**DECISION OF THE TRIBUNAL**

FTS/HEC/AC/22/0157

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| **Witness List:**  **Witnesses for Claimant:**  The Claimant, parent of the child  **Witnesses for Responsible Body:**  Educational Psychologist (Witness A)  Head Teacher (Witness B)  Deputy Head Teacher (Witness C)  Quality Improvement Officer (Witness D) |
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**Claim**

1. This is a disability discrimination claim. The claimant alleges the responsible body breached its statutory duties under sections 15 (discrimination arising from disability) and 19 (indirect discrimination) of the Equality Act 2010 (**2010 Act**) when it excluded the child from school on ten occasions between November 2021 and August 2022.

**Decision**

1. The responsible body has indirectly discriminated against the child in relation to exclusion and the failure to provide full time education, for the purposes of section 85(2)(e) and (f) of the 2010 Act; and accordingly, a contravention of part 6 of the 2010 Act has occurred.
2. We make an order that the responsible body complies with the remedy set out in paragraph 73 below.
3. There has been no discrimination arising from disability.

**Process**

1. At the case management call in November 2022 the responsible body advanced two preliminary issues, namely that the child did not have a disability and that the claim was time barred. It was determined that both these preliminary issues would be decided at the full evidential hearing. Witness statements, the views of the child, a joint minute of agreed facts and written submissions were lodged in advance of the three-day hearing which proceeded remotely via Webex in February and March 2023. Both parties supplemented their written submissions with oral submissions at the conclusion of the evidence.
2. The claimant was permitted to lodge a 21 page bundle of medical records at the start of the first day of the hearing.

**Findings in Fact**

***The child***

1. The claimant is the parent of the child. The child’s elder sibling has identified Attention Deficit Hyperactivity Disorder (**ADHD**) and was removed from the care of the claimant for a period of about one year when the child was in primary 4 and 5. The child’s twin sibling has identified anxiety based Autistic Spectrum Condition and ADHD. That twin sibling has experienced emotionally based school avoidance on transition to secondary school.
2. At the age of 12, the child started at secondary school in August 2021. The school is managed by the responsible body in terms of section 85(9)(c) of the 2010 Act.
3. The child has found the changes associated with transitioning to a larger school environment challenging to process. The child experiences difficulty with regulation of his emotions and behaviour. The child experiences anxiety and becomes overwhelmed.
4. When the child becomes dysregulated, they appear to find it hard to consider the consequences of their actions and the impact which these are having upon others.
5. The child has difficulty with down regulating and falling asleep resulting in tiredness throughout the day.
6. Whilst the child describes being sociable and presents as such amongst their peer group, they experience difficulties socially with being able to see situations from another person’s perspective.
7. The child has sensory difficulties, specifically around noise. When the child is out in the community with family, the child benefits from wearing headphones. The child wears jogging suit bottoms rather than school trousers.
8. The child finds it hard to process language and to talk about their feelings. When annoyed, the child tends to shut down, will not talk, and says ‘No.’ The child needs time to calm down before talking situations through.
9. The child finds eye contact difficult and finds it challenging to share their views within meetings.
10. The child can find double periods challenging in terms of the sustained attention required over time and so requires movement breaks as well as the option of taking a break and returning to tasks.
11. The child has additional support needs.

***Medical involvement***

1. In January 2022, the child was referred to the Child and Adolescent Mental Health Service (**CAMHS**) for further assessment of a neurodevelopmental condition, following initial assessment and completion of screening questionnaires by Community Child Health in 2021.
2. The referral letter noted the child’s current problems to be: (1) attention deficit; (2) disruptive and violent behaviour; (3) social interaction difficulties; and (4) possible oppositional defiant disorder.
3. In March 2022, the child attended a CAMHS CHOICE appointment which led to onward referral for a CAMHS clinical psychology assessment. Due to long waiting times, this assessment is not due to take place until April-June 2023. The school’s efforts to expedite matters have not been successful as the child does not meet the criteria for a more urgent assessment.

