted and that “the respondent admits that there were failures by the school” and therefore that the following remedies have been offered:

    a. Statement that discrimination has occurred;
    b. Written apology;
    c. School staff have been trained to manage the child’s plan;
    d. The child’s plan has been varied and corrected to reflect the child’s needs;
    e. Fundraising event for a diabetes charity.

18. The letter then sets out the detail of the incidents which it was accepted were failures on the part of the school, and stated that “since these incidents, training has been provided to School A staff and will be provided to School B Secondary School staff to ensure constancy of care for the child. The child's care plan has been updated and details clear plans to ensure that this situation does not arise again, these have been shared with School B Secondary School.....the respondent accepts that on this occasion..... discrimination has occurred, and furthermore the Respondent apologises for any distress caused to the child....the respondent further apologises for the child missing the .....activity camp....these were failures to the child and failures in following current policies and procedures. The latter do not require to be changed or revised as the failure was not to follow these rather than a failure of the policy or procedure".

19. I have a number of concerns about issuing a judgment in the terms sought by the claimant, notwithstanding the fact that the claim is not resisted.

20. I do not accept that decree should be granted, as it might be in the Sheriff Court “of consent”. This Tribunal is a creature of statute and the requirement is to adhere to the rules governing procedure. The delays in dealing with this case mean that the relevant

rules as at the date of this determination are the First-tier Tribunal of Scotland Health and Education Chamber (Procedure) Regulations 2017 (although I do not consider that to have any material bearing on the outcome). Rule 83 permits the legal member (formerly convenor) to decide a claim without a hearing where the responsible body states in writing that they do not resist the claim or where both parties agree in writing to dispense with a hearing. At 83(3) it is stated that "In deciding a claim ….the legal member shall do so on the basis of any notice of claim, any response, any statement of case, any supplementary written statement of case and any written evidence submitted in accordance with the rules".

21. I take the view that that rule does not permit me to issue a judgment without giving consideration to the papers. Having considered the material available to me, I am not prepared to make a judgment in the terms sought by the claimant for the following reasons.

22. It is my view that the remedies sought by the claimant, and the admitted failings of the responsible body do not in fact exactly align. I do not consider what the responsible body offered to do or confirms has been done is as stated by the claimant in the remedies sought.

23. Further, I consider that the remedies as sought are somewhat vague in their terms. To the extent that the claimant seek orders requiring the responsible body, and specifically the primary school in question, to undertake actions, I consider that the orders sought are lacking in specification and framed with insufficient precision, such that to grant an order in the terms sought would not be appropriate, and in any event such an order would not be enforceable. I consider that I would require to be specific about a number of factors, in respect of who, what, how and when any requirements should be implemented. For example, it is not clear to me, from the papers, what health care plan is being referred to, what training is being referred to, what policies are being referred to.

24. Further, in so far as these orders relate to what the school should do in respect of The child, since he no longer attends the school in question, I consider them to be academic, in the sense that they will not benefit the child to which this claim relates.

25. I take that view, not least because of the provisions of the Equality Act in relation to remedies. In particular, Schedule 17, paragraph 9 of the Equality Act 2010 sets out the powers of the Tribunal, namely

> (1) This paragraph applies if the Tribunal finds the contravention has occurred;
>
> (2) The Tribunal may make such order as it thinks fit;
>
> (3) The power under sub-paragraph (2) –
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> a. may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
>
> b. does not include power to order the payment of compensation.

26. Thus while the Tribunal can make such orders as it thinks fit, the Tribunal is constrained by that power, which indicates to me that the power will in particular be exercised with a view to obviating or reducing the adverse effect on the child. Here one of the orders sought is to "ordain the respondent to adhere to the Health Care Plan for The child", others for training and the development of policies. Since The child is no longer attending the primary school, it is not clear to me from the papers submitted that such orders would in fact benefit him.

27. I note in any event that the respondent suggests in the letter of 3 October, that the "child's care plan" has been updated already and that training has already taken place. I note too that the responsible body does not accept that policies and procedures require to be changed or revised since in their view this was a failure of implementation, rather than a deficiency of the policies themselves.

28. I was however prepared to make a declarator that the child has been discriminated against contrary to the provisions on the Equality Act, Chapter 1, Part 6 (it is not possible to be more specific given the lack of specification in the written case statement).

29. Notwithstanding the lack of specification in the case statement, it was clear to me from the admissions made by the respondent in the letter of 3 October 2017 in respect of failures in respect of blood tests, failures to make adjustments in respect of the school

trip, and failures of communication, that the school is at least admitting to a failure to make reasonable adjustments in terms of section 21 of the Equality Act.

30. I was also prepared to make an order for an apology. Notwithstanding the letter of 3 October contains an apology, I have assumed, especially since this request is not opposed by the responsible body, this is an offer to make a formal apology. I therefore order that, within four weeks of the date of this judgment, the responsible body should issue the claimant with an apology which complies with the current guidance set down by the SPSO.

31. With regard to the claimant's request for an order for "a good will gesture" of a donation, I had some misgivings about that given that arguably it is an oxymoron. In any event, I questioned whether the Tribunal's powers, which do not of course extend to the power to make an award of compensation, would extend to the power to make an order for a donation. In the circumstances, I have decided that it is not appropriate to make such an order, not least because it is lacking in precision. Having said that, I note that the responsible body is offering to arrange a fundraising event for a diabetes charity, and therefore the suggestion is not in fact opposed by the respondent. Clearly that is something which would be welcomed by the claimant, would reinforce the apology which I have ordered and would go some way towards making amends as sought by the claimant for the distress that she has been subject to as a consequence of the failings of the responsible body.