Health and Education Chamber
First-tier Tribunal for Scotland

The Bulletin

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Contents

Foreword

May Dunsmuir

Chamber President

Dear members,

As I write this from my home office areas of Scotland are about to enter into further levels of restriction, with around 2 million people from the central belt placed within Level 4; while in some other areas restrictions will be eased. Schools remain open, whatever the local authority level of restriction.

As one who lives in a Level 4 area I am getting ready to 'hunker down' until 11 December. That's a great phrase - I read one description of its meaning as "hunkering down under a cliff until the storm passed". We are still in the Covid storm but as far as I can see we are continuing to endure and while doing that we are ever strengthening.

We now have a well embedded remote hearings system that allows us to deliver justice as efficiently as possible. My office has provided judicial cover throughout the pandemic, without interruption. Our members have been open to change and willing to embrace new systems with strong will and tenacity. Our casework team have adapted their systems to ensure that necessary digitalisation has had no impact on the quality and quantity of our business. We are supported by the President of Scottish Tribunals, the Judicial Office and the SCTS, including the Director of Tribunal Operations and his team of senior managers. This amounts to what we might call in the ASNT a "team around the child", except in this case we have a "team around the HEC".

Please be encouraged and assured by this. We are in very good shape to continue to withstand this storm for as long as it takes. We are learning as we go. Sometimes this is conceptual learning and sometimes very practical learning, such as the member who informed me she had a power cut during a hearing but wasn't sure the other members would have noticed as her face was "frozen" on the screen. She had the good sense to alert the clerk and the hearing was able to resume. There will be occasions like this that my guidance has not entirely covered. Please continue to let me know and I will endeavour to make adjustments or to inform our IT team.

We are not just hunkering down, we are also progressing a number of initiatives and developments. These include a revision to the Judicial Decision Writing Toolkit in 2021, an update to the Case Digest and a review of training needs across the

Chamber. The UN CRC will be incorporated into domestic law in 2021 and we are in a state of readiness for how that might impact on our business.

We are also continuing to do what we do best, which includes this Newsletter. I am grateful to Deirdre for her editorial expertise. We have in this edition an excellent mix of topical knowledge and expertise, some from within our own membership. I found, as always, Muriel's expertise on the Equality Act very informative. This article on the anticipatory duty will find its way into my Equality Act folder. Similarly, Gillian's article on Allied Health Professionals and the 'near me' system, which I was not familiar with. So too, Derek's on other areas of legislation beyond the 2004 Act. You will also read an article from the EHRC on remote hearings and one from Iain Nisbet on school closure and education continuity directions, both very relevant to our current work.

I commend the Bulletin to you both as a way of informing one another but also as a reference tool to add to your armoury.

These remain extraordinary times and I said in the May 2020 Bulletin that these times require extraordinary efforts. In this the simple act of kindness goes a long way. *Health in Mind* say that random acts of kindness make us feel good. It is good for our own mental health, it helps reduce stress and can improve our overall wellbeing. This means that being kind to someone can not only make them feel supported and cared for, but can also make you feel good too. They suggest that kindness breeds kindness and makes us feel part of a wider, connected and caring community. Even the smallest act can have a big impact.

Let's engage in as many random acts of kindness that we can during this time. My morning has just been transformed by the home baked scone my husband has just placed before me to brighten my day – a random act of kindness.

I notice my nearest neighbour has just put his Christmas tree up – earlier than I have ever known him to – but he's determined his children will feel uplifted and excited, despite Covid – let's take that same attitude. Feel free to send me pictures of your own trees!

I remain, as always, extremely proud of our membership. Our HEC family is a strong one. Strong enough to withstand Covid.

As we move towards Christmas, I hope that your community of family, friends and neighbours will remain safe, well and connected. We all hope for an easing of restrictions over Christmas. Whatever that looks like, I hope you will enjoy the love and support of others during this time.

Until we meet again, my very best wishes.

May

Health and Education Chamber Update

Paul Stewart, Operations Manager

Scottish Courts and Tribunals Service

Paul Stewart, Operations Manager for Glasgow with the Scottish Courts and Tribunal Service, highlights the changes that have taken place in response to COVID-19 and other recent developments within the Health and Education Chamber.

Since my last update in May 2020, we have continued to face significant challenges as a result of the COVID-19 outbreak but the HEC administrative team has responded well in response to these challenges, making substantial changes to the way we work to ensure that we can continue to support the ASNT during a period of great uncertainty.

The Glasgow Tribunals Centre closed to all SCTS administrative staff on 25 March 2020. While limited key staff have since been able to return, the changes we have implemented have meant that the HEC administrative team were able to work remotely since March 2020 and continue to be able to do so.

Since March 2020 we have worked closely with the President to develop strong processes to manage the caseload during lockdown and to better facilitate remote working. The HEC has set an example to other jurisdictions in this respect. Perhaps the most notable change is our use of Cisco WebEx as a virtual hearings platform. The HEC was the first Tribunal in Scotland to have been given permission by the President of Scottish Tribunals to use a video conferencing platform for hearings. The HEC administrative team made a tremendous effort to ensure that this was a success. They have quickly become experts in setting up and hosting hearings, conducting test sessions with parties and members, and resolving any issues that arise - to the extent that the team have been able to successfully support other Tribunal events via Cisco WebEx including the annual Tribunal Forum and Legal Member Evening Training. We are now conducting almost all hearings via Cisco WebEx which enables participants to see and hear everyone, and for evidence and submissions to be delivered live without the need for any participant to attend a hearing venue. The hearings that have taken place so far have gone exceptionally well, with any technical problems being resolved and all hearings finishing within the number of days allocated by the tribunal.

We expect that this will mean that the HEC should now be able to operate during any local or national lockdowns without having to suspend business.

It appears the caseload of the ASNT has also been impacted as a result of COVID-19. The caseload of the jurisdiction has decreased during the first half of the reporting year, with 57 applications received between 1 April 2020 and 31 October 2020 This is a decrease of 45 applications over the same period in 2019. We are continuing to monitor our caseload figures on a regular basis. The longer term impact of the national lockdown earlier in the year is still unknown and we may see an increase in applications in the latter half of the 2020/21 reporting year.

Since my last update there have also been some notable changes within the team. Firstly, Hugh Delaney has now returned to work in a new role with the First-tier Tribunal for Scotland Housing and Property Chamber. I would like to thank Hugh for all of the support he has provided to the HEC and wish him well in his new role. I am very pleased to announce that Sarah Tracey has been promoted to the position of HEC Team Leader following Hugh's departure.

The President extends her thanks to Hugh for his years of service - first to the ASNTS and then to the HEC. Hugh provided the President with a great deal of support during her early years and beyond. The jurisdiction and the Chamber has been enriched by Hugh's knowledge, expertise and commitment. We wish him well in his new post.

DATES FOR YOUR DIARY

Wednesday 12 May 2021

All Members' Conference

The conference will be conducted virtually

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Inclusive Justice in a time of remote hearings

Cameron-Wong McDermott

Equality and Human Rights Commission

Cameron-Wong McDermott, solicitor at the Equality and Human Rights Commission, highlights some of the themes emerging from the Commission's recent work on remote hearings with a particular focus on the Health and Education Chamber .

