



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/21/0018

List of witnesses

For the claimant:

The claimant

For the responsible body

Deputy Head Teacher, school A - witness A
Principal Teacher Mathematics, school A – witness B

Claim

1. In this claim, the claimant argues that the responsible body has discriminated against the young person (his daughter) in its provision to her of education, contrary to s.85(2) and (6) of the Equality Act 2010 (**the 2010 Act**). More specifically the claimant argues:
 - a. that the responsible body should have provided maths tuition for the young person over a period from January to February 2020; and
 - b. that the responsible body failed to reach an adequate estimated grade for the young person's National 5 maths subject for academic session 2019-20.

Decision

2. The claim is dismissed since no unlawful discrimination under the 2010 Act has taken place.

Process

3. The claim was managed through a number of telephone case conference calls, between the legal member, the claimant and the responsible body's solicitor and by a series of directions. A preliminary decision allowing the claim to be considered out of time under rule 61(5) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of

Procedure 2018 (schedule to SSI 2017/366) (**the rules**) was issued in October 2021 (T084-091).

4. The bundle consists of T001-094, C001-134 and RB001-392. These page numbers include the written submissions of the parties, and the directions for these, but not the authorities lodged by the responsible body with their submissions. All of those authorities were considered.
5. A hearing took place on Cisco WebEx, an online hearings platform, in December 2021.
6. Written submissions were lodged and exchanged on dates agreed by the parties, and were available by mid January 2022. The tribunal then deliberated.
7. The legal member and the tribunal provided some assistance to the claimant during the course of the claim. This is in line with the overriding objective in rule 2 of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) (**the rules**), in particular rule 2(2)(c), which requires assistance to be provided to ensure procedural equality between the parties. Given the complexity of the 2010 Act and the different types of discrimination, it would not be fair and just to expect the claimant to marshal his evidence and arguments strategically in the same way as someone who is legally qualified. We do not mean any disrespect to the claimant in taking this approach, as he conducted the claim very diligently.
8. Examples of this assistance include: seeking the claimant's views on his claim withdrawal notice (case management call note at T078-081); suggestions on the structure and broad content of witness statements (case management call note at T092-093) and guidance on the structure of written submissions (but not on their content) (directions at T094). This is the kind of assistance envisaged by rule 2(2)(c), falling short of advocating the course the claimant should take, which is expressly prohibited.
9. **[This paragraph has been removed by the Chamber President for privacy reasons under rule 101(3)(b)(c) and (4) of the rules.]**
10. Finally on process, the claimant in his written submission refers to legislation and guidance which is not related to the 2010 Act. While such sources can be relevant to a 2010 Act claim, this is only where there has been conduct or omissions which meet the tests of less/un-favourable treatment or disadvantage (as defined below). As this is not the case here, we need not address those other sources.

Findings in Fact

General findings

11. The young person is 18 years old. The claimant is the young person's father.

12. The young person attended school A. She attended there from secondary year 1, commencing in August 2015. She left school at the end of academic year 2019-20, her 5th year of secondary school. She was removed from the school roll in August 2020.
13. The young person has been diagnosed with autistic spectrum disorder. She has problems with anxiety and mood, and sometimes presents with psychotic symptoms. She has been prescribed anti-psychotic and anti-depressant medication. **[Parts of this paragraph have been removed by the Chamber President for privacy reasons under rule 101(3)(b)(c) and (4) of the rules.]**
14. In April 2019 the young person was admitted to hospital A on a compulsory treatment order under the Mental Health (Care and Treatment) (Scotland) Act 2003. The young person was later discharged from hospital A and was then re-admitted in July 2019. She was then discharged from hospital A in December 2019. The responsible body was informed of the latter discharge in January 2020. She was re-admitted to hospital A in February 2020 and was again discharged in March 2020.
15. The young person started secondary year 4 in August 2018. At that point, she intended to undertake 6 Scottish Qualification Authority (**SQA**) Higher subjects. School A staff advised against this at the time.
16. The young person's attendance record at school A in secondary year 4 was 58%, and she was late in arriving in school 33 times.
17. The young person did not attend school A in secondary year 5.
18. Between December 2018 and March 2019 (during her secondary year 4 education), the young person attended school A for 31 half-days out of a possible 134 half-days.
19. The young person's low attendance record in secondary years 4 and 5 was caused by her mental health struggles.
20. The young person secured a grade A in SQA National 5 English and a grade C in SQA National 5 Maths, both awarded in August 2020.

