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Note: Pursuant to Civil Procedure Rules, rules 5.4C, 5.4D and rule 39.2(4) and section II of the Contempt of Court Act 1981 it is ordered that the parties and witnesses referred to herein not be disclosed, in order to protect the identity of the First Claimant.

Case No: QB-2019-000706

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2020] EWHC 1046 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th April 2020

Before:

DEPUTY MASTER HILL QC

- -

Between:

(1) ST (a minor)
(2) RF

Claimants

-and-

L PRIMARY SCHOOL

Defendant

- -
- -

RF (in person) for the **Claimants**
Craig Murray (instructed by BLM Solicitors) for the **Defendant**

Hearing date: 18th and 20th March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DEPUTY MASTER HILL QC:

Introduction

1. This claim is brought by ST (a child) and RF (her mother) against L Primary School ("the School"). ST has Down's Syndrome. She attended the School from February to July 2013. The claims are for (i) a breach of the Data Protection Act 1988 ("the DPA"); (ii) a breach of the Human Rights Act 1998 ("the HRA"); and (iii) the misuse of personal information. The claims arise out of the sending by the School of a letter dated 14 March 2013 to the parents in ST's year group which contained information about ST.

2. The trial of these claims was listed before me over two days. For the Claimants, I heard evidence from RF, her husband (MT) and Sian Forsythe. I was also invited to take into account written statements from some hearsay witnesses who did not attend. For the School, I heard from the Headteacher (JR) and the former Chair of the Board of Governors (DS). The parties then made sequential written closing submissions which I have considered.

The factual background

(i) ST's placement at the School

3. In January 2013, ST and her parents moved to the area where the School is located. RF and MT had been unhappy with the education ST had received at her previous School. They had heard good things about the School, not least because of its values based inclusive education programme. ST was accepted into the School and was placed in year 5. Her parents had hoped that she could be 'held back' at least one school year but JR said that the local authority did not permit this.

4. RF completed a standard form in which she indicated that she did not give permission for ST to be photographed or recorded on video by the School, for photos of ST to be used on the School website or for any photo of ST or her name to appear in the local newspaper in School-related news items.

5. ST was in receipt of a Statement of Special Educational Needs. ST would attend the School's 'Fledglings' unit in the mornings with a small number of other children with additional needs. She would attend the usual year 5 classes in the afternoons. The

School put in place a programme of support for her, as set out in a detailed 'Provision Map'. Two learning support practitioners assisted ST when she was at School. A 'Positive Handling Plan' was agreed to address any challenging behaviour by ST. At regular intervals from 6 March 2013 to 15 July 2013 various external professionals visited the School to re-assess her Statement of Special Educational Needs and provide further support for ST's education. This led to her Provision Map being updated.

6. ST's first day at School was a half-day on 8 February 2013. She was ten years old at this point. In the School's 'General Concerns' document it was recorded that (i) ST had sat on the floor, blocking the door so no-one could go in or out of the classroom; (ii) she had variously tried to bite, kick and pull the hair of three staff members; and (iii) she had grabbed a box containing books, scissors etc off the table and thrown it across the room. It was noted that other children were frightened and were taken out of the classroom, and that when a staff member had gone to cuddle ST, she had pulled the staff member's hair again, thrown more objects and tried to bite her. RF and MT were called in and said that they were surprised by ST's behaviour, indicating that she had only behaved like this once before at Brownies.

7. Similar incidents were recorded on the General Concerns document on 11 February 2013, 26 and 28 February 2013 and 6 and 8 March 2013 and an Incident Report form on 27 February 2013.

8. On 13 March 2013, just after 2 pm, according to the General Concerns document, a 'Major Incident' took place. Reference was made to ST throwing things, pulling things off the tables biting legs and hands and pulling hair. It was noted that some year 4 children arrived and that ST tried to grab them, such that a staff member had to stand between ST and the children. ST was then noted to have calmed down, but a further incident was noted as occurring just after 3.05 pm as the children were getting ready to go home. It was recorded that ST had thrown things, that children had had to duck to avoid the objects and were then taken out of the classroom, and that ST continued to be aggressive to various staff members to such a degree that they had to build a 'barrier' of chairs between themselves and ST but she "*continued to throw anything she could get her hands on*". MT arrived and ST calmed down and signed that she was sorry.

(ii) The decision to send the 14 March 2013 letter

9. JR gave evidence that around 7-8 parents contacted the School to express concern about what their children had seen and experienced in class. This contact was by telephone calls, 'in person' discussions or emails. JR gave evidence that the emails had been deleted in July 2013 at the end of the School year in accordance with her usual practice (as in light of the lack of complaint about the letter from ST's parents before July 2013, she had no reason to keep the emails from the parents).

10. Although I have not seen any direct evidence from the parents in question I accept JR's evidence that concerns were raised by parents with the School about ST's behaviour and about whether the School was able properly to meet ST's needs, while keeping other children safe.

11. I also accept JR's evidence that she and JE (another staff member with particular responsibility for behavioural issues) decided that rather than respond to each parent individually, they would write a letter to all the year 5 parents, the 13 March 2013 incident having acted as a 'catalyst' for this decision. JR explained that she had written such a letter on three previous occasions and she knew of other headteachers who had taken this course. JE drafted the letter and JR approved the text.

