Neutral Citation Number: [2025] UKUT 148 (AAC)
Appeal No. UA-2024-000254-HS

IN THE UPPER tribunal
ADMINISTRATIVE APPEALS CHAMBER

Between:

NE and GE

Appellants

- v -

Governing Body of a Primary School

Respondent

Before:	**Upper Tribunal Judge Citron**
Hearing date:	8 May 2025
Place of hearing:	Manchester Civil Justice Centre

Representation:

Appellants:	by Mrs E, the first Appellant
Respondent:	by Mr Jamie Jenkins of counsel, instructed by Bury Council Legal Services

On appeal from:

Tribunal:	First-Tier Tribunal (HESC Chamber)
Tribunal Case No:	EH351/23/00005
Hearing date	28 November 2023
Decision date:	22 December 2023

SUMMARY OF DECISION

DISABILITY DISCRIMINATION IN SCHOOLS (89)

The Appellants made a disability discrimination claim to the First-tier Tribunal, alleging that the Respondent's nursery had withdrawn the offer of a placement for their 3-year-old child on account of his disabilities; the First-tier Tribunal found that the child had disabilities per the statutory definition and appeared to find that there had been no withdrawal of the nursery placement; it dismissed the claim. Permission to appeal to the Upper Tribunal was not formally limited but was given on account of potential inconsistency in the First-tier Tribunal's findings as to whether and when a placement at the nursery was withdrawn; and a lack of express findings as to whether the

withdrawal of the nursery place, if it indeed took place, was discriminatory. The Upper Tribunal held that, whilst there were imperfections in the way the First-tier Tribunal decision was expressed, it was adequately clear that the withdrawal of a nursery place that was the subject of the claim was the one that allegedly took place at a certain point in time; the fact that a place at the nursery was, in fact, withdrawn at a different (later) point in time, was not the subject matter of the claim, and so the First-tier Tribunal did not err in not making clear findings about it. The Upper Tribunal further found that other challenges by the Appellants to the First-tier Tribunal's findings of fact did not rise to the level of being legal errors. The appeal was therefore dismissed. The Upper Tribunal did observe that the First-tier Tribunal decision would have been much clearer had it (a) expressly identified the discriminatory conduct which was the subject matter of the Appellants' claim, and (b) expressed the issues in the case by reference to that; and commended such an approach to other writers of First-tier Tribunal decisions in this area of the law.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal in question did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. In what follows references to

    a. the "**tribunal**" and to the "**decision**" are to the First-tier Tribunal and its decision as referred to above;

    b. numbers in square brackets are to paragraphs of the tribunal's decision (unless otherwise indicated.

The claim to, and decision of, the tribunal

2. The Appellants made a disability discrimination claim to the tribunal against the Respondent in respect of the Appellants' child, O (who was 3½ years old when the claim was made).

3. In its "background" section ([11-21]), the tribunal decision:

    a. described O's disability (and the tribunal decision later found O to have a disability in accordance with the statutory definition ([63]): the tribunal decision found O to have developmental delays, communication difficulties and to be mainly non verbal;

b. recounted events in 2022 and 2023 surrounding the offer of a place for O at the nursery in the Respondent's primary school, and what happened next; these included a request made by Mrs E, around the same time, for an EHC plan for O, and a consultation related to that, to which the nursery responded (see [15]).

4. The following matters emerge from the "background" section of the tribunal decision as being in dispute between the parties:

   a. the first, and principal, factual dispute, was whether, when the school "advised" Mrs E in January 2023 that "the school" was not suitable for O's needs, this

      i. meant that the school was withdrawing the offer of a nursery place for O "due to his EHC plan and his disabilities" (the Appellants' contention – see [14], end of final sentence, read with [16], second sentence); or

      ii. was (only) a consultation response regarding O's EHC plan; it related to the reception school year, not to the nursery; and that the nursery place for O remained open, at that stage; this was the Respondent's view;

