



Additional Support Needs

DECISION OF THE TRIBUNAL

List of witnesses

For the claimant:

Young person's mother (witness A)

For the responsible body:

Depute Head Teacher (witness B)
Quality Improvement Officer (witness C)

Claim

1. In the emergency circumstances of the Coronavirus pandemic in 2020 the Scottish Qualifications Authority (**SQA**) developed a method of awarding National Qualifications and gave schools powers to determine awards. The claimant alleges that the responsible body should have taken steps to ensure the young person was treated fairly in this process and specifically, that the private tutoring provided to her ought to have been taken into account before estimating her grades in Higher Biology and English.
2. The claimant alleges that in failing to do so the responsible body subjected the young person to discrimination arising from disability and indirect discrimination; and that the responsible body failed to make reasonable adjustments, all in terms of the Equality Act 2010 (**the 2010 Act**). The claimant seeks a statement that discrimination has occurred and that an apology be provided by the responsible body.

Decision

3. We find that the responsible body has not failed to comply with the duty to make reasonable adjustments in terms of section 21 of the 2010 Act. The claim is therefore dismissed. The claim for indirect discrimination in terms of section 19 of the 2010 Act is not well-founded and is dismissed. The claim of discrimination arising from disability in terms of section 15 of the 2010 Act is not well-founded and is dismissed.

Process

4. A case conference call took place in April 2021 at which time the claimant confirmed that he did not wish representation. Following this a number of directions were issued to regulate proceedings. Written witness statements were agreed and a joint minute of agreed facts was prepared. An independent advocate was appointed to take the views of the young person. A report was lodged (T058) and this, read together with the personal statement at C024, represents the written views of the young person. The bundle of productions which the tribunal considered is numbered T001-068, C001-399, and RB001-123. The bundle contained all documents lodged by both parties.
5. At the request of the claimant a second case conference call was fixed for June 2021 to discuss the hearing process and to ensure that he was as well informed as possible in this regard. The claimant was allowed to lodge the documents numbered C280-399 late and the responsible body was given time to adjust their submissions to take account of these.
6. At the hearing, the responsible body's representative indicated that she had worked in the past with one of the ordinary member's daughter. She otherwise had no connection or relationship with the ordinary member. The claimant expressed no concern and the tribunal was satisfied that there was no conflict of interest.

Views of the Young person

7. The independent advocate attended the hearing to provide an oral report on the young person's views. The young person found last year very difficult. She was extremely tired and she felt almost thwarted whenever she tried to evidence her school work. She thought the school could do more. She accepts she was given support but by that time it was too late. The young person thought it was unfair when she was doing the work at home but an awful lot of that work was not being accepted as evidence of her ability and understanding of the subject. She is particularly disappointed with her English grade as she feels can excel in English. She feels this school year has been much better.

Findings in Fact

8. The claimant is the father of the young person. At the relevant times the young person was a pupil at the school, which is a state school.
9. The young person was born with a condition which has required three major surgeries, the most recent of which was in October 2016. She had a postsurgical reaction to this latter procedure, which resulted in a diagnosis of Chronic Fatigue Syndrome (**CFS**) for which she receives treatment from Child and Adolescent Mental Health Services (**CAMHS**) (C032). Her symptoms include long-term fatigue, 'brain-fog', low powers of stamina and concentration, along with consequent anxiety and depression. Her original condition has also left her with speech impediments that contribute to fatigue, a compromised immune system and vulnerability to acute upper respiratory infections, which are more frequent in winter months. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy of the child 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)]**

10. As a result, the young person has, since 2016, been unable to consistently attend and access education within the school in the normal way – especially in the period October to March when the severity of her symptoms can be worse. During S4 and S5 her attendance ranged from 50% to 71%.
11. Another reason for the young person's attendance being lower in the 2019-20 school session was her parent's reluctance to confirm the part-time timetable which had been discussed with witness B in October 2020 (RB082, para 24)
12. For the session 2018-19, the school presented the young person as a candidate in four subjects: Nat 5 English, Nat 5 Modern Studies, Nat 5 Biology and Nat 5 Maths. For the session 2019-20 the school presented the young person as a candidate in three subjects: Higher English, Higher Modern Studies and Higher Biology.

