IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No HS/2703/2019 (V)

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Jake Rylatt, instructed by Coram CLC

For the Respondent: Ms Jennifer Thelen, instructed by Birketts

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings. This order does not apply to: (a) the appellant's parent(s); (b) any person to whom the appellant's parent(s) discloses such a matter or who learns of it through publication by the parent(s), for reasons bona fide aimed at promoting the appellant's best interests; or (c) any person exercising statutory (including judicial) functions in relation to the appellant where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

The case is to be cited as F v Responsible Body of School W.

DIRECTIONS

A. I directed at the start of the hearing under s.29ZA of the Tribunals, Courts and Enforcement Act 2007 (inserted by the Coronavirus Act 2020) that the Upper Tribunal was to use its reasonable endeavours to make a recording of these proceedings using the Skype for Business recording facility and preserve it for a reasonable time in case a member of the public wishes to view the proceedings. To the extent that, whether by virtue of the lack of publicity of the hearing via Court hearing lists or otherwise, the hearing did not constitute a public hearing, I directed that in the light of the exceptional public health considerations and because the response of the Upper Tribunal, as with other parts of the courts and tribunals, has been and remains in a phase of rapid development and the case is of a technical nature unlikely to be the subject of public interest, the hearing could proceed as a private hearing. Neither counsel voiced any objection.

B. The General Stay ordered by the Chamber President on 25 March 2020 expressly exempted from its scope remote hearings, such as the present one, which had already been arranged. So far as may be required, I lift the stay to

enable the issue of this decision, if practicable, within the period of the General Stay.

C. The Upper Tribunal office must forward a copy of this decision to the Tribunal Procedure Committee.

DECISION

The appeal is allowed. The decision of the First-tier Tribunal on the papers on 31 October 2019 under reference EH935/1900089 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision in terms that the claim is to be registered including, as free-standing claims, the appellant's claims based on a failure to make reasonable adjustments.

REASONS FOR DECISION

Preliminary

1. This decision follows a remote hearing which was consented to by the parties. As required, I record that:

> (a) the form of remote hearing was V (Skype for Business). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, with counsel on both sides and involving pure matters of law. Further delay would be inexpedient as this is an appeal on an interlocutory point and proceedings in the First-tier Tribunal ("FtT") are stayed pending its determination;
>
> (b) the documents that I was referred to were contained in an electronic bundle of 94 pages: I was working off the paper file which it was confirmed contained all the same material, albeit slightly differently numbered;
>
> (c) the order and decision made are as set out above;
>
> (d) after the hearing had concluded, counsel were asked for their views on the suitability of the process and indicated they considered it very satisfactory for this type of hearing (i.e. on a pure point of law, without evidence and when both parties were professionally represented.)

2. This was the first such hearing in this Chamber of the Upper Tribunal and came at the end of a tumultuous week when there had been very significant pressure on judges and legal and administrative staff, with very reduced numbers of the latter groups in a position to work. Whilst publicity is normally given to hearings by this Chamber via the daily hearing lists and the hearing would normally take place in an open court, the latter is not the case in this

instance and the lack of mention in the daily hearing lists was only realised at a time when no staff were available who could remedy it. I therefore made Direction A above.

3. Both parties have requested that an order be made under rule 14. I am satisfied that such an order is appropriate. This is an appeal on an interlocutory point and the substantive case will continue in the FtT, where anonymity is applied. The usual practice in disability discrimination cases in this Chamber is to anonymise the name of a child or young person in any published decision, without formal order, subject to any objection. The reasons underlying that practice are just as appropriate if a formal order has been requested. That needs to extend to the identity of the respondent as well, in order to preserve the appellant's anonymity.

What this case concerns

4. The appeal examines whether, and in what circumstances, the FtT may refuse to register a case (over which it would potentially have jurisdiction) in whole or part and what procedural safeguards are required. It arises in the context of a claim for alleged disability discrimination by a school against a former pupil, a young man now aged 20, to whom I refer simply as "F". F has a diagnosis of autism and because of his behaviour and aggressive outbursts is said to require a high level of support. He also has a dermatological condition, which his autism makes much harder to manage.

The litigation so far

5. F, with the assistance of his mother, brought a claim against his former school, alleging that a number of incidents between February and April 2019 resulted in unlawful discrimination against him. Their culmination occurred in April 2019 when a member of staff was injured following a physical and aggressive outburst by F, leading initially to a fixed term exclusion, subsequently converted to a permanent exclusion.