***Educational psychology involvement***

1. The child first became known to the educational psychology service in October 2021 following contact from the claimant expressing concerns regarding the child’s transition to the school.
2. A formal consultation facilitated by the educational psychologist, witness A, took place in April 2022.
3. The child requires a timetable which takes account of their individual needs and preferences. That timetable requires to be appropriately balanced over the course of the child’s week.
4. The child requires movement (walking, pacing, striding out to provide a physical release) to support their emotional regulation. They need access to a space within which to pace, which will not present further opportunities for distraction or interaction with others. The child will also benefit from other forms of physical regulation throughout the day.
5. The child requires an agreed visual plan for where to go and what to do when they feel anxious or stressed.
6. The child would benefit from their One Page Profile being updated and shared within a teacher case conference supported by the educational psychology service.

***The exclusions***

1. In the 2021/22 academic year, during the first and second terms of school, a number of incidents took place involving the child. Not all of these incidents led to an exclusion of the child. Prior to the exclusion in January 2022, a Warning of Exclusion letter was issued following a number of incidents that had taken place prior to the Christmas holidays and further supports were offered.
2. The child was excluded from school as detailed in the table below.

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| **Date of exclusion** | **Duration** | **Reason for exclusion** |
| November 2021 | 3 days | Damage to school property |
| January 2022 | 3.5 days | Persistent disobedience |
| February 2022 | 5 days | Persistent disobedience |
| February 2022 | 3 days | Persistent disobedience |
| March 2022 | 3 days | Persistent disobedience |
| March 2022 | 3 days | Persistent disobedience |
| April 2022 | 4 days | Verbal abuse of staff and dangerous conduct |
| May 2022 | 6 days | Persistent disobedience |
| May 2022 | 3 days | Physical assault against another pupil |
| August 2022 | 5 days | Physical assault of a pupil and racist abuse |

1. The behaviour of the child leading to the exclusions include, amongst other things: verbal abuse to staff and pupils; inappropriate and racist behaviour towards another pupil; homophobic behaviour; violent and reckless conduct causing injury to another pupil; dangerous behaviour involving electrical sockets; theft of another pupil’s property; trapping a teacher in a room causing significant distress to that teacher; knocking a staff member to the ground; disrupting classes by wandering round the school playing German marching music and doing Nazi salutes; vandalism to school property; throwing a chair down a flight of stairs; and wandering the school corridor carrying a fire extinguisher, pointing the extinguisher into classes and dangling it over a balcony with lots of people below.
2. Since the final term of the academic year 2021/22, the child has been on a part-time timetable. During this period the child did not attend the school for substantial periods in each school week.
3. The responsible body adopted a new exclusions policy in June 2022, effective from June 2022. Guidance to accompany the new policy has also been produced.
4. A risk assessment has been completed including the requirement for the child to have close adult supervision by a pupil support assistant on the child’s return to school. The claimant has refused to agree to this requirement and has kept the child off school.
5. As a result, the child has not returned to school following the exclusion in August 2022.
6. The claimant has refused the following supports offered by the school for the child:

* fidget toys;
* physical monitoring booklet;
* option to work with CLD during an EPC period to support the child with managing emotions/building confidence/making positive choices/socialisation;
* soft starts/early finishes to support the child in having successful shorter days in school and to use these as building blocks back up to being in full time;
* a Pupil Support Assistant to walk with the child to and from classes;
* two mornings per week at a specialist provision in the area; and
* suggestion for self-referral to Social Work.