(iii) The 14 March 2013 letter

12. This letter is the subject matter of all three claims and so it is necessary to set out its content in full. The letter reads as follows:

> "*Dear Parents*
>
> *As you are aware we have a new child in year 5, her name is [S] and she has Downs Syndrome. [S] is a lovely little girl who brings many positives to our School. However she does find some aspects of School life challenging and your child may have witnessed some behaviour that they find disturbing.*
>
> *We would like to reassure you that your child's safety is paramount. The staff are trained in positive handling techniques and are more than capable of dealing with any situation that arises. We anticipate that these episodes will become less frequent as [S] settles in and we get to know one another more fully.*
>
> *In the meantime if you, or your child, has any concerns please don't hesitate to come in and talk to myself, [JE] or [another staff member] about them.*
>
> *Thank you for supporting our values based inclusive education programme at [L] Primary School.*
>
> *Kind regards*
>
> *JR*
>
> *Headteacher*".

13. The letter was sent to the 60 or so year 5 parents at the end of the School day on 14 March 2013.

14. Whether RF gave her consent for the 14 March 2013 letter to be sent is a matter of dispute which I consider further below.

(iv) Events after 14 March 2013

15. RF's evidence was that she was so distressed by the sending of the letter she took the unusual (for her) step of opening a shop in the town in the hope of meeting people and

're-building ST's reputation.' Whatever RF's feelings about the letter she did not mention it while ST remained at the School.

16. JR's evidence was that the letter generated a positive response from the year 5 parents and therefore as far as she was concerned it had had the desired effect of integrating ST into the School. I was shown a letter from a Mrs Castree, whose child had been in ST's class, saying that she felt that the letter helped to explain the situation and reassure her that the situation was being addressed. RF pointed out that Mrs Castree is employed by the School.

17. There were further incidents of challenging behaviour by ST in late March 2013 and then on 27 June 2013 and 2, 7, 11, 16, 17 and 18 July 2103. The School had continued to take specialist advice as to how best to address ST's behaviour, including from a Functional Behaviour Assessment and further assessments by the Council's Educational Psychologists and Behaviour Support specialists. There was an annual review on 8 July 2013 and while much of it was positive, there was extensive discussion about ST's behaviour. Her parents considered that the School was 'crowding' her with adults but the School did not consider that that was the issue. The School eventually formed the view that it could not meet ST's needs and recommended that she be placed in a specialist school where staff were more experienced in addressing behaviour like ST's. The School withdrew ST's place.

18. From late June 2013 RF was engaging in very heated correspondence with JR. On 11 September 2013 she commenced disability discrimination proceedings against the School in the First-Tier Tribunal (Special Educational Needs and Disability) ("the FTT"). In December 2013 DS asked RF to stop contacting JR or posting about her on social media.

19. On 19 February 2014 the FTT concluded that the School had unlawfully discriminated against ST by withdrawing ST's place at the School (in fact a single judge of the FTT had previously ruled that the School had no prospect of defending that claim and so it was barred from doing so). The FTT also concluded that the sending of the 14 March 2013 letter amounted to direct discrimination contrary to the Equality Act 2010, s.13, because other children would not have had a letter that singled them out and marked them out as a "*behaviour problem*" sent. Finally, the FTT found that the sending of the letter amounted to an act of discrimination arising from disability, contrary to the Equality Act 2010, s.15. In respect of the latter claim the FTT concluded that the letter was on account of ST's behaviour which arose because of her disability. It rejected JR's evidence that the aim was to calm parents down and reassure them and considered that "*the letter could have had the effect of increasing anxiety among the parents rather than decreasing it*".

20. In both the FTT proceedings and this claim RF has alleged that JR and the School were never fully committed to supporting ST and engaged in a campaign to have her removed from the School. The FTT found that there was no evidence to support that contention and accepted JR's evidence that ST was loved by the staff and pupils and that they made every attempt to settle her and understand her difficulties.

21. RF also complained about the letter to the Information Commissioner's Office ("the ICO"). By letter dated 30 April 2014 the ICO made clear that its role was "*not to*

investigate or adjudicate on individual concerns but….[to] consider whether there is an opportunity to improve… practice". However the ICO's letter went on to quote the fact that the FTT had "*concluded that the evidence does not show that you had provided consent for this letter to be distributed to the year 5 parents*" and then said "*In the circumstances we have decided that it is unlikely that the School has complied with the requirements of the DPA in this instance. This is because to share such sensitive personal data with other parents without explicit consent is likely to be unfair and therefore a breach of principle one of the DPA which states that processing should be fair and lawful*".

22. On 2 December 2014 RF commenced County Court proceedings which included reference to the 14 March 2013 letter. These proceedings were struck out, apparently after an application to amend was made by RF. She initiated this claim on 28 February 2019. The earlier proceedings were not considered a bar to this claim being determined at trial.

Analysis of evidence and findings on the 'consent' issue

23. The central factual issue in this case is whether RF consented to the 14 March 2013 letter being sent. The Claimants' case was that no such consent was given, whereas the School averred that it had been.

