



The Bulletin



The Bulletin

Edition 7
November 2021

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Foreword

May Dunsmuir

Chamber President

Dear members,

20 months on—and typing this message from home, with the winter sun splitting the trees today (instead of the thick grey skies of the last few days). How have you adjusted to the past year and half (and a bit) or are you still adjusting? I am not too sure if this is the much talked about ‘new normal’, or if we are in the pre-phase of that? What is clear is that we are able to carve out a way of life while life saving innovations are developed to help protect us in the fight against COVID-19.

We have learned some new language along the way — ‘LFT’ once meant liver function test to me! And I have only recently begun to stop saying CPR, when I mean PCR—all very benign, except when you are sharing with a relative that you had to have CPR!

It seems to me that with the passage of time, the closer to home shores COVID becomes. I know that many of you have either experienced COVID or have known others in your family and I know that some of you have lost loved ones during this pandemic, which makes the loss somehow harder to bear. I do hope that brighter days lie ahead.

I remain very proud of all that we have achieved in the HEC in the past 20 months and that is due to the strong enduring spirit of our members and our staff. Since our last Bulletin in May, we have delivered two complex cases training events, two evening training events, our annual Tribunal Forum (with the highest number of attendees ever) and we continue to deliver justice without delay—all using the remote options available to us. There is much to applaud.

Remote hearings—until end January 2022

I have just announced to stakeholders that our remote hearings will continue until end January 2022, in light of recent public health announcements and in order to maintain a safe and healthy approach. I set out my plans for a staged return to physical hearings at your evening training. While the conceptualisation of this remains the same, the timeline is likely to shift to the spring of 2022 but I will keep you up to date.

Members’ Conference—March 2022

I have also recently decided to change our March 2022 (planned for in-person)

member conference to a remote event, after considering the position of the Judicial Institute and their experiences. This is consistent with their plan to deliver judicial training remotely for the first six months of 2022.

Keeping up to date

A lot of new or revised material has been or will be generated to keep us on our toes in 2021, which includes:

- * Edition 2 of our Toolkit (issued in October)
- * Edition 3 of our Case Digest (to be issued in December)
- * Information Note 01/2018: Parties, Representatives, Witnesses and Supporters (revision issued in October)
- * Information Note 01/2021 (members only) Glossary of terms for unrepresented parties (issued September)
- * Documentary Evidence revision (out for consultation until 20 December. To be issued January 2022, revoking earlier guidance)
- * The Child and Tribunal Proceedings (to be issued in November) consolidating the current four child guidance notes into one.

Keeping in touch

It is, as ever, vitally important to keep in touch with others, as we enter into a season of darker nights and colder (wetter!) days. Some of you might enjoy the dark nights but for others this might be their most challenging time. Working from home brings the advantage of home warmth and a more climate friendly approach to travel (I do not miss the three hour shunt to Edinburgh via a car, subway, train and a number of crowds!) but it does mean that we miss some of the warmth of in-person social contact. Make it your mission this winter to find a way to stay in touch. Part of our HEC commitment to this comes through the Bulletin, which, as always, provides an excellent range of information and perspectives and I am grateful to Deirdre for her hard work as Editor.

I smiled my way through Vinit's article (I too enjoyed Ally McBeal and those extensive toilets!) while learning about a very early time-bar case and how a dose of humanity ruled the day. I am sure you will find Lesley's article on how AHPs are managing the balance between face-to-face and remote working interesting; and Muriel's, on how to approach multiple claim types. Rob Holland brings an autism perspective on the impact of the pandemic; while Sally Cavers reintroduces us to the Inclusion Ambassadors—our friends in the development of our sensory hearing suites—with a reminder that there is no 'one-size fits all'. Enjoy these and others.

Thank you for all your support during 2021. I hope you have a restful, healthy and joyous festive season when it arrives.

May



Health and Education Chamber Update

Elaine Forbes, Operations Manager

Scottish Courts and Tribunals Service

Elaine Forbes, current Operations Manager with the Scottish Courts and Tribunal Service, introduces herself and Natasha Russell, Senior Operations Manager, and shares some recent developments within the Chamber.

Since the last Bulletin in May 2021 I have joined the team, in a temporary position, as Operations Manager. Prior to this I was the Improvement and Learning officer, which included supporting the HEC as an administrative trainer. I recently delivered training for the casework team. I have worked for the Scottish Courts and Tribunal Service for 9 years and HM Courts and Tribunal Service for 19 years prior to that. I did take some time out from being a civil servant to train and run a business as a dog groomer.

My hobbies include travelling and I recently bought a lodge that I enjoy spending time at with my partner and our dog George. In my 3 months since joining the HEC I have enjoyed getting to know the team and the work that they do.



Natasha Russell first joined the Chamber in December 2020 as Senior Operations Manager on a temporary basis. She has recently secured this position permanently.

Natasha has worked within SCTS for 11 ½ years, 9 of which have been with the Housing and Property Chamber. Working in a variety of roles across casework, clerking and scheduling teams, she has progressed to her current role.

Natasha is enjoying her new role and is looking forward to supporting the President, members and the administration team to shape the future of the HEC.

In her spare time, you will find Natasha enjoying a beach walk or exploring Scotland's castles. Natasha enjoys spending time with her friends and family, especially her 3 year old nephew, Harrison.

The team have continued to work remotely and it has now been almost 20 months since we were working from the Glasgow Tribunals Centre. There continues to be challenges but the team has shown great resilience and has continued to deliver an

excellent level of service to all of our Tribunal users, during a very challenging period. We continue to refine aspects of our remote working processes, including our use of Cisco WebEx for remote video hearings. We are now successfully preparing the electronic bundles in accordance with the President's guidance on documentary evidence. This will hopefully lead to smaller electronic bundles, less duplication and only include relevant excerpts of large documents instead of the whole document. It has also shortened the timescales using electronic transmission, as postage often created delay.