Findings on the provision of education for the young person

21. Throughout the period between the young person's admission to hospital A in April 2019 and her re-admission in February 2020, staff at school A delivered both educational and pastoral support to her on a regular basis. This included tuition and regular contact with the young person's parents as well as ongoing input in progress review meetings at hospital A.

22. The responsible body put in place educational provision for the young person through its Interrupted Learner Service (**ILS**), beginning in January 2020, one day after becoming aware that the young person had been discharged from hospital A.
23. Tuition arranged through ILS began in January 2020. The last such tuition session took place in February 2020. This tuition consisted of two hours per week by a tutor, (**Ms W**), attending the young person's home. One such session was cancelled by the young person's parents. A total of four two-hour tuition sessions were delivered by Ms W.
24. Ms W set homework for the young person. Her tuition focused on the young person's English SQA National 5 subject. Neither Ms W nor the responsible body provided maths tuition to the young person in January or February 2020.
25. The responsible body instructed Ms W to provide maths work for the young person to complete and return. Some maths work was given to the young person by Ms W, but it was not returned.
26. The responsible body and Ms W agreed that ILS tuition would initially focus on English only. The reason for this was to ensure that the young person's portfolio of work (required as part of the SQA English National 5 curriculum to be submitted by March 2020 and worth 30% of the overall grade) would be completed and submitted on time. An internal deadline for completion of a draft of this portfolio (for marking and returning to the young person before submission to the SQA) was set by school A staff at March 2020. School A and Ms W agreed to turn to maths tuition after the submission of the English portfolio.
27. In March 2020, schools in Scotland were ordered to close due to the Covid-19 pandemic, and SQA examinations due to take place in May 2020 were cancelled.
28. In February 2020, prior to completion of the draft portfolio to school A, the young person was admitted to hospital A. The portfolio was not submitted to school A or to the SQA. In March 2020, school A was informed by the SQA that the portfolio assessment element for National 5 English had been cancelled, due to the Covid-19 outbreak.
29. Between January and February 2020, the young person struggled with the weekly two-hour tuition provided by the ILS tutor. During that period, one tuition session was cancelled by the young person's parents.
30. In February 2020, the young person's parents informed school A that ILS input for the young person should cease indefinitely as the young person had been re-admitted to hospital.
31. In January 2020, the young person's mother informed school A staff that a private maths tutor (**Mr H**) had been organised by her parents. Mr H no longer teaches in secondary schools.

32. Mr H delivered four one-hour sessions of maths tuition to the young person during February 2020.
33. School A staff did not consult Mr H when considering the young person's refined grade for National 5 maths.

Findings on school A's calculation of the young person's National 5 maths grade

34. During secondary year 4, the young person was working on Highers, including in maths. By the end of secondary year 4, in her end of year report, the young person's target maths Higher grade was a C. Since she was not producing or covering enough material to pass the course, her working grade was not entered in her end of year school report (RB027).
35. During her secondary 5 year, and while in hospital A, the young person received teaching on maths from a teacher, organised by the responsible body (**Ms S**). That teaching was delivered between August 2019 until December 2019. A detailed tabular log of the subject matter studied over that period, the tuition learning intentions, success criteria, evaluation of learning and pupil views on learning was produced by Ms S (RB082-RB089).
36. During the period from August to December 2019, the young person's level of achievement and engagement in maths while in hospital A fluctuated. Sometimes she did not attend for the whole lesson. Sometimes she was not well engaged or struggled to concentrate. On other occasions, she engaged very well.
37. Around mid-December 2019, the decision was made (with the agreement of the young person's parents) that she would switch from aiming to take Highers in English and maths to aiming for National 5 awards in those subjects.
38. Due to absences from school (as discussed above), the young person received only five lessons on National 5 maths content (between 3 and 18 December 2020). This contrasts with five lessons per week, which is the usual contact time.
39. If the young person had continued working on National 5 maths at the same rate as she had been in December 2020, she would have been unlikely to have passed her National 5 maths assessments.
40. In accordance with normal process, school A submitted to the SQA estimated grades for the young person in maths (grade C) and English (grade B). These estimated grades were submitted in March 2020, prior to school closure announcements caused by the Covid-19 pandemic.

