



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE NOS: UA-2024-001667 and 001669-HS
[2025] UKUT 047 (AAC)
RP V BARNESLEY METROPOLITAN DISTRICT COUNCIL**

Decided following an oral hearing on 29 January 2025

Representatives

| | |
|-----------------|-------------------------------------|
| Claimant | RP spoke on her own behalf |
| Local authority | Ms Mel Dyson of the local authority |

DECISIONS OF UPPER TRIBUNAL JUDGE JACOBS

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

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| References: | EH/370/23/00034 and EH370/24/00010 |
| Decision date: | 18 July 2024 |
| Hearing: | Video hearing |

As the decisions of the First-tier Tribunal involved the making of an error in point of law, they are SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the cases are REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISIONS

A. Introduction

1. These cases concern the Education Health and Care Plans for two boys. The First-tier Tribunal gave permission to appeal to the Upper Tribunal in both cases.
2. The appellant is the boys' mother. I asked her at the start of the hearing whether there was any difference between the children so far as her arguments were concerned. Putting it into legal terms, she told me that there were differences between the cases but they were not material to her arguments. I do not, therefore, need to distinguish between them or refer to them by name or initial.

3. RP was concerned to resolve the education of her sons as soon as possible. I therefore undertook to make my decision by the end of this week. That explains why I have concentrated on the two grounds on which I have allowed the appeal.

4. I will say this briefly about the other grounds. They tended in presentation and discussion to merge into one another and they were challenges to the tribunal's findings of fact. The Upper Tribunal has a limited role in relation to the facts, which are essentially matters for the First-tier Tribunal.

B. Procedural irregularity

5. Tribunal Judge McCarthy, who gave permission to appeal, was concerned by the allegations about the fairness of the hearing. In part, this concerned the questioning and conduct of one of the specialist members of the panel. And in part, it concerned the different pagination. I have decided that there was a procedural irregularity in respect of the latter. I do not need, therefore, to deal with the former.

6. In her grounds of appeal, RP wrote:

My bundles had different pagination to the LA and the Tribunal panel

It became apparent in the final hearing that my bundle was paginated differently to the bundles the panel members and the LA were working from. This made it extremely difficult for me to navigate and at numerous points throughout the hearing put me under pressure not only to ask questions, but to answer them as well. I feel this put me at a significant disadvantage at the final hearing. This is demonstrated by the point raised below relating to ... attainment and the page reference in the order not matching up to the page number in my bundle (page 131 in my bundle and page 136 in the other bundles, as referred to in the final order).

7. As I said to RP, differences like this are an 'occupational hazard' in tribunal and court proceedings. I would expect tribunals to check when they first refer to a bundle whether there are differences in the page numbering. It is usually identified early on and, once identified, becomes little more than an irritation. As Judge McCarthy said in his grant of permission:

9. Differences in pagination would not usually undermine fairness; the Tribunal is well aware that printed copies of a bundle often are paginated after the index while electronic versions are paginated from the start of the index. Accommodation for such discrepancies is usually made by giving both page numbers. Usually I would expect the panel to have proceeded in this way, but the allegation of unfair conduct means this may have to be investigated further.

8. I would normally have agreed with what the judge expected to happen; that was my provisional view before the hearing of these appeals. It was only then that I realised this was not just a difference between the paper copy and the electronic version. Ms Dyson told me that she was working from an electronic version, but her pagination also differed from the panel's electronic version.

9. I do not have to decide whether or not this issue and the confusion it caused affected the outcome of the appeal. A mistake of law has to be material, but in the case of a procedural irregularity the test is whether it was 'capable of making a material difference to the outcome or the fairness of the proceedings': see Brooke LJ

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in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9(vi)]. I have had the benefit of seeing RP at the hearing before me. She was articulate, and she was knowledgeable about safeguarding, which was an important factor for her in the placement of her children. But she was not used to legal proceedings and there were, as I now know, three versions of the bundle. I have no reason to doubt her description of the effect that that had on her presentation of her case. I consider that what she has described was an unfairness in the proceedings and that was an error of law.

C. Provision from the start of the placement

10. I can deal with this briefly, as the procedural irregularity means that the decisions must be set aside.

11. The tribunal dismissed the appeals in respect of both boys. That means that it did not order any changes in the Plans. Despite this, the tribunal said for both boys that matters should be made clear in their revised Plans. That was not sufficient. If something was not clear in the current Plans, the tribunal should have ordered that the necessary changes be made. It may be that revised Plans were expected in the near future, but the boys were entitled to a Plan that reflected their needs from the start of their placement. Putting it off until later was not an option. That was also an error of law.

**Authorised for issue
on 07 February 2025**

**Edward Jacobs
Upper Tribunal Judge**