6. Grounds of claim were submitted, prepared by Coram Children's Legal Centre, experienced solicitors in this field. There were complaints of:

> (a) direct discrimination, contrary to s.13 of the Equality Act 2010;
> (b) indirect discrimination, contrary to s.19;
> (c) discrimination arising in consequence of disability, contrary to s.15; and
> (d) failure to made reasonable adjustments, contrary to s.20.

7. On 15 October 2019 the matter came before Judge Hockney on the papers, resulting in what are headed as "Case Management Directions on the Papers." The legal basis for them is stated to be rules 5 and 6 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008/2699 ("the HESC Rules").

8. The Directions record:

> "All discrimination claims are seen by a Judge before registration. The purpose is to identify the issues which have to be determined, and to issue directions which will enable an appropriate response to be drafted and the relevant evidence to be available. The Judge's analysis provides assistance to the parties in preparing for the hearing, so that they are aware of what the issues are which the Tribunal must decide, and what evidence will be relevant. It may also allow the parties to reflect on the scope for an agreed settlement of the dispute. If you disagree with any of the directions below, you must apply for variation of the directions by the deadline stated.
> …
> These directions are to be read together with the standard directions issued on registration. A party has the right to request any of the directions to be varied. …"

9. The judge noted that the claim related to:

> (1) F's permanent exclusion;
> (2) the alleged failure to provide F with a full-time timetable from March 2019 until 1 April 2019 *(sic)*; and
> (3) "the alleged failure to make reasonable adjustments such as the failure to provide sign language and failing to communicate about [F's] needs."

She noted that the exclusion was most appropriately brought under section 15, observing that excluding a pupil might constitute unfavourable treatment and that if there was a sufficient link between the treatment and the disability it would be for the responsible body to demonstrate that the exclusion was a proportionate means of achieving a legitimate aim (or that the responsible body neither knew, nor had reason to believe, that F was disabled). While the tribunal could not make findings of a failure to make reasonable adjustments in relation to an exclusion decision, it could look at such alleged failure as evidence relevant to whether the decision was proportionate. Accordingly, such issues as the alleged failure to provide communication support could be considered when deciding whether the responsible body had acted proportionately.

10. The material part of the judge's Directions provided:

> "It is ordered:
>
> <u>The claim</u>
>
> 7. The fixed term exclusion on 3rd, 5th, 24th, 26th and 29th April 2019 followed by (*sic*) the permanent exclusion on 26th April 2019 is accepted for registration.

> 8. The allegation that [F] was placed on a reduced timetable from March until 1st April 2019 is accepted for registration.
> 9. No other claims are registered."

The Directions went on to set out the process by which they could be challenged. Paragraph 15 then gave Directions for the responsible body's response, including requiring them to indicate

> "what elements of the claim as defined in direction 8 above, if any, are accepted as factually correct, and which facts are disputed, why they are disputed, and the evidence the responsible body will rely on in relation to those elements."

11. On 17 October 2019 the appellant's solicitors duly applied for Judge Hockney's Directions to be varied:

> a. submitting that the "failure to make reasonable adjustment" allegations were distinct from the exclusion and ought to be considered separately in their own right;
> b. referring the FtT to where in the claim (paragraph 43) the allegations were set out and where the examples of reasonable adjustments that ought to have been made were to be found;
> c. submitting that all the incidents were within the limitation period for reasons given in the claim; and that
> d. therefore "these incidents ought to be registered and that the responsible body is required to respond to them".

12. That application was refused by Judge Lewis on 31 October 2019 on the papers. The judge stated:

> "It is correct that the Registrations Order dated not include Paragraph 43 (*sic*). I have reviewed the claim and concluded that the claim is not drafted with sufficient precision to identify the breach of section 20 Equality Act 2010 such that the RB could respond. The "provision, criterion or practice" is not sufficiently identified and the claim is vague and generalised. It is not pleaded with sufficient particularity, to identify the date(s) and the specific incident and what the Claimant says should have happened."