Innovations in many areas of Scotland's justice system have been fast-tracked to ensure continuity during the current public health crisis. In June 2020, the Equality and Human Rights Commission in Scotland ("the Commission") published the findings and recommendations of our Inquiry into the experience of disabled accused people in the criminal justice system: 'Inclusive Justice: a system designed for all.' The Inquiry found that technologies such as video link could present barriers to an accused person's participation in proceedings. Following the publication of the report the Commission hosted a webinar to bring together justice, equality and human rights practitioners and academics to compare practices in different justice settings and to examine the risks and opportunities presented by the recent expansion of remote hearings.

This article seeks to draw together the themes emerging from our work on remote hearings which are relevant to those who come into contact with tribunals in Scotland, and in particular the Health and Education Chamber (HEC). Whilst we are in the early days of our experiences with remote hearings, we want to raise awareness of how these technologies impact on people with protected characteristics. In turn, we hope that these learnings will serve as a means of improving practice, with the ultimate aim of ensuring equal access to justice and effective participation for those at the centre of hearings.

"Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed."

'Equal Treatment Bench Book' 2018, guidance for Judges and Magistrates for England and Wales

It is a longstanding common law principle that those involved in legal proceedings must be able to participate effectively. However, almost all of the criminal justice professionals in England and Wales who we interviewed as part of our criminal justice inquiry felt that the use of video hearings did not enable defendants to participate effectively, and reduced the opportunities to identify if they might have a cognitive impairment, mental health condition and/or neuro-diverse condition. The Commission ultimately concluded that video hearings can cause disconnection and separation between people and the legal process and are not suitable for people who need support with communication.

While video hearings in the criminal justice system are a relatively new innovation (and had been used on a very limited basis in Scotland before the coronavirus pandemic), in some Tribunals the use of remote hearings has been longstanding. This is in part due to the greater flexibility in the rules around how evidence is taken and how hearings are conducted.

Nevertheless, some of the same issues around participation which we identified in our criminal justice report were also raised in our webinar. We were privileged to hear the perspective of Mrs May Dunsmuir, Chamber President of the HEC. At the time of the webinar (June 2020) all physical hearings had been postponed for the HEC with the exception of time critical hearings in the Tribunal's Additional Support Needs (ASN) jurisdiction (which were going ahead by telephone link).

In her presentation, the President emphasised the need for new technologies to secure access to justice and ensure effective participation for those at the heart of proceedings in the HEC. She noted that the ASN Tribunal often hears from children with profound, complex and multiple health conditions, with the majority having at least one or more disability. However while the justice system often prioritised the need to avoid exposing children to judicial proceedings, the President found that children sometimes wanted the opportunity to be heard in their own hearing and in the manner that they choose. Access to justice therefore required tribunal judges to 'move heaven and earth' to ensure that those who are the subject of proceedings are able to participate. In the tribunal's ASN jurisdiction, this approach has resulted in several child-led innovations, notably the creation of sensory hearings suites. The President stated that it was important to always have regard to Article 13 of the Convention on the Rights of Persons with Disabilities (effective access to justice for persons with disabilities on an equal basis with

others) and Article 12 of the Convention on the Rights of the Child (the opportunity to be heard).

What does effective participation mean in the context of hearings in the HEC? In answering this question, the President referred to Hart's ladder of participation, which refers to the level of participation of young people in projects. In her view, the person who is the subject of the proceedings has to remain the centre of proceedings; it is important to view the proceedings through their lens. In this respect, while for some young people remote hearings might be an invasion into home life, it had to be recognised that for others this might be a more suitable form of hearing. Furthermore, sensory hearing principles have to be applied, meaning that any unnecessary distractions such as background clutter or noise should be removed. Finally, justice must be seen to be done, and in this respect, a remote hearing must not be viewed as a lesser form of justice. In this sense, remote hearings have to be planned, with the right technology in place and reassurance provided during the hearing.

Other speakers during the webinar raised issues which have universal application. In response to the question of what could be improved with remote hearings to ensure that a right to fair trial is adhered to, John Scott QC – offering a perspective from criminal law – argued that lawyers had to take greater responsibility for ensuring that the parties to proceedings fully understood what was going on during the hearing.

Professor Sarah Craig spoke about the immigration context and about her research on video technology in bail hearings. Commenting on the loss of co-presence which people at the centre of immigration proceedings often felt when video technology is used, Professor Craig emphasised the importance of preparation for video hearings to allow for full participation.

Finally, the President of the HEC raised an issue which will resonate with the legal profession as a whole, that is the need to ensure that the technology used to facilitate remote hearings is constantly examined and improved. She noted that even the smallest lag time between speech and movement could pose a challenge for someone with a sensory disability or auditory processing condition.

So where are we now with remote hearings? According to the Scottish Government's second two-monthly report to Parliament published on 11 August

2020, remote hearings and electronic processes have increased across all areas of criminal and civil business. For civil business, they are now the default position. In relation to the criminal sphere, three criminal summary trials were held virtually in Aberdeen and Inverness in June 2020. The Sheriff Principal who produced the report evaluating these trials has recommended that the aim should be for virtual trials to become the default determination in summary crime, both to enable the backlog of cases at all court levels to be meaningfully dealt with, and in the longer term after the recovery period.

While the issue of remote hearings has engendered significant and often heated debate amongst practitioners, what is clear is that as remote hearings are used more frequently, the likelihood is that the technology will become embedded in our justice system. The priority therefore is to ensure that discussion of changes is centred around the person at the heart of the proceedings, to ensure that they are able to fully participate. If a physical hearing is requested then every effort must be made to accommodate that request in the interests of access to justice and a fair trial or hearing.

Cameron-Wong McDermott is a solicitor at the Equality and Human Rights Commission Scotland. He previously worked as a legal advisor in the Registry of the European Court of Human Rights.

Disability Discrimination and the Anticipatory duty

Muriel Robison, Health and Education Chamber, Legal Member

Muriel Robison, Health and Education Chamber Legal Member and a full-time Employment Judge, considers the duty to make reasonable adjustments in the context of schools and the provision of education.

Introduction

The duty to make reasonable adjustments is the most significant of the prohibited conduct provisions in the Equality Act 2010 (the Act) which, in relation to disability alone, creates a positive obligation to take active steps to implement adjustments for disabled people. As practitioners are well aware, in the education context, this is an anticipatory duty, which means that respondents require to make adjustments for disabled pupils generally. But what exactly does this mean for schools?

The relevant statutory provisions

Under s.85(2) of the Act, the responsible body of a school must not discriminate against a pupil in the way that it provides education; affords the pupil access to a benefit, facility or service; by not affording the pupil access to a benefit facility or service; or by subjecting the pupil to any other detriment. By reason of s.85(6), read with Schedule 13(2) of the Act, the duty to make reasonable adjustments applies to the responsible body of a school.

The responsible body, that is either the education authority or an independent school, is thereby under a duty to make reasonable adjustments in terms of s.20, and any failure to comply with that duty will amount to discrimination contrary to s.21.

General Duties in terms of the Act

There are three elements to the reasonable adjustments duty in the general application of that provision, namely:

1. where a provision, criterion or practice (PCP) puts a disabled person at a comparative substantial disadvantage, the requirement is to take such steps as are reasonable to avoid that disadvantage;

2. where a physical feature puts a disabled person at a comparative substantial disadvantage, the requirement is to take such steps as are reasonable to avoid the disadvantage; and

3. where a disabled person would but for the provision of an auxiliary aid be put at a comparative substantial disadvantage, the requirement is to take reasonable steps to provide that aid.

