The Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011, as amended

Rule 13 Preliminary matters

The Convener, having by direction of 5 July 2016 invited written representations on the following preliminary issue: **"**Whether in light of actions subsequently taken and to be taken by the respondents, the claim should be dismissed on the basis that it no longer serves a practical purpose.", and having received and considered each party's written representations,

DETERMINES that the preliminary issue should be answered in the affirmative and hereby dismisses the claim.

Reasons

1. The claimant's son attends at a primary school run by the respondents. His son has autism spectrum disorder. His son attends a specialist unit at his primary school for children with conditions of that kind, but he also attends mainstream classes. The primary school has separate educational excursions designed respectively for attendance by pupils attending mainstream classes, and pupils attending the specialist unit. These excursions take place once a year. The respondents' policy, at the time the claim was presented to the Tribunal, was that a child attending both mainstream classes and the specialist unit could only attend one of those excursions. Thus such a child would have to miss out going on the excursion with their mainstream classmates, or miss out going on the excursion with their fellow pupils attending the specialist unit.

2. The claimant complained that this constituted a form of treatment prohibited by the Equality Act 2010. It was not said, expressly at least,

which of sections 13, 15, 19 or 21 were said to be contravened, but which particular provisions might be applicable are not, in my view, material to the preliminary issue I have to decide.

3. The respondents have now changed their policy, allowing a child who attends both mainstream classes and the specialist unit to go both to the excursion for mainstream class pupils and that for pupils at the unit.

4. The claimant has not questioned that, and the respondents have not made submissions on whether, the Tribunal has any power to dismiss the claim on the basis that it no longer serves any practical purpose. Nonetheless, I think it right to consider that question at the outset.

5. The civil courts' function in the ordinary run of contentious litigation is to decide only live, practical questions; they have no concern with academic questions (*Macnaughton* v *Macnaughton's Trs* 1953 SC 387, LJC (Thomson) at 392). An exception exists where the point arising is one of public law affecting a public authority, which might affect a large number of other cases (*R* v *Secretary of State* ex parte *Salem* [1999] 1 AC 450, Lord Slynn of Hadley at 456G/457B), but even if this case can be said to raise a question of public law, there is no indication that there are presently, or might be in the future, cases raising a similar point regarding a school's policy on excursions.

6. In my opinion, unless there is some indication to the contrary, the Additional Support Needs Tribunal for these purposes is in a similar position to the ordinary civil courts. I am unaware of any such contrary indication in the 2010 Act, in or elsewhere. It follows, in my view, that the ASNT must have the same inherent power and responsibility that the civil courts possess to bring to an end proceedings which will serve no practical object, without determining those proceedings on their merits. This enables the resources of the ASNT and of the parties to be preserved rather than expended on a claim which, even if successful, will not result in the grant of any remedy. By its very

nature, whether the claim has become academic is a "preliminary … issue arising from a claim which must be determined prior to the substantive hearing of the claim" (Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011, rule 13(1)) because if it is decided adversely to the claimant, a substantive hearing would be unnecessary.

7. To determine what purpose this claim might serve, one must ask what might be achieved by the claimant upon its conclusion. For the sake of answering this question, I have assumed (without deciding) that the claimant would succeed in showing that the inability of his son to attend both excursions is in some way contrary to the 2010 Act.

8. The Equality Act 2010, Schedule 17, provides:

> "**9 Powers**
> (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)—
> (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."

9. The Upper Tribunal (Administrative Appeals Chamber), which has an appellate jurisdiction over such claims in England and Wales, has observed that these powers enable a tribunal make declarations (or what in Scotland would be called declarators), or to order an apology (*ML* v *Tunbridge Grammar School* [2012] UKUT 283 (AAC), Judge Rowland at [22]). The Upper Tribunal has observed that the purpose of such a remedy is not simply as an instrumental measure tending to prevent further unlawful conduct, but also provides a form of vindication

for the claimant (*ibid.*). In another case, the Upper Tribunal expressed doubt about the proportionality of ordering monthly reports after a one-off incident, but nothing was said casting doubt upon the competency of such an order (*Gayhurst Community School* v *ER* [2013] UKUT 558 (AAC), Judge Jacobs at [27]). This would seem to be an example of a measure designed to prevent recurrence of a wrongful act. From my review of decisions of the ASNT on claims made under the 2010 Act, (which can be found at the ANST's website here: http://bit.ly/2aWpBsd), it is clear to me in practice that the ASNT orders apologies and issues declarators, and has occasionally made orders concerning staff training. I also note that the Equality and Human Rights Commission's *Technical Guidance for Schools in Scotland*, para. 8.27, (online at http://bit.ly/2bkCIzv) states that the ASNT may order an apology to be given, staff training to take place, changes to policies or practices, additional education for a pupil who has missed education, or an additional school trip for a child who has missed a trip.

10. In summary, it follows that a Tribunal can grant orders to obviate or reduce the adverse effect of a matter to which the claim relates (2010 Act, Sch 17, para. 9(3)(c)) (*eg* additional education or an additional school trip), it can grant an order designed to prevent the recurrence of wrongdoing (*eg* monthly reports, staff training), or make some other order to provide vindication to the claimant (*eg* declarator or apology).

11. In commendably clear and concise written representations by the claimant, who is not legally represented, he states:

> "I am satisfied my son and other disabled pupils within [the specialised unit] … are not currently the victims of disability discrimination. From 20th August 2013 until 11th May 2016 my son and other disabled pupils within [the specialised unit] … were the victims of disability discrimination."

