



Additional Support Needs

DECISION OF THE TRIBUNAL

Claim

1. The claim relates to a number of alleged acts of discrimination contrary to the Equality Act 2010 (“the 2010 Act”). The specific allegations of discrimination are as follows:-
 - 1.1 That the young person has never had any of his mainstream classwork differentiated resulting in the gap between the young person and his peers becoming greater. This is alleged to be ongoing discrimination.
 - 1.2 An alleged discriminatory process regarding the selection of subjects for S3.
 - 1.3 Alleged discrimination relating to choices at senior school.
 - 1.4 Alleged discrimination in not crediting the young person for his achievements both in terms of qualifications and more generally.
 - 1.5 Alleged discrimination in not permitting the young person to return to school for the current academic year (August 2020 onwards).
2. The claim was lodged with the tribunal on 3 May 2019 with the exception of allegation 1.5 above which was lodged in a separate claim on 30 June 2020 that was subsequently added to the present claim.

Decision

3. No discrimination contrary to the Equality Act 2010 having been established, the claim is dismissed.

Process

4. The young person’s views were taken by an independent advocate and are contained in two advocacy reports at T231-234 and T243-246.
5. We considered all the relevant written evidence numbered in the bundle. These included Witness statements contained in the bundle as follows; Witness A (R 117-126), Witness B (R127-132) and Witness C (R 153-155). A joint minute was agreed and is incorporated into the bundle at page T304. Oral submissions were made by the claimant and the responsible body made written submissions, supplemented orally. References in this decision to numbers in brackets are references to pages in the bundle. The young person is referred to as such throughout this decision even when he was a child at the

time as we consider it would cause confusion to use different terms for the same person. When referring to the claimant and his spouse we use the term “parents”.

Findings in Fact

6. The claimant is the father of the young person.
7. The young person is 18 years old.
8. **[This paragraph has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 101(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
9. The young person has a diagnosis of Autistic Spectrum Disorder affecting his social interactions and understanding, flexibility of thought and emotional regulation. He has low muscle tone with joint hypermobility. He has binocular vision difficulties and has delayed development of receptive and expressive language. He has a Learning Disability.
10. The young person was an agreed deferred entry to primary one.
11. The young person attended a special school for the first year of his secondary education at the request of his parents.
12. The young person started at the school in August 2016. The young person entered the school as an S1 pupil.
13. The young person’s most recent coordinated support plan was issued in October 2019.
14. All pupils in the school follow a broad general education between S1 and S3 and national qualification courses are undertaken from S4 onwards.
15. During his S3 year the young person was absent from the school from 8 November 2018 until May 2019 due to ill health.
16. The timetable for the young person’s S3 year was agreed with the parents and the claimant was ultimately satisfied with it.
17. The S4 course booklet for the school did not reflect course choices that were appropriate for the young person’s level of ability and attainment.
18. An interim timetable was put in place for the young person’s phased return to the school in May 2019.
19. Following the May 2019 timetable, discussions took place with the parents to determine the young person’s S4 timetable. This process resulted in a substantially final timetable in August 2019 with minor changes made, without altering subjects or timings, in October 2019.

20. The changes to the S4 timetable were made to accommodate the parents' wishes.
21. The claimant submitted a complaint to the responsible body about the S4 timetable in August 2019. The complaint was rejected. The claimant was ultimately satisfied with the final S4 timetable.
22. The young person's attendance in S4 deteriorated from November 2019 until his final attendance in school in January 2020.
23. The young person achieved 20 Scottish Qualifications Authority National Units: fifteen at level 1, four at level 2 and one (for Music: Performing Skills) at level 4.
24. Throughout his time at the school the young person's education experience was highly differentiated from his fellow pupils. The extent of the differentiation varied over time and by subject. It included doing different class work, one to one teaching in the Enhanced Support Area ("ESA") for certain subjects, not undertaking any social subjects, one to one support at all times, and one to one teaching and hand on hand support for practical tasks in Craft Design & Technology ("CDT"). The course work in S3 Biology was so differentiated that he effectively followed a different course than his classmates. He did not undertake theory parts of the music course. A small science class designed to meet his particular needs was created for his S4 year; his parents withdrew him from the class.
25. From 30th January 2020 to date, the young person has been detained in a mental health unit under the Mental Health (Care and Treatment) (Scotland) Act 2003.
26. The school environment has changed substantially since the young person last attended, staff have moved on to new positions and pupils the young person knew have left.
27. The responsible body's Social Work service is seeking to secure a long-term funded residential placement to meet the young person's needs following discharge from the mental health unit. Continued education remains part of the responsible body's plans but the nature of the education provided would depend on the placement.

