



INFORMATION NOTE No 03/2018

MAKING A DISABILITY DISCRIMINATION CLAIM

Purpose of this Information Note

1. This information note is to assist you to decide whether a disability discrimination claim can be made to the Additional Support Needs jurisdiction of the Health and Education Chamber of the First-tier Tribunal for Scotland (referred to as “the Tribunal”) in this note.
2. The Tribunal can consider and decide claims of disability discrimination of persons in school education in Scotland under the *Equality Act 2010*. This covers a school managed by an education authority, an independent school or a grant aided school¹ but not a further education college.
3. This Information Note is set out in three parts. **Part 1** explains who can make a claim and some of the types of claims that can be made. **Part 2** explains the process of making a claim. **Part 3** explains what happens after you have made a claim.
4. The following terms are used in this Note:
 - “The Tribunal” means the Additional Support Needs jurisdiction of the Health and Education Chamber of the First-tier Tribunal for Scotland.
 - “a tribunal” means the three people who will consider a claim or reference and make a decision – one will be a legal member who is an experienced lawyer and the other two are specialist members, with expertise in education, social work or health. Occasionally a tribunal will be made up of one legal member, sitting alone.
 - “The 2010 Act” means the *Equality Act 2010*.
 - “The claimant” means the person making the disability discrimination claim.
 - “Parties” means the claimant and the responsible body.

¹ 2010 Act, Part 6, Chapter 1, section 85 (8); and Education (Scotland) Act 1980, section 73(c) or (d).

- “Parent” includes guardians and any person who is liable to maintain or has the actual custody of a child or young person².
- “The 2018 Rules” means The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)

Part 1: who can make a claim and the types of claim

Who can make a claim?

5. A parent of a child or young person who is disabled or the disabled child or young person can make a claim where they have capacity to do so³. A person lacks capacity to make a claim if they are incapable of doing something by reason of mental illness, development disorder or learning disability or of inability to communicate because of a physical disability. A child of 12 years is presumed to have the capacity to bring their own claim. A child of a younger age may also have capacity. **The person making the claim is called “the claimant”.**

Who is the claim against?

6. **The claim is against the “responsible body”**, which is the organisation the law says will be responsible in cases of disability discrimination. In the case of public schools in Scotland, this will be the education authority. If the alleged discrimination occurred in an independent school, the responsible body is the owner or governing body of the school.

What is a disability?

7. The 2010 Act⁴ defines a person with a disability as a person who has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. The condition should be in existence for at least a year.

What is not considered a disability?

8. Children who wear glasses are not covered if that is their only difficulty. Conditions which occur regularly (such as hay fever) or are only temporary (such as broken bones) are excluded, as are addiction to alcohol, tobacco and drugs.

² Education (Scotland) Act 1980, section 135.

³ 2010 Act, Schedule 17, Part 3, section 8

⁴ 2010 Act, Part 2, Chapter 1, section 6(1)

Can a child without a disability ever be discriminated against?

9. If you or your child are not disabled, but are victimised (treated worse than others) by a school or a local authority because you have given evidence or information in connection with a claim that you or another person is making, or proposing to make, against the responsible body, you may be able to make a claim for victimisation under the 2010 Act.

What is disability discrimination?

10. Disability discrimination can occur when a person is treated less favourably than someone else because of his or her disability. Discrimination can also happen when a disabled person is placed at a substantial disadvantage because reasonable adjustments have not been made to account for their disability.

Types of Claims

11. The Tribunal can hear many types of claims, and below is an outline of some of the types of claim which can be made.

Admissions

12. The responsible body must not discriminate because of a pupil's disability. This would apply:
- in the way in which the responsible body has decided who will get a place in schools;
 - in the terms on which they offer pupils a place at the school; and
 - by refusing to accept, or deliberately not accepting, an application from a disabled pupil for admission.

Exclusions

13. The responsible body must not discriminate against a disabled pupil by excluding him or her from the school because of their disability or where the pupil's behaviour resulting in the exclusion arises due to their disability. This applies whether it is permanent or fixed term exclusion.

Education and Associated Services

14. A school must not discriminate in the education and associated services it provides for disabled pupils. This covers all aspects of school life and the teaching provided to pupils. It also covers periods during lunch times, other breaks and after school activities. The responsible body has a duty to make reasonable adjustments to support disabled pupils⁵.

⁵ 2010 Act, Part 6, Chapter 1, sections 85 and 85(6).

When can discrimination be justified?

15. Even though a disabled pupil may have been treated less favourably than other pupils or has been placed at a disadvantage, the discrimination will not be illegal if the responsible body can show that it was justified in the circumstances.

16. For example, discrimination may be justified when:

- when a disabled pupil is refused admission to a school as a result of a “permitted form of selection” (which is a legal way of choosing pupils);
- because an adjustment would involve removing or altering a physical feature (this is not included in the definition of reasonable adjustments a school has to make);
- because of the costs and practicality of making a “reasonable adjustment”; and
- because of health and safety issues.

