

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

Permission is given to appeal against the decision of the First-tier Tribunal made on 13 February 2017 under reference EH926/16/00024.

As the decision involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

A. History and background

1. This is another case in which the First-tier Tribunal has struck out proceedings, leading to an appeal to the Upper Tribunal and, in due course, to a rehearing before the First-tier Tribunal, exactly the opposite of what the tribunal no doubt intended.

2. The case concerns a claim under section 85 of the Equality Act 2010, brought in the First-tier Tribunal on 8 June 2016 by Mrs G in respect of discrimination against her son B by NDHS, which is an Academy.

3. The tribunal identified five allegations of discrimination:

- At a meeting on 15 January 2016, NDHS tried to remove B from its roll.
- NDHS failed to enter B as an external candidate for exams, changed his exam board and did not make adequate arrangements for him to take his exams.
- NDHS failed to provide psychologist support to help B's transition back to NDHS.
- NDHS failed to make reasonable adjustments for B's medical condition during PE.
- NDHS failed to prepare a transition plan to support B's return to the school.

The tribunal considered these allegations and the application by NDHS that the proceedings be struck out. Concerned that Mrs G did not have representation, the tribunal set out its provisional reasoning in detail and adjourned to give her time to obtain legal advice. This she did in the form of Mark Small of Baker Small solicitors. The tribunal then made its decision to strike out the proceedings for lack of jurisdiction or, in the alternative, for lack of prospect of success.

4. An important background to the tribunal's reasoning was that the local authority had decided under section 19 of the Education Act 1996 that it should make arrangements for B's education as, by reason of his illness, he would not otherwise receive suitable education. The local authority made arrangements

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with another school, which I call LS. The tribunal said at paragraph 15 of its reasons that it 'considered each of the issues within the claim to identify who was legally responsible for B at the time, what was the role of NDHS, was the claim made against the correct party and if it was, whether it had a reasonable prospects of success.'

B. The oral hearing

5. I held an oral hearing of the application for permission to appeal on 24 July 2017. Russell Holland of counsel, instructed by Baker Small solicitors, represented Mrs G. Tom Amraoui of counsel, instructed by Andrew Brett solicitor with NPLaw, represented the Academy. I am grateful to both counsel for their written and oral arguments. At the end of the hearing I asked whether, if I were to give permission, counsel wished to have a chance to make further argument. Both submitted that they would leave it to me to decide if I felt that further argument on the appeal was required. I have decided to proceed to a decision without further argument.

C. Legislation

Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699)

2 Overriding objective and parties' obligation to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—

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- (a) help the Tribunal to further the overriding objective; and
- (b) co-operate with the Tribunal generally.

8 Striking out a party's case

- (1) With the exception of paragraph (3), this rule does not apply to mental health cases.
- (2) The proceedings, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction would lead to the striking out of the proceedings or that part of them.
- (3) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
 - (a) does not have jurisdiction in relation to the proceedings or that part of them; and
 - (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
- (4) The Tribunal may strike out the whole or a part of the proceedings if—
 - (a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or part of them;
 - (b) the applicant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
 - (c) the Tribunal considers there is no reasonable prospect of the applicant's case, or part of it, succeeding.
- (5) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (3) or (4)(b) or (c) without first giving the applicant an opportunity to make representations in relation to the proposed striking out.

Education 1996

19 Exceptional provision of education in pupil referral units or elsewhere.

- (1) Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.
- (1A) In relation to England, subsection (1) does not apply in the case of a child—
 - (a) who will cease to be of compulsory school age within the next six weeks, and

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(b) does not have any relevant examinations to complete.

In paragraph (b) 'relevant examinations' means any public examinations or other assessments for which the child has been entered.

(2) Any school established (whether before or after the commencement of this Act) and maintained by a local authority which—

(a) is specially organised to provide education for such children, and

(b) is not a county school or a special school,

shall be known as a 'pupil referral unit'.

(2A) Subsection (2) does not apply in relation to schools in England.

(2B) Any school established in England (whether before or after the commencement of this Act) and maintained by a local authority ¹ which—

(a) is specially organised to provide education for such children, and

(b) is not a community or foundation school, a community or foundation special school, or a maintained nursery school,

shall be known as a 'pupil referral unit'.

(3) A local authority may secure the provision of boarding accommodation at any pupil referral unit.

(3A) In relation to England, the education to be provided for a child in pursuance of arrangements made by a local authority under subsection (1) shall be—

(a) full-time education, or

(b) in the case of a child within subsection (3AA), education on such part-time basis as the authority consider to be in the child's best interests.

(3AA) A child is within this subsection if the local authority consider that, for reasons which relate to the physical or mental health of the child, it would not be in the child's best interests for full-time education to be provided for the child.