(i) The Claimants' evidence

(a) The evidence of RF, MT and Ms Forsythe

24. RF was adamant that the School had not sought her consent to the sending of the letter.

25. Rather, her evidence was that on the first day back to school after the Easter holiday, which was established to have been 16 April 2013, she was handed a copy of the letter by the School receptionist. She said that her face must have expressed the distress she felt about the contents of the letter because at that point JR appeared and put her arm around RF, saying "*We had to do this*". RF's evidence was that she asked why it had been sent; that JR said that some parents had been concerned; and that RF asked "*But was <u>this</u> really necessary?*"

26. RF said that it was only later that evening that she realised that the date on the letter was some weeks before, and this upset her. She was very concerned that the letter had gone to all the parents in the School (not just the year 5 parents) and was concerned for ST's safety. She described being fearful that the letter could have inadvertently fallen into the hands of a paedophile who would then know the name of the one child in year 5 at the School who had Down's, and could have approached her in the playground, or something of that nature. RF was adamant in her evidence that she would never have agreed to the letter which she regarded as discriminatory profiling of her daughter.

27. RF's evidence was supported by that of her husband (MT), who confirmed his understanding that RF had never consented to the letter being sent; described seeing RF going into a "*mild hysteria*" on learning that the letter had been sent; and said that

she "*worried endlessly*" about ST's safety. MT said that RF had been 'warned' by a previous social worker to avoid being too 'over-protective' of ST.

28. Both RF and MT pointed to the fact that RF had declined consent to the School to use ST's photograph etc as described above, as evidence that she would not have agreed to the letter being sent.

29. RF responded to the suggestion that if she had been genuinely distressed about the letter she would have complained about it during one of her twice daily visits to the School, by saying that she did not do so, as she was very keen for ST's placement at the School to "*work*" and so "*kept her head down*". This had also been her position before the FTT.

30. Sian Forsythe, a close friend of RF, also described her distress and anxiety about the distribution of information to the public about ST by the School. She was not challenged on this evidence at trial.

(b) The Claimants' hearsay evidence

31. The Claimants invited me to have regard to the evidence of three further witnesses who gave similar evidence to that of Ms Forsythe: Nicki Gilbert, Anthony Bradford and Karen Myers.

32. The School objected to the admissibility of this evidence on the grounds that although the Claimants had informed the School that these witnesses were not being called to give oral evidence (in compliance with CR 33.2(2)(a)), they had not informed the School of the reasons why the witnesses were not being called (as required by CPR 33.2(2)(b)). It was suggested that had the Claimants done this, the School would have applied under CPR 33.4 to have the witnesses attend to be cross-examined at trial. Alternatively, the School argued that the evidence should be admitted, but very little weight attached to it.

33. In response, RF stressed that she was a litigant in person. She emphasised that the School had been made aware of the Claimants' intentions with respect to these witnesses for some time (as they had featured in an earlier summary judgment application) and that there had been further discussions about including their evidence in 'the hearsay part' of the trial bundle. She argued that at no point had the School pointed out her procedural error. She said that she did not consider that she needed to arrange for the witnesses to attend, had not wanted to require them to do so (noting, for example, that one was ST's current Headteacher) and would have tried to arrange for their attendance had she known this was required.

34. As set out above the School accepted that I could, in principle, admit the evidence. The route to admissibility was not fully canvassed in argument but it seems to me that it would be either via CPR 3.9 (by affording the Claimants relief from sanctions) or via CPR 3.10(b) (by exercising the general Court power to rectify matters where there has been an error of procedure).

35. The terms of CPR 33.2(3)(b) are mandatory but do not specify a sanction for non-compliance. A case management order made in this case on 10 December 2019

directed the parties to serve witness evidence and "*all notices relating to the evidence*" by a certain date and contained a general provision that non-compliance meant that the case was "*liable to be struck out or some other sanction imposed*". These elements therefore mitigate in favour of the Claimants needing to seek relief from sanctions under CPR 3.9.

36. On that basis, the familiar elements as set out in *Denton v White* [2014] 1 WLR 3926 fall to be considered, namely (i) the seriousness and significance of the breach in respect of which relief from sanctions is sought; (ii) why the failure or default occurred; and (iii) all the circumstances of the case, including whether the breach has prevented the efficient and proportionate conduct of the litigation.

37. Applying those factors I conclude that (i) the Claimants' breach was not serious or significant, as they had made clear throughout what their intentions were with respect to these witnesses, and if asked by the School, would no doubt have provided the reasons for their intended non-attendance at trial; (ii) the failure occurred because RF is a litigant in person and had not understood that the reference to "*notices*" in the case management order related to the procedural requirements for hearsay evidence; and (iii) the breach has had <u>some</u> impact on the efficient and proportionate conduct of the litigation because the witnesses were not made available for cross-examination at trial. However I was shown no correspondence suggesting that the School's solicitors had pressed RF for reasons for their non-attendance, or the contact details for the three witnesses. The School's counsel accepted that his solicitor had nevertheless been able to make some initial contact with Ms Gilbert (presumably as she made clear in her witness statement which school she is currently Headteacher of), but for whatever reason she was not before the Court as a live witness. Further, the School's counsel asked Ms Forsythe no questions at trial which raises a doubt over whether they would in fact have cross-examined these three witnesses (who give very similar evidence) had they attended.

38. For all these reasons I decided that it would be appropriate to grant the Claimants relief from sanctions for non-compliance with CPR 33.2 and admit the evidence as hearsay at trial. If the correct route to admissibility was in fact CPR 3.10, then I considered that it would be appropriate to exercise that power and remedy the Claimant's procedural failure.