13. It was against that decision that the appellant sought to appeal. His application to the FtT for permission to do so was referred on by the FtT to the Upper Tribunal, without the FtT having considered it, apparently on the instructions of the Deputy Chamber President. No reasons are evident in the papers I have why that approach was taken and in the absence of them, I respectfully consider it was contrary to rule 47 of the HESC Rules for the FtT to fail to consider an in-time application for permission to appeal that had been made to it. I waived the requirement in rule 21 of the Upper Tribunal Rules for an application for permission to appeal to have been considered below and gave permission to appeal.

14. The parties made an agreed application to the FtT to stay the remainder of the proceedings pending resolution of the present appeal. That, too, was referred by the FtT to the Upper Tribunal. I refused the resulting application, on the basis that the Upper Tribunal has no power to stay ongoing proceedings in the FtT on a statutory appeal, whereas rule 5(3)(j) of the HESC Rules gave the FtT express power to stay its own proceedings.

The relevant legal framework

15. Section 22 of the Tribunals, Courts and Enforcement Act 2007 provides:

> (1) There are to be rules, to be called *"Tribunal Procedure Rules"* , governing–
> (a) the practice and procedure to be followed in the First-tier Tribunal,…
> (b) ….
> (2) Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee.
> (3) [Introduces the detailed provisions of Schedule 5 – see below].
> (4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing–
> (a) that, in proceedings before the First-tier Tribunal…, justice is done,
> (b) that the tribunal system is accessible and fair,
> (c) that proceedings before the First-tier Tribunal… are handled quickly and efficiently,
> (d) that the rules are both simple and simply expressed, and
> (e) that the rules where appropriate confer on members of the First-tier Tribunal … responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.
> (5) …

There is little in Schedule 5 which bears on this case, save to note that by para 16:

> Rules may confer on the First-tier Tribunal… such ancillary powers as are necessary for the proper discharge of its functions.

16. The following provisions of the HESC Rules are relevant.

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

5. Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
…
(c) permit or require a party to amend a document;
(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
(e) deal with an issue in the proceedings as a preliminary issue;
(f) hold a hearing to consider any matter, including a case management issue;
...

6. Procedure for applying for and giving directions

(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.

(5) If a party, or any other person given notice of the direction under paragraph (4), wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

7 Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
(a) waiving the requirement;
(b) requiring the failure to be remedied;
(c) exercising its power under rule 8 (striking out a party's case);
(d) exercising its power under paragraph (3); or
(e) except in mental health cases, restricting a party's participation in the proceedings.

8. Striking out a party’s case
…
(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.
…
(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 … (4)(b) or (c) without first giving the applicant an opportunity to make representations in relation to the proposed striking out.
>
> (6) If the proceedings, or part of them, have been struck out under paragraph (2) or (4)(a), the applicant may apply for the proceedings, or part of them, to be reinstated.
>
> 15. Evidence and submissions
>
> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
> (a) issues on which it requires evidence or submissions;
> (b) the nature of the evidence or submissions it requires;
>
> 23. Decision with or without a hearing
>
> (1) Subject to paragraphs (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
> (a) each party has consented to the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without the hearing.
> …
> (3) The Tribunal may dispose of proceedings without a hearing under rule 8 (striking out a party's case).

17. A Practice Direction[1] dated 30 October 2008 made by the Senior President of Tribunals sets out the information to be provided in connection with a disability discrimination claim, including by para 6(f)

> "details of the alleged discrimination, including the date or dates on which it is alleged to have taken place".

By paragraph 7:

> "If the applicant fails to include the required information or documents with the application notice, the Tribunal may waive the requirement under rule 7(2)(a), or require the applicant to remedy that failure under rule 7(2)(b) before admitting the application notice."

18. The *Practice Statement* [11 June 2018] *authorising Registrars, Tribunal Caseworkers and authorised Staff Members First-tier Tribunal (Health, Education and Social Care Chamber (SEND/CS/PHL)) to carry out functions of a judicial nature* refers to the "issue of registration directions under rule 5" which "are to be in standard form (as approved, from time to time, by the Chamber President or Deputy Chamber President)".