   b. the second, and secondary, factual dispute concerned the Respondent's view, as recorded at [16], third sentence, that the nursery place for O "came to an end as the parents disengaged with the process"; the Appellants denied having "disengaged with the process" (see [17]); and in any event, as per the primary issue (above), their view was that the school withdrew the offer of the nursery place not due to "disengagement", but when it told them, in January 2023, that it was not suitable for O's needs. The tribunal decision at [17] goes on to recount evidence of one the Respondent's witnesses, the chair of the school governors, to the effect that there had been a breakdown in communication between the parties in November 2022 – this appears to be an explanation of why, in the Respondent's view, the Appellants misapprehended what the school communicated to them in in January 2023, and interpreted it as a withdrawal of the offer of nursery place for O. The tribunal decision at [17] records the Appellants' disagreement with this "breakdown in communication" explanation of what happened i.e. they reiterated their view that the chair of governors of the school "refused to admit O due to his needs and requirement for an EHCP".

5. Immediately after the "background" section, the tribunal decision stated the issues in the tribunal proceedings; first, whether O had a disability (as I have indicated, this was answered by the tribunal in the positive, and is not challenged in this appeal); and second, at [23], in two parts, whether O's placement at the Respondent's nursery was withdrawn – and, if so, whether the withdrawal was due to and/or in discrimination of O by virtue of his disability.

6. I note that the tribunal decision does not, in terms, state the subject matter of the Appellants' disability discrimination claim to the tribunal; this is something to which I will return below.

7. The Equality Act 2010 provisions cited in the tribunal decision at [24] included s85 (*Pupils: admission and treatment etc*), s15 (*Discrimination arising from disability*), s20 (*Duty to make adjustments*) and s21 (*Failure to comply with duty*).

8. The tribunal decision recounted evidence over 47 paragraphs, from [25] to [62]. In the "conclusions" section that followed, the tribunal decision gave its finding on the first issue at [63], and then expressed its views on the witness evidence between [64] and [66]. Its findings on the second issue were in the four paragraphs from [67] to [73]. They were (stripped to their essentials, but indicating where a finding was stated more than once) that:

    a. Mrs E was committed to O's best interests and cared for her children's interests;

    b. due to the breakdown in relationship, Mrs E retained a mistrust of the school staff and the chair of governors in particular; this coloured the lens in which she engaged with them; she was quite entrenched in her views and this unfortunately led to assumptions and conclusions around discrimination ([67]); there had been a significant breakdown in trust and communication between "the school and the parent and the Responsible Body" ([69], fourth sentence);

    c. there was insufficient evidence to persuade the tribunal that the nursery place offer had been withdrawn ([69], third sentence); the Respondent had kept the nursery place open ([70]); the school was not referring to the nursery placement in its 5 December 2022 consultation response to O's EHC plan stating that they were not a suitable placement; the nursery placement for O remained in place; the nursery placement was not withdrawn ([71]); the placement remained open until April 2023; the nursery had again offered a place to O in the weeks before the tribunal hearing ([72]);

    d. there were parallel processes in place (the EHC plan process and the nursery admission process) which resulted in a lack of clarity, and confusion for Mrs E; the chair of school governors' lack of familiarity with the process "contributed to the miscommunication"; this was not discrimination ([72]); the confusion led to the school not following set processes such as how they responded to the local authority; the school had not been dishonest. it was a pressured time for all involved and was exacerbated by staff absences and local authority staff turnover; misjudgements were made; this does not equate to discrimination ([73]).