**Reasons for the Decision**

***Disability***

1. In determining whether the child has a disability, we had regard to section 6 and schedule 1 of the 2010 Act. We were also referred to the following cases: *Ministry of Defence v Hay* 2008 ICR 1247, EAT; *Goodwin v Patent Office* [1998] UKEAT 57 98 2110; *J v DLA Piper UK LLP* UKEAT/0263/09; *Walker v Sita Information Networking Computing Ltd* UKEAT/0097/12; *Rayner v Turning Point* UKEAT/0397/10/ZT; *JC v Gordonstoun Schools Ltd* 2016 CSIH 32; and *Hewett v Motorola Ltd* 2004 IRLR 545, EAT.
2. We took the following principles from the case law in considering whether the child had a disability under the 2010 Act.
3. There is no requirement to have a medical diagnosis or a precise medical cause for an impairment.
4. It is the impact on the child’s day to day activities that is important rather than the cause of the impairment(s) or other medical issues which may otherwise arise.
5. Neurodiversity cases should be considered on a case-by-case basis with the focus on the effect on the child’s normal day to day activities.
6. Difficulties with social interaction and communication, where those difficulties have a substantial adverse effect on day to day activities, can meet the definition.
7. The finding of a long-term substantial adverse effect will, in most cases, lead, as a matter of common sense, to the inference that the child is suffering from an impairment which has produced that effect.
8. A purposive construction designed to confer protection rather than restrict it, should be applied to the legislation.
9. The responsible body submitted that the child was not disabled within the meaning of section 6 of the 2010 Act. Rather, the child had behavioural issues which were not sufficient to make a determination of disability. There was no medical diagnosis of disability and no medication was taken by the child to assist or counter their behaviour. The responsible body submitted that the Tribunal cannot and should not find that the child’s behaviour equated to disability.
10. We disagree with those submissions. Mindful of the principles listed in paragraph 36 above, the child has a mental impairment which has an adverse effect on their ability to adapt to the environment of their secondary school education. That manifests itself as the substantial difficulties identified at paragraphs 9 to 16 above. The effects are long-term in that they are likely related to a long term neurodevelopmental condition. This is a reasonable inference from the medical correspondence produced and also from the fact that the effects have been present since primary school and continue on to the present day.
11. Whilst we accept that not all of the child’s behaviours are necessarily indicative of a disability, in the factual context of this claim, we have no difficulty in reaching the conclusion that the child has a disability. That context includes the child’s educational history at primary school, their family history of neurodiversity (including in a twin sibling), some of their various behaviours at secondary school and the fact that the CHOICE assessment led to onward referral to clinical psychology at CAMHS. In addition, the responsible body has offered a wide variety of supports to the child in order to assist with the child’s additional support needs. The responsible body was aware of, or ought to have been aware of, all of this context prior to the first exclusion. We consider that the responsible body ought reasonably to have been expected to know, before the time of the first exclusion in November 2021, that the child had a disability within the meaning of section 6 of the 2010 Act.
12. The lack of a medical diagnosis or precise medical cause of the impairment and the lack of drug treatment are irrelevant issues for this purpose and ought not to have influenced the responsible body in coming to the view that there was no disability.

***Timebar***

1. The relevant rule is Rule 61 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (**2018 Rules**):

(4) The First-tier Tribunal shall not consider a claim unless the claim has been received by the First-tier Tribunal 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 at the end of the period.

(5) The First-tier Tribunal may consider any claim which is out of time under paragraph (4) if, in all the circumstances of the case, it considers that it is just and equitable to do so.

1. There was no material difference between the parties on the applicable case law. We were referred to the case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, paragraphs 18, 19 and 25.
2. We took the following principles from this case in considering the tests stated in Rule 61 (4) and (5).
3. The time limit is strict.
4. There is no presumption that it should be relaxed.
5. It is for the party seeking an extension to satisfy the tribunal that it is just and equitable to extend the time limit.
6. The Tribunal has the widest possible discretion.
7. That discretion is broad, unfettered and requires consideration of all the circumstances of the case.
8. The explanation or reasons for the delay are relevant matters to which the tribunal ought to have regard, although the absence of any explanation or reasons for the delay is not, of itself, determinative of the matter.
9. The claim was intimated in September 2022.
10. The responsible body submitted that any exclusion prior to March 2022 ought not to proceed. Each exclusion stood alone, it was submitted.
11. We disagree. On the evidence, the exclusions were related to each other. We considered them to be conduct extending over the full period till August 2022. Accordingly, the claim is not time barred.
12. In the event that we are wrong about the exclusions being conduct, rather than standing alone, we would have allowed the full claim to proceed by exercising our discretion under Rule 61(5). Mindful of the principles listed in paragraph 43 above, and considering all the circumstances of the claim, in the exercise of the broad discretion afforded to us under Rule 61(5), we are satisfied that it is just and equitable for the Tribunal to consider this claim with reference to all ten of the exclusions listed in the table above.
13. Evidence would have had to be led, by way of background context, of all ten exclusions, in any event. The latter five exclusions were not time barred. There was no prejudice to the responsible body in determining the issues on all ten exclusions. All of the exclusions were imposed by the same members of staff. They all related to the same child and school and were made in relation to similar behaviour by that child. The delay was relatively short in the context of parties attempting to resolve matters without recourse to the Tribunal.

