ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DETERMINATION

The decision of the First-tier Tribunal (SENDIST) dated 22 May 2019 (after a hearing on 17 May 2019) under file reference EH845/19/00048 does not involve an error on a point of law. The appeal against that decision is dismissed.

The orders of 20 June 2019 and 4 July 2019 suspending the effect of the decision of the First-tier Tribunal cease to have any effect from the date of this decision.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This case concerns the following main questions:

(1) whether the First-tier Tribunal (SENDIST) has power to order reinstatement of an expelled pupil under paragraph 5(2) of Schedule 17 of the Equality Act 2010 and the

relevance to that question of the decision of the Court of Appeal in ***Mackenzie v. University of Cambridge*** [2019] EWCA Civ 1060 (20 June 2019)

(2) the means by which decisions of the First-tier Tribunal (SENDIST) can be enforced, if not by the Tribunal itself

(3) whether, in the light of the historic reluctance of the courts to order specific performance of contracts involving personal service/contact or supervision, it is appropriate to order such reinstatement

(4) the appropriateness of ordering an apology in SEND cases.

2. It deals with the expulsion from the School of a ten year old boy, who was a pupil at the School, who has ADHD, sensory processing difficulties and emotional and social difficulties arising from trauma in his early childhood and in the womb. He was permanently excluded from the School on 9 February 2019.

3. Although the School is named in the decision, I have anonymised the identity of both the pupil concerned and his parents lest he be identified either directly or through the names of his parents. I have referred to the pupil throughout as "Bobby", a name which he requested should be used for the reasons which he will understand, but which need no additional explanation by me. I refer to him as Bobby both where I refer to him myself in the body of this decision and when I am quoting from original documents which used his actual name (whether in the bundle which was before the Tribunal or from the decision of the Tribunal itself, which I have altered accordingly). I have referred to his parents by the letters JKL and MNP, again where I refer to them myself in the body of this decision and when I am quoting from original documents which used their actual names (whether in the bundle which was before the Tribunal or from the decision of the Tribunal itself, which again I have altered accordingly).

4. The Appellant is the Cothill Trust as proprietor of Ashdown House School ("the School"). The Respondents are JKL and MNP, as the parents of Bobby ("the parents").

5. The School appeals, with my permission, against a decision of the First-tier Tribunal (Judge Clare Hockney, Mr Nick Aziz and Ms Lindsey Rousseau) ("the Tribunal") which it made after a hearing on 17 May 2019 at which both parties appeared and were represented. The Tribunal produced its written decision on 22 May 2019. I shall refer in more detail to the Tribunal's decision and its reasons below. Permission to appeal was initially refused by Tribunal Judge Brayne on 3 June 2019.

Timing and Structure of this Decision

6. The decision in this case is time-critical in the sense that the new school term begins on 4th September 2019 and the parties need to know sufficiently in advance of the beginning of term what the result of the appeal is, so that they can make arrangements accordingly. I have therefore produced this decision as swiftly as I can so that the parties have as much advance notification of it before the commencement of the new school term to make their individual arrangements as necessary.

7. The structure of this decision is as follows:

The Tribunal's Decision and Reasons

8. The Tribunal's decision runs to 28 numbered paragraphs. Since it will be necessary to explain the Tribunal's findings in more detail, particularly when I consider Ground 4, it is sensible to set out the entirety of the decision so that it can be seen in context from the outset. It will also allow that decision to be read in the body of this decision without having to refer back to another document.

9. The Tribunal's decision reads as follows:

"Claim

JKL and MNP claim the RB discriminated against their son Bobby by permanently excluding him on 9th February 2019, contrary to s.85 and s.15 of the Equality Act 2010. The RB accepts that Bobby is disabled but contend the permanent exclusion was a proportionate means of achieving a legitimate aim.

Issues

1. The issues were identified in the case management discussion dated 12 April 2019. This identified that the permanent exclusion on 9th February 2019 was the only issue in this appeal and is most appropriately brought under s.15 of the Equality Act 2010 - discrimination arising from disability.

> *"(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

2. The RB accept that Bobby is disabled and at the start of the hearing accepted that the exclusion was because of something arising in consequence of Bobby's disability. Parents agreed that the RB had a legitimate aim - to ensure the health and safety of staff and pupils but did not believe the RB acted proportionately. The key issue for the Tribunal to decide was whether the exclusion was proportionate.

3. If the claim of discrimination is upheld parents want Bobby to be reinstated and for the RB to issue an apology.

Background

4. Bobby is currently aged 10 and was in Year 5 at Ashdown House School ("the school"). He has attended the school since September 2017. Bobby has an Educational Health and Care Plan (EHCP) and a diagnosis of ADHD and sensory processing difficulties. The school is named on his EHCP. He also has emotional and social difficulties arising from trauma in his early childhood and in the womb. He was adopted at aged 13 months.

5. Bobby was excluded on 9th February 2019. Parents appealed to the Governors, but the appeal was not upheld. Parents were informed by letter dated 15th March 2019 that their appeal was unsuccessful.

6. The exclusion letter notes that Bobby was excluded for aggressive and targeted behaviour towards another year 5 boy, including placing him in a headlock on 4th February 2019, pushing him in the haha, chasing him in the changing room (which resulted in the boy slipping and receiving a head injury), placing another boy in a headlock on 28th January 2019, and being involved in 37 incidents of unprovoked aggression since his arrival at the school.

General information

7. All section numbers, unless stated otherwise, refer to sections of the Equality Act 2010. The Tribunal carefully read all the documents provided by the parties, but in giving its reasons for its findings mentions only those which were of importance in helping it to make those findings. It took a careful note of the evidence and submissions received at the hearing but mentions only the parts of that evidence and the submissions which are particularly relevant in helping it to make those findings.

Tribunal's findings of Fact and conclusions with reasons

8. We carefully considered the written evidence submitted to the Tribunal in advance and the evidence given to us at the hearing from JKL, Mr Davies and [Ms] Hawkins. We also took account of the relevant sections of the Equality Act and the guidance issued by the Secretary of State.

Is he disabled?

9. Section 6 defines disability. A child or young person must have a mental or physical impairment, whether it has been diagnosed or not. The impairment must have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Long-term means it has lasted, or is likely to last, at least six months. The Tribunal only has jurisdiction if it finds that the person allegedly discriminated against is disabled, except in cases of victimisation. This was not put at issue in this appeal, and the Tribunal found that Bobby is disabled for the purposes of the Equality Act. He has ADHD, and his EHCP clearly set out his difficulties regulating his behaviour, that he likes to be in control, and demonstrates unsafe and impulsive behaviour such as running away and being aggressive towards adults and peers. We concluded that such impairments have a long term adverse effect on his ability to carry out normal day to day activities.

Section 15 - discrimination arising from disability

Did the RB treat Bobby unfavourably because of something arising in consequence of his disability?

10. The RB accepted that the exclusion was because of something arising in consequence of his disability. We found that excluding Bobby permanently amounts to unfavourable treatment under the Equality Act. We noted the Equality and Human Rights Commission's (EHRC's) technical guidance which suggests that being treated unfavourably means being placed at a disadvantage (para 5.44). In this case he was treated unfavourably by being excluded as Bobby was denied access to education at Ashdown House School.

11. We then considered whether the unfavourable treatment was because of something arising in consequence of Bobby's disability and concluded that it was. The permanent exclusion was noted to be (page 175) due to Bobby's aggressive, targeted behaviour and 37 incidents of violent unprovoked aggression since he started school in September 2017. We noted that in Bobby's EHCP that he has difficulties regulating his behaviour, that he likes to be in control, demonstrates unsafe and impulsive behaviour such as running away and being aggressive towards adults and peers. We concluded that Bobby was treated unfavourably because of something arising in consequence of his disability.

Was the treatment a proportionate means of achieving a legitimate aim?

12. As we concluded the behaviour was because of something arising in consequence of the disability, the burden of proof shifts to the RB to show that this treatment was a proportionate means of achieving a legitimate aim.

13. The RB submitted that its legitimate aim was ensuring the health and safety of staff and pupils. All agreed this was a legitimate aim and the Tribunal found that this was a legitimate aim. It is also a legitimate aim to maintain appropriate standards of behaviour (as noted on page 48 of the RB's response).

14. There is a statutory duty to make reasonable adjustments. It is unlikely to be a proportional means of achieving a legitimate aim, if reasonable adjustments have not been made. We heard evidence from [Ms] Hawkins that the RB put in place a number of reasonable adjustments as set out on pages 254-255 including:

- 2 taster days instead of 1
- Bobby attended in September 2017 on a part time basis initially
- Risk assessment drawn up for Bobby and reviewed termly.
- September 2017 Bobby starts art therapy,

- Bobby is offered weekly SALT sessions and additional targeted support for lessons.
- September 2017-March 2018 parents e-mailed a daily update re Bobby's behaviour. From March 2018 only in relation to serious incidents.
- October 2017, 1:1 supervision at lunch breaks. Removed in October 2018 at Bobby's request and ensuring more staff on duty instead.
- Marble jar introduced in March 2018 to reinforce good behaviour.
- Bobby has own book for incidents.
- October 2017 – Bobby offered a safe space to use.
- October 2017, behaviour policy put in place leniently while Bobby settles in.
- Adjustment to school rules in light of Bobby's tendency to flee.
- December 2017 training to staff.
- January 2018 Bobby starts school full time.
- Adjustments made for Bobby if aggressive during sports.
- Adjustments to the behavioural policy such as allowance made for Bobby's behaviour when parents absent, levelled down a temporary exclusion in October 2018 to an internal exclusion and also levelling down in February 2019.

15. We found the school did make some reasonable adjustments as set out above, but we found that other adjustments should have been made. In evidence [Ms] Hawkins accepted that Bobby was not given any anger management sessions, rather the weekly speech and language therapy with the Speech and Language Therapist (SALT), who did use schemes to try to help him regulate his behaviour and provided strategies to help him deescalate. The Tribunal noted that at page 150 of Bobby's EHCP it was stated that Bobby will have support to manage peer relationships. This may include meditation support (from Mr Taylor) social skills grouping within the educational setting and/or teaching of specific skills such as debating one's view respectfully. It also stated Bobby will require supported experiences in different social situations. We found, based on Ms Hawkins evidence that the only support for peer relationships was mediation support and the Speech and language sessions. [Ms] Hawkins explained that they had put in place a social skills group but as all the children had social communication difficulties this didn't work and was stopped. Relying on the specialist expertise of the tribunal, we were surprised that the group was disbanded as such groups will consist of children with social communication difficulties and the purpose is to encourage appropriate social interaction. Based on Ms Hawkins evidence we found that Bobby was not receiving social skills groupings or learning how to debate his view. We also found that Bobby was not supported in different social situations, based on [Ms] Hawkins evidence. This was noted as provision in his EHCP and it was reasonable to expect the school to provide this. If Bobby had received regular group work and support in different

situations as his EHCP required then some of the 37 behaviour incidents or placing two boys in a headlock (which led to his exclusion) may have been avoided as Bobby would have been provided with tools to help control his behaviours. Further, the school did not consider any anger management training for Bobby, despite the fact that he was involved in 37 incidents since September 2017. Anger management training was also a reasonable adjustment, even if not mentioned in his EHCP.

16. The Tribunal also noted from [Ms] Hawkins and Mr Davies evidence that the school did not seek the Local Authority's advice or any advice from CAMHS either in the run up to the permanent exclusions or following the incident on 28th January 2019 or 4th February 2019. [Ms] Hawkins stated in evidence that she would have considered an urgent EHCP review after the headlock incident on 28th January 2019, but events overtook this as Bobby was involved in a second incident on 4th February 2019. The Tribunal found that the two headlock incidents were not the only reason for Bobby's exclusion, based on Mr Davies's evidence and the exclusion letter, which clearly state the school took into account 37 incidents from September 2017 onwards. Mr Davies stated in oral evidence that he took into account previous incidents in reaching his decision to exclude, and the fact that Bobby said he would target this boy who was scared of Bobby. If the school was so concerned about the early incidents, such that there was a risk of permanent exclusion, we would expect the RB to contact the Local Authority as a matter of urgency and ask for an urgent EHCP review and advice. We would also expect the RB to seek advice from CAMHS or at least have made attempts to do this. From [Ms] Hawkins's evidence CAMHS only contacted her 2 weeks after Bobby's permanent exclusion to see how he was getting on. At this stage it was far too late.

17. Whilst we note that the RB claimed it adjusted the behavioural policy to take account of Bobby's disabilities and had done this for some earlier incidents as noted in the behaviour log at pages 379-388, the behavioural policy appeared to have been applied, more harshly in relation to the headlock incidents than other children who had been violent, even taking into account the fact that Bobby had been involved in 37 other incidents since he started. Our reasoning for this finding is set out below.

18. Parents gave evidence that their daughter was kicked and punched by 4 boys in June 2018 and Mr Davies did not dispute that she was kicked as this has been observed by the previous headmaster's wife. The only sanction applied to these boys was a Head's detention. Mr Davies told the Tribunal that in terms of sanctions applied to other pupils only one other pupil had been temporarily excluded for inappropriate behaviour towards a girl. In Bobby's behavioural log it mentions other boys slapping Bobby, and Mr Davies stated that pupils received Head's detentions for this.

19. In the behaviour log on 11th September 2018, page 383 the log notes that Bobby tried to break a stick that a year 6 boy was hitting people with and the year 6 boy then bit Bobby. No action was taken against [the year 6 boy], and based on Mr Davies evidence, (that only one child has been temporary excluded for his behaviour towards a girl), a far lesser sanction than even a fixed term exclusion was applied to this child for biting and hitting. This was an older child with a stick who was hitting others and bit Bobby.

20. We accepted, based on JKL's evidence, that was not disputed by the RB, that Bobby suffered an injury to his hand when stabbed by another pupil with a pencil, shortly before his permanent exclusion. This required bandaging and there was still a visible injury one week later. In response to this Mr Davies said that Bobby instigated this incident. In effect that it was Bobby's fault, that another child stabbed him with a pencil. It was not clear if any sanction was applied to the child or children involved and in any event any sanction was less than a temporary exclusion (based on Mr Davies' evidence). We found, based on Mr Davies evidence that he appeared to be blaming Bobby for his injury and thought this was an example of the health and safety risk that Bobby posed and was at risk to himself. It was not clear why Bobby placing two boys in a headlock, even if he said he was going to target this boy, was seen as so much more serious, than the pencil incident or 4 boys kicking Bobby's sister, or Bobby being bitten by an older boy, and relatively minor sanctions were imposed for this. We found the permanent exclusion was not proportionate, even taking into account the fact that Bobby had been involved in other incidents as set out in the behaviour log.

21. The exclusion letter referred to 37 behaviour issues as one of the reasons for permanent exclusion, but the Tribunal accepted JKL's evidence, that the permanent exclusion came like a bolt out of the blue. Mr Davies said parents were aware permanent exclusion was a possibility as Bobby had been sent home on other occasions. When questioned he accepted that the other occasion was around 18th March 2018 (almost a year earlier) when Bobby was sent home two hours early to calm down. We found that parents had no idea that Bobby was at risk of permanent exclusion and had they been advised by the school that this was a possibility, we found, based on JKL's oral evidence, that they would have taken steps such as requesting an urgent EHCP review and considered a medication review. JKL was a very credible witness and we accepted his evidence.

22. We also noted that both parties agreed there was good communication between themselves prior to the exclusion, and it would have been expected that the RB would have discussed any building concerns with the parents, rather than calling a meeting from which the permanent exclusion became the outcome.

23. If the RB was concerned about escalating behaviours, we would expect the school to have instigated an urgent review of his EHCP, sought to have contacted CAMHS, considered additional support, such as putting back the 1:1 support and have alerted parents that there was a real risk of permanent exclusion as stated above, this would have enabled parents to seek an urgent EHCP review or take medical advice about increasing Bobby's medication.

24. Despite Mr Davies stating that Bobby posed a risk to the safety of others, he was unsure whether the safeguarding lead, Mr Moore, had notified the local authority of such concerns, which we found was inconsistent with Mr Davies being so concerned about the health and safety of others including Bobby.

25. Mr Davies provided written and gave oral evidence that he considered other sanctions other than permanent exclusion, but when questioned it was not clear what other sanction he considered other than he was so concerned about the health and safety of pupils that he felt no amount of 1:1 support or support would change things. We found he did not consider steps such as taking advice from CAMHS or the Local Authority (to review the EHCP) before deciding to permanently exclude Bobby, furthermore we found the behavioural policy was not adjusted to take account of Bobby's disability in relation to the permanent exclusion.

26. We find that the RB did discriminate against Bobby by permanently excluding him on 9th February 2019 and the permanent exclusion was not a proportionate means of achieving a legitimate aim.

Remedy

27. The RB did not suggest that the relationship between parents and the school had broken down so that it would not be appropriate to reinstate Bobby if discrimination was found. JKL told the Tribunal that the school has done a fantastic job with Bobby, and Bobby wants to return to school, he feels rejected by his birth mother and now rejected by his school. The Tribunal also noted that JKL and MNP's daughter is still at the school and both parents are very happy with the school. We found there was no reason why Bobby should not be immediately reinstated, particularly as Bobby clearly wants to return.

28. Parents also requested an apology for the discrimination. We agreed that a formal apology should be made to Bobby who has faced considerable distress because of the permanent exclusion, which we found was discriminatory.

The Tribunal's Order

10. Consequent upon its findings, the Tribunal made an order that

(1) the claim of disability discrimination against the School under s.15 of the Equality Act 2010 (discrimination arising from disability) succeeds

(2) the School must withdraw the exclusion and reinstate Bobby with immediate effect with support and extra tuition for lost learning

(3) the governing body of the School is to write a letter of apology to Bobby to be sent within 14 days of the date of the decision

(4) the governing body of the School is to produce a redacted copy of the decision to be sent to the Legal Department of the Equality and Human Rights Commission ("the EHRC") within 14 days of the decision.

There was a minor point on the form of the order. It was common ground that all of the orders were intended to be made against the proprietor of the School (which was implicit in paragraphs 1 and 2 of the order already) and that the reference in paragraphs 3 and 4 of the order should refer to the proprietor of the School rather than the governing body of the School and to the extent necessary I am prepared to amend the order in that minor fashion under the slip rule.

11. As stated above, permission to appeal was initially refused by Tribunal Judge Brayne on 3 June 2019. The School sought permission to appeal from the Upper Tribunal on 11 June 2019.

Case Management Directions

12. Upper Tribunal Judge Ward made case management directions for the future conduct of the application on 20 June 2019. In particular he ordered that

(1) as requested by the School, there be an oral hearing of the application for permission to appeal and to consider whether the temporary order for suspension of the effect of the First-tier Tribunal's decision (which he made as part of his order) should be continued

(2) the case be listed for hearing before me at 2pm on Thursday, 27 June 2019 with a time estimate of 2 hours

(3) both parties be represented at the hearing

(4) the effect of the decision of the First-tier Tribunal be suspended until the Judge had given his decision following the oral hearing, as to which he explained

> "This is a purely holding mechanism. The time involved is limited. It would not be in the interest of Bobby or the School for there to be compliance with the decision (with the possibility of subsequent reversal) before the application for permission to appeal can be heard."

Permission to Appeal

13. I heard the oral application for permission to appeal on the afternoon of 27 June 2019 as directed. The parties were ably represented by, respectively, for the School Miss Zoe Gannon of 11 King's Bench Walk (instructed by Stone King LLP) and for the parents Ms Claire Darwin of Matrix Chambers (instructed by Sinclairslaw).

14. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in ***Smith v. Cosworth Casting Processes Ltd*** [1997] 1 WLR 1538). In the exercise of its discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal's decision.

15. I handed down a written decision granting permission to appeal on all four grounds adduced on 4 July 2019. Although Grounds 1 and 2 had not been argued below, I gave permission for them to be relied upon by the School for the reasons there set out. It seemed to

me that there was a realistic prospect that the School could demonstrate that the First-tier Tribunal's decision was erroneous in law in those four respects.

16. I directed that the appeal be listed for hearing in London either before me or before another Judge of the Upper Tribunal authorised to hear this type of case in the week of 15 or 22 July 2019 as the Listings Section might advise with a time estimate of 1 day. As matters turned out, the matter came on for argument before me on Monday 22 July 2019.

17. In giving permission to appeal and making further directions for the hearing of the substantive appeal, I directed that the effect of the decision of the Tribunal was to remain suspended until the Judge had given his decision following the oral hearing of the appeal. The original suspension was imposed by Judge Ward on 20th June 2019 as a purely holding mechanism on the basis that the time involved was limited and it would not be in the interests of Bobby or the School for there to be compliance with the decision (with the possibility of subsequent reversal) before the application for permission to appeal could be heard. To some extent the reason for the suspension had been overtaken by events in that the school term ended at noon on 5 July and the autumn term does not commence until 4 September, by which time matters should have been resolved one way or the other, at least so far as the Upper Tribunal is concerned. However, the rationale of Judge Ward's decision remained in that it would not be in the interests of Bobby or the School for there to be compliance with the decision for only one day at most (with the possibility of subsequent reversal) before the appeal could be heard.

18. Miss Gannon and Ms Darwin again appeared respectively for the School and the parents. Both are to be commended for the excellence, focus and clarity of their written and oral arguments and I am very much indebted to them for their assistance in both the permission application and the substantive appeal itself.

The Grounds of Appeal

19. The four grounds of appeal to the Upper Tribunal are contained in an attachment to the completed form UT4 dated 13 June 2019.

20. In summary form they are as follows:

Ground 1: the order for reinstatement was *ultra vires* or otherwise wrong in law. The School was a private/independent school and its relationship with the parents/pupils was contractual. There was no route to enforce the order either through the civil courts or by way of judicial review. While the Tribunal has what on the face of it appears to be a broad discretion under the Equality Act to make such orders as "it sees fit", it was not Parliament's intention that this power include the making of an order of what amounts to specific performance. The Tribunal was therefore wrong in law or had acted *ultra vires* in ordering the School to readmit Bobby since such an order had no legal effect and/or was misleading to the parents. In effect the only power which the Tribunal had was to recommend reinstatement rather than to order it and to present what was a recommendation as if it were an order was misleading or irrational.

Ground 2: the Tribunal failed to have any or any sufficient regard to the fact that the School was an independent school and that any remedy must be made under the terms of the contractual arrangement between the School and the parents. It also failed to have regard to the fact that it would be ordering specific performance of a contract, in a contract involving personal performance (and was making an order which was not enforceable by the parents) and in such circumstances it was relevant that

(a) the Headmaster was very concerned for the safety of the other children

(b) the unchallenged evidence of the School was that Bobby had on two separate occasions within a week placed a child in an "RKO" headlock

(c) the clear and unchallenged evidence was that, following the first incident, Bobby had promised that he would not perform the RKO headlock again and was disciplined, but despite being disciplined and promising not to perform the RKO headlock again, he did so within a week of the first incident

(d) the clear and unchallenged evidence was that incidents happened even while Bobby was being supervised and that the School's view was that 1:1 supervision had been tried and was ineffective. In such circumstances it was not possible to keep other pupils safe.

Ground 3: the Upper Tribunal has given guidance on the extremely limited circumstances in which the Tribunal should order an apology, in the decision of Judge Jacobs in ***Gayhurst Community School v. ER (SEN)*** [2013] UKUT 558 (AAC) at [25]-[26]. The Tribunal did not satisfy itself that the apology would have any "true value" and in the present case it would not have any "true value" since the position of the School was that the decision to exclude was an appropriate one given the risk of serious injury to other pupils. The Tribunal had therefore failed to follow the guidance of the Upper Tribunal in making the order.

Ground 4: the findings of discrimination by the Tribunal under s.15 of the Equality Act 2010 were wrong in law in that

(a) the Tribunal gave insufficient weight to the risk to other pupils

(b) the Tribunal was wrong to have regard to other incidents involving other children when determining whether the decision to exclude was a proportionate response to achieving a legitimate aim

(c) the Tribunal was wrong to find that anger management training was a reasonable adjustment

(d) the Tribunal's findings that Bobby was not supported in different social situations was not supported by any reasoning or evidence

(e) the Tribunal wrongly proceeded on the basis that regular group work was required as part of the EHCP.

The Statutory Framework and The Jurisdiction

21. Before considering the grounds of appeal in more detail, it is convenient to set out the statutory framework and the jurisdiction of the Tribunal to explain the statutory context in which the present matter arises.

22. Although it is no longer in force, the Disability Discrimination Act 1995 ("the 1995 Act") (as amended by the Special Educational Needs and Disability Act 2001 ("the 2001 Act")) provided that

> **"s.28H Tribunals**
>
> (1) The Special Educational Needs Tribunal -
>
> (a) is to continue to exist; but
>
> (b) after the commencement date is to be known as the Special Educational Needs and Disability Tribunal.
>
> (2) In this Chapter –
>
> "the Tribunal" means the Special Educational Needs and Disability Tribunal
>
> …
>
> (3) In addition to the jurisdiction of those tribunals under Part 4 of the Education Act 1996, each of them is to exercise the jurisdiction conferred on it by this Chapter.

23. The 2001 Act inserted into the 1995 Act a provision in the form of s.28I which dealt with the jurisdiction and powers of the SENDIST to the effect that

> **"s.28I Jurisdiction and powers of the Tribunal**
>
> (1) A claim that a responsible body -
>
> (a) has discriminated against a person ("A") in a way which is made unlawful under this Chapter, or
>
> (b) is by virtue of s.58 to be treated as having discriminated against a person ("A") in such a way,
>
> may be made to the appropriate tribunal.
>
> …
>
> (3) If the appropriate tribunal considers that a claim under subsection (1) is well-founded -

> (a) it may declare that A has been unlawfully discriminated against; and
>
> (b) if it does so, it may make such order as it considers reasonable in all the circumstances of the case.
>
> (4) The power conferred by subsection (3)(b) –
>
> (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates; but
>
> (b) does not include the power to order the payment of any sum of by way of compensation.
>
> (5) Subject to regulations under section 28J(8), the appropriate tribunal –
>
> (a) for a claim against the responsible body for a school in England, is the First-tier Tribunal".

24. It is convenient at this point to set out the Explanatory Notes to the 2001 Act. Explanatory Notes to an Act are not part of the Act, but may be used to understand the background to and the context of an Act and the mischief at which it is aimed (Bennion, *Statutory Interpretation*, 7th ed., para. 24.14 and see to the like effect ***R (D) v. Department of Work and Pensions*** [2010] 1 WLR 1782).