Part 2: Making a claim to the Tribunal

Time Limits

17. The time limit for making a claim to the Tribunal is **6 months from the date of the alleged discrimination**. Where there is a continuing omission, then the alleged discrimination is still ongoing.

How do I make a claim?

18. A claim can be made using the claim form which is on the Tribunal's website at www.healthandeducationchamber.scot. A paper copy can be sent to the Tribunal, but if you have internet access you can complete and submit a claim form using the following email address ASNtribunal@scotcourtribunals.gov.uk. A claim may be made in writing and signed by the claimant, but a claim submitted electronically will normally be accepted without the claimant's signature. If you have told us that a representative is acting for you, all correspondence will be addressed to the representative.

What information do I need to provide?

19. You will need to provide the following:

- information showing that the child or young person has a disability;
- information showing that the alleged discrimination was connected to the child or young person's disability;
- information showing that the alleged discrimination was not justified in the case of indirect discrimination;
- details of what you are asking the Tribunal to do.

20. Photocopies of documents, such as letters from the school or education authority which relate to the matter you are claiming about, should be included with your claim form. Letters or reports about the disability should also be included. If further information is required, you will be asked to provide this.

21. Original documents should not be sent.

22. You must also send a copy of your claim and supporting papers to:

Equality and Human Rights Commission
2nd Floor, 151 West George Street, Glasgow, G2 2JJ
or
(by email) LegalRequestScotland@equalityhumanrights.com

23. If the claim is one which the Tribunal can deal with, a copy of the claim and any accompanying documents will be sent to the responsible body inviting them to respond.

What remedies are available?

24. The tribunal has no power to award money as compensation for any discrimination that may have taken place. If the claim is decided in your favour, the tribunal will consider what you have requested. The tribunal may decide that there is a more appropriate remedy and may direct that this be awarded as well as, or instead of, the remedy you have requested. The tribunal can order the following remedies:

- a statement that discrimination has occurred;
- a written apology;
- training to be provided to school staff;
- policies to be developed;
- reinstatement in the school;
- another remedy not stated above which you may also indicate.

Part 3: What happens next?

Case statement period

25. Once the Tribunal is satisfied that the claim is competent, both parties will be given a period of time in which to submit to the Tribunal any further evidence which they feel may assist the Tribunal in making its decision. This is called **the case statement period**, and both the claimant and respondent will be given a set period of time within which to submit further evidence.
26. In most circumstances, a **30 working day**⁶ case statement period will apply. The period will begin on the second working day after the claim is received.
27. You will be able to add to the information you provided with your claim. You should collect any further written evidence which you intend to rely upon and lodge this with the Tribunal **at the end of the first 20 working days of the case statement period**. This removes the risk that evidence may be missed if submitted on an ad hoc basis. The date of the 20th working day will be given to you once your claim has been registered.
28. The case statement can also include a written statement of the views of the child or young person to whom the claim relates. Any documents submitted will be copied to the responsible body involved, who will have the remaining **10 working days** of the case statement period to respond.
29. The response from the responsible body will be collated together with the claim form and any written information submitted with it and your case statement. These documents will be numbered and sent to you or your representative and to the responsible body.

Withdrawal of claim

30. You may withdraw your claim at any point prior to the hearing or during the hearing. Once a claim has been withdrawn, it will be dismissed. It may be that the responsible body has decided to agree with your claim and take action to end the discrimination. If the responsible body does not oppose your claim, this does not mean that you need to withdraw your claim. A legal member may make a declaratory decision on the basis of the papers and no oral hearing will be necessary⁷.

Consolidation of hearings

31. There may be more than one claim about the same person or about a similar issue. A legal member can make a decision to enable the claims to be heard at a single hearing. The Tribunal also deals with references (appeals) regarding the additional support needs of children and young people. If your claim relates to a

⁶ The 2018 Rules, rule 64(2)

⁷ The 2018 Rules, rule 83

child or young person for whom a reference has already been lodged, the legal member may consolidate the hearings for the reference and the claim, if this is appropriate.

Witnesses⁸

32. Before the case statement period ends, parties should consider whom they wish to bring as a witness and provide a list of names to the Tribunal. Each party is entitled to call up to five witnesses to give evidence. The legal member may, in exceptional circumstances, permit more witnesses. The parties themselves may also give evidence. In some cases the evidence of one or two people may be sufficient to decide the claim.
33. Parties should consider whether the witnesses they wish to call would be available to attend on the notified hearing date. A witness can give written evidence or speak to the tribunal by video link or telephone conference call if personal attendance is not possible. If a witness is reluctant to attend or may have difficulty in getting time away from work to attend, you can apply to the Tribunal to have the witness cited to attend.
34. Both parties are responsible for keeping their own witnesses up to date and should inform them if there have been any changes to the hearing date or time.

