



## **DECISION OF THE TRIBUNAL**

### **Word Meanings**

In this decision the following word meanings are used:

- |                |   |
|----------------|---|
| 'the 2010 Act' | means the Equality Act 2010   |
| 'rules'        | means the rules of The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) |
| 'the parties'  | means the claimant and the responsible body.  |

### **Claim**

1. This claim was made on 19 February 2019 [T1-80], under Schedule 17, Part 3, paragraphs 7 and 8(b) of the 2010 Act. The person making the claim is the claimant.
2. This is the second claim made by the claimant. The first claim was made on 31 May 2018 and I made a decision on 28 September 2018, finding that there had been a contravention of the 2010 Act.
3. This claim and the first claim relate to the same responsible body.
4. The claimant is concerned that the responsible body has not complied with some of the orders I made in the first decision. This is being dealt with as a separate matter under my power to monitor the implementation of a tribunal decision. For that reason, I will not refer any further to this here.
5. The claimant was excluded from school on 27 November 2018. She believes that the responsible body treated her unfairly by:
  - failing to make reasonable adjustments and,
  - by excluding her, the responsible body treated her unfavourably for reasons arising from her disability; and,



## Additional Support Needs

- due to the failure to make reasonable adjustments; there was no objective justification for that treatment.

## Decision

6. The responsible body has unlawfully discriminated against the claimant contrary to sections 85(2) and (6) of the 2010 Act:
  - By failing to make reasonable adjustments for the claimant in response to her evolving needs; and,
  - By excluding the claimant from school (both formally and informally), treated her unfavourably for reasons arising from her disability and, due to the failure to make reasonable adjustments, there was no objective justification for that treatment.
7. The responsible body is ordered in terms of Schedule 17, Part 3, paragraph 9(2) of the 2010 Act to do the following, which are set out in the terms agreed by the parties, although I have added a timescale to the first order:
  - a. Make a written apology to the claimant, which complies with the Scottish Public Services Ombudsman guidance on apologies, within one month of the date of this decision;
  - b. Liaise with school A to ensure that any external tuition required by the claimant is sourced and put in place for her (including tuition which may be required to help her catch up with work required, as and when she is able to do so);
  - c. Overturn the exclusion decision of 27 November 2019; and
  - d. Amend the claimant's attendance records for S3 and S4 to record the days she was not allowed to attend school because of exclusions (formal and informal) as authorised absences.



## Additional Support Needs

### Process

8. The claimant was represented by her solicitor throughout the process. The responsible body was initially represented by the Parent and Pupil Support Manager – Additional Support for Learning, and, from 17 September 2019, by a solicitor.
9. I made a direction on 4 March 2019 confirming that the claim was competent. Case conference calls then took place on 10 April, 6 May and then 27 May 2019. Two days were fixed for an oral hearing to take place on 24 and 25 June 2019. The oral hearings were cancelled as progress had been made with a new school placement for the claimant at school A.
10. A joint minute of agreed facts was lodged by the parties [T86-88].
11. Correspondence was sent to me, dated 17 June 2019, which sets out the joint position of the parties. After considering this, I fixed a procedural hearing to take place on 17 September 2019.
12. Rule 83(1) allows me to decide the claim without a hearing where both parties agree in writing to dispense with a hearing. The parties submitted their joint position in writing on 17 June 2019 and confirmed their position on 17 September 2019.
13. I was invited to make a decision under rule 96(2), in the agreed terms helpfully supplied to me, which I have adopted in the relevant areas of this decision.

### Findings in fact

14. The claimant was 15 years old.
15. The claimant has autistic spectrum disorder (ASD), obsessive-compulsive disorder (OCD), and certain sensory conditions. The claimant finds it difficult to communicate with others, which can affect her learning. She finds changes in routine or plans very difficult. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the claimant under rule 101(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**



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16. At the time of making the claim the claimant was a pupil in school B ('the school'), which is managed by the responsible body.
17. Supports were to be provided to the claimant in the school, which included a 'safe space', a scribe for tests and exams and a tutor for specialist subjects.
18. The claimant made complaints to the school about being bullied. The claimant was bullied on a bus on 16 September 2018 by another pupil, a boy from the school, which was recorded by the police as a 'hate incident'.
19. On 21 November 2018, in a state of anxiety and upset, the claimant set off the school fire alarm. The claimant was not excluded for this but was told by the school that any repeat would lead to exclusion.
20. On 27 November 2018, again upset, the claimant set off the school fire alarm. **[Part of this finding in fact has been removed by the Chamber President for reasons of privacy and anonymity of the claimant under rule 101(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
21. The claimant was excluded on 27 November 2018 following this incident. She has not attended the school since then.
22. School staff disclosed the claimant's personal information. A Guidance Teacher advised another pupil that the claimant was to be excluded.
23. Following an extensive search by the responsible body, the claimant was admitted to school A, which is an independent day and residential school for children and young people with autism, at the start of the school year in August 2019.
24. The claimant has a residential place at school A and will return home during school holidays. The claimant is happy at school A.



## Reasons for decision

25. Before reaching this decision, I considered each of the documents included in the bundle of productions. Rule 96(2) allows me to make a decision in terms agreed by the parties where I consider it fit to do so. I was satisfied that I could decide the matter without a hearing and make a decision in the terms agreed.
26. The parties asked that I make four orders, all of which are within the jurisdiction of the Tribunal. I considered these to be appropriate and proportionate, and made each of the requested orders (paragraph 7, (a)-(d), above)).
27. There was no disagreement that the claimant is a disabled person.
30. The claimant relied on two different forms of discrimination in her claim.

### *Discrimination arising from disability (section 15)*

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

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

If the answer to stage 1 is 'Yes' then I move on 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.

32. 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 am satisfied that the claimant's exclusion from the school amounts to discrimination arising from disability.



### Additional Support Needs

#### *Failure to comply with the duty to make reasonable adjustments (sections 20 - 21)*

33. The responsible body has a duty to make reasonable adjustments in certain circumstances. This means 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, there is a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid.

34. 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. (paragraph 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. (paragraph 6.13)*

35. Having considered the agreed facts, I am satisfied that the responsible body failed to make reasonable adjustments for the claimant in response to her evolving needs. The failure to make reasonable adjustments amounts to unlawful discrimination. That failure puts the claimant at a substantial disadvantage in comparison to non-disabled pupils.

28. The remainder of the decision (paragraphs 29 to 32) reflects the terms agreed by the parties.

29. The complaints made by the claimant about bullying (paragraph 18) were never resolved to her satisfaction. There was confusion between the school and police as to what action should be taken against the other pupil whose actions were deemed by the police to be a hate incident.



Additional Support Needs

30. The response by school staff to the claimant setting off the fire alarm caused her to be upset and distress. The 'safe space' (paragraph 17) which had been identified for the claimant was not made available to her when she became distressed. **[Part of this paragraph has been edited by the Chamber President for reasons of privacy and anonymity of the claimant under rule 101(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
31. The school placed too much reliance on a simple undertaking that the claimant would not set off the school fire alarm a second time (paragraph 19).
32. There was confusion between the school and the responsible body regarding the matter of a scribe for exams and specialist teachers (paragraph 17).
33. I have decided to issue a letter to the claimant, explaining my decision, given her age and the important role she has played. A copy of this will be provided to the responsible body. This was discussed briefly at the hearing. The letter does not form part of the decision