During the 2020/21 reporting year, the Chamber received 83 new applications which can be broken down into 71 references and 12 claims. This is 65 fewer applications than we received during the 2019/20 reporting year — and the lowest number of new applications received by the Chamber in a reporting year since 2016/17; however we are mindful that this decrease is likely to be a result of the pandemic and school closures. From April to November 2021 we have seen our caseload increase back to post pandemic levels, similar to the number of cases received during our busiest year in 2019/2020. During this period we have received 97 new applications which can be broken down into 87 references and 10 claims.

I can also report that the 6th floor hearings facility within the Glasgow Tribunals Centre continues to be developed, with the installation of a biophilic wall at the entrance to the floor.



Hazel McKay

A short update from me. After gaining promotion in July of this year, I now have a new role as Head of Tribunals Operations. My role has various aspects, but I am mainly responsible for the administrations of the Glasgow and Hamilton centres.

I am delighted to still be involved with the Health and Education Chamber, through ensuring that the high quality administrative support provided to the President and the Chamber, continues.

Natasha Russell will now permanently take up my previous post as Senior Operations Manager, and I know you will all join me in wishing her every success in her new role.

I will still have the opportunity to attend future training events, where I look forward to meeting with the membership and participating in the group work, that the team and I learn so much from.



DATES FOR YOUR DIARY

All Members' Conference (remote) 10 March 2022

Legal Member Evening Training (remote) 12 October 2022

All Members' Conference 23 March 2023



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Learning from Covid – How Allied Health Professionals are Using Remote Working to Support Children and Young People

Lesley Sargent

Health and Education Chamber, Ordinary Member

Lesley Sargent, HEC specialist member, offers a timely reflection on some of the innovative ways remote working has been used across Scotland to support children and young people with additional support needs.

In the November 2020 Bulletin, tribunal member, Gillian McKelvie, described how the COVID-19 pandemic had led to a shift to remote working for healthcare professionals. In the meantime, we have experienced a similar shift across many sectors including the work of the HEC and other tribunals, and in the time ensuing since March 2020, we have now had the opportunity to reflect on the impact this has had on established ways of working. Gillian shared some early outcomes identified by a Scottish Government report in autumn 2020 that signalled a note of optimism for allied health professionals (AHPs) trying to ensure access and continuity of support for children and young people, in the face of ongoing barriers relating largely to technology, limited resources and concerns about digital inequality.

Fast forward a year, through further lockdowns, continued restrictions on social movement, balanced by the hope engendered by vaccination rates and gradual reopening of schools and other areas of public life, and it feels like a good time to take stock and reflect on how our ways of working have changed.

What are AHPs such as speech and language therapists, occupational therapists and physiotherapists doing now to ensure that children with additional support needs can access our support in the most appropriate way? Gillian's article highlighted that online appointments had already become established as a choice for families to be offered as an option where appropriate. However, not all interventions lend themselves to online delivery and remote working does not suit everyone.

In 2021, more AHPs than ever before have regular access to technology through use of laptops and smartphones with remote access to NHS applications. NHS Near Me, a secure video conferencing platform, initially implemented in remote and rural parts of Scotland, has now been introduced across all fourteen regional health boards and implemented by a wide range of health professionals working in acute and community settings. In NHS Lothian we set up online 'waiting rooms' for all our

children's SLT teams. Our monthly reports demonstrate that Near Me appointments were rising steadily in early 2021 but reduced from April, around the time that schools and nurseries reopened their doors to children.

Since August, and the start of a new school year, most children have been back in school and AHP school visits have resumed to some extent. Some restrictions and safety measures are still in place, so it's hardly surprising that we have begun describing the 'blended model' as the status quo for our input. Child planning meetings may take place in person or as a video conference call on MS Teams or Skype; Near Me appointments may be set up with a child in school with support from a classroom assistant as the child's therapy partner, and therapists may share activities and resources with families using classroom apps such as SeeSaw so that school staff and families have access to the same information.

We have to be mindful of patient preferences and their ability to access digital options. In local follow up appointments following Autistic Spectrum Disorder (ASD) assessment, around 50% families opt for a face-to-face appointment with the remainder choosing a video consultation with a Speech and Language Therapist (SLT) and ASD outreach teacher; this has now become a routine option offered to families. An SLT colleague working with children with hearing impairment consulted with families and found that the majority preferred online review appointments that they could attend from their home rather than travelling to a hospital or clinic setting. However, initial face-to-face appointments continue to be the preferred starting point for many families and may be an essential aspect of assessing a child's strengths and needs.

Hazel McKellar, HEC specialist member, shared the following examples from Speech and Language Therapy highlighting the value of including the child and other partners in decisions about delivery of therapy:

'A' was 14 years old when a request for assistance was made to Speech and Language Therapy in late 2020. The request was for assessment of their language and communication skills to support a referral from school to CAMHS. An initial conversation took place with the therapist, A, and their parent. A was given the choice of where and how the sessions would take place. They asked for them to happen in school. Unfortunately only two sessions took place before the second COVID-19 lockdown. I contacted A and their parent and suggested Near Me video sessions. A is an avid gamer and liked the idea of video sessions. They were able to use their phone and to be in the privacy of their own room. We were able to complete checklists together and to explore A's communication difficulties and needs. A was relatively relaxed using this format and said they enjoyed the video calls because they 'were not stressful'. I was able to complete a comprehensive report with recommendations to the Team around the Child during lockdown, avoiding a delay for A.

