IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. *UA-2023-000704-HS*
[2024] UKUT 00150 (AAC)

On appeal from **First Tier Tribunal (Health, Education and Social Care Chamber)**

Between:

Mr and Mrs X (parents)

Appellants

- v –

The Proprietor of Woodcote High School, now 'The Collegiate Trust' (the Responsible Body)

Respondent

Before: Upper Tribunal Judge S Davies

Hearing date: 16 April 2024
Decision date: 23 May 2024
Heard in: London

Representation:
Appellant: in person by Mr X and Mr Y (Mr X's son)
Respondent: Mr Ian Perkins, counsel for Browne Jacobson LLP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 4 November 2022 under number EH306/22/00013 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside to the following extent. The case is remitted to be reconsidered by the Tribunal in accordance with the following directions on the issue of whether failure to maintain accurate or updated Individual Education Plans was an act of disability discrimination under section 15 Equality Act 2010.

Directions

1. **This case is remitted to an identically constituted panel for reconsideration at an oral hearing.**

2. **If the same panel cannot be reconstituted within a reasonable time, or at all, a wholly different panel shall be constituted to consider the remitted issues afresh.**

3. **This Direction may be supplemented by later directions by a Tribunal Judge in the Health, Education and Social Care Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

Introduction

1. The parties to the appeal are Mr & Mrs X, the Appellants, and the Proprietor of Woodcote High School, the Respondent (also referred to as the "Responsible Body" and the "school"). This is an appeal against the decision of the First-tier Tribunal (Health, Education and Social Care Chamber) ("the Tribunal"), which sat on 21 October 2022. The Tribunal gave a reserved decision dated 4 November 2022 (the "Decision") dismissing complaints of failure to make reasonable adjustments under section 21 Equality Act 2010 (EqA) and of discrimination arising from disability under section 15 EqA.

Permission to Appeal

2. The Appellants' application to the Tribunal for permission to appeal was refused by Deputy Chamber President Judge M Tudur in a decision dated 11 May 2023. The Appellants' subsequent application to the Upper Tribunal, on 2 June 2023, for permission to appeal was refused on the papers by Upper Tribunal Judge E Mitchell on 4 July 2023.
3. Both applications were made on the basis of grounds of appeal drafted by Mr O Persey of counsel; to the Tribunal dated 28 November 2022 and to the Upper Tribunal dated 30 May 2023.
4. The Appellants requested an oral hearing to renew their application for permission to appeal to the Upper Tribunal which was listed before me in London on 19 September 2023, when they appeared in person. By this stage the grounds of appeal had been revised and were drafted by the Appellants. In my decision of 17 October 2023 I refused permission to appeal on grounds 1a,1b(2),1b(4),1b(5),1b(6), 2 and 3 and I gave permission to appeal on ground 1b(1) (only in so far as it relates to ground 1b(3)) and ground 1b(3).

The Appeal Hearing

5. A hearing was originally listed on 12 March 2024 in London but was vacated as the parties were not ready to proceed and a bundle of authorities had not been agreed. At that hearing both parties appeared unrepresented.
6. At the re-listed hearing on 16 April 2024 in London, the Appellants were unrepresented, attending with their son Mr Y. It was agreed that Mr X (L's father) would make oral submissions and he would confer with Mr Y who was also permitted to make submissions.

7. The Respondent was represented by Mr Perkins, who attended with Ms A King of the school and a junior barrister, Ms Bourne, who attended for observation purposes only.

8. The Appellants presented a 10 page document entitled 'Our Responses for UTT Appeal Hearing' at the hearing on 16 April 2024. This document had not been provided to the Upper Tribunal or the Respondent prior to the hearing. Once a copy had been made for the Respondent, Mr Perkins indicated that he did not object to the document, albeit more notice would have been helpful. Accordingly I took the content of this document into account, alongside the agreed authorities bundle and skeleton arguments from both parties.

9. In these reasons the Appellants' surname has been changed to X and their daughter is referred to as L for reasons of confidentiality; no offence is intended to her or her family.

Identity of Respondent

10. The Appellants raised queries about the identity of the Respondent and those individuals representing the Respondent prior to instructing legal representation. Mr Perkins addressed this in his submissions. The following passage is taken from his submissions at paragraphs 3, 4 and 7:

> 'At the time that the FTT claim was issued and determined Woodcote High School ("the School") was run by a single academy trust called 'Woodcote High School'. However, in April 2023 the School transferred to a multi-academy trust, 'The Collegiate Trust'.
>
> Therefore the FTT determined a claim against the Woodcote High School trust which still exists as an entity, albeit with no assets or liabilities but it is The Collegiate Trust who answer this appeal.
>
> …
>
> The Collegiate Trust accepts that it is the current 'proprietor of the school', is engaging with the extant proceedings and does not seek an amendment to the proceedings or to evade answering this appeal notwithstanding that it was not the proprietor at the inception of the FTT action or at the time of the FTT decision.'