Duties in the schools' context

Schedule 13(2) of the Act states that the responsible body must comply with the first and third requirements. The second requirement does not apply to schools[1].

Reading s.20 with Schedule 13 of the Act, the provisions require to be modified for application in the schools context as follows:

- in relation to the first and third requirements, the relevant matters are the 'provision of education or access to a benefit, facility or service'[2].
- in the first requirement, a reference to a PCP is one applied by or on behalf of the responsible body of a school[3].
- for the third requirement, an auxiliary aid includes an auxiliary service[4].
- in relation to both requirements, the reference to 'a disabled person' is a reference to 'disabled pupils generally'[5].

With regard then to the articulation of the first requirement in a case relating to s.85, s.20(3) of the Act should be read as follows:

'a requirement, where a PCP [applied by or on behalf of the education authority] puts [disabled pupils generally] at a substantial disadvantage in relation to [the provision of education or access to a benefit facility or services] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage '.

Similarly, the third requirement (s.20(5)) should be read for the purposes of cases involving schools, as follows:

'a requirement where [disabled pupils generally] would but for the provision of an auxiliary aid [or auxiliary service] be put at a substantial disadvantage in relation to [the provision of education or access to a benefit facility or service] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid or service'.

Application of anticipatory duty in practice

So how does the anticipatory duty operate in practice? It is the reference to 'disabled pupils generally' which confirms that the reasonable adjustments duty is

[1] Schools are however under a duty to improve access for disabled pupils, including in relation to the physical environment of the school (see Education (Disability Strategies and Pupils Educational Records) (Scotland) Act 2002)
[2] Schedule 13 para 2(4)(b)
[3] Schedule 13 para 2(3)(a)
[4] Section 20 (11)
[5] Schedule 13 para 2(3)(b)

an 'anticipatory duty', for cases in the education context, as is the case for the provision of services and the exercise of public functions. It is clear from the case law that this does not mean that a school should anticipate every adjustment which is reasonable for all disabled pupils.

These provisions replace similar provisions in predecessor legislation. The particular implications of the anticipatory duty (for service providers) were explained by Sedley LJ in *Roads v Central Trains Ltd 2004* EWCA Civ 1541:

> "They cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability – impaired vision, impaired mobility and so on. Thus the practical way of applying s.21 in discrimination proceedings will usually be to focus the question and the answer on people with the same kind of disability as the claimant"[6] .

In the public functions context, Lord Dyson MR confirmed in *Finnigan v Chief Constable of Northumbria Police*[7] that

> "the duty to make reasonable adjustments is anticipatory. It is owed to disabled persons at large in advance of an individual disabled person coming within the purview of the public authority exercising the relevant function"… [It is] "important…to keep in mind the distinction between (anticipatory) changes to a [PCP] which are applicable to a category or sub-category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis. The duty to adjust a [PCP] is to be judged by reference to the former, and not the latter"[8].

In the services context, Lord Justice Underhill in the Court of Appeal in *Paulley v First Group plc*[9] quotes Lord Dyson, and describe the correct approach:

> "… thus the questions (a) whether a given PCP puts disabled persons generally at a substantial disadvantage in comparison with non-disabled persons and (b) whether, if so, the defendant has failed to take reasonable steps to avoid that disadvantage are to be decided by reference to the disadvantage suffered by the relevant class of disabled person rather than by the individual claimant. The question whether, if such a breach is established, it constitutes a breach "in relation to" the claimant….is separate and comes later".

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[6] At paragraph 11
[7] *Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445* at [32]
[8] At [36]
[9] *Paulley v First Group plc [2015] 1 WLR 3401* at [63]
[10] *DM v Fife Council [2016] CSIH 17* at [76]
[11] Although it should be noted that this is a case which concerns a local authority's public functions duty and not section 85

This passage is in turn quoted by Lord Bracadale in the most relevant decision when considering the duty for schools in the Scottish context, namely *DM v Fife Council*[10] [2016] CSIH 17[11] .

These authorities suggest that there are two stages to the test to determine whether the anticipatory duty has been breached. At the first stage, which is a group test, consideration is given to whether the PCP/failure to provide aid or service puts pupils with same kind of disability at a substantial disadvantage in comparison with non-disabled pupils. Recalling that 'substantial' means more than minor or trivial[12], the duty is thus triggered when such disadvantage is identified for the group e.g. pupils with dyslexia, pupils with autism, pupils with learning difficulties.

Where the duty is thus triggered, there is an obligation to take reasonable steps to avoid the disadvantage to that group, so that the question is not whether it is reasonable to make a particular adjustment for the individual claimant. Thus a school must consider possible adjustments for different kinds of disability in advance of a particular disabled pupil attending the school.

If there is a duty to make an adjustment as above, then an individual will have a claim if there is a failure to comply with the duty in relation to the individual, although in the schools context as well as the services context, the individual must show that they have suffered a detriment.

What is not clear however is the extent to which a service provider or indeed public authority must implement reasonable adjustments for an individual on an ad-hoc basis, as would be the case in the employment context.

Equality and Human Rights Commission Guidance

The EHRC in its Services Code of Practice states that 'Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty in accessing services, or has suggested a reasonable solution to that difficulty'[13].

What this clearly suggests is that, when it comes to the question about what adjustments are reasonable in a particular case, the assessment of what is reasonable will take into account the extent to which the service provider has knowledge of the claimant's disability; is aware of the individual's circumstances and needs; and what adjustments are contended for.

What is surely significant in the school context is that the circumstances of the individual pupil will almost certainly be known to the school, which is much less likely to be the case for services or even public functions.

[12] Section 212(1)
[13] See Para 7.26

This point is not directly addressed in the EHRC's Technical Guidance on Schools. However, it is clear that the circumstances of the individual pupil are deemed relevant to the legal test. When it comes to the question of 'what is meant by reasonable steps', it is expected that consideration should be given to what is reasonable for the individual pupil. Indeed, it states that, 'It will usually be a matter of discussing with the pupil and those who know him or her and his or her needs, what those needs are and what is likely to be most effective'[14].

Further, the factors to be taken into account[15] largely focus on what is reasonable for the individual pupil. In particular, under 'the effectiveness of the step in avoiding the disadvantage', it is stated that 'Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by the individual disabled pupil. In line with additional support for learning, the needs of the individual pupil are central. Even pupils with the same disability might need different adjustments to overcome the disadvantage. It is important not to make assumptions about a disabled pupil's needs, because this may lead a school to provide a completely ineffective adjustment'[16].

Conclusion

Arguably then the circumstances of the individual pupil are factors which must be taken into account in the assessment of reasonableness, notwithstanding the 'anticipatory' nature of the duty. It would seem contrary to the rationale for a positive anticipatory duty if that resulted in an individual being denied adjustments which were otherwise reasonable.

[14] Para 6.44
[15] Para 6.29
[16] Para 6.40

Covid Directions in Education

Iain Nisbet, Education Law Consultant

Iain Nisbet, education law consultant, considers the series of Directions issued by the Scottish Government which followed the Coronavirus Act 2020 and examines the legal basis for school closures in light of the COVID-19 pandemic.

