



Decision on Preliminary Matter under Rule 69

1. This is a claim under the Equality Act 2010. Early in the life of the claim, a preliminary matter was raised by the responsible body. This matter relates to the competency of the claim, more specifically the question of whether or not the claimant may make a claim on behalf of her son. I decided that it would be appropriate to deal with this as a preliminary matter under rule 69 of the First Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (Schedule to SSI 2017/366) ('the Rules'). Following a conference call with the parties, I issued directions dated October 2018 inviting written submissions on this preliminary matter. Those submissions (from the responsible body, reply from the claimant and response from the responsible body) were all received by the November 2018 deadline set out in those directions. I have decided that the claim is competent.
2. The claim is made under Schedule 17, paragraph 8 of the 2010 Act, which provides:

"Jurisdiction
A claim that a responsible body has contravened Chapter 1 of Part 6 because of a person's disability may be made to the Tribunal by-

 - (a) the person's parent;
 - (b) where the person has capacity to make the claim, the person."
3. The responsible body argues that this provision, considered alongside certain provisions in the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act'), the Education (Scotland) Act 1980 ('the 1980 Act') and the Age of Legal Capacity (Scotland) Act 1991 ('the 1991 Act'), should be interpreted in such a way that where someone such as the claimant's son (who it is accepted would have capacity under the 2010 Act to make a claim) is the alleged victim of discrimination, only he and not his parent may make a claim under Schedule 17, paragraph 8 of the 2010 Act.
4. The claimant argues that she falls squarely within the terms of Schedule 17, paragraph 8 since she is the person's parent (the person - the alleged victim of discrimination - being her child).
5. The responsible body argues that the provision (above) in Schedule 17 para 8 is ambiguous, requiring me to consider other legislation and sources in order to interpret it. I do not agree that the provision is ambiguous. In my view, the provision simply lists those persons who may make a claim alleging a contravention of Chapter 1 of Part 6 of the 2010 Act. The first is the person's parent. The second is the person him or herself, if he/she has capacity to do so. There is no suggestion that these are alternatives. The word 'or' is absent

between (a) and (b). What appears between the two is a semi-colon. When one looks to other places in the Act where semi-colons appear between items in a list in the absence of 'or' or 'and', it is clear that they are not alternatives (for example, see Schedule 17 para 10(2)).

6. Further, if Parliament had meant to restrict claims of a parent to cases where the alleged victim does not have capacity to make a claim, it could very simply (and in my view would) have made its intention much clearer. For example, it could have used the word 'or' between the two options. Alternatively, it could have referred in sub-paragraph (a), to 'where the person does not have capacity to make the claim, the person's parent..'. As the claimant points out, Parliament chose to make paragraph (b) conditional, but left paragraph (a) unconditional. I have to assume, in the absence of anything to the contrary in the 2010 Act, that this is what was intended. This means that a parent of a person who alleges that he/she falls within s.85 in relation to the subject matters listed there may make a claim to the Tribunal under Schedule 17 para 8. Arguably, the age limit does not come directly from s.85 (which simply refers to 'pupil'; the definition of 'child' in s.86(5) applies only to that section, and so to victimisation claims) but from the definition of 'parent' (taken from s.135 of the 1980 Act – see s.212(1) of the 2010 Act). I say arguably since, as the claimant notes, it is possible that Parliament intended that a pupil of any age can make a claim under Schedule 17, para 8 (s.85 making no reference to 'child' or 'young person'). However, I need not consider this question since the claimant in this case is clearly a 'person' and the 'parent' of the alleged victim, who is a 'young person' as 'young person' (and its s.135 meaning) is imported as a result of the importation from the 2004 Act of the definition of 'parent'. This is the more restrictive of the two approaches, and under it, the claimant is entitled to make a Schedule 17, para 8 claim.
7. Even had I taken the view that the provision is ambiguous, my decision on the preliminary matter would have been the same. The responsible body refers to s.18(1)-(2A) of the 2004 Act and to the definition of 'child' in s.135 of the 1980 Act. While the argument is carefully made, it seems to me that the structure adopted in s.18(1)-(2A) lends weight to the claimant's position. I agree with the responsible body that the consequence of those s.18 provisions is that where a young person (the alleged victim here is a 'young person', he is currently 17, see the 2004 Act, s.29(1)) has capacity to make a reference under the 2004 Act, only he/she may do so, and his/her parent may not. However, Parliament has chosen to adopt a different approach under the 2010 Act. It could have adopted the s.18 wording and structure (or similar), but chose not to. While I accept that both the 2010 and 2004 Acts adopt the 1980 Act definition of 'child' (as well as those of 'pupil' and 'parent', the latter introducing 'young person'), that does not mean that both Acts are to be interpreted in a similar way in other respects. Many Acts use the 1980 definition of a 'child', and other expressions. This only means that for the purposes of these words, the same meanings are to apply. It does not, in my view, infer a stronger link between two Acts than that. The nature of a reference under the 2004 Act and a claim under the 2010 Act are different. They have different legal bases, and the policy considerations in the framing of the Acts are not the same.