Are there disadvantages to remote working from a staff perspective? It is clear that some interventions simply don't lend themselves to online appointments, and building rapport with a child or family can be more difficult when it's remote. Ensuring that strategies are embedded and activities followed up on in school is also more complicated when working remotely and may require a shift in responsibility to a therapy partner. Ultimately this can bring longer term benefits with the Team around the Child sharing responsibility for support across settings. Physiotherapists in NHS Lothian are predominantly working with children in person but are continuing to conduct professional and school meetings remotely which brings time and cost efficiencies for staff in Health and Education settings.

Digital solutions are increasingly being implemented to support CPD training to Education and Early Years settings, although it's acknowledged that technological issues continue to pose barriers to effective and consistent delivery. Online training now constitutes a key element of early intervention and prevention that underpins the universal and targeted services provided by AHPs, providing increased flexibility of service delivery and generally improved access for Education staff.

AHPs are now using a wider range of digital platforms and apps as an integral part of service delivery. Families and professionals can access service updates on Facebook and Twitter, staff are creating 'how to' videos on YouTube and digital newsletters to share good practice. At the same time, therapy staff and families are clear that face-to-face interactions with children continue to be essential for many aspects of our work. Further research and reflection is doubtless required as we continue to learn more about the effectiveness, impact, benefits and limitations of digital engagement with children, families and other professionals.

Lesley Sargent has been a Tribunal member since 2010. She is currently employed by NHS Lothian as a paediatric Speech and Language Therapist and works as the service Lead for the Midlothian Children's SLT service, which supports children and young people with a wide range of communication needs in clinical and education settings.



On the edge of change – can we deliver for autistic people and families?

**Rob Holland, External Affairs Manager
National Autistic Society Scotland**

Many children and young people involved in the tribunal process have a diagnosis of autism. Rob Holland, External Affairs Manager, at National Autistic Society Scotland, highlights some of the challenges our children and young people face and introduces the Scottish Government's commitment to take forward new legislation to promote inclusivity for children and young people with autism and their families.

To say we're living through a time of change is an understatement. The way we interact, learn and work has changed immeasurably over the last 18 months, bringing with it very real challenges for all of us but particularly for Scotland's 56,000 autistic people and their families.

Autism is a spectrum condition and affects people in different ways. Some people require very limited or no support at all while others require round-the-clock social care and support. Like all people, autistic people have their own strengths and challenges. Key challenges that many face are around social interaction and anxiety levels - familiar structures and routines often help and these, of course, have been affected hugely over the last 20 months.

Our report '[Left Stranded](#)' published in September 2020 collated the views of more than 4000 autistic people and families across the UK. The concerning results showed that the overwhelming majority were worried about their mental health during lockdown, reporting how their anxiety levels had worsened and they felt more socially isolated. The impact on families has also been significant with 1 in 5 saying they had to reduce work due to caring responsibilities while 7 in 10 parents also reported that their child has had difficulty understanding or completing school work, with half of respondents adding that their child's academic progress had suffered.

Here in Scotland we responded to try and support as many people as we could, by running online social groups where autistic young people and adults could safely meet and connect, while on the campaigning front we pushed for additional support to help children and young people in the transition back into face-to-face learning.

We also knew that returning to the pre-pandemic status quo was not something individuals and families wanted to see, and that in no small part led us to campaign

in the lead up to May's Holyrood Election under the banner of 'Our Voice Our Rights' – a call for the world's first Autism and Learning Disability Commissioner to promote and protect rights and to help build a more inclusive Scotland.

This call has been heard and we were delighted to see the following commitment within the recent Programme for Government to '...take forward a Learning Disability, Autism and Neurodiversity Bill, with scoping work carried out in 2021/22. We will also provide an independent advocate for people to secure the protections of such a law, through a Learning Disabilities, Autism and Neurodiversity Commissioner.'

(P41 *Programme for Government*)

This hugely welcome commitment is just one of three major reforms which will hugely affect autistic people and their families.

The Scottish Government is now consulting on plans to introduce a National Care Service, the remit of which will span both children and adult social care. The First Minister has described it as the "most significant public service reform" since the establishment of the NHS, with the stripping away of powers from local authorities and the placement of accountability for quality into the hands of Ministers.

Many autistic people and their families rely on social care to live independent and fulfilling lives, and we must not lose sight of this within these huge structural changes. Nor must we forget that there are many people who would benefit from care who get little or none.

The second raft of reforms are underway within education, with a consultation underway to replace the Scottish Qualifications Authority and to reform Education Scotland in order to separate out its inspection function.

Again, these are structural, but change will undoubtedly be felt down the way by current and future learners. In 2018, we published '*Not Included, Not Engaged, Not Involved*', which found over a third of autistic children had been excluded whether formally or informally, often due to a lack of support or understanding of their needs.

This hard-hitting report has led to some real gains, not least the inclusion of a baseline of autism awareness within the Initial Teacher Education framework, so all new teachers should have a greater understanding moving forward.

Any future inspection regime must therefore include a focus on ensuring that autistic and other learners with additional support needs get the support they need, and that new training is being embedded effectively in policy, practice and culture.

This brings us back round to the Commissioner concept, which is to form part of the forthcoming 'Learning Disability, Autism and Neurodiversity Bill', which we hope will be in next year's Programme for Government.

Underpinning our calls for a Commissioner was the 2020 report 'The Accountability Gap', published under the auspices of the Cross-Party Group on Autism. A survey of more than 900 autistic people and families in Scotland found 72% of respondents reporting that they did not have enough support to meet their needs.

The evidence laid bare that there is a persistent and pernicious gap between what support should be available according to the law, and what is available in reality, with families being passed pillar to post by a system seemingly intent more on blocking than helping them.

We believe that a Commissioner could help tackle this by rooting out bad practice, promoting good practice and joining up the system. We also see this office acting to promote and protect rights, as well as being a powerful ally to whom people can turn if they are failing to get the support they need.