39. Ms Gilbert is the Headteacher of ST's current school. She has known RF since September 2014. She described having seen RF engaging in "*very unusual, over-protective behaviour*" of ST; how she had spoken several times about the distress caused to her by the distribution of the letter by the School; and how she had been keen to protect ST's privacy at her new school.

40. Mr Bradford was a former mayor and councillor of the town where the School is located. Ms Myers was a Teaching Assistant for ST at her former primary School (and a friend of the family). They both described RF's distress at the sending of the letter, but did not attribute these to any particular date.

41. Having admitted the evidence of the three witnesses as hearsay I had to consider its weight. I did so with regard to the Civil Evidence Act 1995, s.4. This provides that in estimating the weight (if any) to be given to hearsay evidence in civil proceedings the

court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and that regard may be had in particular, to (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness; (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) whether the evidence involves multiple hearsay; (d) whether any person involved had any motive to conceal or misrepresent matters; (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; and (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

42. Applying the factors set out in the Civil Evidence Act 1995, s.4 I concluded that the hearsay evidence was to be afforded some weight: it provided general corroboration of other parts of the Claimants' case (in particular as to the distress the letter caused her), from witnesses of some standing, but with the exception of Ms Gilbert's evidence about the privacy form at ST's current school, there was nothing entirely 'new' in the hearsay statements.

(ii) The School's case

43. JR's evidence was that she spoke to RF about the letter when she came to collect ST from School at lunchtime on 14 March 2013.

44. JR's witness statement was to the effect that she had spoken to RF when she came to School to drop off ST's lunch which she or MT did on a daily basis. However JR corrected herself in her live evidence at trial to say that she spoke to RF when she arrived at School to collect ST for a medical appointment. The General Concerns document and the School's electronic diary both record that ST had to leave School early that day for medical reasons.

45. JR's evidence was that she showed RF the letter in the foyer of the School; that RF did not give any negative comments about the letter; and that had she done so, she would not have sent the letter. She said that RF said she was worried that parents were complaining about ST and that she did not want ST to have a bad reputation. JR's evidence was that RF gave her the impression that she was grateful for the action being taken to reassure the parents and that the meeting was positive. JR said that she gave RF a copy of the letter at that time. She did not describe any other meeting with RF at the School about the letter.

46. JR's evidence was supported by the former Chair of the Board of Governors (DS) who gave evidence that in their next weekly catch up JR told DS that she had sent the letter, and that RF had approved its contents.

(iii) Analysis and findings

47. There is no contemporaneous documentary evidence explicitly on the issue of whether RF consented to the 14 March 2013 letter being sent, such as minutes of a meeting between the School and ST's parents. Accordingly I have had to determine

this issue based on the witness testimony only, looked at in the context of all the evidence.

48. RF and MT were clear that they regard the tone of the letter as offensive and stigmatising (although I recognise that there are differences of opinion about that). They both gave very clear written and oral evidence that they did not, and would not, consent to a letter of this sort being sent about ST.

49. As at mid-March 2013, RF and MT had recently moved to the area in question; their daughter had been at her new school for just over a month; and they had not yet fully integrated themselves into their new community. In those circumstances, while some parents may have welcomed a letter of this kind, many may have had reservations, and would at the very least have wanted to have a proper discussion with the School about the letter, and input into the contents of it.

50. However it is clear to me that RF and MT are especially devoted parents to ST. This much was apparent from their evidence, and from the manner in which RF put her questions to other witnesses and made her submissions. They go to considerable lengths to ensure ST receives the best possible education and care, including at times making complaints and bringing litigation on her behalf. This broad characterisation of them as parents is borne out by the Common Assessment Framework report about the family, from shortly before ST joined the School, the writer of which described RF and MT thus: "*Both parents have done extensive research on [ST]'s condition…[ST] is clearly a well loved child who has input from both parents who are devoted to her needs and development…[ST]'s parents life revolves around [ST]…*".

51. It is also apparent to me that RF and MT were particularly protective of ST, perhaps "*over-protective*" as RF herself accepted and some of the wider evidence suggested. They were especially keen to preserve her privacy: RF had, unlike other parents, refused to allow ST's photograph or name to be used by the school, and this has continued at her current school.

52. On balance I found that the hearsay evidence provided helpful corroboration of Ms Forsythe's evidence that the letter caused RF distress, but I was conscious that none of the hearsay witnesses provided any dates for the distress in RF that they had witnessed.

53. The medical evidence was that by early 2014 RF was reporting to her GP some adverse mental health consequences of her engagement with the School but did not address the issue of the letter specifically. By early 2014, of course, the relationship with the School had entirely broken down.

54. The School's closing submissions squarely attacked RF's credibility and asserted that her account was "*incredible, or at least unreliable, and ought to be rejected*". However:

    (i) I did not find the suggestion that RF had given different accounts of the exact date when she first saw the letter significant (and in the same way, I did not find the fact that JR initially thought that the conversation had taken place

when RF was dropping off ST's lunch rather than collecting her for a medical appointment significant).

(ii) I found the reason RF gave for why she did not complain about the letter more forcefully at the time persuasive: it is apparent that as at mid-March 2013, she and MT were very keen for the placement at the School to work, and by the time it became apparent that it was not going to, they had much more pressing issues to consider around where ST was going to be educated.

(iii) I note that RF has been involved in several complaints and pieces of litigation. However at least some of those – notably the FTT and ICO proceedings which relate to these issues – were merited.

