



# The Bulletin



**The Bulletin**

**Edition 8**  
**May 2022**

## Contents

**P2      President's Foreword**

**P4      HEC Update & Contact Details**

**P7      Pandemic Recovery**

**P9      Increased Play for Children at times of  
Uncertainty**

**P11     The benefit of remote learning**

**P12     COVID-19 related issues in the Employment  
Tribunal**

**P16     The COVID-19 pandemic and HEC decisions**

**P19     News**

**P21     Health and Education Chamber Guidance**



## Foreword

**May Dunsmuir**

*Chamber President*

*Dear members,*

I hope you are well and enjoying the beginning of some summer days. The longer nights and increased daylight can help to improve the mood. My only complaint is that the earlier sunrise wakens me up much too early! Try as I might, it is like a camera flash going off in my brain synapses. I wonder how you cope with seasonal changes? Not everyone copes well with change. The last two years has been a time of rapid change. My preference is usually to **consider, test and review** any changes. We have not always been able to do this, especially during periods of lockdown and school closure. This meant that some of the processes, which are now very familiar to us, were introduced without the capacity to consider as fully as usual and with limited testing. The process of review remained, if sometimes conducted differently from 'before'. Reviewing is a very valuable tool and helps me to refine, adjust and develop in the Chamber. Take our remote hearings as an example.

### **Remote hearings: beginnings**

We introduced remote hearings in June 2020 after the first national lockdown and during national school closures, as a means to expedite suspended cases and postponed hearings. They began in telephone form only. We used our case management skills to develop this, so they were not born out of limited experience. In July 2020, we introduced our online hearings using the Cisco Webex platform. This was an entirely different process and not a familiar one. We had limited ability to test, as there was a pressing need to decide all suspended placing requests. We were by now, in the timescale of new school term preparations. However, we did have the benefit of reviewing other jurisdiction experiences. I was able to consult with SEND, who had been delivering remote hearings successfully from the beginning of the pandemic; and I had access to the research that was beginning to filter through on the experiences of parties, representatives and witnesses in remote hearings. Our Judicial Institute was also developing training for courts judiciary on remote judging, where I was invited to share our tribunal experiences and by so doing, to hear the court perspective. All of this helped to inform and fine-tune our own remote hearing experiences.

### **Listening and Learning**

If I had to define a term that best describes my experiences as a Chamber President during a pandemic, it would be the importance of 'listening and learning' (which was once the theme of an ASNTS Annual Report). We are so much the richer for this.

On this note, there is a great deal more research becoming available on the impact of the pandemic on education – particularly the impact of school closures on children and young people's mental health. Derek's article on our case types during

the past two years is illuminating in this respect. While Muriel provides us with some insight into COVID and disability case types in the Employment Tribunal. Gillian's article emphasises again the critical role of Allied Health Professionals. I like the reference here to Michael Rosen's quote, "recovering but not recovered", when describing his own recovery from COVID. I think I will adopt this when describing where we are on our journey – recovering but not recovered. Not quite at the stage of being able to offer full in person hearings again, but on the way. Not at the stage of delivering training in person this year but with plans to do so next year.

### **Case volume**

The legal members will have recently received correspondence from me about the rise in placing requests this year, which is the highest ever recorded. The reasons for this may arise from a number of factors. The rise in concern for children and young people's mental health (see the update in the Bulletin from the Scottish Children's Services Coalition in the Children and Young People: News and Developments, section); the impact of education delivery over the past two years, increasing or exacerbating additional support needs; and the continuing impact of absence caused by COVID infection rates. It is too early to say whether this rise is the beginning of a new pattern, or whether it is part of COVID recovery.

### **Remote hearings: Phase 1**

We have now entered into phase 1 of our planned re-introduction of in-person hearings. This will run until end June, unless there is a need to extend this timescale. I will keep you up to date. In the meantime, please let me know how you get along during this time. Part of listening and learning is to do this internally as well as externally. While there is a growing body of research on experiences in justice, I am just as concerned to learn from our own experiences. That is why you are asked to complete feedback following each day in a remote hearing.