This current parliamentary year is therefore critical, as the Scottish Government begins its scoping exercise by engaging with us and others within the sector as to the powers, remit and role of the Commissioner.

We will need to work hard to make the case that the Commissioner has appropriate powers, duties and resources in order to truly ensure people get the support they need, and that their voices are heard within the changing landscape of care and education.

If we end up with a toothless tsar, we risk regression rather than the positive progress we all want to see. This cannot be allowed to happen.



Ambassadors for Change

**Sally Cavers, Head of Inclusion
Children in Scotland**

Sally Cavers, Head of Inclusion, with Children in Scotland highlights how the Inclusion Ambassadors are challenging inequality, leading change, and empowering young people with additional support needs.

According to the Scottish Government's latest annual census, in 2020 approximately 226,838 pupils in Scotland were identified with additional support needs. This represents nearly one third (32.3%) of all pupils across publicly funded primary, secondary and special schools.

There are requirements in Scotland that place a legal duty on those working within education to identify children and young people's needs and provide support so they can benefit fully from their education. In addition, the UNCRC clearly identifies the right of all children and young people to an education, and to additional support where that is needed. However, we are more than aware that there can often be a gap between policy and practice, due to any number of reasons ranging from inadequate resources, staff shortage and gaps in knowledge and understanding.

The [Inclusion Ambassadors](#) are providing evidence and experience that can shape future provision, identifying what works, what needs to change and what would make things better.

The Inclusion Ambassadors all speak from experience. The small group represent a range of local authority areas, giving us a broad view across Scotland. We work with them over the course of a year, or more, to understand their experiences as young people with additional needs in the Scottish education system.

We hear positive experiences of good relationships with school staff as well as appropriate support and the huge difference this makes. However, over the last year we have consistently been told that our Inclusion Ambassadors feel like they are not listened to or involved in decisions about their own education, that there are varying levels and quality of support and the need for more understanding and sensitivity from both school staff and peers. In the shadow of COVID-19, for many, these issues have only been exacerbated.

As one of the agreed actions in the Additional Support for Learning Action Plan the

Inclusion Ambassadors produced a [Vision Statement](#) earlier this year which outlined how they think schools could help them, and their peers, feel more included and support.

They asked for school to help them be the best they can be, viewing it as a place where children and young people could socialise, learn and become prepared for life beyond school. They also called for recognition that a one-size fits all approach, in this context, is rarely appropriate, that young people should be included in decisions about their support and that success can look different for everyone.

This is the education system we all want for our children and young people. Given the Scottish Government's commitment to progress children's rights, this should be achievable.

Through the work of services such as [Enquire](#), [Reach](#) and [My Rights, My Say](#), there is support for ensuring children, young people, families and the education sector are aware of the rights of the children with additional support needs. But the key question is still, how do we make this a reality?

The Inclusion Ambassadors are helping by providing schools and other education providers with the tools they need to support change and improvement.

Most recently, the group published a [Pledge Pack](#) to facilitate an inclusive, supportive educational experience for all pupils. The pack has been developed from discussions by members of the group and what they feel is important to them. It encourages reflection on how young people with additional support needs are being supported and listened to in their setting, and calls for the identification of actions to ensure inclusive practices are upheld and progressed.

Specifically, it calls for schools to make a commitment to ensuring that children and young people with additional support needs can work with teachers they trust and have a say in decisions about their education.

The Pack includes a statement of support, to be signed by a representative on behalf of the school. It then asks for three action points. This call for specific commitments should help focus schools in what can be a daunting and overwhelming area, and also provides accountability. In the same way that schools are held accountable for their performance, or their attendance rates, this, in a much less formal way, calls for them to view the need for action on inclusion with the same importance. Soon we will be calling for schools and education establishments to share their pledges with us, and how they plan to deliver them. We hope this will provide us with a catalogue of case studies and a route map of how change is happening, one school at a time.

Crucially, we must remember it's not just words on paper. For the nearly 300,000 children and young people who attend school with additional support needs this is their everyday reality. Each and every one of these children and young people have a right to education and a right to the most appropriate support. It is not what we would like to happen, but what should be happening, in line with ensuring the rights of all children and young people are upheld. It is our plan to help make those rights a reality.

For more information on the Inclusion Ambassadors or to access any of their resources visit <https://childreninscotland.org.uk/inclusion-ambassadors/>, or email Parisa Shirazi pshirazi@childreninscotland.org.uk

Challenging inequality and leading change: A report on the work of the Inclusion Ambassadors from 2020-21 was published in September. [Download a copy here](#)

Running Order - Disability Discrimination Claims

Muriel Robison

Health and Education Chamber, Legal Member

Muriel Robison, HEC legal member, considers the logical order in any claim where more than one form of discrimination is being relied upon.

Following previous articles on the Equality Act 2010 (the 2010 Act) focussing on the different forms of disability discrimination, I am often asked what is the best order to argue or consider claims in cases where more than one form of discrimination is relied on.

I set out here a suggested order and the rationale for this. However, it is important too, when assessing which provisions to rely upon, to consider the interplay between the different prohibited conduct provisions and when it might be best to focus on one rather than another.

Direct discrimination

The first type of claim to consider is likely to be direct discrimination.¹ There is an obvious rationale for that. If a claimant can succeed in proving direct discrimination, then a respondent will not be entitled to put forward any defence.