8. The responsible body argues:

“....Parliament's intention was not to give parents any greater or lesser right than those they have regarding making references to the Tribunal under the 2004 Act.”

The responsible body offers no direct explanation or authority for this submission. I come back again to the nature of claims under the 2010 Act – they are based on allegations of discrimination. Those under the 2004 Act are not. A reference and a claim are, therefore, fundamentally different in nature. Without an express or implicit indication that Parliament intended parental rights of access to each to be measured on an equal basis, such an assumption is unfounded.

9. I am not persuaded that the argument based on rule 90 of the Tribunal Rules is a sound one. That rule is unrelated to eligibility to make a claim under the 2010 Act; it is about the views of a child. The terms of that rule simply mean that the Tribunal must seek the views of a child (and not of a young person) where the parent of the child makes the claim. Where the child makes the claim, such a step will be unnecessary since the child would be a party. Where a parent makes a claim on behalf of a young person or where a young person makes a claim, the obligation does not apply. This is explicable on the basis that those framing the rules sought to regulate the provision of the views of a child on account of his/her age, but not the views of a young person (whether as a party or as the alleged victim). Put simply, rule 90 does not relate to eligibility to claim, nor does it apply to ‘young persons’.
10. On the content of the Technical Guidance for Schools in Scotland, 2014 (‘the Guidance’), I am not persuaded that it assists with the issue in hand. The responsible body refers to para 8.26 and the reference to ‘child and parent’, but it seems to me very likely that the authors of the Guidance simply did not consider a case where a parent could make a claim on behalf of a ‘young person’. After all, there is no reference to a ‘young person’ in the provision (or, indeed, in the 2010 Act at all); it is imported, as noted above, rather obscurely by the importation of the 1980 Act definition of ‘parent’. In any event, the Guidance, while requiring to be considered, does not have the same status as the statutory provisions, and is not meant to necessarily cover all possible permutations. What the Guidance does envisage is a situation where concurrent eligibility can exist in relation to a claim (albeit in relation to a child and parent). This supports the notion of concurrent claim eligibility. I can see no reason in principle for implying that such concurrence does not apply in relation to a parent and her child who happens to be a ‘young person’ for 2010 Act purposes.
11. The reference to the 1991 Act comes for the first time in the responsible body’s reply to the claimant’s response. Given my decision on the preliminary matter, I did not see the need to allow the claimant a right of reply to this fresh point. Again, I do not find the 1991 Act to be of any assistance. The provisions referred to (sections 1 and 2) relate to the capacity of those under 16 years of age to enter into transactions (including the right to bring or defend civil proceedings – s.9). Neither the claimant nor her son fall within those provisions. In my view, that means they are simply irrelevant. There is no reference in the 2010 Act to the 1991 Act provisions. However, I note that there is a reference

in the 2010 Act (albeit in relation to 'incapacity') to the Adults with Incapacity (Scotland) Act 2000 ('the 2000 Act') (s.141(7) of the 2010 Act). It seems to me that capacity of the claimant's son (were that to be under consideration) ought to be measured under that Act (given that he is an adult for capacity purposes – s.1(6) of the 2000 Act). However, the capacity of the claimant's son is not being considered here.

12. Finally, both parties address the possible risk of a parent bringing a claim where the young person who is the alleged victim of discrimination objects to the claim being brought. That is a risk, and one which (as the responsible body points out) is not of the same kind as the similar risk in relation to a child. However, even had I been persuaded that the provision in question is ambiguous, this risk (which seems very slim) would not represent an absurdity such that a particular general interpretation of the provision should be followed to avoid it.
13. For these reasons, I reject the responsible body's competency argument. I have asked the casework team to allocate the claim to a legal member in order that a conference call can be arranged to consider further procedure.