25. Although they are not part of the Act, the Explanatory Notes to the 2001 Act explained that s.28H amended the 1995 Act by inserting a new s.28H to change the name of the SENT to the SENDIST and to extend the jurisdiction of the SENT to hear cases of disability discrimination in schools and that the new s.28I amended the 1995 Act to set out the circumstances in which a parent could make a claim to the SENDIST and the powers which the SENDIST was to have if it found that there had been unlawful discrimination. The Notes stated that

> "91. Sections 28I(3) & (4) gives SENDIST wide powers to order any remedy it thinks appropriate with the exception of financial compensation. Although SENDIST will not be able to award financial compensation it will be able to order schools and LEAs to take compensatory action to take account of past discrimination and shape

> the future prospects of the disabled child. Examples of the kind of orders that SENDIST might make are:
>
> - that the LEA or school provide disability awareness training for some or all staff;
>
> - that the LEA or school prepare guidance on combating disability discrimination for issue to all staff;
>
> - that an LEA Equal Opportunities Officer arrange and attend, at specified times, meetings between the school and the child's parents to review what reasonable adjustments (short of adjustments to the physical premises or provision of auxiliary aids) might be required;
>
> - that the school/LEA change policies, for example, those that prevent visually impaired pupils going into the science laboratory, those that prevent disabled pupils going on certain school trips and anti-bullying policies so that they deal with bullying on the grounds of disability;
>
> - that additional tuition is provided to enable a child to catch up on things he has missed due to discrimination (such as science lessons in the example above);
>
> - that a library is relocated to the ground floor (short of requiring an adjustment to the physical premises), or if not possible, that the school provides a list of available books and ensures that they are brought down to the child for him to read in a quiet room;
>
> - that an independent school must admit a disabled pupil (where the school had previously refused) or must admit the pupil on the same terms as pupils who are not disabled (where, for example, the school had offered a place but at an increased fee); or
>
> - that a maintained school which has temporarily excluded a disabled pupil must provide additional tuition to enable the pupil to catch up on education missed due to discrimination.
>
> 92. SENDIST will be able to set rigorous deadlines when directing action by schools and LEAs. If a responsible body fails to comply within the deadlines, the parent can ask the Secretary of State to make a direction to require compliance".

26. Although paragraph 91 did not in terms refer to permanent exclusions, Ms Darwin submitted that logically it must do so given the subject of the sixth and seventh bullet points which dealt with admission and temporary exclusion.

27. The First-tier Tribunal was established by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The Act provides that

> "3(1) There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act".

28. Since it will figure in the narrative below, it is also convenient to note here that s.27(1) of the 2007 Act provides that

> "27(1) A sum payable in pursuance of a decision of the First-tier Tribunal or Upper Tribunal made in England and Wales—
>
> (a) shall be recoverable as if it were payable under an order of the county court in England and Wales;
>
> (b) shall be recoverable as if it were payable under an order of the High Court in England and Wales.
>
> …
>
> (5) The Lord Chancellor may by order make provision for subsection (1) or (3) to apply in relation to a sum of a description specified in the order with the omission of one (but not both) of paragraphs (a) and (b).
>
> (6) Tribunal Procedure Rules—
>
> (a) may make provision as to where, for purposes of this section, a decision is to be taken to be made;
>
> (b) may provide for all or any of subsections (1) to (3) to apply only, or not to apply except, in relation to sums of a description specified in Tribunal Procedure Rules".

29. Again, although they are not part of the Act, the Explanatory Notes to the 2007 Act explained that

> "30 Tribunals have no enforcement powers of their own. If a monetary award is not paid then, in England and Wales, the claimant must register it in the county court and use the enforcement methods

> available there (for example section 15 of the Employment Tribunals Act 1996) …".

30. To complete the reference from the previous paragraph, the Employment Tribunals Act 1996 provides that

> "**Enforcement**
>
> 15(1) Any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with employment tribunal procedure regulations shall be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of the county court".

31. The Transfer of Tribunal Functions Order 2008 transferred the functions of the SENDIST under s.28H of the 1995 Act to the First-tier Tribunal.

32. The provisions of the Disability Discrimination Act 1995 have been repealed and replaced by the Equality Act 2010 ("the 2010 Act") which provides that

> **"Discrimination arising from disability**
>
> 15(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
>
> …
>
> **113 Proceedings**
>
> (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
>
> (2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.

…

116 Education cases

(1) A claim is within this section if it may be made to—

(a) the First-tier Tribunal in accordance with Part 2 of Schedule 17,

…

(1) Schedule 17 (disabled pupils: enforcement) has effect.

…

Schedule 3

…

3 Jurisdiction – England and Wales

A claim that a responsible body has contravened Chapter 1 of Part 6 because of a person's disability may be made —

(a) to the English Tribunal by the person's parent or, if the person is over compulsory school age, the person

…

5 Powers

(1) This paragraph applies if the Tribunal finds that the contravention has occurred.

(2) The Tribunal may make such order as it thinks fit.

(3) The power under sub-paragraph (2)—

(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;

(b) does not include power to order the payment of compensation".

33. Again, since they will figure in the narrative below, it is also convenient to note here two further sections of the 2010 Act which provide that

"114 Jurisdiction

(1) The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to—

…

(c) a contravention of Part 6 (education);

…

(3) Subsection (1)(c) does not apply to a claim within section 116.

…

(6) The county court or sheriff—

(a) must not grant an interim injunction or interdict unless satisfied that no criminal matter would be prejudiced by doing so;

(b) must grant an application to stay or sist proceedings under subsection (1) on grounds of prejudice to a criminal matter unless satisfied the matter will not be prejudiced.

…

119 Remedies

(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) The county court has power to grant any remedy which could be granted by the High Court—

(a) in proceedings in tort;

(b) on a claim for judicial review.

…

(7) The county court or sheriff must not grant a remedy other than an award of damages or the making of a declaration unless satisfied that no criminal matter would be prejudiced by doing so".

34. Although they are not part of the Act, the Explanatory Notes to the 2010 Act explained with reference to Schedule 17 that

> "Powers: paragraph 5
> 913. If a tribunal finds that a school has discriminated against a pupil, it can make any orders it sees fit, particularly in order to remove or reduce the problem. However, it may not award the payment of compensation.
>
> …
>
> Background
> 917. This Schedule is designed to replicate the effect of provisions in the Disability Discrimination Act 1995".

35. So far as this case is concerned, in summary the relevant functions are conferred on the Tribunal by the 2010 Act and in particular paragraph 3 of Schedule 17 to the Act which provides that the Tribunal has jurisdiction to hear a claim that a responsible body has contravened Chapter 1 of Part 6 of the Act (which concerns schools, as to which see below).

36. It is common ground that the parents' claim falls within paragraph 3 of Schedule 17 and that the Tribunal therefore had jurisdiction to hear it.

The Duty to Admit Pupils (State Schools)

37. The admission of pupils to state schools is governed extensively by statutory provisions. These provisions do not apply to private schools, which Parliament has expressly left outside the ambit of the statutory obligations to admit pupils which would otherwise apply.[1] These include:

(1) the admissions arrangement rules set out in Part III of the School Standards and Framework Act 1998 ("the 1998 Act"), which require state schools to comply with a strict set of rules and procedures to admit local pupils, do not apply to independent schools

[1] Subject to the duty imposed by s.85(1) of the 2010 Act, as to which see below.

(2) the statutory power in relation to maintained schools which allow a local authority to direct a maintained school admit a pupil out of area under s. 96 of the 1998 Act. There is no equivalent power in relation to independent schools

(3) under s.43(2) of the Children and Families Act 2014 ("the 2014 Act") certain types of schools are required to admit the individual named in an EHCP. That subsection provides that

> "The governing body, proprietor or principal of the school or other institution must admit the child or young person for whom the plan is maintained".

The preceding subsection (1) lists the school or institutions subject to that duty, namely:

> (a) a maintained school;
>
> (b) a maintained nursery school;
>
> (c) an Academy;
>
> (d) an institution within the further education sector in England;
>
> (e) a non-maintained special school;
>
> (f) an institution approved by the Secretary of State under s.41.

38. Notably this does not include an independent/private school, like Ashdown School, which is not subject to that duty. It is for this reason that parents are required to obtain a letter from an independent school stating it is willing to be named in the EHCP, to ensure that, should a Tribunal name an independent school in the EHCP, the school will be willing to accept that pupil.

39. In relation to academies the Upper Tribunal has found that an academy is part of the state education system and that, while under a different set of statutory duties, it is possible to name an academy school against, so to speak, "its will" in an EHCP because of the funding

arrangements between the Secretary of State and the academy enable enforcement (see: ***SC v The Learning Trust (SEN)*** [2012] UKUT 214). Having considered the position of an academy, which was under a public law duty to reconsider its position in light of the decision of the First-tier Tribunal, Judge Rowland further commented that

> "23 The position of Mossbourne – and, I suspect, any other academy – is therefore totally different from that of a private independent school, which does not have any obligation to admit a child otherwise than on its own terms."

Discrimination Arising from Disability

40. I did not understand there to be any disagreement between the parties as to the general principles which apply to the law relating to discrimination based on disability which I set out in the next three paragraphs.

41. One particular form of discrimination prohibited by s.15 of the 2010 Act is discrimination arising from disability. That is a new provision; the 1995 Act had provided for protection from "disability related discrimination" (initially s.5(1), but from 1 October 2004 s.3A(1)). However, following the judgment of the House of Lords in ***London Borough of Lewisham v Malcolm*** [2008] UKHL 43, [2008] IRLR 700, those provisions were considered to be inadequate to provide the degree of protection from disability-related discrimination which was intended for disabled people.[2]

42. Under s.15(1)(b) of the 2010 Act, discrimination arising from disability is subject to the standard objective justification defence test: that is, the unfavourable treatment in question must be "a proportionate means of achieving a legitimate aim". The test under s.15(1)(b) is an objective one according to which the Tribunal must make its own assessment[3], rather than merely reviewing the assessment made by the appellant.

43. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (***Homer v Chief Constable of West Yorkshire*** [2012] UKSC 15, [2012] ICR 704). When determining whether or not a measure is proportionate, the Tribunal must consider whether or not a lesser measure

[2] See *Harvey on Industrial Relations* at [368.01].
[3] See ***City of York Council v Grosset*** [2018] IRLR 746

could have achieved the proprietor's legitimate aim (***Naeem v Secretary of State for Justice*** [2017] UKSC 27, [2017] 1 WLR 1343). The Tribunal must also consider whether the measure taken was proportionate at the time at which the unfavourable treatment was applied (***The Trustees of Swansea University Pension & Assurance Scheme & anor v Williams*** UKEAT/0415/14, [2015] IRLR 885 at [40-42][4]).

Application of the 2010 Act to the Education Sector

44. Ss.84 to 89 of the 2010 Act apply to maintained schools, pupil referral units, independent schools and all types of academy and free school. S.84 provides that

> "(5) "School"—
>
> (a) in relation to England and Wales, has the meaning given in section 4 of the Education Act 1996;
>
> (b) in relation to Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980.
>
> (6) A reference to a school includes a reference to an independent educational institution in England; and a reference to an independent educational institution in England is to be construed in accordance with Chapter 1 of Part 4 of the Education and Skills Act 2008".

45. Ss.90 to 94 apply to institutions in the Further Education sector (including sixth-form colleges) and universities and other institutions in the Higher Education sector. Ss.95 to 97 apply to qualifications bodies. Schedules 11 to 14 provide for some limited exceptions to the Act's prohibitions of discrimination, none of which are relevant to this appeal.

46. S.85(1) deals with discrimination in admission in schools and prohibits discrimination by schools against prospective pupils. S.85(1) imposes a statutory obligation on all schools – including independent schools – to admit pupils, if not doing so would amount to an act of discrimination.

47. S.85(2) prohibits other types of discrimination by schools as follows:

[4] Which was also heard by the Court of Appeal and the Supreme Court, but those appeals did not relate to this issue.

> "(2) The responsible body of such a school must not discriminate against a pupil—
>
> (a) in the way it provides education for the pupil;
>
> (b) in the way it affords the pupil access to a benefit, facility or service;
>
> (c) by not providing education for the pupil;
>
> (d) by not affording the pupil access to a benefit, facility or service;
>
> (e) by excluding the pupil from the school;
>
> (f) by subjecting the pupil to any other detriment".

There is a similar duty in the case of victimisation in s.85(5).

48. S.85(7) confirms that s.85 applies to all of the following types of schools:

> In relation to England and Wales, this section applies to –
>
> (a) a school maintained by a local authority;
>
> (b) an independent educational institution (other than a special school);
>
> (ba) an alternative provision Academy that is not an independent educational institution;
>
> (c) a special school (not maintained by a local authority)".

49. In England, a parent may make a claim to the Tribunal that a "responsible body" (i.e. a local authority, a governing body or a school proprietor) has contravened ss.84–89 of the Act because of a person's disability. That does not extend to school admissions cases i.e. maintained school and academy admissions.[5] Claims that a responsible body has otherwise contravened the Act (for example, in relation to a different protected characteristic) must be brought in the County Court. Proceedings in the Tribunal must usually be brought within 6 months of the event, although that period is extended to 9 months if conciliation is attempted.

[5] Which must be dealt with under the appeal arrangements under s.94 of the 1998 Act, or Academy arrangements (as defined in s.1 of the Academies Act 2010) between the responsible body for an Academy and the Secretary of State.

50. In Wales, complaints must be made to the Special Educational Needs Tribunal for Wales. Both schools admissions and school exclusion cases fall outside of the jurisdiction of the Special Educational Needs Tribunal for Wales under the 2010 Act (see paragraphs 13 and 14 of Schedule 17).

Ground 1

51. As referred to in paragraph 32 above, the powers of the Tribunal are set out in paragraph 5 of Schedule 17 of the 2010 Act as follows

> "(1) This paragraph applies if the Tribunal finds that the contravention has occurred.
>
> (2) The Tribunal may make such order as it thinks fit.
>
> (3) The power under sub-paragraph (2)—
>
> (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
>
> (b) does not include power to order the payment of compensation".

52. Miss Gannon submitted that, when determining the proper limits of the discretion conferred by paragraph 5(2), it was necessary to consider (i) whether there was any route to enforce the order (ii) absent such a route, whether Parliament intended to grant the Tribunal such expansive and draconian powers. As she puts it, the first issue is whether the reinstatement order is enforceable; the second question is whether Parliament intended to grant the Tribunal the power to order specific performance of a contract by a private school. It seems to me, however, that the two questions should in fact be the other way round: the question of jurisdiction logically comes before the question of the enforcement of the powers conferred by that jurisdiction, although the two questions are interdependent and the first question cannot be answered in isolation from the second.

53. Miss Gannon submitted that, in the case of independent/private schools, the only powers which the Tribunal had under paragraph 2 were

(1) to make declarations that there had been a breach of the 2010 Act and

(2) to make recommendations

(It followed that the "orders" to the School to apologise and to contact the EHRC in paragraphs 3 and 4 of the Tribunal's order could only be considered as recommendations as well.)

54. The difficulty with that submission, however, is that it would render the Tribunal effectively toothless (and the problem would also arise if she were right that orders of the Tribunal were not otherwise enforceable, even if it had the jurisdiction to make them). I put to her two possible scenarios in argument, one the school which deliberately thumbs its nose at the decision of the Tribunal and announces that it had absolutely no intention to comply with the declaration granted and the recommendations made to it, the other a more measured response in which the school says (see ***Ross v. Stanbridge Earls School*** [2002] EWHC 2255 (QB) at [18] below) that, in weighing the risk to the school and its other pupils, it was legitimate to consider the potential effect of undermining the authority of the headmaster in a situation in which he was peculiarly in a better position than the tribunal to make a judgment as to the overall welfare of his staff and pupils, and that with the best will in the world it could not therefore comply with the declaration and recommendations made. Was it really the case that in both situations there was effectively nothing which the Tribunal could do and nothing which any other court could do either? After all, if she were right, all that the Tribunal could do, apart from making pious exhortations in the form of recommendations which were not even cast in mandatory terms and which could freely be ignored without fear of sanction, would be to make a declaration – and a declaration was only a formal statement or announcement, as Hayden J had said in ***Re M (MASM v. Hackney LBC)*** [2015] EWCOP 3, [2015] 3 WLR 190 at [49]-[50]:

> "… a declaration cannot be of the same complexion as a court order. It lacks both the necessary clarity and failed to carry any element of mandatory imperative.
>
> … my order of 20 February 2015 was expressed to have been made pursuant to section 16, it was drafted in declaratory terms. As such, for the reasons which I have set out above, it cannot, in my judgment, trigger contempt proceedings. There cannot be "defiance" of a "declaration" nor can there be an "enforcement" of one. A declaration

> is ultimately no more than a formal, explicit statement or announcement."

55. Miss Gannon conceded that a declaration and recommendation would be less effective than an order for compensation or a mandatory order. That was not to say, however, that a declaration or recommendation was ineffective: schools no doubt would not want to have such a declaration made against them and would face the risk of gaining an undesirable reputation. As to recommendations, again it was likely that schools would treat them seriously, even if not as binding obligations. I accept that in the overwhelming majority of cases schools would comply with a declaration and recommendations for those reasons, but that is not an answer to the cases which I put to her in argument where the schools either thumb their noses at the tribunal or say that in all conscience they cannot comply with a declaration and recommendations which they believe to be misconceived. It is in precisely those difficult cases where the tribunal needs to be able to make a coercive or mandatory order, even if the further enforcement of that order has to be made by another court or tribunal because the tribunal which made the order does not itself have the power of enforcement.

56. Ultimately, although she couched her argument in forceful and beguiling terms, I am unable to accept Miss Gannon's argument that Parliament has produced an essentially toothless body which has no effectual powers to deal with cases of disability discrimination in schools, either because it had no jurisdiction in the first place to make effective orders beyond the making of a declaration or because it did have such jurisdiction, but such jurisdiction was effectively rendered nugatory because there was no other means of enforcing the Tribunal's order.

57. Miss Gannon argued that the terms of the statute were the lodestar by which I should be guided, but in my judgment that lodestar leads to the conclusion that the Tribunal does have the power to order reinstatement. As a matter of first impression, a power to order reinstatement would appear to have been included within the jurisdiction of the Tribunal, which is ostensibly set out in the widest terms

> "(2) The Tribunal may make such order as it thinks fit"

and which is reinforced by the provisions of paragraph 5(3)(a) of Schedule 17 which state that the powers conferred

> "(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates"

although that power

> "(b) does not include power to order the payment of compensation".

As I explain below, that first impression is reinforced when one considers the legislative predecessor of that provision and its re-enactment in the 2010 Act.

58. As I observed to Miss Gannon in the course of the argument, the apparent width of the power conferred by paragraph 5(2) ("may make such order as it thinks fit") coupled with the specific derogation in paragraph 5(3)(b) ("does not include the payment of compensation") would suggest at first blush that the Tribunal did have the power to order reinstatement and that it would require a specific prohibition, such as that in paragraph 5(3)(b), to preclude it from having such a power. The logic of her submission suggested that the paragraph should be reworded

> "(2) The Tribunal may *not* make such order as it thinks fit"

and then

> "(3) The power under sub-paragraph (2)—
>
> (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
>
> (b) does not include power to order the payment of compensation *or to make an order for specific performance/reinstatement*"

or perhaps

> "(b) does not include power to order the payment of compensation; and

> *(c) does not include power to make an order for specific performance/reinstatement*".

59. Although it does not fall for decision, the reason for the exclusion of the power to award compensation in paragraph 5(3)(b) is not clear. Neither counsel could suggest a policy reason for the exclusion and it does not accord with Ms Darwin's later argument that the power to order reinstatement was consistent with the tortious nature of the remedies under the 2010 Act since discrimination was a statutory tort and the purpose of damages in tort was to put the claimant back in the position in which he would have been if the tort had not been committed. The power to order compensation is the quintessential remedy for tortious wrongdoing, so on her submission one would think that it should have been included in the Tribunal's powers, but it has in fact deliberately been excluded from the ambit of the Tribunal's jurisdiction. If, however, the Tribunal had had the power to award compensation, there would have been a ready means of enforcing it under s.27 of the 2007 Act.

60. Moreover, the legislative history of the provision suggests that it was intended to have the wide effect for which Ms Darwin contends and not the narrow one for which Miss Gannon argues. The original form of the provision in the form in which it was inserted into the 1995 Act by s.28I was in the following terms (with emphasis added)

> "(3) If the appropriate tribunal considers that a claim under subsection (1) is well-founded -
>
> (a) it may *declare* that A has been unlawfully discriminated against; and
>
> (b) if it does so, it may make such *order* as it considers reasonable in all the circumstances of the case.
>
> (4) The power conferred by subsection (3)(b) –
>
> (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates; but
>
> (b) does not include the power to order the payment of any sum of by way of compensation".

61. Miss Gannon had, of course, submitted that the Tribunal only had the power to make declarations and recommendations. If that were the case, paragraph 3(a) would confer the power to make the declaration, but paragraph 3(b) specifically refers to the making of "such *order* as it considers reasonable in all the circumstances of the case". It does not refer, as Miss Gannon's argument would have it, to the making of recommendations. In addition, the power to award compensation was specifically excluded under paragraph 4(b), whilst under paragraph 4(a) the power conferred may in particular be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates. Yet if the power to make a declaration is already catered for in the legislation in paragraph 3(a) and the power to award compensation is specifically excluded by paragraph 4(b), it is difficult to see what other substantive or significant order, other than one to order reinstatement, is comprehended by paragraph 3(b) given that the power conferred by that subsection is to be exercised with a view to obviating or reducing the adverse effect on the person concerned, which would potentially be achieved by an order for reinstatement.

62. There is no suggestion that the form in which s.28I was originally enacted caused problems to tribunals or those who appeared in front of them or that there was perceived to be a problem with the ambit of the orders made under that provision. Nor is there any material which suggests that there was perceived to be a need to amend the provision to clarify or alter the jurisdiction of the Tribunal. Moreover, although the Explanatory Notes to the 2010 Act are not part of the Act, reference can legitimately be made to them to understand the background to and the context of the 2010 Act and the mischief at which it was aimed. As paragraph 917 of those Explanatory Notes explains, Schedule 17 of the 2010 Act was designed to replicate the effect of the provisions of the 1995 Act (rather than to alter them). There was therefore no obvious reason to amend the substance of s.28I of the 1995 Act; if there were no reason to amend it, there would appear to have been no intention to amend it.

63. In my judgment, the re-enactment of s.28I of the 1995 Act by paragraph 5 of Schedule 17 of the 2010 Act was merely a word-shortening provision and did not effect any substantive alteration to the otherwise wide terms of the original provision under which the Tribunal did have the power to order reinstatement in the case of disability discrimination in a school.

64. In contrast to the wide jurisdiction conferred on the Tribunal in dealing with disability discrimination in schools, Ms Darwin said that it was instructive to compare the powers conferred by paragraph 5 of Schedule 17 with the powers conferred on other courts and statutory tribunals under the 2010 Act, which were expressly limited in some instances:

(1) s.119(2) provides that a County Court has the power to grant any remedy which could be granted by the High Court in proceedings in tort, or on a claim for judicial review. That would include the power to make a mandatory order

(2) s.124(2) of the Act provides that an Employment Tribunal[6] may make a declaration, order the respondent to pay (uncapped) compensation to the complainant, or make an appropriate recommendation

(3) s.126(2) of the Act provides that an Employment Tribunal may make an order declaring that a complainant has a right to be admitted to an occupational pension scheme, or right to membership of the scheme

(4) s.133 of the Act is to similar effect in equal pay cases

(5) s.143 of the Act provides that a County Court may make an order for an unenforceable contractual term to be removed or modified.

65. None of those provisions is cast in terms that

> "The Tribunal [or Court] may make such order as it thinks fit",

in marked contrast to the position under paragraph 5(2) of Schedule 17.

66. Nevertheless, Ms Darwin was not able to explain why the Tribunal should have wider powers in this respect than, for example, the Employment Tribunal in the exercise of its pure employment jurisdiction. She speculated that one reason might be that the Tribunal was

[6] This is correctly a reference to the 2010 Act, although it deals with Employment Tribunals, as likewise with the next cited provision; it is not a reference the 1996 Act,

unable to order compensation, whereas the Employment Tribunal can, and occasionally does, award compensation of millions of pounds to victims of discrimination and Parliament might therefore have taken the view that the Tribunal would need to be more "creative" than other courts and tribunals when deciding what non-monetary remedies could obviate or reduce the adverse effects on victims of discrimination for the acts of discrimination to which they have been subjected. She was, however unable to point to any material which might justify or reinforce that speculation.

67. There is in my judgment an additional reason why Miss Gannon's submission that the Tribunal only has the power to make declarations and recommendations cannot be correct and that emerges from the terms of s.124 of the 2010 Act. Parliament is quite cognisant of the distinction between declarations, orders and recommendations and has explicitly recognised that tripartite distinction in s.124 which provides (with emphasis added) that

> "**Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in s.120(1).
>
> (2) The tribunal may—
>
> (a) make a *declaration* as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) *order* the respondent to pay compensation to the complainant;
>
> (c) make an *appropriate recommendation*.
>
> (3) An *appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps* for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
>
> (4) Subsection (5) applies if the tribunal—
>
> (a) finds that a contravention is established by virtue of s.19, but
>
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
>
> (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under s.119.
>
> (7) *If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may—*
>
> *(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;*
>
> *(b) if no such order was made, make one".*

It has not seen fit to insert similar provisions (minus the power to make orders for compensation) in paragraph 5 of Schedule 17 when it could easily have done so if its intention had been, as Miss Gannon suggests, to confer power to make only declarations or recommendations on the Tribunal.

68. If, as I have held, paragraph 5(2) of Schedule 17 does confer on the Tribunal the power to order reinstatement, one might have expected there to be readily identifiable powers of enforcement (if not by the Tribunal itself since it is common ground that the Tribunal does not have the power to enforce its own orders), lest the effect of the orders be negated by the absence of such an enforcement power.

