Upper Tribunal for Scotland

2024UT72
Ref: UTS/AP/24/0042

DECISION OF

Lord Fairley

ON AN APPEAL
IN THE CASE OF

Fife Council,
per Harper Macleod LLP

Appellant

- and -

AB (a child),
per Cairn Legal

Respondent

FTS Case Reference: FTS/HEC/AC/23/0197

18 December 2024

Decision

The appeal is refused.

Introduction

1. The respondent has a bilateral, moderate mixed form of deafness. She has used hearing aids since she was 3 years old. She is bilingual in English and British Sign Language ("BSL"). She has completed BSL Levels 1 and 2 and uses BSL socially with deaf friends.

2. The appellant is an education authority. The respondent attends a school operated by the appellant. She is currently in S5.

3. Four categories of deafness are recognised and used by the British Society of Audiology, the National Deaf Children's Society and the Scottish Government when collecting data as part of the Record of Deaf Children. These are: mild (21-40dB), moderate (41-70dB), severe (71-95dB) and profound (greater than 95dB).

4. Audiogram test results of the respondent showed a right ear average threshold of 61dB and a left ear average threshold of 57bB. Her current hearing threshold is at an average of around 64bB, but at certain frequencies can be as low as 70dB. On all of these figures, her deafness is therefore at the upper end of the moderate category. Her degree of deafness can fluctuate and can be exacerbated by ear infections, ill health or seasonal allergies.

5. In an application to the First Tier Tribunal for Scotland (Additional Support Needs) ("FTS"), the respondent claimed that the appellant had discriminated against her contrary to the Equality Act, 2010 both indirectly and by failing to make reasonable adjustments.

6. The claim of indirect discrimination did not succeed. The FTS found, however, that the appellant had unlawfully discriminated against the respondent contrary to section 85 of the Equality Act, 2010 by failing to make reasonable adjustments. More particularly, the FTS found that the appellant was under duties (a) to provide the respondent with BSL support at interpreter qualified level; (b) to provide her with Teacher of the Deaf (ToD) support throughout S5 and S6; and (c) to allow her access to the Deaf Base outside timetabled teaching periods as required.

7. The appellant was given permission to advance three grounds of appeal against the decision of the FTS. Permission was given on grounds 1 and 2 on the papers and without a hearing. Permission was given on ground 3 following an oral hearing. The first ground relates to an alleged error in the reasons given by the FTS for preferring the evidence of a skilled witness led by the respondent (witness A, a Deaf Education Pathway Co-ordinator from the University of Edinburgh) in preference to that of the appellant's skilled witness (witness H, an Educational Audiologist / Team Manager employed by the appellant). In the second ground it is contended that the FTS erred in law in treating Article 30 of the United Nations Convention on the Rights of the Child ("NCRC") and Article 24 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") as conferring directly enforceable rights upon the respondent. The third ground relates to the issue of the "class" of disabled pupils (in terms of Schedule 13 to the 2010 Act) of which the respondent is a member part and on which the FTS based its decision.

Summary of issues in the appeal and parties' submissions

Ground 1

8. The FTS noted that the two skilled witnesses from whom it heard were in agreement as to the level of the respondent's deafness. Their opinions differed, however, as to the impact or effect which her deafness has upon her. The FTS preferred the evidence of the respondent's witness

(witness A) to that of the appellant (witness H). It gave reasons for that decision in the following terms:

> "45. Witness A provides an impartial and balanced understanding of the impact of the claimant's deafness; whereas witness H insists upon the science of deafness and the use of technological aids without factoring in the claimant's lived experience. In short, the voice of the claimant is considered by witness A and wholly discounted by witness H. Witness H insists that the claimant is simply wrong when she reports her own experiences. He characterises much of this as 'hearsay' and has formed conclusions without discussion with the claimant or from assessing her.
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> 46. Witness A accepts the limits of her assessment. She has 25 years of experience as a Teacher of the Deaf and she is a senior university lecturer in deaf education. She does not need to be an audiologist to have completed her assessment. She offers concessions where these are appropriate. She considers the science of deafness and the concerns of the claimant. Few concessions are made by witness H. There are many examples of this.
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> 47. Witness H criticises witness A (and the NHS Audiologist) for using the NHS Audiologist's terminology 'moderate-severe' to describe the claimant's level of deafness (which he describes as 'woolly') despite approving its use in the Deaf Service's Focused Support Document. He refuses to accept it as a common sense descriptive term or to accept that the claimant's threshold levels (at 57dB and 61dB) are closer to the severe end of the moderate range (70 dB) than the mild end of the moderate range (41dB) which we accept.
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> 48. Witness H criticises witness A's report for not being carried out in the school and for using a lower level of speech, when the assessment of witness A is intended to evaluate the claimant's language and communication skills, rather than the acoustics at the school. Witness A acknowledges that she does not know the claimant well. She accepts that she cannot comment on the learning environment in the school. She was nevertheless pleased to hear about the acoustic developments. Her report gives examples of a range of conditions and signal to noise ratios. Witness H relies on a 'test battery' approach for assessment. This consists of two elements - overall academic performance, and whether teachers have reported concerns about progress. This does not include any objective measurement of the claimant's ability to hear in class and the factors which may affect this or her lived experience."