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[1] P*ractice Direction: First-tier Tribunal Health Education and Social Care Chamber Special Educational Needs or Disability Discrimination in Schools Cases*

The Employment Tribunal Rules

19. In Directions prior to the hearing I raised the following:

> What, if anything, are the implications for the present case of the Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013/1237 (as amended)? I note that these contain express rules addressing the rejection of a claim (which appears similar to the concept of non-registration as applied by the FtT). In particular, I note that by r 12(1)(b) and (2), a claim (or part of it) is to be rejected if a judge considers it "in a form which cannot sensibly be responded to or is otherwise an abuse of the process": that seems to be the consideration which underpinned Judge Lewis's decision in the present case. I further note the ability by r.13(1) to apply for reconsideration on the basis that the decision to reject was wrong or that the defect can be rectified and the entitlement by r.13(3) to a hearing, unless the claim is accepted in full. I note that the Rules which the 2013 ET Rules replaced (SI 2004/1861) did not include such provisions: the previous r.3, detailing circumstances when a claim would not be accepted, did not include an equivalent of when it "cannot sensibly be responded to". The introduction of the provisions by the 2013 Rules appears to have been a deliberate step taken following the proposals presented to the Secretary of State by Underhill J (as he then was).

The former SENDIST Rules

20. In those Directions I also observed:

> It may also be useful to consider the implications of the Regulations which governed disability discrimination claims in the former SENDIST, the Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations SI 2002/1985. ... The perceived issue of insufficiently particularised claims to allow the Responsible Body to respond was then dealt with via reg 8, which required the President to direct that further particulars be provided within 10 working days. I also note the wide-ranging power to give Directions under reg 23. However, it appears that those rules discouraged treating issues as preliminary issues: note reg 21(6) where the power to hold a hearing on a preliminary issue only arises "where it appears to the President that there is an issue in any claim which must be determined prior to the substantive hearing of the claim" (emphasis added).

The appellant's submissions

21. Mr Rylatt put forward three grounds of appeal. There is a degree of overlap between then, but his position was that grounds 2 and/or 3 could succeed even if ground 1 were to fail.

22. Ground 1 was that the FtT judges concerned had failed to direct themselves to the correct legal test for registration, to which, bearing in mind that the concept of "registration" is unknown to the 2007 Act or the HESC Rules, he submitted the closest analogy was the power in rule 8(4)(c) to strike out the whole or part of proceedings where there was no reasonable prospect of the applicant's case, or part of it, succeeding.

23. Ground 2 was that Judge Lewis had erred by finding against the appellant on a ground (insufficiently particularised pleadings) which had not been evident from Judge Hockney's order, without raising the concern with the appellant's lawyers to provide a chance to make representations or to apply to amend the claim. Analogies might be found in the procedural safeguards in rule 8(5) in relation to various categories of striking out and in dicta in *BB v London Borough of Barnet* [2019] UKUT 285 (AAC) that "where it is an entirely new issue or basis for decision that no one contemplated during the hearing" "fairness will require the tribunal to put it to the parties."

24. Ground 3 was put on the basis of irrationality, expressed in terms of a failure to take into account relevant considerations and/or to "grant sufficient weight to those considerations". The ground was put on the basis of explaining why, in the context of this particular case, the provisions, criterions or practices" and what the appellant says should have happened were sufficiently pleaded.

The respondent's grounds of resistance

25. The written grounds (which were drafted by someone other than Ms Thelen and which she developed in oral submissions) submitted in essence:

> a. Judge Hockney's Order was not to be equated with a striking-out; rather, it was dealing with an issue as a preliminary issue, as rule 5(3)(e) permits;
>
> b. it gave reasons why the reasonable adjustments claim was not registered;
>
> c. the claim was indeed incorrectly pleaded;
>
> d. Judge Lewis's decision was reaffirming Judge Hockney's decision, for the same reasons; and
>
> e. the judges were appropriately drawing on their expertise in the subject matter of the law to be applied in this type of case (cf. 2007 Act, s.2(3)(c)).

Discussion at the hearing

26. There was a certain amount of common ground between counsel. In interpreting any rule, it is necessary to do so in the context of the Rules as a

whole. It is not permissible to create "by the back door" by relying on general powers a rule covering substantially the same ground as an express rule already existing but without the same safeguards (see *Care First Partnership v Roffey* [2001] ICR 87). Caution should be exercised in relying too heavily on analogies with the Employment Tribunal Rules: even though some cases of disability discrimination in schools do not involve the State and may have more of a citizen and citizen character, many do and it would be undesirable to have a dual system, or one which was driven by the circumstances of one type of litigant. Guidance from the Upper Tribunal on certain issues associated with the registration power (should there be found to be one) would be helpful.