Exam assessments during the pandemic

13. In March 2020 the decision was taken to cancel the exam diet in schools as a result of the Coronavirus pandemic. The SQA introduced the alternative certification model (**ACM**) in which schools were required to estimate a pupil's final grade based on their actual and inferred attainment. Teachers were asked to infer what the likely end point for attainment would be had the students continued to make progress. Grades produced under the ACM had to be submitted to the SQA by May 2020 (C175).
14. The school submitted the following grades for the young person: Higher English (C), Higher Modern Studies (B) and Higher Biology (C). The school took into account the young person's medical conditions and the impact they had on her when assessing her grades for Higher Biology and English (witness B RB100, para 86). They took a holistic approach and positively marked her (witness B, RB093, para 59 and email from Headteacher, C169).
15. Prior to the national lockdown in March 2020 the young person submitted little work to the school.
16. The school was not provided with information from the young person's private tutors in March 2020.
17. In English, there was insufficient internal evidence to estimate much above what was offered from the prelim exam and the young person's folio of work, due to her school absences. Her prelim results were 33% (which is an E grade). Her folio was estimated at 12/15 for each essay and this created a combined total of 47%, which resulted in the C grade. Two pieces of work later supplied by the young person's private tutor did not give an indication of what she could achieve in an exam but did show that she was capable of understanding the texts well (C169). A second piece of work supplied by the private tutor on the Scottish text did not follow the format for the exam.
18. In Biology, the evidence relied upon was taken from the young person's prelim exam and two unit tests, which resulted in the C grade. The school was not provided with Biology homework set by the young person's private tutor to consider as part of determining her Biology grade.

SQA appeal

19. In August 2020 the SQA introduced an appeals process in respect of grades produced under the ACM and submitted to the SQA (C054). There were three grounds on which a presenting centre could submit an appeal. The second of these grounds was where 'a centre's internal review process may disclose that a candidate's estimate was affected by discrimination or other conduct by the centre that is unacceptable under the Equality Act 2010'. Any appeal had to be submitted by September 2020 and could only be made by the presenting centre, in this case the young person's school.
20. The claimant and the young person's mother (the parents) asked the school to submit an appeal in respect of the grades submitted for Higher Biology and English, on the grounds that inferred attainment had not included work completed with private tutors. The school declined to submit an appeal and the school's Headteacher confirmed this decision in an email to the young person's parents dated September 2020 (C025).
21. Schools were obliged to follow SQA Guidance (witness B, C087) and best practice when making grade estimations. This includes a responsibility to gather appropriate evidence. It is for the school to decide what evidence they are prepared to accept and review, such as work completed throughout the year at home or with a private tutor. The school needs to be able to authenticate this evidence. If they are unable to do so they may not include it when estimating grades (SQA Guidance, C103). The views of the private tutors, work the young person had completed with them and their markings were not incorporated into the young person's grade assessments as the school could not authenticate their work. The school wanted to use evidence which had been undertaken in assessment conditions or otherwise in controlled conditions to ensure the validity of the work being used to inform the estimates and to maintain national standards (witness B, RB091-092).
22. The two Higher English pieces, 'Street Car Named Desire' and 'Don Paterson Rain' had not been taken into account when the young person's grade had first been produced but were considered when the young person's parents were seeking an appeal (witness B, RB100 paras 83-84). The 'Don Paterson Rain' piece is normally completed in the final exam in timed conditions (witness B, RB071, para 28). Had the school taken these two pieces into account when estimating the young person's final grade it would have made no difference to the grade (Headteacher, C169 and witness B, RB095, para 65).

Private tutors

23. The young person was supported during the 2019/20 school year by tutors privately employed by her parents for Higher English and Higher Biology. The responsible body had no management responsibility or quality assurance remit in regard of their work. The private tutors are not listed on the General Teaching Council of Scotland's (**GTCS**) register. The GTCS is the independent regulatory body for teachers in Scotland.
24. As part of the introduction of the inferred attainment in the 2019/20 school session there was an SQA Academy course. All of the teachers at the young person's school attended the course. It is not clear whether the private tutors attended (witness C, RB073).
25. Prior to the national lockdown in March 2020, there had been no request in the 2019-20 school session by either of the young person's parents for the school to engage directly

with the private tutors (witness B, RB088, para 40) and there was no agreement that the private tutors would be part of the school support plan (witness B, RB091, para 50).