Reasons for the Decision

28. While there were some factual disputes in the evidence, all the evidence of the significant facts which lead us to the conclusion that there has been no unlawful discrimination were not disputed. We deal with each aspect of the claim in turn.

Allegations relating to differentiation of classwork

29. This aspect of the claim was originally presented as ongoing discrimination, however in submissions the claimant accepted that in S3 and S4 the young person's curriculum was differentiated, but claimed that there had been issues during S1 and S2. Given the allegation was no longer one of ongoing discrimination, we needed to consider whether it was time barred.
30. The young person completed his second year at the school in June 2018 and the claim was received on 3 May 2019. Rule 61 (5) of The First-tier Tribunal Health and Education

Chamber Rules of Procedure 2018 (“the rules”) provides that the tribunal shall not consider a claim unless the claim is received before the end of the period of 6 months beginning when the act complained of was done. Accordingly in terms of rule 61 (5) the claim ought not to be considered. However, given rule 61(5) allows a claim to be considered out of time if, in all the circumstances of the case, we consider it just and equitable to consider it, we heard submissions as to whether we should consider the claim. The claimant made arguments to the effect that this aspect of the claim could be considered to be part of a course of conduct along with other aspects of the claim. We did not accept this submission: the other acts complained of, even had they been established, are, in our view, separate unconnected acts. We did not consider it just and equitable to consider this aspect of the claim when the issue, if there ever was one, had been resolved. Indeed the claimant gave repeated evidence that he was satisfied with the young person’s education during S1 and S2. Consequently, this aspect of the claim is dismissed.

31. Had the allegation remained one of a continued act of discrimination, it appeared to us that while the claimant stated he was alleging direct discrimination he was in fact alleging a failure to make reasonable adjustments in terms of section 20(3) of the 2010 Act. However, such a claim is not supported by the evidence, indeed there was evidence of a wealth of adjustments made to enable the young person to participate in education; we have recorded some of those adjustments in finding in fact 24. In evidence the claimant was clear that his complaint concerned only the mainstream classes that the young person attended from S3 onwards. These subjects were CDT, Art, Drama, Biology and Music. In each of these classes evidence was clear that the education provided was highly differentiated to enable the young person to benefit from it.
32. Given the ultimate acceptance in submissions by the claimant that the curriculum was differentiated during his S3 and S4 years, we do not consider it necessary to describe all aspects of differentiation but rather give examples that demonstrate the curriculum was in fact widely differentiated. The majority of this evidence came from Witness A and, to a lesser extent, Witness B but was supported by documentary evidence including individual planning tools (R80-91). The young person had the support of an ASNA (additional support needs assistant) and an additional teacher was engaged to provide 1:1 assistance. The class work was also differentiated. In Art the young person received part of his education in the ESA, and it was agreed with the claimant that the young person was not able to do theory elements of the course and parts of the course were delivered using a computer. It was also agreed that the young person was unable to undertake theory elements of the music course. The young person participated in a small group science class at the start of S4 taught by a science teacher but with his own additional 1:1 ASNA as well as the other children in the class having another member of staff supporting them. There was a dispute in the evidence as to whether the offer of the small group science class was made for S3, but given the claimant accepted that there was differentiation in S3 and S4 and the wealth of examples of differentiation, it is unnecessary for us to reach a conclusion on this factual dispute. The claimant also suggested that because the young person brought home a biology workbook, this meant that the biology work in S3 was not differentiated. This is a huge evidential leap, as there could be many reasons why the young person brought the workbook home. The clear evidence from Witness A was that the class teacher was effectively teaching two courses simultaneously, one to the young person and one to the rest of the class.

33. There was no evidence to suggest the young person was ever expected to do the same work as other pupils: indeed the overwhelming evidence was that the young person's education was highly differentiated in all subjects from that of his peers.