(3B) Regulations may provide that the education to be provided for a child in pursuance of arrangements made by a local authority in England under subsection (1) must be provided from a day that, in relation to the pupil concerned, is determined in accordance with the regulations.

(4) A local authority may make arrangements for the provision of suitable education otherwise than at school for those young persons who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

(4A) In determining what arrangements to make under subsection (1) or (4) in the case of any child or young person a local authority shall have regard to any guidance given from time to time by the Secretary of State.

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(5) Any child for whom education is provided otherwise than at school in pursuance of this section, and any young person for whom full-time education is so provided in pursuance of this section, shall be treated for the purposes of this Act as a pupil.

(6) In this section—

‘relevant school’ means—

- (a) a maintained school,
- (b) an Academy,
- (c) a city technology college, or
- (d) a city college for the technology of the arts;

‘suitable education’, in relation to a child or young person, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have (and ‘suitable full-time education’ is to be read accordingly).

(7) Schedule 1 has effect in relation to pupil referral units.

402 Obligation to enter pupils for public examinations.

(1) Subject to subsections (2) and (3), the governing body of a maintained school shall secure that each registered pupil at the school is entered, at such time as they consider appropriate, for each prescribed public examination for which he is being prepared at the school at the time in question in each syllabus for that examination for which he is being so prepared.

Equality Act 2010

85 Pupils: admission and treatment, etc

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

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

(2) The responsible body of such a school must not discriminate against a pupil—

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;

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- (f) by subjecting the pupil to any other detriment.
- (3) The responsible body of such a school must not harass—
 - (a) a pupil;
 - (b) a person who has applied for admission as a pupil.
- (4) The responsible body of such a school must not victimise a person—
 - (a) in the arrangements it makes for deciding who is offered admission as a pupil;
 - (b) as to the terms on which it offers to admit the person as a pupil;
 - (c) by not admitting the person as a pupil.
- (5) The responsible body of such a school must not victimise 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.
- (6) A duty to make reasonable adjustments applies to the responsible body of such a school.
- (7) In relation to England and Wales, this section applies to—
 - (a) a school maintained by a local authority;
 - (b) an independent educational institution (other than a special school);
 - (ba) an alternative provision Academy that is not an independent educational institution;
 - (c) a special school (not maintained by a local authority).
- (8) In relation to Scotland, this section applies to—
 - (a) a school managed by an education authority;
 - (b) an independent school;
 - (c) a school in respect of which the managers are for the time being receiving grants under section 73(c) or (d) of the Education (Scotland) Act 1980.
- (9) The responsible body of a school to which this section applies is—
 - (a) if the school is within subsection (7)(a), the local authority or governing body;
 - (b) if it is within subsection (7)(b), (ba) or (c), the proprietor;

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- (c) if it is within subsection (8)(a), the education authority;
 - (d) if it is within subsection (8)(b), the proprietor;
 - (e) if it is within subsection (8)(c), the managers.
- (10) In the application of section 26 for the purposes of subsection (3), none of the following is a relevant protected characteristic—
- (a) gender reassignment;
 - (b) religion or belief;
 - (c) sexual orientation.

D. The fairness issue

6. Mr Holland criticised the First-tier Tribunal for the procedure it followed. One criticism was that the tribunal did not refer to the overriding objective when considering its exercise of rule 8. The other was that the tribunal, having identified that the allegations of discrimination were 'wide ranging and difficult to define', should have given Mrs G a chance to amend her claim.

7. I do not accept those criticisms. Procedurally, the tribunal dealt with the case with scrupulous fairness.

8. With regard to the overriding objective, this should form part of the First-tier Tribunal's consideration of every procedural issue to which it applies. There ought to be no need to mention it expressly, as it should be clear from the tribunal's approach to procedural issues that it has taken it into account. Its relevance and scope will depend on the issue. Rule 2(4) provides that it applies to the interpretation of the rules and practice directions and to the exercise of powers under the rules. There was no issue of interpretation of the rules in this case, so it only applied to the exercise of its powers. Striking out for lack of jurisdiction, which was the principal basis of the tribunal's decision, is mandatory and the tribunal is under a duty to allow a party a chance to make representations under rule 8(5). There was no scope for the overriding objective to operate there. But the tribunal also had the opportunity to exercise its general case management powers in respect of the chance to make representations. The procedure it followed of an adjournment coupled with its provisional detailed analysis shows that it was motivated by the need to deal with the case fairly and justly, to help Mrs G understand the complexity of the issues involved, and to help her participate fully in the proceedings.

9. With regard to amending the claim, Mr Small did not apply for this and merely suggested that the issues could be identified under two headings. Mrs G had the benefit of a solicitor experienced in education law and there is nothing to suggest that the tribunal would not have considered an application to amend the claim if he had made one.