On Wednesday 18 March 2020, the Scottish Government announced that schools in Scotland should close as of Friday 20 March. And close they did. Exceptions were made for residential schools, for the children of keyworkers and for vulnerable children (including those with complex additional support needs). Those exceptions aside, compliance was 100% as public schools, independent schools and grant-aided schools from Shetland to Dumfries shut their doors.

What was the legal basis for this wholesale closure? That – remarkably – remains a difficult question to answer.

My initial response was that this was a matter which would be treated by the courts (if called upon to do so) in a similar way to the *Walker v Strathclyde Regional Council* cases (1986 SLT 523 and 1987 SLT 81). In those cases the right to school education had been interrupted by industrial action by teaching staff. The education authority was found not to be in breach of duty as they had taken all reasonable steps to comply.

However, there then followed the Coronavirus Act 2020, which provided Scottish Ministers with powers to issue Educational Closure Directions (Schedule 16) and Educational Continuity Directions (Schedule 17). Educational Closure Directions allowed Scottish Ministers to close (some or all) schools, and (importantly) effectively disapplied certain educational duties, including s.1(1) of the Education (Scotland) Act 1980 (which was the duty relied on in *Walker*) and s.4(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act), (the duty to provide additional support). This, to my mind, seemed a much better solution than having courts determine matters after the event. It would be a transparent means of closing schools, and would be subject to some form of

Parliamentary scrutiny (albeit likely truncated in the circumstances).

The Scottish Government did not issue an Educational Closure Direction. On one view, trying to rely on a *Walker* style argument runs into real problems where there are statutory powers available which Ministers chose not to use. It appears that there may have been no legal basis for the initial period of school closures, which were achieved by Ministerial *fiat* alone. The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020/279) which (as amended) continue to govern the principal lockdown restrictions in Scotland have from the outset explicitly allowed attendance at school.

It was only after nearly two months of schools in Scotland being closed that the Scottish Government issued a formal direction, providing a legal basis for the closure. However, it was not a Closure Direction, but rather an Educational Continuity Direction, which came into force at 2pm on Thursday 21 May 2020.

As required by law, the order states that in making the direction Scottish Ministers a) had regard to advice regarding the coronavirus from Scotland's Chief Medical Officer; and b) were satisfied that the direction was a 'necessary and proportionate action' in relation to the continued provision of education. Why a direction became necessary at that stage, and not before, is not addressed.

The Direction applied across Scotland, and to all thirty-two education authorities. There is no mention of independent or grant-aided schools, although the Act certainly allows for a direction to be issued which covers those schools (as well as further and higher education institutions). So, the Directions only ever affected public schools, although the independent sector played along in precisely the same way.

The Direction effectively continued the previous *de facto* closure with certain exceptions, with subsequent Directions (there were five in total) providing for further loosening of restrictions and, eventually, the re-opening of schools.

The Direction also required education authorities to plan and prepare 'for children to resume attendance at schools' – including nursery classes 'at the earliest time it is safe to do so', having regard to Scottish Government guidance.

It required education authorities to support in-home learning 'in accordance with appropriate local arrangements'. This also applied (though perhaps to a lesser

extent) to children receiving education at schools under the arrangements for vulnerable pupils and children of key workers.

Finally, education authorities were required to provide education and childcare 'pursuant to appropriate local arrangements' for:

- the children of key workers (including NHS and social care staff); and
- vulnerable children (including those eligible for free school meals, with complex additional support needs and at-risk children).

Where the authority was unable to provide free school meals for children eligible for them, they were required to provide reasonable alternatives (e.g. other food and drink, vouchers, or cash).

One very significant effect of the Directions was that it means that any failure to comply with certain duties or time limits was to be disregarded 'to the extent the failure would be attributable to this Direction'. These included s.4(1) of the 2004 Act, and any time limits prescribed in or under the 2004 Act (except placing request time limits, which had already been extended under separate regulations) i.e. CSPs, independent adjudication etc.

However, as the guidance note pointed out 'That means that any failures which cannot be attributed to a Direction would continue to be treated as a failure to comply with that duty or time limit.'

Wording used throughout the Direction mean that, in order to properly understand what was required of schools, and what permitted, you needed to read not only the Direction itself (a slimline 4 pages); but also 'relevant guidance issued by the Scottish Ministers', any documents which set out the 'appropriate local arrangements' and the guidance note which accompanies the direction, to work out what guidance is regarded as relevant to which bits. This, I would suggest, was no easy task.

The first and second Educational Continuity Directions used the term 'child/children' in the main, but also 'pupils' and 'young people'. These all have different legal meanings. In some places the term 'child' was used where the provisions apply only to children – and not to those aged 16+, but elsewhere, the intention seemed to be that 'child' should be read as including young people as well. The language was then tightened up in the third iteration, with the term 'pupil' (which covers all

ages) being used more often.

The fourth Direction effectively brought to an end the provision of childcare for keyworker and vulnerable children as of 31 July 2020.

By the time we reached the fifth and final Direction, it was effectively a re-opening Direction, specifying that: schools may reopen to pupils from 11th August 2020; schools must reopen to pupils by 18th August 2020; but that authorities must prepare contingency plans to be used 'immediately in the event of a local coronavirus outbreak'.

There was no continuation of the disregard of failures in specified statutory duties within this fifth Direction. Therefore, the only period during which education authorities (and parents) may be able to rely on failures to comply with certain duties or time limits being disregarded is limited to the period from 2pm on 21 May 2020 until 1 minute past midnight on 10 August 2020 – and only insofar as it is the restrictions within the Direction(s) which have led to the failure.

This means, of course, that in returning schools have all the same duties in place to make adequate and efficient provision for pupils' additional support needs, and to make reasonable adjustments (including the provision of auxiliary aids and services) to avoid substantial disadvantage to disabled pupils. Under the circumstances, there may well be significant needs to be met, and adjustments to be made, although it is true that the particular circumstances we find ourselves in may well affect what is viewed as "reasonable".

As I write, new restrictions are being imposed, and it is entirely possible that new Educational Closure or Continuity Directions will follow. In that event, the impact on provision for additional support needs will need to be considered afresh.

This article is adapted from a series of blogs which first appeared on the Additional Support Needs Blog, and which can be accessed here:

https://additionalsupportneeds.co.uk/tag/educational-continuity-directions/

Iain Nisbet is an independent Education Law Consultant and specialist, with particular interests in additional support needs law and the Equality Act 2010 as it applies to education. He is the Convener of the School Closure Review Panels, a Consultant Solicitor with Cairn Legal and a member of the board of trustees of the Scottish Commission for Learning Disability.

Case Analysis

Recent Upper Tribunal Decision

Aberdeenshire Council v SS, DS [2020] UT 25

In the March 2020 case *Aberdeenshire Council v SS, DS* [2020] UT 25[1], Lady Carmichael sets out her reasons for refusing permission to appeal. The First-tier Tribunal (FTT) had decided to overturn the respondent's (education authority's) decision to refuse the appellant's placing request. The FTT therefore required the respondent to place the child in the independent school nominated by the child's parent.

The respondent sought to appeal this decision. Permission to appeal was refused by the FTT. The respondent applied to the Upper Tribunal (UT) for permission to appeal; this application was also refused.