Complaints

26. The young person's parents submitted a complaint to the responsible body, which was received on September 2020, regarding the school's decision not to submit an appeal. Witness C was appointed to investigate the complaint. By letter dated October 2020 (RB034-038) the parents were advised that their complaint was not upheld. The parents then invited the Scottish Public Services Ombudsman to consider their complaint. By letter dated February 2021 they were advised that the complaint would not be taken forward (RB039).

Support in school

27. The young person was part of the school's targeted support group which is a group of pupils who have been identified and are known to the curricular leaders of the school and staff who teach them as being at risk of not achieving what they could attain without additional support. Attainment of the pupils in this group is tracked as part of the school leadership team meetings (RB077-78).

28. A Child and Young Person Planning Document or GIRFEC (**the GIRFEC**) is in place for the young person (C156-168), which commenced in November 2017 and was formally reviewed in June 2018. The GIRFEC records a number of actions to be taken by the school to support the young person (witness B, RB078-79). This does not include the young person being assessed for the provision of local authority tuition.

29. The decision on whether a pupil is entitled to local authority auxiliary tuition is not taken by the school but by the responsible body. The responsible body did not advise the claimant that the young person would not be eligible for local authority auxiliary tuition (RB 081).

30. The young person was not an external learner nor was she home-schooled. In recognition of her additional support needs, the school provided her with a part time timetable and a range of supports, which included access to the schools Nurture Hub and school library (RB079).

31. The part time timetable was provided to allow the young person to have sufficient rest between classes and to meet her additional support needs; it was not designed to allow her to engage with a private tutor during what would otherwise be school hours, although the school were aware that this was happening (witness B, RB081 and RB083). The young person had the opportunity to leave school for private study. If she engaged in private tuition during this time this was at the discretion of her parents.

32. From October 2019 onwards the young person was expected to attend at least three (out of six) periods of her English classes, split across her two teachers. Attempts were made by the school to agree the reduced school timetable following a meeting between witness B and the young person's parents in October 2019. Despite a number of prompts, this was not agreed by the parents until January 2020. Between January and March 2020 the young person only attended two of the double English periods and otherwise self-certified (witness B, RB086).

Reasons for the Decision

General remarks on the evidence

33. The claimant appeared an earnest and committed parent, who was focused on securing the best outcomes for his daughter. He was strident in his approach and produced comprehensive documentary evidence in support of his claim, which demonstrated some knowledge and understanding of this process. At times we were not persuaded on his interpretation of the language or content of some of those documents. For example, he interpreted the SQA Guidance (C100) in stricter terms than the language suggested when it came to the school's discretion on whether to take into account work completed by home (private) tuition. Witness A is also a steadfast and committed parent. We did not doubt their focus as parents and their concern for their daughter.
34. The witnesses for the responsible body gave their evidence in an objective, consistent and balanced manner. We were able to attach some weight to this. They were qualified and experienced in their respective fields. Witness B has known the young person since taking up position in the school in September 2019. Before then she had a number of detailed hand over meetings with the acting Depute when she was informed of those pupils who required targeted support or had additional support needs. She was familiar with the young person's disabilities and understood her additional support needs. She had also regularly communicated with the parents and had met with them in October 2019. Witness C was more at arm's length as the investigating office into the complaint raised by the parents. She was able to provide us with a clear sense of the depth and quality of her investigation and an independent perspective on the approach taken by the school to the ACM process.
35. We benefitted from the provision of written witness statements for all of the witnesses and none of the witnesses deviated in any significant way from their statements/reports. Where there were areas of material disagreement between the witnesses for the claimant and the responsible body, we preferred the evidence of the responsible body.

Preliminary matter: Timing of the claim

36. The responsible body asked us to treat the claim as 'time-barred' in terms of rule 61(4), which provides:
- (4) The First-tier Tribunal shall not consider a claim unless the claim has been received before the end of the period of six months beginning when the act complained of was done. Conduct extending over a period is to be treated as done by the end of that period.
37. Rule 64(5) provides:
- (5) The First-tier Tribunal may consider a claim which is out of time if in all the circumstances of the case, it considers that it is just and equitable to do so.
38. This was not raised by the responsible body until the week before the hearing. The claimant was nonetheless able to provide a persuasive response at the hearing.