Direct discrimination will be established where there is less favourable treatment because of disability. If the reason for any less favourable treatment is found to be disability, then a direct discrimination claim will succeed. The respondent may put forward an alternative reason for the treatment, but if the claimant shows the necessary causal connection between disability and the less favourable treatment, then a respondent is unable to rely on any defence no matter how benign the motive for the treatment.²

Be aware however that certain forms of conduct/treatment may be exempt, because the 2010 Act sets out a number of exceptions from conduct which would otherwise

¹ Robison, M, Update on section 15, The Bulletin, HEC Edition 3, November 2019

² See example from Technical Guidance for Schools in Scotland, para 5.7 which gives the example of a school which decided that it was better for a pupil with a hearing impairment to watch a subtitled film version of a play which other pupils were taken to watch at the theatre. Despite good intentions this would be direct discrimination.

be unlawful. In the schools context for example, there is an exception for schools using a permitted form of selection (say on academic ability) which will not discriminate by applying this form of selection to disabled children who apply for admission.³

Reasonable adjustments

It is likely to be appropriate to consider reasonable adjustments next.⁴ While this might not seem an obvious approach, the answer to the question whether there has been a failure to make reasonable adjustments or not is likely to be relevant for claims under other provisions, not least because it will be a relevant factor in making the assessment about whether there has been objective justification, which is a consideration in both claims for discrimination arising from disability and for indirect discrimination.

As this is an anticipatory duty, no question of knowledge on the part of the respondent arises. Further, the focus is on reasonableness. If a tribunal decides that a respondent has failed to make that which is found to be a reasonable adjustment, then there is no longer any further requirement to consider whether such a failure was justified.

Discrimination arising from disability

It has been suggested by Lord Justice Elias in *Griffiths v Secretary of State for Work and Pensions*⁵, that claimants should not assume that their claim is best argued as a failure to make reasonable adjustments, given the more robust provision of discrimination arising from disability. While that case related to dismissal in the employment context, a relevant example in the schools context might be where a pupil has been excluded or already moved schools, where the focus will not be on sanctions for past behaviour. Any past failure to make adjustments e.g. to the exclusion policy might be better argued simply as disability related unfavourable treatment.

This may be a claimant's strongest claim, largely because of the absence of any requirement to show a comparison, and the focus on whether there is unfavourable treatment related to the claimant's disability.

However, although a claimant may well be able more easily to establish

³ See Equality Act 2010 Schedule 11, para 8. Note this does not displace the duty to make reasonable adjustments or allow blanket exclusions in relation to disabled children.

⁴ Disability Discrimination and the Anticipatory Duty HEC Bulletin 5th Edition at page 11

⁵ 2015 EWCA Civ 1265

unfavourable treatment, a respondent will have a defence to such a claim.

While perhaps unlikely to be an issue in the schools context, a respondent will have a defence if they can show that they did not know (or could not reasonably have been expected to know) that the pupil was disabled.⁶ Lack of knowledge might result in a claimant being unable to prove what might otherwise be a strong claim under these provisions.

Even if knowledge is established, a respondent may well argue that any unfavourable treatment is 'a proportionate means of achieving a legitimate aim'.⁷ However, as discussed above, if there has been a failure to make reasonable adjustments, there should be little need for extensive consideration of this question because, as stated in the Technical Guidance, 'If a school fails to make an appropriate reasonable adjustment, it is likely to be very difficult for it to argue that unfavourable treatment is justified.'⁸

Indirect discrimination

Likewise, given that a respondent may seek to show that any indirect discrimination is justifiable, if there is a failure to make reasonable adjustments, it is unlikely that any legitimate aim for a provision, criteria or practice (PCP) will be proportionate.

However, as discussed in previous articles⁹, careful consideration should be given to whether it is appropriate to pursue a claim for indirect discrimination at all.

This is because it is likely that the circumstances giving rise to a claim for indirect discrimination will also have given rise to a claim for discrimination arising from disability. As noted above, the need to show comparative disadvantage may be a difficult hurdle to cross. Further the focus is on groups with the same disability, not the same impairment, and disabilities can be very individual, and a group cannot be formed of one person.¹⁰

Lord Justice Elias puts it this way: "It is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disabilityonce the relevant disparate impact is established, both forms of discrimination are likely to

⁶ This is not of course an issue in the reasonable adjustments question because the duty in the schools context is an anticipatory one.

⁷ Section 19(2)(d) of the 2010 Act

⁸ Technical Guidance for Schools in Scotland at para.5.54

⁹ Indirect Discrimination Claims in Schools HEC Bulletin 6th Edition at page 14

¹⁰ *Eweida v British Airways* 2010 EWCA Civ 80

stand or fall together. However, the converse is not true. If it is not possible to establish that the relevant PCP created a disparate impact, the case will not fall within the concept of indirect discrimination but it may nonetheless constitute discrimination arising out of disability.”¹¹

There is one circumstance when it is likely to make a difference if a claimant fails to include an indirect discrimination claim. Assuming that the claimant can show group comparative disadvantage, then a claimant could establish indirect discrimination even if the respondent does not have knowledge of the claim.

While knowledge may be a relevant factor in the assessment of whether there is objective justification, lack of knowledge is certainly not a bar to a claimant succeeding under these provisions. Knowledge proved crucial in one case which succeeded, a decision of the Employment Tribunal ¹², where the claimant’s claim in respect of discrimination arising from disability was not well-founded, because it was accepted that the respondent knew nothing of the claimant’s disability.

Harassment because of disability

This is a further form of prohibited conduct which may be relied upon, where the facts are unlikely to overlap with those relied on for the other disability specific claims.¹³ The harassment provisions require a pupil to show that a respondent (or those for whom a respondent is vicariously liable, usually teachers) engaged in unwanted conduct related to disability which had the purpose or effect of violating the pupil’s dignity or creating an intimidating, hostile, degrading or humiliating environment for the pupil.¹⁴ While it is surely unlikely that teachers will engage in such conduct with the intended purpose of violating a pupil’s dignity, it might well be that their conduct has that effect on a disabled pupil. If, however, purpose is proved, then the claim will succeed. If not, but it had the prescribed effect, consideration will require to be given to all the circumstances of the case, both from a subjective point of view, and also whether it was reasonable for the conduct in question to have had the effect which it did.

