IN THE UPPER TRIBUNAL **Appeal No.** HS/1170/2019

ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Appellants: RD and GD

Respondents: The Proprietor of Horizon Primary ('Responsible Body')

DIRECTIONS

I direct that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

DECISION

This decision of the First-tier Tribunal **IS NOT SET ASIDE.** Although the decision of the First-tier Tribunal involved the making of errors of law, the Upper Tribunal exercises its power NOT to remake the decision, under section 12(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

1. The Appellants in this case are Mr and Mrs D, the parents of a child I will refer to as X. Mr D, who is a layman, represented them in person. I shall refer to them as the Appellants and to their son as X.

2. The Respondents are the responsible body of the Academy attended by X at the relevant time. They were represented by Mr Russell Holland, of counsel, instructed by Anthony Collins Solicitors LLP. The hearing took place at the Rolls

Building on 24 January 2020. Mr D and Mr Holland attended, as did Mr Grainger, a solicitor from Anthony Collins Solicitors LLP. A Ms Harrison was also present.

3. It should be mentioned at the outset that Mr Holland accepted the inquisitorial role of the Upper Tribunal with grace, assisting me impartially with difficult matters that would not be apparent to Mr D but which might assist his case.

4. The Appellants claimed that the Respondent Responsible Body of the Academy (which I shall collectively call 'the School') had discriminated against X, on the ground of his disability. There was no dispute that X was disabled within the meaning of the Equality Act 2010.

5. The Appellants claimed under section 85(2), section 15 (discrimination arising as a consequence of unfavourable treatment) and section 20 - 21 (discrimination caused by failure to make reasonable adjustments). The grounds of appeal that I admitted were these:

   (i) The Tribunal limited the period of the asserted discriminatory behaviour to the 6 month period from 1 February 2018 – down to the date X was removed from School by the Appellants at the end of November 2018 for a holiday, without permission. The Tribunal thereby excluded the claimed period of 17 July 2017 **–** 1 February 2018. Did it err in law, having regard to its power to extend time for claiming under Schedule 17, paragraphs 4(3) and 4(5)(b). Would the result have been different if the F-tT had included the earlier period? [1]

   (ii) Did the Tribunal err in law in failing to recognise that, for the purposes of s. 15, a consequence could have more than one cause, and in failing to identify a second operative cause of the asserted discrimination?

   (iii) Did the Tribunal err in law in respect of the duty under s.21 by failing to establish a basis sufficient in law for it under s. 20? The Appellants did not raise this issue and it is potentially against their interest. The Upper Tribunal has jurisdiction, however, to raise points under its inquisitorial powers whether raised by the parties or not.

[1] There is a slip in my directions on the period applicable to the Appellants' claim. It should have read that the relevant period ran from 2 February 2018, the claim having been made 6 months later. The question for the Upper Tribunal was whether it was correct to *exclude* the previous period of 17 July 2017 – 1 February 2018.

6. References to pages in the First-tier Tribunal bundle are noted by 'FtTpx'. References to pages in the Upper Tribunal bundle are given as 'UTpx'. I shall refer to the tribunal that heard the appeal as 'the Tribunal'.

7. I rejected the Appellants' ground that X suffered discrimination because he was unable to have free school lunches whilst on a part-time timetable. This was not pursued at the hearing.

8. The Appellants made a number of submissions refuting the reasons for refusing permission to appeal to the UT by a First-tier Tribunal Judge. The refusal of permission to appeal is not the decision under appeal and I do not deal with it further.

9. The Upper Tribunal has jurisdiction over errors of law. A First-tier Tribunal is responsible for findings the facts of an appeal to it. The Upper Tribunal is bound by their findings unless they are irrational, perverse, or fundamentally flawed in a way that undermines its reasoning. I do not consider that the matters that the Appellants raise as errors of fact come near to establishing an error of fact, let alone one that undermines the Decision. The Appellants' view that certain findings are factually incorrect are not are not borne out by the evidence. For example, it is clear from the evidence in the bundle that the School initiated a request for an assessment by the LA shortly after X arrived at the School; that it made it clear (despite some initial misunderstanding by the Appellants) that it could not provide a home tutor from their existing funding, but that it would, try to provide a teaching assistant (TA) and it was prepared in the interim for their SENCO to provide 1:1 teaching for X on her free afternoons. The Appellants *rejected* these. They did not consider the SENCO, let alone a TA, to be sufficiently qualified. The evidence indicates that in March 2018, the *LA* gave the parents the option of home tuition or remaining at the School until a specialist placement could be found; that the School continued its efforts to find a way of reintegrating X into full-time Schooling (§26 - 29 of the Decision) and that the search for a tutor foundered owing to a lack of funding for the teacher preferred by the Appellants, not for any lack of diligence by the School.

10. There were other matters relating to the nature of legitimate aim, proportionality, and reasonable adjustments which arose in the course of the Upper Tribunal hearing. Mr Holland was able to respond to on the day. I consider that it fair to deal with these in this decision.