27. Ground 1 proved to be the central issue. Mr Rylatt's submission is that while a system of registration in the manner employed could *prima facie* fall within the case management power of rule 5(1), when one looks at wider principles, they do not support such an interpretation. Thus, case management powers are subject to any limitation imposed by legislation: *R(Roberts) v Parole Board* [2005] 2 AC 738 at [44], which includes section 22(4) of the 2007 Act. A rule must be made "with a view to securing" the objectives listed in that section: see *R(Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341 at [22]. He appeals to dicta in that case and to the overriding objective in rule 2(1) of the HESC Rules to emphasise that justice and fairness should prevail. In his submission, rule 5, correctly interpreted, cannot extend to the registration system as operated; there is adequate provision by rule 8 to address unmeritorious claims and thus no gap in the Rules which requires to be filled. Judicial acknowledgment that the present registration system could be operated under rule 5 would constitute an unlawful amendment of the HESC Rules by judicial decision.

28. For her part, Ms Thelen submits that while in some instances the registration mechanism may fall under rule 5(3)(e) dealing with preliminary issues, it would more generally sit within rule 5(1) in any event. That is consistent with the Practice Statement of 11 June 2018 (see [18]). The registration mechanism is not the same as striking-out, which presupposes the existence of a claim, in respect of which summary relief can be granted. The registration process can contribute to the aims of fairness and justice, including by ensuring that parties (including those who are not represented) can participate fully in proceedings; by using the expertise of the FtT effectively by focusing the parties early on the core issues; and by dealing with cases in ways which are proportionate to the importance of the case, the costs and the resources of the parties.

29. She submitted that it was instructive to refer to the Civil Procedure Rules My understanding is that two points were being made. First, one may compare CPR 3.1(2)(k), which sets out a specific power to "exclude an issue from consideration", with CPR 3.4.(2), which provides for a power to strike out a statement of case where it discloses "no reasonable grounds for bringing or defending the claim" or is "an abuse of process or is otherwise likely to

obstruct the just disposal of the proceedings": thus, the High Court has two routes at its disposal. Secondly, according to the Commentary, the strike-out power "can be exercised by a judge acting on their own initiative at the stage of issuing a claim…and thus defendants against whom an ill-founded action is sought to be brought will be spared needless expense in having to initiate "strike-out" proceedings." Accordingly, submits Ms Thelen, since CPR expressly permits a form of early case and issue management, even without a requirement for representations, such management is not unfair or unjust. She points out that in disability discrimination proceedings, it may be possible to proceed under any or all of four different sections, each dealing with different types of discrimination, and often particular situations can be categorised in more than one way, so it makes sense for the FtT to give its view. In her submission, that was all Judge Hockney was doing and it was significant that no complaint was made on the appellant's behalf about the judge's recategorisation of the claims expressed to have been made under s.13 and s.19 as falling under s.15.

29. This led to a discussion which I regard as significant for the purposes of this decision. Ms Thelen took the refusal to register a claim, achieved without a hearing or opportunity to make representations, as something that could be reversed later in the proceedings, even at the hearing itself, as it remained "still a pleaded claim". Whilst the power to give Directions under rule 5(2) is, as Ms Thelen submitted, ongoing, I am very doubtful that that is realistic in the context of a refusal to register. I should be very surprised if the FtT by not registering a claim is intending merely to give a provisional indication of its view, which could be re-opened later. The Upper Tribunal sees enough cases relating to disability discrimination in schools to be aware that they can generate huge amounts of sometimes ill-ordered material, not infrequently presented, by litigants in person, with a high degree of emotional commitment. It is far more likely that the FtT is seeking to take steps to manage such material, in which context a preparedness to re-open that which has previously been not registered seems highly unlikely. There is nothing I have seen anywhere drawing to the attention of parties (if such be the case) that even though a part of their claim had not been registered, they could always try again later. Even if it could be done, by then time would have run on and an extension of time would be needed to bring claims not previously registered (and there can be particular difficulties with the extension of time provisions in the Equality Act). It would, moreover, be perfectly understandable for a respondent, on learning that particular claims had not been registered, to assume that he was no longer required to provide evidence or submissions on that point (an assumption encouraged by Directions such as paragraph 15 of Judge Hockney's Directions, quoted at [10] above) and so potentially be at a considerable disadvantage in addressing the point if required to do so later on.

Conclusions

30. In my view, the very uncertainty and ambiguity in what is involved in a refusal to register is a powerful indicator that, as operated, it is not lawful. Mr

Rylatt draws attention, with justification, to the lack of clarity as to what test is being applied. If it is not to be equated to striking -out, then what test is it?