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E. The jurisdiction issue

10. The tribunal made an error of law by treating the issue as one of jurisdiction. A three-judge panel of this Chamber recently analysed the nature of jurisdiction within the meaning of rule 8: *LS and RS v Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 257 (AAC). It adopted the classic analysis of jurisdiction by Lord (then Lord Justice) Diplock in *Garthwaite v Garthwaite* [1964] P 356 at 387:

In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors.

I note that the example he gave of a lack of jurisdiction under head (ii) was an action against a foreign sovereign or ambassador, which would be bound to fail regardless of the subject-matter of the case.

11. The importance of jurisdiction arises, as Lord Diplock pointed out at page 388, when it is statutory. Its role is to identify the type of case in respect of which a tribunal has authority to act. The question whether heads (i), (ii) and (iii) are satisfied must, therefore, be asked and answered at that level of generality. Is this the *type* of subject matter, party and remedy over which the tribunal has authority? This must not be confused with the separate question of whether any individual claim between particular parties is likely to succeed on its merits. The question is whether it is the type of case that the tribunal has authority to consider and decide on its merits.

12. The tribunal decided that NDHS did not have a legal responsibility in respect of the matters complained of. There are two ways to analyse this. One way is that the matters that Mrs G complained of and the relief she sought were within the scope of the First-tier Tribunal's jurisdiction under section 85, so heads (i) and (iii) of that definition were satisfied, but that head (ii) was not. The other way is that the problem lay with head (i) rather than head (ii), since the matters complained of were outside the powers of NDHS.

13. On either analysis, the tribunal did not ask the right question at the jurisdictional level. By descending into the particulars of the case, it elided two separate questions: (a) whether the tribunal had jurisdiction (rule 8(3)(a)); and (b) whether Mrs G had any reasonable prospect of success on the merits of her claims (rule 8(4)(c)). If that approach were correct, it would deprive rule 8(3)(a) of any separate existence in respect of Lord Diplock's head (ii).

F. The prospect of success issue

14. The tribunal did not act under rule 8(3)(a) alone. In the alternative, it exercised the power under rule 8(4)(c). If its approach on the latter was sound, the error in respect of the former would not be material.

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15. I have decided that the tribunal has not shown that it approached this issue correctly. It may, or may not, have come to the correct decision, but its reasons do not show that it has done so. I have come to this conclusion for the following reasons. The tribunal's focus was on the jurisdiction issue. Its reasons on the prospect of success issue were by way of backup. As a result, they lacked an account of the detailed analysis the tribunal promised in paragraph 15 of its reasons. And, also as a result, the issue of who was responsible for B's education was prominent. I accept Mr Holland's argument that that is not the correct question.

16. I can illustrate how the tribunal should have proceeded, and how it went wrong by not doing so, by reference to entering B for exams. The correct way to deal with this allegation was to begin with section 85 and decide whether NDHS has harassed, victimised or discriminated against anyone under the terms of that section. As the issue concerned entry for examinations, that should have led the tribunal to section 402 of the Education Act 1996. On the face of it, the effect of the local authority's action under section 19 had been to transfer responsibility for entry for exams to LS as the school at which he was being prepared for examinations. However, the matter was more complicated by the fact that NDHS was still playing a supportive role in respect of exams. The tribunal needed to analyse that role, relative to the allegation, to decide whether what NDHS did amounted to harassment, victimisation or discrimination. Notice that the focus is on what NDHS did and did not do and whether that amounted to a breach of section 85. A school's powers and duties under the education legislation are a relevant factor, possibly even a decisive factor in deciding whether the act or omission amounted to harassment, victimisation or discrimination. But the come at the end of the analysis, not at the beginning.

17. The tribunal set out its analysis in paragraph 20 of its reasons. It breaks down like this:

- The legal responsibility to make exam arrangements was that of the local authority and LS.
- NDHS continued to support B, his parents, LS and the local authority, but it was not their legal responsibility to do so.
- So the claim in respect of exams had no reasonable prospect of success.

Notice how the tribunal, by its emphasis on legal responsibility and by treating it as alone decisive, changed the focus away from section 85, thereby cutting away anything that NDHS might have done in its supportive role as irrelevant under section 85. Its approach effectively determined the outcome.

18. I am not saying that the tribunal made exactly the same mistake in respect of each claim. All I am saying is that the tribunal's misplaced focus was inherently dangerous and, without a detailed explanation of its reasoning, it is impossible to know whether this affected the outcome. That is why I have directed a rehearing.

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**Signed on original
on 31 July 2017**

**Edward Jacobs
Upper Tribunal Judge**