41. In April 2020, the SQA advised Scottish schools of the amended process for grading pupils, which involved schools submitting a refined grade for each SQA subject for each pupil. That refined grade would form the basis for the SQA's consideration of final grades.
42. The refined grading process was new, and different to the estimated grades process. The refined grade process involved consideration of a number of factors, namely: professional judgment, knowledge of pupils' work, demonstrated attainment and inferred attainment. New refined bands were identified (19 instead of the usual 9) and candidates were required to be ranked within those bands.
43. The SQA also required schools to focus on other sources of data, where data from performance in examinations and coursework were not available for a pupil.
44. In considering the young person's refined maths grade, school A staff took into account the following:
 - a. Ms S's detailed log of the young person's maths work from August to December 2019 while in Hospital A (RB082-RB089);
 - b. historical data from her secondary schooling record (focusing on secondary 4 and 5);
 - c. classroom teacher knowledge of the young person's maths ability;
 - d. information from Ms W on how the young person was coping with learning generally;
 - e. the need for the young person to have additional time for assessments, separate accommodation and supervised breaks, due to her disability.
45. The refined grading process within school A was quality assured in a number of ways, including checking with departmental staff, the Principal Teacher, Support for Learning and by witness A.

Reasons for the Decision

46. There are four main forms of discrimination under the 2010 Act: direct discrimination (s.13); discrimination arising from disability (s.15); indirect discrimination (s.19) and failure to make reasonable adjustments (s.19-20).
47. It is not completely clear whether the claimant is relying on all forms of discrimination or only on discrimination of the reasonable adjustments and indirect kinds. Given that the claimant is unrepresented, as noted above, some flexibility of approach is required. The responsible body's representative addresses all types other than direct discrimination. We will deal with all four.

48. Our task is not to decide on a disputed complaint. We may only decide whether or not unlawful discrimination under the 2010 Act has occurred. That means that we need to apply the evidence and facts to the legal tests for discrimination. In addition, the case law makes it clear that we need not decide on every point and argument made by each party. Indeed, brevity in decision reasons has been commended by the appeal courts. We therefore concentrate only on the main points and arguments made in the claim.
49. The young person clearly meets the definition of disability under s.6, as is amply demonstrated by our findings at paragraph 13 above. This is not in dispute.
50. There were no credibility or reliability issues with any of the three witnesses. All gave their evidence in a reasonable and diligent manner.

The law

51. For all four main types of discrimination under the 2010 Act, one of two similar concepts are crucial. These concepts are:

Less favourable/unfavourable treatment (direct and disability discrimination)

Disadvantage (indirect and reasonable adjustments discrimination)

52. The similarity between these two concepts can be seen in case law and in guidance. The Supreme Court recently discussed the concept of 'unfavourable treatment' under s.15 in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 (**Williams**). Lord Carnwath (delivering the unanimous opinion of the court), adopted the following definition of 'unfavourably' from the Court of Appeal's judgment:

... it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person ... The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life.

Lord Carnwath goes on, at para 27:

...in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions..

53. *The Technical Guidance for Schools in Scotland* published in 2014 by the Equality and Human Rights Commission (**the Technical Guide**) indicates that treating someone 'unfavourably' means putting that person at a disadvantage (paragraph 5.44). Here, the Guide makes reference back to an earlier passage, at paragraph 5.21:

'Disadvantage' is not defined in the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something about which a reasonable person would complain – so an unjustified sense of grievance would not amount to a disadvantage. A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently.

54. The content of the Technical Guide in this area was approved by Lord Carnwath in *Williams* (paragraph 27).
55. There are other parts of the definitions for each of the four types of discrimination. However, as explained below, we conclude that the young person was not treated less/un-favourably and was not put at a disadvantage by any of the actions, omissions, policies or practices of the responsible body. For this reason, we concentrate on these concepts.
56. It is clear from the *Williams* case and the Technical Guide that 'unfavourable treatment' and 'disadvantage' are to be treated as similar concepts. The Technical Guide refers to 'detriment' as being a similar concept to 'disadvantage'. For ease of reference, we will use the term 'detriment' when referring to either 'unfavourable treatment' or 'disadvantage'.
57. For a relevant detriment to be caused to the young person, that detriment has to result from (a) treatment by the responsible body (under s.13 and s.15 of the 2010 Act) or (b) as a result of a provision, criterion or practice (**PCP**) applied by the responsible body (under s.19 and 20-21 of the 2010 Act).
58. Taking these two points (detriment and caused by the responsible body), we use the concept below of 'relevant detriment'. We now turn to apply these concepts to the relevant facts for each of the main areas of the claim, namely (1) absence of maths tuition and (2) adequacy of refined maths grade calculation.
59. It is clear that the issues raised in this claim fall within s.85 (2) and (6) of the 2010 Act, providing jurisdiction for this Tribunal to deal with them under schedule 17, Part 3 of that Act.
60. We turn to the burden of proof. The initial burden is on the claimant to establish a case on the face of it, and if he does so, the burden then shifts to the responsible body (2010 Act, s.136, as discussed in the Explanatory Notes to the Act, para 443).
61. One point which is loosely connected with the concept of burden of proof emerged in this case, both in the evidence and in submissions. The duties in the 2010 Act to avoid discrimination fall on the responsible body, not on the claimant. This means that the claimant need not, in law, explain why he did not act in a particular way. For example, it