The time of the act complained of - section 61(4)

39. The responsible body submits that time in this case started to run on 29 May 2020, being the date by which the SQA required estimated grades under the ACM to be submitted. On that calculation the claim should therefore have been submitted by 28 November 2020. It would not be just and equitable to allow a claim lodged three months late, which is not an insignificant amount of time. The longer the time that passes the more it impacts on witnesses' memory and recall.
40. The claimant submits that the claim is directed at the failure by the responsible body in the stage 1 and 2 complaints to acknowledge discrimination and to make an appeal to the SQA. This first occurred on 3 September 2020; in which case the claim was lodged in time (on 25 February 2021). In any event, it would be just and equitable to allow the claim. Many factors affecting the case were outwith the claimant's hands. The process of appeal was not clear; initially it was thought that pupils could appeal and then this was changed. The stage 1 and 2 complaints moved very slowly. Inevitably, all of this was hampered by the national lockdown and the impact of the pandemic.
41. We were satisfied on the calculation of the claimant that the claim had been lodged in time. However, had we not been persuaded here, we would have been satisfied that it was just and equitable to allow the claim to be received late. We explain why we would have reached this view below.

Just and Equitable – section 61(5)

42. This test has been considered on appeal by case law from the Employment Tribunal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, the Court of Appeal. Lord Justice Leggatt explained how the test should be interpreted (at paras 18-19 and 25):

“18. First, it is plain from the language used...that Parliament has chosen to give the...tribunal the widest possible discretion. [unlike some other time bar legislation], this legislation]...does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list....[T]he only requirement [is] that [the tribunal] does not leave a significant factor out of account...”.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)....

25. [In response to an argument that the claimant requires to advance a good reason for the lateness and some evidence to support that reason].., I cannot accept that argument. As discussed above, the discretion given by [the legislation to the tribunal].. to decide what it “thinks just and equitable” is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are

relevant matters to which the tribunal ought to have regard..”.

43. The principles set out in *Abertawe* are based on, among others, a Supreme Court case, namely *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at para 75. For these reasons, *Abertawe* should be regarded as the correct modern authority.
44. All rules, including rule 61, must be interpreted in line with the overriding objective in rule 2. Rule 2(2)(c) makes provision for procedural equal footing, which has application here given the fact the claimant is unrepresented.
45. If we accept the responsible body’s calculation, the claim is delayed by three months. In the context of the pandemic, the national lockdown and school closures this is not a significant period. The responsible body did not suffer any prejudice and there is no question of it having affected the reliability of the witnesses, nor the cogency or volume of evidence available. In all of the circumstances of the case, it would have been just and equitable for us to have considered the claim in time.

General remarks on the legal test (2010 Act)

46. Section 85(2) provides that the responsible body of a school must not discriminate against a pupil in a range of ways, which include the way it provides education for the pupil or by subjecting the pupil to any other detriment. The claimant relies on three types of discrimination.

(1) Failure to make reasonable adjustments (section 20)

47. This duty can take three forms. The one relied on by the claimant is the first requirement. Section 20(3) provides:

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

48. The terms ‘provisions’, ‘criterion’ and ‘practice’ (**PCP**) are not defined in the 2010 Act but should be construed broadly. It is not always necessary to identify which of the three applies to the particular policy being challenged.
49. Section 212 of the 2010 Act defines ‘substantial’ as ‘more than minor or trivial’, which suggests the disadvantage should be of some substance, although there is a relatively low threshold when determining this. There is no sliding scale to be applied here. Whether a disabled pupil is at a substantial disadvantage or not will depend on the circumstances of the case.
50. The Equality and Human Rights Commission, Technical Guidance for Schools in Scotland (**Technical Guidance**) states:

The duty is ‘to take such steps as it is reasonable to have to take to avoid the substantial disadvantage’ to a disabled person caused by a provision, criterion or practice applied by or on behalf of a School, or by the absence of an auxiliary aid or service. (p63, para 6.4)

51. The Technical Guidance provides a list of factors that are likely to be taken into account when considering what adjustments it is reasonable for a school to have to make (p65-66) and these include:

- The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- The effect of the disability on the individual
- The need to maintain academic, musical, sporting and other standards
- The interests of other pupils and prospective pupil

The reasonable adjustment

52. The reasonable adjustment which the claimant says the school should have made was to have included evidence from the two private tutors when estimating the young person's grades under the SQA ACM process in Higher Biology and English (case statement C006) and to gather external learning evidence (C011), and include private tutors in the discussion about what grades the young person should receive (C015). The claimant submits that the school's failure to do this meant the young person was treated unfavourably and she was placed at a disadvantage. He describes the provision of private tutoring as part of a blended process of internal (school) and external (private tutors) learning. The responsible body do not accept that this model of learning was agreed by the school. Witness B explained that the young person was not entirely home-schooled or a home attender (RB071, para 26). The school did not view the private tutors as education providers and did not consider the young person to be an external learner (RB093, para 57).