In issuing the UT reasons for this decision, Lady Carmichael dealt with three grounds of appeal. The two main grounds will be discussed here. From the reasons, a number of practical points emerge.

1. An arguable point of law and 'hedging' of reasons

There requires to exist an 'arguable' point of law before permission to appeal may be granted[2]. Lady Carmichael used the definition of that test adopted by the UT in an English immigration case[3], namely that the point of law must not only be arguable, it must be material too[4]. It is clear from the *Nixon* case that a material error is one where if the error had not been made, there is a reasonable prospect that this would have made a difference to the outcome of the case[5].

This was important for one of the main grounds of appeal before Lady Carmichael. The respondent argued that the FTT had erred in leaving out of account provision by the child's current school of one day of tuition per week at the independent school. The FTT decided that only the provision in the child's current school was relevant to the ground of refusal under consideration[6]. This was on the basis of the words 'other than the specified school' in the wording of the relevant ground of refusal[7]. The respondent argued that this interpretation of the wording was

[1] https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020ut024.pdf?sfvrsn=0

[2] Tribunals (Scotland) Act 2014, s.46(2) and (4), considered together.

[3] *Secretary of State from the Home Department v Nixon* [2014] UKUT 00368 (IAC), Mr Justice McCloskey, President of the Upper Tribunal Immigration and Asylum Chamber, at paragraph 5 (case report available online). The source of the reference to materiality used in *Nixon* is a 2011 Guidance Note for the Immigration and Asylum Chamber – again see paragraph 5 of the decision.

[4] Paragraph [6] of the decision. The parties agreed that this is the correct test.

[5] This definition, used in *Nixon*, was taken from another immigration case, *Anoliefo (permission to appeal)* [2013] UKUT 00345 (IAC), a decision of Mr Justice Blake, former President of the Upper Tribunal Immigration and Asylum Chamber, at para [16]: again, see *Nixon* at paragraph 5.

[6] Education (Additional Support for Learning) (Scotland) Act 2004 ('2004 Act'), schedule 2, para 3(1)(f).

[7] 2004 Act, schedule 2 para 3(1)(f)(ii).

arguably wrong. Lady Carmichael did not indicate whether or not she agreed with that view, since she decided that even if the tribunal had erred, that error would have made no difference to the outcome of the reference. This view was formed given (in particular) that the tribunal said so; the decision reasons explicitly stated that had the tribunal adopted the respondent's favoured interpretation, its decision overall would have been the same[8].

This method of judicial reasoning may, for convenience, be referred to as 'hedging', that is, to issue qualified reasoning. This is where the tribunal, having given its reasons for deciding a particular point in dispute, goes onto reason on the assumption that its decision on that point is incorrect. On doing so, where it reaches the view that its overall decision (the outcome of the case) would have been the same even if it is incorrect on the point, it may explain this, and in doing so it is qualifying its reasons. This is an important judicial reasoning technique, especially given the materiality requirement described above. To put it another way, the tribunal would be explaining how its error (if it is so) would make no difference to the outcome of the case.

However, two points to note. Firstly, the tribunal needs to be clear in its deliberations that the alternative interpretation would have led to the same outcome, and if so it should say so explicitly. Secondly, if using this technique, the tribunal ought to say why it takes that view. In this case, the FTT referred back to earlier reasoning and to the gap in suitability it found to exist between the two schools[9]. So, the reasons can be short and can refer to other parts of the decision, but they need to be stated. Otherwise the UT may not be able to tell if the alternative conclusion was a reasonable one.

More generally, it is good practice to reason in this way. The UT has not heard the evidence. Only the FTT will know what its decision would have been, had it taken a different approach to the facts or law. Where such reasoning is not explained, it could lead to an appeal being allowed and the case having to be re-heard unnecessarily. While it takes time to explain the response to an alternative approach in decision reasons, this could save considerable time and expense later in a jurisdiction where time is of the essence.

Finally, and importantly, there seems to be limited scope for an appeal to proceed where the alleged error would not have made a difference to the outcome of the case; that is, where there is a point of law of general application.

In *Anoliefo*[10], this test is described as one where the point to be determined is of public importance and where there is a public interest in its determination. Assuming this test was adopted in this jurisdiction, it could apply for example where there is a point of statutory interpretation which is likely to affect other cases, and which has not yet been determined at appellate level.

2. Amending the response

[8] Paragraphs [17]-[19] of the decision. The same materiality argument was used by Lady Carmichael in connection with the ground of appeal on the attempt to amend the response, discussed below: see para [14].
[9] These reasons are discussed by Lady Carmichael at paragraph [18] of the *UT* decision.
[10] See note 4 above for the full case reference.

Either party to a reference may amend its written case[11]. The provision dealing with a proposed amendment by the respondent is rule 19(5) of the rules[12]. Such an amendment is only permitted in 'exceptional circumstances' and at the discretion of a legal member (if the request comes before the hearing) or at the discretion of the tribunal (if the request comes during the hearing).

In this case, the respondent sought, prior to the hearing, to add a new ground of refusal of the placing request, so that it could be argued alongside the ground originally relied upon. The legal member had, prior to the hearing, refused that request. The respondent in its permission to appeal application argued that this decision was arguably wrong in law. The respondent claimed that the proposed new ground of refusal arose as a result of a new solicitor for the respondent having noticed a new line of argument while taking a statement from a skilled witness in preparation for the hearing. However, Lady Carmichael decided that the legal member had applied the correct test ('exceptional circumstances') and that it was not arguable that it had been wrongly applied.

Three factors were considered by Lady Carmichael to be relevant to this question:

(1) the proposed new line of argument was around the child's difficulty with transitions, but this was already an issue raised by the appellant in its case statement, and so was not new;

(2) the respondent's response had been prepared by someone who was legally qualified; and

(3) the tribunal as an 'expert tribunal' would have been well aware of 'difficulty with change' being a frequent feature for children with autistic spectrum disorder.

Taking these together, Lady Carmichael decided that the tribunal had not erred in refusing permission to amend the response.

What is important to note here is that the test is a high one: 'exceptional circumstances' and this is the test whether the request comes early or late in the process. The test is not one of prejudice or disadvantage to the requesting party.

Also, the factors relied upon by Lady Carmichael are important more generally, in particular the presence of legal advice when the case statement is formed, and the expert knowledge of the tribunal. These factors may well apply in consideration by the tribunal of future requests for amendment, whether by the appellant or respondent[13]

[11] These are regulated by The First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, schedule to SSI 2017/366 ('the rules'). The appellant's written case (beyond the initial reference form) is a 'case statement' (rules 14 and 17(3)), while the respondent's is a 'response' (rule 19).

[12] The provision for case statement alteration by the appellant is at rule 17(4) of the rules. Where an alteration is sought, the correct route via a supplementary case statement, and the test for permission to allow this is not stated in the rule.

[13] Factors such as those considered in the present case as relevant to amending the response are likely to be relevant to the case statement, when one considers the overriding objective in rule 2. It is fair to say, however, that since the 'exceptional circumstances' test does not apply to case statement supplements, it might be easier for the appellant to justify an amendment than for the respondent to do so.