This is a stand alone provision in respect of which the facts to be relied upon are likely to be distinct from those relied upon in respect of the other forms of discrimination.

¹¹ Ibid para 27

¹² *Bevan v Bridgend County Borough Council* ET Case No1602784/12

¹³ Although it may be possible to argue direct discrimination on the facts, the requirement for a comparison is likely to make a harassment claim more likely to succeed.

¹⁴ Section 26 Equality Act 2010

Victimisation

A school may also be liable for victimisation, that is where a pupil suffers a detriment because they (or perhaps their parent or sibling¹⁵) have carried out, or are believed to have carried out, a so-called protected act, such as making a complaint under the Equality Act.¹⁶ The focus here is not on the pupil's disability, but rather on the 'protected act', as the causal link to be established is between the alleged detriment and the protected act.

Again, this is a stand alone provision, which may be the only provision which is considered. There is no requirement for a pupil to prove or have proved discrimination under any of the other provisions to succeed with this claim.

Conclusion

This article suggests a logical order for the consideration of the different types of prohibited conduct which may be relied on in disability discrimination claims and how the different forms of discrimination interplay. It should not however be understood as in any way prescriptive. Each case should, of course, be considered in context, and it may well be that there are good reasons for dealing with claims in a different order

¹⁵ See section 86(2) Equality Act 2010

¹⁶ Section 27 Equality Act 2010



The limits of time

Vinit Khurana QC

Health and Education Chamber, Legal Member

Vinit Khurana QC, HEC legal member, provides a unique insight into how a Scottish court previously considered the issue of a statutory time limit.

Memory is a funny thing. I forget why.

As an avid viewer of *LA Law* and *Ally McBeal*, I remember looking forward to my undergraduate legal adventure in the 1990s. How exciting, in the midst of passionate legal debate, to be reeling off important case names supporting the clearly winning propositions being advanced (all having been practiced to the vocals of Barry White in the enormous toileting facilities).

Unfortunately, I soon discovered that I was unable to recall the vital case names. Whether or not it was because of my earlier medical training, the most reliable way for me to remember names was to understand the story behind the name. Judicial pronouncements could not be retained in my brain without an understanding of the facts of the case. Once I knew the story, it became far easier to recall a case name, why it was important and where it was reported. Context is all.

On 10 June 1940, there was a riot in Edinburgh. Amongst others, no doubt, four shop and restaurant premises at around the top of Leith Walk were looted and destroyed (as it happens, not far from Valvona and Crolla's current premises in Elm Row). The reason? They were owned by Italian proprietors. Italy had just entered the second world war. Anti-Italian sentiment was high in Edinburgh.

The *Riotous Assemblies (Scotland) Act 1822* allowed proprietors to claim compensation for damage to property caused by rioting. The time limit to bring such an action was one month. The proprietors raised the action on 9 July 1940, just within the time limit imposed by the 1822 Act. All seemed well. There is a but.

Unfortunately, the proprietors named the defenders as the Lord Provost, Magistrates and Councillors of Edinburgh rather than the Town Clerk of Edinburgh. The defenders raised this point in their defence. They sought to have the case dismissed. In response, the proprietors sought to amend the case to add the Town Clerk of Edinburgh as the correct defender.

A debate before a Sheriff took place on 30 July 1941. The defenders prevailed. The case was dismissed. The proprietors appealed to the Inner House of the Court of Session. The appeal was heard by four judges on 30 and 31 October 1941. The Lord Justice Clerk (Lord Cooper) issued the unanimous decision on 18 November 1941.¹

The case is cited as authority for the following two principles:

- where a statute prescribes a special method for enforcing a statutory right or liability, no other method of enforcement can be resorted to; and
- an amendment to substitute the right defender for the wrong defender, or to cure a radical incompetence in the action, or to change the basis of the case, is not permitted after the expiry of the time limit.

I remember it not because of the dry principles above. Rather, I remember it because of the story. The proprietors won their appeal.

The reasoning? In this case the proprietors had invoked the correct statutory provision. The basis of their action had been the correct one. Their only mistake had been to name one representative of the right defender (the Lord Provost, Magistrates and Councillors of Edinburgh) rather than a different representative of the right defender (the Town Clerk of Edinburgh).

Stories help to create a unique set of connections within the brain. Those connections trigger recall.

What were my triggers in this story?

- It was enlightening to have a society enact a piece of legislation in 1822 that allowed compensation from the local community for the riotous acts committed within its territory.
- The connection between Edinburgh and Italy goes back a long way (it predates the six nations rugby matches by some distance).
- Riotous human behaviour goes back even further.
- The legal process in the midst of war was far quicker than it is currently. The case was raised within a month. It was debated on finalised pleadings within about a year of being raised. The appeal was heard within three months of the debate. The decision was issued eighteen days later.
- The courage of the judiciary. It would have been easy, in the midst of a war, to apply the well known general principles against the proprietors.

¹ *Alberto Pasquale Pompa and others (Antonio Pompa's Trustees) v The Lord Provost, Magistrates and Concillors of the City and Royal Burgh of Edinburgh* 1942 SC 119

Technically, the Sheriff had been right. There was a time limit. It had not been complied with. Humanity found a way.

Memory is a funny thing. I am looking for a story so that I can recall why.

Vinit Khurana QC is a member of the Scottish Bar and is dually qualified in law and medicine. Vinit has been an Advocate since 1999 and took silk in 2018. Vinit has been a member of the HEC since 2018.

Topical Updates

Health and Education Chamber

In this new (regular) Newsletter feature, we will discuss some issues that have arisen recently, and which we expect will carry some future practical importance.

