Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Claim

1. This is a claim under the Equality Act 2010 ('the 2010 Act') in which the claimant alleges that the responsible body has discriminated against him in relation to certain school assessment arrangements, in particular in refusing to allow the claimant additional time for certain Scottish Qualification Authority (SQA) examinations.

Decision

2. The claim is dismissed. On the evidence available to the tribunal, we are not satisfied that the claimant has a disability in terms of the definition in s.6 of the 2010 Act. It is therefore not possible for the responsible body to have discriminated against the claimant under the 2010 Act.

Process

3. The claim was lodged in March 2020. It was determined as one which is 'time-critical' as that phrase is used in the recently issued President's Guidance to Tribunal Members No 01/2020, *Hearings and the COVID-19 Outbreak*. Following this determination, the claim was case managed by case conference calls and directions to an oral hearing which took place in May 2020 by telephone conference.

4. The parties produced written submissions. We deliberated and reached a decision on the claim.

5. We issued a Summary Decision under rule 96 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) ('the rules'). The purpose of this document was to inform the parties promptly of the outcome of the claim, pending the issue of the full decision reasons. While the Summary Decision document records the decision of the tribunal, it is not the full written decision as is required in rule 94(2) of the rules. This document is the full written decision under rule 94(2).

6. The claimant was represented by his father. The claimant's representative (who is also 'witness G') referred to himself as a supporter, but his role could more accurately be described as a representative. It is unusual for a representative of a party to be a witness in a case, but there is nothing to prevent this from happening in exceptional cases when that is appropriate. Since the claimant's representative could address some relevant factual matters on the claim, we permitted this in the exceptional circumstances which applied here. The claimant's representative also referred to himself as a skilled witness. However, as was pointed out during the case management process, this is incorrect. While the claimant's representative does possess qualifications and experience which are relevant to the

question before the tribunal, it is procedurally wrong for a representative to be a skilled witness. A skilled witness is either (1) a witness who has direct professional experience of the factual issues in the case or (2) a witness who is giving independent evidence on matters within his/her expertise, for the assistance of the tribunal. The claimant's representative does not fall into either of these categories. We have no doubt that the claimant's representative was able to use his qualifications and experience to understand the issues and frame questions, but that is the extent to which his expertise could be used appropriately in this process.

7. We had access to (and took full account of) an electronic folder of evidence ('bundle') comprising pages 001 - 367 which contained all documents (including witness statements from each witness) lodged by both parties. At the start of the hearing, this ran to page 365. However, two additional documents which did not appear in the original bundle were added (namely an image of a mobile phone screen showing a message from the claimant and an e-mail from witness G to the claimant's school, 'school A') and were numbered pages 366 and 367 respectively. The responsible body's representative agreed that these documents could be added.

8. While this document is our full written decision under rule 94(2), it does not set out every fact and argument in the case. We have recorded only those facts and arguments which are crucial to our decision. We should add that the claimant's representative sought to raise a number of issues about the manner in which school A staff had handled communications and events in connection with the claimant. We have not dealt with any of these matters here. As was pointed out on a number of occasions to the claimant's representative before and during the hearing, our role is not to conduct a general review of events; we may only consider whether or not there has been a breach of the 2010 Act, and if so, what should happen as a result.

Findings in Fact

General findings

9. The claimant is a pupil at his local secondary school, school A.

10. During academic year 2019-2020, the claimant has been in his sixth and final year at school A.

11. During academic year 2018-2019, the claimant completed five Scottish Qualifications Agency ('SQA') Higher grade subjects achieving the following grades: English - A; Modern Studies - A; Physics - C; Maths - C and Computing - D.

12. During academic year 2019-2020, the claimant undertook four SQA Higher subjects: Physics, Maths, Computing and Business Management. Three of these (Physics, Maths and Computing) were repeats of Higher subjects taken the previous year to try to improve his grades in those subjects.

13. On or around March 2020, the Scottish Government announced that due to the COVID-19 outbreak, the SQA examinations for academic year 2019-2020 would not take place.

14. In April 2020, the SQA published a document '*Information for Centres: Producing Estimates, Session 2019-20*' (bundle, pages 310-319). That document sets out the process for the determination of SQA subject grades for session 2019-20 for all Scottish pupils in the absence of SQA examinations. That process involves Scottish schools calculating an 'estimate' grade for each SQA subject for each pupil for 2019-20. The document provides that the 'estimate' grade for each pupil for each SQA subject be submitted to the SQA for consideration by 29th May 2020.