31. Nor can one infer from the rest of the HESC Rules what the test might be. If a claim is registered in its entirety but is considered, by reason of the way it is formulated, to be impossible or otherwise unfair for the respondent to have to answer, the FtT has powers other than refusing to register to address that, such as those to require a party to amend a document (rule 5(3)(c)), to require submissions on particular issues (rule15(1)(a)) and under rule 8 to strike out for failure to comply with directions or on the ground that the case has no reasonable prospect of success.

32. I accept that there may be value in a judge providing initial, provisional, guidance to the parties, not least in discrimination cases with their potential for multiple heads of claim. The purpose underlying the extract from Judge Hockney's order, set out at [8] above, is a sound one.

33. CPR 3.1(2)(k), as it is applied, despite the breadth with which it is worded, provides less support than Ms Thelen might wish for the legitimacy of a process other than striking-out as a means of focussing the issues at a very early stage in a case. I note from the Commentary at CPR 3.1.11 that

> "in practice the case management powers mentioned in subparas (j)(k) and (l) of r.3(1)(2) are usually left for exercise by the court conducting a pre-trial review or considering the trial itself or the trial of a preliminary issue."

34. However, I do accept that the earlier that unmeritorious cases can justly be weeded out, the better, both for the other party[2] and for the hard-pressed FtT; and to that extent, I would regard an interpretation of rule 5 which allowed, in appropriate cases and subject to appropriate procedural safeguards,a refusal to register certain claims as compatible with th ooverriding While the consequences may be similar, because of the different stages within the life of a case when they occur, I do not accept Mr Rylatt's submission that what was being done through refusing to register a claim was a strike-out by the back door.

35. I do, though, emphasise the word "justly" in the above and an important note of caution was sounded by Lord Steyn as to the dangers in cutting off discrimination cases at too early a stage: see his observations in *Anyanhwu v South Bank Students Union* [2001] UKHL 14 at [24]:

> "24. In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field

[2] On whom, in discrimination cases, the burden of proof is liable to rest because of s.136 of the Equality Act

> perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

36. If a registration process is to be undertaken at all in relation to cases in which the FtT would potentially have jurisdiction, if it is done without a defined basis, there is the risk that injustice may occur. In the present case, what would have been acceptable as a provisional expression of the judge's view has, through the registration procedure as operated, become the vehicle for a definitive ruling (as once the Order had been upheld by Judge Lewis it became) excluding parts of a claim from getting off the ground, but without what I regard as necessary procedural safeguards.

37. In considering what fairness might require, I bear in mind the well-known passage in *R v Home Secretary ex p Doody* [1994] 1AC 531 at 560.

> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: - 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

38. In considering what fairness requires in such a context, I do set some store by the approach of the Employment Tribunal Rules, motivated by similar considerations, but spelling out the issues and providing appropriate procedural safeguards. Whilst I accept that the type of litigation is different, the fundamental concern of balancing the interests of the parties and of the tribunals and others who use them more generally, is not. Similarly, whilst Ms Thelen sought to downplay the significance of the SENDIST Rules on the basis that they are structured differently, I do not see the difference as material to the purpose for which I draw upon them. In my view they, like the Employment Tribunal Rules, provide telling examples of what is lacking here.

39. In my view, there was a lack of fairness in this case. Judge Hockney thought that the "reasonable adjustment" issues were relevant to proportionality and that was a view she would plainly have been entitled to express, on a provisional basis, if giving guidance to the parties. Nowhere, however, does her order explain why she was preventing (seemingly definitively, subject ony to the possible rule 6 application) the reasonable adjustment claims from proceeding as independent claims, as the appellant

was additionally seeking. Merely because the reasonable adjustment claims could be relevant to the proportionality of the respondent's action in connection with permanent exclusion does not provide an answer to why the free-standing reasonable adjustment claims could not proceed: one does not exclude the other. Judge Lewis's order did therefore proceed on a basis which had not been foreshadowed by Judge Hockney's order and without giving the appellant a chance to make any representations (or to ask for a hearing, as might have happened in an employment tribunal or SENDIST) to consider the point and/or to amend the pleadings to deal with the judge's concern. I appreciate that a court or tribunal is not under a limitless obligation to put its provisional views to the parties (see *BB v LB Barnet* [2019] UKUT 285 (AAC)) but in this case it did not happen at all.