1. When is a request to place a 'placing request'?

This question has arisen in a few references.¹

The important point to grasp is that a request need not be called a placing request to be one. Nor does a request need to be dealt with by the education authority as if it is a placing request in order to be one. The only relevant question is: does the request meet the statutory definition of a placing request? If it does, it is one (and must be dealt with as such). If it doesn't, it is not one. In the former case, where the request is refused, there is a right of recourse to the First-tier Tribunal for Scotland Health and Education Chamber (HEC). In the latter case, the HEC has no jurisdiction to hear a reference relating to the request.²

The statutory definition of a placing request is as follows:

..a request to an education authority to place the child in the school specified in the request, being a school under their management.³

Also relevant is s.28(1):

References in this Act to a 'request' are to a request which-

(a) is in –

(i) writing, or

(ii) another form which, by reasoning of its having some permanence, is capable of being used for subsequent reference

¹ See the published HEC preliminary decision [ASN D 11 06 2019](#) and an (as yet) unpublished preliminary decision in FTS/HEC/AR/21/0071, dated 11 October 2021. See also the Additional Support Needs Tribunal for Scotland (ASNTS) decision [ASNTS D 10 2011 02.06.11](#) on a related but narrower issue in which the request was made by someone other than a parent. It was held not to be a placing request.

² In such a case (where there has been no placing request), this precludes the HEC from hearing a reference about its refusal; a claim under the Equality Act 2010 may still be possible (if the refusal could be discriminatory).

³ 2004 Act, schedule 2, para 2(1) and 2(3); s.29. A broadly similarly worded provision defines the term as it applies to a school not under the management of the education authority – 2004 Act, schedule 2, para 2(2) and (3); s.29.

(as, for example, an audio or video recording), and

(b) contains a statement of the reasons for making the request.

These provisions were interpreted in two recent HEC decisions as meaning that a request for a child to be placed in a school which was initially dealt with through an internal process put in place by the respondent was, at the time it was made, a placing request.⁴ In one case, the main reason for this decision was explained as follows:

When one considers the definition of a placing request, it embodies a simple idea: a reasoned, written (or permanently recorded) request to place a child in a school named in the request. As long as the request meets these criteria, it is a placing request under the 2004 Act. The fact that an education authority does not treat it as such does not change the status of a request. Nor does the fact that an education authority has a system for dealing with requests such that it does not treat them as a placing request if coming through a particular route. The sole question is whether or not the request meets the statutory definition. If it does, it is a placing request and must be treated as such. If not, it should not be treated as such.⁵

The legal member making the decision (as a competency one) also decided that the requirement that a placing request is reasoned imposes a low threshold.⁶ In addition, the fact that the request is made by a school on behalf of a parent and not by the parent may not deprive the request as having the status of a placing request.⁷

This line of reasoning means that where an education authority has set up a process for dealing with requests to place children in schools that does not involve treating all such requests as placing requests, the 2004 Act may not be being properly applied, for some or all of those requests.

2. Information provided on right of access to the HEC

Although the HEC jurisdictions under the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) and the Equality Act 2010 (the 2010 Act) are technically separate, we are seeing more and more cases in which the

⁴ [ASN D 11 06 2019](#) and an (as yet) unpublished preliminary decision in FTS/HEC/AR/21/0071, dated 11 October 2021. In the former case, the process was a multi-disciplinary panel. In the latter case, the process was a policy which stated the ways in which a placing request could be made.

⁵ [ASN D 11 06 2019](#), para 8.

⁶ [ASN D 11 06 2019](#), para 11.

⁷ [ASN D 11 06 2019](#), para 10. By contrast, where a request was made by a head teacher and not on behalf of a parent, it was held not to be a placing request, see ASNTS decision: [ASNTS D 10 2011 02.06.11](#).

flexibility of the 2010 Act is being recognised.

So, for example, the 2010 Act has been used to resolve CSP⁸ and placing request⁹ disputes. In such instances, a claim instead of or in addition to a reference could be submitted.

One area which came to our attention recently is around the information provided to parents when there might arise a claim under the 2010 Act. Where a placing request is refused, there is a statutory obligation on the education authority to inform the person who made the request of the right to refer the decision to the HEC.¹⁰ For certain decisions around CSPs, a similar obligation arises.¹¹

A similar statutory obligation does not apply in relation to claims under the 2010 Act. However, the obligations on responsible bodies under the 2010 Act extend to avoiding discrimination in the pupil admission arrangements and decisions.¹² This means that whenever there is a decision made to reject a placing request, s.85(1) of the 2010 Act could apply. The same could be said in relation to decisions on a CSP, to which various parts of s.85 of the 2010 Act might apply.¹³

These case-types are in addition to the better-known jurisdiction of the HEC to consider claims arising out of exclusions.¹⁴

The question that arises is:

Should the responsible body inform a parent (and possibly a pupil) of a right to make a 2010 Act claim to the HEC whenever an event happens which could reasonably give rise to a claim?

If so, this obligation would apply not only to exclusion decisions, but also decisions on placing requests and CSPs, as well as any other decisions which could fall within the very broadly framed subject areas of s.85 of the 2010 Act.

While there is no specific statutory provision requiring that such information is provided, there could still exist a legal obligation to do so, namely under the 2010 Act itself. It is possible to argue that where a responsible body does not provide

⁸ See the Inner House decision of *City of Edinburgh Council v R* 2018 S.C. 399, where the court, on appeal from an HEC decision, held that a failure to prepare a CSP amounted to unlawful discrimination under s.15 of the Equality Act 2010.

⁹ See the decision in the HEC case [ASN D 20 07 2020](#).

¹⁰ 2004 Act, s.28(2)(e)(ii).

¹¹ 2004 Act, s.11(2)(b)(ii) (decisions on whether to make CSPs and on whether to review them) and s.28(2)(d) (decisions on requests to establish if a CSP is required and on requests for a review).