(iv) It may be that there are You Tube videos illustrating ST's musical talent, but I was shown no evidence that her social media presence indicates were she is at any one time, such that the 'safety' concerns RF had on seeing the letter were not merited. ST is of course now much older than she was when the letter was sent.

(v) There are some parts of RF's evidence which I did not accept. For example, I do not consider that JR was involved in a 'campaign' to ruin the family's reputation and to exclude ST from the School. I also consider that on occasions she 'underplayed' the difficulties that ST's behaviour caused the School staff. While I did not watch the video that had been made of one of the July incidents I suspect it is unlikely that staff were deliberately antagonising ST, as RF considered could be seen on the video.

(vi) On balance I do not consider that these general points about RF's credibility undermine her account that she did not approve of the contents of the letter and found it upsetting.

55. Overall, I concluded that the Claimants' evidence as to RF not having consented to the sending of the letter was consistent and clear. In those circumstances the most compelling evidence from the School would be needed to prove that RF had agreed that the 14 March 2013 letter was sent.

56. I did not find the School's evidence compelling. It came down to JR's recollection of a brief and informal discussion with RF in the foyer of the School and DS's recollection that JR later told him the letter had been approved before it was sent. None of this is corroborated by contemporaneous documentation. As to the credibility of these general recollections:

(i) Because RF made no complaint about the letter, and because other parents seemed to react favourably to it, JR understandably thought that the letter had been a 'success'. She no doubt moved on to the pressing issue of how best to meet ST's needs at her School, and generally the demands of running a busy School.

(ii) JR was a busy headteacher juggling a lot of responsibilities and who must have had fleeting discussions with dozens of parents, teachers, children and

other professionals during the course of a working week. The impression given in the evidence was that the foyer area of the School is a hive of activity at certain times of the day, where lots of these quick exchanges take place.

(iii) JR was not required to recollect the circumstances in which the letter was sent for over 6 months, until the FTT proceedings later in 2013 when RF raised the issue of the lack of consent. JR gave evidence about the exchange to me just over 7 years after the alleged discussion.

(iv) It is also pertinent that RF describes an exchange in the foyer of the School about the letter after it had been sent, which JR did not refer to in her witness statement. RF's evidence about that exchange was that it was reasonably affable in that JR put her arm around her, and RF simply questioned whether the letter had to be sent. JR did not deny that this second exchange occurred, or RF's description of it. The only issue she took with JR's account was that she did not think that "*We had to do this*" were the exact words she used, but she did accept that she would have conveyed that the School had felt compelled to write to the letter due to the parents' concerns.

57. Overall I conclude that JR was mistaken in her evidence and has confused the two exchanges with RF about the letter. I find that there was no discussion with RF before the letter was sent, but there was an exchange after it had gone. I consider that DS was also mistaken in his recollection of what JR told him, but he was even more removed from events and being asked to recollect them many years later, and so the error can perhaps be understood.

58. I make it clear that I do not consider that either JR or DS has deliberately given false evidence. I found them clear and fair witnesses on the wider issues: for example, JR regretted that the School had unlawfully excluded ST and accepted that in light of the FTT/ICO's finding, and the advent of the General Data Protection Regulation (Regulation (EU) 2016/679), they would not send a letter of his nature now.

59. However I do find that they were both wrong in their recollection on the specific issue of whether or not RF consented to the sending of the letter.

60. The conclusion I have reached about JR's evidence is very similar to that reached by the FTT, but I did not consider myself bound by the FTT's decision and considered the issues afresh, based on all the evidence before me, which was different in some respects to that before the FTT.

61. I therefore conclude that RF did not consent to the letter being sent.

The Claimants' claims

62. The School's primary case was that the consent given by RF was a complete defence to all the claims. As I have concluded that consent was not given, that element of the School's defence falls away. I now consider each claim, based on the alternative arguments advanced by the School.

The DPA

63. The Claimants' claim was that the School had breached the 'first principle' of data protection contained in Schedule 1 of the DPA which requires that personal data "*….shall be processed fairly and lawfully and, in particular, shall not be processed unless….(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met*".

64. The School argued that the DPA may not apply at all to the letter, if "*…the content of the [l]etter was simply a narrative by [JR] of her recent experiences and views, which was not based on [ST]'s school records*". I do not consider that such an interpretation of the DPA is correct: the typing of the letter by the School amounted to the processing of data "*….by means of equipment operating automatically in response to instructions given for that purpose*" within the DPA, s.1(1)(a) and/or the information about ST's Down's Syndrome and the behavioural issues that this caused her was noted in many places within the School's records within the DPA, s.1(1)(c)/(d). If neither of those sections apply, the information was surely "*recorded information held by a public authority [that] does not fall within any of paragraphs (a) to (d)*" within the DPA, s.1(1)(e).

65. Further, I am satisfied that all of the information in the letter amounted to "*sensitive personal data*" about ST as it amounted to "*information as to…[her] physical or mental health or condition*" within the DPA, s.2(e).

66. Accordingly the issues for me to determine are whether the data was processed fairly and lawfully and, in particular, whether at least one of the conditions in Schedule 2 and one of the conditions in Schedule 3 was met.

(i) "*Fairly and lawfully*"

67. Absent the consent of ST's parents to the sending of the letter, I do not consider that the data was processed "*fairly*". For the reasons given below in relation to Schedules 2 and 3 I do not consider that the data was processed "*lawfully*".