11. In light of the above and the name of the Respondent used in these proceedings, I do not consider it necessary for me to make any further determination on or to take any procedural step with regard to the identity of the Respondent.

Scope of Appeal

12. Permission to appeal was granted on a limited basis: that the consolidation of the nine originally identified claims to six claims at the Tribunal hearing on 21 October 2022:

    (1) was unfair, as the unrepresented Appellants did not have time to prepare, and this put them at disadvantage as they did not fully understand the legal implication of consolidation (ground 1b(1) in the Permission to Appeal);

    (2) led the Tribunal to fail to properly consider the claim that the school failed to maintain accurate or updated Individual Education Plans (IEPs) as a complaint of discrimination (ground 1b(3) in the Permission to Appeal)

13. The first ground of appeal was only permitted to the extent that it impacted the second ground.

Tribunal's decision

14. In the period leading up to the hearing by the Tribunal, judges engaged in active case management of the claim, in order to clarify and identify the Appellants' complaints in a form that could be considered as a claim under the EqA (paragraph 9). Judge Brownlee initially registered nine complaints of direct discrimination (section 13 EqA) and seven complaints of failure to make reasonable adjustments (section 21 EqA) only. No complaints of discrimination arising from disability under section 15 EqA were identified at case management stage.

15. The Tribunal recorded its decision on consolidation of claims as follows:

> '11. In her Order of 22 March 2022, Judge Brownlee identified nine allegations which could arguably be advanced as grounds that the RB had discriminated against L or otherwise failed in their duties to make reasonable adjustments or provide her with auxiliary aids or services:
>
> a. From September 2020, failing to ensure L's individual education plans were accurate and updated;
> b. From 17 February 2021 onwards, raising L's suitability to remain a pupil at the school in email correspondence;
> c. Between 5 August 2019 and 30 December 2021, failing to set and/or support L with homework;
> d. From September 2020, failing to provide suitability differentiated work, objective targets and monitoring to support L's educational needs;
> e. Between 6 January 2021 and 5 February 2021 (lockdown period), failing to provide suitably differentiated work;
> f. Failing to implement recommendations of a speech and language assessment dated 21 September 2021;
> g. From September 2020, falsifying SEN assessment documents;
> h. From September 2020, removing L from classes without informing Mr & Mrs X; and
> i. Failing to carry out a thorough investigation under the school's complaints procedure.
> …
>
> 13 We discussed the scope of the claim with the parties at the beginning of the hearing. We emphasised that Judge Brownlee had identified the arguable grounds of claim on the basis of the limited information available to her at the time. We emphasised that Judge Brownlee had adopted a cautious approach so as not to unfairly or prematurely limit the scope of the claim, which had been made without the benefit of legal advice by self-representing claimants. We explained to the parties that with the benefit of reading both parties' submissions and the written evidence, and bearing in mind that discrimination lies in the result for L rather than in acts or omissions which do not of themselves impact upon her, we could consolidate these nine preliminary grounds into six consolidated grounds for our determination, not all of which were obviously ongoing within six months of the claim or obviously formed

> part of a course of conduct together with those events which occurred within six months of the claim'

The consolidated complaints referred to as 'differentiation' were described as follows:

> '13 b. The 'differentiation' issue: whether the [Responsible Body] had discriminated against L by failing to differentiate the curriculum adequately or at all. In determining that issue, we would reach factual findings about whether the [Responsible Body] had falsified SEN assessment documents or failed to maintain an Individual Education Plan (IEP) but we would not treat these as freestanding grounds for discrimination. Equally, we considered that the complaint raised by Mr & Mrs X that [L] was removed from classes without their knowledge was a component of this ground because the parties agreed that removal from mainstream classes was an element of the differentiation the [Responsible Body] had identified'.

As for the form of discrimination, the Tribunal concluded that there was no basis for consideration of direct discrimination complaints (paragraph 15) and the Tribunal set out the way in which they would consider the claims in paragraph 16 of the Decision:

> 'We considered each ground of claim now identified at a – f of paragraph 13 above to be primarily an allegation of a failure to make reasonable adjustment, with the exception of the "suitability" and "complaints" issues, which were claims of discrimination arising in consequence of disability within the meaning of section 15 EqA. However, even in relation to the first four grounds, where we could identify that ground could also be argued as one of discrimination arising in consequence of disability, we have also considered the claim in that way.'