40. Although the point was not argued before me in the terms in this paragraph and I do not rely on it for anything more as proving a further pointer of the direction of travel of this decision, I also note that there is no indication that Judge Lewis's decision gave any consideration to the alternative steps to deal with a claim considered non-compliant offered by rule 7 and highlighted by paragraph 7 of the 2008 Practice Direction.

41. Whether the pleading was or was not satisfactory was not a matter admitting of only one answer, so it cannot be said that representations, whether in writing or at a hearing, would have made no difference. An illustration may be found in Judge Lewis's search, arguably improbable in the context of what was being complained about, for reference to a "specific incident", which she then found to be lacking.

42. Whilst I consider that the application to vary Judge Hockney's order went some way towards anticipating what might be in the mind of the judge determining that application, the application was general in character and in my view does not show there was no need for Judge Lewis's concern to be put to the appellant's lawyers.

43. I am, therefore, satisfied that the decision of 31 October was in error of law. Should that be expressed as being (as submitted by Mr Rylatt) that rule 5 does not confer a power to do what was done by the flawed procedure in this case, or that rule 5 does confer such a power, but the procedural shortcomings brought about the error of law?

44. I prefer the latter analysis. The rule 5 power is very widely expressed. I do not agree with Ms Thelen that the process is what the June 2018 Practice Direction contemplates, which appears from what is set out at [8] to be the standard directions about bundles, witnesses and so forth, but that is not fatal to the notion that rule 5 may encompass a procedurally lawful registration procedure. Other powers in the Rules are expressed not to cut it down. While statute may do so, the empowering section in the 2007 Act indicates what the Tribunal Procedure Committee is required to have in view when making the Rules. Many of the considerations listed can be achieved in more than one way. Those are matters for the Committee to weigh up within the

limits of its discretion set out in *Detention Action*. I do not accept that applying the principle in *Roberts* leads to the conclusion that because a particular rule in a particular case can be argued to result in justice not being done (cf. 2007 Act, s.22(4)(a)), that reflects on the scope of the rule.

45. Nor do I consider *Detention Action* otherwise more than of somewhat tangential relevance. That case was a systemic challenge to very specific rules by way of an application for judicial review. The problem addressed by the present case is not the conferring by the HESC Rules of a general management power, but of how it has come to be used in this (and no doubt other) cases.

46. In view of the conclusion I have reached it is not necessary to rule separately on Grounds 2 and 3.

47. Mr Rylatt's submission that if there is to be a process of refusing to register, one needs to know "where the goalposts are" is in my view justified. It may be that in the light of this decision the FtT and/or Tribunal Procedure Committee will wish to consider whether any amendment to the HESC Rules is desirable to include express provisions governing registration (as the Employment Tribunal Rules do), or whether the matter can be dealt with relying on the rule 5 power, supplemented by a more developed procedure and greater clarity via practice directions and/or practice statements.

48. Both counsel asked me to provide "guidance on the use of the registration power". It seems to me in summary that the FtT lawfully may:

> (a) provide indicative guidance as to the judge's views of the issue in a case;
> (b) operate the strike-out provision in the HESC Rules in accordance with their terms; and
> (c) operate according to defined principles, and with appropriate procedural safeguards, a registration system, which may have the effect of screening out some cases, or parts of cases which might, later in proceedings, have been the subject of an application under rule 8.

However, if there is to be a mechanism such as (c) (and observations such as Lord Steyn's, quoted at [35] above, suggest that careful thought may be needed as to whether or not there should be one for discrimination cases, its content should in my view be a matter for the FtT itself and/or the Tribunal Procedure Committee and I do not consider it appropriate for me to give the more wide-ranging guidance counsel have requested.

49. I am therefore substituting a decision that the claim be registered with the inclusion of the reasonable adjustment claims in para 43 of the claim as freestanding claims. Ms Thelen asked me to make an order that further and better particulars be provided. That is a matter I consider should be left to the FtT. I am not to be taken as pre-judging by the present decision any application which may now be made by the respondent or any step taken by

the FtT on its own initiative in accordance with its Rules and following a fair procedure to address any perceived continuing inadequacy in the formulation of the reasonable adjustment claims.

C.G.Ward
Judge of the Upper Tribunal
6 April 2020