is suggested that he could have pressed school A staff to provide maths tuition at the time. This is not a valid point. It is for the responsible body to comply with its duties irrespective of anything a parent does or does not do. From a practical point of view also, this argument is flawed: the claimant would have been facing a very difficult period in January and February 2020, given the fragile state of the young person's mental health. It is not reasonable to expect him to have, in that situation, been able to contact school A staff to ensure that they were providing adequate education for the young person. We therefore reject any suggestion that the claimant ought to have done more, both for legal and practical reasons.

62. The claimant has not established sufficient facts pointing to a breach of any of the duties in the 2010 Act having occurred. This means that the burden of proof has not been satisfied by the claimant. We will now explain why, in each of the areas of the claim, we have reached that conclusion.

(1) Absence of maths tuition

63. The claimant argues that school A staff (and therefore the responsible body) ought to have put in place face-to-face maths tuition for the young person in January - February 2020.

64. The responsible body argues that this would not have been a good idea, since the ILS tuition had to concentrate on English, in order that the (at the time) required English portfolio could be submitted to the SQA. They argue that the young person would not have been able to complete her portfolio by the deadline, had the ILS tutoring been split between maths and English.

65. In our view, the responsible body's approach to this matter is reasonable and justified. There was a clear strategy in place for staggering the English and maths tuition for the young person at the relevant time. There was close communication between Ms W and school A staff.

66. The window of opportunity for ILS tutoring was narrow (between January 2020 and February 2020) and the responsible body put in place four sessions (one was cancelled, so would have been five) in that narrow window. In terms of volume, and given the evidence of the limitations on the young person's learning capacity at that time, it seems to us that the addition of maths tuition alongside English teaching would have been likely to be detrimental to the young person's educational progress.

67. The strategy of dealing with ILS teaching of English first (to get the portfolio completed) before turning to maths was a sound one. No-one could have predicted that schools would close in March 2020 due to a global pandemic, or that the young person's mental health would deteriorate in February 2020, leading to a cessation of ILS tuition. This means that school A staff could reasonably expect to be able to carry through this sequential teaching strategy.

68. Coming to relevant detriment, as defined above, the absence of any maths tuition being provided by the responsible body was not a denial of an opportunity; in fact, it was a necessary step to attempt to safeguard her educational progress and mental health. This absence of tuition is not something about which the young person can reasonably say that she would have preferred to be treated differently.

69. We can detect no relevant detriment here.

(2) Adequacy of refined maths grade calculation

70. We will deal with this issue in two parts: (a) consultation with Mr H; and (b) maths grade calculation generally.

(a) Consultation with Mr H

71. The claimant argues that school A staff, when estimating the young person's grade, ought to have taken into account information from Mr H, the young person's private maths tutor.

72. The responsible body argues that for a number of reasons this would not have been appropriate, and would not have made a difference to their estimated maths grade assessment for the young person.

73. We do have a concern about the approach of the responsible body in this matter. The evidence indicates that a private tutor would never be consulted in a situation where a grade requires to be estimated. We are not convinced that this approach is legally sound. The relevant SQA guidance does not prohibit information like this being taken into account. A policy of never taking such a step, whatever the circumstances, strikes us as too rigid. Rigid public body policies where there is no room for exceptions are usually unlawful.

74. However, we do need to consider the value and impact of Mr H's evidence in this case.

75. Mr H did not give oral evidence. He did submit a signed statement (C111). There is also an e-mail from him to the young person's mother dated February 2020 (T032). However, as he did not give oral evidence, these documents can only be treated as having limited evidential value. It was not possible to question Mr H on his views. This is important, as the basis for his views is not clear from either document. He asserts in both the e-mail and statement that the young person is not operating at C grade level in National 5 maths, but instead should be able to secure an A grade. There is no indication of why he takes that view. He does not refer to examples of any work carried out by the young person, nor is there any indication that her work was graded by him, or the conditions under which any grading was carried out.