16. At paragraph 39, the Tribunal deals with the IEPs and explains why it does not put much weight on the Responsible Body's admission of not keeping IEPs up to date:

> 'Although we take into account the [Responsible Body's] acknowledgement in its Stage 3 complaint response and in its response to this claim that staff failed during this period to keep L's Individual Education Plan up to date, we do not place great weight on that admission because discrimination lies in the result for a disabled pupil and not in whether the [Responsible Body] kept meticulous records. Put another way, it is perfectly possible for a [Responsible Body] to meet all its duties to a disabled pupil without keeping a single record, provided it can show its actions are based in an adequate understanding of a pupil's disability, coupled with sound judgement as to the adjustments that may be required to accommodate them.'

Submissions and their scope

17. The parties prepared their skeleton arguments and submissions for the possibility of me determining the section 15 EqA complaint. However, I decided that if the appeal succeeded on consolidation, consideration of whether there had been discrimination under section 15 EqA in relation to IEPs must be remitted to the Tribunal. This is because if the appeal succeeded on the consolidation point, the section 15 EqA complaint had never been considered by the Tribunal at all.

18. Accordingly, I have considered the parties written submissions, skeleton arguments and the cases referred to within them carefully but summarise below only those arguments and passages of cases which are relevant to the determination of the appeal.

Appellants' submissions

19. The Appellants relied upon a skeleton argument of 29 pages dated 9 April 2024 and a 10 page document (Our Responses for UTT Appeal Hearing) handed up on 16 April 2024. At the hearing, the Appellants accepted that the scope of their skeleton argument went further than those matters for which permission to appeal had been granted and strayed into matters for which permission had not been granted.

20. The Appellants submit that, as consolidation of claims took place at the start of the Tribunal hearing, they did not fully appreciate the implications of consolidation nor did they have time to prepare to deal with the differently framed claims considered by the Tribunal. Neither party was represented at the Tribunal hearing and the Appellants submit that they followed the Judge's decisions and felt that they had no other choice. The Appellants were confused and not sure of what they had prepared for in the hearing. In hindsight, the Appellants do not agree with the consolidation; they had issues with the IEPs which were raised in the initial claim form (under 'unfavourable treatment 1' at pages 4 and 6 FTT Core Bundle 1).

21. As they did at the oral permission to appeal hearing on 19 September 2023, the Appellants rely on **City of Edinburgh Council v R [2018] CSIH 20**, a claim about the authority failing to assess for and then provide an adequate Coordinated Support Plan (CSP). The Appellants referred me to paragraphs 13 to 17 of that judgment:

> '[13] The final submission for the authority merits greater consideration. It was contended that there had been no identification of the basis for the conclusion that, in terms of section 15(1)(a) of the 2010 Act, the authority had treated the pupil unfavourably "because of something arising in consequence of (the pupil's) disability." At the appeal hearing it appeared that both counsel considered that this provision meant that the delay/inadequacies in respect of the CSP required to be caused or contributed to by the pupil's disability, as opposed to, for example, by a lack of adequate resources, systemic failures, or sheer carelessness on the part of the authority. It was submitted that the tribunal did not address the cause of the unfavourable treatment. (Counsel for the mother submitted that the onus was on the authority, and it had not

presented any non-discriminatory cause for the unfavourable treatment.)

[14] In our view the suggested approach involves an erroneous construction of the wording in section 15(1)(a), which states:
"(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,"
The building blocks are: (a) the authority treating the pupil unfavourably (this is satisfied); and (b) the cause of this being something arising in consequence of the pupil's disability.
No doubt the wording in the second part was carefully chosen. If the intention was that the disability must be a cause of the treatment being unfavourable, this was a curious way of expressing it**.** In the present case the "something" was the delayed and then inadequate CSP. While as a generality a CSP can be required in respect of a pupil without a disability, in the context of this claim, if the pupil had not been disabled there is no reason to suppose that there would have been a CSP. It was the disability which resulted in the need for the CSP, and it was the CSP which was the unfavourable treatment.

