

Health and Education Chamber  
First-tier Tribunal for Scotland



Additional Support Needs

**DECISION OF THE TRIBUNAL**

**Meanings**

In this decision the following terms are used:

- ‘the 2010 Act’            refers to the Equality Act 2010
- ‘rules’                    refers to rules of The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)

**Claim**

1. This claim was made on 31 May 2018 (T1-22), under Schedule 17, Part 3, paragraphs 7 and 8(b) of the 2010 Act. The person making the claim is the claimant.

**Decision**

2. **I find that a contravention of the 2010 Act has occurred and I declare that the responsible body unlawfully discriminated against the claimant by reason of her disability, by:**
  - failing to make reasonable adjustments for the claimant, which amounts to unlawful discrimination;
  - excluding the claimant from school, which amounts to discrimination arising from disability; and
  - the responsible body’s practice and policies on exclusion amount to indirect discrimination.
3. Having found that a contravention has occurred, I decided to make orders, in terms of Schedule 17, Part 3, paragraph 9(2) of the 2010 Act. The responsible body is ordered to comply with these.

**Background**

4. A claim, dated May 2018, was made by the claimant. The claim was raised against the responsible body, who is responsible for the school the claimant attends.

5. The claimant was represented by her solicitor. The responsible body was represented by the Parent and Pupil Support Manager.
6. During the case statement period, the responsible body requested a one-week extension, and noting no objection, I extended this.
7. Parties then asked for a suspension of the proceedings to allow them to discuss implementation of the remedies and I suspended the proceedings.
8. Following agreement on the claim by the parties, I conducted a case conference call, at which time I asked the party representatives to confirm that they were content for the matter to be decided without a hearing; and to discuss the language and style of a letter I intended to draft to the claimant, summarising my decision in accessible terms.
9. Both parties agreed in writing to dispense with a hearing, in terms of rule 83(2)(d).

### **Submissions**

10. In the claimant's case statement, it was submitted that:
  - the responsible body had failed to make reasonable adjustments, which amounted to unlawful discrimination;
  - the claimant's exclusion from the school amounted to discrimination arising from disability;
  - the responsible body's practice and policies on exclusion amounted to indirect discrimination.
11. The claimant sought twelve separate remedies.
12. In their case statement response, the responsible body accepted the claimant's submissions and made proposals to meet each of the twelve remedies sought.
13. Both parties, having reached agreement, invited me to make a decision in terms agreed in writing, under rule 96(2).

## **Reasons for decision**

14. Before reaching this decision I considered each of the following documents:

- the claim form, with documents attached, numbered T1 to T24;
- the claimant's case statement, and supporting documents, numbered C1 to C41;
- the responsible body's case statement, and supporting documents, numbered R1 to R10;
- the parties draft decision and the draft letter of apology attached.

15. The claimant's solicitor advised that both parties were now in agreement and I was invited to make a decision under rule 96(2), in the draft terms helpfully supplied to me, which I have adopted in the findings in fact and orders made. Rule 96(2) permitted me to make a decision in terms agreed by the parties where I considered it fit to do so. I was properly satisfied to this extent.

16. The claimant sought twelve separate remedies, all of which were within the jurisdiction of the Tribunal. I considered these to be appropriate and proportionate.

17. In their case statement response, the responsible body accepted the three heads of the claim and made proposals to meet each of the twelve remedies sought. Their proposals were comprehensive and conclusive.

18. Rule 83(1) permitted me to decide the claim without a hearing where both parties agreed in writing to dispense with the hearing. The parties submitted their written agreement on September 2018. I was satisfied that there was sufficient written evidence before me to allow the claim to be decided without a hearing.

## **Findings in Fact**

19. The claimant had the capacity to make the claim, having instructed her own solicitor to act on her behalf.

20. The claimant has autistic spectrum disorder (ASD), obsessive-compulsive disorder, hyperacusis and misophonia.

21. The claimant is a disabled person.

22. The claimant is a pupil in High School A, which is managed by the responsible body.

23. At the time of the claim the claimant had not attended mainstream classes since the beginning of 2018.

24. On 23 May 2018, the claimant was excluded from school for reasons arising from her disability.

25. An increase in the needs arising from the claimant's disability has led to a requirement for support from staff with a greater specialism in ASD.

26. There was a delay in the responsible body providing suitable staff and support for the claimant.

### **Findings in law**

30. Although there is no dispute between the parties in either areas of law or fact, it is nevertheless helpful to set out the areas of law which apply and my findings in each of these respects.