9. As originally framed at the stage of the permission application, this first ground of appeal suggested that the FTS had erred:

> "…in holding that witness H had relied upon a 'test battery' approach for assessment (para 48). That finding was contrary to the evidence before the tribunal and was material

to its decision. No issue is taken with what is meant by a 'test battery' approach. There was no evidence that this was the approach taken by witness H."

10. In a written note of argument submitted for the respondent in advance of the full hearing of this appeal, it was pointed out that the FTS's finding that witness H had used a 'test battery' approach was based upon witness H's own testimony and upon the terms of his written report which stated inter alia: "a test battery approach is used at all stages". The suggestion that there was "no evidence" that such an approach had been taken was not tenable.

11. At the full hearing of the appeal, senior counsel for the appellant accepted that there was indeed an evidential basis before the FTS for the finding that witness H had used a 'test battery' approach. Faced with that difficulty, he explained that the point which the appellant actually wished to take in the appeal related instead to the conclusion of the FTS that the approach of witness H "does not include any objective measurement of the claimant's ability to hear in class and the factors which may affect this or her lived experience" (para. 48).

12. This was not the same point as was made in the permission application. The point, however, was said to be a straightforward one: it was clear from the written report of witness H that he had indeed considered both the respondent's ability to hear in class and her lived experience. He had used the 'test battery' approach only as a cross-check.

13. Since this seemed to me to be an entirely new point, different to the one for which permission had been granted on the papers, I allowed the respondent a period of two weeks within which to lodge written submissions on the questions of (a) whether or not it should be considered at all; and (b) if so, how the respondent wished to answer it. The respondent lodged such written submissions on 3 December 2024.

14. In summary, the respondent submits that in the absence of any express provision in the Upper Tribunal for Scotland (Rules of Procedure) (Scotland) Regulations, 2016 for amendment of grounds of appeal after permission has been given, the application made by the appellant here is, in fact, an application to bring a new ground of appeal out of time. No good reason has been shown for the granting of such an application. In any event, the new ground does not disclose an arguable point of law. It is simply a statement of disagreement with the FTS's preference for the evidence of one witness over another. The reasons given by the tribunal for rejecting the evidence of witness H were clearly expressed and were open to it. There was no dispute that, in contrast to witness A, witness H had, in fact, carried out no direct testing of the respondent.

Ground 2

15. Within its consideration of the issue of "substantial disadvantage", and under a sub-heading: "Deaf identity and linguistic rights", the FTS referred to passages from the BSL Toolkit. The Toolkit notes that deaf children need to meet other fluent signing children and staff in order

to develop their self-expression and confidence in language, and that having access to BSL and learning English allows a deaf child to become bilingual.

16. Within the same sub-heading of its reasons, that FTS stated:

> "76. The claimant identifies as a deaf person. As a BSL user she belongs to a linguistic and cultural minority, protected by article 30 of the UNCRC. As such she has the right, in community with other members, to enjoy that culture and use her own language. The UNCRC has recently been incorporated into Scots law. Once the provisions commence it will be unlawful for a public authority (which includes education authorities) to act or fail to act in a way which is incompatible with the UNCRC requirements. For the purpose of this hearing, at this moment in time, we must have regard to the claimants UNCRC rights and we accept that Article 30 applies.
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> 77. The claimant argues that Article 24 of the UNCRPD confers a duty on States Parties to facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community. Specifically, Article 24(4) requires 'appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and / or Braille….' We accept that Article 24 applies here."

17. The appellant contends that it was a material error of law for the FTS to conclude that international treaties which had not then been incorporated into domestic law "applied" to the position of the respondent. At the date of the FTS's decision, neither the UNCRC nor the UNCRPD had been incorporated into domestic law.

18. The respondent submits that the FTS did not purport to apply the terms of either international treaty. The reference to the treaties "applying" should be read only as meaning that the respondent was someone whose situation was covered by the terms of the treaties, which were therefore contextually relevant to the interpretation of the domestic legislation of the Equality Act, 2010. The FTS was clearly not under the impression that either treaty gave rise to directly enforceable rights.