11. It will also be necessary to deal in due course with *F-T v The Governors of Hampton Dene Primary School* [2016] UKUT 468 on which Mr D relied. I do not consider that it provides assistance: (i) the decision can be distinguished; and (ii) I disagree with its reasoning in certain important respects.

12. It is most unfortunate that X's School was not kept aware of developments in the satellite litigation or given any real assistance by the LA.

The Legislation

Equality Act 2010

85 Pupils: admission and treatment, etc.

(1)The responsible body of a School to which this section applies must not discriminate against a person—

(a)in the arrangements it makes for deciding who is offered admission as a pupil;
(b)as to the terms on which it offers to admit the person as a pupil;
(c)by not admitting the person as a pupil.

(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.

(3) – (6) not applicable

(7)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).

(8) not applicable

(9)The responsible body of a School to which this section applies is—

(a)if the School is within subsection (7)(a), the local authority or governing body;
(b)if it is within subsection (7)(b) (ba) or (c), the proprietor;
(c)if it is within subsection (8)(a), the education authority;
(d)if it is within subsection (8)(b), the proprietor;
(e)if it is within subsection (8)(c), the managers.

(10) …

15 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.

20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) – (6) not applicable

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) – (12) not applicable

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column

21 Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 13 – reasonable adjustments (this modifies s. 20)

2(1)This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part.

The duty for Schools

2(1)This paragraph applies where A is the responsible body of a School to which section 85 applies.

(2)A must comply with the first and third requirements.

(3)For the purposes of this paragraph—

(a)the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

(b)the reference in section 20(3) or (5) to a disabled person is—

(i)in relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;

(ii)in relation to a relevant matter within sub-paragraph (4)(b), a reference to disabled pupils generally.

(4)In relation to each requirement, the relevant matters are—

(a)deciding who is offered admission as a pupil;
(b)provision of education or access to a benefit, facility or service.

Schedule 17 – time limits

4(1)Proceedings on a claim **may** not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred.

(2). . . . . .

(2A) not applicable

(3)The Tribunal may consider a claim which is out of time.

(4)Sub-paragraph (3) does not apply if the Tribunal has previously decided under that sub-paragraph not to consider a claim.

(5)For the purposes of sub-paragraph (1)—

(a) not applicable

(b)conduct extending over a period is to be treated as occurring at the end of the period;

(c)failure to do something is to be treated as occurring when the person in question decided on it.

(6)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P acts inconsistently with doing it, or
(b)if P does not act inconsistently, on the expiry of the period in which P might reasonably have been expected to do it.

Children and Families Act 2014

42 Duty to secure special educational provision and health care provision in accordance with EHC Plan

(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2)The local authority must secure the specified special educational provision for the child or young person.

(3) – (5) not applicable

(6) “Specified”, in relation to an EHC plan, means specified in the plan.

66 Using best endeavours to secure special educational provision

(1) This section imposes duties on the appropriate authorities for the following Schools and other institutions in England—
(a)mainstream Schools;
(b)maintained nursery Schools;
(c)16 to 19 Academies;
(d)alternative provision Academies;
(e)institutions within the further education sector;
(f)pupil referral units.

(2) If a registered pupil or a student at a School or other institution has special educational needs, the appropriate authority must, in exercising its functions in relation to the School or other institution, use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made.

(3) The "appropriate authority" for a School or other institution is—

(a)in the case of a maintained School, maintained nursery School or institution within the further education sector, the governing body;
(b)in the case of an Academy, the proprietor;
(c)in the case of a pupil referral unit, the management committee

The background chronology.

13. X (born 7 December 2010) is an autistic child with significant special educational needs and behavioural problems. He began attending the School in January 2017. The School asked the LA to transfer the high needs funding given to X's previous school for him, but the LA said this was not possible. The School therefore made a fresh application for high needs funding to the LA. As early as 23 January 2017, it was making adjustments to meet X's needs (p14). By 29 June 2017, the School and the Appellants were discussing the possibility of X attending school on a part-time basis (p22). The Appellants were concerned about this unless extra tuition could be provided at home (fttp22). The School could *not* provide a tutor but offered to send a trained ASD *teaching assistant* (TA) to their home for an hour twice a week (fttp23). X's behaviour continued to deteriorate. The School informed the Appellants that detention no longer seemed to effect any change in X's behaviour. Then, following a physical assault on another child and his persistent disruptive behaviour, X was excluded from School on 4 July 2017 for ½ day. From 17 July 2017 he was placed on a part-time curriculum. The appellants drew to the School's attention the DofE School Attendance Guidance for Maintained Schools, Academies etc, November 2016) 'Guidance on part-time timetabling for children' reminding the School that it should have a fixed end date and the part-time timetable should not be treated as a long term solution (fttp36). The Appellants were soon concerned about the lawfulness of keeping X on a part-time timetable and brought it to the School's attention. It is notable that, by this stage, there was very little left to the School term.