New ways of working for Allied Health Professionals arising from the COVID-19 Pandemic

Gillian McKelvie, Health and Education Chamber, Ordinary Member

Gillian McKelvie, Health and Education Chamber Ordinary (specialism paediatric physiotherapist) Member, shares some of the developments and innovations in NHS service provision from the perspective of an allied health professional.

At the end of March 2020, all non-essential face to face NHS services were discontinued due to the COVID-19 pandemic, prompting a move to remote consultations using telephone or video.

The lack of face to face consultations during lockdown had a significant impact on people with additional support needs. Health concerns for children with physical disabilities were highlighted in a recent French survey[1] which reported on the difficulties for children and young people (CYP) aged 0-18 years with physical disabilities during the COVID-19 lockdown. It concluded that there were major consequences for the wellbeing of CYP. Parents reported 55% had no social interaction with other CYP and 44% stopped all physical activity. The risk of being sedentary is higher in people with physical disabilities, which in turn can result in loss of motor skills. Parents reported their main concern was rehabilitation (72%) and their main difficulty was mental load (50%).

Allied Health Professional (AHPs) had to quickly adapt to provide safe, patient-centred care during the period of lockdown. In a short space of time, appointments were replaced with telephone or video consultations. Websites offering advice, information and specific exercises were sent to patients by email.

Evidence for video innovations

Video consultations for therapy have been used in remote and rural areas pre-COVID. A systematic review of video rehabilitation in Sherbrooke, Canada[2] described intervention for children with disabilities aged 0-12. For children with motor difficulties, effective video interventions tended to be centred on increasing parent skills to carry our exercise programmes. The review did not recommend replacing face to face services with video interventions, but that it should be considered as a delivery option.

[1] Cacioppo M, et al. Emerging health challenges for children with physical disabilities and their parents during the COVID-19 pandemic: The ECHO French survey. Ann Phys Rehabil Med (2020), https://doi.org/10.1016/j.rehab.2020.08.001

[2] Chantal Camden, Gabrielle Pratte, Florence Fallon, Mélanie Couture, Jade Berbari & Michel Tousignant (2019): Diversity of practices in telerehabilitation for children with disabilities and effective intervention characteristics: results from a systematic review, Disability and Rehabilitation, DOI: 10.1080/09638288.2019.1595750 https://doi.org/10.1080/09638288.2019.1595750

An Australian study[3] looked at the impact of delivering school-based speech and language therapy (SLT) and occupational therapy (OT) to children in remote and rural areas, via video conferencing. Results from this study suggest that video conferencing may help reduce inequalities and improve academic outcomes over time.

What is Near Me?

'Near Me' is a secure online video consulting service approved for use by the Scottish Government and NHS Scotland that enables health and care appointments to take place at home or close to home. It has been available nationally since December 2016, mainly to serve rural and island areas. At the start of the pandemic March 2020 there were around 300 consultations weekly. The NHS rapidly set up training webinars to support staff to use Near Me and by June 2020 there were around 17,000 consultations weekly.

Consults are securely encrypted and user confidentiality is safeguarded ensuring privacy and professionalism.

Clear, succinct instructions are vital to communicate to parents and families which can be reinforced with visual demonstrations.

Ending the session by reinforcing the learning points and following up with a phone call can ensure there is time for questions.

Benefits include parents appreciating not entering the hospital environment especially with vulnerable children, and removing the need for families to travel to appointments. Colleagues can join the same video appointment to offer multi-disciplinary appointments and translators, (including family members abroad) can also join to support families where required.

Near Me public engagement survey published by Technology Enabled Care Scottish Government[4]

Members of the public and health professionals' views on video consultations (Near Me appointments) were gathered between 29 June and 24 July 2020. There were 5400 respondents. Health professionals included doctors, nurses, AHPs and psychologists.

Purpose of the Near Me consultation

The public engagement consultation was held in order to:

- Understand the benefits and barriers of using video consultations and identify improvements.

- Understand the views of people who had never used Near Me and raise awareness of the potential for further use.

[3] Impact of school-based allied health therapy via telehealth on children's speech and language, class participation and educational outcomes Danette H Langbecker, Liam Caffery, Monica Taylor, Deborah Theodoros, Anthony C Smith First Published October 20, 2019 Research Article Find in PubMed. https://doi.org/10.1177/1357633X19875848

[4] https://www.gov.scot/publications/public-clinician-views-video-consultation-executive-summary/

Co-produce an Equality Impact Assessment to gain insight into the extent to which different groups were able to access Near Me.

Interesting findings

The majority of respondents (86.5% of the public and 94% of clinicians) felt that video consultations should be used where appropriate during periods of physical distancing and in future. Both groups reported:

Benefits included low infection risk, improved access to services, more convenient, saves time, better for the environment and less time off work /education.

Barriers included poor internet connection, no private space and limited access to devices.

The Equality Impact Assessment identified the following key points:

- Clinicians and organisations often made assumptions about which groups of people should be offered a Near Me appointment; people preferred where possible, to have a choice
- The need for inclusive communication guidance for Near Me including easy read and languages other than English
- Community hubs could be made available to provide private space, loan of devices and practical assistance.

The way forward

As a paediatric physiotherapist, the move to remote approaches for rehabilitation has been effective but there have also been challenges. Physiotherapy (PT) is a hands-on profession and in some areas of clinical assessment, a face-to-face consultation is necessary. Clinical reasoning is essential in assessing the risk of providing consultations at a clinic, at home or more recently at school during this time of lockdown. At the time of writing, clinicians feel that offering a combination of video and face to face clinics is most effective.

The Chartered Society of Physiotherapy (CSP) has commissioned an evaluation of the impact of remote PT in a variety of settings. This will help to recommend and develop guidance on innovative approaches and new ways of working. It is considered that Near Me will be embedded into everyday practice.

Finally, many of us are spending more time in front of a screen. The CSP has produced the following desk based exercises designed to be fitted into the working day. Staying healthy at work is easier than you think. https://www.csp.org.uk/system/files/do_you_sit_at_your_desk_exercise_sheets_a4.pdf

Gillian McKelvie has been a tribunal member since 2007. She has been a paediatric physiotherapist within NHS Lothian community paediatric physiotherapy team for 30 years. She works with children and young people with physical disabilities, aged 0-18 years, in clinics, schools and at home.

Peripheral Thinking: Beyond the Usual Provisions: Part 2(b)

Derek Auchie, Health and Education Chamber, Legal Member

In the third part of this series of discussions, Professor Derek P Auchie, HEC Legal Member, continues to explore HEC-relevant provisions in UK legislation other than the 2004 and 2010 Acts. Here, the Education (Scotland) Act 1980 ('the 1980 Act') is considered.

Introduction

The 1980 Act is a daunting piece of legislation; even with dozens of repealed provisions, it extends to over 150 pages. It is daunting not only in its length but also its coverage. Subjects dealt with include: religious education, provision of school lunches, prosecutions for non-attendance at school, standard of food and drink at schools, medical and dental examinations of pupils, school inspections, employment of teachers and independent school administration. A real mixed bag.

Among these provisions, there are a few important ones which could be relevant in any placing request, Co-ordinated Support Plan (CSP) or Equality Act 2010 (2010 Act) case. I have picked these out and will now consider them.