Ground 3

19. The respondent is a disabled person for the purposes of section 6 of the Equality Act, 2010. The appellant is the education authority for the school attended by the claimant. As such, it is the "responsible body" for that school, and is subject to the duty to make reasonable adjustments for the respondent (Equality Act, section 85(6)).

20. The scope of the duty to make reasonable adjustments is set out in section 20. That duty comprises three separate and independent components. Only the third of those – auxiliary aids –

is relevant to this case. In terms of section 20(5), read with the education qualifications in schedule 13, paragraph 2 (shown in square brackets) that duty arises:

> "where [disabled pupils generally] would, but for the provision of an auxiliary aid, 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."

In that situation, the duty on the responsible body is to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21. In the context of the provision of education, therefore, the duty to make reasonable adjustments in terms of section 20(5) requires a comparison of the position of "disabled persons generally" with "persons who are not disabled". By using the expression "disabled people generally" in the test of comparative substantial disadvantage, Parliament intended that the test should be considered by reference to the needs of the relevant class. Responsible bodies are expected to consider and take reasonable steps to overcome barriers that may impede people with different kinds of disability. This exercise has been described, for ease of reference, as a "class-based approach" (see *DM v. Fife Council* 2016 S.C 556).

22. Before the FTS, parties were agreed that the relevant class of which the respondent formed part was "deaf pupils generally". The FTS referred to that class at para. 52 of its reasons and used it as a key element of its subsequent decisions on reasonable adjustments.

23. Before this tribunal, however, the appellant seeks to depart from its previous agreement as to the relevant class. It submits instead that the appropriate class of which the respondent formed part was "pupils with moderate deafness". It further submits that the FTS's acceptance of parties' common position that the relevant class was "deaf pupils generally" was a material error of law and that the definition of the class in that way was not open to the FTS on the evidence.

24. The respondent submits that the FTS made no error of law. It was entitled to define the relevant class as "deaf pupils generally", particularly where there was no dispute over that point. The qualification "moderate" concerns a degree of disability not a type of disability.

Decision and Reasons

Ground 1

25. I agree with the supplementary written submission for the respondent that the appellant's attempt to argue a different ground to that for which permission was granted is, in effect, an application to extend the time period within which to advance a new ground of appeal. I also agree with the respondent that no good reason has been shown for the lateness of that change in position, nor has it been shown that it would not be in the interests of justice to allow

the new point to be advanced. The purpose of written grounds of appeal and the permission process is to bring early focus to the alleged error of law upon which an appellant wishes to rely. Clarity and precision are important, and the grounds of appeal should not be treated as a draft which can then morph into something different once permission has been granted.

26. In any event, however, I also agree with the respondent's subsidiary submission that there is no arguable merit in the proposed new ground. Nothing in the materials relied upon by the appellant suggests that witness H personally carried out any direct testing of how the respondent's deafness affected her. That was the point being made by the FTS at para 48. The FTS set out its reasons for preferring the evidence of witness A to that of witness H at paras. 45 to 48 (quoted above). The task of determining issues of reliability and weight and resolving conflicts between the evidence of witnesses is pre-eminently one for the FTS. In the absence of a clear error of law, this tribunal should not interfere with such a decision. No such error is apparent in the reasons given by the FTS.

Ground 2

27. Contrary to what is suggested by the appellant, the FTS did not conclude that either the UNCRC or the UNCRPD created rights in domestic law, nor did it purport to enforce rights under either article 30 of the former or article 24 of the latter. Much is made in this ground of appeal of the use by the FTS of the word "applies" in paras 76 and 77. That approach however treats the reasons of the FTS as if they were a conveyancing document. That is not the correct approach.

28. On a fair reading of paragraphs 76 and 77 of the FTS's reasons, it acknowledged the claimant's status as a deaf person, and the recognition of that status in both the BSL Toolkit and in international law. It correctly directed itself that, whilst the UNCRC had been incorporated into Scots law, the provisions of the incorporating legislation were not yet in force. There is nothing in either of the quoted paragraphs to suggest that the FTS believed that it was bound directly to apply or enforce either of the UN Conventions (or, for that matter, the BSL Toolkit). Instead, it was simply acknowledging the existence of those materials as the context in which the status of a disabled person was being considered under domestic law in terms of section 6 of the Equality Act, 2010.

29. On a fair reading of its reasons, therefore, the FTS did not err in the way suggested in this ground of appeal.

Ground 3

30. The starting point for the application of a class-based approach is section 6(3)(b) of the Equality Act, 2010. It refers to the concept of those who "share a protected characteristic" being a reference to people who "have the same disability". As a generality, therefore, the class-based

approach requires there to be a focus on those with "the same" disability. The more difficult question, however, is what is meant by "the same"?