14. At fttp37, the Appellants wrote to the LA inclusion and attendance lead with concerns about the part-time timetable, concerns about possible further

exclusions and the impact of the Equality Act 2010 on the power to exclude pupils who, inter alia, were disabled.

15. Early in the Autumn term 2017, the School was in the process of requesting an assessment of X's special educational needs (fttp38, 41). They were also hoping to increase X's attendance hours from 18 September, and then again to 12pm in late September. The Appellants' attempted to obtain further information about the time limit on the part time timetable around the same time (fttp44). The School wrote to the Appellants in October to dispute their views on the legal requirements of part time timetables (fttp46, 47) and to make it clear that they were not threatening X with further exclusions for bad behaviour but explaining that if a child's behaviour continued to warrant it, whether due to SEN or otherwise, the likelihood of exclusion could be seen as increasing (fttp46). Notes regarding X's behaviour (fttp48) indicated that his behaviour continued to be poor even during X's short hours at School. He was, for example, repeatedly stabbing a little girl with a pencil. These notes were before the Tribunal. The School suggested some further changes to try to ameliorate X's problems. The possibility of moving X to some full-time days in the winter terms was mooted in October 2017 (fttp48). By the end of October 2017, the School received notice that the LA decided to carry out a statutory assessment of X to ascertain whether he might need an EHC plan.

16. In a review on 21 November 2017, 'mum and the School 'are recorded as being 'in agreement that full days is [sic] too difficult for him at the moment' due to his behavioural problems as recorded in his behaviour book (fttp51). At the beginning of the winter term, the School continued to make adjustments to X's day to help him (fttp52).

17. The LA provided a copy of the proposed EHC plan in January 2018. The Appellants were unhappy with the provision to be made and the setting suggested by the LA, which was, I believe, a mainstream School with a special unit.

18. I pause here to note that the LA, and not the School, is responsible for the EHC plan, not the School. The appropriate authority of a school (in this case, the proprietor) does, however, have a duty under s. 66(2) of the Children and Families Act 2014 to use its best endeavours to ensure that the special educational provision called for by the pupil's special educational needs is made. It is not an absolute duty and it arises under a regime separate from the Equality Act 2010 and remediable by judicial review.

19. The School would not have been privy to the content of the EHC plan until it was issued.

20. The Appellants issued judicial review proceedings against the Local Authority regarding X's Education Health and Care Plan (EHC plan). The LA then agreed in February 2018 that X should attend a special school, though no school was identified at that stage (fttp270). My understanding from Mr D is that, after considerable wrangling with the LA and instituting the judicial review proceedings, the LA agreed at the 11th hour to the parental choice.

Unfortunately, the new school could not give X a place for several months which meant he would have to remain at his current School for while longer.

21. In late November, the Appellants took X out of School without its permission in order to take him on holiday.

22. The Appellants have, at times, treated the differing regimes of disability discrimination and special educational needs as if they were one and the same. Such confusion arises, understandably, because factors that arise under the Children and Families Act 2014 in respect of special educational needs and provision may be relevant factors in deciding questions of proportionality, legitimate aim and reasonable adjustments under the Equality Act 2010.

The grounds of appeal

23. **Appeal ground (i) the time limit issue** - The Appellants made their disability discrimination claim on 1 August 2018. The question, pared down to its essence, is whether it erred in excluding the period of 17 July 2017 to 1 February 2018 because that period was more than 6 months before the date the appeal was lodged.

24. To consider this issue properly, we must go back to the telephone case management directions (undated - ftt[394ff). These purport to settle the grounds for which an appeal is admitted (registered) and give case management directions. The Directions that are issues also contain analysis of issues to help the parties.

25. The registration process appears is not found in the Tribunals, Courts and Enforcement Act 2007 or the First-tier Tribunal Rules It appears to be an emanation of the case management power of the Tribunal to regulate its own procedure under rule 5 of those Rules. It is understandable that the Chamber should have a system to register appeals and assist the parties to focus their minds at an early stage on the requirements of a valid claim in the notoriously difficult area of disability discrimination under the Equality Act 2010. The downside is that the registration procedure is opaque.

26. In *F v The Responsible Body for W School* [2020] UKUT 112 (AAC), Upper Tribunal Judge Ward held that a decision refusing registration of a particular aspect of the Appellant's case was unlawful, as was the decision of a second First-tier Tribunal judge purporting to uphold it. The decision to refuse registration of part of the appellant's case was made without affording the appellant's representative any opportunity to make submissions. Judge Ward was as concerned in that case as I am in this one about an obvious lack of fairness in the way the 'directions judge' made his decision. In *F,* however, the

Appellant was fortunate enough to have a solicitor acting for him and the solicitor took on the rogue decisions first by applying for a variation and then by appealing them.