15. The responsible body is required, under the SQA document, to submit 'estimate' grades for the claimant for each of his four 2019-20 Higher grade subjects.

16. School A uses the 'Dyslexia Toolkit' as recommended by Education Scotland. The toolkit assists in both the assessment of whether a pupil may have dyslexia and in strategies to be used in educating pupils with dyslexic traits.

17. At various points during the claimant's secondary education, school A suggested that the claimant use an electronic handheld spell checker and/or a PC with a spellchecker. The claimant refused to do so.

Findings on the claimant's primary school education

18. During academic year 2013-14, the claimant was in Primary 7. As part of the transitional arrangements for all pupils at that stage, in March 2014, the claimant completed the Single Word Spelling Test (SWST). At the time of the test, his chronological age was 11.06 years. The results of the test suggested a chronological spelling age of 9.05 years.

19. In March 2014, the claimant completed two further assessments: York Assessment of Reading Comprehension ('YARC') test and the Dyslexia Screener ('DS'). The YARC test assesses single word reading, reading rate and comprehension. The DS assesses non-verbal reasoning, phonological processing, spelling, perceptual speed, reading and vocabulary.

20. In March 2014, the YARC test results indicated that the claimant (at chronological age 11.06 years) had a reading ability, reading rate and comprehension age of at least 12.05 years.

21. In March 2014, the DS assessment indicated no signs of dyslexia. However, the claimant achieved a below average score on one element of the DS, namely phonological processing, which is an assessment of the ability to identify individual sounds in words. This result can be associated with spelling difficulties.

Findings on the claimant's secondary school education, year 1

22. During academic year 2014-15, while the claimant was in year 1 of secondary school at school A, he undertook a routine MidYis assessment. This is an assessment designed to highlight any issues which might require further attention. That test has the following elements: Vocabulary, Maths, Non-Verbal Reasoning, Skills (made up of Proof Reading and Perceptual Speed and Analysis). The results in these tests contribute to an overall score which is an average of the maths and vocabulary scores. In this test, 100 is the average score for each component as well as for the overall score. A score below 85 is indicative of concern. The claimant scored as follows:

- Vocabulary: SS 104
- Maths: SS 101
- Non-Verbal: SS 113
- Skills: SS 104
- Proof reading: SS 99
- PSA: SS 104
- Baseline: SS 103

23. At the end of academic year 2014-15, the claimant's parents asked that school A re-test the claimant for dyslexia. School A agreed. As a result, a number of tests were administered with the following results when the claimant had a chronological age of 12.09 years:

- Reading (YARC secondary version): Reading Accuracy 13.09 years, Reading Rate 13.01 years, Reading Comprehension 16 years+.
- Vocabulary (British Picture Vocab Scale -BPVS): Vocabulary Age: 14.04 years.
- Spelling (SWST): Spelling age: 10.04 years.
- Dyslexia Portfolio (which assesses reading, visual processing, spelling, phonological awareness, working memory and free writing speed):

  Single Word Reading: SS 107
  Single Word Spelling: SS 106
  Processing Speed: SS 101
  Phonological Awareness: SS 110
  Working Memory Cluster: SS 84
  Free Writing: SS 97

24. The average score for the Dyslexia Portfolio is 100 with a score below 85 indicative of concern. The scores achieved by the claimant therefore suggest a weakness in working memory, which is the ability to hold information in mind for short periods in order to do something with it. The score for spelling was within the average range and appeared to show an improvement in the claimant's ability.

25. In 2015, at the request of the claimant's parents, school A organised eight half hour one-to-one sessions for the claimant, delivered by a support for learning teacher, focussing on memory strategies and visualisation for spelling.

Findings on the claimant's secondary school education, year 2

26. School A operates a system of communication to address additional support needs of pupils, which involves the creation of a 'confidential folder' for certain pupils. This is a document which describes a pupil's additional support needs and informs teachers of strategies which should be used to support the pupil. Teachers are encouraged to discuss any requirements for particular pupils with the additional support needs team which are not mentioned in those pupils' confidential folders, so that the folder can be updated.

