The Governing Body of School T -v- AA & RA
[2023] UKUT 311 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001519-HS**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

The Governing Body of School T

(Responsible Body)

Appellant

- v –

AA and RA

Respondents

Before: Upper Tribunal Judge Freer

Decision date: 28 November 2023
Deciding after an oral hearing on 30 August 2023

Representation:
Appellant: **Mr A Line, Counsel**
Respondents: **AA in person**

ORDER

The Upper Tribunal orders 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

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 22 June 2022 under number EH301/21/00046 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 and remit the matter in accordance with the following directions on the issue of whether to exercise discretion to consider a claim that is out of time and if so, also the issue of objective proportionality pursuant to section 15(1)(b) of the Equality Act 2010, to be reconsidered by an identically constituted panel, unless that panel cannot be reconstituted within a reasonable time or at all, in which case a wholly different panel shall be constituted to consider the remitted issues afresh.

Directions

1. **This case shall be 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 THE DECISION

Introduction

1. This is an appeal to the Upper Tribunal against a decision of the First-tier Tribunal ("the Tribunal") dated 18 July 2022 that the Responsible Body for School T ("the Appellant") discriminated against child 'A' contrary to section 15 of the Equality Act 2010 when it decided not to provide on-site education to him from 03 February 2021 onwards.

2. The Respondents are the parents of child A.

Background Summary

3. The essential background to this matter is that at the time of the hearing before the Tribunal, A was 14 years old. He has had a diagnosis of Autism since he was 4 years old.

4. School T ("the School") is a community special school.

5. In March 2013, A received a statement of special educational needs, which transferred to an EHC plan in 2018. A joined the School in January 2019.

6. A settled into his class and made steady progress. However, A's school life became significantly affected as a result of the Covid-19 pandemic and the national lockdowns.

7. A found the return to school in September 2020 challenging and his inappropriate physical behaviours began to escalate.

8. As a result, in October 2020, A moved to the School's additionally resourced provision known as the Living and Learning Centre ("LLC"). In the LLC, A was taught individually and away from the class.

9. Between September and December 2020, staff needed physically to restrain A on a number of occasions to protect the health and safety of himself and the staff.

10. In January 2021, during the third national lockdown, due to difficulties at home the School ensured that A received teaching for five days per week.

11. After five injuries were sustained by staff caused by A between 19 January and 02 February 2021, a decision was made by the School on 02 February 2021 that A could no longer attend the school site to receive his education. That decision was

implemented from 03 February 2021. On 08 February 2021 that decision was conveyed to the Respondent parents by the School Headteacher.

12. On 03 March 2021 a section 20 Children Act 1989 agreement was made between the relevant Local Authority and the Respondent parents.

13. An annual review meeting took place on 17 March 2021, at which the Respondent parents did not attend. It was agreed that A required 24-hour care and education. This led to the conclusion by those in attendance that the School was no longer a suitable placement for A.

14. On 06 April 2021 A was moved to a children's care home in Southend-on-Sea, which is a large distance from the School. It was agreed by the parties at the Tribunal hearing that this care home was not suitable for A.

15. The LA has now decided that A requires a 52-week residential placement, funded by Education, Health and Social Care. The Respondents had appealed to the First-tier Tribunal over the content of A's EHC Plan, during which all parties agreed that the School was not the appropriate educational placement and that action has been withdrawn.

16. The Respondents presented their claim to the Tribunal on 10 November 2021.

The case put to the First-tier Tribunal

17. The Respondent parents argued that the decision to stop providing A with on-site education from 03 February 2021 amounted to discrimination arising from disability pursuant to section 15 of the Equality Act 2010. In particular that the Appellant could not show that the treatment of A was a proportionate means of achieving a legitimate aim under section 15(1)(b).

18. The Appellant argued that although it had sympathy with the circumstances of A and the Respondent parents, the decision was objectively justified.

19. Importantly, at the Tribunal the Appellant raised a preliminary point relating to the time limit for presenting the claim. There was consideration over whether or not this matter had been considered and determined by a previous judge and the Tribunal decided to consider the issue of time limits afresh taking into account the submissions made by both parties.

The First-tier Tribunal's decisions and reasons

On the time limitation issue

20. The Tribunal concluded that the failure to provide on-site education was a continuing act because it continued to be in place on and after 11 May 2021, within the period of six months before the date on which the claim was presented. The Tribunal considered that it had uncontested evidence that the School continued to be named in Section I of A's EHC Plan and had remained named in that plan at the date of the hearing. The Tribunal concluded that in all the circumstances the claim was in time in respect of the decision of 02 February 2021 not to provide on-site education to A, an action which continued on a constant basis beyond 11 May 2021.