27. The gist of the problem in this appeal is that the disability discrimination claim made in August 2018 covered a period from 17 July 2017 to the date X left the School at the end of November 2018. If the 6 month rule applied, the earlier part of the period (before February 2018) was time barred. Following a telephone[2] case management hearing, the Directions Judge took the view at [6] of the Directions (fttp395, undated) that 'a claim for discrimination **must** be made within 6 months of the discrimination complained of (Schedule 17, Equality Act 2010).' In his view, there were no ifs, ands or buts about this and he accordingly refused to register any part of the appeal arising before 2 February 2018.

28. The general rule under paragraph 4(1) of Schedule 17 of the Equality Act 2010 is that the proceedings on a claim *may* not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred (italics added). However, paragraph 4(5)(b) states that conduct extending over a period is to be treated as occurring at the end of the period. This effectively moves the start date to the end of the period over which the conduct occurred. A course of continuing conduct is not defined in the Equality Act 2010. In addition to this provision, paragraph (3) states that a Tribunal *may* consider a claim which is out of time.

29. The first decision the Tribunal has to make at this stage is whether the conduct complained of extended over a period. If the Tribunal decides that it did not, the Tribunal *may* in any event consider a late claim even where time has expired under paragraph 4(3)). It is plainly not correct, therefore, to state a claim *must* be brought within 6 months. The legislation does not sound an automatic death knell.

30. If a judge is given a discretion, s/he must exercise it (i) consciously and (ii) judicially. There are many cases on this point, but the principle is set out succinctly by Upper Tribunal Judge Markus in *T J v Secretary of State for Work and Pensions (ESA)* [2014 UKUT 445 (AAC) at [13]:

> 'As the Tribunal of Commissioners said in *R(IB) 2/04* at paragraph 94, there must be a conscious exercise of a statutory discretion of the tribunal, and (if a statement of reasons is requested) reasons should be given as to why it was exercised in the manner it was. This was said in relation to a different discretion but the principle is of general application: see *Stovin v Wise* [1991] AC 923 at 950B'

31. Since the Appellants was complaining about the part-time timetable very soon after it was imposed, it was plainly a live issue for the directions judge.

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[2] Mr D confirmed to me that the directions hearing was by telephone.

32. It is helpful here to expand on the F-tT's procedural powers to regulate its own proceedings under rule 5 of the First Tier Tribunal Rules (HESC). Under rule 5(3)(e), it can hold a preliminary hearing. A preliminary hearing is usually on a legal point which, when decided, will dispose of part (and sometimes all) of a case. As a matter of natural justice, the parties are entitled to make submissions on the point in issue. Tribunals may hold directions hearings, and a Disability Discrimination Tribunal can also hold a registration hearing, presumably under its general powers.

33. There is nothing in the First-tier Tribunal Rules to say that a Tribunal cannot combine a case management directions hearing (which tells the parties who should do what and when) with a registration hearing (to clarify the issues) and a preliminary hearing (which may dispose of a legal point). What is essential is that the directions judge keeps firmly in mind the fairness requirements for the different functions. It is one thing to tell a party to do thus-and-such by this-or-that date. It is entirely another to decide a disputed legal point on which all or part of an appeal may hang without affording the parties a fair opportunity of making submissions on the matter. That is what happened here.

34. If the Directions Judge wished to take the time limit point as part of the registration process/case management hearing, the first port of call should have been to ask for submissions on the issue. The judge should then have decided whether this conduct extended over a period and if so, from when. If he ruled against the Appellants, he should have made clear what they could do about it, since it appeared to be more than a simple 'direction' that they could apply to vary. The judge could also have expressed a view but left it for the Tribunal at the substantive hearing.

35. The Directions Judge appeared, however, either to be unaware of paragraph 4(5)(b) or to have ignored it. Had he considered the relevant provisions, he might have accepted a more extensive period as having been made in time. But he did not advert to this provision.

36. In addition, even if the Directions Judge found that it was *not* continuing conduct, he then had statutory discretion to consider whether it was in the interests of justice to extend the time limit to cover the much longer period claimed by the Appellants. Nothing in the case management directions indicates that, in making his ruling, the Directions Judge adverted to paragraph 4(3). He obviously considered himself bound by a mandatory cut off (fttp394), so it is not surprising that he did not explain the matter further. In doing so, he disposed of part of the case.

37. On the face of it, these are errors of law of more than one dimension. On top of stating the law incorrectly, the judge overlooked provisions clearly relevant to the case and as a consequence failed to give any or any adequate reasons on the matter. He also failed to give the Appellant an opportunity to address him on this disputed point which led to breach of natural justice and the Appellant's right to a fair hearing..