(ii) Schedule 2

68. Schedule 2 includes reference to the data subject having given consent to the processing. The School cannot, in light of my findings, avail itself of that element of Schedule 2.

69. The School relied on the further elements of Schedule 2 that justify the processing of data if it is "*necessary*" (i) to comply with a legal obligation to which the data controller is subject, other than an obligation imposed by contract; (ii) for the exercise of any function conferred on any person by or under any enactment; and/or (iii) for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

70. The School argued that it was under statutory duties to provide education services to all the pupils in their care; that it was necessary in fulfilling those duties to take steps to integrate ST into the mainstream classroom environment; and that the letter served the subsidiary purpose of reassuring other pupils and their parents that any disruptive behaviour by ST which they may have seen was temporary and was appropriately addressed by teachers.

71. I do not consider that the School can discharge the burden of showing that the sending of the letter was "*necessary*" for these purposes because:

(i) I have found that the parents' consent to the letter was not obtained;

(ii) There is no evidence that alternative, lesser measures were fully considered and the costs and benefits of each canvassed, with the conclusion that the sending of the letter was the only possible option;

(iii) The act of sending the letter to so many people without the parents' consent was likely to, and did, cause them significant distress;

(iv) There is no evidence that the School properly balanced the risks of potential harm to ST and her parents by the sending of the letter with the potential benefits of the letter; and

(v) The FTT (a specialist tribunal in this field) may also be correct that the letter could in fact have had the effect of increasing and not decreasing the concern among the parents.

(iii) Schedule 3

72. In written closing submissions, the School relied on the elements of Schedule 3 that justify the processing of sensitive personal data if (i) the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject; or (ii) the processing is necessary for the exercise of any functions conferred on any person by or under an enactment.

73. The School did not develop its arguments under (i) above, and I confess I do not follow it. If the School's implied (and it must be said, very unattractive) argument is that ST's behaviour was deliberate and amounted to steps that made the data about herself public, this can only have been to the children and teachers in her class and not to all the parents in year 5 to whom the letter was sent. I do not therefore consider that it can properly or fairly be said that ST (as the data subject) had taken deliberate steps to make the data public.

74. As to (ii), the School relied on the same duties as it advanced in relation to Schedule 2. Again I reject these arguments for the same reasons as are set out at paragraph 71 above.

(iv) Conclusion

75. For the reasons set out above I am satisfied that the School breached the first data protection principle by sending the 14 March 2013 letter.

76. The route to compensation for that breach is found in the DPA, s.13. This section sits within Part II of the DPA, entitled the rights of "*data subjects*". By the DPA, s.1(1) a "*data subject*" is "*an individual who is the subject of personal data*". Here, the person who was the "*subject*" of the personal data was ST and not RF.

77. Accordingly it is only ST and not RF who could recover damages for the breach of the DPA. I deal separately below whether any compensation should be awarded to ST for this breach.

The HRA

(i) Overview

78. Under the HRA, s.6(1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

79. By s.7(1) a person who claims that a public authority has acted in a way which is made unlawful by s.6(1) may bring proceedings against the authority under the Act.

80. The School has not sought to argue that in sending the 14 March 2013 letter it was not acting as a public authority.

81. The Claimants advance their HRA claim under Articles 8 and 14 of the European Convention on Human Rights ("the ECHR"), as set out in Schedule 1 to the HRA.

82. Article 8(1) provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence*". Under Article 8(2), "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

83. Article 14 provides that "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

(ii) Article 8

84. The Strasbourg Court's Guide on Article 8 includes the following that I consider pertinent to this case:

    (i) The Court has defined the scope of Article 8 broadly, even when a specific right is not set out in the Article (para. 2);

(ii) Examples of specific factual scenarios where the Court has concluded that Article 8 does not apply include access to a private beach by a person with disabilities, a conviction for professional misconduct and serious personal injuries sustained in a traffic accident (paras. 3-6);

(iii) Private life is a broad concept incapable of exhaustive definition and may embrace multiple aspects of the person's physical and social identity (para. 65);

(iv) The notion of private life is not limited to an "*inner circle*" in which the individual may live his own personal life as he chooses and exclude the outside world: rather Article 8 encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a "private social life" (para. 66);

(v) Private life encompasses a very wide range of issues, but cases falling under this notion can been grouped into three broad categories (sometimes overlapping) namely: (i) a person's physical, psychological or moral integrity, (ii) his privacy and (iii) his identity and autonomy (para. 70);

(vi) Reputation is protected by Article 8, provided the attack on a person's reputation attains a certain level of seriousness and is made in a manner causing prejudice to personal enjoyment of the right to respect for private life (para. 145);

(vii) The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 (para. 166);

(viii) An interference with Article 8(1) rights will only be justified if, under Article 8(2), it is "*accordance with the law*" and "*necessary in a democratic society*";

(ix) In order to determine the second of these issues, the Court balances the interests of the State against the right of the applicant; will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued; and will approach the notion of "necessity" on the basis that the interference must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued. It is also the duty of the State to demonstrate the existence of a pressing social need behind the interference (paras 26 and 27); and

(x) In *Glass v UK* (Application no. 61827/00, 9 March 2004), damages were awarded to the mother of a disabled child, where medical treatment had been given to him without her consent (albeit that the Court had concluded earlier in its judgment that it was only required to examine the issues raised from the standpoint of the child's right to respect for his physical integrity, having regard to the second applicant's role as his mother and legal proxy).