27. A confidential folder was created for the claimant during academic year 2015-16. In that document, the claimant is described as able with good comprehension skills. It describes the claimant has having some mild indicators of dyslexia which affect working memory and spelling and he was advised to use a spellchecker and a PC with spellchecker for extended writing tasks. In addition, general strategies for helping children with dyslexia were included,

as set out in a document “Specific Learning Difficulties (Dyslexia): Classroom Strategies”, bundle, page 176.

28. From the start of the confidential folder (in year 2 of secondary school) to year 4 of secondary school, none of the claimant’s teachers identified a need for the claimant to receive support in any assessments.

Findings on the claimant’s secondary school education, year 3

29. During academic year 2016-17, no concerns were expressed by any teaching staff about the claimant’s progress.

Findings on the claimant’s secondary school education, year 4

30. In academic year 2017-18, the claimant entered secondary year 4 and began preparing for his SQA National 5 examinations in six subjects to be taken at the end of that academic year. Shortly after the start of academic year 2017-18 (in September 2017), the claimant’s confidential folder was, as a matter of routine, reviewed by school A. The claimant reported that he did not need any special assessment arrangements and that he did not wish to use a spellchecker or laptop. He reported that he preferred to handwrite.

31. In session 2017-18, following the review of the claimant’s confidential folder, the claimant’s class teachers were invited to indicate any concerns with the claimant’s progress or to suggest any particular examination arrangements which he would require. No such concerns or suggestions were made.

32. In January 2018, the claimant completed his preliminary National 5 examinations. No special arrangements (such as additional time) were in place for the claimant for those examinations. Following those examinations, the claimant’s class teachers were asked if any additional arrangements would be needed for the final SQA examinations at the end of that academic year. No such arrangements were suggested.

33. School A holds ‘verification meetings’ in accordance with SQA guidance in order to consider whether any additional examination arrangements are required for any pupil. At such a meeting in March 2018, school A considered whether the claimant would require any additional arrangements for the upcoming SQA examinations. The claimant’s parents informed school A that he had experienced some anxiety during the preliminary exams and that he found the main hall (where the preliminary exams had taken place) intimidating.

34. At the verification meeting in March 2018, school A decided to allow the claimant to take his SQA National 5 examinations in a small group setting. Following that decision, the claimant’s parents made a request for the claimant to be allowed, in addition to the small group setting arrangement, extra time in his SQA National 5 examinations.

35. School A sought the views of the claimant’s six subject teachers about the request for additional time. Five of those teachers indicated that there was no/insufficient evidence of such a need. One teacher (Modern Studies) suggested that the claimant might benefit from extra time in his examination for that subject. That assessment was based purely on the fact that the claimant did not complete his preliminary exam in that subject on time. As a result of that request, the claimant was allowed additional time for only his Modern Studies SQA examination.

36. The claimant's parents disagreed with school A's decision and argued again for extra time for the claimant in all of his National 5 subjects.

37. School A consulted with the responsible body's educational psychologist on the matter. The advice, provided in May 2018, was to gather evidence over time and contexts and to use general strategies that support children with dyslexia. The educational psychologist's advice also emphasised the value of contextual evidence as being more important than evidence from testing.

38. At the start of June 2018, the claimant's teachers were again asked to indicate whether special arrangements would be needed for the claimant. The teachers were asked to complete a proforma document from the dyslexia toolkit, which asks each teacher to indicate whether or not a pupil has any of 66 difficulties across 15 areas. These areas are: oral language, auditory, phonological, reading/writing and comprehension, spelling, writing and page layout, punctuation, processing speed, under-performance, visual and perceptual, short-term and working memory, sequencing, number, organisation and motor and coordination. There is also a text box for 'Other Information'. Only one of the 66 boxes (a total of 396 boxes across all six subjects) was ticked as applicable, namely by the claimant's Modern Studies teacher who ticked the box under the heading 'Under-performance' which refers to timed tasks involving literacy skills. School A did not change its decision about extra time in the claimant's National 5 exams.

Findings on the claimant's secondary school education, year 5

39. In September 2018, the claimant's parents requested that small group accommodation and extra time be put in place for the claimant's preliminary and SQA final Higher grade examinations. School A agreed to this request on the basis that the claimant's mother was, at that time, ill. These additional arrangements were made for all of the claimant's subjects for both preliminary and final exams.