38. I have considered whether the introductory comments at the beginning of the standard case management template could be seen to absolve the Directions Judge of error or shift the blame to the Appellant. The formal introductory matter, printed in the document in italics, states at paragraph of fttp394:

> 'the judge's analysis provides assistance to the parties in preparing for the hearing, so that they are aware of what **the issues are which the Tribunal must decide** … If you disagree with any of the **directions** below, you must apply for a variation…' [emphasis added]

39. It is difficult to see how the Directions Judge's conclusion, expressed as an absolute time limit and, in effect, striking out a large part of the Appellant's case (without reference to the rules on striking out in rule 8 of the First Tier Tribunal Rules (HESC) can be viewed merely as 'helpful analysis' or a direction that a party can seek to vary. It is a conclusory statement of law with no explanation of any attendant rights to pursue the ruling on appeal.

40. The next question is whether this error carries over to the F-tT at the substantive hearing. Mr Holland's response to the ruling on the period in questions was that it was for the Appellants to object to that case management decision at that stage. There was no duty on the F-tT when determining an appeal at hearing to re-open and re-assess determinations already made that the earlier stage. He suggested that, while the later F-tT was not bound by the ruling, it should not open it of its own initiative (UT bundle, submission of 20 January 2020, not paginated).

41. If the case management hearing had been no more than a straightforward directions hearing, it would be very difficult to see why it should be re-opened, given that the introductory matter explained what the parties could do if they disagreed. But it was not simply a case management directions hearing. It was a registration hearing and, in effect, a hearing on a preliminary point without giving anyone the opportunity to make submissions. The flaws in these proceedings are manifest. I respectfully agree with Judge Ward's views on the shortcomings of the registration process and with the brief, cautious guidance he gave in *F v The Responsible Body of W School* at paragraph [47]: The F-tT

    a. may provide indicative guidance as to the judge's views of the issue in a case;
    b. should operate the strike-out provision in the HESC Rules in accordance with the terms; and
    c. should operate according to defined principles, and with appropriate procedural safeguards, a registration system which may have the effect of screening out some cases, or parts of them…:

42. Did the error in the Directions hearing carry over to the substantive appeal? The information available to me at [4] of the Decision that:

> 'the parties agreed that the relevant period was from 2 February 2019, which is 6 months before the claim was made. Whilst X had been on a part-time

> table [sic] before that, at that date the statutory assessment had been completed and the EHC plan issued, which changed the provision available'

43. There at two difficulties with this paragraph. The first is with the words 'the parties agreed'. The Appellants all along case appeared to have been that the School discriminated against X since July 17, 2017, when he was placed on a part-time timetable. The change of tack was puzzling and, in the absence of any explanation, may have led me to consider whether there was any substance to the agreement. However the Tribunal went on in paragraphs [5] and [6] to provide a rational explanation for its finding that the Appellant agreed that the period of claim was limited to the period from 2 February 2018: the Appellants had already had an apology from the School and the School had made changes in accordance with the recommendations of a stage 4 complaint report. The parties had obtained what they wished from the School regarding the previous period.

44. In these circumstances, I have come to the conclusion that the Appellants did, indeed, agree to the claim running from 2 February 2018. The effect of my decision on this matter is that the F-tT was entitled to exclude the period in the claim prior to 2 February 2018. The Tribunal gave different reasons from those of the directions judge, but it was entitled to make the decision it gave for the reasons it gave. There was no error of law.

45. **Appeal Ground 2**: **Dual Consequences** - Did the Tribunal err in law in failing to recognise that, for the purposes of s. 15, a consequence could have more than one cause, and by failing to identify a second operative cause of the asserted discrimination?

46. Discrimination under this section occurs (a) where a person (A) treats the disabled person (B) unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is proportionate way of achieving a legitimate aim.

47. The Appellants case is that the School unlawfully deprived X of access to a full-time curriculum, wrongly kept him on a part-time curriculum, failed to make sufficient adjustments for X, for example by providing him with home tutoring and a team of specialists for his special educational needs, or take steps to provide for his special educational needs following the issue of the EHC plan. They attribute this to X's disability and behaviour problems arising from it.

48. The Appellants generally describe the School's fault under s15 as failing to make reasonable adjustments. While that term is properly used to describe the duties arising under sections 20 and 21, a failure to make reasonable adjustments and the question of proportionate treatment may overlap so that the arguments on reasonable adjustments may be relevant in considering proportionality under section 15. The Tribunal took the same view.

49. The School's case is that the part-time timetable for X was not a consequence of X's disability but arose as a consequence of the LA's failure to fulfil their statutory duties. They further submitted that, if the treatment was unfavourable, it was a proportionate means of achieving a legitimate aim. These were to ensure the health and safety of pupils and staff, maintain academic and behaviour standards, and ensure the well-being and dignity of pupils.

50. The paragraph numbers go awry after paragraph [38] of the Decision, so from here on I will give a UT page number and the paragraph number as it stands on that page.

