



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/23/0199

Witnesses for Claimant:

1. Witness D, Director of Organisation A
2. the Claimant

Witnesses for Responsible Body:

1. Witness B, Deputy Head Teacher
2. Witness C, Equal Opportunities Officer

Claim

1. This is a disability discrimination claim. The claimant alleges the responsible body breached its statutory duties under sections 20(3) and 20(5) of the Equality Act 2010 (**2010 Act**) when it failed to consider properly the relevant factors associated with the request to allow the pupil (**the child**) to have a support dog accompany them at school.

Decision

2. The responsible body discriminated against the child in terms of section 21 of the 2010 Act by breaching its duties under sections 20(3) and 20(5) of the 2010 Act.

Process

3. There were two case management calls: in February 2024 and March 2024. The views of the child were obtained by an independent advocate. A joint minute of agreement was lodged along with statements and biographies for each of the witnesses. Written submissions were lodged in advance of the hearing and these were supplemented by oral submissions and further written submissions following the conclusion of the evidence.
4. The final bundle, which included all of the above documents, consisted of 661 pages.

Findings in Fact

5. The claimant is the parent of the thirteen year old child.
6. The child person has a diagnosis of cerebral palsy, Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder and right hemiplegia.
7. The responsible body is responsible for providing education for the child.
8. The child has an assistance dog.
9. The child attended mainstream classes at primary school without an assistance dog, although latterly the assistance dog accompanied the child to the gates of the primary school.
10. During the transition period to secondary school, the responsible body had meetings and discussions with the claimant about the possibility of the assistance dog accompanying the child to school and then within school.
11. The child is currently enrolled at a secondary school but has not yet attended. The assistance dog is of great benefit to the child. It has allowed the child to do things they could not previously do. It also has a calming effect on the child. The use of the assistance dog would assist the child to access education in the secondary school at which they are enrolled.
12. An assistance dog organisation (**organisation A**) provided the child with training for their assistance dog from about 2022.
13. Organisation A is not a body accredited by or a member of Assistance Dogs UK (**ADUK**).
14. The child has been effectively trained by organisation A and is capable of safely handling their assistance dog both at home and in public spaces.
15. In the absence of any national policy or guidance in relation to assistance dogs in secondary schools, the responsible body developed its own guidance on this issue. That guidance came into effect around the beginning of 2023. The responsible body view their own guidance as a draft guidance pending the promulgation of national guidance by the Scottish Government.
16. In about February 2023 the responsible body, using its own newly drafted guidance, had taken the decision not to allow the assistance dog into the school. The decision was made largely on the basis that the child would require an additional adult to support the use of the assistance dog whilst in school.
17. Following the decision, the responsible body sought the input of its equalities opportunities officer. That process ultimately resulted in an explanation of the decision being conveyed by letter to the claimant. The letter was dated August 2023. This time the decision was stated mainly to be on the basis that the assistance dog had not been

trained by ADUK or a body accredited by ADUK. This criterion had not been in place prior to the newly drafted guidance coming into effect.

18. This was the first time that the claimant had been advised of the above criterion.
19. At the time of making the decision in about February 2023 the responsible body had not carried out a full risk assessment in relation to the use of the assistance dog in that particular school. Prior to making this decision, the responsible body had not requested sight of any of the relevant documents in relation to the training and insurance for the assistance dog.
20. At no time prior to the making of the above decision by the responsible body in about February 2023, had it sought the input of its equalities opportunities officer.

Reasons for the Decision

The law

21. There is no dispute about the applicable law.
22. Section 4(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 provides that every education authority (*the responsible body in this case*) must:
 - (a) In relation to each child and young person having additional support needs for whose school education the authority are responsible, make adequate and efficient provision for such additional support as is required by that child or young person, and
 - (b) make appropriate arrangements for keeping under consideration-
 - (i) the additional support needs of, and
 - (ii) the adequacy of the additional support provided for, each such child and young person.
23. Where a child is classed as disabled within the meaning of the 2010 Act (as is the case with the child in this case), the responsible body has a duty to make reasonable adjustments under section 20 of the 2010 Act, to remove or reduce a disadvantage incurred as a result of the child's disability. Of the three requirements under section 20, only two apply to schools, namely (3) and (5).
24. Sections 20(3) and 20(5) of the 2010 Act provide:
 - (3)where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
 - ...
 - (5)where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter 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.
25. The burden of proof rests on the responsible body to demonstrate that the adjustments sought by the claimant are not a reasonable request made under section 20. Provided

that the responsible body can demonstrate that the proposed adjustment is not reasonable in the circumstances, then the request ought to be refused.

26. Section 21(2) of the 2010 Act provides that the responsible body will have discriminated against a disabled person if it fails to comply with its duties under sections 20(3) and 20(5) in relation to that person.

27. Section 173(1) of the 2010 Act provides a definition of an assistance dog:

- (a) a dog which has been trained to guide a blind person;
- (b) a dog which has been trained to assist a deaf person;
- (c) a dog which has been trained by a prescribed charity to assist a disabled person who has a disability that consists of epilepsy or otherwise affects the person's mobility, manual dexterity, physical coordination or ability to lift, carry or otherwise move everyday objects;
- (d) a dog of a prescribed charity which has been trained to assist a disabled person who has a disability (other than one falling within paragraph (c)) of a prescribed kind.

Is the assistance dog within the secondary school a reasonable adjustment?