Definitions

The 1980 Act is often used for its statutory definitions. These can be found in s.135 of the Act (although in some instances, the definition there refers to other provisions in the Act). In s.29(2) of the Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act), there are a list of expressions the meanings of which are identical to those in s.135 of the 1980 Act. Notable in its absence from that list is the definition of "young person": that provision is defined in s.29(1) of the 2004 Act and the definition of this term in the 1980 Act is different, so caution is needed.

Where a term defined in s.135 is not defined specifically in the legislation in question, the s.135 definition should be used.

Adequate and efficient provision of school education

Section 1 of the 1980 Act places a duty of every education authority to secure this in its area. This duty is not unqualified but it has been described as being 'of prime importance'[1]. There is authority to indicate that such a duty is to be applied not to pupils generally, but to each individual pupil[2], and that lack of resources is not a

[1] *Walker v Strathclyde Regional Council* 1986 SC 1 (No.1), Outer House, Lord Davidson at 14.
[2] Norrie, K., *The Law Relating to Parent and Child in Scotland* (SULI) 3rd Ed, para 12.23.

relevant consideration in relation to such a duty [3].

Of interest here is the definition of 'school education', found in s.1(5)(a) of the 1980 Act. It means 'progressive education appropriate to the requirements of pupils, regard being had to the age, ability and aptitude of such pupils…' Such education must be provided to pupils.

This duty could be argued to be the starting point in any education adequacy argument in any of the three main types of HEC case.

In placing request cases, whatever the ground of refusal, it is relevant to consider whether the respondent has complied with this duty (as with all of its statutory duties) at the 'appropriateness in all of the circumstances' stage. So, even if the sole ground of refusal is the 'employment of an additional teacher' ground [4] the question of age, ability and aptitude of the child and the fit of the education provided could be considered, since it is relevant to the 1980 Act s.1 duty.

In a CSP case, the provision of adequate and efficient education will lie at the heart of consideration of whether a CSP is required, needs to be reviewed, or should have its content changed (three of the main CSP-type cases in the HEC).

A failure to comply with this statutory duty in relation to the child/young person in question could be an indicator of discrimination in a 2010 Act claim.

Duty to provide for social, cultural, recreation and physical education facilities

This duty is found in s.1(3) of the 1980 Act, and is expanded further in s.6. It is important to note that s.1(3) contains a duty; s.6 provides powers, although the examples in s.6 assist in understanding the meaning of some of the terms in s.1(3); none of those terms are defined in the Act.

This duty indicates that education authorities must provide education beyond the obvious, traditional components. These elements are not optional extras.

These provisions could be relevant in particular to CSP content cases, certain grounds of refusal of a placing request and to the 'appropriateness in all of the circumstances' test.

They might also be pertinent to the question of whether a child/young person with certain needs is being discriminated against if this statutory duty is not being complied with.

Duty to provide a psychological service

Section 4 of the 1980 Act requires every education authority to provide a psychological service for its area. The non-exclusive functions of such a service are listed in s.4. Interestingly, these functions include the giving of advice to parents

[3] *R v East Sussex County Council, ex parte Tandy* [1998] AC 714, House of Lords.
[4] Schedule 2, para 3(1)(a)(i) of the 2004 Act.

and teachers as to appropriate methods of education for children having additional support needs[5].

This would seem to be a duty which applies to schools in general, but it could be argued that this duty is not being complied with in the context of an individual case (in the same was as such an argument exists under s.1 – see above).

Perhaps of more interest, there is a duty on the education authority to 'in suitable cases' provide for the additional support needs of children[6]. This must be a reference to something more than advice to parents and teachers, and so refers to more direct psychological input. There could be a question around whether the situation of the child in question is 'suitable' for such input. It is not clear whether an argument that such a service is being provided on a 'consultancy' (advice) basis would be enough to justify compliance with this duty. It may depend on whether that approach is followed as a blanket policy or only in suitable cases.

An argument that one (or both) of these duties is not being complied with could found a content argument in a CSP reference, or again could be relevant at the 'appropriateness in all of the circumstances' stage of a placing request reference.

Lack of provision of adequate psychological input could also be argued in a 2010 Act discrimination case, and the provision of such input could be the subject of a 2010 Act Tribunal order.

Education for children unable to attend school

Under s.14 of the 1980 Act, unless in certain circumstances set out in s.14(2) and (3), where:

> (1) due to extraordinary circumstances, a pupil is unable to attend school or it would be unreasonable to expect a pupil to do so, or;
>
> (2) where a pupil is unable to attend school or where it would be unreasonable to expect him/her to do so due to ill-health,

special arrangements for education elsewhere than at school must be made.

This could be relevant to, in particular, a 2010 Act claim where the alleged lack of (or inadequate) provision of education for a pupil who is ill is said to amount to unlawful discrimination.

The content of a CSP may require to be amended where a pupil is not able to attend school for a prolonged (or even, depending on the circumstances, a short) period.

In placing request terms, it may be the case that the child is still being provided with education 'in the [education authority] school' would include provision elsewhere than in the school building, for the purposes of the 'respective suitability' test[7].

[5] 1980 Act, s.4(b)
[6] 1980 Act, s.4(c)
[7] 2004 Act, schedule 2, para 3(1)(f)(iii)
[8] 2004 Act, schedule 2, para 3(1)(ii)

Provision of accommodation

There is a duty on education authorities under s.17 of the 1980 Act to provide sufficient accommodation in public schools to are to enable them to perform its functions under ss1-6 of the Act. While this is a broadly framed duty, it may be relevant in placing request cases where school accommodation is an issue, and offers some context in cases where the "significant expenditure in altering accommodation" ground of refusal is used[8].

Education in accordance with the wishes of parents

Parental wishes lie at the heart of the presumption in favour of education authorities granting placing requests[9]. However, s.28 of the 1980 Act applies the need for regard to the wishes of parents to all activities of education authorities.

It is crucial here to note that: (1) education authorities need only have regard to the principle of education in accordance with parental wishes, and (2) having had such regard, they need act only so far as is compatible with the provision of suitable instruction and training and (3) having had such regard, they need act only so far as it is compatible with avoiding unreasonable public expenditure.

Despite its qualifications, this duty is relevant in any HEC case where the education authority has, or is proposing to do/not do something which is not in accordance with parental wishes. This makes it relevant to almost all such cases[10]. It has been said that:

> "Unless it can be shown that parental wishes were wholly disregarded, or were overborne by some improper consideration, or that the authority paid to the parents' wishes a degree of regard less than any reasonable authority would have paid, the general principle would seem to have little enforceable content[11]."

The requirement to only have regard to parental views means that the education authority can have regard to other factors in addition to parental wishes and it can make exceptions to the general duty[12].

This does not mean that the duty cannot be breached; it seems clear that the duty will not be complied with where scant regard is had to parental wishes, or where the expenditure relied upon (in a case where this reason is used) is not unreasonable. The reference to 'public' expenditure seems to refer to expenditure of the education authority in general, and not only to the expenditure for the child in the relevant school.

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[9] 2004 Act, schedule 2, para 2(1)
[10] It might not be relevant where, for example, the young person is the appellant/claimant.
[11] Norrie, K., The Law Relating to Parent and Child in Scotland (SULI) 3rd Ed, para 12.26.
[12] Lord Ross in *Keeney v Strathclyde Regional Council* 1986 SLT 490, Outer House, at 492 where he refers to case law on the then equivalent English legislation. See also *Harvey v Strathclyde Regional Council* 1989 SLT 612, House of Lords, although the test applied in that case is the one for judicial review, which is not the same as the one which the Tribunal should apply.