51. The Tribunal flagged up the following evidence.

    a. LA offered the Appellants the alternative of leaving X at the School or home tutoring him ([27], and p49, §30, Decision).
    b. The School offered a reintegration plan which the Appellants rejected ([34], Decision; p49 §28).
    c. The Appellants wanted the School to provide specialist external support until the end of summer term, including a behaviour specialist, though the latter was not included in the EHC plan.
    d. The Appellants' proposals were not accepted by the School. Instead, the School provided a tutor who, liaising with the School SENCO, worked with X for a few hours each week in the morning ([32] Decision).
    e. X made progress from May 18 which continued when he returned to School full-time in September 2018 with a tailored programme ([33]-[34], Decision).
    f. It was only in October 2018 that the LA agreed to place X at the Appellants' preferred School (UTp49, [29]).

52. On the issue of the implementation of the part-time timetable, the Tribunal made these findings of fact -

    (i) That a reintegration plan was offered and rejected (UTp49 [28]);
    (ii) The Appellants should not have been left in the position of choosing between leaving X at the School or home tutoring;
    (iii) Not receiving full-time education was unfavourable treatment;
    (iv) The School did try to listen to the family's concerns and be creative with the resources that they had, including diverting the SENCO away from other duties to support X 1:1 initially, followed by funding a full-time teaching assistant, which worked well in his final term [UTp50,, [36]);
    (v) The EHC plan was written specifically for a placement in a special School, not a mainstream School such as the RB's.
    (vi) X's part-time attendance was not because of his disability but because of the LA's delay in naming a specialist placement.

It is only finding (vi) that is problematic.

53. **Multiple Causes and s.15:** The first question posed by s.15 is a loose one: has B been treated unfavourably because of something *arising* in consequence of B's disability. 'Arising' captures a wide range of connections with the disability. It may arise not only from the condition itself, but from the effects of that condition: *Urso v Department of Work and Pensions* [2017] IRLR 30 EAT. There may be several links in the chain back to the disability: *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 EATS; The effects of the condition need not be the primary reason for the unfavourable treatment complained of: *Urso*.

54. In *Sheikholeslami,* Mrs Justice Simler (as she then was) decided at [50] that, under s. 15, the 'something' that causes the unfavourable treatment need not be the main or sole cause, but must at least have [been] a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it (see *Pnaiser v NHS England* [2016] IRLR 170 at [31(d), again per Simler J.) I respectfully agree with Simler J in that case.

55. It should have been obvious to the Tribunal that on the circumstances before them, the discrimination might have arisen from two causes. If it rejected one of those obvious causes, it had to explain why it did not consider it to have sufficient causal potency. In basing its decision on an either/or choice without further analysis, the Tribunal erred in law.

56. I do not see how the Tribunal could have rationally arrived at this particular conclusion for at least the period of 2 February until Autumn 2018 when X resumed full-time education. The underlying reason for X's placement on a part-time timetable remained the same throughout that period: because of his educational and behavioural problems, he was unable to cope with a full-time timetable. If one asked oneself 'why did the School not put him on a full-time timetable earlier?' there were two reasons: (i) his behaviour had not stabilised sufficiently for him to return full-time; and (ii) he was awaiting a placement elsewhere.

57. The next question is whether this error was material. The principle of multiple causation is an important one, and that is why I gave permission to appeal. Since the Tribunal went on to consider an alternative basis for finding that the School treated X was proportionately, and I am able to uphold the alternative, the error was not material.

58. **Legitimate aim:** The legitimate aim was not in issue. It is difficult to envisage a situation in which it was not a legitimate aim to protect staff and students from a pupil's uncontrolled, often violent, seriously disruptive behaviour and to provide an environment that facilitated learning. It is important in this regard to bear that the schools had tried many techniques to effect a change in the child's behaviour, which failed.

59. **What does proportionate treatment mean?** In *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at para 165 Mummery LJ identified three

elements in the concept of proportionality: "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?" … In *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 (Supreme Court), at [68] et seq, Lord Reed considered that proportionality has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. His lordship added at [74] that the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure". The European Court of Justice put it in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) [1990] ECR I 4023*, "the disadvantages caused must not be disproportionate to the aims pursued". The Supreme Court approved these cases in *Akerman-Livingstone v Aster Communities Ltd.* [2015] 1 AC 1399, [2015] 3 All ER 725.

60. A Tribunal will not necessarily err in law by not citing case law in an area, as long as it gets the effect of the law right in its decision. It is best, however, for the Tribunal to have the necessary steps that need to be taken firmly in mind in order to keep on track. The Appellants had been asking since early on whether it was necessary for X to remain on a part time timetable. It is the implicit assumption behind the Tribunal's decision that that was indeed so. Step 4 then requires the Tribunal to decide whether the impact of the treatment is disproportionate to its likely benefit.

61. The Appellants' submission was that the treatment was disproportionate because it amounted to a deprivation of X's right to a full-time timetable over a long period and the School had, in their view, done nothing to fill the void for him.