Findings on the claimant's secondary school education, year 6

40. In academic year 2019-20, the claimant decided to re-take Highers in Computing, Maths and Physics and to take a new Higher subject, namely Business Management. School A asked the claimant's teachers for each of these four subjects to comment on whether there was any evidence from classwork or tests that the claimant required any additional arrangements for his SQA examinations. The claimant's Physics teacher requested additional time based on the claimant achieving 6 extra marks with extra time at his preliminary exam in that subject. At the following verification meeting on 29th November 2019, school A agreed that the claimant would receive additional examination time for Physics only, as well as small group accommodation for all of his examinations, based on the information received from his subject teachers.

41. In January 2020, the claimant's parents wrote to school A seeking agreement for extra time for all of the claimant's Higher subjects that require extended writing. School A sought the views of each of the claimant's teachers about this request. The class teachers for Maths, Business Management and Computing responded by indicating that there was no evidence to suggest a need for additional time in these subject examinations.

42. The claimant sat Business Management Higher in academic year 2019-20. He had not taken that subject at National 5 level. He was one of several pupils (to use a phrase employed by schools and pupils for this situation) taking the subject as a 'crash course'. The claimant (among other assessments) sat two timed class tests in which he scored 55% and 65%. The time allowed for each of these tests was 40 minutes and 45 minutes respectively. The claimant was not given additional time for either of these class tests. In other classwork in that subject the claimant scored: 92%, 69%, 70%, 60%, 61% and 75%.

43. The claimant sat his preliminary Higher exams in January 2020. He scored 47% in the Business Management exam, equivalent to a D grade. He had not been permitted any additional time in that examination. The claimant did not manage to complete the final question worth a maximum of four marks. Out of 16 questions, the claimant did not receive any marks for an additional two questions. For some questions, despite writing several paragraphs, he did not receive many marks (for example 1 out of a possible 5 marks and 2 out of a possible 6 marks). He received full marks for some questions.

Reasons for the Decision

General process and parties' positions

44. This case focusses on examination arrangements for the claimant in relation (in particular) to his Business Management Higher subject. The claimant argues that he has dyslexia and that he ought to have received additional time for all of his preliminary exams for each of his four 2019-20 subjects. In particular, he argues that the failure to provide additional exam time represents a failure to make reasonable adjustments under s.20 of the 2010 Act. The failure to do so, where it occurs, represents disability discrimination in terms of s.21 of the 2010 Act. It is clear that this tribunal has jurisdiction to deal with this claim, under s.85(2)(a) and (6) of the 2010 Act (as provided in schedule 17, part 3, paragraph 8 of the 2010 Act).

45. The claimant seeks five remedies (bundle, page 064). Although the case focused in particular on the Business Management subject, the fifth remedy relates to the grades for all four of the claimant's preliminary exams in academic year 2019-20. The claimant asks that the tribunal orders that the estimate grades submitted to the SQA for each subject should be the claimant's 'predicted grades' (a reference to the predicted grades submitted to UCAS to support the claimant's university application). As an alternative, the claimant asks that the preliminary grades for academic year 2019-20 are not used as part of the calculation of SQA estimate grades, having been "invalidated" by disability discrimination.

46. The other four remedies sought are more general: a statement that discrimination has occurred, an apology, a requirement for training and a requirement for school A to review, develop and revise its existing policies.

47. The responsible body argues that the claimant does not have dyslexia, nor does he have a disability in terms of s. 6 of the 2010 Act. If the claimant does have a disability, the responsible body argues that reasonable adjustments were taken to avoid the disadvantage the claimant faced.

48. On burden of proof, the responsible body argues that the burden falls squarely on the claimant. This is correct, but only up to a point. Section 136 of the 2010 Act suggests that

the claimant only carries a partial burden of proof. The Explanatory Notes to the 2010 Act at the relevant part of paragraph 443 explain the effect of s.136 as follows:

> "This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to [the responsible body] to show that he or she did not breach the provisions of the Act."

49. We have approached the burden of proof in the manner provided in s.136, as interpreted in the Explanatory Notes. In reaching our conclusion on each of the two main applicable questions (below), we have asked ourselves if the claimant has established sufficient facts to enable us to reach the conclusion that the relevant legal tests have been established.