Representation

35. Both parties can choose to have a representative or can change a representative at any point prior to the hearing, but it is important that the party informs the Tribunal in writing without delay. If you chose to have a representative, you or your representative should confirm this in writing to the Tribunal and all communication will normally be sent only to the named representative.
36. Parents or children will often be unfamiliar with the Tribunal process and may want somebody to represent them at the hearing. This could be a family member, a friend, someone from a representative organisation or someone with a legal qualification.
37. Legal aid may be available but this will depend on each individual's circumstances. In some instances, sponsorship can be obtained from the Equality and Human Rights Commission if legal aid is not available.

Pre-hearing case conference calls

35. Shortly after the end of the case statement period, the legal member will hold a telephone conference call with the parties or their representatives, to discuss the hearing procedure, to confirm what witnesses are to be called and when, to agree a running order and to deal with any other preliminary matters. No special

⁸ See [Information Note No 01/2018 : For Parties, Representatives, Witnesses and Supporters](#)
You will find a copy of this on the Tribunal's website.

equipment is required to take part in a conference call. The case officer will send all the necessary information to those who will be taking part in the call.

36. Where the parties are legally represented, the legal member may ask the representatives to prepare a written minute of agreement setting out the facts which are not in dispute. This will allow a tribunal to focus on the remaining matters which are not agreed.
37. The legal member will fix the hearing date at the case conference call, after taking into account the availability of both parties and their witnesses. If there is a problem with the date, the party must inform the Tribunal immediately, stating the reason why the date is unsuitable.
38. Once the date has been agreed, the case officer will send information to both parties regarding the date, time and place of the hearing.

The views of the child or young person

38. Where the views of the child or young person are not included in the case papers, the legal member at the case conference call may direct that these be taken, usually by an independent advocate.

Hearings

35. Hearings are held in a variety of venues across Scotland, which can include Scottish Government buildings, business centres, universities, colleges, Tribunal suites and local authority accommodation. The choice of venue is important to ensure that it is private and convenient for parties. **If you have any access needs or special requirements, please inform the case officer as soon as possible.**
36. Hearings normally start at 10.00 am and can last a full day or more. Start times may be altered by the legal member and will be notified to parties. Complex cases may require more than one day. Each party will have a private waiting room. No lunch is provided and parties are asked to make their own arrangements.
37. Hearings are usually held in private. For that reason, witnesses will normally be in the hearing room only when giving their evidence. They will not be allowed to observe either before or after this period. The case officer will come for the witness when the tribunal is ready to hear from them. **The claimant and responsible body and their representatives will be able to remain in the hearing room throughout the hearing.**
38. A child or young person who is the claimant may give evidence, and any child over the age of 12 years who is not the claimant can also give evidence. A child under the age of 12 years who is not the claimant can only give evidence where the legal member considers that the evidence is necessary to enable a fair hearing and that the welfare and interests of the child are not prejudiced.

Decision

35. Depending on the complexity of the issues under consideration the legal member may give a verbal decision at the end of the hearing. In all cases parties will receive a full written statement of the facts found by the tribunal and the reasons for the decision. **This should be issued within 10 working days.** If the decision is likely to take longer, the case officer will inform parties.

Appeal rights

Tribunal review

36. Following the issue of a tribunal decision, a tribunal may either at its own instance or at the request of a party review any decision made by it where it is necessary in the interests of justice to do so.⁹
37. A written application to review in any of the above circumstances must be received by the First-tier Tribunal for Scotland **not later than 14 days of the date the written reasons were sent to parties.** The application should state the reasons why a review of the decision is necessary.
38. The review will where practicable be undertaken by one or more of the members of the First-tier Tribunal for Scotland who made the decision to which the review relates. Where it is not practicable to do so, the Chamber President will appoint another tribunal. A tribunal may dispense with an oral hearing if both after considering parties' views and where the tribunal considers a hearing is not necessary in the interests of justice.
39. After reviewing the decision and if the decision is to be varied or revoked, a tribunal will substitute it for a suitable decision. A tribunal may order a rehearing by the same tribunal which made the decision, or by a different tribunal.
40. A review does not affect the time limit of 30 days for an application for permission to appeal being received (see below).

⁹ The 2018 Rules, rule 11

Appeal to the Upper Tribunal

41. Either party may seek permission in writing to appeal a decision of a tribunal to the Upper Tribunal¹⁰. The application must –

- Identify the decision of the tribunal to which it relates;
- identify the alleged point or points of law on which the person making the application wishes to appeal; and
- state the result the party making the application is seeking.

41. A party cannot appeal simply on the grounds that it does not agree with a tribunal outcome; **an error in law must be identified**. This is usually where a tribunal has not correctly applied the law or has not explained its decision adequately.

42. Applications for permission to appeal must be received within 30 days of the date the decision was sent to parties.¹¹

May Dunsmuir
President
January 2018

¹⁰ The 2018 Rules, rule 9

¹¹ The Scottish Tribunals (Time Limits) Regulations 2016, regulation 2