62. I do not accept the Appellants' view that the School had done nothing. Read impartially, the correspondence in the bundles does not support the Appellants' interpretation of the School's failures, including (but not limited to) 'inaction, recalcitrance, buck-passing and promise breaking'. The Tribunal took care in setting out evidence that it must have been taken to confirm its findings, and made specific findings that are supported by the evidence. I have given a number of examples in [9] above of places where the Appellants' interpretation of factual matters is not sustainable.

63. Nevertheless, since the agreed start date of the claim was 2 February 2018 and term would have ended towards the end of July, this is still nearly 6 months.

64. At the end of the day, whether treatment is proportionate is a matter of judgment for the specialist Tribunal hearing the appeal. A Tribunals makes this judgment by identifying the factors relevant to the issue and then looking at each one in the context of the others. It must then decide whether overall, the disadvantages outweigh the benefit.

65. The exercise is not mathematical and there is no algorithm that will give an answer. Some factors may seem to be of great importance when looked at individually but may lose force when seen in the light of others. Full-time education, for example, may seem very important in principle, but a Tribunal may reasonably consider that that the pupil's emotional well-being would be at undue risk under the pressure of a full-time timetable; or that, a school having tried a variety of ways to change the pupil's behaviour and failed to do so, the balance lay in favour of protecting others by adopting a part-time timetable. Specialists may have advised that a part time timetable was important for the child's health and well- being, or the Local Authority may have decided under s. 19(3A) and (3AA) of the Education Act 1996 that a part-time timetable was in the interests of the child's health. Any of these could help bolster a decision that the treatment by way of a part time timetable was proportionate, though clearly a great many further factors might be in play. For example, the part time timetable may have gone on so long and with so little further advice that the disadvantage outweighed the benefit.

66. I accept Mr Holland's submission that the Tribunal gave adequate reasons on for finding that the School's treatment of X was proportionate to its aim. Its reasoning is brief [34] – [36]. X's behaviour and educational problems could not be accommodated in that school setting without careful, step by step planning and implementation. The School took numerous reasonable steps towards reintegrating X slowly into school as and when his behaviour improved. It diverted staff (the SENCO) and a 1:1 TA to help accomplish this. It also drew up a reintegration plan which, sadly, the Appellants' rejected. I am in difficulties seeing how any lack of proportion could be laid at the School's door after that point.

67. Moving forward, I note Mr Holland's submission that the Tribunal had accepted an earlier submission by the School (fttp410, [23]) that X was not put at a disadvantage at all by the part time timetable. That would have knocked out any issue on proportionality and legitimate aim. I do not read the relevant paragraphs (UTp49-50 at [28] – [36]) of the Decision as accepting that proposition. Those paragraphs are directed at legitimate aim and proportionality and not disadvantage.

68. **Can duties under the Education Act 1996 impact on duties under the Equality Act 2010?** The Appellants' submission referred to a requirement that the School make full provision for X's special educational needs. Their underlying assumption is incorrect. It is the local authority's responsibility to make provision for a pupil's special educational needs (s.42 of the Children and Families Act 2014).

69. A responsible body has a duty to its pupils with special educational needs to use its best endeavours to see that 'the special educational provision called for' by them is made under s. 66 of the Children and Families Act 2014. For the great of children who have special needs, however, special educational provision is made by their local school through its own budget. Notably, s. 66 does *not* require a

Responsible Body to implement an EHC plan. Moreover, by use of the passive tense ins. 66(3), the duty is to see that the' provision …is made'. This does not, in my view, mean that the Responsible Body must makes the provision itself. Its duty is to endeavour to see that 'it is made'.

70. The duty to use best endeavours is a high one. It would make no sense for lift this provision and place it wholesale into the Equality Act 2010, which is based on proportionate response.

71. If it is claimed that a Responsible Body has failed in its duty, the action lies in judicial review. Where the claim is made under s. 15 the Equality Act 2010, the standard to be applied is that which is set out in Equality Act 2010 and the Responsible Body is entitled to rely on the forms of justification or defence available under that Act. I am unable to see any statutory justification to import duties from the Education Act 1996 into the Equality Act 2010, thereby undermining the modulated approach in that legislation. If the Appellants were correct, a mainstream School would be required to put in place the very high level of provision required by an EHC plan designed for the facilities and funding of a special School.

72. **Appeal Ground 3: Reasonable adjustments:** Did the Tribunal make an error of law in respect of s.21 by failing to establish a basis sufficient in law under s. 20 for imposing a duty to make reasonable adjustments on the School?

73. The Appellants claimed that the School failed in its duty under s. 21 to comply with a requirement to make reasonable adjustments for X. The Directions Judge registered s. 20(3) as the relevant subparagraph setting out the requirements for the Appellants' claim under s. 21: where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

74. The Appellants must make out each of these elements before the burden shifts to the Respondents. Identification of a PCP is a definitional requirement of the provision. It is not permissible simply to assert that the victim was substantially disadvantaged, or that an adjustment should reasonably have been made without knowing what the provision, criterion or practice was. The Appellants did not identify a PCP, though they were directed by the Directions Judge to do so (fttp396, [9] case management directions).