[15] Blackstone's Guide to the Equality Act, third edition, states (paragraph 3.23) that the legislation is aimed at cases "where the reason for the (unfavourable) treatment is not the disability itself, but something which arises in consequence of the disabled person's disability." This contradicts the proposition that the cause of the treatment being unfavourable has to be the disability. A more remote connection is sufficient. Blackstone's Guide continues to the effect that any detriment can amount to unfavourable treatment, irrespective of how others are treated. There is no need for a comparison with the treatment of non-disabled people. Treatment common to the disabled and non-disabled can, in the case of the former, amount to discrimination if, in the circumstances of the case, the treatment arises in consequence of the disability. So if, but for the disability, the disabled pupil would not have been subject to the unfavourable treatment, then, on the face of it, the statutory test is met.

[16] Echoing another passage in Blackstone's Guide, the tribunal observes that "it is the thing which arises in consequence of the disability which must have caused the treatment." Examples are figured such as absences from work, and behavioural or capability issues. Thus, even if a disabled person is being treated in the same way as non-disabled people, for example by being disciplined as a result of absences or careless work, discrimination can occur in terms of section 15(1)(a). If a CSP had been required of the authority in respect of a non-disabled pupil, then the fact, if it be the fact, that whatever caused the deficiencies in the present case would have operated to the same disadvantageous effect on that person's education, this will not allow the authority a defence to this disabled pupil's discrimination claim.

[17] Overall it is sufficient that the authority knew of the pupil's disability, subjected her to unfavourable treatment because of a CSP which was required because of the disability, and, in terms of subsection 1(1)(b), cannot show that the treatment was "a proportionate means of achieving a legitimate aim" (there was no suggestion of a legitimate aim). Our

> conclusion is that the tribunal did not err in its findings in paragraphs 11(41/2):
> "It appeared to the tribunal that where a pupil, in consequence of disability, has additional support needs such that the pupil requires a CSP in terms of section 2 of the 2004 Act then the failure by a responsible body to provide a CSP or the provision of a CSP which is not adequate, is unfavourable treatment in terms of section 15 (discrimination arising from disability) of the 2010 Act… and adversely affects how the responsible body provides education for the child in terms of section 85(2)(a) of the 2010 Act." (my emphasis)

22. The Appellants submit that **Edinburgh** shows that an IEP can be considered 'something arising' from disability and failure to maintain it correctly, or the IEP itself, can amount to unfavourable treatment. As such their complaint about the IEPs was a freestanding claim which the Tribunal failed to consider when they consolidated the 'differentiation' ground.

23. There was unfavourable treatment because of something arising in consequence of L's disability, as paragraph 39 of the Decision records the 'Respondent's acknowledgment in its Stage 3 complaint response and in its response to this claim that staff failed during this period to keep L's IEP up to date…' The Tribunal erred in law as they did not place great weight on the Respondent's admission that IEPs were not up to standard and suggested that the Respondent did not have to maintain meticulous records.

24. The EHCP is reviewed annually, whereas IEPs should be reviewed termly. As such IEPs are arguably more present than other assessment documents. IEPs contain the education plan which the school should follow. In the stage 3 complaint hearing on 19 July 2021, Ms Woodcock said that IEPs are support strategies for staff (p49 FTT Bundle 2). As such IEPs support teachers to understand what they need to do for L's education and it is therefore vital that IEPs are maintained.

25. IEPs are supposed to be L's education plan; if there is no proper plan that is unfavourable treatment. Inadequate IEPs had a massive impact on L's education. The similarity of the IEPs meant that they did not make provision for new learning; new targets should have been put in place and there was insufficient evidence that targets were achieved. This is supported by relevant technical guidance that targets should be regularly reviewed and should not remain the same.

26. The point about the Respondent's failure to maintain adequate IEPs should not be confused with the allegation of falsification of documents; regardless of the Tribunal's finding that there was no falsification of documents the Appellants remain concerned that the IEPs were not adequate and sufficient for purpose.

27. The Respondent's suggestion that the IEPs were merely not up to standard in respect of formatting is rejected. The changes made by the school to IEPs from year 10 onwards were not just aesthetic. It was clear from the questioning of the panel at the complaint hearing on 19 July 2021 that the content of the IEP that was at issue. This is demonstrated by the panel asking about the difference between active & passive signposting; noting that the IEPs did not appear to have many changes year on year; and asking if the IEPs could have a higher level of personalisation (in line with the EHCP) (p48 FTT Bundle 2).