The substantive claim

21. It was not contested that A had a disability at the material times. The Tribunal also made that finding.

22. It was also not contested that the decision by the Appellant not to provide on-site education for A on 02 February 2021 amounted to unfavourable treatment and that the decision not to provide on-site education for A on or after 02 February 2021 was 'something arising from' A's disability.

23. On that basis the only matter remaining for consideration was whether or not the Appellant could show that the treatment of A was objectively justified and the Tribunal concluded that the aims of the Respondent were not achieved by proportionate means.

Proceedings before the Upper Tribunal

24. The Appellant's application for permission to appeal to the First-tier Chamber was refused.

25. The Appellant made a further application for permission to appeal to the Upper Tribunal, which was considered by Judge Wikeley and a decision was made on 23 February 2023 to grant permission to appeal on grounds 1 and 2. Grounds 3, 4 and 5 were rolled-up as an application to appeal and possible appeal as part of this oral hearing.

The issues on this appeal

26. The issues on appeal raise the following grounds:

Ground 1: the Tribunal erred by finding that the decision taken by the Appellant, for A not to attend the School premises, was a continuing act, as opposed to an act with a continuing consequence. In so doing, the Tribunal erred in its conclusion that it had jurisdiction to determine the claim.

Ground 2: even if the Tribunal had been entitled to conclude that the decision taken by the Appellant, that A not attending the School premises, was a continuing act, on the facts the continuation of that act had only been intended to operate for 10 weeks. The Appellant's ability to facilitate A's return to the School was then overtaken by events beyond the Appellant's control. The Tribunal failed to recognise that the ending of the continuing act after 10 weeks (or at the earlier point that A was moved to the care home) rendered the claim outside of its jurisdiction.

Ground 3: in its analysis of the Appellant's legitimate aims, the Tribunal in error overlooked one of the pleaded aims, which rendered unsafe its analysis of proportionality.

Ground 4: in its assessment of proportionality, the Tribunal: (i) failed to take into account relevant considerations and/or reached a perverse conclusion; (ii) wrongly attributed any failure to provide education after the 02 February 2021 decision to the Appellant; (iii) erred by failing to critically analyse whether the steps it had identified as being proportionate measures would have made any difference to the legitimate aims being pursued; and (iv) failed to apply properly a reasonably necessary standard.

Ground 5: although not raised at the Tribunal hearing, the Appellant argues that the Tribunal erred in its approach to section 15(1)(a) of the Equality Act 2010, by

finding that there was unfavourable treatment because of something arising in consequence of disability after A's move to the care home on 06 April 2021.

Statutory Framework

27. Section 85(2) of the Equality Act 2010 provides:

(2) The responsible body of [a school to which this section applies] 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.
. . .
(7) In relation to England and Wales, this section applies to—
(a) a school maintained by a local authority;
. . .
(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;

28. Section 116(1)(a) and (3) of the Equality Act 2010 provides that Education cases are claims that may be made to the First-tier Tribunal in accordance with Part 2 of Schedule 17 and that Schedule 17 (disabled pupils: enforcement) has effect.

29. Schedule 17, paragraph 4 makes provisions on time limits:

(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.
. . .
(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)—
(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.

30. Section 15 of the Equality Act 2010 provides:

(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."

Caselaw authorities

31. It is not in dispute that there are no provisions in the Tribunal's procedural rules (the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008) that supersede the legislative provisions contained in the Equality Act (see *JL -v- Governing Body of Cherry Lane Primary School* [2019] UKUT 223 (AAC)).

32. Most of the common law authorities relating to time limits and conduct extending over a period derive from the Employment Tribunal jurisdiction. Section 123(3)(a) of the Equality Act relating to employment tribunals is drafted in almost identical terms to paragraph 4(5)(b) of Schedule 17.

33. To summarise some key relevant authorities, an act occurs when it is done and cannot be equated with the date of communication, or when knowledge was acquired that the act was discriminatory (see for example *Virdi -v- Commissioner of Police of the Metropolis* [2007] IRLR 24, EAT at para. 25).

34. The question is whether the alleged discrimination is 'conduct extending over a period' as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. (see *Barclays Bank plc -v- Kapur* [1991] IRLR 136, HL).