9. The tribunal decision dismissed the discrimination claim.

The grant of permission to appeal

10. I gave permission to appeal, following an oral hearing, in a decision issued by the Upper Tribunal on 17 November 2024. Permission was not formally limited, though I noted that the matters which had led me to give permission were as set out in that decision, which I regarded as arguable with a realistic (as opposed to fanciful) prospect of success

11. The permission decision said the following under the heading "Why I have given permission to appeal":

> "8. Given the issues in the appeal as framed in the tribunal decision at [23], it was important for the tribunal to make findings as to (1) whether the offer of a place for O at the nursery had been withdrawn; and (2), if so, whether that withdrawal was discriminatory to O.
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> 9. It seems to me arguable that the tribunal decision erred in law by not making these important findings, since
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> a. the findings at [70] and [72] are arguably inconsistent:
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> i. [70] states that the nursery offer for O was *never* withdrawn following its being made in May 2022; this ties with [69], which says that the tribunal were not satisfied that there was sufficient evidence of the placement having been withdrawn; it also matches the evidence of [the head teacher] as recorded in the tribunal decision at [39]); whereas
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> ii. [72] states that the nursery place remained open *until April 2023* and that O was *again* offered a place in recent weeks: this clearly indicates that the offer *was* withdrawn; this matches the evidence of [the early years lead], as recorded in the tribunal decision at [47], that O came "off roll in line with admission policy" at the end of the spring term 2023; it also ties with the witness statement of [the head teacher] at page 79 of the tribunal bundle, which says that a place remained open for O for the spring term of 2023, but it was then "re-allocated" for the year 2023-24, due to the Appellants' non-responsiveness (in the view of [the head teacher]); it also aligns with the Respondent's case as summarised in the tribunal decision at [16]; and with the tribunal decision saying at [21] that a placement was *now* available for O at the nursery;
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> b. arguably, this inconsistency is impossible to reconcile or ignore as immaterial, even if one takes a realistic and contextual reading of the tribunal decision:
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> i. if one were to take the finding at [70] as the better articulation of the tribunal decision's findings, then the tribunal decision is arguably in error of law for not explaining why it favoured [the head teacher]'s evidence (as it recorded it) over [the early years lead]'s; or how it came to that finding in the light of the statement in [the

head teacher]'s own witness statement, at page 79 of the tribunal bundle, cited above; such a reading also means that the tribunal decision is arguably inconsistent with the "new evidence" in the November 2023 emails, which may render those emails relevant evidence that was not put before the tribunal, despite reasonable efforts by the Appellants to produce all relevant evidence (and so admissible on an appeal);

ii. on the other hand, if one were to take the finding at [72] as the better articulation of the tribunal decision's findings, then the tribunal decision is arguably in error of law by not making clear findings as to *why* the offer was withdrawn at the end of spring 2023: evidence of [the early years lead] is recorded as to her views on this matter (the failure of the Appellant to "attend" – see [47]); arguably, however, on such a key matter for determination by the tribunal (*why was the offer withdrawn? was it discriminatory*?), it was an error of law for the tribunal not to have made its own findings;

c. I have considered the argument that the tribunal decision did clearly make the finding (at [71]) that the decision made by the Respondent in December 2022 was in relation to O's EHCP and not in relation to O's nursery placement, and that this disposed of the main factual allegation by the Appellants (that that decision *did* relate to the nursery placement, and was discriminatory – see [14]). However, given the issues in the appeal as framed by the tribunal decision at [23], it was arguably an error of law on the tribunal's part not to have determined them (even if it did deal with the main factual allegation by the Appellants)."

The Upper Tribunal proceedings

12. I had before me the Upper Tribunal bundle, which included the Appellants' application to the Upper Tribunal and additional documents sent by them (certain emails between the head teacher of the Respondent's school and the local authority's SEND unit in November 2023 (i.e. shortly before the tribunal hearing); a letter from the local authority of 8 February 2024 stating that O's EHC plan named the Respondent's school; a letter from the local authority chief executive to the Appellants dated 2 September 2024, in response to Mrs E's complaint about the former SEND lead and his involvement with the Respondent's school in relation to the school place for O; and an email from the local authority's SEND unit dated 1 November 2024 with the latest position (it appeared that O had still not been "enrolled" at the Respondent's school)). I also had access to the papers that were before the tribunal.