Observations on the oral evidence

50. The witnesses for the responsible body largely gave their oral evidence in accordance with their witness statements. There were no significant departures for any of those witnesses. The same can be said for the claimant and witnesses F and G. This was not a case in which the central facts were in dispute; the case is mainly about interpretation of the facts.

51. There was a suggestion by the claimant's representative, in his questioning of the responsible body's witnesses and in his written submissions (page 3), that the lack of any dyslexia or learning disability qualification by the teaching staff at school A is a matter of note. However, we do not accept that this is the case. We heard in the evidence of witness F that there are no longer any accredited dyslexia courses at any Scottish university or college and there have not been for some time. Some courses do exist in England and Wales. Witness F stated that she would not expect teachers in Scotland to have such accreditation because of the lack of availability of courses. Witness F also confirmed that teachers generally do not have any formal training in psychometrics (which is the interpretation of scores and profiles resulting from the administration of standardised tests). Given all of this and the access to advice from the responsible body's educational psychology service, we do not regard the lack of dyslexia or learning disability training of the school A teaching staff as a matter which influences how we should assess the value of their evidence.

52. We feel we should make some comments about the evidence of witness F. Witness F provided a detailed statement and gave oral evidence. Witness F is clearly very well qualified and experienced in the field of dyslexia. She gave her oral evidence in a very clear, honest and measured manner. However, there are a number of limitations to her evidence in the context of this claim.

53. Firstly, witness F accepted that she had not had time to carry out a full assessment of the claimant. She would normally do so over a number of sessions in a total of around 7 hours, and in person. She had only spent two hours talking to the claimant over the telephone. Secondly, and related to this, in the absence of a full assessment she was unable to say whether or not the claimant is dyslexic. This seriously undermines the impact of witness F's evidence. While (as indicated below) a diagnosis of dyslexia (or any other condition) is not required for the 2010 Act to apply, much of the analysis in witness F's

statement is based on the assumption that the claimant is dyslexic. Thirdly, she has not met the claimant, nor spent any time with him in an educational environment; this is in contrast to the witnesses for the responsible body, who all know the claimant as a pupil. Fourthly, in her statement witness F engages in a discussion of whether or not the responsible body has complied with disability discrimination legislation. In doing so, witness F, with respect, has stepped outwith her area of expertise. The issue of whether or not legal tests have been complied with is a legal question. In Scotland, skilled witnesses are not permitted to address the 'ultimate question', in other words any of the legal tests; they may only address factual and opinion issues within their own area of expertise. By attempting to address the question of discrimination (a pure question of law), witness F has engaged in an assessment of the merits of the case in the absence of hearing (as the tribunal does) all of the evidence. This limits the impact of some of the conclusions of witness F in her report. Fifthly, and related to the last point, witness F states that her role is to "support" the claimant (bundle, page 074) and therefore appears there (and in other places in her statement) to be advocating for the claimant, which is not the role of a skilled witness. A skilled witness should not be seen as supporting a party's case; such a witness should offer independent analysis of the evidence to the tribunal. Sixthly, witness F appears to hold the view that the opinions of teachers on educational issues related to their pupils are just opinions, suggesting that they are of limited value. We do not share that view. Teachers are usually best placed to understand if a pupil, with whom they are spending time in the classroom, is struggling in an aspect of their education (whether assessment related or otherwise). Teachers use their professional judgement in such matters.

54. Taking these six points together, we feel that we require to treat the evidence of witness F with some caution. Where her evidence contradicts that of the claimant's teaching staff, we tended to prefer the latter.

The questions

55. It is clear that there are three main questions we must answer:

(A) Does the claimant have a disability, as defined under s.6 of the 2010 Act?

(B) If yes to (A), did the responsible body discriminate against the claimant in its decisions on examination arrangements for his 2019-20 preliminary examinations, or at any earlier point in his secondary education?

(C) If yes to (A) and (B), which remedies are appropriate?

56. Since our answer to question (A) is 'No', we need not address questions (B) or (C). However, we will state our views on (B), for the sake of completeness.

(A) Does the claimant have a disability, as defined under s.6 of the 2010 Act?