35. In *Hendricks -v- Metropolitan Police Comr [2002] EWCA Civ 1686* (affirmed in *Lyfar -v- Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548, CA and *Aziz -v- FDA* [2010] EWCA Civ 304, CA) it was held that in cases involving numerous allegations of discriminatory acts or omissions it is not necessary to establish the existence of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken. What has to be proved in order to establish conduct extending over a period is: (*a*) that the incidents are linked to each other and (*b*) that they are evidence of 'an ongoing situation or continuing state of affairs'.

36. Dismissal and demotion are examples of two common detriments relied upon in discrimination and/or whistleblowing claims as being one-off acts, where time runs from the date of the decision to dismiss or demote, despite the fact that the consequences of those decisions continue, such as the loss of pay or other benefits.

37. The same conclusion can be reached even where there is a policy or practice in place. For example, in the absence of any evidence of a *discriminatory* policy, the appointment of a man to a post in preference to a female constituted a single act of discrimination (*Amies -v- Inner London Education Authority [1977] ICR 308, EAT*). Also, in *Parr -v- MSR Partners LLP* [2002] EWCA Civ 24, the Court of Appeal held that a decision under a policy, which provided upon reaching a certain age partners at the respondent firm could be removed as an equity partner but remain as a salaried partner, was a one-off act with continuing consequences because it was not an automatic policy and a decision had to be taken by the firm in each case.

38. In *Sougrin -v- Haringey Health Authority* [1992] ICR 650 the Court of Appeal held that where there had been a failure to obtain a higher grade on an internal appeal due

to racial discrimination, the loss of pay associated with the higher grade could not be construed as a continuing act of discrimination but was merely the consequence of the appeal decision. However, the Court held that circumstances would be different where an employer adopts a discriminatory policy that effectively bars an employee who has a protected characteristic from access to material benefits. This would amount to a continuing act of discrimination until the discriminatory policy is removed (see *Rovenska -v- General Medical Council* [1997] ICR 85, CA).

39. The position relating to a rule or policy was addressed in *Chaudhary -v- Specialist Training Authority of the Medical Royal Colleges [2001] All ER (d) 294 (Nov)*, where the EAT (later affirmed by the CA), stated: "The continuing application of a discriminatory rule or policy to a complainant is to be distinguished from the continuing existence of a discriminatory rule or policy and its single or occasional application to a complainant. . . For a complaint to be well founded that policy must be applied to the complainant to his or her detriment".

40. Therefore, a *discriminatory* regime, rule, practice or principle that has an automatic detrimental effect on the complainant will be regarded as conduct extending over a period - such as the continuance of a mortgage subsidy scheme for male employees (*Calder -v- James Finlay Corpn Ltd (1982)* [1989] ICR 157, EAT) and the continuance of a pension scheme containing a provision that racially discriminated against employees whose previous service was in Africa, rather than in Europe (*Barclays Bank -v- Kapur*, above).

41. A disciplinary suspension will be an act which extends over a period, so that the last date on which the act of suspension is deemed to take place is the day on which the employee receives notification that the suspension has ceased (see T*ait -v- Redcar and Cleveland Borough Council [2008] All ER (d) 17 (April)*, *EAT)*.

42. The Court of Appeal in *Cast -v- Croydon College [1998] ICR 500*, confirmed that subsequent refusals resulting from further considerations of a matter, which were not merely a reference back to an earlier decision, could each start the time limit to run, regardless of whether it was based on the same facts as before. In *Cast* the complainant requested, both before and after her maternity leave, to be allowed to work on a job share or part-time following her return to work. On each occasion the request was turned down after fresh consideration and time began to run from each refusal.

43. The fine line between a one-off act on the one hand and continuing conduct on the other is demonstrated in *Owusu -v- London Fire and Civil Defence Authority* [1995] IRLR 574*,* where the EAT held that failures to promote or shortlist the applicant were undoubtedly specific instances, whereas the failure to regrade or offer him the opportunity to act up amounted to a *prima facie* case of a continuing act "in the form of maintaining a practice which, when followed or applied, excluded [him] from regrading or opportunities to act up". It all depends upon the evidence and the explanations for the refusals.

Discussion

Appeal Ground 1:

44. The Appellant accepts, as it must, that the Tribunal properly directed itself to the statutory provisions relating to time-limit jurisdiction.