13. I am grateful to both Mrs E and Mr Jenkins for attending the hearing of the appeal and explaining their arguments.

14. The powers of the Upper Tribunal in an appeal such as this are limited to deciding whether there was a error of law the decision of the tribunal. If there is such an error, the Upper Tribunal may set the tribunal decision decide, and then either remake the decision or remit the case back to the tribunal for rehearing.

Why I have decided that there was no material error of law in the tribunal decision

15. I will divide this discussion between consideration of arguments that led me to grant permission to appeal, and other arguments raised by the Appellants.

The arguable errors raised in the Upper Tribunal's permission decision

16. The Respondent's primary argument against the arguable errors raised in the permission decision was that the scope of the tribunal proceedings was limited to an allegation by the Appellants that the Respondent discriminated against O on grounds of disability when it withdrew O's nursery place in (or around) January 2023 – and so, if and to the extent the tribunal found that the Respondent did not withdraw the place then, the discrimination claim fell to be dismissed. In other words, the first limb of the second issue at [23] was overstated: the true issue in the tribunal proceedings was not whether the nursery placement was *ever* withdrawn, but whether it was withdrawn in late 2022 or early 2023 as part of the school informing Mrs E, at that time, of its view that it was not suitable for O's needs. The Respondent's case is that the tribunal decision made a clear finding on that point – see [71] – to the effect that the nursery placement was not withdrawn at that time, and there was no legal error in this finding or in the tribunal decision concluding, as a result, that the discrimination claim fell to be dismissed.

17. I am persuaded that, whilst the tribunal decision could have expressed itself more clearly, both in framing the issues at [23] and presenting its findings, the Respondent's is the legally correct reading of the tribunal decision, viewed in its entirety and in the context of arguments put by the parties; and therefore that the imperfections in the way the tribunal decision was expressed, do not rise to the level of being material errors of law. I come to this view for the following reasons, cumulatively:

    a. the tribunal's jurisdiction, or powers, in this case are framed by the relevant statute: here, paragraph 3 of Schedule 17 to the Equality Act 2010, which provides that "a claim that a responsible body in England has contravened Chapter 1 of Part 6 because of a person's disability may be made — (a) to the English Tribunal by the person's parent …". The way this is expressed indicates that the contravention by the responsible body has to have occurred prior to the claim (which, of course, makes eminent sense). The Appellants' claim to the tribunal was dated 10 April 2023; and whilst it ranged over a number of topics, it clearly included the allegation that the school had discriminated against O in early 2023 when it informed Mrs E that it was not suitable for O's needs, and clearly did *not* include an allegation that a (later) withdrawal of O's nursery placement in April 2023 was discriminatory conduct;

    b. it is clear enough from the tribunal decision's presentation of the disputed factual issues, that the contention that O's nursery placement was withdrawn in April 2023 as a result of the parents' "disengagement with the process", was a contention *of the Respondent*, in opposition to the

Appellants' contention that the placement had been withdrawn earlier in the year, as part and parcel of the school telling the parents that it was not suitable; in other words, it was no part of the *Appellants'* discrimination case, as understood and presented in the tribunal decision, that O's placement was withdrawn sometime in April;

c. this view of the subject matter of the Appellant's discrimination claim explains the features of the tribunal decision highlighted in the Upper Tribunal's permission decision, namely

    i. imperfections in the tribunal decision's factual findings as to whether O's nursery place had been withdrawn (see paragraph 9a of the permission decision, quoted above); and

    ii. the fact that the tribunal decision made no express finding as to whether the withdrawal of the nursery place in April 2023 was a discriminatory act (see paragraph 9b ii of the permission decision).

    The first feature was a by-product of it being understood (but not expressly spelled out at [23]) that the only relevant withdrawal of a nursery place for O was the one that was alleged to have taken place in late 2022/early 2023; the second feature was a by-product of a similar understanding that the withdrawal of the nursery place in April 2023 (assuming that was what happened) was not the result of discriminatory conduct by the Respondent.

