THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

BB v LONDON BOROUGH OF BARNET
[2019] UKUT 285 (AAC)
UPPER TRIBUNAL CASE NO: HS/1402/2019

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber):

Reference: EH302/18/00050
Decision date: 26 April 2019

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and is not set aside under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This case concerns the Education, Health and Care plan for Alyssa who was born in 2008. It comes before the Upper Tribunal on appeal with permission of the First-tier Tribunal. Upper Tribunal Judge Ward directed an urgent oral hearing, which took place before me on 4 September 2019. Mr Friel of counsel appeared for Alyssa's father and Mr Greatorex appeared for the local authority. I am grateful to both counsel for their submissions.

A. What happened after the hearing

2. It is standard practice for the parties to produce a working document, showing what the plan contains and how the parties would like it changed. The code is for the parents' wishes to be in bold and the local authority's in italics (with strike through to indicate a deletion in each case). Agreements are shown by underlining. It is not unusual for agreements to be reached during a hearing.

The number of unresolved issues

3. After the hearing on 21 March 2019, the parties gave to the tribunal a copy of the working document showing what was agreed and what was still in dispute

at that stage. I was told that this was not standard practice. Standard or not, this is a good practice, which ensures that the parties have made clear for the tribunal what remains to be decided.

4. Mr Greatorex told me that the document submitted to the tribunal identified 55 points of dispute, 17 in Section B and 38 in Section F. I haven't checked the figures and am content to take him at his word. He wrote in his skeleton argument:

> Such a high number is not uncommon but is extremely unsatisfactory because it prevents the parties and the tribunal from spending their limited time at the hearing on the small number of key disputes that actually matter to the parties. This may be something the Upper Tribunal wishes to express a view about.

5. I will say something, but I doubt whether it will make much difference in most cases. It is obviously desirable that the First-tier Tribunal should spend its time as efficiently as it can. One way that that can be achieved is for the parties to co-operate with the tribunal, as they are required to do by rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699), by reaching whatever agreements are appropriate at as early a stage as possible. The increasing use of caseworkers in the tribunal may allow active case management to encourage early agreement and discourage the natural tendency to leave things to the door of the court or beyond. The fewer the issues, the more time the tribunal can devote to them, and the better its decision will be for the child, who is after all the one who matters. Beyond that, it is impossible to generalise. There are, no doubt, some cases in which the parties, for the best of motives, are unable to agree on a large number of important issues. Just as there are other cases in which the motives may not be the best. It is not always easy in practice to distinguish the former from the latter. There are case management processes that can be used for the latter, but my experience has been that they can take a disproportionate time; the best approach is often to get on and hear and decide the case.

The formatting of the tribunal's decision

6. Having considered the case, the tribunal made a decision on 26 April 2019, which it issued with a new version of the working document. It ordered that the plan be altered by replacing the existing text with the amendments set out in the working document. I have checked with the tribunal to ensure that I have the original document as issued by the tribunal to the parties. If the judge had removed the bold, italic and underlining, leaving the text in plain font, there would have been no problem. But the judge did not do that. Instead, the document as issued retained the formatting as presented to the tribunal after the hearing. This led the local authority to treat the passages in bold as merely proposals by the parents and not as amendments accepted by the tribunal. It issued a copy of the plan with them removed, which in turn led Mr Friel to draft his grounds of appeal on the basis that the tribunal had failed to deal with a

number of issues. It was only when Mr Greatorex made his response to the appeal that this came to light.

7. I do not know whether the judge's approach to the format of the working document is standard practice. It was, to say the least, unfortunate. If it could confuse counsel of Mr Friel's experience, it is not helpful. Having said that, the local authority should have checked with the tribunal before removing wording from a document that was annexed to its decision. I am satisfied that the tribunal intended the document as issued to represent its final decision, regardless of formatting. As Mr Greatorex pointed out, the tribunal had removed some of the parents' proposals, so those that were left can fairly be taken as having been accepted by the tribunal.

B. Taking account of Alyssa's views

8. Section 19 of the Children and Families Act 2014 provides:

> **19 Local authority functions: supporting and involving children and young people**
>
> In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
>
> (a) the views, wishes and feelings of the child and his or her parent, or the young person;
>
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
>
> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
>
> (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

The Upper Tribunal has decided that this section applies at the appeal stage (*S v Worcestershire County Council* [2017] UKUT 92 (AAC)) despite there being no legislative provision to that effect (*M and M v West Sussex County Council* [2018] UKUT 347 (AAC)). However, this does not mean that a tribunal's decision will necessarily be set aside for failing to comply with this duty (*M and M* at [58]). The Upper Tribunal may decide not to set the decision aside either because the error was not material or in exercise of its power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. As Mr Friel acknowledged, a child's views will not normally be decisive, although they could be.