### **Member Review**

Your feedback informs new developments, Guidance, training and fine-tuning in the Chamber. As does your member review. This is a valuable tool, which helps me to identify areas for Chamber development and reinforces the value of every member. Members who have completed their reviews have so far found this of value. My thanks go to our Lead Reviewer, Lesley, and her team of Member Reviewers, who work very hard to make sure that the review process is tailored and meaningful.

### **Finally.....**

For those of you who have planned holidays away from home or at home this year, I hope you have a great rest and an opportunity to enjoy the days. For those who have not yet made any plans for holidays, I encourage you to do so. I remind my staff regularly of the value of a break. You do not always know you need one until you stop. It is then that you realise the importance of a bit of perspective and rest from the screen, emails and case management calls! I have several books at the ready to take on holiday with me – real books too. Despite my son's lovely gift of a Kindle some years ago, I have not managed the transition. There is nothing to beat holding a book in your hand and turning the pages.

*Whatever you enjoy, I hope it comes in abundance over the summer period.*

Best wishes,

May



## Health and Education Chamber Update

**Elaine Forbes, Operations Manager**

***Scottish Courts and Tribunals Service***

*Elaine Forbes, Operations Manager updates us on recent developments within the HEC Administration.*

Since the last Bulletin I have now been part of the HEC team for 10 months. I have enjoyed learning and growing within my role and working with the team on various projects that will further enhance the service we provide to the Chamber.

The casework team have continued to work remotely which has proved phenomenally productive; it has now been over 2 years since we were working from the Glasgow Tribunals Centre.

### **Team and performance**

During the 2021/22 reporting year, the Chamber received 133 new applications (117 references and 16 claims). This is only 13 less than the highest receipt during 2019/2020 when 146 applications were received. We have returned back to almost pre-pandemic high intake levels.

### **HEC Decisions Database**

A request was made at the last Tribunal (Additional Support Needs) Forum to make it easier to search for terms within judgements on the HEC Decisions Database on the website. A working group was set up to look at the functionality of the website and to identify possible improvements.

**Sarah Tracey was part of the working group and writes:** “The working group completely overhauled the HEC Decisions Database making it easier to navigate and search. I am proud to be part of such a talented, fun, & motivated team that is dedicated to making an impact on the business we are working in.



We worked together to create categories which will allow for a search of types of decisions and also included a keyword search function, which will deliver results where the keyword appears in any decision. We then made our way through the historical decisions to update them to the new version which includes the decision reference within the document. It took a number of days for the team and I to update before making the changes live to our website. It was a massive amount of work, but the feeling of pride I got when the final decision was uploaded to the website was incredible. The team continue to upload decisions as soon as they are ready for publication. This improvement definitely gives our stakeholders a valuable and easy tool to use on the website to enable them to quickly find any anonymised decisions by using single words or phrases at the click of a button."

## **DATES FOR YOUR DIARY**

Legal Member Evening Training (remote) 12 October 2022

All Members' Conference (in-person) 23 March 2023



## **Health and Education Chamber Contact Details**

### **0141 302 5863 President's Office**

Lynsey Brown, EA to the Chamber President

Member Liaison Officer

[HEChamberPresident@scotcourttribunals.gov.uk](mailto:HEChamberPresident@scotcourttribunals.gov.uk)

### **0141 302 5904 Elaine Forbes, Operations Manager**

[eforbes@scotcourttribunals.gov.uk](mailto:eforbes@scotcourttribunals.gov.uk)

### **0141 302 5860 Casework Team**

Sarah Tracey, Team Leader/Senior Case Officer

Megan Wilkinson, Case Officer

Amy Richardson, Case Officer

[ASNTribunal@scotcourttribunals.gov.uk](mailto:ASNTribunal@scotcourttribunals.gov.uk)

### **0141 302 5999 Member Scheduling**

[HECscheduling@scotcourttribunals.gov.uk](mailto:HECscheduling@scotcourttribunals.gov.uk)

### **0141 302 5999 Glasgow Expenses**

[glasgowexpenses@scotcourttribunals.gov.uk](mailto:glasgowexpenses@scotcourttribunals.gov.uk)