53. The school made a number of reasonable adjustments to support the young person in her education. The GIRFEC plan was in place (C160) and the range of adjustments were agreed in November 2017. These included the provision of a part time timetable. Further arrangements were put in place in June 2018 after the young person was diagnosed with CFS (GIRFEC Plan, C166). These include an agreement that teachers would be informed of her current medical status, requesting feedback on her progress and providing her with work to catch up. The young person was to have a soft start; she was to have permission to leave school during non-contact periods where agreed to go to the central library or a coffee shop; and her parents were to review the young person's timetable before she returned to school in August 2018 and inform the school if it was to be reduced further in any way. It was also agreed that before the young person returned to school in August 2019, her parents would review her timetable with her (witness B, RB078).

Local authority tuition

54. The GIRFEC plan did not make any provision for tutors. The claimant stated that this had been discussed at the meeting in November 2017 when he was advised that the young person was not eligible for local authority tuition. He stated that those at the meeting were then informed by him and witness A that they would therefore engage private tutors (C002, para 1.5). The responsible body denies this. There is no record of discussion in the GIRFEC plan and no record that a referral to the additional support for learning service was made, which would have been necessary to determine if the young person qualified for local authority tuition. Witness B spoke to the Depute Head who chaired the meeting in November 2017, who stated that the parents were not told that

the young person would not be eligible for local authority tuition. Witness B also spoke to the Guidance Teacher, who stated that she had not advised the young person's parents that she would not receive a tutor from the local authority, at the later meeting in June 2018 (RB081, para 21).

55. We are satisfied that all reasonable steps were taken by witness B to investigate this. In the absence of a reference in the GIRFEC, or any other school record, or contrary independent evidence which can be tested, we accept that there is little or no evidence to suggest that the school were asked to consider the provision of local authority tuition.

Private tuition

56. Two private tutors were employed by the young person's parents to support her in Higher Biology and English. It is not uncommon for parents who can afford to do so to employ private tutors in this way to supplement school learning.

57. Neither of the witnesses for the responsible body were able to be satisfied on the teaching credentials of the tutors. Witness C was concerned that neither of them were registered with the GTCS. As well as this, it was not known if they had attended SQA training on inferred attainment; whereas all of the school teachers had. Witness C described an inherent risk to the integrity of any assessment system which allows private tutors to override a school's judgement. We agree. It is critical to be able to authenticate work which is completed at home. The SQA is clear that if something is submitted by a pupil it must be capable of being authenticated; it must be clear that it reflects their own work. If it is not possible to authenticate work produced at home with the support of private tutors the school must rely on the professional judgement of its teachers. We say more on this below.

Part-time timetable

58. In October 2019 witness B met with the young person's parents when she informed them that it was important that the young person continued to have some regular contact with her teachers each week. There were two English teachers at that time. Witness B explained the importance of attending the lessons of both teachers. She advised that the young person needed to attend at least three periods (out of six) each week at school. Further support was offered by reducing the number of periods she was attending in Biology and Modern Studies by one period each to balance her timetable and not add additional pressure. The parents were provided with a draft timetable which they were asked to agree. They were informed that the school needed to know when the young person would be in school in order to discharge their health and safety obligations (witness B, RB082, para 23). Despite prompts for a response from the parents, the timetable was not agreed until January 2020 (RB082, para 36)

The inferred attainment process: predicted grades

59. The main examples of external learning which the claimant relies on are two pieces of work produced in English which were not considered as part of estimating the young person's grade but which were looked at subsequently when the parents requested that the school appeal her grades. Witness B explained that had these pieces of work been considered it would not have altered the grade awarded (RB100, para 84).