9. In this case, there was no evidence of her views from Alyssa herself. There was, however, evidence from her mother writing, as she explained, with the

experience of seeing her daughter's reactions in different situations. It is realistic to treat that as evidence of Alyssa's views, even if they are obtained second-hand and by inference. The evidence shows that Alyssa's views coincided with that of her parents. I would go further and say that the parents' views were formed, in part at least, on account of Alyssa's views as they understood them to be. The tribunal's failure to deal with this is not a failure that would justify setting aside the tribunal's decision.

10. I agree with the suggestion by Upper Tribunal Judge Mitchell that tribunals should, as a matter of routine, deal with the child's views in their reasons (*M and M* at [59]), perhaps by having a standard heading in the template for decisions.

C. Specialist knowledge and experience

11. This issue arises from the tribunal's decision and reasoning on occupational therapy. The tribunal reasons explain how it made its decision on this issue:

> 56. The OT proposed by Ms Eriksen [on behalf of Alyssa] was again substantial at 45 minutes direct OT per week by an outside therapist. The tribunal felt that this was excessive even for the most severe special educational needs, the tribunal would expect OT to be integrated to enable practice and generalisation of skills.
>
> 57. Whilst the LA had unfortunately not provided an OT assessment using its expertise the Tribunal felt that given Alyssa's needs a more appropriate model would be for a termly 45 minute visit by an OT who will provide a programme that will be integrated and developed by a TA.
>
> 58. Alyssa needs to practice all of these skills in everyday situations to enable this they need to be embedded in the curriculum so to seem meaningful to Alyssa and to allow for the impact of her ADHD i.e. a little and often approach.
>
> 59. The Tribunal was concerned about the high level of therapy being suggested for a child with a profile of Alyssa's and the requirement that the therapists needed to be onsite to deliver this, it appeared to the tribunal that the therapy requirement was being made to be placement specific.

12. Those paragraphs are a model of clarity on how the tribunal made use of its expertise in assessing the evidence of the parties and deciding on the what the plan should contain.

13. Mr Friel criticised the tribunal for using its expertise without putting its thinking to the parties and to the experts, and for failing to make findings on Alyssa's needs. He also criticised the tribunal for failing to be sufficiently specific about what was required. Mr Greatorex argued that it was clear to the parties that the matter was in issue and that there was no evidence from the local authority. The tribunal had been entitled to use its expertise.

Use of expertise

14. It is a feature of tribunals that they have limited jurisdiction. This allows for the judges and members to specialise. Section 2(3)(c) of the Tribunals, Courts and Enforcement Act 2007 provides:

> (3) A holder of the office of Senior President of Tribunals must, in carrying out the functions of that office, have regard to-
>
> (c) the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters; ...

This is carried through into the tribunal's rules of procedure, which impose as part of the overriding objective in rule 2:

> (2) Dealing with a case fairly and justly includes-
>
> (d) using any special expertise of the Tribunal effectively; …

This has long been recognised as a feature of the way that tribunals work. These provisions merely give it statutory form and embed it in the structure of tribunals and their operation.

15. It would be contrary to the overriding objective for a tribunal to use its special expertise in a way that was inconsistent with dealing with a case fairly and justly. Which is just another way of saying the parties are entitled to a fair hearing, a common law requirement that is now subsumed, at least in part, by rule 2.

16. The ways in which a tribunal may use its expertise are various, and the circumstances in which they may do so are subject to (possibly infinite) variation. And it is always relevant and necessary for the Upper Tribunal to consider whether what happened affected the outcome of the case: see the emphasis on materiality in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [10] and the approach of the Court of Appeal in *Richardson v Solihull Metropolitan Borough Council and the Special Educational Needs Tribunal* [1998] ELR 319 at 342-343 (Beldam LJ) and 343-344 (Peter Gibson LJ). That makes it difficult to establish precise rules. And this, in turn, affects the way that it is appropriate to rely on earlier decisions. They can properly be relied on for statements of principle. It is wise, though, not to elevate what is really no more than the application of a general principle into a sub-principle or rule. And it is dangerous to reason by comparison from case to case when so much can depend on the particular combination of circumstances and their context, and on their impact on the outcome of the case.

17. I have made the point about the use of authority in order to deal with one of Mr Friel's argument. He referred to *M v Worcestershire County Council and Evans* [2003] ELR 31 in which Lawrence Collins J found no fault with a tribunal that had used its expertise. Mr Friel sought to distinguish that case on the ground that the tribunal had been presented with a choice of provision in that case, whereas in this case it had not. I do not accept that argument or that approach to the authority. The distinction does not figure in the judge's reasoning

and, applying the touchstone of principle, it is not appropriate. The issue is the fairness of the proceeding, not the particular context or the way in which fairness was said to be compromised. Whether the tribunal had a choice or not may be relevant, but it does justify two categories of case or even of outcome.