28. As for the meaning of 'unfavourable treatment', the Appellants referred to the Equality and Human Rights Commission's ('EHRC') Technical Guidance for Schools in England:

> 5.21: ' A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently.'
>
> 5.44 'For discrimination arising from disability to occur, a disabled pupil must have been treated 'unfavourably'. This means that he or she must be put at a disadvantage (see *paragraph 5.21*). Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable, for example being excluded from the school. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment. Sometimes, the unfavourable treatment may be less obvious. Even if a school thinks that it is acting in the best interests of a disabled pupil, it may still be treating that pupil unfavourably.

Respondent's submissions

29. The Respondent referred me to the following authorities on how appellate courts should approach first instance decisions.

30. **Piglowska v Piglowski [1999] 1 WLR 1360** confirms that the approach should be to assume that the judge at first instance knew how to perform their functions. Lord Hoffmann said:

> 'The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed… These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account…An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that the judge misdirected himself'.

31. This assumption of competence is heightened when dealing with a professional tribunal. In **Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49**, Lady Hale provided the following guidance:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see Cooke v Secretary of State for Social Security [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to

> find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."

32. The Respondent drew my attention to the fact that the appeal grounds now in issue were raised for the first time at the oral permission to appeal hearing on 19 September 2023, 10 months after the Tribunal decision was made.

33. The Respondent submitted that is was necessary to consider the complaint relating to IEPs as initially brought. This was first in an internal complaint to the school, on 11 February 2021, culminating in a stage 3 complaint hearing on 19 July 2021 and a written outcome letter of 21 July 2021. It was submitted that the concerns advanced in the internal complaint to the school were with regard to (1) a general lack of progress for L and (2) a concern that documents had been fabricated/falsified.

34. The school's position in response has not changed; L's progress was slow as an inherent result of L's educational challenges. This was endorsed by the Tribunal who found that the Respondent, a mainstream school, had done all they could for L's education. The IEPs were not fabricated; the Tribunal made a clear finding that this accusation was not made out on the evidence.

35. The Respondent submitted that the Appellants' queries, during the course of the internal complaint, indicated a questioning of the parental experience of receiving IEPs that were similar. This was their subjective position, in reality slow progress was justified and to be expected. When questioned about the similarity of the IEPs at the complaint hearing on 19 July 2021, the school's witness showed insight and agreed the formatting of documents could be revisited. This was the extent of the school's admission.

36. It is submitted that the IEPs were not advanced as part of the claim to the Tribunal at all; they were mentioned but not as a head of complaint. Rather they were referred to as a potential piece of evidence. The Appellants were required to amend their pleadings to add cogency. The Appellants did so on 1 February 2022 where the IEP allegation appeared within a diffuse set of written pleadings. Judge Brownlee registered the claim on 22 March 2022, and in doing so needed to exercise case management powers to order the pleadings into an intelligible claim.

37. In the Appellants' pleadings they retained the language used in the internal school complaint; 'as parents'. This shows the Appellants' complaint was in respect of their subjective parental experience, with a slow rate of change, and that the IEPs had been falsified. As for L's progress, the Tribunal accepted that the IEPs did not require drastic change year by year because L's progress was not rapid or drastic.

38. When recording the consolidation of claims, the Decision (paragraphs 12 - 13) highlighted that: the scope of the claim was discussed with both parties at the start of the hearing; Judge Brownlee had identified arguable grounds of claim based on the limited information available to her at the time of case management; Judge Brownlee adopted a cautious approach so as not to unfairly or prematurely limit the scope of the claim; and any allegation was vulnerable to falling outside of a continuing course of conduct which was ongoing within six months of the claim being made.

39. The Tribunal has wide discretion when it comes to case management including consolidation of claims (Rule 5(3)(b) of Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the Rules)). It is not an error of law per se that a Tribunal considers, adds or removes an allegation. It is not an obligation on the Tribunal that an intelligible claim is brought; that obligation rests on the party bringing the claim. The Tribunal's discretion should not be curtailed because of the decisions of another judge at case management. The hearing judge is better placed to settle the claims to be heard, as they can judge the merits with the benefit of the evidence and address the parties to check for any objection. No objection to consolidation was raised at the hearing.

40. As for the meaning of 'unfavourable treatment', the EHCR technical guidance must be read in full. There are checks and balances in place in that guidance. The detriment must be something a reasonable person would complain about; an unjustified sense of grievance would not amount to a disadvantage.

41. Once scrutinised, all that is left is the claim with regard to the parental experience of receiving IEPs. The slow rate of change having been determined by the Tribunal along with rejection of the allegation of fabrication of documents. The remaining claim was not capable of being discrimination against L herself. There was no unfavourable treatment; there was no denial of an opportunity, or of a choice. The Tribunal found that the school had done all it reasonably could to support L's education; it is clear there was no tangible disadvantage. A claim could only succeed if L as a reasonable person has a justified grievance; there can be no such complaint.