In most placing request references, it will not be difficult for education authority to show that this duty has been complied with since in refusing the request, consideration will have been given to parental wishes. Similarly with CSP references, where the CSP usually records parental views.

A wider issue, however, may exist where parents of a child wish a particular kind of educational provision, for example one based more on life skills and practical instruction, than on a more traditional approach. This might then be relevant to some of the grounds of placing request refusal and also at the 'appropriateness in all of the circumstances' stage of consideration.

Claims under the 2010 Act could also involve the wishes of parents, bearing in mind the very wide subject matter to which the duty applies – any power or duty under the 1980 Act.

Parental duty to provide education

Under s.30 of the 1980 Act, parents are required to provide an 'efficient' education to their children which is suitable for each child's age, ability and aptitude. This duty can be complied with by causing each child to attend a public school regularly or 'by other means'.

This duty may be relevant in a case where home schooling is provided, whether fully or partially. It might also be relevant in a case where homework is an issue. A parent could argue that he/she is unable to perform this duty without certain resources/support from the education authority, and in such a case the s.1 duty would also apply (discussed above).

Conclusion

The provisions considered here are the only ones in the 1980 Act which would appear to be of relevance to HEC cases. They should be considered in all cases, since, like certain provisions of the Children (Scotland) Act 1995 (discussed in an earlier article), they are not always on the radar of the tribunal as it focusses on the 2004 or 2010 Act.

Children and Young People: News and Developments

Although COVID-19 continues to dominate the headlines, some exciting law and policy developments are taking place in Scotland that will undoubtedly impact on children and young people and those working alongside them.

The Additional Support for Learning Review

The Additional Support for Learning Review report was published in June 2020. The report is entitled: Support for Learning: All our Children and All their Potential and is available to download at www.gov.scot/publications/review-additional-support-learning-implementation. The report follows a comprehensive review led by Angela Morgan which considered current evidence and engaged with a range of people and groups to identify good practice and further improvement in ways that children and young people with additional support needs progress their learning.

The report makes a number of findings and key recommendations around the implementation of the 2004 Act across Scotland. The Scottish Government, in partnership with COSLA and the Association of Directors of Education in Scotland (ADES) is expected to give a formal response to the report's recommendations in the Autumn. The Bulletin will include an article on the Review in the future, following the recent Scottish Government response.

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

Scotland is set to become the first country in the UK to directly incorporate the UN CRC into domestic law. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill was introduced to the Scottish Parliament on 1 September 2020. The main purpose of the Bill is to incorporate the UN CRC, which once enacted, will make it part of Scottish law. Some key provisions in the Bill include:

- a duty that public authorities must not act in a way that is incompatible with the UN CRC requirements;
- power to bring proceedings before a court or tribunal where a public authority is alleged to have acted in a way that is incompatible with the UN CRC;
- provision for courts in Scotland to have powers to decide if legislation is compatible with the UN CRC requirements;
- provision for the Scottish Government to change laws to make sure they are compatible with the UN CRC requirements;
- the Children and Young People's Commissioner in Scotland having power to take legal action if children's rights under the UN CRC are breached;
- a requirement on the Scottish Government to publish a Children's Rights Scheme to show how they are meeting UN CRC requirements and explain their future plans for children's rights.

The Bill seeks to promote children's rights and ensure that children and young people are involved in decisions that affect their lives. By incorporating the terms of the UN CRC, the Bill aims to ensure that children's rights are always respected, protected and fulfilled by public authorities. Where necessary, children will be able to go to courts or tribunals to enforce their rights.

The Scottish Government is in the process of seeking views on the Bill and members can check its progress here:

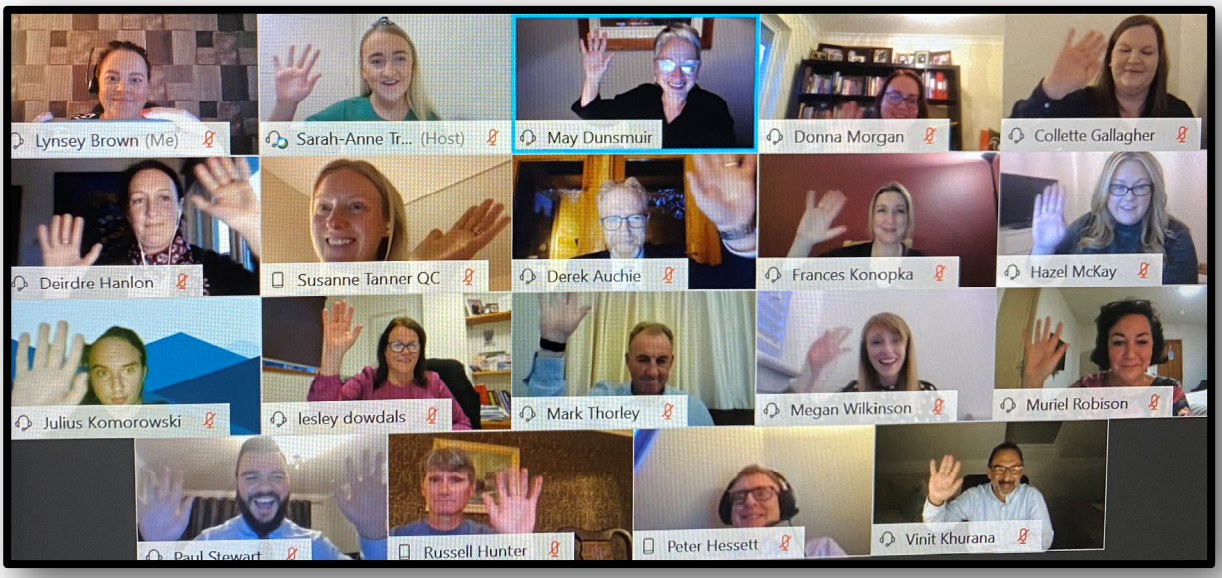
https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115977.aspx

Collette Gallagher, Health and Education Chamber, Legal Member

HEC legal member Collette Gallagher, was recently promoted to the position of Locality Reporter Manager within the Scottish Children's Reporters Administration (SCRA). Collette's new role involves responsibility for ensuring the delivery of effective and efficient services to children and families in line with the Children's Hearings (Scotland) Act 2011 and SCRA policies, plans and standards, by appropriately managing skills and resources within and across the locality. The role will also involve the development and influencing of policy initiatives and relationships with key partner agencies within the Locality area in line with SCRA national policy.

The Bulletin congratulates Collette in her exciting new role.

Our first remote Legal Member Evening training, which took place in October – a wave from all and smiles abound!



HEALTH AND EDUCATION CHAMBER GUIDANCE

To Members

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PGN 02 2018 Capacity and Wellbeing

PGN 03 2018 Independent Advocacy

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PGN 05 2018 Postponements, Suspensions and Procedure

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03 2018 Making a Disability Discrimination Claim

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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@scotcourtstribunals.gov.uk if they wish to contribute in any way. Any 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 all contributions may be subject to editing. Our next publication will be in **May 2021** and any contributions must be submitted no later than **1 March 2021.**

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