69. The power to enforce orders for sums payable under the decision of the Tribunal under s.27 of the 2007 Act to be enforced as if they were orders of the High Court of the County Court does not apply in this situation. The consequence is either an inability to enforce any Tribunal orders (other than monetary awards) which it nevertheless has the jurisdiction to make or there must be some other mechanism to enforce the order.

70. Miss Gannon submitted that, had Parliament intended that the Tribunal should have powers such as that to order reinstatement of a pupil into a private school, it would have done three things:

(i) it would have expressly included within the legislation a provision that specific performance could be ordered (cf. the Employment Tribunal where the relevant legislation included specific provisions for the Tribunal to order reinstatement or re-engagement and

specific provisions to enable the employer to refuse to comply with such an order (as to which see ***Mackenzie*** below)

(ii) it would have included within that power necessary restrictions or limitations, such as those in ss.114(6) and 119(7) of the 2010 Act to the effect that the County Court must not grant remedies (whether in the form of an interim injunction, an award of damages or the making of a declaration), unless satisfied that no criminal matter would be prejudiced by so doing

(iii) it would have granted the Tribunal the powers to enforce an order for specific performance or, absent such powers, as in the case of compensation, another route by which a claimant could seek to enforce that order in a different court (as with s.27 of the 2007 Act).

71. I have already dealt with her first point in that regard in paragraphs 51 to 67 above, since I have held that an order for reinstatement or specific performance is included within the powers of the Tribunal by paragraph 5(2) of Schedule 17 on the true construction of the Act.

72. As to her second point, it seems to me that those are provisions which narrow or inform the scope of a jurisdiction already conferred by s.119(2)(a). If, as I have held, there is jurisdiction to order reinstatement conferred by paragraph 5(2) of Schedule 17, there is no equivalent provision which narrows or informs that jurisdiction, but the likelihood is that any tribunal would take into account the need not to prejudice any criminal matter by making any such order and would not do so unless satisfied that the criminal matter would not be prejudiced.

73. The third point requires more explanation. As seen above (paragraph 28), Parliament has sometimes provided means by which the orders of a Tribunal, which cannot enforce its own orders, can nevertheless be enforced in the County Court at the suit of one of the parties:

(i) s.27 of the 2007 Act, but that provision only applies to "a sum payable" by a decision of the First-tier Tribunal or the Upper Tribunal; other orders of the Tribunal are not enforceable or "recoverable" under this provision

(ii) s. 15 of the 1996 Act, but again that provision only applies to "any sum payable" and one which has been registered in accordance with Employment Tribunal procedure regulations;

(iii) there is additionally in the case of the First-tier Tribunal (Property Chamber) s.176C of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") which provides that

> **"Enforcement**
>
> Any decision of the First-tier Tribunal or Upper Tribunal under or in connection with an enactment specified in section 176A(2), other than a decision ordering the payment of a sum (as to which section 27 (enforcement of the Tribunals, Courts and Enforcement Act 2007), is to be enforceable with the permission of a county court in the same way as orders of such a court".

S.176A of the 2002 Act provides that

> "(2) The enactments specified for the purposes of subsection (1) are—
>
> (a) this Act,
>
> (b) the Leasehold Reform Act 1967,
>
> (c) the Landlord and Tenant Act 1985,
>
> (d) the Landlord and Tenant Act 1987,
>
> (e) the Leasehold Reform, Housing and Urban Development Act 1993, and
>
> (f) the Housing Act 1996".

74. Again, it is not clear what the policy reason was for favouring the enforcement of "any" of the decisions of the First-tier Tribunal (Property Chamber) in respect of those enactments whilst not conferring similarly wide enforcement powers in the case of the SENDIST.

75. There are also separate provisions which enable the Tribunal to refer witness summonses and other evidential issues to the Upper Tribunal, where the Upper Tribunal is granted the powers of the High Court to compel compliance with a direction for the attendance of witnesses, provision of documents and other such matters (under s.25 of the

2007 Act), but curiously there is no specific provision to enable the enforcement by the Upper Tribunal of an order for reinstatement made by the First-tier Tribunal itself.

76. What these provisions in the various Acts demonstrate, said Miss Gannon, is that Parliament knows that "Tribunals have no enforcement powers of their own" (see the Explanatory Notes to the 2007 Act) and that it therefore confers particular enforcement powers in the case of particular tribunals, as it had done in 1996, 2002 and 2007, but in that event why had it not done so in the case of the 2010 Act? The conclusion, argued Miss Gannon, was that Parliament had not provided a mechanism for the enforcement of such orders because it did not intend that such orders should be enforceable.

77. In relation to a public body such as a state school, she argued that there were other methods by which a claimant could subsequently potentially obtain compliance with an order, but none of those alternative methods would be available against an independent school for the following reasons:

(i) there was no statutory or other obligation on the School to admit a pupil, other than the contractual arrangement between the parents and the School[7]

(ii) there was no statutory body which had power to require the School to admit Bobby either because of the order of the Tribunal or because he had been named in the EHCP

(iii) unlike state schools, there was no funding agreement between the School and the Secretary of State to enable enforcement of a decision of the Tribunal in that way

(iv) judicial review of the School's decision making was not available

(v) should the parents seek to enforce the order through the civil courts, there was no mechanism to compel the School to comply with the order of the Tribunal.

78. For her part Ms Darwin submitted that the suggestion that the Tribunal's order was unenforceable through the civil courts was absurd. She said that the Tribunal had the

[7] Subject to the duty under s.85(1) of the 2010 Act.

jurisdiction to make an order for reinstatement. She accepted that the Tribunal was unable to enforce its own order, but she said that many statutory tribunals were unable to enforce their own decisions, for example the Employment Tribunal, the decisions of which had to be enforced in the County Court.

79. She submitted that the logic of Miss Gannon's own case was that the Tribunal was effectively hobbled when it came to enforcement of its orders since (i) it was unable to order an award of compensation (ii) there were no specific statutory routes to enforce any other kind of order.

80. She argued that the logic of the School's position must be that the First-tier Tribunal's jurisdiction in all areas was effectively limited to making monetary orders which could be enforced by a County Court or the High Court as expressly provided for by s.27 of the 2007 Act; the Tribunal had no means of making an efficacious order other than a monetary order.

81. It is, however, clear that in the specific case of the First-tier Tribunal (Property Chamber), there are wider enforcement powers conferred by s.176C in respect of "any decision" under the listed enactments (although, as mentioned above, there seems to be no reason of principle why that should be so in the case of the Property Chamber, but not any other Chambers of the First-tier Tribunal).

82. Ms Darwin nevertheless submitted that the fallacy of the School's position on its own case could be quickly illustrated by taking the example of the Employment Tribunal and its powers under the 2010 Act. S.15 of the 1996 Act, like s.27 of the 2007 Act, allows for enforcement of sums payable in pursuance of a decision of an Employment Tribunal only. There is no specific statutory route for enforcement of any other type of order made by an Employment Tribunal. Accordingly, if the School's argument is right, then the Employment Tribunal – despite the express provisions at s.124 of the 2010 Act to the contrary – does not have jurisdiction to make either a declaration or an appropriate recommendation, or perhaps more accurately, might have the jurisdiction to make them, but cannot ensure that they are enforced since no enforcement mechanism has been provided.

83. It seems to me that that particular example is an apposite one. Parliament has conferred specific powers to do certain things in s.124 of the 2010 Act and in my judgment that conferral of express powers must by necessary implication carry with it the ability to ensure that a jurisdiction which has been specifically conferred can be effectively enforced (else the conferral of the jurisdiction by express words would be rendered nugatory by implication). Similarly in the case of the powers conferred under paragraph 5(2) of Schedule 17, the only difference being that in the former case the powers were conferred by express words and in the latter case by slightly longer means of statutory interpretation.

84. Assuming that there was a power to enforce the reinstatement decision of the Tribunal, I asked Ms Darwin *where* that power would reside, since (as is common ground) the Tribunal itself would have no power to enforce the order. In oral argument she suggested that the body which most naturally should have that power would be the Upper Tribunal, but in her skeleton argument she had argued that the Upper Tribunal's powers to punish a contempt of court under s.25 of the 2007 Act were limited to matters relating to the attendance and examination of witnesses, the production and inspection of documents and all other matters incidental to the Upper Tribunal's functions; whilst that might allow the Upper Tribunal to punish as contempt a failure to comply with one of its own orders, it seemed unlikely that it would extend to the Upper Tribunal punishing for contempt for non-compliance with a reinstatement order made by the First-tier Tribunal.

85. S.25 of the 2007 Act provides that

> "**Supplementary powers of Upper Tribunal**
>
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—
>
> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
>
> (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
>
> (2) The matters are—
>
> (a) the attendance and examination of witnesses,

(b) the production and inspection of documents, and

(c) all other matters incidental to the Upper Tribunal's functions".

86. That section allows the Upper Tribunal to punish as a contempt a failure to comply with one of its own orders. It also allows a breach of a requirement to give evidence or produce or make available a document in the First-tier Tribunal to be referred to the Upper Tribunal with a view to the Upper Tribunal punishing the person for contempt of court, as to which see ***CB v. Suffolk County Council*** [2010] UKUT 413 (AAC) in which a teacher in an independent school who failed to comply with a witness summons issued by the First-tier Tribunal was ordered by the Upper Tribunal to pay a fine of £500. The Upper Tribunal exercised its enforcement powers under s.16(3) of the Contempt of Court Act 1981 to specify that non-payment of the fine would result in a term of imprisonment of 7 days if the fine were not paid within the specified period. The Upper Tribunal emphasised that, if the recipient thought that the summons was inappropriate, the proper course of action was to ask the First-tier Tribunal to set it aside and, if that failed, to apply to the Upper Tribunal for judicial review to quash the summons. Simply ignoring it was not a legitimate course to take. Similarly, in ***BO v. Care Quality Commission (Enforcement Reference)*** [2013] UKUT 53 (AAC), a fine of £100, with an alternative of two days imprisonment, was imposed on another case where a summons had been ignored.

87. It seems unlikely, however, that s.25 as currently drafted would extend to the Upper Tribunal punishing for contempt for non-compliance with an order of the First-tier Tribunal which was a substantive order for reinstatement. As volume III of the Social Security Legislation 2018/19 states at paragraph 5.117

> "This section gives the Upper Tribunal power to punish for contempt of court in relation to its own proceedings. Where a person has failed to comply with a requirement to attend at any place for the purpose of giving evidence to the First-tier Tribunal or otherwise to make themselves available to give evidence to the First-tier Tribunal or to swear an oath for [or] in connection with giving evidence in First-tier Tribunal proceedings, that tribunal may refer the case to the Upper Tribunal which may exercise its powers under this section as though the First-tier Tribunal had been the Upper Tribunal (see r.7(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber)

> Rules 2008 and r.7(3) and (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008").

88. I therefore agree with Ms Darwin's written submission rather than her tentative oral submission to the contrary. It is obviously an omission in the legislative scheme that s.25 of the 2007 Act only allows the Upper Tribunal to punish a contempt of court which is limited to matters relating to the attendance and examination of witnesses, the production and inspection of documents and all other matters incidental to the Upper Tribunal's functions (either in relation to its own proceedings or on referral from the First-tier Tribunal in relation to one of the stated matters), but not to punish as a contempt a refusal to comply with a substantive decision of the First-tier Tribunal.

89. So far as enforcement by the County Court is concerned, as the provisions in the 1996, 2002 and 2007 Acts suggest, that would appear to require specific statutory authorisation to confer authorisation to enforce tribunal orders on a court which is itself a creature of statute, which is missing in this case, so that the only potential avenue for assistance in enforcement would appear to lie in the High Court.

90. That route, submitted Miss Gannon, was precluded by the recent decision of the Court of Appeal in ***R (Mackenzie) v. University of Cambridge***, to which I shall now turn.

R (Mackenzie) v. University of Cambridge

91. The case of ***Mackenzie v. University of Cambridge*** was heard on 12 June 2019 and the decision of the Court of Appeal was handed down on 20 June 2019. It had not therefore been before the Tribunal when it heard the instant case and reached its decision, but was heavily relied upon by the School in seeking permission to appeal and on the substantive appeal itself.

92. ***Mackenzie*** was an employment case, brought not under the 2010 Act, but under the Employment Rights Act 1996 ("the 1996 Act"). Until her dismissal the claimant had been employed by the University of Cambridge as a lecturer in the Law Faculty. She brought proceedings in the Employment Tribunal claiming that she had been unfairly dismissed contrary to Part X of the 1996 Act. In the course of the hearing of that claim the University conceded liability. Under the statutory scheme governing remedies for unfair dismissal, she

had a choice whether to seek an order for reinstatement or re-engagement (under ss.113 to 115 of the 1996 Act) or a compensatory award. She chose to seek an order for re-engagement. The University resisted the making of such an order on the ground that re-engagement would not be practicable. The tribunal rejected that argument and held that, although there had indeed been an irretrievable breakdown in her relationship with a senior colleague, there was no breakdown in the relationship of mutual trust and confidence between herself and the University more generally, which continued (and indeed continues) to employ her services on a self-employed basis. The tribunal accordingly made a re-engagement order.

93. It was the University's case that the effect of the tribunal's order was not to impose an enforceable obligation on it actually to re-engage the claimant, but only to render it liable for an "additional award" under s.117 of the Act if it did not do so. It declined to re-engage her and instead paid her the maximum amount payable under the applicable provisions.

94. The claimant launched judicial review proceeding in the Administrative Court challenging what she characterised as its "ongoing failure to comply with the Order of the Employment Tribunal that [she] be re-engaged as a lecturer …" and sought as her primary relief (1) the quashing of the University's decision to refuse to comply with the re-engagement order and (2) a declaration that that refusal was unlawful. Permission to apply for judicial review was refused by Morris J on the papers and by Jay J after an oral hearing on the basis that the remedies under the 1996 Act were exclusive and could not be enforced by proceedings in the High Court. She appealed, but her application for judicial review was dismissed by the Court of Appeal.

95. In giving the lead judgment, Underhill LJ stated at [6] that

> "The essential issue raised by the claim is whether the Claimant is entitled to relief in the High Court in relation to a right arising under the 1996 Act, and more particularly in relation to the enforcement of an order for re-engagement made by the tribunal under that Act."

96. He analysed the statutory provisions in some detail (which it is not necessary to repeat for the purposes of this decision, save that it should be noted that he held at [8] that the effect of s.111, which provided for the Employment Tribunal to have jurisdiction to determine

claims of unfair dismissal, was to confer an exclusive jurisdiction). What was material for present purposes was s.117 which provided (with emphasis added) that

> "(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if —
>
> (a) an order under section 113 is made and the complainant is reinstated or re-engaged, but
>
> (b) the terms of the order are not fully complied with.
>
> (2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.
>
> (2A) …
>
> (3) Subject to subsections (1) and (2), if an order under section 113 is made *but the complainant is not reinstated or re-engaged in accordance with the order*, the tribunal shall make —
>
> (a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), *and*
>
> (b) except where this paragraph does not apply, *an additional award of compensation* of an amount not less than twenty-six nor more than fifty-two weeks' pay, *to be paid by the employer to the employee*.
>
> (4) Subsection (3) (b) does not apply where —
>
> (a) the employer satisfies the tribunal that it was not practicable to comply with the order,
>
> (b) …
>
> (5)-(8) …"

97. S.117 thus covers two situations: (i) where an order is made under s.113 and is not "fully" complied with (sub-sections (1) and (2)) (ii) where such an order is made, but the complainant is not reinstated or re-engaged, in other words where the order is not complied with at all (sub-section (3)). ***Mackenzie*** concerned the latter scenario. What the Act provided for in that case was an ordinary compensatory award (such as would have been made initially if no s.113 order had been made) and an "additional award" of between 26 and 52 weeks' pay, *unless* the employer demonstrated that it was not practicable to comply with the order.

98. Underhill LJ added at [15]-[17] that

> "15. The next part of Chapter II (sections 118-126) contains the provisions for assessing a compensatory award. I need not summarise them here, save to note that section 124 provides for a limit, the so-called statutory cap, which at the time of the tribunal's order in this case stood at (in the circumstances applicable to the Claimant) £74,200.
>
> 16. The final part of Chapter II (sections 127-132) concerns interim relief, in the form of an order that for certain limited purposes a claimant's contract of employment should "continue" pending the determination or settlement of his or her complaint. Interim relief is only available in certain types of cases, into which the Claimant's case does not fall; but one aspect of the provisions relating to it is relevant to the issues before us – see para. 24 below.
>
> 17. I should finally note that s.15(1) of the Employment Tribunals Act 1996 (not, N.B., the Employment *Rights* Act, with which we are otherwise concerned), which is headed "Enforcement", provides that any sum payable in pursuance of a decision of an employment tribunal (in England and Wales) shall be recoverable as if it were payable under an order of the County Court."

99. The argument for the claimant was that the effect of s.115 was that an order for re-engagement created an obligation on the employer to re-engage the employee and a correlative right in the employee to be re-engaged. It followed that that right must be capable of being enforced. Since the scheme under the 1996 Act did not provide any mechanism in the Employment Tribunal for the specific enforcement of a re-engagement order, an employee whose employer had failed to comply with an order for re-engagement must be entitled, so that he had an effective remedy and in conformity with the requirement of the European Convention on Human Rights, to invoke the procedures of the High Court. Underhill LJ, however, rejected that argument at [20]:

> "In my view that argument fails at the first stage. S.115 must be read in the context of the group of sections of which it forms part, and specifically of s.117. In my view it is clear when ss.115 and 117 are read together that an "order for re-engagement" is not intended to impose an absolute and indefeasible obligation on the employer to re-engage the employee, or a correlative right in the employee to be re-engaged. Rather, it creates a situation in which the employer must *either* re-engage the employee *or* become liable for the awards

> specified by s.117(3), which include an additional award on top of what it would have had to pay if no re-engagement order had been made. In my view the only natural reading of s.117(3) is that the consequences for which it provides are the *only* consequences that follow from non-compliance with a re-engagement order, particularly bearing in mind that the section is headed "Enforcement of order …". Mr O'Neill submitted that it was necessary to treat ss.115 and 117 as wholly distinct – one providing for the substantive right, and the other for its enforcement. I do not agree. This group of sections constitutes a scheme in which it is necessary to construe any particular section in the light of the others. (I should say that although I have referred in the foregoing only to s.115, because that is what we are concerned with in this case, the same must go for orders for reinstatement under s.114.)"

100. He continued

> "21. That conclusion in my view follows from the reading of the sections themselves, but it is reinforced by three other considerations.
>
> 22. First, if Mr O'Neill were right there would be a situation where rights created by the 1996 Act fell to be enforced by orders of the ordinary Courts. The statutory scheme of employment protection is intended to be entirely self-contained and fall under the exclusive jurisdiction of the employment tribunal … It is true that pecuniary awards of the tribunal are enforceable in the County Court (see para. 17 above); but that is the subject of express statutory provision, and there is no equivalent provision empowering the County Court, or indeed the High Court, to make an order for specific enforcement of a s.113 order. Further, the County Court procedures in question are enforcement procedures in the narrow sense: the employment tribunal has specified the amount payable, and the role of the Court is simply to see that payment is made. By contrast, what the Claimant is seeking from the High Court is not "enforcement" in that sense but a substantive order of that Court. It cannot be assumed that in such a case the Court could or should merely cut-and-paste the tribunal's order. At the very least it would be necessary for it to provide for a new date for compliance (the original date having, *ex hypothesi*, passed); but other elements of the s.113 order might require to be re-visited as a result of the passage of time or other changed circumstances. We would thus have a hybrid situation in which the High Court was having to make decisions of a kind which would normally fall within the jurisdiction of the employment tribunal. That would be a unique hybrid and in my view unacceptable in principle.
>
> 23. Secondly, the provisions of s.117 are mandatory: both sub-section (1) and sub-section (3) provide that in the situations to which they apply (respectively, partial compliance and non-compliance) the

> tribunal "shall" make awards of the kinds specified. On the face of it, that would mean that an employee in whose favour a s.113 order had been made but which had not been complied with by the specified date would be entitled *both* to an order from the Court for specific performance *and* to a full compensatory award and additional award which the statute provides for only in the case where reinstatement or re-engagement has not occurred. That seems to me wrong in principle. Mr O'Neill submitted that that was the wrong analysis. The right to an award under s.117(3) was intended to be additional to the right to be reinstated/re-engaged rather than in substitution for it. If the employee is in the end reinstated or re-engaged, albeit belatedly, that fact could be reflected in the amount of the compensatory award; and it was not inappropriate that the employer should have to pay an additional award as a penalty for its initial non-compliance. I cannot read s.117(3) in that way. It seems to me clear that the awards for which it provides are indeed intended to be made as an alternative to actual reinstatement/re-engagement. On Mr O'Neill's reading the employee would have both the penny and the bun; and the fact that the penny could possibly be reduced to a halfpenny by an adjustment of the compensatory award (which would in any event only be possible if the award was made after the belated reinstatement/re-engagement) does not make that any more acceptable in principle.
>
> 24. Thirdly, as noted at para. 16 above, Chapter II includes elaborate provisions empowering the tribunal in special cases to impose by way of interim relief a continuation of the contract of employment, for limited purposes, against an employer who was unwilling to reinstate/re-engage the employee pending determination of the claim. That makes it even harder to accept that Parliament intended that employees should have an absolute right to re-engagement, on a final basis, and yet failed to make any explicit provision for it.
>
> 25. There are perfectly understandable reasons why Parliament should not have been prepared to empower tribunals to make specifically enforceable orders for reinstatement or re-engagement. As I have already mentioned, the law has always been very reluctant to countenance the making of orders requiring parties to continue in an employment relationship. Of course there are cases where for particular reasons such orders are acceptable, but there is nothing surprising in Parliament intending to legislate to give effect to the general rule and to rely on the mechanism of the additional award to incentivise employers to comply with a s.113 order. I accept that the phrase "*order* for re-engagement" may in that case be rather inapt; but ultimately what matters is not the label used but the substance of the provisions to which it refers."

101. He therefore concluded that

> "31 … The reason why there is no statutory machinery for requiring an employer actually to re-engage an employee, as opposed to requiring it to pay an additional award, is that the statute on its true construction does not give him or her a right to be actually re-engaged. That being so, failure to re-engage does not represent a breach of any right and there is nothing for which an effective remedy is required.
>
> …
>
> 33 … the obligation is one that the statute does not intend should be specifically enforceable: the only remedy for non-compliance is the additional award. If that means that it is a rather unusual form of "order", so be it."

102. Miss Gannon argued that it was relevant that in an equivalent tribunal jurisdiction the statute had specifically set out the provisions for what amounted to the specific performance of a personal contract. She relied particularly on the passages in which Underhill LJ had held that

(i) the statutory scheme of employment protection was intended to be entirely self-contained and to fall under the exclusive jurisdiction of the Employment Tribunal (paragraph 22)

(ii) pecuniary awards of the tribunal were enforceable in the County Court, but that was the subject of express statutory provision and there was no equivalent provision empowering the County Court, or indeed the High Court, to make an order for specific enforcement of a s.113 order (paragraph 22)

(iii) were the High Court to be required to make a substantive order, that would create a unique hybrid which was unacceptable in principle (paragraph 22)

(iv) there were perfectly understandable reasons why Parliament should not have been prepared to empower tribunals to make specifically enforceable orders for reinstatement or re-engagement, not least because the law has always been very reluctant to countenance the making of orders requiring parties to continue in an employment relationship (paragraph 25)

(v) the reason why there is no statutory machinery for requiring an employer actually to re-engage an employee, as opposed to requiring it to pay an additional award, is that the statute

on its true construction does not give him or her a right to be actually re-engaged (paragraph 31)

(vi) the obligation is one that the statute does not intend should be specifically enforceable: the only remedy for non-compliance is the additional award (paragraph 33).

103. She argued that those principles were directly applicable in the present case and that in the present context there was no material difference between the position of the First-tier Tribunal considering special educational needs and disability and the Employment Tribunal considering an order for reinstatement of re-engagement arising out of unfair dismissal.

104. In the light of the decision of the Court of Appeal in ***Mackenzie***, I considered that there were serious issues which require to be determined in relation to powers of the First-tier Tribunal under paragraph 5 of Schedule 17 of the 2010 Act and that, pending such determination, the School had a reasonable prospect of success in making good its first ground of appeal. For that reason I granted permission to appeal in relation to Ground 1 and I must now state my conclusions on the effect of that decision for the purposes of the substantive appeal.

105. As I observed to Miss Gannon in the course of the argument both on the permission application and on the appeal itself, the position of the Tribunal dealing with a breach of the 2010 Act falls to be distinguished from that of the Employment Tribunal under the 1996 Act in two significant respects.

106. In the first place, under the 1996 Act it is clear that, when ss.115 and 117 are read together, an order for re-engagement is not intended to impose an absolute and indefeasible obligation on the employer to re-engage the employee, or a correlative right in the employee to be re-engaged. Rather it creates a situation in which the employer must *either* re-engage the employee *or* become liable for the award specified by s.117(3), which includes an additional award on top of what it would have had to pay if no re-engagement order had been made. It is a case of *either … or*.... The claimant cannot have both the penny and the bun. By contrast, there is no *either … or …* in the case of a breach of the 2010 Act under paragraph 5 of Schedule 17. If Miss Gannon is right, the claimant is confined to a declaration and a

recommendation, but nothing with teeth, neither the penny nor the bun, but a statement of entitlement to the penny if one had been available.

107. Secondly, in the 1996 Act, there are elaborate provisions empowering the tribunal in certain cases to impose by way of interim relief a continuation of the contract of employment for limited purposes against an employer who was unwilling to reinstate/re-engage the employee pending the determination of the claim. That made it harder to accept that Parliament intended that employees should have an absolute right to re-engagement on a final basis and yet failed to make any explicit provision for it. Miss Gannon argued that the existence of the provisions for interim relief did not weigh against an absolute right to re-engagement on a final basis and was in reality neutral on that question, but I do not agree with that submission. There is nothing akin to those interim provisions for continuation pending final determination in the 2010 Act, which weakens the argument that Parliament intended that the Equality Act claimant before the Tribunal should not have the right to reinstatement.

108. On the other hand, there are two considerations which militate in the other direction and in favour of Miss Gannon's contention.