42. **Edinburgh** can be distinguished as a CSP is the equivalent in Scotland of the EHCP, both of which are statutory documents. An IEP is optional, it is one potential element of provision falling under an EHCP. An inadequate CSP is far more likely to amount to unfavourable treatment than an inadequate IEP. The Appellants have proceeded on the basis that the IEP was not sufficient and held it to a concocted standard; it is not a statutory document or subject to statutory guidance. There is no single way of producing an IEP, rather it is a summary document which acts as a crib sheet for use by teachers. The IEP does not consider success and failure and teachers comments; other documents that sit alongside it do, such as the 'round robin' and SEND support documents.

43. When scrutinised the IEPs form only marginal part of the claim advanced on a narrow specific basis, with which the Tribunal did not agree as a finding of fact. The result is that the complaint is left without reason and justification. The Tribunal addressed the issue; it did not err in law, taking the view that the section 15 EqA allegation should not be retained amongst other complaints left to deal with on the day of the hearing.

Conclusion

44. Throughout my deliberations I have held in mind the authorities of **Piglowska** and **Sudan** and the requisite assumption of competence and the expert nature

of the Tribunal in this case. I have borne in mind that the Tribunal Decision must be read as a whole and not subject to 'narrow textual analysis'.

Consolidation

45. I have considered the history of proceedings and prior to that the complaint to the school which lead to the claims being brought.

Stage 3 complaint outcome

46. The school's stage 3 complaint outcome letter of 21 July 2021 (p2 FTT Bundle 2) states: "we reviewed the IEP's and would like to apologise on behalf the school that these forms were not up to the high standards we would expect.'

47. Whilst the detail of the internal school complaint is relevant background, the question of whether the Appellants brought a discrimination claim in respect of IEPs is to be considered on the basis of the pleadings (the claim form of 31 December 2021 and the further information of 1 February 2022).The relevant passages are as follows:

Claim form

48. In the claim form, the Appellants complain of the following as 'unfavourable treatment' (p4 FTT Core Bundle 1):

> 'Unfortunately based on observation and our insight into the school's assessment it is unfairly assumed our daughter is not capable of learning the GCSE syllabus. Therefore, as a result there seems to be minimal effort to teach her this even at a foundation stage. This has led to insufficient & unsuitable work being provided to stimulate or further her education. This has come to our attention mainly in 2021. Based on the poor assessment documents to date this has probably has been like this for earlier schools' years.'

49. Under 'More detail about your claim' (p6 FTT Core Bundle 1) the Appellants say:

> 'At present we have not attached too much documents related to our findings of falsified documents. At this stage it would increase the document files too much. However, as part of the case management we would be able to produce & provide these if requested by the Tribunal or if needed in advance. These relate to the EHCP, Personal support plans, lEPs etc (Send Assessment Documents)'

Further Information

50. In a Tribunal Order of 26 January 2022, the Appellants were directed to provide further information and clarification of the discrimination claims. The Appellants responded on 1 February 2022 (p229 FTT Bundle 2) as follows:

> '2. As requested,
>
> **Details and dates of the alleged incidents of disability discrimination which have occurred between the 30th June and 30th December 2021 include**:
>
> …

> Accessibility to view past and future general education progress and monitoring as parents of a pupil at the school
>
> (1) Although there has been an acknowledgement by the school that the IEPs are not up to high standards unfortunately this has not improved with time with similar issues still ongoing
>
> …
>
> c) **Details and dates of the alleged incidents of disability discrimination which occurred on or before the 29th June 2021 and the reasons why they form part of a continuing act:**
>
> -We believe there has been a falsification of SEN Assessment documents. This includes the Individual Education Plans (IEPs) for Years 7 – 9. These documents have little changes, additions etc. for the summary of concerns, positives, targets to be achieved and strategies. There are a few minor changes to the learning support only but this is not reflected in the pre-mentioned IEP subject areas which seem stagnant and repetitive. Also, we were not sent copies of these beforehand at the time or involved in the final review process. 10/02/21. Also note these were not the same documents investigated as part of our Complaints process by the school and these were subsequently changed. The stage 3 complaint process stated the evidence had been based on probabilities but this was unfair when all the evidential documents were available for review. Although the school acknowledged the quality of these documents was not to a high standard there was no acknowledgment of the falsification of documents for our complaint process.'