60. The responsible body submits that the young person was not put at a substantial disadvantage by the school's implementation of the ACM. Any disadvantage which she suffered was as a result of her not having returned as much work to school (notwithstanding that she had private tutors who were supporting her at home) and there not being an agreement on the part-time time table, until January 2020. In the event we disagree with that position, the responsible body submits that the reasonable adjustment sought by the claimant was not reasonable.

Authentication

61. When determining a pupil's grade under the ACM, the school would only be able to use course work and assessments which have been set and marked by the school's teachers (C093). The question is whether that is a reasonable approach to have taken in this case. The claimant suggests that the school should have taken steps to authenticate the external work. We do not agree.

62. In order to maintain academic standards it is critical that a consistent, fair and transparent process of assessment is employed, which is capable of being robustly tested. The SQA guidance provides some discretion to the school on whether it could consider external evidence. However, in this case, the work of the tutors could not be authenticated. The school had no control over what the tutors were teaching the young person in the two subjects. The tutors' teaching experience and training were unknown. They were not registered with the professional regulatory body for teachers in Scotland. They are not employed by the responsible body. Furthermore, little or no work being completed with the private tutors had been handed in to be marked by the school (witness B, RB091).

63. We accept that the private tutors may know the young person well. However, we agree with the Headteacher's position that taking their advice into account in formulating estimates may be discriminatory towards other pupils in the school who are not in a position to secure the support of private tutors. Private tutors can supplement but not replace the delivery of learning and teaching in school. It is therefore critical that their teaching credentials and methods are consistent with the standards, systems and approaches taken by the school before their work with the young person can be taken into account. This was not the case here. The concerns of the school are legitimate concerns.

64. The English teacher raises concerns about the English tutor (C169). Witness B raises concerns with the language used and the way in which the Biology tutor expressed herself in the email to the school (page C201). There was no way of knowing whether the work submitted had been conducted under exam conditions, or supervised. The English teacher's comments on the two pieces of work lodged (C169) show that they were not completed in a manner which made them suitable to be taken into account. Witness B explained that the evidence used to estimate the grades had either been completed in assessment conditions or in controlled conditions (RB091, para 51). The work completed with the tutor did not follow the format of an exam in English. It was a collection of written notes, they did not follow the command words, there were no skills questions nor did they follow the standards of SQA. The school was not provided with the instrument of assessment or the marking scheme in order to support the work.

Conclusion on reasonable adjustments

65. Taking into account work produced by the young person with her tutors and/or taking into account the view of her private tutors was not reasonable as it would undermine the legitimate objective of maintaining academic standards. Other reasonable adjustments were in place, including the part-time timetable. The school demonstrated an ongoing commitment to supporting the young person to achieve her academic potential. There was regular communication between the school and the claimant, witness B had met with the young person's parents and had engaged with CAMHS.
66. Witness C explained why taking the views of private tutors into account is problematic from an equity perspective (RB074); a concern shared by the Chief Education Officer in the second stage response to the complaint (C027), the Headteacher and witness B. Private tutoring was not part of the young person's GIRFEC plan, nor did the school consider this to be necessary. The fact that not all families have the financial means to engage private tutors is relevant to an assessment of the reasonableness of the adjustments sought by the claimant. Taking into account the views of private tutors or work produced with those private tutors would have been far beyond the normal approach taken by a state school. When estimating pupils' grades under the ACM, the school did not include any local authority auxiliary tutors in the discussions (witness B, RB093). The claimant referred to the absence of local authority auxiliary tutor support but the young person was in no worse a position in so far as producing grades under the ACM as those pupils who have such support.
67. Had the two pieces of English work been taken into account this would not have been an effective adjustment as it would not have improved the grade. This goes to the very core of what is a reasonable adjustment – it ought to avoid the disadvantage. On the question of grading had the tutors been spoken to, their view would not have been taken into account as the school would have placed reliance on the judgement of its own teachers. Accordingly, this proposed adjustment would also not have been effective.
68. We are satisfied in all the circumstances of the case that the school took a holistic approach when determining what grades to estimate for the young person and positively marked her by giving her higher grades than those she would have received if the school had only taken into account the evidence before it. The reasonable adjustments contended for are at odds with the school's legitimate objective of maintaining national academic standards; they do not sit well in the context of a state school which has pupils who come from a variety of financial backgrounds; and were unnecessary in light of the approach being taken by the school to estimating the young person's grades. The claim on reasonable adjustments is dismissed.