109. The first is the argument that the statutory scheme under s.116 and Schedule 17 of the 2010 Act in relation to disability discrimination in the case of pupils is intended to fall under the exclusive jurisdiction of the SENDIST. It is true that pecuniary awards of the First-tier Tribunal are enforceable in the County Court under s.27 of the 2007 Act (which of course are clearly excluded from the jurisdiction of the Tribunal under paragraph 5(3)(b) of Schedule 17 of the 2010 Act), but that is the subject of express statutory provision and there is no equivalent provision empowering the County Court or indeed the High Court to make an order for specific enforcement of a reinstatement order under Schedule 17 paragraph 5(2).

110. In addition, there is the question raised in ***Mackenzie*** at [22] and whether enforcement in the High Court would simply require cutting and pasting or whether it would require other substantive enforcement. Ms Darwin argued that, apart from perhaps setting a new date for compliance, there would not be any other potential difficulties as envisaged in ***Mackenzie*** at [22]. However, the order for reinstatement made by the Tribunal is not only an order for the

immediate withdrawal of the exclusion and the reinstatement of Bobby, but also provides for the provision of support and extra tuition for lost learning, which would potentially involve ongoing supervision and might also involve requiring the order to be revisited as a result of the passage of time or other changed circumstances.

111. If that be the case, that would arguably lead to the hybrid situation in which the High Court was having to make decision of a kind which would normally fall within the jurisdiction of the First-tier Tribunal. That, in the light of the remarks in ***Mackenzie***, would be a unique hybrid (since there is no such hybrid in the case of an Employment Tribunal) and would be unacceptable in principle.

112. I have not found it an easy question to decide, but I have come to the conclusion that ***Mackenzie*** is not determinative of the issue in this appeal for the following reasons:

(i) the case is binding authority on the construction of ss.114, 115 and 117 of the 1996 Act; the *ratio* of the case is to be found in paragraphs 29, 31 and 33 of the decision, as I think Miss Gannon was ultimately constrained to admit

(ii) ss.114 (or 115) and 117 when read together do not impose an absolute and indefeasible obligation on the employer to reinstate or re-engage the employee, or a correlative right on the employee to be reinstated or re-engaged, but rather create a situation in which the employer must *either* reinstate/re-engage the employee *or* become liable for the awards specified in s.117(3), which include an additional award on top of what it would have had to pay if no reinstatement or re-engagement order had been made

(iii) that is to be distinguished from the instant case in which there is no *either … or …* situation. The Tribunal has imposed and absolute and indefeasible obligation on the School to readmit the pupil; it is not the case, unlike the employment context, that the School has the choice of readmitting him or paying an additional penalty in lieu thereof

(iv) the reason why there was no statutory machinery for requiring an employer actually to reinstate or re-engage an employee was that the statute on its true construction did not give him a right actually to be reinstated or re-engaged. Accordingly, failure to reinstate or re-

engage did not represent a breach of any right and there was nothing for which an effective remedy was required. The *maxim ubi ius, ibi remedium* did not apply since there was in fact no *ius*. By contrast here, the Tribunal has ordered Bobby to be reinstated; failure to comply with that order would represent a breach of his rights and does require an effective remedy

(v) paragraphs 22, 23 and 24 are dicta which reinforce the Court's conclusion on the construction of the relevant provisions, but they are nevertheless dicta, albeit of the Court of Appeal and as such entitled to the greatest respect

(vi) although the statutory scheme under s.116 and Schedule 17 of the 2010 Act in relation to disability discrimination in the case of pupils is intended to fall under the primary jurisdiction of the SENDIST, the existence of the powers in the EHRC to take action under s.24 of the 2006 Act (as to which see below) means that it is not the exclusive jurisdiction, by contrast with the statutory scheme of employment protection which is intended to be entirely self-contained and fall under the exclusive jurisdiction of the Employment Tribunal

(vii) what the parents would be doing on Ms Darwin's argument would be to commit the School for contempt of court in not obeying the order of the Tribunal; that is not the same as the situation deprecated in ***Mackenzie*** at [22] in which the claimant would not be seeking committal for contempt, but a substantive order for reinstatement or re-engagement from the Court which trespassed on the otherwise exclusive jurisdiction of the tribunal. (That does not mean that there are no problems concerning supervision inherent in an order for reinstatement, as I will discuss when I turn to dealing with Ground 2 later in this decision.) Recasting the order sought from the court in ***Mackenzie*** from one involving re-engagement to one for committal for contempt would not have worked since the order of the Employment Tribunal did not involve an absolute and indefeasible order on which a committal could have been founded, but in the instant case by contrast there was an absolute and indefeasible order.

113. Accordingly, I do not consider that the decision in ***Mackenzie*** precludes the parents from arguing that there are alternative methods of enforcing the order for reinstatement, as Ms Darwin has contended.

The 2002 Code of Practice for Schools

114. I should add that I did not derive much assistance from Ms Darwin's reliance on the terms of the old 2002 Code of Practice for Schools which was issued by the Disability Rights Commission (the predecessor of the EHRC) which was cited by Judge Rowland in ***ML v. Tonbridge Grammar School*** [2012] ELR 508 where said at [18]:

> *"The Code of Practice for Schools*, issued by what was then the Disability Rights Commission in 2002, includes a section headed "Redress and Conciliation in England and Wales" which part of the document is less a code of practice than a now somewhat out-of-date explanation of what is available. It says of the powers of what is now the First-tier Tribunal –
>
> "**Remedies**
> If a claim of unlawful discrimination is successful, SENDIST can make a declaration that a child has been unlawfully discriminated against, and it can order any remedy it thinks reasonable against the responsible body, with the exception of financial compensation. Examples of the kind of orders that SENDIST might make are:
> - disability training for staff;
> - the preparation of guidance for staff on combating disability discrimination;
> - meetings between an LEA equal opportunities officer, parents, the pupil and the school to review what reasonable adjustments (short of adjustments to the physical premises or provision of auxiliary aids) might be required;
> - the review or alteration of school or LEA policies, for example, those that prevent visually impaired pupils going into the science laboratory, those that prevent disabled pupils going on certain school trips, and anti-bullying policies so that they deal with bullying on the grounds of disability;
> - additional tuition to compensate for missed lessons (such as science lessons in the example above);
> - the relocation of facilities (short of requiring an adjustment to the physical premises);
> - the admission of a disabled pupil to an independent school (where the school had previously refused) or their admission on the same terms as pupils who are not disabled;
> - additional tuition for a temporarily excluded pupil to enable the pupil to catch up on education missed due to discrimination;
> - a formal written apology to a child."

115. As Judge Rowland said, that part of the document was less a code of practice than a now somewhat out-of-date explanation of what was available. Moreover, although it was a statutory code of practice, it was not itself primary or secondary legislation and if the Tribunal did not otherwise have the power to order reinstatement it could not have been conferred by the Code of Practice itself.

C & C

116. Nor did I derive much assistance from the comment in the decision of Judge Rowley in ***C & C v. The Governing Body of a School & Ors*** [2018] ELR 554 at [83] where she said

> "Ms. Hannett's third argument was that a child excluded from school has other procedural safeguards, namely the right (in certain cases) to make representations to the governing body that the child should be reinstated and the right to seek the review of the exclusion by an Independent Review Panel under section 51A of the Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (SI.2012/1033). Ms. Hannett rightly conceded the limited utility of each of these rights in this context, the former being available only in limited circumstances and the latter applying only to permanent exclusions and (in contrast to the First-tier Tribunal) not having the power to order that the child be reinstated to the school. Neither option would, in fact, have been available in this case."

117. Judge Rowley was dealing with an altogether different case and an altogether different regulation. She was dealing with the provisions of regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 (S.I.2010/2028) and was dealing with the argument that the impact of regulation 4(1)(c) on children such as the subject of that case was tempered by three arguments, of which that in paragraph 83 was the third. The argument was that the excluded child had the right to seek the review of the exclusion by an Independent Review Panel, but that was a limited right since it applied only to permanent exclusions and the Panel did not have the power to order that the child be reinstated in the school. That option would not in fact have been available in that case in any event. It was said in the course of that paragraph that the Panel, unlike the Tribunal, did not have the power to order reinstatement of an excluded child in the case of a permanent exclusion, but that point does not appear to have been fully argued and I do not regard it as being an authoritative decision on the point.

118. Ms Darwin also relied on the SEND26A claim form entitled "Disability discrimination by parent after permanent exclusion" (page 2 of the original hearing bundle) which stated at the top of the first page

> "If your child has been permanently excluded and you are **not** asking for reinstatement use Form 4A instead".

The terms in which the form was couched could not, of course, alter the substance of the jurisdiction which had been conferred on the Tribunal, but the result of my decision is that the claim form was predicated on a correct view of the Tribunal's jurisdiction and does not need to be altered.

Alternative Methods of Enforcement

119. Ms Darwin argued that there were other methods of enforcement of a Tribunal decision for reinstatement. The School was indeed an independent school, but it was still subject to the law of the land, including the jurisdiction of the High Court and there were a variety of different mechanisms for an order of the Tribunal to be enforced against an independent school like the School in this case: (i) the inherent jurisdiction and the law of contempt (ii) s.24 of the Equality Act 2006 at the behest of the EHRC (iii) judicial review. I shall consider each of those alternatives in turn.

The Inherent Jurisdiction

120. Ms Darwin relied on the High Court's inherent jurisdiction to control its own procedure and she relied in particular upon

(i) the judgment of Lord Dyson in ***Al Rawi v. Security Service*** [2012] 1 AC 574 at [18]-[20]:

> "18 A distinction should be made at the outset between the court (i) exercising its inherent power to control its own procedure and (ii) exercising its general power to develop the substantive common law incrementally. We are not here concerned with (ii), a paradigm example of which would be the incremental development by the courts of the law of negligence. We are concerned with (i). In his seminal article "*The Inherent Jurisdiction of the Court"* [1970] Current Legal Problems 23, Sir Jack Jacob said: "the source of the inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define,

> and indeed appear to elude definition." But there is no doubt that the court's inherent power to regulate its own procedures is not unlimited. For example, the power may not be exercised in *contravention* of legislation or rules of court. In the words of Sir Jack Jacob [1970] Current Legal Problems 23, 24: "the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision." In such a case, its power has been removed by statute and cannot be exercised.
>
> …
>
> There are many examples of the court in the exercise of its inherent power introducing procedural innovations in the interests of justice. Thus it invented the power to grant *Mareva* injunctions … and make *Anton Piller orders*… These orders were devised to prevent misuse of the court's procedure and to ensure that its procedure is effective. The PII procedure was also a creature of the common law devised by the court in the exercise of its inherent power to regulate its own procedures. The remedy of discovery (now known as disclosure) was developed by the courts of equity in order to aid the administration of justice. Upon the amalgamation of the Court of Chancery and the common law courts into the High Court by the Judicature Acts, that remedy came to be governed by the Rules of Court …"

(ii) the power of the High Court to prevent interference with the due course of justice in inferior courts and to assist them so that they may administer justice fully and effectively, as the Divisional Court had held as long ago as 1903 in ***R v. Parke*** [1903] 2 KB 432 at p.442:

> "Many inferior tribunals are not Courts of record, and, therefore, have no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and before they can do anything to interfere with such offences against public justice all the mischief possible may have been effectually done. This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others."

(iii) the power of the High Court to render assistance to inferior courts to enable them to administer justice fully and effectively, see the article by Sir Jack Jacob *"The Inherent Jurisdiction of the Court"*, in [1970] Current Legal Problems 23 at p.48 (referred to by Lord Dyson in the decision cited above)

(iv) recent examples of the High Court exercising its inherent jurisdiction to assist inferior courts so that they may administer justice fully and effectively, including the making of civil restraint orders in relation to proceedings in the Employment Tribunal in ***The Law Society of England and Wales v. Otobo*** [2011] EWHC 2264 (Ch) and ***Nursing & Midwifery Council v. Harrold*** [2015] EWHC 2254 (QB), [2016] IRLR 30.

121. Miss Gannon argued that the inherent jurisdiction could not be used in a manner which cut across a statutory scheme and she cited the judgment of Lord Sumption (dissenting) in ***Re B (A Child) Reunite International Child Abduction Centre & Ors*** intervening [2016] UKSC 4, [2016] AC 606 at [85] to the effect that

> " … the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme … I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court."

122. Miss Gannon cited a number of authorities in support of her contention. I do not consider that it is necessary to consider them all in detail, not least since the basic principles do not appear to be in dispute and it is not contended that any of the decisions in question was wrongly decided. I shall nevertheless refer to three of the main authorities on which she relied in support of her basic contention.

123. In ***Billson v. Residential Apartments Ltd*** [1991] 3 WLR 264 Browne-Wilkinson VC said at p.282G-H:

> " … the inherent equitable jurisdiction as between landlord and tenant to relieve from forfeiture for wilful breach of covenant (other than a covenant for the payment of rent) has been extinguished by reason of Parliament having legislated comprehensively in that field."

That is undoubtedly correct, but the case here is not the same. Here, the parents are not attempting to employ some residual substantive equitable jurisdiction to supplement a gap in the statutory scheme; rather they are invoking the inherent jurisdiction of the High Court to assist inferior courts in exercise of their jurisdiction: in other words, ***Al Rawi*** 18(i), not (ii).

124. She also cited ***Department of Social Security v. Butler*** [1995] 1 WLR 1528. In that case, following the separation of the parents of a child, maintenance assessments requiring the making of periodical payments were issued against the child's father, giving rise to an obligation to pay pursuant to s.1(3) of the Child Support Act 1991. The father failed to meet his obligations in full and by May 1995 arrears of maintenance totalled some £4,000. The Secretary of State for Social Security applied *ex parte* for an injunction to prevent the father from reducing the moneys held by his solicitors as his share of the proceeds of sale of the former matrimonial home to a sum less than that amount, but the application was refused both at first instance and by the Court of Appeal. The Court of Appeal held that the Child Support Act provided a detailed and comprehensive legislative scheme for the assessment and enforcement by the Secretary of State, magistrates' courts and county courts of the financial responsibility of absent parents for their children, so that the High Court's civil jurisdiction was excluded by necessary implication. It is, however, instructive to read in some detail what the members of the Court said in reaching their conclusion.

125. Evans LJ analysed the statutory provisions in some detail and said at pp.1531H-1532B:

> "When a liability order has been made, the Secretary of State may levy the appropriate amount by distress and sale of the liable person's goods (section 35(1)) and he may enforce recovery by means of garnishee proceedings or a charging order, if a county court so orders (section 36(1)). The final sanction is committal to prison, which may be ordered by a magistrates' court (section 40).
>
> The following observations may be made on these statutory provisions. (1) The Act of 1991 together with regulations made under it provide a detailed and apparently comprehensive code for the collection of payments due under maintenance assessments and the enforcement of liability orders made on the application of the Secretary of State. (2) The only method provided for enforced collection before a liability order is made is a deduction from earnings order made by the Secretary of State himself under section 31. (3) Although section 1(3) provides for a duty which arises when the maintenance assessment is made, this duty is not expressed as a civil debt. Mr Crampin accepts that the duty could not be directly enforced by action in any civil court, or by any means other than as provided in the Act. (4) There is no provision for precautionary or *Mareva*-style relief."

126. He continued at p.1536C-H:

> "I do not find it possible to consider this issue except in relation to the specific statute under which the question may arise. It is not suggested that the statutory duty imposed by the Act of 1991 and the rights given by it to the Secretary of State are examples of any general category. Ultimately, the issue is one of interpretation of the statute concerned. If the plaintiff seeks to enforce a statutory right which the court can entertain and if personal jurisdiction is established over the defendant, which was the question in issue in *The Siskina [1979] AC 210*, then there is no objection in principle to the limited exercise of the power to make ancillary orders in support of substantive proceedings which may take place in some other tribunal, whether arbitration by agreement or overseas because of territorial imperatives, or both: the *Channel Tunnel Group case [1993] AC 334*. But if the statutory right is one which the High Court has no power to enforce even when both personal and territorial jurisdiction are established, then in my judgment, arbitration apart, the court cannot exercise an ancillary or partial jurisdiction in a case where it has no substantive powers.
>
> That is the position, in my judgment, in the present case. Mr Crampin concedes that the duty to pay under a maintenance assessment cannot be enforced by action in any civil court. Put another way, the statutory procedures are comprehensive. They do not give any "ancillary" or supportive jurisdiction to the High Court, nor do they give the Secretary of State any power to anticipate the liability orders which he can obtain from justices, except by means of a deduction from earnings order which he himself can make. Nor does the court have any general or supervisory jurisdiction, in my judgment, for the reasons given above. The statutory right to obtain a liability order from magistrates' courts is not a "cause of action" within the principle defined by Lord Browne-Wilkinson in the *Channel Tunnel Group case [1993] AC 334*.
>
> The Chancery Division authorities relied upon by Mr Crampin as I read them support this conclusion. Both in *Hayward v. East London Waterworks Co. 28 Ch D 138* and *Stevens v. Chown [1901] 1 Ch 894* before granting an injunction the court was satisfied that the right upon which the plaintiff relied was one which the High Court could enforce. Such a right may be created by statute, as it was in both of those cases; but it does not follow that every statutory right is of that sort."

127. Finally, he said at p.1537G:

> "The department has ample statutory powers to prevent the arrears from accumulating until the situation is reached where a substantial sum is due and no liability order has been made. I therefore would dismiss this application."

128. Morritt LJ said at p.1540C-D, G-H:

> "It is well established that a pre-emptive or quia timet *Mareva* injunction (that is to say in anticipation of the accrual of a cause of action) will not be granted: cf. *Veracruz Transportation Inc. v. VC Shipping Co. Inc. (The Veracruz I) [1992] 1 Lloyd's Rep 353*. Likewise it is well established that where a statute creates a new right which has no existence apart from the statute creating it, and at the same time prescribes a particular method for enforcing it in a particular court, it is, in general, to that remedy and that court alone that recourse must be had: cf. *Halsbury's Laws of England*, 4th ed., vol. 44 (1983), p. 593, para. 945. Whether or not that is so in particular cases depends on the construction of the Act in question.
>
> …
>
> The Child Support Act 1991 introduced a wholly new framework for the assessment and collection of the sums required for the maintenance of children by their parents. There is no provision for the enforcement of any maintenance assessment except by the Secretary of State and his methods of enforcement are limited in the way I have mentioned. It seems to me that it would be inconsistent with the Act as a whole in general and with section 33 in particular if the Secretary of State were to be at liberty to apply for *Mareva* injunctions in the High Court. If the conditions in section 33(1) are satisfied then Parliament has clearly laid down that the Secretary of State should proceed first in the magistrates' court and then in the county court. If those conditions are not satisfied then Parliament has clearly ordained that the Secretary of State should not be entitled to enforce the maintenance assessment by court process at all."

129. Thirdly, Simon Brown LJ said at p.1542C-F

> "Even assuming that the High Court's *Mareva* jurisdiction would not otherwise be lacking for want of a present cause of action, I have no doubt that detailed consideration of the Act of 1991 shows such jurisdiction to have been removed by necessary implication. The Act of 1991 provides the most detailed and complete code for assessing and enforcing the financial responsibility of absent parents for their children; it amounts to a comprehensive legislative scheme. Had Parliament thought it necessary or desirable to embellish it by providing for *Mareva* relief, it could and would have done so; that,

> moreover, would plainly have been achieved by conferring such additional jurisdiction upon the county court.
>
> Mr Crampin submits that there exists a lacuna in the legislation, capable of being filled by the High Court's exercise of its power under section 37 of the Supreme Court Act 1981. I respectfully disagree. I find no lacuna and, rather than superimpose an unideal High Court jurisdiction upon the perfectly coherent recovery machinery already provided, I suggest that the department in future makes more efficient use of that machinery, notably by seeking liability orders before arrears are allowed to reach the surprisingly high level arrived at here. Ample enforcement powers — including, if necessary, county court *Mareva* relief — will then immediately become available in the courts below. I too, therefore, would dismiss this application."

130. However, in that case (i) there was one method of enforced collection before an order was made (ii) there were several methods of enforcement after a liability order was made (iii) there could be no enforcement as a civil debt and therefore the liability was not enforceable by action in civil court (iv) no *Mareva*-type relief was provided for. In other words, there were ample enforcement powers *already* available under the Act and there was no lacuna in the legislation. There was perfectly coherent recovery machinery which ought to be resorted to more frequently and with more efficiency. In short, there were other ways of skinning the cat. By contrast here, the School's position is that there was no jurisdiction to make the order in the first place or, even if there were such jurisdiction, there was no means of enforcing the order for reinstatement. In ***Butler***, even if the court did have jurisdiction to grant a *Mareva* injunction before a liability order was obtained from the justices, there were compelling reasons of policy why no injunction should be ordered, except possibly in unusual and exceptional cases. It could not have been the intention of Parliament, nor was it desirable for the courts, that the statutory proceedings in magistrates' courts should be duplicated and shadowed by "ancillary" proceedings in the High Court. In this case, by contrast, there is no risk of duplication or shadowing by "ancillary" proceedings; if the inherent jurisdiction cannot be used, there is no effective remedy in a case where there has been unlawful disability discrimination since the Tribunal's order cannot be enforced.

131. Thirdly, she relied on ***Johnson v. Unisys*** [2001] UKHL 13, [2003] 1 AC 518 where Lord Hoffmann said at [56]-[58]

> "56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But

> Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.
>
> 57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:
>
> > "there is not one hint in the authorities that the...tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? .... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."
>
> 58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent."

132. She also relied on Lord Millett who said at [80]

> "But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right; and it is obviously unnecessary to imply a term into a contract to give one of the contracting parties a remedy which he already has without it. In other cases, where the common law would be giving a remedy in excess of the statutory limits or to excluded categories of employees, it would be inconsistent with the declared policy of Parliament. In all cases it would allow claims to be entertained by the ordinary courts when it was the policy of Parliament that they should be heard by specialist tribunals with members drawn from both sides of industry. And, even more importantly, the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost."

133. Again, it seems to me that the House of Lords was dealing with a very different point. Parliament had legislated for a system of limited compensation for unfair dismissal before the Employment Tribunal. Accordingly, it could not be right to seek to resurrect a claim for

damages for wrongful dismissal at common law which was not subject to the statutory cap. But that is not this case.

134. I am therefore satisfied that the authorities on which Miss Gannon relied, all of which were no doubt correctly decided, do not preclude the parents from seeking to rely on the inherent jurisdiction of the High Court. By contrast here, what the parents would be seeking to do would not be to undermine the will of Parliament nor would they be contravening any other statutory prohibition in relying on the inherent jurisdiction of the High Court. They are not doing that which Parliament has said should not be done.

135. On the contrary, it seems to me that Ms Darwin can gain assistance for her proposition from what was said by Proudman J in ***Otobo*** where she quoted Sir Jack Jacob's article mentioned above and continued:

> "43. I was immediately comforted by the words in the opening paragraph, as follows:
>
> > "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits."
>
> 44. I take a number of principles from the article (and the authorities therein cited) relevant to the present case. First, as a matter of principle the general jurisdiction of the High Court is unlimited, save insofar as it has been taken away by statute. The High Court is not subject to supervisory control by any other court except by due process of appeal, and it exercises "the full plenitude" of judicial power in all matters concerning the general administration of justice within its area.
>
> 45. Secondly, the inherent jurisdiction derives historically from coercion, that is to say punishment for contempt of court and of its process, and regulation, that is to say regulating the practice of the court and preventing abuse of its process. This is the origin of the power to restrain a litigant from proceeding frivolously, oppressively or vexatiously. The juridical basis for the exercise of the High Court's summary powers to determine such matters was derived, not from any statute or rule of law but from the very nature of the court as a superior court of law: see the discussion and reference to authorities at page 27.

> 46. Thirdly, under its inherent jurisdiction the High Court has power, not to review the decisions of inferior courts, but (1) to prevent interference with the due course of justice in those courts and (2) to assist them so that they may administer justice fully and effectively. The author of the article's researches in Holdsworth's *History of English Law* indicate that the origin of the control and superintendence of the High Court over inferior courts stems from the jurisdiction of the Court of King's Bench in matters of contempt of court. Moreover, the basis for the exercise of the jurisdiction is importantly that the inferior courts do not have the power to protect themselves: see *R v Davies* [1906] 1 KB 32 at 47.
>
> 47. Fourthly, the powers of the court under the inherent jurisdiction are complementary to its powers under the Rules and are not replaced by them. I quote from the article:
>
> > "[W]here the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins"."

136. Similarly, she can rely on what was said by Hamblen J (as he then was) in ***Harrold*** to the effect that

> "19. Of particular relevance to the issue raised in the present case is Sir Jack Jacob's analysis of the High Court's "Control over Powers of Inferior Courts and Tribunals" at p.48-9 where he states as follows:
>
> > "The control and superintendence of the High Court over inferior courts stems, at any rate in part, from the jurisdiction of the Court of King's Bench in matters of contempt of court. Under its inherent jurisdiction, the High Court has power by summary process to prevent any person from interfering with the due courts of justice in any inferior court and to punish any such misconduct as a contempt of court, i.e. of the High Court. The basis for the exercise of this jurisdiction is that the inferior courts have not the power to protect themselves.
> >
> > But the High Court also has power under its inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively, *e.g.* by the issue of a sub-poena to attend and give evidence, and to exercise general superintendence over the proceedings of inferior courts, *e.g.* to admit to bail..."."

Contempt of Court

137. Miss Gannon said that there was no clear authority on the scope of the contempt jurisdiction in the statutory jurisdiction of the SENDIST and no reported decision where there had been a breach of an unenforceable order which had been subsequently enforced by contempt proceedings. The former point may be so, but it is not a definitive answer to the question and the second presupposes that the "order" is indeed unenforceable, which I have held it not to be. She argued that there was no definitive list of tribunals which were protected by the High Court's powers in relation to contempt, but again that does not answer the question now at issue.

138. She submitted that some statutory courts and tribunals have expressly been granted powers to deal with conduct which would fall within the notion of contempt, in contrast to SENDIST where no such statutory provisions have been granted powers for SENDIST to deal with a failure to comply with an order, either on its own or by application to a superior court. She referred to, for example, s.311 of the Armed Forces Act 2006, ss.134(1) and s.290(5) of the Insolvency Act 1986, s.149 of the Legal Services Act 2007, s.67(6) of the Friendly Societies Act 1992, s.336 of the Charities Act 2011 and s.14(13) of the Building Societies Act 1997. (These are set out in a chart in Arlidge, Eady & Smith on *Contempt* (2017) (5th ed.) at pp.1148-1150.) Those provisions, however, are designed to allow bodies which are clearly not court or tribunals (such as the Parliamentary Commissioner, the Local Government Commissioner, the Charity Commissioners or Business, Enterprise and Regulatory Reform Department inspectors) to certify to the High Court conduct which would constitute contempt if it related to a court of law which had the power to commit for contempt of court. I do not see that the existence of such certification powers to bodies which are not courts answers the question posed in this case.