57. This is a key question in every claim under the 2010 Act. The protection of the Act applies only where the claimant has a disability. The definition of disability in s.6(1) of the Act is short and is worth setting out:

> "A person (P) has a disability if—
> (a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

58. In approaching this definition, we have found the guidance of Langstaff J, the President of the Employment Appeal Tribunal, useful:

> "It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

(*Aderemi v London and South Eastern Railway Ltd*. (EAT) [2013] ICR 591 at paragraph 14; see also *JC v Gordonstoun Schools Ltd* 2016 SC 758; 2016 SLT 587, Inner House, per Lady Smith at paragraph 45).

59. This passage suggests a number of subsidiary questions:

(i) Does the claimant have a physical or mental impairment?

(ii) Does that impairment have an effect on the claimant's ability to carry out normal day-to-day activities?

(iii) Is that effect substantial?

(iv) Is that effect long-term?

60. Only if each of these questions is answered 'Yes' can it be said that the claimant has a disability under s.6(1) of the 2010 Act. We will now consider each of these subsidiary questions in relation to the claimant.

(i) Does the claimant have a physical or mental impairment?

61. Our answer to this question is: Yes.

62. The Equality Act 2010 Guidance: *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, May 2011, published by the Office for Disability Issues, HM Government (paragraph A3, page 8) assists with this question. It is stated there that the impairment need not be as a result of an illness and that its cause need not be known. As the responsibly body's representative (correctly)

conceded, a diagnosis of dyslexia (or of any condition) is not necessary for an impairment to exist under s.6(1).

63. We are satisfied that the claimant has certain mild mental impairments. These are impairments of his working memory and spelling (though when last tested, his spelling was within the average range). These are evidenced in the tests undertaken by School A and discussed at paragraphs 18-24 above.

64. There is not, however sufficient evidence to satisfy us that the claimant has dyslexia. There is only mention, in a 2015 entry in the claimant's confidential folder, of 'some indicators of mild dyslexia'. Witness F, a specialist with significant experience of dyslexia, was unable to say whether or not the claimant has dyslexia. She did not rule it out; but she did not have sufficient evidence to confirm the position one way or the other.

(ii) Does that impairment have an effect on the claimant's ability to carry out normal day-to-day activities?

65. Our answer to this question is: No.

66. For the purpose of this question, we need to consider what is meant by 'ability'. As Langstaff, J points out in the passage above, we must consider the effect of the impairment on the claimant's ability. Someone's ability to do something is measured over a period of time, not in a single moment. This must be the correct approach, since someone may be able to do something, but may not do it on every occasion it is attempted. So, a sprinter may be able to run a race in under, say, 15 seconds. That does not mean that the sprinter will always do so. The same applies to examinations: pupils do not perform to the same level in every examination. Sometimes performance levels vary greatly, depending on a range of common factors such as: proficiency in the subject; level of preparation; exam nerves; examination technique and the particular questions in the exam paper itself. This is all well enough understood as to be within judicial knowledge.

67. It is argued that the claimant's ability to perform well in exams was hampered by his mental impairments. There is insufficient evidence to enable us to reach this conclusion. This is for a number of reasons.

68. Firstly, the claimant is someone who is generally academically able. He scored A grades in Modern Studies and English Highers in session 2018-19. In the main subject which was the focus of this case (Business Management) he scored well in class examinations, and indeed scored very well in other assessments for that subject (paragraph 42, above).

69. Secondly, the claimant does not always require additional time in order to complete examinations. Taking the most recent evidence available, the claimant did not use additional time in Higher Computing in 2018-19 in either the preliminary or final exams. He used only some of the extra time allocated in his final Physics exam. He used all of it in his final Maths and English exams. This does not suggest a general issue with ability to complete examinations on time; rather it suggests that the time used by the claimant varies according to the subject. This is most likely the case for all pupils. Every pupil has stronger and weaker subject areas. Each exam question paper within a subject is different too. Further, even where the claimant did not have the benefit of extra time in exams, there is evidence to suggest that he is able to write an adequate volume of material (10 pages in his Business Management preliminary exam in January 2020 (bundle, pages 354-364)). Witness E, the

claimant's teacher for that subject, explained in her witness statement (and in her oral evidence) that, having examined the claimant's answer paper, the issues which led to the grade of 47% were issues of technique and knowledge, not timing. We regard the evidence of witness E on this point as persuasive. She is an experienced teacher closely acquainted with the subject over a number of years – she held the post of Principal Teacher of Business Education at school A for 29 years before becoming Faculty Head for Business and Technology and has taught the subject for a total of 36 years.