Article 14

85. The Court's Guide on Article 14 and Protocol 12, Article 1 includes the following key principles:

(i) Article 14 has no independent existence: it does not prohibit discrimination as such, but only discrimination in the enjoyment of the other rights and freedoms set out in the ECHR (para. 3);

(ii) The ancillary nature of Article 14 does not mean that its applicability is dependent on the existence of a violation of the substantive provision, such that the Court has recognised the applicability of Article 14 in cases where there has been no violation of the substantive right itself (paras. 4-9);

(iii) The material scope of application of Article 14 is not strictly limited to that of the substantive provision: for Article 14 to be applicable it is sufficient for the facts of the case to fall within the wider "ambit" of one or more of the Convention Articles, to be linked to the exercise of a right guaranteed by the substantive Article, or that it does not fall completely outside the ambit of the substantive Article (paras. 4 and 10-18);

(iv) Article 14 does not provide a definition of what constitutes "direct discrimination" but this is understood to describe a "*difference in treatment of persons in analogous, or relevantly similar situations*" and "*based on an identifiable characteristic, or 'status'*" (para. 27); and

(v) The Court has confirmed that Article 14 also covers discrimination by association, that is, situations where the protected ground in question relates to another person somehow connected to the applicant. This concept has been relied on successfully by the parents of disabled children (paras. 36 and 37).

(iv) ST's claim

86. The information in the letter included ST's name, the year in which she was placed at School, her disability, her temperament, and the fact that she had some behavioural issues which could be regarded as "*disturbing*" and lead to "*safety*" concerns. I consider that this information was protected by her Article 8(1) rights.

87. The sending of the letter amounted to publication of information about ST to a group of people she did not know. This amounted to an interference with her Article 8(1) rights.

88. I do not consider that this interference was justified because:

(i) I have found above that it was in breach of the DPA, and so the interference cannot be said to have been "*in accordance with the law*"; and

(ii) Applying the approach set out at paragraph 84(ix) above, it was not "*necessary in a democratic society*": while I accept that the School's actions were intended to ensure the protection of the rights and freedoms of the other children in ST's class, I do not consider that the sending of the letter was proportionate for the reasons given at paragraph 71 above.

89. ST's case is analogous to the following cases:

(i) *M.S. v. Sweden* (Application no. 74/1996/693/885, 27 August 1997) - where the disclosure, without a patient's consent, of medical records, including information relating to an abortion, by a clinic to the Social Insurance Office, and therefore to a wider circle of public servants, constituted an interference with the patient's right to respect for private life; and

(ii) *Mockutė v. Lithuania* (Application no. 66490/09, 27 February 2018) - where the disclosure of medical data by medical institutions to journalists and to a prosecutor's office, and the collection of a patient's medical data by an institution responsible for monitoring the quality of medical care, were also held to have constituted an interference with the right to respect for private life.

90. I therefore find that the sending of the 14 March 2013 letter amounted to a breach of ST's Article 8 rights.

91. I do not consider that the letter would have been sent if ST was not disabled. On that basis the sending of the letter amounted to a difference in treatment of ST compared to other children based on her disability and thus a breach of her Article 14 rights read with Article 8.

(v) RF's claim

92. I have found the issue of whether the HRA claim by RF, as ST's mother, is sound more difficult to determine.

93. Neither party took me to case-law specifically holding that private information about a disabled child is, or is not, covered by the parent's Article 8 rights.

94. The School argued that there is no such authority, but that RF could not claim as a 'secondary victim'. Reliance was placed on *Liverpool Women's Hospital NHS Foundation Trust v. Ronayne* [2015] PIQR P20, per Tomlinson LJ at paras. 8, 14, 33 and 41. In *Ronayne,* the Claimant's wife had become seriously ill as a result of the NHS Trust's admitted negligence, and he claimed psychiatric injury consequent upon shock of seeing wife's sudden deterioration and appearance. On appeal it was held that the events concerned were not of a nature capable of founding a 'secondary victim' case as they were not horrifying, sudden and exceptional.

95. I am not persuaded that the 'nervous shock' cases under the domestic law of negligence, such as *Ronayne*, are the correct analogy here.

96. Rather, I consider that the general Article 8 and 14 principles set out above are of greater assistance.

97. RF was capable of being identified by the letter as she was known to be ST's mother. She is, as I have found above, the very protective mother of a disabled child who provides her with extensive daily care and regularly advocates for her child's rights. Her status as the mother of a disabled child is integral to her daily existence and to her identity. Her concerns over her child's welfare were key to her own personal integrity and wellbeing. The sending of the letter adversely, in her view, affected her reputation in the School community.

98. In those circumstances I consider that the information within the letter was protected by her Article 8(1) rights to respect for her privacy and family life. For the same reasons as are given at paragraphs 71, 88 and 89 above in respect of ST, I do not consider that the interference with those rights was justified under Article 8(2).

99. If I am wrong in that analysis, the information was within the "ambit" of RF's Article 8 rights and RF was discriminated against in the enjoyment of those rights under Article 14: she was directly discriminated against because she was treated less favourably than the mother of a non-disabled child (who would not have had such a letter sent) and/or she was subjected to discrimination by her association with her disabled child.