#### *Disability*

31. The claimant has a disability in terms of section 6 of the 2010 Act.

#### *Disability discrimination*

32. Disability discrimination is defined in section 25(2) of the 2010 Act as discrimination of one of four kinds; the claimant relied upon three different forms of discrimination in the claim:

- Discrimination arising from disability (section 15);
- Indirect discrimination (section 19);
- Failure to comply with the duty to make reasonable adjustments (sections 20 to 21).

#### *Discrimination arising from disability*

33. There is a two stage process to the application of section 15(1):

Stage 1: Did the responsible body treat the claimant unfavorably because of something arising in consequence of her disability? (Section 15(1) (b));

If the answer to stage 1 is 'Yes' then we move to consider stage 2:

Stage 2: Can the responsible body show that the treatment is a proportionate means of achieving a legitimate aim? (section 15 (1)(b)).

If the answer to stage 2 is 'No', discrimination arising from disability has taken place. If the answer to stage 2 is 'Yes' then it has not.

34. In this case, being satisfied that the answer to the stage 1 test is 'yes' and the answer to the stage 2 test is 'no' and having considered the agreed facts, I found that the claimant's exclusion from the school amounts to discrimination arising from disability, in terms of section 15 of the 2010 Act.

### Indirect discrimination

35. Paragraph 78 of the Explanatory Notes to the 2010 Act describes this form of discrimination as follows:

*“Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it.”*

36. To trigger this section, there would have to be a ‘provision, criterion or practice’ which the responsible body applies to all pupils including the claimant, but which puts the claimant at a disadvantage. In this case, the particular practice is the responsible body’s practice and policies on exclusion.

37. Having considered the agreed facts, I found that the responsible body’s practice and policies on exclusion amount to indirect discrimination, in terms of section 19 of the 2010 Act.

### Failure to comply with the duty to make reasonable adjustments

38. In the context of this case, section 20(5) provides that where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid; those steps being known as ‘reasonable adjustments’.

39. In their *Technical Guidance for Schools in Scotland*, the Equality and Human Rights Commission explains:

*“The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school, and that they can enjoy the other benefits, facilities and services that the school provides for pupils. (para 6.11)*

*..... A school’s duty to make reasonable adjustments is an anticipatory one owed to disabled pupils generally, and therefore schools need to think in advance about what disabled pupils might require and what adjustments need to be made for them. (para 6.13)*

*.....Schools may have to provide a disabled pupil with:*

- *.....Extra staff assistance (para 6.58)”*

40. Having considered the agreed facts, I found that there was a delay in the responsible body providing suitable staff and support for the claimant. In that delay, the responsible body failed to make reasonable adjustments.

41. The failure to make reasonable adjustments amounts to unlawful discrimination in terms of section 20 to 21 of the 2010 Act. That failure puts the claimant at a substantial disadvantage in comparison to non-disabled pupils.

## **Orders**

42. In terms of paragraph 9 of Schedule 17 of the 2010 Act, where a contravention has occurred, a tribunal may grant any order it sees fit, except compensation. In this case, noting that both parties are in agreement, I order the responsible body to comply with the following.
43. The responsible body shall make a written apology to the claimant, in the agreed terms set out in the letter, which is appended.
44. The responsible body shall return the claimant to mainstream classes with adequate in-class support, save in circumstances where the claimant herself indicates that she is too anxious to attend, in which case she will be supported to access the curriculum using suitable alternative means.
45. The responsible body shall provide one to one time with an additional support for learning teacher, to allow the claimant to catch up with the work that was missed.
46. The responsible body shall provide tutor support from a teacher in appropriate subjects, augmented by the use of information technology.
47. The responsible body shall provide scribes to help the claimant to record her answers for tests and exams.
48. The responsible body shall put in place a procedure for school staff to follow when the claimant reports bullying, in which school staff will report allegations of bullying to the senior management for investigation, without expressing an opinion on the complaint.
49. The responsible body shall update and revise the claimant's additional support plan, in light of the tribunal's decision, with a view to consistency of provision of appropriate support.
50. The responsible body shall review, develop and revise its policy on exclusion and discipline, together with its policy on inclusion and equality and its accessibility strategy.
51. The responsible body shall review, develop and revise its equality outcomes and policy under the public sector equality duty to adopt relevant policies and targets for the reduction of the 'exclusion gap' which exists in the respondent for pupils with ASD and disabled pupils.

## **Concluding remarks**

52. It is my understanding that the claimant completed her application with limited assistance from her representative. I am grateful to her for the detailed application she made, which was of considerable assistance to me.
  
53. I extend my thanks to both representatives for their hard work in securing a prompt and focused solution to this claim. This, I hope, has minimised any stress to the claimant, which might otherwise have occurred.