18. It follows that the arguable errors of law identified in the permission decision have not been made out; I find that they are in the nature of imperfections in the way the tribunal decision was expressed, but they are not material legal errors.

19. I note that the tribunal decision would have been much clearer had it (a) expressly identified the discriminatory conduct which was the subject matter of the Appellants' claim, and (b) expressed the issues in the case by reference to that. I would commend such an approach to other writers of tribunal decisions in this area of the law.

Other arguments of the Appellants

20. The Appellants were not legally represented, and their arguments ranged over a number of topics and allegations, not all of which were relevant to the question in this appeal (being, whether there was a material legal error in the tribunal decision); however, their core arguments of relevance, were:

    a. that they did not agree with the tribunal decision's factual finding that when the school told them, in late 2022 or early 2023, that the school was not suitable for O, it was referring to his EHC plan, not to his nursery placement, such that the nursery placement remained open;

b. that certain things that took place well after the Appellants made their claim of disability discrimination – principally, in the autumn of 2023 – were further acts of discrimination and/or evidence that indicated that the school had acted in the discriminatory manner alleged, in withdrawing O's nursery place in late 2022/early 2023. Much of the additional documents provided by the Appellants concerned these later events;

c. that the Appellants' claim referred to the school's duty to make reasonable adjustments and this aspect was not addressed in the tribunal decision.

21. I am not persuaded that these arguments amount to any material legal error in the tribunal decision. This is because:

a. (allegedly) discriminatory conduct that post-dated the Appellants' claim, including that alleged to have occurred in autumn 2023, was outside the scope of the Appellants' claim; such conduct could, I accept, have significance as evidence i.e. it could be appropriate for the tribunal to draw inferences from those later events, about what, on the balance of probabilities, had occurred earlier – I will return to this below;

b. the Upper Tribunal may only interfere with a factual finding (such as the one challenged by the Appellants, see paragraph 20a above) if it involves *legal* error – for example, if the finding is perverse, irrational, or one which no reasonable tribunal could have arrived at, on the evidence before it. The position was summarised thus by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para 114:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are … all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:
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> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
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> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

I am not persuaded that the challenged factual finding in this case is *legally* wrong, to the standard just described: the tribunal decision recounted the evidence it heard in detail, and explained clearly what it made of the witnesses; its decision to rely on the evidence of certain of the Respondents' witnesses, in coming to the factual finding which the Appellants now seek to challenge, cannot be characterised as legally wrong;

c. specifically as to any inferences the tribunal could or should have drawn from events that post-dated the discriminatory conduct in the Appellants' claim, I note that the tribunal decision at [18-21] (in the "background" section) makes some findings about events later in 2023 – [21], in particular, states that a nursery place was "now" available for O; I also note that at [72-73], the tribunal decision made some criticisms of the school's and local authority's conduct, whilst making clear its view that none of this amounted to "discrimination"; in the light of this, I am not persuaded that there was any legal error on the part of the tribunal, in not taking into account relevant material in making its decision;

d. as for the fact that the Appellants' claim form referred to the duty to make reasonable adjustments, this appears to be in the context of their claiming that the Respondent withdrew O's nursery place because of his needs: the argument is, essentially, that the Respondent should have made adjustments, *rather than withdrawing the nursery place*. Viewed in that context, I do not think the tribunal decision erred in seeing the "adjustments" point as subsumed in the question (being the second issue identified in the tribunal decision, at [23]) of whether or not the Respondent did, in fact, withdraw the nursery place (and so was dealt with the by the tribunal decision's finding that the nursery place was not withdrawn, as alleged). I am reinforced in this view by the fact that both the "background" and "evidence" sections of the tribunal decision indicate that the core point in dispute in the proceedings was the withdrawal of O's nursery place.

Conclusion

22. It follows that there was no material legal error in the tribunal decision, and so the appeal falls to be dismissed.

Zachary Citron
Judge of the Upper Tribunal

Authorised by the Judge for issue on 13 May 2025