12. In his representations the claimant expresses three outstanding related concerns of which the following is a short summary. First, he expresses a concern over the effectiveness regarding past training, given that the aspect of the policy to which he objected was kept in place and reviewed without a change to the aspect about excursions to which he objected. Second, he notes the respondents' statement that future training will be provided to its staff, but he expresses concern as to what assurances can be provided that this will be fulfilled. I take this as a concern as to the content and effectiveness of any future training, especially given that previous training did not lead to any material change to the policy. Thirdly, he complains that the "constant denial of any wrongdoing is hugely disrespectful" to the claimant's son and other pupils in his son's situation.

13. If the Tribunal found that his son were the victims of treatment contrary to the 2010 Act, what potential remedies would be available which would be apt to meet the claimant's concerns? The claimant's concerns about training appear to be aimed at preventing the repetition of unlawful conduct. I think the ASNT could competently grant a remedy with that object in an appropriate case. I do not think, however, on the circumstances presented to me there is any prospect of such an order being made in this case. The treatment complained of did not arise because of how matters were conducted as a matter of practice by individual staff, but rather as the result of a deliberate statement of policy. Training is appropriate to change behaviour, or day-to-day implementation of policy, by staff. But here what was objected to was not what an individual staff member did, or what occurred in practice, but the explicit terms of a policy. Now the policy has changed, it is clear the claimant's son will be able to attend each excursion that his classmates attend. So, in my opinion, there is no occasion for the Tribunal to order training to take place in order to prevent the specific treatment complained of from being repeated.

14. The claimant might point out that the objectionable aspects of the policy were in place for over two and a half years, and persisted despite a decision of the Scottish Public Services Ombudsman upholding complaints by the claimant as to how that policy came to be formulated. The claimant might argue that training might be appropriate to address how the school treats children with autism or with other disabilities more generally, to ensure it acts compliantly with the 2010 Act. But this would go significantly beyond seeking to prevent a recurrence of the specific situation that gave rise to the present claim. In my view, the ASNT should not normally contemplate imposing remedies to prevent recurrence of contraventions of the 2010 Act in situations distinct from that giving rise to the claim. For any future violations of a different kind, a claimant must normally be content with the possibility of a further claim being presented to the ASNT. If it was ever appropriate for the Tribunal to provide wide-ranging relief, it would only be proportionate where there were breaches of greater breadth, severity and/or frequency than that which is alleged in this case. That deals with the first and second aspects, as I have summarised them, of the claimant's outstanding concerns.

15. There is then the third concern which arises from the absence of acknowledgment of any wrongdoing by the respondents. I take this to be a complaint of an absence of official recognition that the policy put in place was unlawful. Again, I think it would be competent, in an appropriate case, for the ASNT to provide vindication to the parent of a wronged child, either by declarator or by ordering an apology, or both.

16. The question then is whether the claim ought to be still regarded as serving a practical purpose in that, if it succeeds, the claimant may obtain an apology and/or a declaration, but no other form of remedy. In my opinion, it cannot be so regarded.

17. It cannot be the case that the ASNT is always required to hear, and the respondent required to defend, proceedings seeking to impugn conduct

where no remedy is sought to reduce or obviate harm and where there is no apparent risk of repetition, no matter how minor the alleged contravention. There may be cases where the alleged nature of the wrongdoing or the harm resulting is so grave that the claimant's position ought to have some form of official recognition, for want of a better remedy. This is not such a case.

18. The aspect of the policy complained of prevented the claimant's son from attending both excursions put on each year by his school. The effect of not attending both would have affected the son on the day of the missed excursion and perhaps the next day or so when the excursion was discussed in class. Its effects were therefore fairly limited. In my view, even if the terms of the policy were unlawful, the effects upon the claimant's son were insufficiently significant and frequent to allow a tribunal claim to proceed for the sole purpose of obtaining either an apology or a declarator. The nature of the alleged contravention is insufficiently grave that, if made out, it would require to be remedied by some form of order designed solely to provide vindication. If the respondents' policy had not been changed, and the claim had continued to a successful conclusion, sufficient redress would have been provided by ordering the respondents to alter their policy. The nature of the alleged wrong would not require any additional redress. As the respondents have already changed their policy, it follows that all the claimant could have achieved by presenting this claim has now occurred whilst this claim is pending.

19. The Tribunal has no power to award monetary compensation for conduct in contravention of the 2010 Act. The claimant has, understandably, not suggested any remedy that might reduce or remove the alleged past disadvantage. As the claimant's son can now attend all the excursions put on by the school, there is no additional trip that the child could go on as some form of compensation in kind for missing out in the past.

20. As there is no remedy that the Tribunal could now properly grant should the claim be successful, it follows that the claim does not now serve any practical purpose, and ought to be dismissed.

21. The claimant has expressed discontent as to the absence of an offer of a joint minute of agreement by the respondents in implementation of what he understood to have been undertaken at mediation. I do not have the respondents' observations on this, so I cannot arrive at any view on this. It is unnecessary for me to do so. It might be arguably relevant to the Tribunal's power to make an award of expenses in terms of the Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011, rule 40(1)(a). But it cannot have a bearing on what remedies the Tribunal could have granted, had the case been decided on its merits in the claimant's favour, and is therefore irrelevant to this preliminary issue.

22. I have considered whether any further procedure is required before determining this preliminary issue, such as a hearing. I have also considered whether a proper view can be arrived at as to the potential remedies that might be granted in advance without determining the merits of the complaint, and without a full Tribunal consisting of a Convener and two specialist members. I have concluded that any further procedure or inquiry could make no difference. The essential facts upon which my decision is based are clear and uncontroverted, namely the alteration to the respondents' policy on excursions. The parties' positions are set out clearly in their written representations. Nothing turns upon particular considerations on which specialist knowledge of education or disability would be of advantage.

23. For the avoidance of doubt, no part of this decision should be read as a finding either that the respondents' former policy did or did not contravene any provision of the 2010 Act.