18. Fairness depends on the context. In this case, the local authority had not put forward any evidence on occupational therapy. It was clear that the tribunal would have to make a decision on the limited evidence available, with the benefit of its expertise. The duty of fairness does not solely rest on the tribunal. The parties are under a duty to cooperate under rule 2 of the rules of procedure, and that duty applies to their representatives as well (*Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [37]). That meant that the parties should have provided evidence, if they wished to do so, and assisted the tribunal by inviting the members to put their ideas to the parties and the witnesses. They should not sit back and then criticise the tribunal for not doing what they could have prevented. I am not saying that this absolved the tribunal from its duty of fairness, only that the parties were required to assist the panel.

19. The difficulty for a tribunal is how to allow the parties to comment effectively on the case before it has fully deliberated on the case and made its findings of fact. How can the parties effectively comment without knowing what the members are thinking? What should the tribunal do if something new occurs to the members after the hearing? That depends on what it is that arises. It may be an entirely new issue or basis for decision that no one contemplated during the hearing. In that case, fairness will require the tribunal to put it to the parties (*Richardson* at 332 (Beldam LJ)). In other cases where the tribunal's thinking has been effectively, albeit not perhaps directly addressed, putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. The tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing and that further reference back to the parties is not necessary unless something new arises that has not been fairly covered. The tribunal is entitled to expect the representatives to anticipate the likely range of options that the tribunal will consider and present their case accordingly.

20. In view of the nature of the issue in this case, the way that it arose and the way the hearing was conducted, I am satisfied that there was no unfairness in the way the tribunal used its expertise.

Necessary findings

21. I consider that the tribunal did make sufficient findings on Alyssa's needs that led to the occupational therapy provision. The content of the special educational provision for sensory and physical set out in Section F contained the therapy that the occupational therapist would devise and that provision related back to the special educational needs in respect of sensory and physical in Section B.

Specific provision

22. Mr Friel emphasised the importance that the plan be as specific as possible. He cited Laws J in *L v Clarke and Somerset County Council* [1998] ELR 129 at 137:

> The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done.

And the first sentence of that paragraph was approved by the Court of Appeal in *Bromley London Borough Council v Special Educational Needs Tribunal* [1999] 3 All ER 587 at 597. But notice that the whole paragraph is carefully worded to depend on what is appropriate in the particular: *so* specific, *so* clear, necessary in the *individual case*, and *Very often*. Indeed, the passage follows shortly on Laws J's comment at 136:

> In my judgment a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement. One can appreciate the force of the comment in the guidance. There will be some cases where flexibility should be retained.

23. In distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision that is appropriate for a child. The plan has to provide not just for the moment it is made but for the future as well. Indeed, in this case the plan was only intended to apply when Alyssa changed schools a few months later. It is likely that the provision that is required will vary according to the child's needs at a later date. If absolute precision was required, it could only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what was now required, with possible appeals, could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. That cannot be right. A plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. The tribunal was entitled to use their expertise to decide on the proper balance between precision and flexibility. I am satisfied that that it what it did in this case.

A final word

24. I cannot end this section better than by quoting what Collins J said in *Secretary of State for Children, Schools and Families v Philliskirk* [2009] ELR 68 at [30]: 'that is what the Tribunal is there for - to form its own judgment'.

D. Speech and language therapy

25. Mr Friel's grounds of appeal criticised the tribunal for its provision on speech and language therapy, essentially for lacking specific detail. Mr Greatorex's response on paper and at the hearing was that the provision included in the plan was substantially what the parties had agreed. In support of that, he took me through the relevant parts of the version of the working document as submitted to the tribunal after the hearing and compared them with the version approved by the tribunal. I accept that argument and will not burden this decision with the details of each criticism. I have already made the point that a plan has to be flexible to allow the professionals to do what is appropriate at any particular time and that too much precision can be counter-productive. I accept Mr Greatorex's argument that it was sufficient to say what must happen; the local authority is now under a duty to ensure that it does.

26. It is very difficult to sustain an argument that provision was not sufficiently specific when it was what the parents had asked the tribunal to order and the local authority had accepted it, both of whom were represented at the hearing before the tribunal. That is not to say that it is impossible, but it is very difficult. Despite all the points that Mr Friel has made, I consider that the tribunal's order, essentially by consent, coupled with the local authority's duty to implement it, was sufficiently precise.

E. Teaching Assistant support

27. The tribunal referred to Alyssa having '25 hour TA support', but did not include this in her plan. Mr Friel criticised the tribunal for failing to order this provision. Mr Greatorex replied that it had never been sought, but the local authority would have agreed that it be added and would be prepared to revise the plan as ordered by the tribunal in order to include it. In those circumstances, even if the tribunal did make an error of law, it is not one that would justify me setting aside the tribunal's decision. Any error that was made can and will be remedied for the asking.

F. Other issues

28. Any other issues were either withdrawn by Mr Friel at the hearing or are subsumed by the reasoning I have given.

Signed on original
on 16 September 2019

Edward Jacobs
Upper Tribunal Judge