Registration of claim

51. On 22 March 2022, Judge Brownlee registered claims of direct discrimination and failure to make reasonable adjustments from September 2020 onwards in respect of 'failing to ensure L's individual education plans were accurate and updated'. Judge Brownlee's case management Order contains a preamble which includes the following passage:

> 'All discrimination claims are seen by a Judge before registration. The purpose is to identify the issues that have to be determined, and to issue directions that will enable an appropriate response to be drafted and the relevant evidence to be submitted. The Judge's analysis provides assistance to the parties in preparing for the hearing, so that they are aware of the issues which the Tribunal must decide, and what evidence will be relevant.'

Respondent's response to claim

52. The Respondent provided their response on 18 April 2022 (p12 FTT Core Bundle 1). Within the response the school said:

> 'With regards to;
>
> 1) Failure to ensure L's individual education plans (IEP's) were accurate and updated - the stage three complaint found that whilst IEP's were available but not up to the standard expected. The school has accepted the development point and has since issued more comprehensive IEP.'

Tribunal's case management powers

53. The Tribunal has wide discretion with regard to case management. In particular Rule 5 provides:

> 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—
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> …
>
> (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;
>
> …
>
> (e) deal with an issue in the proceedings as a preliminary issue;

54. The Tribunal is bound to exercise its case management powers whilst giving effect to the overriding objective in Rule 2.

> 2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction

55. It is trite to say that disability discrimination is a complex area of the law, particularly for unrepresented parties. As is reflected in the preamble to the Order of Judge Brownlee of 22 March 2022, identifying the claims and issues in

a discrimination claim at an early stage of proceedings is important. The purpose and benefits of doing so include that it:

i. Enables the parties to know what claims are being pursued in the case
ii. Enables the Respondent to know what claim it has to answer and consider what defences may be available to it
iii. Informs the parties what will have to be proved (and by whom) to decide those claims (and defences)
iv. Identifies the relevant law applicable to each claim (and defence)
v. Informs the case management orders to be made
vi. Assists the parties and the Tribunal to identify what is at issue in the case and whether there are historic, minor or peripheral matters which can be pruned from the case
vii. Assists the parties to consider whether settlement can be agreed.

56. A tribunal has no power to prevent a party pursuing a properly arguable claim, even if it forms one of many similar claims. Where a claim is not properly arguable, the Tribunal has the power of strike out under Rule 8 (4)(c) and 8 (5) in respect of claims which have no reasonable prospects of success. This power was not exercised in this case and I mention it for completeness.

57. At the hearing and in exercise of their case management powers the Tribunal consolidated claims for determination, stating at paragraph 13 of the Decision: 'We explained to the parties that with the benefit of reading both parties' submissions and the written evidence, and bearing in mind that discrimination lies in the result for L rather than in acts or omissions which do not of themselves impact upon her**,** we could consolidate these nine preliminary grounds into six consolidated grounds for our determination, not all of which were obviously ongoing within six months of the claim or obviously formed part of a course of conduct together with those events which occurred within six months of the claim'

58. The Tribunal also decided that the claims should not proceed under s13 EqA (direct discrimination) (paragraph 15) but that they would be considered under s15 EqA (discrimination arising from disability) instead (paragraph 16). Thus changing the form of discrimination complaint being determined. The Tribunal explained this approach to the parties and no objections were made.

59. I do not place great weight on the fact that the unrepresented parties did not object to the Tribunal's approach at the hearing. When dealing with the complexities of the Equality Act provisions, it is not surprising that the Appellants did not fully understand the implications of consolidation.

60. Rule 2 requires the Tribunal to exercise its powers flexibly and without undue formality however unrepresented parties in particular must be enabled to participate fully in proceedings. Whilst the Tribunal has wide discretion in the way in which it manages proceedings and deals with case management, the implications of using those powers require consideration. This includes consideration of whether the changes to the claims as a consequence of consolidation impacted the ability to proceed with a fair hearing or whether, to ensure fairness and full participation, it is necessary to allow an adjournment for parties to consider their position and to prepare to deal with the claims as newly framed.

61. Consolidation had two important effects; the complaint about IEPs was no longer considered as a freestanding complaint and complaints were now to be considered under section 15 EqA, not section 13 EqA. The Appellants prepared their case on the basis that the allegation with regard to IEPs was a freestanding complaint of discrimination and this changed with very little notice. By virtue of the timing of the consolidation, neither party had prepared to address complaints brought under section 15 EqA. The issues to be determined in a section 13 EqA direct discrimination complaint are different to those to be considered under section 15 EqA.