(vi) Conclusion

100. I therefore uphold both ST and RF's HRA claims to the extent set out above.

Misuse of personal information

101. This tort was identified in *Campbell v. MGN* [2002] EWCA Civ 1373 and considered further in cases such as *Murray v. Express Newspapers* [2008] EWCA Civ 446, *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777 (QB) and *Napier v. Pressdram Ltd* [2009] EWCA Civ 443.

102. The Court must determine (i) whether the information disseminated was private, in the sense that it is protected by Article 8, a question which requires consideration of whether, objectively, the person had a "*reasonable expectation of privacy*" about it; and (ii) if so, whether dissemination of the information was justified, applying an "*intense focus*" and a proportionality test, and considering the comparative importance of the right being claimed and the justification advanced for the dissemination.

(i) Did the Claimants have a reasonable expectation of privacy about the information in the letter?

103. In respect of this claim the School argued that the information was already known to the parents, and so was no longer private. I do not accept this because:

(i) I am not confident that prior knowledge of information by a recipient changes the private nature of the information: I note, for example, Strasbourg case-law to the effect that personal data is already in the public domain will not necessarily remove the protection of Article 8 (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Application no. 931/13, Grand Chamber, 27 June 2017), § 134); and

(ii) Even if I does, it is not clear on the evidence that all 60 parents knew this information about ST: presumably year 5 was divided into at least two smaller classes and so only some of the children had daily contact with ST, and even then, not all of those children had necessarily told their parents all these details about ST.

104. In my view ST and RF did have a reasonable expectation of privacy about the information in the letter, not least because it was protected by their Article 8 rights for the reasons given above.

(ii) Was disclosure of the information justified?

105. For the reasons given at paragraphs 71, 88 and 89 above, I do not consider that the School can discharge the burden of showing that the disclosure of the information was justified for the purposes of this tort.

(iii) Conclusion

106. I therefore uphold both ST and RF's claims for misuse of personal information.

Remedy

107. As set out above I have upheld (i) ST's claim under the DPA; (ii) ST and RF's claims for breaches of Article 8 and Article 14 as read with Article 8; and (iii) ST and RF's claims for misuse of personal information. These claims all relate to the sending of the 14 March 2013 letter and so I need to ensure that inappropriate "double recovery" of damages is not made.

(i) ST

108. I do not accept the 'high' case advanced by RF, to the effect that the sending of the letter was the beginning of a series of events that led to ST being excluded from the School. The contemporaneous evidence (including the various reports of the professionals who inputted into ST's education and the annual review) does not support this analysis.

109. Rather, I consider that compensation would only be appropriate for ST for the impact on her of the sending of the letter.

110. Under the DPA, ST could only recover compensation for breach of the DPA if she could prove that she had suffered distress or other damage as a result of the breach (see the wording of s.13, as interpreted by *Google Inc. v Vidal-Hall and Ors* [2015] EWCA Civ 311). There is no clear evidence before me that ST was informed of the sending of the letter and has been distressed by it. I therefore make no award of compensation to ST under the DPA.

111. I consider it appropriate to award her compensation for the misuse of her personal information.

112. I am assisted in the quantification of that award by *TLT and others v Secretary of State for the Home Department and the Home Office* [2016] EWHC 2217 (QB) in which Mitting J made awards of damages to asylum seekers, whose private information had been accidentally posted on a website by the Home Office.

113. Following *TLT*, in assessing damages for distress the court should take into account awards made for psychiatric or psychological injury in personal injury cases to ensure that any award is not out of kilter with them. Taking into account the Claimants' loss of control over their information, and the impact of the data breach upon each of the Claimants, as outlined in their witness statements damages were awarded to each of the Claimants ranging from £2,500 to £12,500.

114. In light of the limited evidence of the direct impact on ST of the sending of the letter, I consider that an award of £1,500 under this head is appropriate. In my view this sum is appropriate to reflect the sending of the letter in itself.

115. As to ST's HRA claim I make a declaration that her rights under Articles 8 and 14 were breached. However I do not make any further award of damages under this head as I am not satisfied that to do so is necessary to award ST just satisfaction under the HRA, s.8(3).

(ii) RF

116. As set out above I do not accept that the letter led to the exclusion of ST from the School. I consider that the decision by RF to open her shop is, on the evidence, too remote from the sending of the letter to sound in damages under any of the claims. Neither of these elements should therefore be reflected in compensation to RF.

117. Applying the guidance in *TLT*, I consider that an appropriate award for RF for the misuse of personal information is £3,000. In my view such a figure properly reflects the distress she suffered, but the absence of medical evidence that she sustained any psychiatric injury as a result of the letter alone.

118. As with ST I make a declaration that RF's rights under Articles 8 and 14 were breached but make no further award of damages under the HRA.

119. Exemplary damages are not appropriate in a breach of privacy claim (see *Mosley*, para. 197) but even if they were, the School's conduct here would not justify such an award.

Conclusion

120. For all these reasons:

(i) I find that the School breached the DPA but make no award of compensation to ST for the breach;

(ii) I make a declaration that the School breached the Article 8 and 14 rights of both ST and RF but make no separate award of damages under the HRA; and

(iii) I conclude that the School unlawfully misused personal information and that this merits awards of £1,500 to ST and £3,000 to RF.