## **COVID-19 Recovery**

**Gillian McKelvie**

**Health and Education Chamber, Ordinary Member**

*Gillian McKelvie HEC Ordinary Member (specialism paediatric physiotherapist), reminds us of the critical role played by Allied Health Professionals as we focus on recovery and rehabilitation at this phase of the pandemic. Her article also highlights how some new ways of working are having a lasting and positive impact.*

Michael Rosen, acclaimed children's author and poet, featured in the *Physiotherapy Journal*<sup>1</sup> this month describing his recovery and rehabilitation after being seriously ill with coronavirus. He developed severe symptoms in March 2020 and spent the next six weeks unconscious on a ventilator in intensive care. He described his slow but steady recovery in a rehabilitation unit with the help of physiotherapists, occupational therapists and speech and language therapists. Initially he was extremely weak, unable to sit up in bed and was dependent on staff for everything. He progressed to using a wheelchair which gave him some independent mobility and then felt liberated by learning to walk with a stick. He found he needed the child-like phrases e.g. "nose over toes" to remind him to lean forward before standing up, and "stick foot foot stick" to remember the safe pattern for walking. He describes being "in a strange state of forgetfulness". Therapists had to understand his anxieties and fears to support him to have the confidence to take the next step.

Michael's story is a stark reminder of the reasons behind the restrictions and resulting disruption of health services. During the crisis, the number of patients in intensive care escalated and health professionals (including paediatric therapists) were redeployed to acute adult wards at times of intense pressure. Some services had to stop in response to immediate demands but, at the same time, opportunities were taken to try new ways of working.

Two years on and COVID-19 infections remain high. But we are also seeing recovery. Children are back at school, restrictions have been lifted, and Allied Health Professional (AHP) services have resumed. So, what have we learned and how has paediatric physiotherapy practice changed post-crisis?

---

<sup>1</sup> Frontline The Physiotherapy Magazine for CSP (Chartered Society of Physiotherapy) members. March 2022 Volume 28 Issue 3.



Some things we stopped were crisis-specific so needed to restart. For example, we now mainly see children and young people (CYP) in-person in clinics, at home and school. Extra appointments were required initially as some younger children needed more time to get to know their therapist again. Hydrotherapy (exercise in water) and Hippotherapy (therapy horse riding) have restarted and are the most effective modality for some CYP.

On the other hand, we have reduced the number of meetings by using email. Professional meetings and Child/Young Person Planning Meetings (C/YPPMs) remain online, saving a lot of travel time and allowing more people to attend. We have also stopped using paper case notes. This was already planned, but the restrictions gave us the impetus to change rapidly to online notes which made working from home possible and improved communication within the multi-disciplinary team. At the start of lockdown, we were given permission to email families, thus improving communication channels with families and schools and enabling us to send user-friendly advice leaflets and videos.

A new weekly telephone helpline has been established, offering direct access to physiotherapy for families and education staff. Although most of our appointments are now in-person, it is clear that remote appointments can increase access to physiotherapy in some situations. For example, some children and young people with chronic fatigue are more comfortable using Near Me video, or prefer to type in “chat” rather than talk. Cisco bridge successfully enables those with cystic fibrosis to exercise together online. This is a real benefit since they cannot meet in-person due to high risk of cross infection.

A national evaluation of remote physiotherapy services carried out by The University of Manchester endorses our experience. Based on a literature review, national survey and in-depth interviews, it recommends a mix of in-person and remote delivery. It found that this hybrid delivery model is able to provide personalised care because of its flexibility in responding to patient needs and preferences. (Report summary [bit.ly/3sqGNuF](https://bit.ly/3sqGNuF).)

Michael Rosen says he is recovering, not recovered. An important distinction! He has given us a real insight into the patient's perspective which is a useful lesson for us all.