76. Further, while we accept that Mr H is a very experienced maths tutor, he does not teach in secondary schools, and it is not clear how long ago he did this. This seems to us to be important, since knowledge of up to date assessment criteria (even before it was radically changed for academic year 2019-20 due to the pandemic) is logically critical for a reliable assessment of the level of a pupil's performance in national qualifications.
77. Laying these concerns aside, Mr H's view in his signed statement is equivocal. He refers (in paragraph 3) to tutoring in 2019, and when he comes to state his view on the level at which the young person is performing, he says that she 'could achieve an "A-pass" at NAT 5 level.' He goes on to refer to her mental health relapse, a reference to her becoming ill in February 2020. In saying that the young person 'could' achieve an A, he is not saying she is likely to, or how high that likelihood is. These are some of the points that could have been teased out in oral evidence.
78. Taking all of this together, there is insufficient evidence available to us to allow us to conclude that the lack of consultation with Mr H represents a relevant detriment. It is not possible to conclude, even on an on the face of it basis, that this represents the denial of an opportunity.
79. Finally, we refer to the volume and status of the evidence school staff had gathered (see finding in fact at paragraph 44 above). In this context, even if a conversation had taken place between school A staff and Mr H, the views of a private tutor who had taken the young person for four one hour maths sessions, is unlikely to have had an impact such that serious consideration would have been given to increasing the estimate. The young person could not reasonably say that she would have preferred to have been treated differently.
80. We can detect no relevant detriment here.

(b) Maths grade calculation generally

81. While the main thrust of the claimant's argument about the calculation of the young person's refined maths grade is around lack of consultation with Mr H, there is a wider attack on the grading. There is mention, for example, of the lack of consultation by school staff with Ms S, the young person's tutor while in hospital A from April to December 2019.
82. Again, in order to give the claimant, as an unrepresented party, the benefit of the doubt, we have considered closely the evidence on how the refined maths grade was reached.
83. Given the range of material taken into account, and the process applied by school A (in the context of the relevant SQA guidelines), in our view, a robust process was undertaken.
84. It is clear from all of the evidence that the young person was operating at a C grade in National 5 maths during academic session 2019-20. This is clear from witness B's

detailed analysis of nine pages of notes provided by Ms S, the young person's teacher at hospital A (RB082-090 – see witness B's analysis in his statement at RB255-256). We also note witness B's evidence of the fact that a pupil who is aiming for a Higher in maths may not (due to the differences in the curricula) be able to simply move down to perform at National 5 level, on the basis that it is easier. Different knowledge (not just knowledge at a different level) is required for National 5 maths than for Higher maths.

85. We do not doubt that if the young person had been mentally healthy, she would have been capable of performing at a higher level. But, we have to take account of the strong evidence suggesting that, due to her mental health issues, she was struggling to perform at National 5 level by the end of 2019. Due to a combination of concentration on English tuition, the relapse in the young person's mental health and the impact of the Covid-19 pandemic, this position did not improve between January 2020 and the submission of the refined grades by May 2020.
86. The refined grade assessment process was robust and fair, based on the evidence then properly available to school B. This means that there was no denial of an opportunity of a better process. The young person could not reasonably say that she would have preferred to be treated differently.

87. We can detect no relevant detriment here.

Alternative analysis

88. If we are wrong on any of our analysis above, the outcome of this claim would have been the same. This is because even if there was a detriment to the young person as a result of any of the above, the claimant would not have been able, on the evidence available, to meet the tests for the four discrimination types.
89. For direct discrimination (2010 Act, s.13), the young person was, in no sense, treated less favourably than a young person who is not disabled. Indeed, the reverse is the case.
90. For discrimination arising out of a disability and indirect discrimination, even if the other parts of the test were met, it is clear that any unfavourable/disadvantageous treatment would have been justified, on the basis that the treatment or PCP was a proportionate means of achieving a legitimate aim (s.15(1)(b) and s.19(2)(d)).
91. In both areas covered above, the responsible body has produced sound reasons for its approach (as explained above in each case). These reasons demonstrate proportionate steps taken to educate and support a young person with a disability, who was struggling to cope through a period of serious mental illness (such education qualifies as a legitimate aim).

92. Finally, on reasonable adjustments discrimination (ss. 20-21 of the 2010 Act), and bearing in mind that this duty is anticipatory in nature, in our view reasonable steps were taken to avoid any disadvantage. It is worth noting that the obligation is not to avoid disadvantage, but to take reasonable steps to do so. In the provision of tuition (both in Hospital A and through the ILS service) and in pastoral support offered, the responsible body took steps which were reasonable to avoid any disadvantage to the young person. Those steps are explained in both areas explored above.