45. The Appellant argues that there was no conduct falling within the scope of paragraph 4(5)(b) of Schedule 17 or alternatively, the decision reached by the Tribunal was perverse in the light of the underlying facts and circumstances.

46. The relevant findings and conclusions of the Tribunal are at paragraphs 9 to 13 of its decision. The main finding is at paragraph 13:

> "The Tribunal panel took the date of 2 February 2021 as being the date on which a decision to stop providing [A] with on-site education at school [was taken]. This was an act which was continuous, on an ongoing basis, until and after the date of 11 May 2021 (six months before the date on which the claim was brought). The Tribunal panel concluded that the failure to provide on-site education was a continuing act, as it continued to be in place on and after 11 May 2021. We had uncontested evidence before us that [the School] continued to be named in section I of [A]'s EHC plan and, at the date of the hearing, was still named in his EHC plan. In all the circumstances, the claim is in time in respect of the decision of 2 February 2021 not to provide on-site education to [A], an action which continued, on a consistent basis, until and beyond 11 May 2021".

47. The Appellant relies on a distinction principally explored within the employment tribunal jurisdiction as set out in the authorities above, between a one-off act with continuing consequences and conduct extending over a period.

48. The issues in the instant case were identified by the Tribunal by reference to an earlier registration order: "[AA and RA] claim under section 85(2) of the Equality Act 2010 that their son was subject to unlawful discrimination on the grounds of disability by [the School]. The claim was received on 10 November 2021". After a case management hearing the claim proceeded relating to the following allegation of discrimination: "From 2 February 2021 to present, A not being educated at school, despite [the School] being named in his Education Health and Care (EHC) plan".

49. The Tribunal correctly recognised that there were two routes available for a claim to be considered once presented out of time: where it amounts to conduct extending over a period and at least the last act relied upon is in time, or where the Tribunal exercises its discretion to admit the claim out of time. In its decision the Tribunal addressed the former route only and made no determination using its general discretion.

50. The alleged claim of discrimination was discrimination arising from disability, in respect of which it was found by the Tribunal, and unchallenged by the Appellant, that at the material times A was a disabled person pursuant to section 6 of the Equality Act 2010 and that A not being permitted to attend at the School was unfavourable treatment arising from A's disability (the final issue of objective justification is a matter under appeal).

51. There was discussion at the Appeal hearing on whether the decision not to permit A to attend the School was an exclusion or a suspension. It is my view that little turns on it for the purposes of the time limit issue[1].

[1] For example, the term exclusion and suspension can sometimes be used interchangeably. See the 'Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement - Guidance for maintained schools, academies, and pupil referral units in England - September 2023'. This states that: "'suspension' is used to refer to what legislation calls an exclusion for a fixed period. Suspensions and permanent exclusions are both types of exclusion, and where this guidance uses the word 'exclusion' this includes both suspensions (fixed-period exclusions) and permanent exclusions".

52. The decision was made on 02 February 2021 and implemented on 03 February. The Headteacher of the School met with the Respondents on 05 February and communicated the decision to them in a letter dated 08 February 2021. The essential part of that letter stated:

> "This letter is just to confirm that the school is currently unable to look after [A] safely.
>
> This is for the following reasons:
>
> • [A]'s behaviours are very challenging and complex.
>
> • The school is usually able to meet complex behaviour needs associated with Autism, but cannot currently meet these needs due to the impact of the COVID 19 pandemic.
>
> • The impact of the pandemic means that the highly specialised Living and Learning Centre, which is an additionally resourced provision, is suffering a reduction in the numbers of available experienced, trained and skilled staff. This is because I must respect the clinical vulnerabilities of the staff members and I cannot place them with our young people. This is in line with the Borough's risk assessment.
>
> • I have taken every precaution and these staff have now had their first COVID vaccination.
>
> • I am awaiting further advice as to when these staff may return to full duties, but this could mean I cannot re-admit [A] for a further 10 weeks.
>
> To be clear, this is not an exclusion. We will continue to provide remote learning and welfare support until [A] can safely return with a skilled experienced member of staff".

53. It is this decision that was the subject of the initial claim to the Tribunal and in respect of which the issue of time limits was addressed.

54. The Tribunal described the School as "considering a *de facto* exclusion" and referred to the School's action of restricting A from site as an 'exclusion' in other parts of its decision. However, I am satisfied when considering the letter by the Headteacher and the facts as found by the Tribunal that it was an expression to describe A's non-attendance on-site as opposed to reference to any particular regulatory provision. For example, it was not a situation such as a permanent or temporary disciplinary exclusion.