(2) Indirect discrimination (section 19)

69. Section 19 provides:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

70. The EHRC Guidance, *What equality law means for you as an education provider: Schools (EHRC Guidance)* provides the following guidance regarding what is a proportionate means of achieving a legitimate aim (page 15).

To be legitimate the aim of the provision, criterion or practice must be legal and non-discriminatory and represent a real objective consideration. In the context of School education, examples of legitimate aims might include:

- Maintaining academic and other standards.
- Ensuring the health and safety and welfare of pupils.

Even if the aim is legitimate, the means of achieving it must be proportionate. Proportionate means 'appropriate and necessary', but 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim.

The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the justification must be. In a case involving disability, if you have not complied with your duty to make relevant reasonable adjustments it will be difficult for you to show that the treatment was proportionate.

Provision, criterion or practice

71. The claimant submits that the method of assessing grades was discriminatory for the young person in relation to her protected characteristic of disability and that the implementation of the ACM was a PCP carried out by schools (C005-6). The responsible body submits that when the school was determining a pupil's grade under the ACM, it would only be able to use course work and assessments which have been set and marked by the school's teachers (witness B email, C093). The claimant submits that this approach was indirectly discriminatory because, as a result of her disabilities, the young person could not present the internal evidence that her non-disabled peers could to inform the estimated grades, putting her at a disadvantage. The external evidence relied upon is the work completed with the young person's private tutors.

72. The responsible body accepts that the school's implementation of the ACM and only using evidence set and marked by the school's teachers to determine a grade under the ACM, amounted to a PCP.

Group disadvantage

73. The claimant did not produce any statistical evidence to support the contention that those who share the young person's disability would be placed at a disadvantage, compared to those who do not possess this protected characteristic, in terms of the school's approach to estimation of grades under the ACM. This is referred to as group

disadvantage. The claimant did not produce any expert or other evidence to support a finding of group disadvantage. Without evidence to this effect we cannot make a finding of indirect discrimination because it cannot be assumed that the impact of these disabilities would be the same on all pupils without evidence in support of this.

74. Even if we were satisfied on group advantage we are not satisfied that the young person was put at a disadvantage by the application of the PCP. If any disadvantage was experienced it is more likely that this was as a result of her not having returned as much work to school as necessary and there not being an agreement on the part-time timetable until January 2020, and lower class attendance. Furthermore, the responsible body did not take into account the evidence of any local authority tutors or private tutors in the ACM process for any pupils.

Legitimate aim

75. The responsible body's submission is that the PCP applied by the school was a proportionate means of achieving a legitimate aim. We agree. The PCP was applied to pursue the legitimate aim of maintaining and adhering to national academic standards (witness B, RB095, para 64). One key issue presented by work produced externally and which has not been set by the school is that of authentication as outlined by the SQA in its correspondence to the school (C171). Witness C also emphasises the importance of authentication (RB066-RB075).

76. Taking all of these factors into account, we decided that including work not set or marked by the school's teachers and factoring in the young person's private tutors' views of her learning, are not consistent with the requirement to maintain and adhere to national academic standards. The responsible body sought to achieve this legitimate aim in a proportionate way because it did otherwise take into account the young person's disabilities and additional support needs when estimating her grades and in particular, when considering her inferred attainment under the ACM (witness B, RB100, para 86). The school marked the young person positively and she was not put at a disadvantage for not having handed in as much work.

77. A number of key factors were considered when assessing the young person's grades.

- a) One of the key pieces of evidence was the prelim results and when sitting these, the young person had the benefit of her Alternative Assessment Arrangements.
- b) The young person was attending school (although on a part-time timetable) which meant that the school had some evidence of her demonstrated attainment.
- c) The school had information about her prior attainment at National 5 level.
- d) The school and its teachers had been working with the young person throughout her secondary school career beginning in S1 and so she was well known to them.
- e) The school had as a resource when estimating the young person's grade in Higher English the principal assessor for the SQA.
- f) The school sought to find out more information about the professional experience of the private tutors by asking if they were GTCS registered or teachers at an education authority school.

Conclusion on indirect discrimination

78. Taking all of these factors into account we are not satisfied that the young person was subjected to indirect discrimination. The claim on indirect discrimination is dismissed.