62. It is not just the Appellants who may have faced disadvantage due to the decision to change the form of discrimination at the start of the hearing. There is no justification defence available to a claim of direct discrimination, whereas there can be in respect of a section 15 EqA claim. Had it wished to pursue such a defence, the timing of consolidation meant the Respondent was not given the opportunity to do so.

63. I am not persuaded by the Respondent's submission that the IEPs were not advanced as part of the claim to the Tribunal at all. Judge Brownlee recognised the Appellants as bringing a freestanding complaint in respect of the IEPs based on the pleadings. The claim of unfavourable treatment cites 'poor assessment documents' and in the further information of 1 February 2022 the Appellants stated 'These documents have little changes, additions etc. for the summary of concerns, positives, targets to be achieved and strategies. There are a few minor changes to the learning support only but this is not reflected in the pre-mentioned IEP subject areas which seem stagnant and repetitive'. The Appellants say this shows that their complaint was not just an allegation of falsification of documents, it was about the content of the IEPs themselves.

64. As for the argument that the Tribunal cannot be fettered by the earlier case management of another judge and is best placed to settle the claims. That may be so in an inquisitorial jurisdiction, but as stated above if the Tribunal departs from the claims and issues originally registered, consideration should be given to the implication of that decision.

65. The question I must answer is whether the Tribunal erred in law in its approach; I consider that they did. Consolidation brought fundamental changes to the claim as registered. The Tribunal has a duty to ensure effective participation, which was not ensured in the circumstances. I conclude that the Tribunal erred in law when consolidating the claim of failure to keep IEPs accurate or updated under the heading 'differentiation' and determining it would not be considered as a free standing claim of discrimination.

Merits of the claim

66. The Respondent invited me to exercise my discretion not to set aside the Tribunal Decision on the basis that there is no realistic prospect the claim will succeed and the matters date back to 2019 in circumstances where the relevant limitation period is 6 months.

67. I reject the suggestion that the delay in the Appellants raising this ground of appeal should militate against setting aside and remitting the appeal. Delay at

the permission to appeal stage contributed to delay overall. Consolidation happened without prior notice to the parties, depriving them of the opportunity to consider the legal implications. In the circumstances of the case, it would not be just to use delay as a factor in support of refusal of remission.

68. Despite persuasive advocacy by Mr Perkins, I do not consider it is clear that the claim has no realistic prospect of success. It will be for the Tribunal to decide if the Appellants' complaint was limited to their parental experience of receiving similar IEPs. The Appellants disagree and say that they were concerned about the content of IEPs. They link the 'poor assessment documents' to a slow rate of progress for L, as the IEP was the support strategy for L's teachers. The Appellants say their concerns were not extinguished by the Tribunal's finding that there was no fabrication of documents, as their concerns extend to the fact that targets and learning support strategies were not reviewed and updated.

69. Furthermore the Tribunal's own finding, at paragraph 39 of their Decision, that the Respondent's staff failed to keep IEPs updated is undisturbed. It appears to me that it is arguable that the school's admission, and prior apology, go further than an acknowledgement of a formatting issue in the IEP documents.

70. Finally the Tribunal's self-direction that 'discrimination lies in the result' at paragraph 39 appears to relate to section 20 and 21 EqA and their finding that the Respondent made all reasonable adjustments for L in respect of differentiation of work. The direction does not appear to encompass the different test under s 15 EqA or the meaning of 'unfavourable treatment' in this context.

71. In summary, I am not persuaded by the argument that the claim is doomed to fail; although it is not a foregone conclusion that it will succeed. I cannot take that decision as it requires consideration of the evidence and giving both parties the opportunity to prepare for a hearing considering discrimination under section 15 EqA. The Tribunal is best placed to determine these points.

Disposal

72. The case will be remitted to the Tribunal to consider the section 15 EqA claim of failure to maintain accurate or updated IEPs.

73. Although the Appellants sought a differently constituted Tribunal to determine the complaint, I can see no reason why the same Tribunal could not deal with this fairly. The Tribunal have had the advantage of hearing the evidence generally and have never considered the claim as now remitted, so can come to it fresh. I therefore remit the case to the same Tribunal.

74. The Appellants should note that the scope of the remittal is limited to the complaint about IEPs only. This is not an opportunity to reopen matters that have been determined already; where permission to appeal has not been granted; nor is it the opportunity to raise any new matters.

S Davies
Judge of the Upper Tribunal
Authorised for issue on 23 May 2024