31. In *R (Rowley) v. Minister for the Cabinet Office* [2022] 1 WLR 1179, the issue concerned the provision of BSL signers at Covid briefings. The court's preferred definition of the class was "people who are deaf and use BSL" rather than the broader class of "all people who are hearing-impaired". By contrast, in *Finnigan v. Chief Constable of Northumbria Police* [2014] 1 WLR 445, where the issue concerned the provision of BSL interpreters during police searches under a drugs warrant, the Court of Appeal defined the relevant class group simply as "deaf persons" (*Finnigan* paras 31, 33 and 39).

32. In *R (VC) v. Secretary of State for the Home Department* [2018] 1 WLR 4781, under reference to the Supreme Court in *Paulley v FirstGroup plc* [2017] 1 WLR 423, the Court of Appeal referred (at para 153) to the concept of "people disabled in the same way". In *Paulley*, that approach had identified "wheelchair users" as the relevant group or class. As was noted in *Rowley* (para 24), similar examples derived from para 7.25 of the Equality and Human Rights Commission's Code of Practice include "visually impaired people who use guide dogs", or "visually impaired people who use white canes" rather than simply "visually impaired people". These examples demonstrate that it may be possible for the relevant group to be a sub-group of those who share the same general type of disability. The cases cited also demonstrate that definition of the class is highly fact sensitive.

33. The approach in *Paulley*, *VC* and *Rowley* (but not in *Finnigan*) was to define the relevant class of those with a shared disability by reference, at least in part, to the use of a particular auxiliary aid. There is potentially a circularity in that approach, and it might also be questioned whether it truly defines the class by reference to the disability rather than by reference to the steps chosen by some within the class to ameliorate the effects of the shared disability. It may be, however, that all that was intended *Paulley*, *VC* and *Rowley* was that the aid in question should be treated as a general evidential indicator of the nature and extent of the shared disability.

34. A different approach would be to define the class by reference to a recognised classification of the degree or extent of the type of disability in question. Belatedly, that is the approach that the appellant submits ought to have been taken by the FTS in this case. There is a logic to that position, provided that the need to define the class in that way can be seen to be based upon on evidence, and provided also that it would serve some practical purpose in resolving the issue before the court.

35. The difficulty with this ground of appeal, however, is that it seeks to approach the definition of class on a wholly different basis to the undisputed position taken before the FTS. As has been noted, the definition of class is, at least in part, an issue of fact. A tribunal will not usually be taken to have erred in law for deciding a case on an undisputed hypothesis of fact,

and the bar is set high for an appellant who seeks to re-argue a case on a materially different factual basis from that upon which it relied or accepted in in the court below.

36. In this case, that difficulty is highlighted by the absence of any factual findings on which the appellant could presently rely in order to argue that defining the class differently would (or even might) have made any difference to the outcome. The high point for the appellant is that it is possible to differentiate between categories of deafness. That, however, takes matters nowhere in the absence of a clear basis to conclude that a different decision on the question of comparative disadvantage would have been reached if the relevant class had been differently defined. At para. 54, the FTS stated:

> "The responsible body submits that no evidence has been led on the disadvantage to deaf pupils generally and for that reason the claimant has failed to discharge the burden of proof. We do not agree. The evidence of the claimant is that deaf pupils generally, and the claimant in particular, are placed at a substantial disadvantage by the failure to make reasonable adjustments. There is sufficient evidence for us to be satisfied on this point."

The very fact that further evidence would be required if the relevant class were to be redefined in the manner now contended for by the appellant is a strong indicator that the appellant is merely seeking to re-litigate the case.

37. A further consideration relates to the issue of the reasonableness of the adjustments sought. On that issue, once a substantial class-based disadvantage had been established, the burden on proof was on the appellant to demonstrate that the adjustments sought were not "reasonable". As is apparent from the reasons given by the FTS at para. 81, however, the appellant failed to discharge that burden because it led no evidence to support its submissions on cost. Re-visiting the definition of the relevant class would also involve re-trying that issue.

38. In summary, the time for the appellant to have disputed the definition of the relevant class was in the proceedings before the FTS. Having regard to the way in which parties approached matters before it, the FTS was entitled to define the relevant class as "deaf pupils generally". There was no error of law in that approach which would allow this this tribunal to interfere. The absence of any basis in the FTS's current findings in fact to support the different argument which the appellant now seeks to advance is a direct consequence of the way in which the appellant conducted the case at first instance. It is not, however, the result of any error of law by the FTS.

Conclusion

39. For these reasons, the appeal is refused.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Lord Fairley
Member of the Upper Tribunal for Scotland