Allegation regarding the selection process of subjects for S3

34. Parties were advised at the outset that this aspect of the claim appeared to be time barred. The latest possible date when the alleged discrimination in any practice relating to the timetable was September 2018 when the timetable was agreed following discussions between the school and the parents. The claim was not received by the tribunal until some 8 months later. Despite alerting parties to the issue, no argument was presented, beyond that it would be just and equitable to consider this aspect of the claim because the process for agreeing the timetable was part of an ongoing course of conduct along with the other allegations.
35. We did not consider the process of fixing a timetable to be part of a course of conduct with the other matters complained of, as they are all quite independent situations. We also did not consider it just and equitable that this part of the claim should be considered beyond the time bar. In coming to this conclusion, the most influential factors for us were that the timetable was ultimately agreed with the claimant and no evidence was presented demonstrating any disadvantage suffered by the young person as a result. We do not consider it just and equitable to allow a late claim relating to a process that had resulted in an agreement between parties.
36. While we did not consider this aspect of the claim due to the time bar, we record that it was not at all apparent that any provision, criterion or practice ("PCP") was applied to the young person; indeed it was apparent that the normal process for pupils to choose subjects was significantly departed from to create an appropriate timetable for the young person.

Allegations relating to choices at senior school

37. This part of the claim relates to the process for the young person to choose subjects for S4. The initial complaint related to the school choice booklet provided to pupils at that time which made no mention of any level 1 or 2 qualifications that the child might be able to select. However there then followed a process of discussion and engagement with the young person's parents to create an appropriate timetable. The young person was absent from the school from 8 November 2018 until May 2019 (R57-59 recording evidence given by the claimant and Witness A). A reintegration timetable (R92) was in place for the young person's phased return followed by engagement with the parents about various drafts of the timetable. We were referred to the 9th draft created in August 2019 and a final 11th draft dated October 2019 which was not different to the 9th draft in respect of the timing or choice of subjects. While the claimant submitted a formal complaint to the responsible body about the timetable, his oral evidence was that he was ultimately satisfied with the timetable put in place for the young person. It was apparent from the evidence of Witnesses A and B that compromises had been made to the timetable to accommodate the claimant's concerns. For example, Witness A gave evidence that he would have preferred there to have been more subjects with less time for each, and Witness B gave evidence that she thought there should have been more consolidation periods in the timetable.

38. It was suggested that the school's process for selection of S4 subjects amounted to indirect discrimination when applied to the young person. However, we accepted that the process for choosing subjects for the young person was a bespoke one. Even if the process as applied to other pupils was a PCP, it was not applied to the young person. Accordingly, the first requirement of indirect discrimination in s19 (1) of the 2010 Act was not satisfied.

Allegations in relation to the school not crediting the young person for his achievements

39. While this complaint was stated as being about general achievements, it was apparent from the claimant's evidence that it was focussed on formal national qualifications. The claimant did accept in his oral evidence that qualifications are not particularly important for the young person and that he benefits from the praise for doing work well. However, there was no material put before us to suggest the young person did not receive appropriate praise for doing work well and plenty of evidence from Witness A and in documents (for example the reports at R20-36) that he did receive praise for working well.

40. In relation to the opportunity to obtain qualifications, it must be remembered that the young person was absent from school in his 3rd year from 8 November 2018 to May 2019 and in his 4th year had poor attendance from November 2019 until his final attendance at the school in January 2020 (Individual Attendance Summaries at R 66-67). Accordingly his opportunity to achieve qualifications was naturally limited. However, he achieved a number of Scottish Qualification Authority National Units recorded at A202-A205.

41. In his evidence the claimant suggested that achievements in S3 were not 'banked' for the following year. Witness A's evidence was that teaching in third year for all pupils was a broad general education and that it was not reasonable to expect teachers providing that general education to also undertake assessments. He also gave evidence that steps were taken, following a parental request, to 'bank' some achievements for the following year towards qualifications. We have concluded that the practice of waiting until 4th year to undertake qualifications amounts to a PCP for the purposes of s19 (1) of the 2010 Act which was applied to the young person. However, there was no evidence that this practice disadvantaged the young person or would disadvantage persons with the same characteristic as the young person when compared with persons without that protective characteristic. Accordingly, the requirements of s19 (2) of the 2010 Act are not met.

Allegations in relation to the young person's return to school during the current academic year (August 2020 onwards)

42. There was an attempt by the responsible body to argue that this aspect of the claim was time barred on the basis that a request was made on 18 September 2019 (R111) and that after a month or so the claimant should have realised that the responsible body would not agree. However, when challenged, this argument was not seriously pursued but for completeness we record that we did not accept it.