***Section 15 of the 2010 Act – discrimination arising from disability***

1. Section 15 of the 2010 Act provides:
2. 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.

1. We have already reached the conclusion that the child has a disability in terms of section 6 of the 2010 Act. We have also determined that the responsible body ought reasonably to have been expected to know the child had the disability. Accordingly, section 15(2) does not apply. If section 15(1) is established, then that will mean that the child has been discriminated against by being excluded from the school under section 85(2)(e) and by being subjected to a detriment under section 85(2)(f). The detriment is the lack of full-time education. We will deal with each in turn.
2. **Exclusion**

***Question (1): By excluding the child, did the responsible body treat the child “unfavourably”?***

1. Our answer here is yes. Section 85(2)(e) of the 2010 Act specifies exclusion as a way in which discrimination may occur. The Scottish Government’s guidance on exclusions sets out the well-established detrimental impact that exclusion has on pupils. The exclusions also mean that the child has missed out on substantial periods of secondary education.

***Question (2): Was the treatment because of something arising “in consequence of” the child’s disability?***

1. Our answer here is yes. The evidence suggested a pattern of conduct by the responsible body in reacting to the various behaviours by the child. We find that many of those behaviours were as a result of the child’s disability and that it was those behaviours that led to the exclusions. It follows that each of the exclusions arose in consequence of the child’s disability.
2. In coming to this conclusion we considered there was ample evidence within the joint minute of agreed facts to reach the view that all of the exclusions were because of something arising in consequence of the child’s disability.

***Question (3): If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?***

1. Our answer here is yes.
2. We were referred to the following authorities: *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15; and the EHRC Technical guidance for schools in Scotland.
3. We took the following principles from these authorities.
4. It is for the responsible body to justify the treatment.
5. The justification must be based on evidence rather than reliance on mere generalisations.
6. The objective must be sufficiently important to justify limiting a fundamental right.
7. The measure must be rationally connected to the objective.
8. The means chosen must be no more than necessary to accomplish the objective.
9. The overall balance must favour the likely benefit of the measure over the impact of that measure on the rights infringed.
10. If relevant reasonable adjustments have not been made, it will be difficult to prove that the treatment was proportionate.
11. Considering the health and safety of pupils and staff is relevant where the risks have been clearly specified.
12. The claimant submitted that no evidence had been led of the safety of pupils and staff being the legitimate aim. In the alternative, it was submitted that any evidence led on this issue was insufficient and only in very general terms rather than related to the child. The risks had not been clearly specified. In any event, exclusion could not be connected to the objective of safety as it was imposed after the incident. Exclusion only made things worse by damaging relationships between staff, the child and the child’s family. Exclusion was disproportionate. Reasonable adjustments had not been made.
13. We disagree with these submissions. Witnesses A, B, C and D gave clear evidence that the justification for the exclusions included the safety of staff and pupils. Each incident was detailed with an explanation provided as to what measures were attempted or considered as an alternative to exclusion. Exclusion was purely the last resort. We accepted that each of the incidents occurred in the way described by the responsible body, some having been captured on CCTV. On each occasion, exclusion was the last resort and necessary to ensure the health and safety of pupils and staff. The risks had been clearly specified, and on many occasions were self-evident, given the nature of the incidents. Numerous reasonable adjustments had been put in place by the school. Further reasonable adjustments had been refused by the claimant. There was no professional evidence led by the claimant to counter or challenge the evidence of witness A. Where there were differences on the above matters in the evidence, we accorded more weight to the evidence of the responsible body’s witnesses. The claimant was not present in school and so did not directly witness any of the child’s behaviour or the school’s responses to that behaviour. In addition, the claimant was not professionally qualified. In our assessment, mindful of the principles listed in paragraph 56 above, each exclusion was justified and proportionate. On each occasion, the exclusion was a proportionate means of achieving a legitimate aim.
14. Since the last exclusion, the child has not returned to school. The claimant submitted that this was out with any exclusion policy. We disagree that the continuing absence from school relates to the final exclusion. A risk assessment has been carried out and discussed with the claimant. One of the reasonable measures contained within the risk assessment is close adult supervision. The claimant has thus far refused to accept this reasonable measure. In the absence of this measure, the responsible body reasonably believes that it cannot ensure the safety of staff and pupils. We accept that latter position. The only reason that the child is not attending school currently is the refusal of the claimant to accept a reasonable measure designed to assist the child back to full time education.
15. **Lack of full-time education**