55. Although the Tribunal's reasoning was summary on the time limit issue, it is my conclusion that the Tribunal clearly had the terms of the Headteacher's letter squarely in mind and upon considering the circumstances described in that letter and the School being named in Section I of the EHC Plan came to the conclusion that there was a conduct extending over a period.

56. With regard to the period up to 06 April 2021 I conclude that it was not an error of law for the Tribunal to reach that conclusion. The period after 06 April 2021 is addressed under Ground 2.

57. In the factual circumstances of this case there was clearly a continuing relationship between the School and A, both in respect of obligations arising from the EHC Plan and the express terms of the Headteacher's letter.

58. A was subjected to the accepted unfavourable treatment of being off-site during the period over which the terms of the Headteacher's letter subsisted. An intention to maintain a daily relationship existed between the School and A. There was a commitment to provide home tutoring.

59. It was a relatively unusual position of not being a disciplinary exclusion, but A being off-site due to an issue of lack of adequate resources caused by the pandemic. The length of the off-site period was subject to receiving and reviewing further advice/information that would influence the process of A's return. The off-site period was not for a definitive predetermined period, but "could" have meant that A would not be re-admitted for 10 weeks depending upon when staff returned to full duties.

60. If an analogy is made with the employment jurisdiction, A's circumstances up to 06 April are more akin to a disciplinary suspension. However, that said, the employment authorities produce general principles, and any comparison must be applied with caution as clearly there are substantial legal and practical inter-relationship differences with special educational needs and disability in schools.

61. Indeed, in many circumstances the difference between conduct extending over a period and a one-off act with continuing consequences may be such a fine line that, properly reasoned, a Tribunal would not err in law whichever side of that line the decision fell.

Appeal Ground 2:

62. A's circumstances materially changed in March and April 2021.

63. On 03 March 2021 A's parents entered into a section 20 Agreement with the Local Authority. On 17 March 2021 an annual review meeting took place with the Headteacher, other members of the School team and a social worker on behalf of the Local Authority. At that meeting it was decided that A required 24-hour care and education and that the School was no longer a suitable placement. On 06 April 2021 A was placed by the Local Authority into a children's care home around 30 miles away from the School, which made daily attendance on-site impracticable.

64. The Tribunal found under its consideration of objective justification that there were no reviews undertaken by the School. There were also concurrent proceedings regarding the content of the EHC Plan in which all parties accepted that the School could no longer be part of the Plan.

65. In those materially changed circumstances the fact that the School continued to be named on the EHC plan was not necessarily an indicator that its decision on 02 February was an ongoing state of affairs.

66. Given the substantial change in circumstances, it is not clear from the Tribunal's decision how it concluded that the School being named in the EHC Plan was conduct extending over a period beyond March and April 2021. The Tribunal has not sufficiently identified the circumstances it has taken into account, explained how these were weighed in the balance and the relevant factors upon which it reached its decision. The authorities on this issue demonstrate why careful analysis is required.

67. It was an error of law for the Tribunal to conclude from the facts that there was a conduct extending over a period by the School once the Respondents had entered into the Section 20 Agreement with the Local Authority, the decision had been taken that the School was no longer an appropriate placement, and A had been placed at the

care home. The section 20 Agreement and the move to the care home were decisions made by the Local Authority, not the Appellant school. Therefore, it could no longer be said that those decisions or the circumstances that followed them amounted to an ongoing state of affairs by the School. The highest that can be argued is that they were continuing consequences of the February decision conveyed by the Headteacher.

68. Even if it can be argued that the decision that the School was no longer an appropriate placement for A was principally one made by the School itself and not the Local Authority, that decision crystallised when A moved to the care home. As found by the Tribunal: "The RB genuinely considered that by the point when [A] started residing at the children's home – from 6 April onwards, it was no longer responsible for any element of is education . . . The annual review meeting of 17 March 2021 had become the point at which [the School] considered it was no longer suitable for [A]".

69. On any analysis of the facts as found there was no conduct extending over a period by the School after 06 April 2021 and it was an error of law for the Tribunal to conclude that there was. The time limit for the School's potential liability started to run from that date.