139. Miss Gannon submitted that, in considering whether committal proceedings would be available, the Upper Tribunal was required to answer two questions posed by Lord Scarman in ***Att-Gen v BBC*** [1981] AC 303 at p.354 G:

> "(1) whether a tribunal [in this case SENDIST] is truly a court; and, if it is,

> (2) does it "come within the contempt jurisdiction of the High Court, whereby in a proper case its proceedings may be protected by contempt proceedings before the High Court."

140. In that case the House of Lords, by a majority, found that the Valuation Court was a court, but that it was not one which was protected by the law of contempt. She accepted that it was fair to say that the speeches of their Lordships do not lay down a universal test of easy application (see Arlidge et al on *Contempt*). The following propositions could nevertheless be discerned from the decision in ***Att-Gen v BBC***:

(i) the initial question is whether or not the SENDIST is a Court (Lord Dilhorne at p.338 D-E, Lord Scarman at p.354G).

(ii) the Court can have regard to the attributes of a court or tribunal, but that there is "no sure guide, no unmistakable hall-mark by which a "court" or "inferior court" may unerringly be identified" (Lord Edmund-Davies at p.349ff, Lord Dilhorne at p.338G-H, Lord Fraser at p.353B)

(iii) in determining whether contempt proceedings are available, an important question for the court is whether the SENDIST is exercising the judicial power of the state or an administrative purpose (Lord Scarman at p.359, with whom Lord Dilhorne at p.339H and Lord Fraser at p.353H agreed). Lord Scarman referred to Griffith CJ's characterization of the concept of judicial power in ***Huddart, Parker & Co v Moorehead*** [1909] 8 CLR 330 at 357:

> "[T]he power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

141. However, she accepted that mental health review tribunals (***P v. Liverpool Daily Post & Echo Newspaper Plc*** [1991] 2 AC 370 at p.380F) and the Leasehold Valuation Tribunal (***Att-Gen v. Singer*** [2012] EWHC 326), both of which are now part of the unified First-tier Tribunal created by the 2007 Act, were judicial rather than administrative bodies and did

exercise the judicial power of the state and were accordingly courts for this purpose. The former is part of the Health Education and Social Care Chamber ("HESC"), of which the SENDIST is part (with effect from 3 November 2008 under the Transfer of Tribunal Functions Order 2008 (SI2008/2833); the latter is now subsumed into the Property Chamber (with effect from 1 July 2013 under the Transfer of Tribunal Functions Order 2013 (SI2013/1036)).

142. Curiously, in ***Floe Telecom Ltd (in administration) v. Ofcom*** [2016] EWCA Civ 768 at [54] Sedley LJ said *obiter* that the Competition Appeals Tribunal was unlikely to be subject to the law of contempt on the basis that it was not a court of record and possessed no power of enforcement nor did it appear to possess a court of record's ultimate sanction to exclude from the suit. The status of the CAT does not need to be resolved in this case (and the comments were in any event obiter), but I would note that the Tribunal does have the power to exclude from suit by striking out cases pursuant to its case management powers, even though it is not a court of record (unlike the Upper Tribunal which also has such powers, but which is expressly designated as a court of record in the 2007 Act.)

143. Miss Gannon also drew to my attention that in ***GMB v. BBC*** [1998] 1 WLR 1573 the Professional Conduct Committee of General Medical Council was held not to be an inferior court to which the protection of contempt of court proceedings applied, despite the fact that it was a statutorily underpinned body which exercised a recognisable judicial function, but as Stuart-Smith LJ said at p.1578C-D (with emphasis added):

> "Mr Henderson emphasised the importance which Lord Scarman attached to purpose, and he also emphasised the distinction drawn by all their Lordships between judicial and administrative functions. He submitted, correctly, that the PCC of the GMC has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. Mr Henderson was correct in submitting that the PCC is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. In *Attorney-General v. British Broadcasting Corporation*, the valuation court was part of the state's machinery of government, but an administrative part, and that explains the emphasis which the House of Lords placed on the distinction between judicial and administrative functions or purposes. In this case, by contrast, the PCC is a statutory committee of a professional body specially

> incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. *Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct*."

144. On the ***BBC*** test, I am satisfied that the SENDIST is a tribunal exercising the judicial power of the state and that for these purposes it should be treated as a court:

(i) s.19 of the Contempt of Court Act 1981 defines "court" for the purposes of the Act as including "any tribunal or body exercising the judicial power of the state" (a phrase reflecting what Lord Scarman had said in ***BBC***); that is precisely what the Tribunal is doing in carrying out its functions

(ii) as described in ***Huddart***, it is empowered to decide controversies between subjects relating to vitally important questions, if not relating to life itself, then to matters vitally relating to quality of life such as the education of children with special educational needs and disputes arising out of disability discrimination in that field

(iii) if it is accepted that mental health review tribunals and the Leasehold Valuation Tribunal, both of which are now part of the unified First-tier Tribunal created by the 2007 Act, were judicial rather than administrative bodies and did exercise the judicial power of the state and were accordingly courts for this purpose, the same must apply to their successor bodies and it would be curious if some parts of the First-tier Tribunal (or indeed some parts of one of the Chambers therein) were courts for the purpose of the law of contempt, but that other parts were not

(iv) an Employment Tribunal is a court for this purpose and its proceedings can be protected by the law of contempt, see ***Peach Grey v. Sommers*** [1995] ICR 549. It is true that the employment tribunals are a free-standing pillar and are not within the unified structure of the 2007 Act, but again it would be curious if one tribunal were protected, but another of broadly commensurate position within the judicial hierarchy were not.

145. I am fortified in that conclusion by the judgment of Paul Walker J in ***CB v. Suffolk County Council*** [2010] UKUT 413 (AAC) where he said at [31]-[33]:

> "31. … In establishing what was formerly SENDIST and now is the relevant part of the Health, Education and Social Care Chamber of the First-tier Tribunal, Parliament intended that decisions about the school provision for pupils with statements of special educational needs should not be left solely to schools, or to local authorities, but that there should be a tribunal to balance the various interests involved. The proper operation of that mechanism was deliberately thwarted (albeit without giving proper consideration to Parliament's intention) by the policy adopted by the school and implemented by Mr Allard.
>
> …
>
> 33. Of course, in one sense, a tribunal will, in the discharge of its statutory duties, endeavour to find common ground between the local authority and parent. Perhaps more than many others, tribunals hearing special educational needs cases are at pains to foster a collaborative approach wherever possible, avoiding excessive legalism, recognising that the interests of the pupil concerned are likely best to be served by such an approach to dispute resolution, when parents and local authority – despite, at times, sharp differences of view – are likely to have to continue in a working relationship for many years. It would, however, be a mistake to infer from their working style that such tribunals are anything other than tribunals applying the law and with the authority of the law."

146. Miss Gannon suggested that the answer as to whether a given tribunal was a court and was protected by the law of contempt might differ depending not only on the difference in identity of the tribunal, but also on the nature of the functions which it performed, but that would potentially give rise to different answers to the question in the case of different tribunals and even different answers depending on different days depending on precisely which functions on any given day the particular tribunal was carrying out. That provides no guide as to which tribunals are courts for the purpose of the law of contempt.

147. Miss Gannon went on to argue that it still had to be determined whether, even if the Tribunal were truly a court, it should nevertheless be protected by the law of contempt before the High Court. She cited Lord Dilhorne at p.339D-E and Lord Fraser at p.353H to the effect that, if the tribunal is a court, it is then for the Court to determine whether or not it is

protected by the law of contempt. She added that the majority confirmed that the Court should refrain, or at its lowest be extremely cautious, before extending the reach of contempt of court.

148. Thus Lord Salmon said at p.342E-F:

> "Indeed, in my opinion, public policy requires that most of the principles relating to contempt of court which have for ages necessarily applied to the long-established inferior courts such as county courts, magistrates courts, courts-martial, coroners' courts and consistory courts shall not apply to valuation courts and the host of other modern tribunals which may be regarded as inferior courts; otherwise the scope of contempt of court would be unnecessarily extended and accordingly freedom of speech and freedom of the press would be unnecessarily contracted."

(I pause to observe that it is curious that a consistory court, which may deal with matters such as the placement of a funerary helmet on the wall of a nave or chancel or the removal of late Victorian pews, should as a long-established matter of public policy be protected by the law of contempt, whereas the SENDIST dealing with a case of unlawful disability discrimination in schools should equally as matter of the same public policy not attract such protection because it is one of a host of other modern tribunals which may be regarded as "inferior courts". Moreover, I do not consider that holding that the First-tier Tribunals created by the 2007 Act are courts for the purposes of the contempt jurisdiction would unnecessarily contract freedom of speech or freedom of the press).

149. Lord Edmund-Davies said at p.351H:

> "Contempt proceedings should never be instituted or upheld by the courts unless it is clear beyond doubt that the demands of justice make them essential. For like reasons, I consider that it should not be left to the judges to widen the scope of such proceedings, and I have no doubt that to accede to the respondent's submissions in this appeal would in truth involve such a widening. I would not myself be a party to it. If it is to be done at all, I think the task must be left to Parliament."

150. Lord Scarman (with whom Lord Fraser appears to agree generally at pp.352B and 353H) said at p.362:

> "If Parliament wishes to extend the doctrine to a specific institution which it establishes, it must say so explicitly in its enactment; as it has done on occasion, e.g. Tribunals of Inquiry (Evidence) Act 1921. I would not think it desirable to extend the doctrine, which is unknown, and not apparently needed, in most civilised legal systems, beyond its historical scope, namely the proceedings of courts of judicature. If we are to make the extension, we have to ask ourselves, if the United Kingdom is to comply with its international obligations, whether the extension is necessary in our democratic society. Is there "a pressing social need" for the extension? For that, according to the European Court of Human Rights, 2 EHRR 245, 275, is what the phrase means. It has not been demonstrated to me that there is.
>
> It is high time, I would think, that we re-arranged our law so that the ancient but misleading term " contempt of court" disappeared from the law's vocabulary."

151. The decision of the House of Lords in ***BBC*** seems to me to be clearly distinguishable from the present case and one which is perfectly explicable on policy grounds. The House was dealing with the status of a valuation court, which was part of the process of rating, discharging functions formerly performed by rating assessment committees, which were administrative rather than judicial bodies, which had long been accepted not to be judicial bodies, and whose one power was to correct a valuation list (see Lord Edmund-Davies at p.340A-D and Lord Scarman at p.360B-F). It is in that context that those remarks, which long antedate the coming into force of the unified Tribunals structure under the 2007 Act, were made.

152. Yet if it objected that it should not be left to the judges to widen the scope of such proceedings, it seems to me that the scope of such proceedings has *already* been widened in that it is accepted that mental health review tribunals and the Leasehold Valuation Tribunal, both of which are now part of the unified First-tier Tribunal created by the 2007 Act, were judicial rather than administrative bodies and did exercise the judicial power of the state and were accordingly courts for this purpose. The same must apply to their successor bodies. As stated above, in that event it would be curious if some parts of the First-tier Tribunal (or indeed some parts of one of the Chambers therein) were courts for the purpose of the law of contempt, but that other parts were not. That Rubicon has already been crossed.

153. Miss Gannon submitted that it would not be a contempt on the part of the School not to comply with a declaration on the part of the Tribunal and in that context she cited the decision in ***St George's NHS Trust v. S*** [1999] Fam 26 at p.60C-D that

> "Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v. Southwark London Borough Council* [1983] QB 698. Apart from that rare exception it operates solely by creating an estoppel per rem judicatam between the parties and their privies: *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 64"

and the decision of Hayden J in ***Re M*** at [49]-[50] (see paragraph 54 above).

154. The short answer to that submission is twofold: (i) if the Tribunal does have jurisdiction to grant an order for reinstatement (as I have held that it does), that is a mandatory order in the first place and so potentially punishable as a contempt; (ii) if it has the jurisdiction only to grant a declaration (which I have held is not the case), it is nevertheless open to the claimant to go back to the Tribunal to get an order in mandatory terms such as to be able to found a subsequent committal application, as was envisaged in ***Webster v Southwark LBC*** [1983] QB 698 by Forbes J where he held at p.706F-G that:

> "I readily accept the proposition that where a court makes only a declaratory order it is not contempt for the party affected by the order to refuse to abide by it. If he does so refuse no doubt the other party can go back to the court and seek an injunction to enforce the order; but mere refusal of one party to an action to abide by a declaratory order is not, as I understand it, contempt of court."

155. Ms Darwin submitted that the refusal of a party to comply with a judgment or order is a contempt of court and the sanction of committal for contempt is among the remedies available as an aid to enforcement. It was well-established that the High Court may punish contempt committed in connection with proceedings in an inferior court and in that regard she relied on the decision in ***Peach Grey & Co v. Sommers***. Miss Gannon argued that the situation in ***Peach Grey*** was very different from that in the instant case. That was a case of

interference with witnesses with intent to pervert the course of justice and amounted to a criminal contempt with the administration of justice. By contrast, this was a case where, if she were right, the order of the Tribunal was in fact no more than a recommendation and not an order amenable to enforcement at all. However, although the facts of that case were very different from this one, it seems to me that the principle underlying the decision is that which is enshrined in the decision in ***R. v. Parke***, namely that the High Court can intervene to prevent interference with the due course of justice in inferior courts and to assist them so that they may administer justice fully and effectively.

156. As to the precise means by which the contempt jurisdiction might be invoked in order to give effect to the order for reinstatement, Ms Darwin submitted that that could be achieved through an application to the Tribunal to attach a penal notice to its original order, as was canvassed in ***Coates v. Octagon Overseas Ltd*** [2017] 4 WLR 91 at [37]. An application could then be made under CPR 81 or, in the alternative, an application could be made directly to the High Court.

157. In that case the claimant was the manager of a mixed residential and commercial development, appointed by the First-tier Tribunal (Property Chamber) pursuant to s.24(1) of the Landlord and Tenant Act 1987. Shortly after the tribunal's order had taken effect, the manager issued proceedings against the defendant owners of the development, seeking an injunction to enforce the order. The county court granted an injunction under s.37 of the Senior Courts Act 1981 and s.38 of the County Courts Act 1984 and attached a penal notice to it.

158. The owners appealed successfully against the grant of the injunction. HH Judge Walden-Smith (siting as a Deputy Judge of the Chancery Division) held that, save in particular circumstances, injunctions were not freestanding, but were incidental to an underlying cause of action. In the absence of a cause of action the County Court had not had jurisdiction pursuant to either s.37 or s.38 to grant an injunction to enforce the management order. The claimant ought instead to have sought enforcement by applying back to the First-tier Tribunal (Property Chamber) for further directions and orders, including, if appropriate, for a penal notice to be attached to the management order and/or by applying to the County

Court for permission for the management order to be enforceable as if it were an order of the County Court. Accordingly, the injunction was discharged.

159. In the course of her judgment the Judge said that

> "25. The enforcement of orders of the FTT (Property) is governed by s.176C of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") which provides as follows:
>
> > "Any decision of the First-tier Tribunal or Upper Tribunal under or in connection with an enactment specified in section 176A(2), other than a decision ordering the payment of a sum (as to which see section 27 (enforcement) of the Tribunals, Courts and Enforcement Act 2007), is to be enforceable with the permission of a county court in the same way as orders of such a court".
>
> …
>
> 30. In this case, what the respondent was seeking, and what it has obtained, is more than simple enforcement of the FTT (Property) management order. What the court has done is to grant an injunction backed with a penal notice thereby providing the respondent with new rights not provided by the management order. In fact, the management order expressly provided that the respondent had liberty to apply to the FTT (Property) for further directions in accordance with s.24(4) of the Landlord and Tenant Act 1987 : "Such directions may include, but are not limited to: (a) Any failure by any party to comply with an obligation imposed by this Order …" And that is what the respondent ought to have done if the management order was not in itself sufficient.
>
> 31. The role of the county court is to assist in the enforcement of orders made in the FTT (Property). It does not create new rights or orders. It is for the FTT (Property) to decide how the management order is to operate and how its agent (the tribunal-appointed manager) is to fulfil his obligations pursuant to the terms of the management order. It is for the FTT (Property) to make orders and, where appropriate, amend or vary those orders.
>
> 32. The respondent ought to have applied to the FTT (Property) to vary the order made appointing him as the manager in order to provide clarification as to the extent of his obligations and clarification as to the precise extent of the property over which he was appointed as the manager. The county court does not have power to vary the order made by the FTT (Property) and, in my judgment, the injunction sought and obtained in this matter, with the penal notice

attached, had the effect of extending the management order made by the FTT (Property).

33. The issue then arises as to whether the FTT (Property) has power to attach a penal notice to the management order. The contention of the appellants is that if the respondent wished to have a penal notice attached, with the threat of committal proceedings hanging over the appellants, then the respondent ought to have applied to the FTT (Property) in accordance with the liberty to apply provision, to have a penal notice attached ... The respondent relies upon an unreported case I dealt with summarily in the county court on 13 December 2013, *Taylor v SHG-SH20 Ltd* (unreported) 13 December 2013.

34 In *Taylor v SHG-SH20 Ltd* I accept I made a clear error in referring to CPR Pt 70 as only applying to the enforcement of money judgments, however I do not accept that it was an error to hold that the FTT (Property) has the power to attach a penal notice if it is satisfied that such is necessary to ensure compliance with the management order. S.24(4) of the Landlord and Tenant Act 1987 provides extremely wide power to the FTT (Property) to make provision for "such incidental or ancillary matters as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters …"

35 The FTT (Property), just like the county court, is a creature of statute. It is therefore necessary to consider what powers are given by statute. S.24(4) of the Landlord and Tenant Act 1987 could not be more widely worded and, while it was forcefully argued on behalf of the respondent that as the power to commit vests in the county court, the power to attach a penal notice must also vest with the county court, I do not accept those submissions. In my judgment, that is the wrong emphasis. The structure provides for the FTT (Property) to make the management order and for the FTT (Property) to determine what orders are necessary in order for that management order to be effective. If the FTT (Property) determines that it is necessary for there to be a penal order attached to the management order as a result of a failure to comply the terms of the order then s.24(4) of the 1987 Act gives the FTT (Property) the power to do so.

36 In my judgment, therefore, Judge Madge erred in granting the injunctions with a penal notice attached on 4 October 2016 and 7 October 2016.

37 There were two ways in which the respondent could have sought to take steps to ensure that the management order was complied with: the respondent could have applied to the FTT (Property) for further directions and orders including, if appropriate, for a penal notice to be attached to the management order; and the respondent could have made an application to the county court pursuant to the provisions of

> CPR Pt 70 and section 176C of the 2002 Act for permission for the management order to be enforceable "in the same way as orders of such a court". I do not consider that such applications would have to be made in the alternative, albeit that the respondent might decide one course was preferable to the other."

160. So far as ***Coates*** was concerned, Ms Gannon argued that what was significant in that case was that there was an express statutory provision in the form of s.176C which the Judge had cited at [25].

161. Thus, in the absence of such a provision in the case of the First-tier Tribunal in this case, the route for the parents to take steps to ensure that the Tribunal's order was complied with, by making an enforcement application to the County Court pursuant to the provisions of CPR 70 and s.176C of the 2002 Act for permission for the order to be enforceable "in the same way as orders of such a court", would not be available.

162. That would still leave Ms Darwin's other potential method of enforcement, namely that the parents could apply to the Tribunal for further directions and orders including, if appropriate, for a penal notice to be attached to the reinstatement order under CPR 81, but if so there would need to be the equivalent provision to s.24(4) of the Landlord and Tenant Act 1987 (see ***Coates*** at [33]-[35]) which provides that

> "An order under this section may make provision with respect to—
>
> (a) such matters relating to the exercise by the manager of his functions under the order, and
>
> (b) such incidental or ancillary matters,
>
> as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters".

163. It should be noted in ***Coates*** that the management order expressly provided that the respondent had liberty to apply to the First-tier Tribunal (Property Chamber) for further directions in accordance with s.24(4) of the Landlord and Tenant Act 1987 : "Such directions may include, but are not limited to: (a) Any failure by any party to comply with an obligation imposed by this Order …". There was no such liberty to apply in the present case. In any

event, I do not consider that there was a like power equivalent to that conferred by s.24(4) in this case.

164. Ms Darwin sought to argue that there was such an equivalent provision to s.24(4) of the 1987 Act in the form of rule 5 of the Tribunal Procedure (First-tier Tribunal Rules) (Social Entitlement Chamber) Rules 2008 which provides that

> **"Case management powers**
>
> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may —
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction;
>
> (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
>
> (c) permit or require a party to amend a document;
>
> (d) permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party;
>
> (e) deal with an issue in the proceedings as a preliminary issue;
>
> (f) hold a hearing to consider any matter, including a case management issue;
>
> (g) decide the form of any hearing;
>
> (h) adjourn or postpone a hearing;
>
> (i) require a party to produce a bundle for a hearing;
>
> (j) stay (or, in Scotland, sist) proceedings;
>
> (k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and -

> (i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> (ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case; or
>
> (l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision".

165. That submission must be based on rule 5(1) and 5(2), since there is nothing in rule 5(3) which deals with the point now in issue. I do not, however, agree with that submission. S.24(1) and (2) of the Landlord and Tenant Act 1987 make substantive provision for the appointment of a manager in the following terms:

> "(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—
>
> (a) such functions in connection with the management of the premises,
>
> or
>
> (b) such functions of a receiver,
>
> or both, as the tribunal thinks fit.
>
> (2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—
>
> (a) where the tribunal is satisfied—
>
> (i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
>
> ...

> (iii) that it is just and convenient to make the order in all the circumstances of the case
>
> (ab) where the tribunal is satisfied—
>
> (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case;
>
> (aba) where the tribunal is satisfied—
>
> (i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case;
>
> (ac) where the tribunal is satisfied—
>
> (i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under s.87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case; or
>
> (b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made".

166. It is in that context that s.24(4) makes further provision in terms that

> "An order under this section may make provision with respect to—
>
> (a) …
>
> (b) such incidental or ancillary matters,
>
> as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters".

That is entirely different from rule 5 which is not dealing with, or purporting to deal with, the making of substantive orders and matters incidental or ancillary thereto, save for the power in rule 5(2), but is expressly confined to case management powers.

167. If that is correct, the first two ways in which the parents might have sought to take steps to ensure that the reinstatement order was complied with are not available. They could not have applied to the Tribunal for further directions and orders including, if appropriate, for a penal notice to be attached to the reinstatement order because there is nothing in this case which is equivalent to s.24(4) of the 1987 Act. Nor could they have made an application to the county court for permission for the reinstatement order to be enforceable "in the same way as orders of such a court" because there is no equivalent to the provisions of CPR Pt 70 and s.176C of the 2002 Act.

168. That does not, however, mean that the parents cannot enforce the reinstatement order by means of committal for contempt at all, but they must do it by a slightly different route. They cannot apply back to the Tribunal to attach a penal notice to the order, but there is nothing to prevent the High Court itself from attaching such a notice if they apply to the High Court for committal for contempt for non-compliance with the order for reinstatement. Thus, by her third route rather than her first two, I consider that Ms Darwin makes good her contention about the means by which the contempt jurisdiction can be invoked.

Equality Act 2006

169. Ms Darwin's second suggested method of enforcement of the Tribunal order was under the Equality Act 2006 ("the 2006 Act") which conferred jurisdiction on the EHRC to apply for an injunction restraining unlawful practices. In this case the School was refusing to reinstate Bobby, even though his exclusion was an unlawful act of discrimination contrary to the 2010 Act; that (the discriminatory refusal to reinstate) was an unlawful act which was continuing.

170. If this method of enforcement is sound, there is no potential problem with having to rely on the inherent jurisdiction, as was said to be the case with reliance on the contempt jurisdiction, since this jurisdiction is one explicitly conferred by statute. Moreover, if it is sound, it would suggest that there is a Parliamentarily-sanctioned enforcement method which demonstrates that, in the field of disability discrimination in schools at least, the jurisdiction

of the Tribunal is not exclusive (though it may be primary), thus undercutting one of the considerations which led to the decision in ***Mackenzie***.

171. Miss Gannon submitted that, whilst the power to seek an injunction was in theory available to the EHRC, it was in practice rarely exercised. Ms Darwin confirmed that it may be rarely exercised, although in her professional experience sometimes threatened, frequently with efficacious results.

172. The only reported occasion on which it appears to have been invoked appears to be ***EHRC v Griffin*** [2010] EqLR 42, where the County Court granted an injunction in relation to a breach of s.25 of the Race Relations Act 1976. The question now at issue did not arise for consideration in that case, which dealt with other matters. The subsequent attempt to enforce the injunction by way of committal proceedings was unsuccessful in the Divisional Court in ***Commission for Equality and Human Rights v Griffin*** [2010] EWHC 3343 (Admin), because the injunctive original order was unclear. That latter decision therefore takes the matter no further.

173. Ss. 20 to 24 of the 2006 Act empower the EHRC to conduct investigations into whether or not a person has committed an "unlawful act", complied with an "unlawful act notice" under s.21 and complied with an undertaking given under s.23. Under s.24 if the Commission thinks that a person is "likely" to commit an "unlawful act" it may apply for an injunction restraining the person from committing the act:

> "**Applications to Court**
>
> (1) If the Commission thinks that a person is likely to commit an unlawful act, it may apply –
>
> (a) in England and Wales, to the county court for an injunction restraining the person from committing the act …"

174. An "unlawful act" is defined in s.24A of the Equality Act 2006. This definition does not in terms state that an unlawful act is a failure to comply with an order of the First-tier Tribunal. Rather it is defined as follows:

> **"Enforcement powers: supplemental**

> (1) This section has effect in relation to—
>
> (a) an act which is unlawful because, by virtue of any of sections 13 to 18 of the Equality Act 2010, it amounts to a contravention of any of Parts 3, 4, 5, 6 or 7 of that Act
>
> …
>
> (e) the application of a provision, criterion or practice which, by virtue of section 19 of that Act, amounts to a contravention of that Act.
>
> (2) For the purposes of sections 20 to 24 of this Act, it is immaterial whether the Commission knows or suspects that a person has been or may be affected by the unlawful act or application.
>
> (3) For those purposes, an unlawful act includes making arrangements to act in a particular way which would, if applied to an individual, amount to a contravention mentioned in subsection (1)(a).
>
> (4) Nothing in this Act affects the entitlement of a person to bring proceedings under the Equality Act 2010 in respect of a contravention mentioned in subsection (1)".