28. We have come to the view that the responsible body has failed to prove that the use of the assistance dog is not reasonable in the circumstances. Accordingly, it has failed to comply with its duties under both sections (20(3) and 20(5) and has thus discriminated against the child.

29. The responsible body submitted that the evidence of its witnesses ought to be preferred on the factors relied upon in coming to the view that the assistance dog was not a reasonable measure. We reject that submission for the following reasons.

30. Firstly, the only person who was directly involved with the family of the child at the time the decision was made was witness B, a deputy head teacher at the secondary school. However, witness B made it clear that they had not been involved in making the decision itself. They were simply conveying that decision to the claimant in about February 2023. Whenever this witness was questioned on the rationale for reasons given for the decision, they simply responded that they did not know and that it would be best to ask the responsible body. In other words, witness B was the messenger at the time of conveying the decision to the family and also a messenger at the hearing. That is not to be taken as any personal criticism of witness B. The responsible body appears to have chosen not to lead any witnesses who could be cross-examined on the reasons behind the decision. The problem with this approach is that we were unable to place any weight on the reasons provided for the decision as they could not be tested or verified. An example of this in relation to witness B is that they conveyed via their adopted witness statement and in oral evidence that the main determining factor for the decision in about February 2023 was that the child was unable to handle the assistance dog without the presence of another adult being present at all times in school. The basis for this view was challenged in cross-examination of witness B. However, the response by witness B was that they did not know the basis of that view and that the questioner would have to ask the council about it.

31. Secondly, the consistent position in evidence of all the witnesses is that the criterion of the assistance dog having to be trained by either ADUK, or a charity registered with ADUK only arose after the decision in February 2023 had been made. The responsible body's internal guidance on the issue was still in draft and was developing over time. At some point between February 2023 and August 2023 the responsible body decided that the consideration of any assistance dog in school could only be advanced further if this criterion relating to ADUK (or any other of the limited number of prescribed charities via section 173 of the 2010 Act) was met. The responsible body submitted that this was not a criterion which resulted in a blanket rejection. We reject that submission. It was clear on the evidence that if this criterion was not met then there would be no need to progress the issue any further, from the perspective of the responsible body. For example, the responsible body did not seek to find out the content or quality of the training provided by organisation A and also did not seek any documentation to ascertain if the assistance dog was insured. In our view, this was a blanket rejection and illustrates the failure of the responsible body to meet its statutory duties.
32. Thirdly, witness C, the equalities opportunities officer employed by the responsible body, was candid in their evidence. When asked if they were surprised that the responsible body had not sought to consult them about this matter until June 2023, they said yes and added that they thought 'surprised' was putting it mildly. It was clear from the evidence of witness C that they felt the responsible body had not adhered to its reasonable statutory duties in relation to this issue prior to June 2023. Witness C stated that had they been involved at the time of the initial decision making process, they would have obtained more detailed information about the child. The witness did not know if their advice would have been the same had they had more time to prepare and had more information at this earlier point in time.
33. Fourthly, whilst witness C believed due process had been followed and that the reasoning conveyed by the letter of August 2023 was correct, we do not agree. The reasoning provided in August 2023 still conveyed the decision had been reached without a full risk assessment being performed. It is clear from the August 2023 letter that the link to a prescribed charity is being used as a blanket rejection criterion. When witness C was asked if this was a continued carte blanche objection on the basis that there was no affiliation to ADUK, their response was that it was not the entire story but that it was a significant part of it. We have reached the view that this was a blanket rejection criterion which prevented the responsible body from investigating the nature of the training provided and the details of the body providing the training.
34. Finally, it is clear from the evidence of the claimant and witness D, that the child has benefitted greatly from their assistance dog. They have been trained properly and are able to handle the dog in public, as well as at home. The child has improved significantly since having the assistance dog. This has allowed the child to experience public situations and deal with their anxiety in such situations in a positive way. The child is currently not attending secondary school. All agree that it would be in the child's best interests to attend secondary school. On the evidence there is every chance that the assistance dog, were it to be regarded as a reasonable auxiliary aid by the responsible body, would allow the child to access education in a secondary school setting. For the reasons in this paragraph, we came to the view that the assistance dog came within the statutory definition of assistance dog under the 2010 Act.

Other matters

35. Having determined the responsible body did not fulfil its statutory duties under the 2010 Act, we find that it did discriminate against the child. The issue of the anticipatory duty was raised very late in the day by the claimant. There was no time for detailed evidence on the matter. As we have determined the case already, we will not address the matter of the anticipatory duty.
36. The claimant moved for expenses in the event of success. We find no expenses due to or by parties. The test in rule 6(1) of The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 is not met. We accept the responsible body was attempting to do its best in difficult circumstances. The use of assistance dogs in this type of situation is a relatively novel matter. No doubt, given the success of the assistance dog in this case, the numbers of applications for use in schools will increase. The Scottish Government guidance on the topic is still awaited. In these circumstances, there was no act, omission or conduct on the part of the responsible body which caused the claimant to incur expense which would be regarded as unreasonable for the claimant to be expected to pay.

Remedy

37. We direct the responsible body to issue a written apology to the child and their family for the discrimination that occurred.
38. We remit the matter back to the responsible body to make a fresh decision.

Some of the wording of this decision has been edited by the Chamber President to protect the anonymity of the parties and the child under rule 101(3)(a) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).