*Michael Rosen's book 'Sticky McStickstick', named after his joke name for his walking stick, is a picture book for children. It describes his battle with Covid, and humorously outlines his rehabilitation and eventual return home. Writing it helped him come to terms with the trauma he went through and aims to encourage children and families to talk about Covid, illness and recovery. Published by Walker Books Ltd. ISBN: 9781529502404*

*Gillian McKelvie has been a Tribunal member since 2007. She is a paediatric physiotherapist within NHS Lothian community paediatric physiotherapy team. She works with children and young people with physical disabilities, aged 0-18 years, in clinics, schools and at home.*



## **Increased Play for Children at times of Uncertainty**

**Mandy Shiel, Head of Education**

**Harmeny Education Trust**

*Our Bulletin has focussed much on the past two years on how we have adapted and adjusted to new ways of working. Here, Mandy Shiel, Head of Education at Harmeny Education Trust, shares the changing approaches used during the height of the pandemic to support children and young people with complex needs with a focus on increased play.*

When schools closed during the first lockdown in Scotland, the staff, teachers and management at Harmeny Education Trust, a grant aided special school with accommodation for children and young people with complex social, emotional and behavioural needs, had to think differently about learning to ensure the valuable relationships they have with their children could be maintained and continue to flourish. Harmeny currently cares for 22 children on a residential basis and 6 children who attend as day placement pupils. Harmeny provides a care and education setting for those children 365 days of the year. It was therefore imperative that all the children in their care felt secure and safe while things in the outside world were so uncertain, and too much change would raise anxiety levels.

Any changes in learning and teaching, and routines, were tailored to the individual needs of the child. Staff knew which children would flourish in cottage, who would benefit from online learning, and who was most vulnerable to the changing circumstances.

### **What change in practice took place?**

Children began to be taught in the cottages where they live instead of their normal classrooms, with teachers and educational support staff allocated to a single cottage to reduce the risk of spreading any infection. The children within each cottage vary in their ages and so this was the first time they would be learning together. This had a positive impact on their confidence as older children began to help the younger ones.

Harmeny is surrounded by 35 acres of woodland and this was used for outdoor play, managed by the care and education staff across the site. During a normal school year, day and overnight trips are organised and these still happened, but in the surrounding woodland. This meant that the children could go camping and attend 'forest school', experiencing all the opportunities these bring including

personal development and help to build self-esteem – it all just took place a little closer to home!

A second playtime was introduced into the afternoon of the school day, which meant time spent indoors was broken into smaller chunks and was more focused, and play became much more integrated into learning. Go Karts were purchased to support this additional play, with driving tests and licences put in place for this activity to make it a life skill activity for the children. The Scrapstore Playpod was able to open and this involved the children playing creatively with junk objects.

Separately, a combination of online learning from home or blended learning with on-site learning at Harmeny was provided to day pupils depending on each child's needs. It was important to keep relationships between pupils and their peers and pupils and staff strong during this time so staff also went to their homes of pupils and accompanied them to local parks to keep within lockdown rules. Online weekly get-togethers with all children were established, and charitable fundraising kept friendships connected between the cottages and with the wider Harmeny family and gave the children an insight into helping others less fortunate than themselves.

### **Who was involved in making the change?**

Harmeny gathered the thoughts and ideas of children and their families to inform the thinking and planning by staff, teachers and managers. Learning is tailored to individual needs as much as possible and decisions are geared around the needs of each child and everyone involved in their care has a say, including the child.

### **What difference did this change make?**

Using the countryside setting to learn outdoors meant that children were not in the same place all the time. The additional playtime was so successful in reducing 'cabin fever' during the school day, and this is remaining in place.

The Harmeny annual Christmas show which brings excitement and anticipation also brings increased anxiety for some. This year it was recorded and watched online, and this was felt to reduce stress levels and enable all children to watch this together.

More information Mandy Shiel, Head of Education, Harmeny Education Trust, email: [mandy.shiel@harmeny.org.uk](mailto:mandy.shiel@harmeny.org.uk)

*This article was first published on the website of CELCIS (Centre for Excellence for Children's Care and Protection) in March 2021 and is one of the Meeting the Challenge examples produced by CELCIS to demonstrate how carers, organisations, and young people have responded to the challenge of the pandemic to meet the needs of children and their families.*

## **COVID-19 and the benefit of remote learning**

**Collette Gallagher**

**Health and Education Chamber, Legal Member**

*With this edition of our Bulletin focussing on some of the positive changes resulting from the pandemic, Collette Gallagher, legal member within HEC, tells us about how she has developed a new skill enabled with the accessibility of remote learning.*

I have wanted to learn sign language for a long time. As a solicitor I had a number of clients whose first language was British Sign Language (BSL) and I felt disappointed in myself that I wasn't able to use sign language to communicate with them but thought that learning sign language would be too difficult.