70. Therefore Appeal Ground 2 is upheld.

Permission to appeal on Appal Grounds 3, 4 and 5

71. At this stage it should be addressed that permission to appeal was granted with regard to grounds 1 and 2 only. Permission to appeal and the substantive issues were rolled-up for grounds 3, 4 and 5. Having heard submissions from the parties, I am satisfied that permission to appeal should be granted in respect of all three remaining grounds. There is a realistic prospect that they will succeed.

Appeal Ground 3:

72. The issue of discrimination arising from disability hinged on the determination of objective justification.

73. The Appellant's response to the initial claim cited two categories of legitimate aims;

> "a. To protect the health, safety and welfare of A, staff and other pupils
>
> b. To maintain the robust Behaviour Policy and structures and systems required in a school of this nature, to alleviate health and safety risks arising from behaviours, associated with complex disabilities".

74. The case management order made 'on the papers' dated 28 March 2022 identified the issues in a general sense and then confirmed that if there was unfavourable treatment arising in consequence of A's disability, the Responsible Body will have discriminated unless it can show that its treatment was a proportionate means of achieving a legitimate aim "such as ensuring the health and safety of its staff and pupils".

75. The objective justification arguments set out by the Tribunal in its written reasons under the summary of the claim do not identify the legitimate aims relied upon. However, it sets out the Appellant's arguments at paragraph 20 of the decision in which the Appellant's justification defence is recorded as being: "A's safety and the safety of others could not be guaranteed".

76. In its conclusions, under the heading 'proportionality' at paragraph 32, the Tribunal states: "The RB argued that the legitimate aims pursued were the protection of A's health, safety and welfare and the maintenance of the behaviour policy to alleviate health and safety risks". At paragraph 33 the Tribunal states: "We considered the point very carefully and found that the aims being pursued were legitimate. By this stage, A's welfare, health and safety were clearly a significant issue. We also accept that there had been an escalation of A's behaviour to such an extent that he was at stage 4 of the school's behaviour policy".

77. Whilst the aims were not addressed separately by the Tribunal as set out in the Appellant's Response, the final formulation as set out in paragraph 32 of the decision sufficiently covered the points as raised by the Respondent. The maintenance of the Behaviour Policy to alleviate health and safety risks includes alleviating health and safety risks to A, the staff and pupils. It does not amount to an error of law by the Tribunal to frame the aims as it did.

Appeal Ground 4:

78. The Tribunal's analysis of proportionality is contained in paragraphs 34 to 38 of its decision.

79. The Tribunal at paragraph 34 of its decision correctly identified that when assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the respondent to the claim. The treatment must be appropriate and reasonably necessary to achieving the aim (see *Homer -v- Chief Constable of West Yorkshire Police* [2012] UKSC [2012] ICR 704).

80. The Supreme Court in *Akerman-Livingstone -v- Aster Communities Ltd* [2015] 3 All ER 725, suggested a four stage guide (*per Lord Wilson*): (1) whether the aim is sufficiently important to justify the treatment; (2) whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; (3) whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and (4) whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered. Although this was a housing possession case, the principles are of universal application.

81. Whilst *Akerman-Livingstone* was not cited to the Tribunal, the final stage of its guidance, of striking a fair balance between the School's need for the aim and the detriment to A, is well established (see for example *Hardy & Hansons plc -v- Lax* [2005] EWCA Civ 846 and *Homer* above).

82. I accept the Appellant's argument that there is no, or insufficient, demonstration of the Tribunal considering the health, safety and welfare of the staff and other pupils as part of its reasoning. It has not set out, even in general terms, the degree of need for the School to accomplish the aim of safety to staff and pupils, such that an assessment can be made of whether a fair balance could be struck with the Tribunal's detailed exposition of the detriment to A. That state of affairs may perhaps be a symptom of the Tribunal describing the aims under Appeal Ground 3 as it did, but the consequence is that in its decision the Tribunal has set out only the effect on A and A's health, safety and welfare but without an assessment of the Appellant's need to accomplish its aim of also including staff and other pupils. For example, it is a finding by the Tribunal that on a number of occasions between September and December

2020 staff had to physically restrain A and between 19 January and 02 February 2021 five injuries were sustained by staff.

83. I also find that as part of this process the Tribunal did not differentiate between decisions that were made by the School as the respondent to the action and those made by the Local Authority which was not. The Tribunal's decision elides together the actions and decision making made by those two bodies, but section 15 requires an analysis of the unfavourable treatment of A by the School.

