**DECISION OF THE TRIBUNAL**

1. **Details of the claim**

A disability discrimination claim, dated 15th June 2015 was received by the Tribunal Secretariat. This claim was denied by the Responsible Body and the matter proceeded to a hearing. At the same time two separate references in relation to the Authority’s alleged failures to make arrangements for the provision of the additional support included in the CSP, being references in terms of section 18(3)(d)(ia) of the Act, were heard. Separate judgements in relation to those two cases are produced.

1. **Summary of the decision**

The Tribunal finds in favour of the Claimant.

1. **Procedural history**

There were conference calls to discuss this case on 15th September, 30th October and 22nd December, all 2015. Parties lodged various helpful papers following these calls, including a Joint Minute and “Questions of Law for the Tribunal”.

1. **Decision**

a/ The Tribunal declares that Responsible Body unlawfully discriminated against THE CHILD

b/ The Tribunal directs that Responsible Body issue a formal written apology to THE CHILD and to her parents, the terms of which to comply with the Scottish Public Services Ombudsman guidance on apology, within fourteen days of the date hereof

c/ The Tribunal requires Responsible Body to ensure provision of staff at the agreed ratios as set out in the CSP.

1. **Discussion**

We were greatly assisted by the written submissions and by oral submissions. Given the ultimate level of agreement we have not felt it necessary to repeat these here at length, but have sought to very briefly summarise these. A full copy of these is available within the papers.

**FACTUAL MATRIX**

The claimant and the responsible body agreed the following facts in relation to the claim:

1. The child is an eight year old girl. She attends School A. She attends a mixture of mainstream classes and also spends some of the school day within the enhanced provision at the school. The claimant is her mother. Responsible Body are the local authority responsible for School A in terms of Section 85(9)(c) of the Equality Act 2010.
2. The child has a diagnosis of severe dystonic cerebral palsy, severe scoliosis and epilepsy. She is also non-verbal; has respiratory difficulties and is prone to choking; has frequent seizures; is fed and medicated through a PEG and has fluctuating muscle tone, which makes it difficult for her to maintain a stable posture. These impairments have a substantial and adverse effect on her ability to move, learn, communicate, and self-care without significant assistance. The child therefore has a disability in terms of Section 6 of the Equality Act 2010.
3. There have been occasions when staff shortages have meant that the responsible body did not provide specific areas of support to The child at the levels set out in her Coordinated Support Plan (CSP).
4. Two trained staff members left the school, one in October 2014 and one in April 2015.
5. There were staff absences on the 28th, 29th and 31st October 2014. The child has not received physiotherapy sessions owing to a lack of staffing on some occasions.
6. The child’s standing frame was at home between summer 2014 and February 2015. Since the standing frame was returned to School A, The child has not had use of it on the following occasions due to staff absence:

10 March 2015

28 & 30 April 2015

5, 18, 19, 21, 22, 25, 26, 28 & 29 May 2015

5, 10 & 12 June 2015

1. The advice of occupational therapy is that The child should build up the amount of time spent in her new moulded seat.
2. Medication has always been given to The child when she has been able to attend school. 2:1 staffing is necessary for the procedure for administering medication to be carried out in accordance with the CSP.

We heard evidence from the following witnesses:

For the claimant: Witness A and The claimant. For the responsible body: Witness B and Witness C. We shall, very briefly, summarise the most salient points of their evidence and our impressions thereof.

Witness A was acting Head Teacher at THE CHILD’s school from August to December 2014. She gave evidence that during that period there was a time in October 2014 when THE CHILD could not attend school. The reason for this was that the class teacher was off sick; a Level F grade auxiliary had retired in October and not been replaced; another F grade was off sick and the remaining F grade was off with stress. Cover was sent from another facility but those staff were not trained to use the PEG that THE CHILD received medication and feeding through on a daily basis.

The claimant, THE CHILD’s mum gave what was, in our view, very clear and understated evidence about THE CHILD’s forced absences from school and the effects on her. She also gave evidence of the lack of provision of physiotherapy and respite care as provided for in THE CHILD’s CSP. The claimant impressed as a most able and caring mother who has dealt with the considerable challenges raised by THE CHILD’s additional support needs with commitment and in a practical, hands on way. In our view she has been very measured and patient in dealing with the issues raised in these references.

Witness B is Learning Support Manager for the Authority. We regret that we did not find her an impressive witness. She gave evidence that THE CHILD’s absence from school was caused by “an exceptional week” and detailed the absences already referred to by Witness A. However, it also became apparent that she had allowed a situation to come about whereby there were too few trained staff in THE CHILD’s school to properly care for her and she ultimately conceded this in cross-examination. She also gave evidence that THE CHILD’s respite has not yet occurred and sought to justify this.

Witness C is the new Head Teacher at THE CHILD’s school and has been in post since January 2015. She appreciated “from day one” that there was an issue about the level of training of existing staff and sought to address this. She explained that

she realised she needed to utilise all auxiliaries within the enhanced provision unit and get them the necessary training. The current position is that all auxiliary staff have had training that allows them to work with THE CHILD, which means that if one person, two people or even three are off then THE CHILD can still be cared for. Witness C has also put steps in place to ensure THE CHILD is provided with the physiotherapy and standing frame time (where and when appropriate) that is specified in her CSP. Witness C presented to the Tribunal as an organised and capable Head Teacher, who is likely to do everything that she can to ensure that there is no repetition of the difficulties that have brought these matters to a Tribunal.

**SUBMISSIONS FOR THE PARTIES**

The Claimant submitted that the Authorities’ acting’s in this case amounted to discrimination in terms of section 85(2)(d) of the Equality Act 2010. The Authority confirmed that they accepted this at the point of submissions.

Therefore the Claimant argued that it was for the Tribunal to consider: a/ whether the remedies suggested by the Claimants are appropriate in all the relevant circumstances; and b/ whether any other remedies would be appropriate in all the relevant circumstances. In doing so, it was submitted, the Tribunal must consider exercising its powers with a view to obviating or reducing the adverse effect on THE CHILD of any matter to which the claim relates (Schedule 17, part 3, para 9 of the Act).

The Claimant sought the following remedies:

a/ a formal declaration that the Authority unlawfully discriminated against THE CHILD

b/ an order that the Authority issue a formal written apology to THE CHILD and to her parents, the terms of which to comply with the Scottish Public Services Ombudsman guidance on apology; and

c/ a requirement that the Authority ensure provision of staff at the agreed ratios as set out in the CSP.

In his submissions the solicitor for the Authority did not oppose the granting of the first remedy and “did not take issue” with the granting of the second remedy. He submitted that we should not grant the third remedy as the staffing is now being provided so this requirement is now unnecessary.

**DECISION**

In light of the evidence and submissions in this case we have no hesitation in granting the first two remedies sought by the claimant. In respect of the apology this is to be made within fourteen days of this decision. Having considered the background and submissions we have also decided to grant the third remedy sought.