Last year I saw that Deaf Action were running a Taster session online one evening a week for six weeks. As it was online and only for 6 weeks it was more accessible for me and so I took the leap and started the course to see whether I would be able to pick it up.

I was surprised at how much I loved learning to sign. The course was a fully immersive course with a Deaf tutor, this enhanced the experience. For two hours a week my voice was switched off and I was only able to communicate with the tutor and other students in sign language. It was great fun and I was able to use my skills to teach others some basic sign.

Learning a new skill gave me a boost to my confidence and having two hours a week invested in my own learning really enhanced my wellbeing. Knowing that I was achieving something that I had wanted to do for such a long time made me feel really good about myself. Since then I have started a SPA BAL introductory level course. I hope to be able to move onto level 1 and continue from there. '

*Collette Gallagher has been a legal member of the Tribunal since 2018. She qualified as a solicitor in 2011 and spent 6 years specialising in mental health and incapacity law before joining the Scottish Children's Reporters Administration (SCRA). She has held a number of roles in SCRA including Children's Reporter and Locality Reporter Manager. She is currently seconded as the organisation's Keeping the Promise Operational Change Lead*

## **COVID-19 related issues in the Employment**

### **Tribunal**

**Muriel Robison**

**Health and Education Chamber, Legal Member**

*Muriel Robison, Health and Education Chamber legal member and a full-time Employment Judge, provides an analysis on how issues around the pandemic have been considered in the context of employment decisions with a focus on disability discrimination claims.*

In the Employment Tribunal there have been a large number of COVID-19 related cases, relating to dismissal following the raising of health and safety concerns, whistleblowing and furlough. Perhaps surprisingly, only three relate to disability discrimination<sup>1</sup>. Although not comparable to this jurisdiction on the facts, these decisions give an insight into how the various tests to establish discrimination should be applied<sup>2</sup>.

In *Anderson v Boots Management Services*<sup>3</sup>, the claimant, who suffered from anxiety, established that she was a disabled person for the purposes of the Equality Act, but the Tribunal found that the respondent had not been aware of that until a disciplinary hearing at which the claimant was dismissed, inter alia, for refusing to wear a mask. The Tribunal concluded that asking the claimant why she was not wearing a mask did not amount to either harassment related to disability or discrimination arising from disability. The Tribunal bore in mind in particular that these events took place during a pandemic, where the position was changing on an almost daily basis and there was a heightened sensitivity because of the rise of transmission of the virus.

Nor did sending the claimant home from work when her colleagues exhibited COVID-19 symptoms amount to discrimination arising from disability. While the claimant did not wear a mask because of her disability, the reason she was sent home was because there was a greater risk that she had been exposed to infection than her colleagues who had been wearing masks. Being sent home on full pay did not amount to unfavourable treatment and in any event did not arise from her disability but from the respondent's actions to take all steps to limit risk. Even if it could be said that the treatment was unfavourable and arose because of the

---

<sup>1</sup> At the time of writing, of which the author is aware

<sup>2</sup> See previous articles in the Bulletin

<sup>3</sup> ET/4107840/20

claimant's disability, the Tribunal concluded that the respondent's actions were entirely justifiable and a proportionate means of pursuing the legitimate aim of providing as safe as possible an environment for staff and customers in the store.

The claimant's claim that she had suffered indirect discrimination also failed. The Tribunal did not accept that the respondent had imposed a provision, criterion or practice (PCP) which was a mandatory requirement to wear a face covering, since the claimant's request for an exemption was accepted. If the wearing of face coverings by staff was a practice, it was wholly justified as a legitimate aim to protect the health and safety of staff and a proportionate means of doing so, particular where exemptions were granted when they were requested.