70. Thirdly, there is very little evidence across six years of secondary education that the claimant was regarded by teaching staff as having difficulty completing examinations within the normal set time limits. As outlined in paragraphs 31-33, 38, 40 and 41 above, school A (sometimes routinely, sometimes in response to a request from the claimant's parents) sought the views of the claimant's class teachers across a range of subjects as to whether the claimant required additional time in examinations. Over the last two examination years, only two teachers have stated that additional time might benefit the claimant. In 2018-2020, the claimant's Modern Studies teacher suggested additional time, based only on the fact that the claimant had not managed to finish his preliminary paper that year in normal time. In 2019-2020, the Physics teacher's evidence in favour of additional examination time for the claimant was described by witness A in her oral evidence as "not robust", being based only on the claimant achieving 6 extra marks with extra time. This consistent lack of reliable evidence, even when repeatedly sought, is strongly indicative of the absence of an issue with the claimant's ability to work within the usual time limits of examinations. This is especially pertinent when one considers the advice obtained from the responsible body's educational psychologist (by e-mail of May 2018 – bundle pages 122-124), where there is expressed a clear emphasis on the importance of gathering contextual evidence over a period of time.

71. On the question of whether the taking of time limited examinations or tests is a 'normal day-to-day activity', in our view, it is not. Again, the Equality Act 2010 Guidance: *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, May 2011, published by the Office for Disability Issues, HM Government assists with this question. At pages 34-35, paragraphs D1-D7, the guidance sets out some examples of what constitutes such activity. It is clear from these examples that the taking of examinations is not such an activity. It is not an activity which, even for a small group of individuals (such as school pupils or university students) is carried out on a daily or frequent basis. Even if we had reached a different view on this question, the points discussed above would have led to the question (iii) being answered in the negative.

72. Having come to the view that there is a lack of evidence of the necessary connection between the claimant's mental impairments and his ability to complete examinations on time, we need not address whether there is a wider impact of those impairments on other normal day-to day activities. There was some limited evidence to the effect that the claimant may have some difficulties with his working memory which affect other activities, such as remembering items on a shopping list. However, it is clear that the claimant is a very articulate and able young man: holding down a part-time job; with an aptitude for competitive debating (having reached the finals of a debating competition in 2019); and has been appointed to positions of responsibility within the school (see the claimant's statement at page 072 of the bundle). Further, in his oral evidence during the hearing, the claimant was articulate, was able to remember considerable details of events over the last few years and answered numerous questions without any apparent difficulty, despite natural anxiety caused by the formal hearing situation. All of this points to an intelligent young man who,

despite the mild impairments we have referred to above, is able to carry out day-to-day activities with ease.

(iii) Is that effect substantial?

73. Had we been required to answer this question, our answer would have been: No.

74. We rely here on similar arguments to those explained under question (ii). We accept the comments of Langstaff, J., above, on the absence of a spectrum between substantial and trivial, given the statutory meaning of 'substantial' (s.212 of the 2010 Act). Taking 'substantial' as meaning something more than trivial, we are satisfied that this part of the definition is not met. The claimant has performed well in school overall and there is no suggestion of any impairment in his ability to carry out day-to-day activities.

(iv) Is that effect long-term?

75. Had we been required to answer this question, our answer would have been: Yes.

76. If we had answered questions (i)-(iii) in the affirmative, we would have found that the effect of the impairment on the claimant's ability was long-term. There is evidence to the effect that a working memory impairment is not something which is likely to fade with time.

77. Since we have been unable to answer 'Yes' to each of the subsidiary questions (i)-(iv), the answer to main question (A) is No.

(B) Did the responsible body discriminate against the claimant in its decisions on examination arrangements for his 2019-20 preliminary examinations, or at any earlier point in his secondary education?

78. Having answered 'No' to question (a), we need not answer this question. However, we will offer a few comments.

79. We are clear that if we did have to answer this question, our answer would have been: No.

80. The applicable provision is s.20(3) of the 2010 Act, which applies where a provision, criterion or practice ('PCP') puts a disabled person at a significant disadvantage on a relevant matter compared to a non-disabled person. In such a situation, in order to avoid unlawful discrimination, the responsible body has to take reasonable steps to avoid the disadvantage.