***Question (1): by providing a lack of full time education, did the responsible body treat the child “unfavourably”?***

1. Our answer to this is yes. All children in Scotland have a right to education and education authorities have a duty to provide this. All children need to be included, engaged, and involved in their education. In this case the child wants full time education and the responsible body agrees that the child ought to be in mainstream full time education.
2. The provision of a part time timetable would not be unfavourable if the child could not benefit from full time education but there was no evidence to suggest that this was the case.

***Question (2): Was the treatment because of something arising “in consequence of” the child’s disability?***

1. Our answer to this is yes, for the reasons set out at paragraphs 52 and 53 above.

***Question (3): If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?***

1. Our answer to this is yes, for the reasons set out at paragraphs 58 and 59 above.

***Impact of exclusion and lack of full time education on the child’s educational progress***

1. The claimant submitted that the lack of full time education was in breach of the child’s rights to education, as set out in Article 2 of Protocol 1 of the European Convention on Human Rights, and Article 28 of the United Nations Convention on the Rights of the Child. Having found that the exclusions were a proportionate means of achieving a legitimate aim, we cannot agree with this submission. It would be an odd and irrational result to find otherwise in relation to these alleged breaches.

***Section 19 of the 2010 Act – indirect discrimination***

1. Section 19 of the 2010 Act provides:
2. 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.

1. Section 6(3) of the 2010 Act provides:

In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

1. We were referred to the following authorities: *Essop & Others v Home Office* [2017] UKSC 27; *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15; *West Yorkshire Police v Homer* [2012] UKSC 15; the EHRC Technical guidance for schools in Scotland; and the EHRC Public Sector Equality Duty guidance.
2. Parties were agreed that the statistics produced by the responsible body revealed a significantly higher proportion of disabled pupils being subject to exclusion from schools, when compared to non-disabled pupils. The statistics from the child’s actual school revealed an even higher discrepancy between disabled and non-disabled pupils. All of the child’s ten exclusions had been classed as belonging in the non-disabled group by the responsible body. As a result the figures given in evidence in relation to the school were an underrepresentation of the actual discrepancy between disabled and non-disabled pupils.
3. We were satisfied from the agreed statistical evidence that the disabled pupil population in the responsible body’s area was at a disadvantage compared with others. The lack of any causal link in the evidence is immaterial to this finding.
4. The responsible body conceded during oral submissions that it had no justification defence in relation to the indirect discrimination claim.
5. In these circumstances, we find the responsible body indirectly discriminated against the child as a result of the child being disabled.
6. The responsible body has now adopted a new local policy on exclusion. There has been training provided to staff in relation to the national policy on which the new local policy is based. We accepted that the statistics produced reveal the discrepancy between disabled and non-disabled is narrowing over time, in the responsible body’s area. Relevant steps have been taken by the responsible body which has resulted in this narrowing of the discrepancy. These steps include regular monitoring and reporting of the exclusion data by a specifically assigned group.

***Remedy***

1. The Tribunal orders the responsible body to make a written apology to the child (in terms of SPSO guidance “How to Make a Good Apology”) that they indirectly discriminated against them in relation to the exclusions from school.