¹² 2010 Act, s.85(1). See also s.85(3)(b) (harassment) and s.85(4) (victimisation).

¹³ For example, s.85(2)(a), (b), (d) and (f). Sub-sections 85(5)(a), (b), (d) and (f) could also apply where it is alleged that victimisation has taken place, as might s.85(3) (harassment).

¹⁴ 2010 Act, s.85(2)(e) and (5)(e).

information about a potential right of access to the HEC (where one is reasonably clear), this omission could, in itself, be discriminatory. This is against a background where a pupil who has additional support needs under the 2004 Act may well also have a disability under the 2010 Act.

3. Online hearings and hearing length

It is reassuring to note that despite a radical change in the medium of hearings (from in-person to online), and even with the occasional technical problems that online hearings bring, the number of days used for each HEC case type remains largely the same:

CSP references – 1 day
Placing request references – 2 days
Equality Act 2010 claims – 2 days

While there are exceptions, this remains the norm. The standard practices of using witness statements and agreed statements of fact mean that the length of time for each witness to give their evidence is significantly less than would otherwise be the case. Oral evidence which is focussed on the issues to be decided (and only on those issues) is the key to efficiency and avoiding delay (as is both sensible and a requirement under the rules¹⁵).

We are confident that, with the continuing assistance of parties, their representatives and witnesses, these timescales will continue to be maintained in the vast majority of HEC cases.

Where it proves necessary to allocate more than the standard number of days, the legal member should inform the President.

4. Human Rights of Children in Scotland

The following publication was issued by the Scottish Government on 19 November 2021—

[Progressing the human rights of children in Scotland: action plan 2021 to 2024](#)

This action plan details what the Scottish Government will do to further the rights of children for the next three years from 2021 to 2024.

¹⁵ Overriding objective in rule 2(2)(e) in the Tribunal rules.

Children and Young People: News and Developments

Supreme Court Decision on United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill").

On 8 October the Supreme Court held that some provisions of the UNCRC Bill are outwith the competence of the Scottish Parliament and accordingly cannot become law.

The UK Government had previously referred the question of the UNCRC Bill's legislative competence to the UK Supreme Court following the Scottish Parliament unanimously passing the Bill in March 2021. Members will recall from our previous Bulletin that this Bill aimed to ensure that children's rights are respected and protected in the law in Scotland, and also sought to place legal obligations on public authorities to respect and protect children's rights in all the work that they do.

Following the legal challenge by the UK Government, the Supreme Court has now held that various provisions of the UNCRC Bill affect the UK Parliament's ability to legislate for Scotland and therefore cannot become law.

Following the Supreme Court's decision, the UNCRC Bill will now be sent back to the Scottish Parliament for the issues determined by the Supreme Court to be reconsidered. The Scottish Parliament may decide to amend or remove the provisions which the Supreme Court has judged to be outwith its competence.

Mental Health Waiting Times for Children and Young People in Scotland

Figures published on 7 September 2021 from Public Health Scotland ¹ indicate that at the end of June 2021, 1,686 children and young people had been waiting over a year for treatment from specialist child and adolescent mental health services (CAMHS). This figure represents a doubling from June 2020 (787). They also represent 14.4 per cent of those waiting for specialist treatment.

¹ [Child and Adolescent Mental Health Services in Scotland: Waiting Times](#)

A number of organisations have expressed concern about the figures including public health watchdog Audit Scotland and the Scottish Children's Services Coalition (SCSC). Audit Scotland has stated that action was now more urgent given the impact of the pandemic on young people and SCSC has called for a renewed focus on expanded prevention and early intervention services, reducing the need for referral to costly specialist CAMHS. It has also called for greater partnership working between the public, private and third sectors as well as greater awareness of the services on offer, especially those at a community level.

The Scottish Government has now committed to allocating more than £29m to improve CAMHS, with £4.25m to specifically address waiting lists.

The full impact of the pandemic on children and young people is still unfolding and for many children with additional support needs, access to CAMHS will play a vital role in prevention and effective treatment of mental ill health and the diagnosis of neuro developmental conditions like autism.

HEALTH AND EDUCATION CHAMBER GUIDANCE

To Members

PGN 01 2018	Views of the Child**
PGN 02 2018	Capacity and Wellbeing**
PGN 03 2018	Independent Advocacy
PGN 04 2018	Adjournments
PGN 05 2018	Postponements, Suspensions and Procedure
PGN 06 2018	Case Management Calls (Revised October 2021)
PGN 01 2019	Asking the Child Questions**
PGN 02 2019	The Child and the Hearing**
PGN 01 2020	Hearings and the COVID-19 Outbreak
PGN 02 2020	Remote hearings and COVID-19 (Revised January 2021)

**To be incorporated into one Guidance note, The Child and Tribunal Proceedings.

To Administration and Parties

PGN 01 2019	Documentary Evidence**
PGN 01 2020	Documentary Evidence and COVID-19** (Revised January 2021)

**New Guidance on Documentary Evidence to replace these guidance notes, is out for consultation

Information Notes

01 2018	Parties, Representatives, Witnesses and Supporters (Revised October 2021)
02 2018	Claiming Expenses - Representatives
03 2018	Making a Disability Discrimination Claim
04 2018	Making a Reference

Children's Guide to Making a Claim

Children's Guide to Making a Reference

Guide to the Glasgow Tribunals Centre Sensory Floor

Member Contributions to the Bulletin

Members are encouraged to contribute to the Bulletin and should contact Lynsey Brown at HEChamberPresident@scotcourtsribunals.gov.uk if they wish to contribute. Contributions must be typed in Arial, font size 12, with justified margins, two spaces after each full stop and with all necessary references set out as a footnote.

Please note that contributions may be subject to editing. Our next publication will be in **May 2022** and any contributions must be submitted no later than **mid-March 2021**.



Disclaimer

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