81. If we for the moment assume (contrary to our conclusion) that the claimant is a disabled person, the responsible body complied with this duty. The PCP in this case is the practice of assessing pupils' need for additional examination arrangements. We would have had some difficulty in finding that there existed a significant disadvantage for the claimant when viewed comparatively, given the steps taken by school A and his generally good examination performance.

82. Even if we had found the other parts of s.20(3) to have been met, the steps taken by the responsible body to avoid disadvantage to the claimant were reasonable for that purpose. These steps were: (1) carrying out assessments (as outlined in paragraphs 18-24 above) of the claimant's abilities in a number of relevant areas; (2) asking class teachers in secondary years 4 and 6 to consider if any evidence existed in relation to the claimant's difficulties with exams which would justify additional time (see paragraphs 21-33, 38, 40 and 41 above); (3) offering the claimant the use of a spell checker or arrangements for using a computer for taking exams; and (4) seeking and following the specialist advice of the responsible body's educational psychology service (bundle, pages 122-124). In our view, these steps were reasonable, given the facts available to the school A staff.

83. Witness F suggested that the results of testing in academic years 2013-14 and 2014-15 (explained at paragraphs 18-24 above) should have led to further investigation. However, we do not agree, given other scores and the overall scores, the emphasis on contextual evidence, the claimant's progress and the lack of any evidence of difficulty from teachers. Witness F also suggests that the purpose of extra time in an examination is only to allow a pupil to display knowledge, and therefore to perform to the best of his/her ability. We do not agree with this analysis. The purpose of a timed exam is not purely to find out how much the pupil knows about the subject. One of the skills required in a timed exam is to assimilate that knowledge under time pressure and to express that knowledge quickly. In other words, to manage time effectively.

84. The school also made small room accommodation for exams available. We have not listed that as an adjustment relevant to this claim since the circumstances in which this was initially permitted (in year 5) were not related to the claimant's mental impairments. They were related to the claimant's anxiety in a large exam venue and there was no evidence to suggest that the claimant had a general anxiety impairment.

85. We asked the responsible body's representative to address the procedural question of whether we ought to consider other forms of discrimination, given that the claimant is not legally represented. The responsible body's representative responded by arguing that this would take our duties under rule 2(c) of the rules (wide as they are) too far. We are not sure that we agree with this analysis, especially as the responsible body's representative (if given an opportunity, which we agree would be necessary for fairness) could apply the facts to the other forms of discrimination and address them. The 2010 Act is not at all easy for the non-legally qualified to navigate (indeed, it is challenging for many who are so qualified). It would therefore have been unfair (and a breach of rule 2(2)(c) of the rules) for us to restrict ourselves to considering only the reasonable adjustments discrimination type.

86. Since we did not get beyond question (A), we did not require the responsible body's representative to address us on the other possible forms of discrimination. However, we can say that having considered the other main forms of discrimination, namely direct (s.13), indirect (s.19) and discrimination arising from a disability (s.15), we are in no doubt that none of these would have applied in this case.

87. On the question of direct discrimination, we are not convinced that school A (and therefore the responsible body) treated the claimant any less favourably than any other pupil. It is clear from the evidence that the policies and practices of school A (testing, seeking evidence from class teachers, offering alternative arrangements and equipment when evidence of need exists) would be applied to any pupil in a similar position to the claimant.

88. On the question of indirect discrimination, it is clear from the evidence that school A applies its practices for additional examination arrangements to every pupil on an equal basis, and on the basis of the existence of evidence of need, on a subject by subject, pupil by pupil, year by year basis. The claimant would therefore not be at a disadvantage when compared to others who did not share the claimant's disability (if we had decided that the claimant had a disability).

89. On the question of discrimination arising from a disability, there was no unfavorable treatment of the claimant as a result of something arising in consequence of his impairments. It is clear that the system in place in school A for assessing need and acting on those assessments, would have allowed the claimant to benefit from measures in place to counteract the impact of any disability. School A's treatment of the claimant can only be described as favourable, not unfavorable. Good examples of that approach are allowing the claimant additional time in his Modern Studies National 5 final examination in year 4, and in his Physics Higher examination in Year 6, both on the strength of relatively weak evidence of need.

(C) If yes to (A) and (B), which remedies are appropriate?

90. Since our answers to (A) and (B) are 'No', we need not consider the question of remedies.