75. Mr Holland submitted in his Response to the Upper Tribunal that it was open to me to dismiss this claim on the basis that the Appellants did not identify a provision, criterion or practice and that the consequent lack of clarity in the Appellants' case. I agree that the Appellants' case was very flawed. Indeed, Mr Holland may have succeeded in having the claim struck out either by a variation of directions or by the Tribunal itself on an application.

76. The Tribunal acknowledged that the Appellants had not identified a provision, criterion or principle but took a stab at identifying it for them as 'the SEND Policy'. One can understand the Tribunal's desire to extract this from the hundreds of pages of evidence before it, but I have come to the conclusion that the effort failed. The Tribunal made no findings about what the policy was. The School was left in the dark. The failure to make findings and to give reasons constitute an error of law. It was, in addition, unfair to the School.

77. The Tribunal then proceeded to find on the evidence that the School had made reasonable adjustments, for the same reasons as it found that School had shown their treatment of X to be proportionate.

78. **The effect of *F-T v The Governors of Hampton Dene Primary School (SEN)* [2016] UKUT 468 (AAC)** There are several reasons why I do not consider *F-T v The Governors of Hampton Dene Primary School (SEN)* [2016] UKUT 468 (AAC) to assist the Appellants. For the purposes of this appeal, it is only necessary to consider the claim made by the Appellant under s. 15 of the Equality Act 2010. This arose because the school put the pupil, a child with Downs Syndrome, on a part time timetable for a long period of time ('the attendance claim'). The Tribunal decided that the child was not discriminated against. It appears to have accepted that the school's treatment of the child was proportionate. It is, perhaps, enough to say that the pupil's classroom had to be evacuated on a daily basis because of her uncontrolled, violent behaviour over a period of time, despite the steps taken by the school to adapt her curriculum and behaviour.

79. The tribunal in *F-T* decided that 'excluding' the pupil from full-time education to the pupil was an act on which a finding of discrimination could be made. The pupil in *F-T* was not, of course, technically *excluded* from School but put on a part-time timetable for a long period of time. The burden then shifted to the school to show that it did not discriminate against the pupil.

80. The Upper Tribunal Judge's main concern here may have been that the Tribunal jumped to the adjustments said to have been reasonably made without having further regard to the nature of the discrimination. Had the Tribunal kept the relevant case law in mind and followed the four steps, it might not have become so thoroughly lost.

81. It is, however, because of the way the judge dealt with s. 2 of the Education Act 1996 in the context of the Equality Act 2010 that I must decline to follow his decision. Section 2 requires a pupil of the appellant's age to receive full-time suitable education. Section 19 (3A) and (3AA) provide exceptions.

82. The judge found the requirement under s.2 of full-time education to be a matter of 'central importance' to that Act and imported this significance into claims under s. 15 of the Equality Act 2010 involving pupils placed on a part-time timetable.

83. As I have set out at [64] – [65] above, proportionality requires the Tribunal to look at each factor individually and in the context of the other factors and then decide whether the there was a balance between the means and the ends. For the reasons I gave in those paragraphs, I do not consider it appropriate for the Upper Tribunal to label a factor as of 'central importance' and thereby give it a predetermined weight. That weight can only be judged when seen in the light of the other factors and that is a matter of judgment for the Tribunal, not prescription by the Upper Tribunal.

84. I also do not see a justification for seeking to assign the special weight a factor may have in one legislative regime – the Education Act 1996 – to a completely different regime – the Equality Act 2010. It is the latter in which the Tribunal carries out its judgment exercise. The question before the Upper Tribunal is whether the Tribunal's judgment call was rational, or was within the range of judgments at which a reasonable Tribunal could arrive. The Equality Act 2010 does not require that a particular factor be given more weight than others. If there is a breach of an Education Act 1996, it is remediable elsewhere. Nor should the Upper Tribunal impede the specialist Tribunal's judgment by imposing a pecking order on fact-sensitive matters.

85. If full-time education is of central importance, it is also not clear why the judge considered that, if some home tutoring had been provided, he would probably have decided the case the other way. That in itself appears to be good reason not to go down a prescriptive route of pre-determined weight.

Remedy

86. The Appellants have succeeded technically on two points of law: (i) the Tribunal erred in failing to consider whether the time limit for making their claims could be extended and (ii) the Tribunal erred in failing to consider whether the discriminatory treatment under s. 15 had more than one cause. However, neither of these proved material to the overall outcome of the appeal. In the circumstances, the decision of the Tribunal is not set aside.

[Signed on original] **S M Lane**
Judge of the Upper Tribunal

[Date] **30 September 2020**

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