(3) Discrimination arising from disability (section 15)

79. Section 15 provides:

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Disability

80. Parties agreed that the young person is a disabled person in terms of section 6 of the 2010 Act and that she has additional support needs. We are satisfied on the evidence that the young person has a disability and that she has additional support needs. Accordingly, section 15(2) does not apply. If section 15(1) is established then that will amount to discrimination.

The treatment

81. The treatment relied upon by the claimant is the failure by the school to take into account the private tutors' views and the work produced by the young person with her private tutors for Higher Biology and English when estimating her grades under the ACM process. We examine this legal test by considering the following questions.

Question 1: Did the responsible body treat the young person unfavourably because of an identified 'something'?

82. The 'something' here is the limited amount of available school work that could be taken into account by the school when estimating the young person's grades in the ACM process.

83. The meaning of the word 'unfavourably' was considered by the Supreme Court in the case of *Trustees of Swansea University Pension Scheme v Williams* [2019] ICR 230, SC where. Unfavourable means placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person but the threshold is relatively low. A broad view is to be taken when determining what is 'unfavourable' and the treatment at issue is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. However, treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous.

84. No comparator is required to establish a claim under section 15.

85. We were assisted by the judgement of Mrs Justice Simler in *Pnaiser v NHS England and another* 2016 IRLR 170, EAT, who considered the authorities and summarised the proper approach to establishing causation under section 15 at para [31]:

- (a) A tribunal must first identify whether there was unfavourable treatment ...No question of comparison arises.
- (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it.
- (c) Motives are irrelevant.
- (d) The tribunal must determine whether the reason/cause... is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

Question 2: Did that 'something' arise in consequence of the young person's disabilities?

86. The approach in *Pnaiser* was confirmed by the Court of Appeal in *Robinson v Department for Work and Pensions* [2020] IRLR 884 that it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

87. The claimant suggests that the school treated the young person unfavourably by assessing her grades without considering all the available evidence. As a consequence of her disability some of young person's attainment evidence was produced externally by the young person with her tutors. By insisting on assessing only internally-produced evidence the school placed her at disadvantage (C005). The responsible body contends that the approach taken by the school was the approach it was taking to determining grades under the ACM in general and was not being done because of something arising in consequence of the young person's disability. The necessary causation is not met.

88. We are satisfied that the young person was not treated unfavourably (by being given lower grades, as the claimant contends) because she had less internally produced evidence. When determining her grades under the ACM, the young person was positively graded despite the fact that the evidence available was less than might have been available for other pupils. Her disabilities and additional support needs were taken into account.

89. We accept that there was a period (between October 2019 and January 2020) when the young person's parents appeared to prioritise private tuition over attending school (although the claimant denies this), which had a bearing on the amount of school teaching the young person received. Her parents also decided that she should focus on one subject at a time prior to March 2020 (that subject being Modern Studies) (witness B, RB097, para 74), which resulted in there being less evidence available to the school to consider when estimating her grades in the other two subjects. Neither of these were something arising in consequence of the young person's disability but followed from her parents' decisions.

90. In conclusion, we are not satisfied that the school treated the young person less favourably because of something arising in consequence of her disabilities

Question 3: If the answers to questions 1 and 2 are yes, has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

91. Having answered 'no' the first two questions, we are not required to consider the final question but had we been required to do so we would have been satisfied that the treatment was a proportionate means of achieving a legitimate aim - for our reasons set out in the section of our decision entitled *Indirect Discrimination and Legitimate Aim*.
92. In addition to this, had the young person handed in work, set by her teachers, but which she had completed at home with the support of her private tutors, the school's teachers would have considered that work but prior to March 2020, very little work was being handed into school for Higher Biology or English (witness B, RB091).

Conclusion on discrimination arising from disability

93. Taking all of the above factors into account the claim on discrimination arising from disability is dismissed.

Additional Comments

94. **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.**
95. We recognise the impact the pandemic has had on school pupils in Scotland with the decision to cancel the exam diet and the introduction of the SQA ACM during the 2019-20 school session. This has led to disappointment for the young person and her parents. The young person may have raised her own appeal to the SQA had this right existed. We acknowledge the concerns of the Children and Young People's Commissioner that children and young people were not recognised as rights holders (C198). Based on the evidence before us, this may not have led to an improvement in her grades, but the young person may have felt her voice was more meaningfully heard.
96. We are pleased that the young person has had a more positive school experience during the 2020-21 session. We are grateful to her for sharing her views with us.