*Hayes v Rendall and Rittner Limited*<sup>4</sup> also involved a claimant who had anxiety and the circumstances around a disciplinary hearing. The Tribunal concluded that the respondent had constructive knowledge that the claimant was disabled.

In April 2020, during the height of the first wave of the pandemic, the claimant was invited to a disciplinary hearing following consideration by the respondent of CCTV footage which suggested potential misconduct. The hearing was to take place on Microsoft Teams and the claimant was sent a link but no instructions on how to join. The claimant was unable to connect to the hearing because he did not know what Microsoft Teams was and he did not have a camera on his personal computer. The hearing was rescheduled and he was warned that if he did not attend, a decision could be taken in his absence. He did not attend for similar reasons and was dismissed for gross misconduct.

The claimant made various claims in the Employment Tribunal including a failure to make reasonable adjustments. Taking a structured approach to the relevant test, the Tribunal held first that asking employees to attend disciplinary hearings via MS Teams was a PCP. Second the Tribunal decided that while MS Teams did not itself put the claimant at a comparative substantial disadvantage (because anyone with a lack of technical knowledge and equipment would have experienced the same difficulties), a non-disabled person would have been better able to cope with the connection difficulties (including contacting the employer on the day of the hearings). By contrast, due to his anxiety, the claimant had to overcome an 'additional mental obstacle'. With regard to the reasonable steps to avoid the disadvantage, this could have been reasonably alleviated by rescheduling the hearing for a third time and conducting it as a telephone hearing, which was a 'simple, inexpensive and timely' adjustment.

---

<sup>4</sup> Hayes v Rendall & Rittner Limited ET/3201451/2020



In the third decision, *Cowie and others v Scottish Fire and Rescue Service*<sup>5</sup>, the Employment Tribunal again took a structured approach to their assessment on whether the claimants had established discrimination arising from disability.

Following the outbreak of the pandemic, staff who were shielding in accordance with government advice and who could not work from home were required to use their accrued annual leave and TOIL before being paid special leave (a non-contractual benefit where family or care responsibilities impacted on their working lives).

The Tribunal first decided that the claimants had been subjected to unfavourable treatment because they had no choice over when to use their TOIL and were required to exhaust it before they received special leave, when others had special leave paid immediately and had the benefit of a payment for the time they had worked.

They then determined that the 'something arising' in consequence of disability was the requirement to make use of the special leave policy which only arose because of the claimants' disabilities. The Tribunal considered it self-evident that the reason why the claimants required to make use of the special leave policy was because their disability prevented them from attending work.

The Tribunal went on to consider whether the respondent had established that the objective justification question, the onus at this stage being on the respondent.

The Tribunal accepted the following were legitimate aims pursued by the respondent:

- Allowing vulnerable employees to remain absent from work for their protection
- Allowing such employees to remain on full pay
- Following a fair and consistent approach for all employees
- Maintaining operational capacity and service delivery in terms of its statutory duties
- Complying with its duty of best value as a publicly funded organisation.

The Tribunal then went on to consider whether the measures used were capable of achieving those aims and whether they were proportionately applied, analysing the discriminatory effect upon the claimants and balancing the impact upon the respondent in respect of each measure relied upon.

The respondent conceded during cross examination that the measure in question was not necessary to achieve the first two aims: requiring exhaustion of accrued

---

<sup>5</sup> ET/4105098/2020

annual leave and TOIL did not contribute to the aims of allowing vulnerable employees to remain absent from work or allowing employees to remain on full pay.

Following careful analysis, the Tribunal concluded that the other aims were not achieved by requiring TOIL and accrued leave to be used first. Even if the aims were appropriate and reasonably necessary, they did not accept that the measure was proportionately applied. In coming to that conclusion, they considered the impact on the staff who were shielding, which was that they could not use accrued holiday and TOIL when it suited them (unlike their colleagues). The respondent's position was that otherwise there would be unfairness if those shielding were allowed to continue to carry forward annual leave and TOIL, and there were real risks to the operation specifically maintaining staffing levels during the pandemic when absence levels were significantly higher.