175. In this case, therefore, the unlawful act was a contravention of the terms of s.15 in that, as found by the decision of the Tribunal, the exclusion from the School amounted to an unlawful act of disability discrimination contrary to s.15 of the 2010 Act. That would trigger the EHRC's powers under s.24. They form an exception to the requirements of s.113(1) of the 2010 Act, that proceedings relating to a contravention of the 2010 Act must be brought in accordance with that Part of the 2010 Act, since s.113(2) provides that

> "Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006"

(which includes ss.20 to 24).

176. In that event it seems to me that the EHRC could potentially have intervened and brought proceedings based on the original expulsion even before the Tribunal hearing had taken place (or before the assistance of the Tribunal had been sought by the issue of proceedings) because that expulsion would itself have been an unlawful act under s.15. It did not in fact do so, but the grounds to do so appear nevertheless to have existed. In addition, the

EHRC could apply for injunctive relief once the Tribunal order had been made and not complied with, since that too would have been an unlawful act, a breach of s.15 which was not going to be remedied and which was ongoing unless nipped in the bud.

177. It would therefore appear that, in the context of breaches of ss.13 to 18 of the 2010 Act, there is a counterpart to the provisions of s.15 of the 1996 Act, s.176C of the 2002 Act and s.27 of the 2007 Act by which enforcement proceedings can be brought in the County Court. They are different from those other provisions in that they would be brought by the EHRC rather than a party to the original suit. They are wider than s.15 and s.27 in that they are not confined to enforcement of "any sum payable" by virtue of the decision of the Tribunal and in that sense they more clearly approximate to the wider terms of s.176C of the 2002 Act.

178. I am therefore satisfied that Ms Darwin has made out her second alternative ground of enforcement.

Judicial Review

179. The third string to Ms Darwin's bow was to argue that the School was amenable to judicial review and that the authorities relied on by it to the contrary needed to be revisited in the light of the different statutory regime which now applies. All schools, including independent schools, are under a statutory duty under the 2010 Act not to discriminate against pupils. That obligation arises regardless of the terms of the contract under which the pupil attends. Accordingly, independent schools may be amenable to judicial review when there are specific statutory duties and provisions which apply to them, see ***R v. Cobham Hall School, ex parte S*** [1998] ELR 389 at pp.397-398. The School's argument that its obligations to Bobby and other pupils were limited to private law obligations under the relevant contract was wrong in the light of the 2010 Act.

180. Further or alternatively, in agreeing to be named in Bobby's EHCP by providing him with education pursuant to that plan and funded by the local authority, the School was exercising public functions and was therefore amenable to judicial review, see ***Cobham*** at pp.397-398.

181. Miss Gannon argued that, where a school was independent of the state sector, any remedy granted to a parent had to be under the terms of the contract between that parent and the school rather than in public law. As such, whilst a decision of the Tribunal requiring a maintained school to readmit a pupil could be enforced by way of judicial review seeking a mandatory order, no such option was available as against a private school. Such a public law remedy would be contrary to a number of well-established and longstanding authorities which hold that a decision by an independent school to exclude a pupil does not have a sufficient public law character to make it amenable to judicial review, for example ***R v. Fernhill Manor School, ex parte A*** [1993] 1 FLR 620 (Brooke J) ***R v. Incorporated Froebel Institute, ex parte L*** [1999] ELR 488 (Tucker J) and ***R v. Muntham House School, ex parte R*** [2000] ELR 287 (Richards J).

182. Ms Darwin admitted that her argument on this point was not, in her words, straightforward and submitted that the authorities relied on by the School to support its position needed to be revisited in the light of the different statutory regime which now applies. On the permission application that seemed to me to be an additional reason for granting permission to appeal so that the validity of the argument in the light of the different statutory regime could be examined rather than militating against the grant of permission to appeal, in which case the argument would remain untested. I shall therefore consider the relevant authorities in more detail and in chronological order.

183. In ***Fernhill*** a girl was expelled from the independent school which she attended for alleged bullying and intimidatory behaviour. Her parents were told of the expulsion in a letter from the headmaster. Neither they nor the girl were informed of the allegations against her before the decision to expel her was taken and they were not given any opportunity to respond to the allegations. The headmaster's decision was endorsed by the governors of the school. Through her mother and next friend she brought an application for judicial review seeking an order that both decisions be quashed and a declaration that the decisions were improper and invalid by reason of a failure to apply the rules of natural justice. Brooke J dismissed the application. At p.632 he said

> "Mr Leggatt submits that a private school is not a public body. He relies on the foundation of the relationship between A and the school

> as being derived solely from a private agreement between the school and A's parents.
>
> Mr Leggatt conceded that the rules of natural justice had not been followed in the applicant's case, but he submitted that the remedy available at law would be a remedy available to her parents if they wished to pursue it in a writ action claiming a declaration and injunction and also, if they saw fit, damages but not an application for judicial review in this court.
>
> I am satisfied that Mr Leggatt's submissions are well-founded. It is true that private schools operate within a statutory framework of control, but the relationships between the private schools and those who attend them are founded on the contract which is made between the schools and those paying for the teaching and education of the pupils at the school. That contract is a completely private contract and it is not underpinned by statute.
>
> The position is quite different in the case of a maintained school …
>
> In my judgment, the law as it stands now makes a clear distinction between public law cases and private law cases. This case falls fairly and squarely into the private law sector in which this court, which exists to provide public law remedies, can provide no relief. Accordingly, I dismiss the application."

184. The next decision in the chronological sequence is the decision of Dyson J (as he then was) in ***Cobham Hall*** which was decided on 27 November 1997. The case concerned the withdrawal or "reallocation" of a pupil's assisted place at an independent school. The Judge held that the decision was amenable to judicial review, on the basis that the school was exercising a public law function in relation to the decision. He analysed in some detail the statutory basis of the assisted places scheme. The legislation (the Education Act 1996 and the Education (Assisted Places) Regulations 1995) made provision for independent schools to enter into participation agreements with the Secretary of State for the purpose of enabling pupils to benefit from education at such schools. Under such an agreement, the school remitted the fees otherwise chargeable to the pupil and the Secretary of State reimbursed the school for the fees so remitted. Provision was made for termination of the agreement by the Secretary of State. The relevant regulations dealt with eligibility for assisted places. It was conceded that in most contexts, in accordance with the ***Fernhill*** case, a private independent school such as Cobham Hall School would not be said to be exercising a public law function. But the submission made was that in the particular matter of selecting pupils for assisted

places and purporting to reallocate an assisted place the school was exercising a public law function. The judge accepted that submission at pp.397H-398D:

> "In my judgment, the decision of the respondent in this case is amenable to judicial review. It is not to the point that for most purposes, and in relation to the majority of its pupils, the school is a private law body exercising private law functions. The question is whether the school is a private law body exercising private law functions in relation to its assisted pupils and, in particular, whether it was doing so in relation to the decision with which I am concerned ...
>
> As Mr Clarke points out, the following key factors are present in the instant case: (i) Parliament has empowered the Secretary of State to fund free education in independent schools; (ii) Parliament has provided the means by which this is to be done, namely by the Secretary of State entering into participation agreements with independent schools; (iii) the Act and the regulations define the criteria for the admission of pupils to the scheme; (iv) the Act and the regulations together with the terms of the participation agreements give the Secretary of State the power to control important aspects of the running of schools generally and, in particular, in relation to the scheme …"

185. Dyson J did not find it necessary to decide whether there was a contract between the parents and the school, but said at pp.398G–399A:

> "In my view, even if there was a contract between G's parents and the respondent, the relationship between the school and G was closely analogous to that between a publicly maintained school and its pupils. In relation to the 15 assisted places, the school was performing functions very similar to those of a publicly maintained school. I accept that the analogy is not exact … But it seems to me that in relation to pupils who have been accepted the analogy is close. The State has an interest in the education of the assisted pupils at public expense. Parliament has reflected that interest by imposing significant controls over the way in which assisted pupils are educated by an independent school. Those controls take two forms: first, the controls imposed directly by the regulations by which the schools are bound; secondly, by giving the Secretary of State considerable powers of control. In this regard Sch 35, para 4 to the [Education] Act [1996] [power to terminate participation agreements] is particularly significant. All these factors lead me to conclude that the respondent exercises public functions in relation to its assisted pupils, and was exercising such a function when it made its decision ….
>
> I should add that I do not attach any significance to the fact that there is a contract between the school and the Secretary of State. The

> participation agreement is one of the mechanisms by which the Secretary of State, exercising what is undoubtedly a public function, controls the school."

186. The Judge went on to find that the school had acted ultra vires the regulations in purporting to withdraw an assisted place. There was no freestanding right to withdraw an assisted place. The Judge did not, however, decide on the appropriate remedy (a declaration or an order for reinstatement) until he had heard further submissions and the outcome of those submissions is not recorded in the report.

187. In ***Froebel*** Tucker J considered the case of a pupil at an independent school who was alleged to be guilty of misconduct, including theft during a school trip abroad. She was initially suspended, but then expelled. An appeal to the governors was refused and her parents sought judicial review of that decision and applied for an interim injunction to require the school to readmit their daughter. The vacation judge initially granted the injunction sought, but when the application for leave to appeal for judicial review came before him he took the view that the governors' decision was not amenable to judicial review since it was not in the domain of public law and considered that the matter was governed by contract rather than statute. Consequently the injunction fell away and the parents' counsel advised that a writ be issued under which they sought a mandatory injunction for the specific performance of the contract between the school and the parents. Tucker J dismissed the application for specific performance for reasons which will be set out more fully below in relation to Ground 2. However, the Judge referred to the concession now made by counsel that he no longer submitted that the independent school was a public body and he opined that that concession was rightly made in the light of the decision in ***Fernhill*** which he cited and adopted as his own.

188. In ***Muntham***, C was a pupil who was expelled from a non-maintained residential school after two months and he sought a judicial review of that decision. Richards J refused the application, but also had to consider the judgment of Dyson J in ***Cobham Hall***. He said at pp.293H-295D:

> "Counsel for C submits that the present case is similar in material respects to the *Haberdashers' Aske's* and *Cobham Hall School* cases. Although a private school, Muntham House School is a special school

and is subject to the complex statutory approvals regime applicable to such schools. The relevant arrangements are made between the school and the local education authority; there is no contractual relationship between the school and the child's parents. All or most of the intake of the school, as indeed of special schools generally, consists of children placed in this way. The functions performed have a sufficient public law element to bring the school within the scope of judicial review.

The starting-point for my assessment of those submissions is the nature and status of Muntham House School itself. Although outside the definition of an "independent" school in s.463 of the Education Act 1996, it is non-maintained and can sensibly be described as a "private" school. It is not a creature of statute. Unlike the CTCs in the *Haberdashers' Aske's* case, it does not owe its existence to an agreement made in the exercise of a statutory power. Further, it is a fee-paying school. True it is that all or most of its fees are paid in practice by a local education authority and that it thereby derives its income indirectly from public funds; but it is not publicly funded in the sense of receiving grants or other direct funding from the public sector.
The school is subject to a strict regime of statutory control under s.342 of the Education Act 1996 and the Education (Special Schools) Regulations 1994. Conditions for approval extend to a wide range of matters including the governing body, welfare of pupils, premises and the keeping of incident and punishment books. In my view, however, that general regime of statutory control is no different in principle from the registration regime that is applicable to independent schools and was held in the *Fernhill Manor School* case not to provide a sufficient degree of statutory underpinning to render decisions of the school amenable to judicial review.

The analogy between the present case and the *Cobham Hall School* case is not as close as was submitted by counsel for C. In relation to assisted places, Parliament had made express provision for the funding of free education in independent schools by the means of participation agreements between the Secretary of State and the schools. Not only was the Secretary of State given extensive powers of control, but the legislative provisions defined the criteria for admission of pupils to the scheme and limited the power of withdrawal of such places. That last point, which was the basis of the decision that the school had acted ultra vires in purporting to withdraw a place, reveals the true extent of the statutory underpinning or penetration. There is nothing equivalent in the present case. There are no regulations governing the admission or exclusion of pupils. The source of the power to admit or exclude is the school's trust deed. When a local education authority places a child in a non-maintained special school pursuant to a statement of special educational needs or an order of the tribunal, it enters into a purely contractual relationship with the school. The placing of the child at the school does not

> impose any statutory duty or confer any statutory power on the school. Moreover the contractual arrangements themselves, although entered into by the local education authority pursuant to specific powers to arrange for the provision of education for pupils at non-maintained schools and to pay the fees of such schools, are different in character from the participation agreements entered into between schools and the Secretary of State under the assisted places scheme.
>
> Those various considerations lead me to conclude that the decision under challenge does not have a sufficient public law character to make it amenable to judicial review. In deciding to exclude C, the school was not performing a public law function.
>
> The fact that judicial review would be available in relation to a corresponding decision of a maintained school does not justify the stretching of the bounds of judicial review beyond their proper limits. Nor does the fact that in the absence of judicial review neither C nor his parents would have any effective legal remedy even if the school's decision had been reached unfairly (assuming for this purpose that no separate contractual relationship could be established between the school and C's parents). Greenwich would probably have a contractual remedy, but that is unlikely to be of great comfort to C or his parents."

189. As Miss Gannon pointed out, that was a case where the local authority was paying for the special educational needs provision, but that was insufficient to render the school's decision to exclude the child in question a public law function so as to render it amenable to judicial review.

190. The next case in the sequence is ***M v. W*** [2006] EWHC 575 (QB) in which Pitchers J said at [5]:

> "It is clear from the authorities to which I have been referred, in particular *R v. Fernhill Manor School, ex parte A ... and R v. Incorporated Froebel Institute, ex parte L ...* that since here the school is independent of the State sector, any remedy by a parent must be under the terms of the contract between that parent and the school rather than in public law. The terms of the contract will of course vary from case to case both as to express terms and implied terms."

191. Finally, in ***SC v. The Learning Trust*** (cited above) Judge Rowland said at [23]:

> "The position of Mossbourne – and, I suspect, any other academy – is therefore totally different from that of a private independent school, which does not have any obligation to admit a child otherwise than on its own terms."

192. In my judgment, the decisions in ***Fernhill***, ***Froebel***, ***Muntham***, ***M v W*** and ***SC*** clearly establish that a decision by a private independent school to exclude or expel a pupil is one which sounds only in contract and is not a decision which has a public law element such as to be subject to challenge by judicial review. They are determinative of that point in this case.

193. The decision in ***Cobham Hall***, on which Ms Darwin placed reliance, is clearly distinguishable from the facts of the instant case. There is nothing in this case which approximates to the provisions of s.479(5), paragraph 4 of Schedule 35, Part V of the Education Act 1996, or regulations 19(c), 21 and 22-23 or the Education (Assisted Places) Regulations 1995. In this case there is no power to control important aspects of the running of the school and in particular in relation to the provision of education under the EHCP. By contrast, in ***Cobham Hall*** there were two forms of control: first, the controls imposed directly by the regulations by which the schools were bound; secondly, by giving the Secretary of State considerable powers of control. In that regard the power to terminate participation agreements under paragraph 4 of Schedule 35 was of particular significance.

194. I accept that the School exists in a statutory framework and that it is subject to obligations imposed upon it by statute, but that does not make it a creature of statute not does it mean that it was set up in the exercise of a statutory power. The existence of the statutory framework and the content of the obligations imposed up on it may inform the content of the express terms and the implied terms of the contractual arrangements which may exist between it and the parents of the pupils who attend that school, but they do not in my judgment thereby render it a public body amenable to judicial review. The passing of the 2010 Act does not in that regard alter the position as set in the earlier authorities to which I have referred above.

195. Here there was an agreement for funding between the local authority and the School once it was named in the EHCP, but the School was not a creature of statute nor was it set up by an agreement in the exercise of a statutory power. Even if the fees for providing Bobby were paid from public funds, the School was not funded in the sense of securing grants or

other direct funding from the public sector. It is not materially different in that sense from the situation in ***Fernhill*** and the other cases which follow it. There is no sufficient degree of statutory underpinning to render the decision of the School amenable to judicial review. I do not therefore accept Ms Darwin's narrower submission based on the existence of the EHCP.

SC v. The Learning Trust

196. Ms Darwin also drew my attention to the preceding paragraph of the decision of Judge Rowland in ***SC v. The Learning Trust*** where he said

> "22 It will be seen that I accept the Appellant's submission, made in relation to the second ground of appeal, that Mossbourne is under a public law duty to reconsider its position in the light of a decision of the First-tier Tribunal. It is, I think, implicit in Mossbourne's letter to the Secretary of State that it does in fact do so. It would be irresponsible and irrational not to look at a decision by an expert and experienced tribunal on the very issue on which Mossbourne has to express a view. It is unnecessary on this appeal for me to consider in what circumstances, if any, Mossbourne could properly not accept the First-tier Tribunal's view. It is sufficient to note that the Secretary of State, who would be required to settle any dispute, gives the highest possible respect to decisions of the First-tier Tribunal"

and she suggested that the School was under a public law duty to reconsider its position in the light of a decision of the Tribunal since it would be irresponsible and irrational not to look at a decision by an expert and experienced tribunal on the very issue on which the School has to express a view. However, Judge Rowland did not have to consider in what circumstances, if any, the school in that case could properly not accept the Tribunal's view. Moreover, as he made clear in the next paragraph, the position of Mossbourne – and, he suspected, any other academy – was therefore totally different from that of a private independent school, which does not have any obligation to admit a child otherwise than on its own terms. I do not therefore consider that the citation from ***SC*** advances the parents' case.

197. I therefore reject Ms Darwin's submission that the decision of an independent School such as Ashdown House in the present case is amenable to judicial review either at all or, in her narrower submission, by virtue of having been named in the EHCP.

198. For these reasons I consider that the Tribunal does on the true construction of paragraph 5(2) of Schedule 17 of the 2010 Act have the power to order reinstatement of a

pupil who has been expelled from an independent school. Although the Tribunal itself does not have the power to enforce its own decisions in that regard, one of the parties to the action can rely on the inherent power of the High Court to commit for contempt of court in the event of non-compliance with the order or the EHRC may itself take proceeding under s.24 of the 2006 Act to achieve the same end. The School, however, is not amenable to judicial review because it is not a public body and in expelling the pupil it was not exercising public law functions.

199. I therefore dismiss Ground 1 of the appeal.

Ground 2

200. Secondly, Miss Gannon submitted that the Tribunal had failed to have any or any sufficient regard to the fact that the School was an independent school and that any remedy must be under the terms of the contractual arrangements between it and the parents. Moreover, she argued that there was a longstanding reluctance on the part of the courts to order specific performance of a contract involving personal service. She relied particularly on the decisions of the courts in ***Fernhill***, ***Froebel***, ***Muntham***, ***Ross v. Stanbridge Earls School*** [2002] EWHC 2255 (QB) and ***M v. W*** [2006] EWHC 575 (QB).

201. In that context she cited the judgment of Tucker J in ***Froebel*** at p.493E-H, referring to the judgment of Megarry J in ***C H Giles & Co Lt v. Morris & Ors*** [1972] 1 WLR 307 at p.318:

> "I note in the course of that passage, just above letter G, that the judge referred to contracts involving a 'degree of the daily impact of person upon person'. I derive from that and other passages in other cases that, where that is an incident of the performance of the contract, the courts will understandably be reluctant to grant injunctions.
>
> The present case is a prime example, in my view, of the 'daily impact of person upon person'. I want to make clear that I have also read the following passages in Megarry J's judgment, but I do not think that it should be assumed that, as soon as any element of the personal service or continuous service has been concerned with a contract the court would, without more, refuse specific performance …
>
> I derive as I say, from the textbooks and from the cases the clear principle that in general, though not necessarily, the courts will be

> reluctant in cases such as this to force one body of persons into daily contact with another against the will of one of the parties. Quite apart from the difficulties of supervision, which are not emphasised in the present case, there are, in situations such as this, difficulties inherent in the breakdown of trust and the undesirability of requiring parties to coexist in a pastoral or educational relationship."

202. She also cited ***Ross v. Stanbridge***, where the Judge, having been asked to make a mandatory injunction against an independent school (and refused), commented

> "18 In weighing the risk to the school and its pupils, it is also, in my judgment, legitimate to consider the potential effect of undermining the authority of the headmaster in a situation in which he is peculiarly in a better position than the court to make a judgment as to the overall welfare of his staff and pupils."

203. She also referred to the following considerations which militated against an order for reinstatement:

(a) the Headmaster was very concerned for the safety of the other children, particularly A, whom Bobby said that he would target and who had been too terrified to attend school the next day

(b) the unchallenged evidence of the School was that Bobby had on two separate occasions within a week placed a child in an "RKO" headlock

(c) the clear and unchallenged evidence was that, following the first incident, Bobby had promised that he would not perform the RKO headlock again and was disciplined, but despite being disciplined and promising not to perform the RKO headlock again, he did so within a week of the first incident

(d) the clear and unchallenged evidence was that incidents happened even while Bobby was being supervised (page 211: "he hit another boy in the face for no reason right in front of me"; page 231: "At the beginning of the French lessons Bobby threw a book and it hit another child in the face") and that the School's view was that 1:1 supervision had been tried and was ineffective (page 372: "we have trialled 1:1 and that didn't work"). In such circumstances it was not possible to keep other pupils safe.

204. Miss Gannon pointed to what Underhill LJ had said in ***Mackenzie*** at [22] about the fact that enforcement would not merely be a case of cutting and pasting a tribunal order for reinstatement:

> "It cannot be assumed that in such a case the Court could or should merely cut-and-paste the tribunal's order. At the very least it would be necessary for it to provide for a new date for compliance (the original date having, *ex hypothesi*, passed); but other elements of the s.113 order might require to be re-visited as a result of the passage of time or other changed circumstances."

205. She also relied on the statement of Underhill LJ in ***Mackenzie*** at [25] about the longstanding reluctance of the law to countenance the making of orders requiring parties to continue in an employment relationship and that there were perfectly understandable reasons why Parliament should not have been prepared to empower tribunals to make specifically enforceable orders for reinstatement or re-engagement in the employment context.

206. Ms Darwin countered that this was not a case where there had been a breakdown of communication between the parties prior to the exclusion. She pointed out that in paragraph 22 of the statement of reasons the Tribunal had noted that the parties agreed that there had been good communication between them prior to the exclusion, such that it would have been expected that the School would have discussed any building concerns with the parents rather than calling a meeting from which permanent exclusion became the outcome.

207. She also pointed to paragraph 27 in which the Tribunal found that

> "The RB did not suggest that the relationship between parents and the school had broken down so that it would not be appropriate to reinstate Bobby if discrimination was found. JKL told the Tribunal that the school had done a fantastic job with Bobby, and Bobby wants to return to school, he feels rejected by his birth mother and now rejected by his school. The Tribunal also note that JKL and MNP's daughter is still at the school and both parents are very happy with the school. We found there was no reason why Bobby should not be immediately reinstated particularly as Bobby clearly wants to return."

208. She submitted that there were none of the difficulties envisaged in ***Mackenzie*** at [22]: a new date for compliance might need to be substituted, but that was all. The order for exclusion had to be withdrawn with immediate effect and Bobby reinstated.

209. In my decision granting permission to appeal I raised three additional questions:

(a) in the context of the previous reluctance of the courts to order specific performance of contracts involving personal service, is it any longer appropriate in the light of recent developments in the law relating to children (and more generally) to draw an analogy between a contract of employment and a contract for the provision of education for a child?

(b) if, however, the longstanding reluctance on the part of the courts to order specific performance of a contract involving personal service is engaged by the facts of this case, did the Tribunal have any or any sufficient regard to that principle, as exemplified in cases such as ***Froebel***?

(c) apart from perhaps setting a new date for compliance, would there be any other potential difficulties envisaged in ***Mackenzie*** at [22]? The order for reinstatement is not only an order for the immediate withdrawal of the exclusion and the reinstatement of Bobby, but also provides for the provision of support and extra tuition for lost learning which might potentially lead to arguments over the degree of supervision needed to police that requirement.

210. Miss Gannon made four submissions in response to those questions:

(a) whether it was still appropriate to draw a comparison between a contract of employment and the provision of education to a child.

She said that, outside of the state sector, it was appropriate to draw that comparison for the following reasons:

(i) the relationship is governed by a contract; the courts have consistently recognised the important distinction between public law statutory duties and contractual relationships freely entered into and should be cautious before blurring that line

(ii) the difficulties of supervision remain where the obligation is merely contractual. That the organisation is a School does not alter this difficulty

(iii) the parties, including the parents, freely entered into this agreement; it was and remains open to the parents to provide Bobby with education in the state sector

(iv) the concerns expressed in ***Froebel*** of the undesirability of requiring parties to co-exist in a pastoral or educational relationship continue to exist – the passage of time has not diminished these concerns.

(v) in any event the Upper Tribunal should follow the clear and consistent line of case law, which is based on well-established principles of contract law and the appropriateness of equitable remedies.

(b) whether the Tribunal had any sufficient regard to the longstanding reluctance to order specific performance.

211. The Tribunal superficially had regard to the fact that there was still a relationship between the School staff and the parents. However, that superficial analysis was not sufficient and importantly did not (i) take into account the undesirability of requiring parties (which includes the pupil and other pupils affected by his behaviour) to co-exist in a pastoral and educational relationship, and (ii) the difficulties of supervision of the order (see ***Froebel*** at p.493H). The Tribunal did not have any regard to either of these essential issues. Indeed it had no regard to the risks posed to other children at all and proceeded as if there would be no need for supervision by the Court of the order at all.

(c) what potential difficulties or decisions would the High Court need to make, other than setting a new date for compliance?