43. It was not at all clear from the evidence when it was decided that the young person could not return to the school for a further year. The request made on 18 September 2019 was not initially rejected, but by the date of the hearing Witness B gave evidence that the assumption was that the young person would not be returning to the school and Witness C was clear that a return to the school was not in the plans of the responsible body.
44. As we understood matters prior to the hearing and as stated in T277, which was accepted as part of the claimant's case statement, the purpose of this aspect of the claim was to secure an opportunity for the young person "to continue with his school education." However, in evidence the claimant was clear, when asked for clarification, that the allegation of discrimination related to ongoing education for the young person, rather than simply school-based education.
45. The young person last attended school in January 2020 and since 30 January 2020 he has been resident in a mental health unit under a compulsory treatment order. The evidence of the responsible body was clear that a return to the school would not be in the young person's interests (Witnesses B and C). Reasons given included the fact that the school has changed substantially with familiar staff and peers moving on, the length of the young person's absence from school, the prospect of a transition back to a busy school environment when Witness C was clear the young person needs a calm environment with appropriate support to focus on basic interactions and "skills-based learning" as well as a further transition to a care provider. Witness C's professional opinion was that the young person needs to be in a safe environment where he can relax and be supported by a multi-disciplinary team on site. Significantly, continued education remains part of the responsible body's plan, and we accept the argument that education is not simply about gaining formal qualifications but must be looked at holistically to include social and life skills to enhance the young person's ability to participate in the world around him. The education provided will depend on what placement is ultimately decided upon, and courses can be found to support him. For example, if a young person has an interest in animal care or horticulture there are a variety of practical skills-based courses available for young adults.
46. Accordingly, in so far as this allegation of discrimination suggests the responsible body will not support the young person's continued education, the claim is not supported by the evidence.
47. While the claimant changed his position when giving evidence, he still made submissions on this aspect contrary to his revised position. While conceding that formal qualifications are not meaningful to the young person, the claimant made repeated references to the young person only having one opportunity in S4 to achieve school-based national qualifications, whereas most young people have three opportunities during S4-S6. This was due to decisions taken earlier in the young person's life, namely an agreed deferred entry to primary school and, at the specific request of the parents, repeating S1 when the young person started at the school after a S1 year at a special school. The claimant was highly critical of what he considered a wasted year in the special school and of its reduced hours of education. The claimant argued that a refusal to allow ongoing school education in these circumstances amounts to direct discrimination with the comparator of an "able bodied person".
48. Direct discrimination in terms of s13 of the 2010 Act requires the subject of the discrimination to be treated less favourably than others because of the protected

characteristic, which in this claim is a disability. The reasons behind the decisions for deferred primary school entry and repetition of S1 were not explored in detail before us but had been agreed by parties and were taken to assist the young person. In our view an appropriate comparator is a young person without a disability who completes 4th year at the same age as the applicant and the request is to return to school education. As the solicitor for the responsible body pointed out, there is no duty on the responsible body to provide education beyond the age of 18 and there was no evidence that a similar request from an “able bodied person” would be responded to differently. Further, given the responsible body has continued to consider and make plans to fund a care placement which will include appropriate further education for the young person, we could not conclude that the young person has been treated less favourably.

49. Accordingly this aspect of the claim is also dismissed.

Additional comments

50. The comments in this section do not form part of the reasons for the decision in this case. These are optional comments which are designed purely for the assistance of the parties.

51. We appreciated the manner in which the claimant conducted these proceedings and that he made every attempt to comply timeously with every request made of him by the legal member during the process. The claimant’s overriding concerns for his son’s welfare and his aim to achieve the best outcome for him were clear throughout. We realise that our decision will be disappointing but, as detailed above, the claims of discrimination were not supported by the evidence.

52. We were nevertheless concerned about statements made by Witness C to the effect that plans for discharging the young person from the mental health unit, where he has resided for nearly a year, are being frustrated by a lack of engagement with the parents. Both parties, quite properly, did not detail the reasons for this which were not relevant to our deliberations and we make no judgement whatsoever about this. However, we urge both parties to renew efforts to work together to secure the best future for the young person. We note from Witness C’s statement that recent offers have been made to the parents to discuss planning the young person’s move from the mental health unit and we hope, whatever difficulties exist between the parties, that the claimant will feel able to take up the offer to do so.