The Tribunal however took the view that there was no evidence, beyond generalisation and speculation, to conclude that implementing the policy would entail very serious risks to operational capacity and service delivery; or to enable it to conclude that this adverse impact outweighed the discriminatory impact on the claimants. This case highlights the need, long articulated in the higher courts<sup>6</sup>, for empirical evidence to support a respondent's claim that any discriminatory measures are objectively justified.

These decisions give some insight into how questions of reasonableness and objective justification are dealt with in the Employment Tribunal, but the importance of a structured and analytical approach to disability discrimination claims should be borne in mind when considering such claims in the HEC.

---

<sup>6</sup> First articulated by the House of Lords in *R v Secretary of State for Employment ex parte EOC* 1994 IRLR 176





## The COVID-19 pandemic and HEC decisions

**Professor Derek P Auchie**

**Health and Education Chamber, In-House Legal Member**

*Professor Derek P Auchie, HEC In-House Legal Member provides an interesting analysis of cases and puts in context the impact COVID-19 has had on substantive decisions within the Chamber over the past two years*

The impact of the COVID-19 pandemic has been significant in HEC cases over the last two years. It has affected how hearings have taken place, with an initial switch to telephone hearings for urgent cases for a brief period, followed by a move to online, video conferenced hearings. In some cases, a hybrid approach has been required (online and telephone).

Then there was the suspension of all except urgent cases and a triage system was developed to identify disputes which might qualify as urgent. President's Guidance had to be prepared on case management at short notice.

The impact of the pandemic has also found its way into HEC decisions themselves. Of those published by April 2022, the pandemic (whether by reference to 'COVID-19', 'coronavirus' or 'pandemic') was mentioned in 35 decisions (10 claims, 4 CSP references and 21 placing request references). This represents 55% of the decisions published since April 2020.

In just under half of these decisions, the reference to COVID-19 is minor – related mostly to procedure with perhaps a passing reference to the pandemic in the main decision reasons.

However, in over half of these decisions, the issues the tribunal decided have been impacted by COVID-19. These questions offer a perspective on how the education of some of the most vulnerable children in our society have been affected by the environment over the last two years. Also evident has been the impact on the ability of education authorities and other service providers to be able to meet the needs of school pupils.

Here are some of the issues which have arisen in HEC decisions:

**Procedural (not mentioned above)**

- Cancellations and postponement of hearings
- Updated advocacy report not able to be produced (at least two cases)

**Curriculum**

- Cancellation of certain core subjects such as technology, PE and music
- Cancellation of extra-curricular activities, such as swimming
- Cancellation of residential school trips
- Off-site specialist support service visits limited

**Physical teaching changes**

- Changes to classrooms with pupils sitting in rows
- Relocation and splitting of classrooms for social distancing needs
- Restrictions on school visit opportunities for placing request purposes
- Re-design of classroom space to allow for social distancing
- Changes to class configurations (four classrooms needed as opposed to 3)
- Support for learning rooms no longer available requiring re-configuration of space
- Delay in fitting out a new sensory room
- New pupil would lead to a new work station which could not be accommodated due to COVID space restrictions

**Transportation issues**

- Staggered school entry and drop off times for pupils
- Pupil support assistant escort in taxi cancelled due to COVID-19, affecting school transport arrangements

**Legal duty issues**

- Duties in relation to the preparation and review of co-ordinated support plans and how they have continued during the pandemic
- Transition planning obligations and how they continued during the pandemic
- Staffing and resource issues (within and outwith school)
- Staff shortages requiring to be covered
- Pupil/teacher ratio affected
- Involvement of tutor while pupil not at school
- Adult support care provider cannot provide support due to not taking new referrals
- Self-directed support increase in payment to help support during lockdown

**Educational impact**

- Regression of academic progress due to non-attendance at school
- Pupil settled and happy before COVID but now unsettled due to period out of school
- Restrictions on ability to move between classes
- Distressed behaviours increasing due to re-adjustment to lockdown (restraint case)
- Online education standards in classes provided during lockdown
- Sensory issues – child struggles to wear a mask
- Difficult family dynamics at home being amplified by lockdowns (and impacting on education)
- Limited social work visit opportunities