212. The new decisions were likely to be numerous and varied depending upon the individual situation of the school and the child, but were likely at least to involve (i) a fresh consideration of whether there had been a breakdown in the relationship (in the intervening period) (ii) whether the child now poses a risk to other children (iii) any change in the child's needs which make the provision unsuitable (iv) any changes in the staffing or setup at the school which now make it an unsuitable provision (v) any additional support that would need to be put in place (vi) the likely costs of that additional support and who would be responsible for bearing that costs (the School, the parents or the local authority). The ***Mackenzie*** judgment reaffirmed the position that it was undesirable to rely on the High Court's inherent jurisdiction to enforce the order of a Tribunal, as that would create a "unique hybrid" which is unacceptable in principle (see paragraph 22).

213. Ms Darwin accepted that there was a principle to the effect that a court will not order specific performance of a contract calling for personal service, but argued that the School's reliance on the principle was misplaced:

(1) the School had not explained how or why the existence of a principle developed by the courts regarding the exercise of discretion to order specific performance of a contract was relevant to the matter of statutory interpretation with which the Upper Tribunal was concerned in this appeal

(2) the appeal did not concern a contract between the School and the parents which the parents were seeking to enforce; indeed, there was no such contract in existence (as the School was named in Bobby's EHCP, his attendance was arranged and paid for by his local authority, so that any contract was between the School and the local authority)

(3) the Tribunal had not ordered specific performance of a contract and indeed there was no mention of any contract in its decision

(4) discrimination was a statutory tort. The School has not explained why case law on the nature of contractual remedies was relevant to the nature of remedies available under the 2010 Act which were tortious in nature.

214. In any event, even if the principle were of relevance to the appeal, she argued that the order made by the Tribunal was not inconsistent with the underlying rationale behind the principle. The principle developed for a number of reasons: (i) in the case of employers seeking specific performance, the courts have refused to order individuals to enter or remain in the service of a master; (ii) specific performance will not be ordered where trust and confidence has broken down or where a continued relationship is unworkable for another reason; (iii) the court will not specifically enforce a contract under which one party is bound by continuous duties, the due performance of which might require constant supervision by the court.

215. However, where those three factors were mostly or completely absent from a case, there was no reason why an order for specific performance should not be made, even in a contract which had an element of personal service (see *Halsbury's Laws of England*, vol.95: Specific Performance, paragraph 508).

216. In this case, the Tribunal had specifically considered whether trust and confidence had broken down and held (in paragraph 27) that it had not:

> "The RB did not suggest that the relationship between parents and the school had broken down so that it would not be appropriate to reinstate Bobby if discrimination was found. JKL told the Tribunal that the school has done a fantastic job with Bobby, and Bobby wants to return to school, he feels rejected by his birth mother and now rejected by his school. The Tribunal also noted that JKL and MNP's daughter is still at the school and both parents are very happy with the school. We found there was no reason why Bobby should not be immediately reinstated, particularly as Bobby clearly wants to return."

217. Ms Darwin finally submitted that the School's reliance on employment law and on the existence of the specific provisions concerning reinstatement and re-engagement in the 1996 Act was also misplaced. The provisions in the 1996 Act were necessary because of the specific statutory prohibition on making an order of specific performance against an *employee*. S.236 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the TULR(C)A 1992") (and predecessor legislation) provided that no court shall compel an employee to do any work by ordering specific performance or by restraining the breach of such a contract by injunction. An order of specific performance against an employee (which

was common in America and other former British Colonies during the era of indentured servitude) would interfere unduly with a person's liberty. In any event, there is no statutory prohibition on making an order against *an employer;* the mischief with which s. 236 TULR(C)A was concerned was compelling *an employee* to work.

218. Ms Darwin argued that there was no contractual document between the parents and the School. I accept that there is no single document with such a title, but as I observed in the course of the argument, that does not mean that there is no contractual arrangement between the parents and the School. A contract can be part oral, part written and partly created by conduct. It is unfortunate that the Tribunal did not make findings about the origin and the status of the arrangements between the School and Bobby's parents, but that is not fatal to the outcome of the appeal. The likelihood is that there was such an arrangement and that it is still in force and I am prepared to proceed upon that assumption for the purposes of this decision.

219. Ms Darwin argued that a contract was not mentioned by the Tribunal. That is correct as a matter of record, but again that does not mean that one did not exist. The position may well be, as was arguably the case in ***Ross*** at [13], that there was a contract which had been varied by the parents in obtaining funding from the local authority consequent upon the naming of the School in the EHCP, as well as a second contract between the School and the local authority which governed the provision of that funding.

220. In my judgment, however, even if Ms Darwin is right that there is no contract between the School and the parents, an order for reinstatement is sufficiently analogous to an order for specific performance of a contract for personal services that the principles which inform the exercise of the court's discretion in deciding whether or not to order specific performance of a contract should similarly inform the decision of the First-tier Tribunal as to whether in the exercise of its statutory jurisdiction it should or should not order the reinstatement of a child to a school.

221. Ms Darwin had of course argued that the remedies available under the 2010 Act are tortious in nature and thus that there is no need to rely on principles which grew out of the development of contractual remedies. However, as I have observed in paragraph 59 above, that submission is weakened by virtue of the fact that in the case of the Tribunal, the tortious

remedy par excellence, that of the award of compensation to put the victim back in the position in which he would have been as if the wrong had not occurred, is deliberately excluded from the ambit of the Tribunal's jurisdiction.

222. Thus, in considering whether to order reinstatement in any given case, a Tribunal should bear in mind that there has been a longstanding reluctance on the part of the courts to order specific performance of a contract involving personal service, as the cases cited above make clear. However, that reluctance does not constitute an absolute bar on the remedy and it is not the case that, where any element of personal or continuous service is present, that fact will necessarily lead the court or tribunal to refuse to order reinstatement. A Tribunal which is minded to make such an order should nevertheless bear in mind the reason why courts have historically been reluctant to order specific performance of a contract which involved personal service.

223. There is nothing in the 2010 Act comparable with s.116 of the 1996 Act in the context of Employment Tribunals, but in the exercise of its discretion it would in my judgment also be sensible for Tribunal considering a disability discrimination claim in the future to consider matters such as whether it is practicable to make an order for reinstatement and, in cases where the applicant has caused or contributed to the expulsion, whether it would be just to order reinstatement.

224. Although in granting permission to appeal, I raised the question (in the context of the previous reluctance of the courts to order specific performance of contracts involving personal service) whether it was any longer appropriate in the light of recent developments in the law relating to children (and more generally) to draw an analogy between a contract of employment and a contract for the provision of education for a child, I am satisfied that Miss Gannon is right that the analogy still applies and should still be drawn.

225. Miss Gannon submitted that the Tribunal had not had regard, or any sufficient regard, to the safety of other pupils and that that factor militated against the order for reinstatement. That factor falls more naturally to be considered in the course of Ground 4 (to which reference should be made), but for the reasons there set out I concluded that Miss Gannon's

criticisms in that regard are not made out and that the Tribunal did not fall into an error of law in that respect.

226. Ms Darwin argued that the order made by the Tribunal was not inconsistent with the underlying rationale behind the principle, which had developed for three reasons.

227. As to her first reason, namely that in the case of employers seeking specific performance, the courts had refused to order individuals to enter or remain in the service of a master, I did not derive assistance from Ms Darwin's reliance on the TULR(C)A 1992. This is not a case of a party in an analogous role to that of an employer forcing a party in the role analogous to that of an employee to work against his will; rather it was a case of the party in the analogous role to that of the employee forcing the party in the analogous role to an employer to allow him back into his position from which he had been expelled.

228. As to her second argument, that specific performance will not be ordered where trust and confidence has broken down or where a continued relationship is unworkable for another reason, I accept her submission that this was not a case where trust and confidence had broken down for the reasons set out in paragraph 27 of the Tribunal's decision. This was, moreover, a case where there was still an ongoing relationship of trust and confidence between the parents and the School since Bobby's sister was still attending the School. This was in marked contrast to the facts of, for example, ***Muntham House*** where the pupil had threatened to kill one of the teachers (p.289E) and his father was confrontational such that it was impossible to establish any working relationship with him to such an extent that he seriously disrupted the headmaster's work (p.289G-H).

229. Potentially, however, there is a problem with the third aspect of the matter, namely that the court will be reluctant specifically to enforce a contract under which one party is bound by continuous duties, the due performance of which might require constant supervision by the court, in the light of the coda to the Tribunal's order that there be "support and extra tuition for lost learning".

230. Miss Gannon's submission was that the ***Mackenzie*** judgment reaffirmed the position that it was undesirable to rely on the High Court's inherent jurisdiction to enforce the order of

a Tribunal, as that would create a "unique hybrid" which is unacceptable in principle. If enforcement were needed, it would not be just a matter of cutting and pasting the Tribunal's order with a new start date. The new decisions were likely to involve (i) a fresh consideration of whether there had been a breakdown in the relationship (in the intervening period) (ii) whether the child now poses a risk to other children (iii) any change in the child's needs which make the provision unsuitable (iv) any changes in the staffing or setup at the school which now make it an unsuitable provision (v) any additional support that would need to be put in place (vi) the likely costs of that additional support and who would be responsible for bearing that costs (the School, the parents or the local authority).

231. It seems to me, however, that that submission is far too wide and would involve a usurpation of the Tribunal's jurisdiction by the High Court. In this context it is instructive to see what HH Judge Walden-Smith said of the respective roles of the Tribunal and the Court in ***Coates***:

> "31. The role of the county court is to assist in the enforcement of orders made in the FTT (Property). It does not create new rights or orders. It is for the FTT (Property) to decide how the management order is to operate and how its agent (the tribunal-appointed manager) is to fulfil his obligations pursuant to the terms of the management order. It is for the FTT (Property) to make orders and, where appropriate, amend or vary those orders.
>
> 32. The respondent ought to have applied to the FTT (Property) to vary the order made appointing him as the manager in order to provide clarification as to the extent of his obligations and clarification as to the precise extent of the property over which he was appointed as the manager. The county court does not have power to vary the order made by the FTT (Property) and, in my judgment, the injunction sought and obtained in this matter, with the penal notice attached, had the effect of extending the management order made by the FTT (Property).
>
> …
>
> 35. … The structure provides for the FTT (Property) to make the management order and for the FTT (Property) to determine what orders are necessary in order for that management order to be effective. …"

232. It is for the Tribunal to make the orders; it is for the High Court in its inherent jurisdiction to commit a recalcitrant party for contempt if it does not comply with those orders, but it is not for the High Court to remake the orders in the wide fashion which Miss Gannon suggested.

233. In the event of genuine dispute what should happen is that the parties should go back to the Tribunal to amend or vary its order, as is provided for by rule 5(2) of the Tribunal Procedure Rules. That would keep separate the roles of the Tribunal in making the original order or subsequently amending or varying the order and the High Court in enforcing recalcitrance through the contempt jurisdiction without trespassing on the field which is correctly that of the Tribunal.

234. Ms Darwin suggested at one point that in the event of a dispute between the parties that the part of the order for the provision of support and extra tuition would not be justiciable, but with respect that cannot be right.

235. So the position is that on the one hand the relationship of trust and confidence had not broken down as between the School and the parents, which is a factor which would favour reinstatement, but that on the other the coda to the order for reinstatement required at least a degree of supervision, which militated against it. How does one square that apparent circle?

236. It seems to me that the answer is provided by the speech of Lord Hoffmann in ***Co-operative Insurance Co v. Argyll Stores Ltd*** [1998] AC 1. That case was not cited to me by either counsel, but I have come across it in the course of my own researches after the hearing. In that case the plaintiffs granted the defendants a lease of one of the units in a shopping centre for a term of 35 years to operate a supermarket. One of the clauses in the lease contained a covenant to keep the premises open for retail trade during the usual hours of business in the locality. The supermarket was the largest shop in the shopping centre and the greatest attraction (in other words it was the anchor tenant). After 15 years the defendants undertook a major review of their business and decided to close 27 loss-making or less profitable supermarkets and in the following year they announced that the supermarket would close. The plaintiffs invited them to continue trading until a suitable assignee could be found, but without replying the defendants closed the supermarket and stripped out the fixture and

fittings. The plaintiffs brought an action seeking specific performance of the keep open covenant. The judge made an order for damages to be assessed, but refused an order for specific performance. The Court of Appeal allowed the appeal by a majority, but the House of Lords restored the order of the judge. In giving the only reasoned speech Lord Hoffmann said at p.13D-G:

> "This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd. v. Harding* [1973] AC 691. If it is a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said (at p. 724):
>
> > "[W]hat the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by inquiry, to do precisely this."
>
> This distinction between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants: see *Wolverhampton Corporation v. Emmons* [1901] 1 QB 515 (building contract) and *Jeune v. Queens Cross Properties Ltd.* [1974] Ch 97 (repairing covenant). It by no means follows, however, that even obligations to achieve a result will always be enforced by specific performance. There may be other objections, to some of which I now turn."

237. It seems to me that the order for the reinstatement of Bobby to the School is an order to achieve a result rather than an order to carry on an activity for a period of time. The coda to the order for "support and extra tuition for lost learning", although not so obviously clear cut, is more like an order to achieve a result than an order to carry on an activity for a period of time. The possibility of repeated applications for rulings on compliance with the order which

arises in the latter case does not exist to anything like the same extent in the former.[8] Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. (Though I should not be taken as suggesting that on the facts of this case the support and extra tuition should be complicated or that it should take some time.) I consider therefore that the coda to the order for "support and extra tuition for lost learning" does not fall foul of the prohibition on ordering specific performance of arrangements which require constant supervision.

238. That is not to say that Tribunals should readily make orders which might require supervision for the reason which Lord Hofmann went on to explain at pp.13H-14E in the passage which immediately follows the one cited above:

> "One such objection, which applies to orders to achieve a result and a fortiori to orders to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically performed. So in *Wolverhampton Corporation v. Emmons* [1901] 1 QB 515, Romer LJ said that the first condition for specific enforcement of a building contract was that "the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance". Similarly in *Redland Bricks Ltd. v. Morris* [1970] AC 652, 666 Lord Upjohn stated the following general principle for the grant of mandatory injunctions to carry out building works:

[8] By contrast, in the ***Co-operative v. Argyll*** case one could well see that over the period of the remaining 14 years of the term there was scope for frequent argument over the observance of the terms of the "keep open" covenant since the clause itself said nothing about the level of trade, the area of the premises within which the trade was to be conducted or even the kind of trade to be carried on (see p.16G-H). There was a restrictive covenant was not to use the premises "other than as a retail store for the sale of food groceries provisions and goods normally sold from time to time by a retail grocer food supermarkets and food superstores", but that language provided ample room for argument over whether the tenant was doing enough to comply with the covenant (pp.16H-17A).

> "[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions."
>
> Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiff's merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see Spry on *Equitable Remedies* (4th ed.) at p. 112. It is, however, a very important one."

239. Given that the sanction for breach of an order is committal for contempt, the Tribunal must therefore be careful not to impose obligations which cannot be precisely drawn lest they be insufficiently precise to be capable of being specifically performed and thus insufficiently precise to found an order for committal. The Tribunal must be careful to see that the School knows exactly in fact what it has to do as a matter of fact, so that in carrying out the Tribunal's order it can give its staff the proper instructions.

240. I am therefore satisfied that, although the principle in ***Froebel*** was not specifically drawn to its attention, the Tribunal was entitled to make the order for the reinstatement of Bobby to the School on the evidence before it and that it did not fall into an error of law in so doing.

241. For these reasons I dismiss the second Ground of the appeal.

Ground 3

242. So far as the apology ordered by the Tribunal is concerned, Miss Gannon submitted that the Upper Tribunal had given what on its face appeared to be conflicting guidance on the role and appropriateness of an apology.

243. In the first case, ***ML v. Tonbridge Grammar School*** [2012] UKUT 283 (AAC), Judge Rowland had said that

> "22. On the other hand, a declaration does not require enforcement and an order for an apology – whether to the child or, as the First-tier Tribunal might consider more appropriate, to the parents – may have

> a wider purpose than merely preventing further discrimination against the child in question. In this context, an apology must include an acceptance that the action or omission did amount to unlawful discrimination, implying or explicitly conveying an assurance that there will not be a repetition. To the extent that an apology is an acceptance that an act or omission has been unlawful, an order that a school apologise can be regarded as part of the vindication of the claimant. To the extent that an apology is also an assurance as to future conduct, an order that there be an apology gives teeth to the declaration."

244. By contrast, in the later case of ***Gayhurst Community School v. ER*** [2013] UKUT 558 (AAC) Judge Jacobs (who did not on the face of his decision appear to have been referred to ***ML***) held that

> "25. The second order was to apologise. I question what value an apology is likely to have in most cases when made under compulsion. An apology, sincerely meant, can be of enormous value. It recognises that something has gone wrong, it accepts responsibility for what happened, and it allows the parties to establish a better relationship for the future. An apology that is not sincerely meant does none of those things; it merely creates resentment on one side and at best an illusion on the other. It does nothing for the parties' future relations and may even make them worse. Left to their own devices, schools may simply adopt some meaningless form of words. And if tribunals accept responsibility for overseeing the terms of the apology, this can result in drawn out arguments over wording.
>
> 26. This is not to say that tribunals should never order an apology. If in the course of the hearing a school shows a willingness to accept responsibility for what has happened, it may be appropriate to incorporate an apology into the tribunal's order. If it seems to the tribunal that the school would be prepared to accept and acknowledge the tribunal's findings on responsibility, it may be appropriate again to order an apology. But a tribunal should always satisfy itself, before ordering an apology, that it will be of some true value."

245. Miss Gannon submitted that the latter decision was to be preferred to the former for the following reasons:

(a) as a matter of ordinary language, an apology must contain a personal statement of regret; an ordered apology was a contradiction in terms

(b) English courts and tribunals have rightly not adopted the ordering of an apology as part of their jurisprudence. An apology was not available in judicial review proceedings or for breach of European Convention rights or in the Employment Tribunal, both of which dealt with equivalent or in many cases far more serious matters to that of the SENDIST. When having regard to the limits of the broad discretion, the Tribunal should have regard to the existing broader jurisprudence.

(c) the order of the Tribunal must serve some purpose, but as Judge Jacobs stated an ordered apology serves no purpose. Where an apology was not sincerely meant, it was likely to create resentment on one side and at best an illusion on the other.

(d) the objectives which Judge Rowland hoped would be achieved by an apology of an acceptance that an act or omission was unlawful and an assurance as to future conduct would only in fact be achieved if that apology were truly meant rather than being imposed by the Tribunal. As to the vindication of the claimant, that would be achieved by being successful in the Tribunal, not by a forced apology.

246. Miss Gannon submitted that the Tribunal did not satisfy itself that the apology would have any "true value" and in the present case it would not have any "true value" since the position of the School was that the decision to exclude was an appropriate one given the repetition of violent incidents by Bobby and the risk of serious injury to other pupils. The Tribunal had therefore failed to follow the guidance of the Upper Tribunal in making the order for an apology.

247. Ms Darwin for her part relied on the decision of Judge Rowland in ***ML*** and argued that the powers of the Tribunal with regard to remedies included the power to order a school to apologise. The Tribunal did not in fact have to satisfy itself that the apology would have any true value, but in any event in this case an apology could be a very valuable remedy, as Judge Rowland had explained. If, however, the Tribunal did have to consider that an apology should have any value, it had in fact done so and rightly concluded in paragraph 28 that it was called for since Bobby had suffered considerable distress from his exclusion from the School.

248. She submitted that the Disability Rights Commission's Statutory Code of Practice for Schools,[9] the EHRC's Technical Guidance for Schools in England[10] and its Guidance for Schools[11] all recognised that a letter of apology to a child was an example of the type of remedies which the Tribunal can order. As that guidance made clear, and as was evident from the wording of paragraph 5 of Schedule 17 to the 2010 Act, the focus of any order made by the Tribunal should be on remedying the adverse effect on Bobby of the act of discrimination by the School.

249. She said that the best known use of an ordered apology as a legal remedy was in defamation cases. Defamation, like discrimination, is a tort. Ss. 8 and 9 of the Defamation Act 1996 provide that where the court gives judgment for the claimant under the summary procedure, it may make an order that the defendant publish or cause to be published a suitable correction and apology.[12]

250. The law had otherwise recognised the "true value" of an apology. The Compensation Act 2006 provides at s.2 that an apology does not amount to an admission of negligence or breach of statutory duty, thus encouraging the making of apologies to injured parties. Further examples were that an apology may be relevant when a court or tribunal is considering (a) a sentence for a criminal offence, (b) an appropriate sanction in some professional disciplinary proceedings, and (c) the term of imprisonment for contempt under s.14(1) of the Contempt of Court Act 1981.

251. The Upper Tribunal, she argued, could take judicial note of the value or potential value of an apology directed to a child who has been the victim of discrimination[13]:

(a) apologies are very important to many people and may provide solace for the emotional or psychological harm caused by unlawful conduct. An apology might reduce the mental

[9] Made pursuant to the powers under s53A of the 1995 Act. A tribunal, appeal panel or court was required to take into account any part of the Code which appeared to it to be relevant to any question arising in those proceedings.
[10] https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england.
[11] https://www.equalityhumanrights.com/sites/default/files/what_equality_law_means_for_you_as_an_education_provider_schools.pdf.
[12] S.9(1)(b) of the Defamation Act 1996.
[13] In that context she drew to my attention and relied on *"Apologies as a Legal Remedy"* [2013] SydLawRw 12; (2013) 35(2) Sydney Law Review 317 for a discussion of the value of an ordered apology and the position under Australian Law. She did not suggest that the article represented the state of English law.

distress, hurt and indignity associated with a permanent exclusion. It might also assist with recovery, forgiveness and reconciliation.

(b) an apology is something which can be readily understood by a child of 10. A child of 10 need not know, and often would not know, that the apology has been ordered by a tribunal and/or that it is made unwillingly. The child will simply understand that he has been wronged by a school and that the school is now apologising for that wrong.

(c) an apology order is consistent with the nature and aim of the 2010 Act and the normative functions of the law.

252. In ***Gayhurst*** Judge Jacobs did not purport to decide that the circumstances to which he referred were the only circumstances in which it would be appropriate for the Tribunal to order an apology. Nor did he purport to limit the Tribunal's wide power to order any such remedies as it sees fit. He merely observed that a Tribunal should always satisfy itself, before ordering an apology, that it will be of some true value.

253. The School's argument was that the Tribunal should have decided that an ordered apology would be of no value simply because it was defending the proceedings, but educational institutions defending discrimination claims will almost always be unwilling to acknowledge wrongdoing until there has been a finding against them. As such, the School's position at the hearing and prior to the time of the order was unremarkable and did not mean that an apology would be of no true value.

254. In this case, the parents had expressly sought an order that the Headmaster or the Governors provide a letter of apology to their son. The very fact that they sought an apology made clear that they considered it to be of benefit or true value to him. The order gave effect to their preference that their son receive an apology and their view that he would benefit from receiving such an apology. Bobby had been greatly upset by his unlawful exclusion (see paragraph 27 of the decision) and that was more than sufficient for the Tribunal to satisfy itself that an ordered apology was of some true value in accordance with ***Gayhurst.***

255. I am therefore faced with an apparent inconsistency between the decision in ***ML*** and the decision in ***Gayhurst.*** To the extent that there is a difference between them, on this point I prefer the decision in ***ML*** and the submissions of Ms Darwin, although I consider that the concerns of Judge Jacobs in ***Gayhurst*** about the true value of an apology and as to the supervision of its terms should be taken into account when tribunals are considering whether or not to order an apology as part of the remedies ordered at the conclusion of proceedings.

256. In reaching this conclusion I consider that it is appropriate to set out guidance for future Tribunals in the following sub-paragraphs:

(a) the Tribunal does have the power to make an order for an apology (as to the width of the jurisdiction conferred on the Tribunal by paragraph 5 of Schedule 17 of the 2010 Act, see above in relation to Ground 1)

(b) an apology may have a wider purpose than merely preventing further discrimination against the child in question. To the extent that an apology is an assurance as to future conduct, an order that there be an apology gives teeth to a declaration of unlawful discrimination

(c) there can be value in an apology: apologies are very important to many people and may provide solace for the emotional or psychological harm caused by unlawful conduct. An apology might reduce the mental distress, hurt and indignity associated with a permanent exclusion. It might also assist with recovery, forgiveness and reconciliation. An order that there be an apology can be regarded as part of the vindication of the claimant

(d) a tribunal should consider whether the apology should more appropriately be made to the child or to his parents. In the case of very young children the latter may be more appropriate for obvious reasons

(e) an order to make an apology may well be appropriate when there is already an acceptance that there has been discrimination or unlawful conduct or where there is an acceptance and an acknowledgment of the tribunal's findings on responsibility

(f) however, the fact that there has been a contested hearing and that the respondent has strenuously disputed that there has been any discrimination or unlawful conduct is not decisive against ordering an apology

(g) nevertheless, particularly where there has been a dispute or a contested hearing, the tribunal should always consider whether it is appropriate to make an order and bear in mind that it may create resentment on one side and an illusion on the other, do nothing for future relations and may make them even worse

(h) before ordering an apology, a tribunal should always satisfy itself that it will be of some true value

(i) a tribunal should always be aware that there may be problems of supervision if it accepts responsibility for overseeing the terms of the apology which can result in drawn out arguments over wording.

257. Applying those principles to the facts of this case, it seems to me that the parents had sought an apology from the outset, suggesting that they considered that it would be of value to their son, who had suffered considerable distress at his permanent exclusion from the School. That suggests that there was value in an apology. This was not a case where there was evidence that an order to apologise would create resentment on one side and an illusion on the other or do nothing for future relations and make them even worse. On the contrary, there had been good communications between the partiers prior to the exclusion, the School had not suggested that the relationship between it and the parents had broken down, there was an ongoing relationship between the School and the parents given that their daughter was still attending the School and the parents were satisfied that the School had done a fantastic job with Bobby. The Tribunal was not, however, prescriptive about the wording of the apology and would not run the risk of having to oversee the terms of any apology in the event of dispute.

258. I therefore dismiss Ground 3 of the appeal.

Ground 4

259. In relation to Ground 4, Miss Gannon's submission was that the findings of discrimination by the Tribunal under s.15 of the Equality Act 2010 were wrong in law. She made 5 specific criticisms of the decision in that respect in that

(a) the Tribunal gave insufficient weight/failed to have regard to the risk to other pupils

(b) the Tribunal was wrong to have regard to other incidents involving other children when determining whether the decision to exclude was a proportionate response to achieving a legitimate aim (paragraph 6 of its decision)

(c) the Tribunal was wrong to find that anger management training was a reasonable adjustment (paragraph 15)

(d) the Tribunal's findings that Bobby was not supported in different social situations was not supported by any reasoning or evidence (paragraph 15)

(e) the Tribunal wrongly proceeded on the basis that regular group work was required as part of the EHCP (paragraph 15).