84. Accordingly the appeal on Ground 4 succeeds on these points.

85. The Tribunal was, however, entitled to make the findings of fact and conclusions it did arising from the Appellant's decision to stop providing A with on-site education. The Appellant is revisiting arguments already made on this issue and it cannot successfully be argued that the Tribunal's decision was perverse in this respect.

86. For example, the Tribunal did not state that the School's decision on 02 February 2021 "caused the decision taken by the Respondents", as alleged by the Appellant. The Tribunal found that there was a decline in A once he was stopped from attending at the School, which: "must have, on any logical view, *contributed* to the decision to sign the Section 20 Agreement".

87. It may have been that some of the circumstances relating to A were present before the decision of 02 February, but it was open to the Tribunal to make findings on the further consequences to A of that decision.

88. The Tribunal highlighted in its findings a lack of formal process, a 'dynamic' process of decision making, and also potential alternative options relating to the Appellant. The Tribunal had the 'reasonably necessary' test squarely in mind.

89. The Appellant has raised arguments that the Tribunal failed to analyse critically whether steps it had identified as potential proportionate measures would have made any difference to the legitimate aims. I conclude that those arguments do not demonstrate a misdirection by the Tribunal or a perverse decision. For example, with regard to the length of the exclusion that the Tribunal found to be a disproportionate response, it was qualified: "without at the very least, a mechanism for ongoing reviews, on at least a weekly basis, to establish if circumstances have changed to mean [A] could attend school even on a part-time basis".

90. However, because of the conclusions and reasons above giving rise to the appeal succeeding, I consider that it is most appropriate for the whole issue of proportionality to be considered afresh.

Appeal Ground 5

91. This point was not taken below as properly declared by the Appellant. It is my conclusion that it is appropriate to address this issue as part of the overall appeal. Applying the decision in *Notting Hill Finance Ltd -v- Sheikh* [2019] EWCA Civ 1337, this is a point of law that does not require further evidence, if the point had been taken at the hearing no evidence of a different nature would have been required. It was raised in the grounds of appeal and the Respondents have had sufficient time and opportunity to address the issue. In essence it raises similar points to those expressed above under Ground 2.

92. Having regard to the decision at Appeal Ground 2, I conclude that the treatment of A after 06 April 2021 is not unfavourable treatment of A *by the School,* nor

unfavourable treatment of A by the School *because of* something arising in consequence of A's disability. A had been placed at the care home by the Local Authority because of the section 20 Agreement entered into between the Local Authority and the Respondents. The care home was some distance from the School making attendance impracticable. The School had already reached a decision that it was no longer suitable for A and considered after 06 April it was no longer responsible for A's education. Any unfavourable treatment of A by the School and because of something arising in consequence of A's disability clearly ceased at that time.

Disposal

93. As a result of the above conclusions, decisions remain to be made on: (1) whether to exercise the general discretion under paragraph 4(3) of Schedule 17 of the Equality Act 2010 and extend time such to cover the removal of A from the School site from 03 February to 05 April 2021 and if so, (2) whether that action of removal off-site struck a fair balance between the School's need to accomplish the general aim of preserving the health, safety and welfare of A, its staff and other pupils, with the extent of the detriment suffered by A as a consequence of that unfavourable treatment by the School.

94. I am satisfied that this matter should be remitted back to the original Tribunal to determine these issues. The Tribunal has heard detailed evidence and despite the passage of time, it is best placed to make those decisions.

95. At this appeal hearing the Respondents, who as a family argued their case with commendable clarity, quite understandably stated that they wanted to draw a line under the matter and concentrate on A's current circumstances - the Local Authority and the parents are at an understanding where they are working together.

96. The Respondents referred me to section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and asked me to set the Tribunal decision aside and remake it. They argue that there is no advantage of having a new hearing.

97. However, I have reached a conclusion where the First-tier Tribunal decision is set aside but the remaining issues require further consideration of all the overall facts. The First-tier Tribunal is in a better position than I am to undertake that task, not least because I have not heard all the evidence. Therefore, there is no realistic alternative other than to remit the matter. However, there remains the opportunity for the Respondents to withdraw their claim to the First-tier Tribunal if they consider, upon reflection, that this is a route which best draws a line under the matter and enables the family to focus on the current best interests of A. It may be that the Appellant can find a form of words to assist with that process should it be explored.

A Freer
Judge of the Upper Tribunal

Signed on the original/authorised for issue on 28 November 2023