**Assessment**

- Change in assessment method via SQA due to COVID-19 – subject of three claims
- Private tutor input on grade assessment process

**Transitions**

- Interruption of educational psychologist input into transition to secondary year 1
- Pupil finding it difficult to return to school due following COVID-19 absence due to difficulties with transitions
- Cancellation of transition planning meetings
- Cancellation of secondary year 1 pupil in-person transition visits

When we consider these points, it brings home the broad impact of the pandemic on pupils in Scotland. It also demonstrates how, within a new hearing environment, HEC members have risen to the challenge of considering new factors in what is already a complex legal landscape.

## Children and Young People: News and Developments

*Our usual round-up of developments that may be of interest to members including concerns around the availability of mental health services for children and young people as well as the developments with the UNCRC Bill.*

### **Child and Adolescent Mental Health Services ('CAMHS')**

The Scottish Children's Services Coalition (SCSC), has called for greatly increased investment in mental health services as the impacts of the Covid-19 pandemic on the young become clearer.

New figures published by Public Health Scotland<sup>1</sup> indicate that over the quarter October to December 2021, 10,021 children and young people were referred to specialist child and adolescent mental health services (CAMHS) for treatment. This includes issues such as anxiety and depression and represents an increase of 27.1% in numbers from the previous quarter (July to September 2021).

The Coalition has expressed concerns that there are a growing number of vulnerable children who cannot access adequate support. The figures published also indicate that there are a total of 1,570 children and young people had been waiting over a year for treatment at the end of December 2021.

In addition to increased investment in specialist CAMHS, the SCSC has called for a renewed focus on expanded prevention and early intervention services as well as greater partnership working between the public, private and third sectors.

### **Mental Health and Incapacity Law Review**

Members may recall from previous Bulletins that the Scottish Mental Health Law Review (SMHLR) is currently reviewing and consulting with the aim of improving the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder. The Review is now in its third phase and in March 2022 published its most recent consultation paper. The aim of this consultation is to find out what people think about the Review's proposals for changes to the law before a final report is sent to the Scottish Ministers by the end of September 2022.

The Review consultation paper seeks views on a range of issues including proposals to address some of the issues faced by children and young people under mental health practice.

---

<sup>1</sup> <https://www.publichealthscotland.scot/publications/child-and-adolescent-mental-health-services-camhs-waiting-times/child-and-adolescent-mental-health-services-camhs-waiting-times-quarter-ending-31-december-2021/>

The consultation is open for views until 27 May 2022 and members can access a summary of the Consultation at: <https://www.mentalhealthlawreview.scot/workstreams/summary-of-consultation-march-2022/>

### **UNCRC (Incorporation) (Scotland) Bill - Update**

Members will recall the decision of the Supreme Court in October last year (reported in the last Bulletin) when the Court ruled that certain aspects of the UNCRC (Incorporation) (Scotland) Bill were out with the competence of the Scottish Parliament.

In March 2022, Martin Whitfield MSP, laid a motion before the Scottish Parliament on the one-year anniversary of the passage of the Bill by the Scottish Parliament. This motion requested that the Scottish Government now set out a timescale for the Bill's reconsideration. The motion has received cross-party support and will soon be debated. We hope to report further on the Bill's progress soon.

## HEALTH AND EDUCATION CHAMBER GUIDANCE

### [To Members](#)

- 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 2020 Hearings and the COVID-19 Outbreak
- PGN 02 2020 Remote hearings and COVID-19 (Revised January 2021)
- PGN 01 2021 The Child, Young Person and the Tribunal

### [To Administration and Parties](#)

- PGN 01 2022 Documentary Evidence

### [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](mailto: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 **November 2022** and any contributions must be submitted no later than **mid-September 2022**.



## Disclaimer

The Health and Education Chamber (HEC) seeks to ensure that the information published in the Bulletin is up to date and accurate, however, the information in the Bulletin does not constitute legal or professional advice and the HEC cannot accept any liability for actions arising from its use.

The views of individual authors are theirs alone and are not intended to reflect the views of the HEC.