



Additional Support Needs

ASN_D_18_12_2019

DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER

Claim

1. This is a claim alleging victimisation by the responsible body under s.27 of the Equality Act 2010 ('the 2010 Act').

Decision

2. I dismiss this claim under rule 74(2)(b) of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (SSI 2017/366) ('the rules').

Process

3. Following the submission of the claim, I noticed a possible competency matter and, following a conference call with the parties, I directed written submission on that matter. Written submissions were made, and I then considered the competency matter. I have addressed below only those arguments which were instrumental in my decision on competence.

Reasons for the Decision

4. The claimant argues that the responsible body has discriminated against him by victimisation under s.27 of the 2010 Act. The protected acts under s.27(1) he alleges occurred are: (1) bringing proceedings under the 2010 Act (a previous case before this Tribunal) (which would fall under s.27(2)(a) of the 2010 Act); and (2) bringing complaints on related matters (which would fall under s.27(2)(c) or (d) of the 2010 Act).

5. The claimant argues that the detriment he has suffered is that complaints and investigations he has attempted to instigate with the responsible body have been blocked or delayed.

6. The jurisdiction of this Tribunal is set out in schedule 17, paragraphs 7 and 8 of the 2010 Act. This Tribunal only has jurisdiction where it is claimed that the responsible body has contravened Chapter 1 of Part 6 of that Act. That is a reference to sections 84-89 inclusive. On looking at the types of discrimination listed in s.85 of the 2010 Act, only s.85(4) refers to victimisation in the context of victimising a 'person'. None of the types of victimisation referred to in that subsection applies here. This leaves s.85(5), which lists the remaining

types of victimisation. Of importance here is the fact that those types of victimisation only apply where a 'pupil' is victimised. Since the claimant is not a pupil, it would seem that the competency matter is a simple one.

7. However, the position is complicated by the provisions in s.86(1) and (2) of the 2010 Act. Those provisions state that in its application to s.85(4) and (5), references to 'B' in s.27(1)(a) and (b) include a reference to a parent or sibling of the 'child in question'. Assuming that the child in question is the claimant's son who formerly attended school with the responsible body, the claimant, as his parent, could, on the face of it, make a valid claim. What is important to note is that s.86 refers not to s.27(1) as a whole but only to s.27(1)(a) and (b).

8. Taken literally, this means that s.86 does not apply the first part of s.27(1), where the following is stated:

"A person (A) victimises another person (B) if A subjects B to a detriment because..."

At first glance, splitting the single sentence of which s.27(1) consists seems odd. However, in my view that is exactly what Parliament intended. The first part of s.27(1) (quoted above) refers to B as the recipient of the alleged victimisation whereas the second part of s.27(1) (consisting of (a) and (b)) refers to B as the person who carries out the protected act. In usual circumstances, 'B' in both instances would be the same person. However, taking s.27 and s.86 together, it seems to me that Parliament intended that the person who carried out the protected act could be the parent or sibling of the child ('B', as referred to in s.27(1)(a) or (b)), while the recipient of the alleged victimisation ('B', as referred to in the first part of s.27(1), as quoted above) may not be. The confusion arises from the use of 'B' in both situations, but the splitting of s.27(1) under s.86 is logical. The claimant points out that Parliament would have been unlikely to have used 'B' for two purposes in s.27, and that perhaps 'B' and 'C' would have been better of the intention had been to split s.27(1). However, s.27 applies to the whole of the 2010 Act (not only to victimisation in relation to educational matters), and the assumption (unless otherwise stated, as in s.86(1) and (2)) is that the person who does the protected act is the also the recipient of the alleged victimisation. That assumption applies no doubt in the vast majority of cases, which explains why that provision is worded as it is.

9. As well as urging this splitting exercise, the responsible body's representative goes onto argue that s.86(1) and (2) allow for a parent or a sibling of a child to do a protected act (for example making a discrimination claim), while the child suffers the detriment. This is logical and is in keeping with the literal wording of the provisions, the heading to s.86 and with the 2010 Act Explanatory Notes on that section. The result of all of this is that s.86(1) and (2) do not afford the claimant jurisdiction where he would not possess it under s.85.

10. Turning to s.85, s. 85(5) (being the provision applicable in this case) refers to the recipient of the victimisation as a 'pupil'. As the responsible body's representative points out, the applicable provision, more specifically, appears to be s.85(5)(f), which refers to 'subjecting the pupil to any other detriment'. The claimant does not indicate in his claim form that his son has been detrimented by the actions of the responsible body of which he complains. It is clear that the claimant himself is the person claiming to have been detrimented. That being the case, s.85 does not apply to this claim. This means that Part 6, Chapter 1 of this claim does not apply. For that reason, this Tribunal has no jurisdiction to entertain this claim.

11. I should add that there is reference in s. 86(2) to 'the child in question', child being defined in s.86(5), whereas s.85 refers to 'pupil', which term is defined differently (in s.135(1) of the Education (Scotland) Act 1980: see s.89(3) of the 2010 Act). Given that s.86(1) and (2) do not have an impact in relation to this claim, I need not consider that distinction.

12. Although the claimant is unrepresented, he responded to the responsible body's competency arguments in very clear and helpful terms. Ultimately, however, I prefer the legal position advanced on behalf of the responsible body.

13. Finally, the claimant in his submissions relies partly on the wording of Guidance issued by the Health and Education Chamber President. Guidance issued by a Tribunal President cannot be used as an aid to interpretation of the law. However, I will draw the claimant's comments to the attention of the President so that the points made about the terms of the Guidance can be considered.