260. With regard to (a), she submitted that the headlock was not merely a headlock without more, but an "RKO" headlock, a wrestling manoeuvre, which involves not merely getting the subject in a headlock, but also throwing him to the floor as part of the manoeuvre. Both of the boys who had been subjected to the headlocks (on 28 January and 4 February 2019 respectively) had been wrestled to the ground and hurt in the process, as was set out in the decision letter: "Bobby grabbed [A] in a headlock, wrestling him violently to the ground, causing pain and distress … [he] had placed another boy in a similar headlock, wrestling him aggressively to the ground and hurting him in the process". The pupil who was the subject of the second headlock had been too scared to attend the School on the following day. Following the first headlock, Bobby had promised that he would not do it again, but had done so a week later and said that he would "target" the other pupil. There was a serious risk to other pupils and the Tribunal had failed to have regard to that factor when determining whether the exclusion was a proportionate means of achieving a legitimate aim.

261. So far as (b) was concerned, the Tribunal had failed to make proper findings as to the two headlock incidents. In such circumstances it erred when it took into account other incidents involving other children when considering the proportionality exercise. In comparing the RKO headlock with other incidents, the Tribunal also erred in that it failed to give sufficient weight to the seriousness of the RKO headlock incidents.

262. As to (c), the Tribunal had been wrong in paragraph 15 to find that anger management training was a reasonable adjustment. The Tribunal had accepted the evidence of Ms Hawkins that Bobby had received support to "help him regulate his behaviour and provide strategies to help him deescalate his behaviour", yet it went on to find that anger management training was a reasonable adjustment. But, she asked, how did anger management training differ from the support which he was already receiving? Such training could only logically include support in regulating behaviour and strategies to deescalate which the Tribunal found he was already receiving.

263. Concerning (d), she submitted that the finding in the same paragraph that Bobby was "not supported in different social situations" was not supported by any reasoning or evidence. The clear evidence before the Tribunal was that strategies and tactics had been in place to support him in different social situations. This was through the provision of 1:1 supervision and the support of Mr Taylor (pages 195 to 241). Moreover, the Tribunal recorded that Bobby had received support to "help him regulate his behaviour and provide strategies to help him deescalate his behaviour".

264. Finally, with regard to (e), she submitted that the Tribunal proceeded on the basis that "regular group work" was required as part of the EHCP, but that was wrong. The EHCP stated that Bobby was to have support to manage peer relationships: "this *may* include mediation support; special skills groups; careful grouping within the educational setting *and/or* teaching of specific skills such as debating one's point of view respectfully". The EHCP did not therefore *require* group work as was said in paragraph 15; rather it suggested that group work might be included as one of a number of options for Bobby. It was therefore not a requirement as the Tribunal suggested. The evidence of Ms Hawkins was that group work had been trialled and was ineffective. As such, the School had provided alternative

support as set out in the EHCP, including SALT support to "help him regulate his behaviour and provide strategies to help him deescalate his behaviour".

265. In reply Ms Darwin submitted that the sole issue for the Tribunal was that of justification within s.15(1)(b) of the 2010 Act. Indeed, the Tribunal had identified that the key issue for it to determine was that of proportionality.

266. The question of justification was essentially a matter of fact for the fact-finding Tribunal. In that context she relied on the decision in ***Singh v. British Rail Engineering Ltd*** [1986] 1 WLR 22 at p.28D:

> "It is essentially a question of fact for the industrial tribunal whether a discriminatory requirement is justifiable. The tribunal in the present case has considered and weighed all the circumstances, some telling in favour of and some telling against justifiability, and in our opinion it cannot be said that its conclusion is perverse."

267. Accordingly, absent any error of law, the Upper Tribunal could only interfere with the Tribunal's conclusion it if was a perverse one, i.e. that the School had made out an overwhelming case that the Tribunal had reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached.

268. The issue for the Upper Tribunal was not how it would have exercised its judgment, but whether there was any error of law in the exercise undertaken by the Tribunal. In this case, none of the issues identified by the School, argued Ms Darwin, amounted to errors of law. The Tribunal took into account relevant evidence and was invited to have regard to all relevant matters. It was for the Tribunal itself to accord appropriate weight to the evidence which it had heard and to make findings of fact based on them accordingly.

269. With regard to (a), she submitted that the Tribunal did have regard to other pupils, but rightly rejected the School's evidence about the seriousness of the risk: it held that the risk to the other pupils was not as serious as the School had asserted and did not justify an immediate permanent exclusion. If there had been genuine concerns by the School about the risk which Bobby posed to the other pupils, the School would have discussed them with his parents (paragraph 22 of the decision) and would have instigated an urgent review of his

EHCP and contacted CAMHS (paragraph 23). The Tribunal found that the School had exaggerated the risk which Bobby posed to other pupils and noted (at paragraph 24) that Mr Davies was "unsure whether the safeguarding lead … had notified the local authority of such concerns" and that this was "inconsistent with Mr Davies being so concerned about the health and safety of others including Bobby".

270. With reference to (b), she submitted that the Tribunal did not err in failing to make extensive findings in relation to the incidents of 28 January and 4 February 2019. The facts of both incidents were not in dispute and were as described in the decision letter. It was unclear what further findings the Tribunal could have made or how that would have impacted on its decision. The School did not suggest that the Tribunal's decision was not "***Meek*** compliant".[14]

271. As to (c), she submitted that the Tribunal did not err in distinguishing between formal anger management training and other strategies which Bobby had been offered. That was clearly a distinction which it was entitled to make and did not amount to an error of law.

272. Ms Darwin took grounds (d) and (e) together and argued that they were based on a misreading of paragraph 15. The Tribunal's findings referred back to the evidence of Ms Hawkins about the disbanding of the social skills groups and had to be understood in that context. Bobby's EHCP expressly required a social skills group, as it was specified in the Cognition and Learning section on page 147 (2nd bullet point up from the bottom).

273. It seems to me that grounds (a) and (b) should be taken together and that what is being complained of is a threefold failure:

(i) failure to make proper findings and/or to give sufficient weight to the seriousness of the headlock incidents

[14] From the Tribunal's outline of the story and its factual conclusions and a statement of the reasons leading to the conclusion, the parties are entitled to know why they have won or lost. The purpose of requiring reasons is that they tell the parties "in broad terms why they lose or, as the case may be, win" (see ***Meek v City of Birmingham DC*** [1987] IRLR 250).

(ii) erring by taking into account other incidents involving other children when considering the proportionality exercise

(iii) failure to have regard to the serious risk to other pupils when determining whether the exclusion was a proportionate means of achieving a legitimate aim.

274. In considering those matters, I remind myself that the issue for the Upper Tribunal is not how I would have exercised my judgment, but whether there is any material error of law in the exercise undertaken by the Tribunal, that the question of justification is essentially a matter of fact for the fact-finding Tribunal, that it is for the Tribunal itself to accord appropriate weight to the evidence which it has heard and to make findings of fact based on them accordingly and that, absent any error of law, the Upper Tribunal can only interfere with the Tribunal's conclusion it if is a perverse one, i.e. that the School had made out on the balance of probabilities that the Tribunal has reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached.

275. It is undoubtedly the case that the Tribunal did not make extensive findings in relation to the incidents of 28 January and 4 February 2019, but the facts of both incidents were not in dispute and were fully described in the decision letter. The Tribunal referred to the decision letter and, in relation to the headlock incidents, summarised them in paragraph 6 where it said that

> "The exclusion letter notes that Bobby was excluded for aggressive and targeted behaviour towards another year 5 boy, including placing him in a headlock on 4th February 2019, pushing him in the haha, chasing him in the changing room (which resulted in the boy slipping and receiving a head injury), placing another boy in a headlock on 28th January 2019, and being involved in 37 incidents of unprovoked aggression since his arrival at the school."

276. It also referred to them again in paragraph 16. As I said to Miss Gannon during the permission hearing, if I had written the decision I might myself have set out the bullet points in the decision letter of 11th February 2019 in full, but I do not see that the Tribunal fell into an error of law in summarising them in the way that it did. Miss Gannon argued that the headlocks were not mere headlocks, but RKO headlocks which involved throwing the victim as part of the manoeuvre. I accept that (it is not in dispute), but any form of headlock is a

serious matter by definition and I do not see that the Tribunal was obliged as a matter of law to set out in more detail than it did what Bobby had done, not once but twice within a week.

277. The Tribunal also recorded that Bobby was guilty of aggressive and targeted behaviour towards A by pushing him into the haha and chasing him in the changing room, resulting in A slipping and receiving a head injury, that he said that he would target the other boy, who was consequently afraid of him, that there had been another incident the previous week, that Bobby had promised not to do it again and that he had been involved in 37 other incidents.

278. It is not the case, for example, that the Tribunal only referred to one headlock and not the other, or referred to the two headlocks, but none of the other 37 incidents, or referred to the two headlocks without reference to the head injury, the fall into the haha and the threat to target A. In those events there might have been a failure to deal properly with the evidence such as to amount to an error of law, but that is not what happened and I do not therefore consider that the Tribunal fell into the first error of law which I have identified in paragraph 273 above.

279. The Tribunal did take into account other incidents involving other children when considering the proportionality exercise. The reason why it did so was to gauge whether the treatment of Bobby was disproportionate when compared with that of other children who had been violent at the school. I do not consider that the undertaking of such an exercise was of itself an illegitimate exercise. It was looking at other acts of violence to see whether they or any of them had also merited the sanction of total exclusion or whether some lesser punishment had been imposed.

280. What the Tribunal found was that

(i) Bobby's sister had been kicked and punched by 4 other boys, but that only result in a Head's detention

(ii) the boy who had been hitting other children with a stick and had then bitten Bobby was subject to a far lesser sanction than a fixed term exclusion

(iii) in terms of other sanctions applied to pupils, only one had been sanctioned for inappropriate behaviour towards a girl and that was a temporary exclusion

(iv) it was not clear whether any sanction was applied to the child who had stabbed Bobby in the hand with a pencil, a wound that required bandaging and was still visible a week later (in any event it was less than a temporary exclusion)

(v) the only occasion when Bobby had been sent home was around 18 March 2018, almost a year earlier, when he had been sent home two hours early to calm down.

281. It was on that basis that the Tribunal found that

> "20. … It was not clear why Bobby placing two boys in a headlock, even if he said he was going to target this boy, was seen as so much more serious, than the pencil incident or 4 boys kicking Bobby's sister, or Bobby being bitten by an older boy, and relatively minor sanctions were imposed for this. We found the permanent exclusion was not proportionate, even taking into account the fact that Bobby had been involved in other incidents as set out in the behaviour log."

282. The Tribunal was not saying that placing two boys in a headlock was not serious. What it was saying was that it was not clear why those incidents were seen as so much more serious than the other incidents of violence, which merited much lesser sanctions, that the sanction of total exclusion was a proportionate response, particularly when the only other occasion on which Bobby had been sent home was almost a year earlier and that for only two hours. In short, the Tribunal found that the ultimate sanction of total exclusion was not proportionate in the context of the treatment of other incidents of violent conduct and that the ultimate sanction was disproportionate when the lesser sanctions of temporary exclusion or fixed term exclusion had not hitherto been resorted to in Bobby's case.

283. I consider that the Tribunal was entitled to embark upon that exercise in order to determine whether the total exclusion was a proportionate response. There was no error of law in embarking on that exercise. The precise weight to be accorded to that evidence was for it as the fact-finding Tribunal and I cannot detect any error of law in the way in which it handled or assessed that evidence, which was a matter for it. I am therefore satisfied that the

Tribunal did not fall into the second error of law which I have identified in paragraph 273 above.

284. It is true that the Tribunal did not say in so many words that "there is a serious risk to the other pupils at the school", but the recitation of the matters to which I have referred in the preceding 3 paragraphs in my judgment speaks for itself. I do not consider that the Tribunal failed to take into account the risk to other pupils at the School – it would have been frankly astonishing if it had in the light of the evidence – but the precise weight to be accorded to that factor, taken in conjunction with all of the other factors which it took into account in determining whether Bobby's treatment was a proportionate means of achieving a legitimate aim, was essentially a matter for it as the fact-finding Tribunal which had heard all the evidence. I do not therefore consider that the Tribunal fell into the third error of law which I have identified in paragraph 273 above.

285. For these reasons I am satisfied that Miss Gannon does not succeed on her Grounds of appeal 4(a) and 4(b).

286. With regard to the School's grounds (c), (d) and (e), it seems to me that those matters, whether taken individually or collectively, even if they amounted to errors of law, did not amount to an error of law which was material to the Tribunal's decision. The matters relied upon in relation to these three matters arose in the Tribunal's discussion of whether reasonable adjustments had been made. That was in the context that, as was said in paragraph 14, there was a statutory duty to make reasonable adjustments and that it was unlikely to be a proportional [sic] means of achieving a legitimate aim if reasonable adjustments had not been made. The Tribunal accepted that a number of reasonable adjustments had been made (paragraph 14 and the beginning of paragraph 15), but found that other adjustments should have been made, as more particularly set out in paragraph 15.

287. However, it was not only the failure to make reasonable adjustments which led the Tribunal to conclude that Bobby's treatment was not a proportionate means of achieving a legitimate aim. In reaching that conclusion, the Tribunal also relied on the fact that there had been no local authority advice or CAMHS advice either in the run up to the permanent exclusion or following the two incidents on 28 January and 4 February 2019 (paragraph 16).

Ms Hawkins' evidence was that she would have considered an urgent EHCP review after the first headlock incident, but that the matter was overtaken by events.

288. It was on that basis that the Tribunal found that

> "16. … If the school was so concerned about the early incidents, such that there was a risk of permanent exclusion, we would expect the RB to contact the Local Authority as a matter of urgency and ask for an urgent EHCP review and advice. We would also expect the RB to seek advice from CAMHS or at least have made attempts to do this. From [Ms] Hawkins's evidence CAMHS only contacted her 2 weeks after Bobby's permanent exclusion to see how he was getting on. At this stage it was far too late."

289. It then went on to consider whether the behavioural policy had been applied more harshly in relation to the headlock incidents than in the case of other children who had been violent, even taking into account the fact that Bobby had been involved in 37 other incidents and found that it had been:

> "20. … It was not clear why Bobby placing two boys in a headlock, even if he said he was going to target this boy, was seen as so much more serious, than the pencil incident or 4 boys kicking Bobby's sister, or Bobby being bitten by an older boy, and relatively minor sanctions were imposed for this. We found the permanent exclusion was not proportionate, even taking into account the fact that Bobby had been involved in other incidents as set out in the behaviour log."

290. Thirdly, the Tribunal accepted the evidence of JKL that the exclusion came like a bolt from the blue:

> "21. … We found that parents had no idea that Bobby was at risk of permanent exclusion and had they been advised by the school that this was a possibility, we found, based on JKL's oral evidence, that they would have taken steps such as requesting an urgent EHCP review and considered a medication review. JKL was a very credible witness and we accepted his evidence.
>
> 22. We also noted that both parties agreed there was good communication between themselves prior to the exclusion, and it would have been expected that the RB would have discussed any building concerns with the parents, rather than calling a meeting from which the permanent exclusion became the outcome."

291. It was this combination of (i) the lack of certain reasonable adjustments (ii) the lack of input from the local authority and CAMHS (iii) the disproportionate treatment of Bobby when compared with the treatment of other pupils who had been violent, even given his previous disciplinary record and (iv) the absence of a meeting with his parents and the possibility of a medication review which led the Tribunal to state that

> "23. If the RB was concerned about escalating behaviours, we would expect the school to have instigated an urgent review of his EHCP, sought to have contacted CAMHS, considered additional support, such as putting back the 1:1 support and have alerted parents that there was a real risk of permanent exclusion as stated above, this would have enabled [his] parents to seek an urgent EHCP review or take medical advice about increasing Bobby's medication."

292. Moreover, before reaching its ultimate conclusion it found that (v), despite Mr Davies stating that Bobby posed a risk to the safety of others, he was unsure whether the safeguarding lead had notified the local authority of such concerns, which was inconsistent with him being so concerned about the health and safety of others including Bobby (paragraph 24) and (vi) that, although he stated that he had considered other sanctions other than permanent exclusion, when questioned it was not clear what other sanction he had in fact considered other than that he was so concerned about the health and safety of pupils that he felt no amount of 1:1 support or support would change things (paragraph 25). Thus it found that

> "25. … We found he did not consider steps such as taking advice from CAMHS or the Local Authority (to review the EHCP) before deciding to permanently exclude Bobby, furthermore we found the behavioural policy was not adjusted to take account of Bobby's disability in relation to the permanent exclusion."

293. It is apparent, when the whole of paragraphs 12 to 26 are read in context, that it was the cumulative effect of factors (i) to (vi) that led the Tribunal to conclude that

> "26. We find that the RB did discriminate against Bobby by permanently excluding him on 9th February 2019 and the permanent exclusion was not a proportionate means of achieving a legitimate aim."

294. In my judgment, even if it had found that there had been no lack of certain reasonable adjustments, there was more than sufficient other material on which the Tribunal could have reached the decision which it had done in paragraph 26 of its decision. In other words, any error of law in relation to lack of certain reasonable adjustments was not ultimately material since the Tribunal's decision since it would have reached the same decision even if there had been no error of law in relation to reasonable adjustments.

295. Given that I have reached the conclusion that the School's grounds (c), (d) and (e), even if taken collectively, and even if they amounted to errors of law, did not amount to an error of law which was material to the Tribunal's decision, it is not in fact necessary to consider those three matters individually since even taken together they would not amount to a material error of law. For the sake of completeness, however, I shall set out my conclusions in relation to each of them individually.

296. So far as (c) is concerned, the difference between anger management training and what was provided to Bobby by way of the support which he was already receiving in the form of SALT therapy was not easy to grasp. I asked Ms Darwin what the difference was at the permission hearing; she stated that there was a difference and that the Tribunal was entitled to draw the distinction, but was not able to explain to my satisfaction what it was. Miss Gannon for her part reiterated that the Tribunal had been wrong in paragraph 15 to find that anger management training was a reasonable adjustment. The Tribunal had accepted the evidence of Ms Hawkins that Bobby had received support to "help him regulate his behaviour and provide strategies to help him deescalate his behaviour", yet it went on to find that anger management training was a reasonable adjustment. But, she asked, how did anger management training differ from the support which he was already receiving? Such training could only logically include support in regulating behaviour and strategies to deescalate which the Tribunal found he was already receiving.

297. Now that I have seen the notes of the evidence from the Tribunal hearing I consider that Ms Darwin was right in her submission that there is a difference between the two concepts, nebulous though it might be. She pointed out that in the notes of evidence at page 78 Ms Hawkins is recorded as saying

> "No anger management – under[stood] non compliant and sanction him and not aware violent and risk assessment this was to do with him fleeing (Newark) and SALT in place and she used schemes – zone or regulation colour charts – how feeling and strategies prevent escalation of incident – times followed this and come log cabin and manage deescalate - once a week".

298. That would appear to be a recognition on the part of Ms Hawkins that, as the Tribunal found in paragraph 15, he was not given any anger management sessions, as opposed to schemes and strategies used as part of the weekly speech and language therapy sessions. I am therefore satisfied that the Tribunal did not err in distinguishing between formal anger management training and other strategies which Bobby had been offered and that it was entitled to conclude that anger management sessions were a reasonable adjustment which should have been made. As Ms Darwin rightly submitted, something could be a reasonable adjustment even if it were not contained in the EHCP.

299. That leaves the last two grounds within Ground 4. Again, it seems to me that grounds (d) and (e) should be taken together rather than treated separately.

300. What the EHCP sets out in Section F (provision to support outcomes) in relation to communication and interaction on page 150 is that

> "Bobby will have support to manage peer relationships. This may include mediation support; social skills groups; careful grouping within the educational setting and/or teaching of specific skills such as debating one's point of view respectfully.
>
> Bobby will require supported experiences in different social situations".

301. The Tribunal has therefore accurately referred to that provision when it said in paragraph 15 that

> "The Tribunal noted that at page 150 of Bobby's EHCP it was stated that Bobby will have support to manage peer relationships. This may include medi[a]tion support (from Mr Taylor) social skills [groups] [careful] grouping within the educational setting and/or teaching of specific skills such as debating one's view respectfully. It also stated Bobby will require supported experiences in different social situations."

302. By contrast, what the EHCP sets out in Section F in relation to cognition and learning on page 147 is that

> "Bobby will have daily opportunities to work in small groups and practise his social skills. Where possible, good social role models should be present".

I am satisfied, however, that what the Tribunal was considering was the provision set out at page 150 and that Ms Darwin's reliance on page 147 is misplaced.

303. The Tribunal went on in paragraph 15 to find that

> "We found, based on Ms Hawkins evidence that the only support for peer relationships was mediation support and the Speech and language sessions."

Mediation support was provided by Mr Taylor (see paragraph 301 above) and the provision of SALT therapy was not in dispute.

304. The Tribunal continued

> "[Ms] Hawkins explained that they had put in place a social skills group but as all the children had social communication difficulties this didn't work and was stopped. Relying on the specialist expertise of the tribunal, we were surprised that the group was disbanded as such groups will consist of children with social communication difficulties and the purpose is to encourage appropriate social interaction."

305. The first sentence is a finding of fact. The second sentence was comment on the part of the Tribunal, but it was comment which it was entitled to make based on its specialist expertise.

306. It went on

> "Based on Ms Hawkins evidence we found that Bobby was not receiving social skills groupings or leaning how to debate his view."

307. In the light of the disbanding of the social skills groups, that comment seems to me to follow inevitably and to be unexceptionable.

308. It continued that

> "We also found that Bobby was not supported in different social situations, based on [Ms] Hawkins evidence. This was noted as provision in his EHCP and it was reasonable to expect the school to provide this."

309. Finally, the Tribunal commented that

> "If Bobby had received regular group work and support in different situations as his EHCP required then some of the 37 behaviour incidents or placing two boys in a headlock (which led to his exclusion) may have been avoided as Bobby would have been provided with tools to help control his behaviours."

310. That was again a comment which the Tribunal was entitled to make and I can see no error of law in that regard. In the context of the whole of the paragraph (in which it had earlier stated the requirements on page 150 correctly) I consider that what the Tribunal was saying was that

> (a) if Bobby had received regular group work and
>
> (b) if he had received support in different situations (as his EHCP required)
>
> then some of the behaviour incidents might have been avoided.

311. Having subjected the text of paragraph 15 to some exegesis, I am satisfied that the Tribunal did not proceed on the basis that regular group work was mandated or required by the EHCP and that the criticism levelled at the Tribunal in that regard is unfounded. The Tribunal correctly set out the terms of the relevant provision in the EHCP on page 150 and correctly noted that regular group work was one of the options for Bobby within the support which was to be provided for him in relation to peer relationships; it did not suggest that it was mandated or required. It commented on its surprise at the disbandment of the social

skills group, as it was entitled to do, and concluded, as was the case, that Bobby was not therefore receiving social skills groupings or learning how to debate his view. It finally commented that, if Bobby had received regular group work and support in different situations as his EHCP required in the latter case, then some of the behaviour incidents might have been avoided as he would have been provided with tools to help control his behaviour.

312. I do not therefore consider that Miss Gannon has made out her ground of challenge in relation to (e).

313. By contrast, I do not consider that the Tribunal's criticism of the School in relation to (d) (on the basis of Ms Hawkins' evidence failing to provide support in other social situations) was correct and in that regard I consider that Miss Gannon's submission was justified.

314. The EHCP stated at page 150 that Bobby would require supported experiences in different social situations, as it recorded correctly earlier in paragraph 15, but it concluded later in paragraph 15 (but without reasons) that

> "We also found that Bobby was not supported in different social situations, based on Ms Hawkins' evidence. This was noted as provision in his EHCP and it was reasonable to expect the School to provide this".

315. The notes of evidence, however, suggest that that was not the tenor of Ms Hawkins' evidence since she is recorded as saying that

> "Page 150. "support peer relations". Social communication group at first as better way. This didn't; work and he had individual support. Mediation support – make sure supported. Mr Taylor talk through and even boys.
> Social skills group didn't work as had similar needs. SALT doing him SALT dealing social situations based on targets – Miss H not have document with her. Page 165. Page 161 intervention on social group. (plus Mr Davies – said Mr Taylor if does something well Mr Davies positively reinforce - also say this went well and carry on this). Will Taylor championed. Page 150 – "supported experience" that where Will Taylor stepped in for form teacher. Cause 18 months developed well.
> - First general

> - Second is supported experience in social situations.
> [Ms] Hawkins raised it case worker and felt covered properly. [Ms] Hawkins felt met outcomes. Section E – above and in process meeting it".

316. The Tribunal's stark and unreasoned conclusion about lack of support in different social situations does not appear to accord with that evidence and in that respect I consider that the Tribunal fell into error. However, although I found that Miss Gannon has made out her ground (d), for the reasons set out in paragraphs 286 to 294 above, I am satisfied that any error in that regard on the part of the Tribunal was not material to its decision.

317. I therefore also dismiss the final Ground of the appeal.

Conclusions

318. For these reasons I am satisfied that the School's various grounds of challenge to the decision of the Tribunal fail.

319. The order of the Tribunal is upheld, save for the minor amendments noted in paragraph 10 above to the effect that

(1) the claim of disability discrimination against the proprietor of the School under s.15 of the Equality Act 2010 (discrimination arising from disability) succeeds

(2) the proprietor of the School must withdraw the exclusion and reinstate Bobby with immediate effect with support and extra tuition for lost learning

(3) the proprietor of the School is to write a letter of apology to Bobby to be sent within 14 days of the date of the decision

(4) the proprietor of the School is to produce a redacted copy of the decision to be sent to the Legal Department of the Equality and Human Rights Commission ("the EHRC") within 14 days of the decision.

320. The suspension originally imposed by Judge Ward and continued by me on the grant of permission to appeal pending the final determination of the appeal therefore also falls away with immediate effect.

321. The appeal is therefore dismissed.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **20 August 2019**