IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/1547/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision:

The decision of the First-tier Tribunal (7th October 2014, file reference *SE 884/14/00012*) that child S was not discriminated against contrary to section 15 of the Equality Act 2010 involved an error of law and is SET ASIDE under section 12(2) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal REMAKES the decision of the First-tier Tribunal and decides that the Respondent Governing Body discriminated against S contrary to section 15 of the Equality Act 2010. The other decisions of the First-tier Tribunal are not set aside.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying child S. This order does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation to S.

REASONS FOR DECISION

Introduction

1. In this case, the Upper Tribunal decides that a disabled child was discriminated against, contrary to section 15 of the Equality Act 2010, as a result of her being denied full-time education for a period of some six months.

2. In these proceedings, the child's mother, Mrs F, represented herself. The Governing Body of the Respondent maintained primary school were represented by Herefordshire Council's Legal Services Team and Ms R Kamm of counsel.

Background

S's schooling in 2013-14

3. On 30 October 2013, the Respondent Governing Body ("hereafter "the School") wrote to Mrs F to inform her they would not offer her daughter S, who had a diagnosis of Down's Syndrome, a place at their primary school for her final year of primary schooling. However, S had a statement of Special Educational Needs (SEN) which named the School and, as a result, the School was required by law to admit her under section 324 of the Education Act 1996 ("the 1996 Act").

4. The School initially thought S's attendance would be incompatible with the provision of efficient education for other children. The 30 October 2013 letter said S's statement of SEN described, at her previous school, frequently challenging behaviour and outbursts of aggression. The School thought it lacked the "withdrawal space" needed to keep S and other pupils safe.

5. The School soon relented although it is not entirely clear whether they did so independently of their having been named in S's statement of SEN. S's class teacher's witness statement for the First-tier Tribunal stated S joined the school part-time on 4th November 2013 "on the recommendation" of the local authority and she developed an individual timetable for S who was placed in a 'Green Group' for children with speech or language disorder. No homework was provided.

6. The teacher's witness statement said S was distressed and unsettled on her first day. Generally, she would tire easily and quickly causing her behaviour to deteriorate. S's school sessions were "gradually incrementally increased" but specific details were not given. Behaviour improvement strategies were used: reduced work group sizes, use of visual aids, use of singing and "working through behaviour strategies". The witness statement said these were reasonable adjustments made for S's benefit.

7. The minutes of a 15th January 2014 review meeting state the school aimed to extend S's school day. She was then attending until noon and her class teacher would assess when she was ready to tolerate a longer school day. The school were also "working on strategies…so that soon she will spend the whole day at school" but these were not described. The minutes added S's behaviour was "very aggressive at the beginning but this has now been broken down". The school did not want to move too quickly because it thought S's behaviour was linked to her tiredness.

8. A report of 2th February 2014 said S made positive improvements in "social behaviour" after joining the school at which point she was physically aggressive and threw things. In November 2013, the classroom had to be evacuated most days but December saw a "marked improvement" with only three incidents. However, recent weeks had seen increased "non-compliance". This report said "significant amendments" to Green Group provision allowed S to make progress. The class teacher "role modelled" appropriate language for "what we believed that she was trying to communicate". S had generalised these language patterns and "used her language to express herself, or on initial signs of distress we model the language that she needs. This has alleviated a lot of frustration and anxiety".

9. At a school meeting on 11th February 2014, Mrs F requested full-time schooling for S. The minutes state the School thought S's "challenging behaviour" meant she was not ready. Mrs F was informed that if S had a good week her school day would be extended by 15 minute intervals.

10. In February 2014 Mrs F wrote to the School expressing concern she might get into trouble because S was not attending school full-time. The School replied that this would not happen because S's educational arrangements were agreed with the local authority.

11. In March 2014, a local authority educational psychologist assessed S. The report recorded "[S's] parents want her to be in school for the whole of the day as a matter of her entitlement".

12. On 30th April 2014, a school report noted S's "challenging behaviour has resolved apart from a few minor incidents of non-compliance". S no longer hit out at other children to attract attention nor at passers-by during class transitions. Shortly afterwards, S started attended the school full-time. She transferred to a maintained special school in September 2014.

The case put to the First-tier Tribunal

13. Mrs F made an application to the First-tier Tribunal alleging that the School had discriminated against S contrary to the Equality Act 2010 ("the 2010 Act"). Her claim form argued:

Claim 1. When S started at the School, Mrs F was told she would attend part-time for a "short time" but her alleged behavioural problems meant this was extended. Full-time schooling was denied even on days of good behaviour (the majority of the time, according to Mrs F). S "loved" the school and did not want to attend part-time. The school's denial of full-time education was a breach of education law. S's treatment was related to her disability: "she was treated far worse than even the guidelines for a disabled child, for example no behaviourist was ever consulted by the school for advice or a plan to put her in full time education". Mrs F accepted S was treated correctly for a "week or two" but, after that, should have been allowed to attend full-time.

Claim 2. S was discriminated against by not being allowed to play music at school. Despite Mrs F's requests, she was not allowed to play music until the last day of the school year at a leaver's assembly. The school also ignored Mrs F's requests for video footage of S's performance at the assembly. If her daughter had not been disabled, the school would never have doubted her ability to play the piano

14. Other claims were made but these were struck out by the First-tier Tribunal before the hearing of Mrs F's application.

15. In response, the School denied discrimination including any failure to comply with any duty to make reasonable adjustments. The child started part-time "following recommendations from the local authority" and "this part-time timetable was increased incrementally in line with [S's] ability to cope with the demands of the school day". Before 27 April 2014, staff thought S would not cope with full-time attendance and this was supported by documents dated 15th January 2014 ('delivery plan and review'), 11th February

2014 (meeting between Mrs F and class teacher), 13th February 2014 (head teacher's letter to Mrs F). Reasonable adjustments were made to the 'Green Group' class curriculum and structure.

16. Regarding claim 2 the school said piano was not part of the curriculum and Mrs F had not enquired about piano lessons until 20th June 2014.

17. A First-tier Tribunal case management 'order' dated 16th January 2015 included a FtT judge's observations on the apparent merits, including that

> "'a Tribunal is likely to find that not attending full-time is a disadvantage for a disabled child, which a school should avoid by making any necessary and reasonable adjustments. It will be for the RB [responsible body] to demonstrate that it did make all such adjustments and that even with those adjustments it was not possible to enable [child] to attend full-time. She was entitled to a full-time education in any event, and if it was not received at school, the school was responsible for providing it, unless her statement of SEN specified otherwise. I note that the statement provided with the claim does not name this RB, and it will be essential for the Tribunal to have a copy of the statement which applied at the relevant time. The RB should ensure this is provided [which they duly did]".

The First-tier Tribunal's decision and reasons

18. The Tribunal decided that the School did not discriminate against S. The Tribunal's reasons stated there were two issues for it to determine:

(a) whether the School, in refusing to allow S to attend school full-time between November 2013 and May 2014, discriminated against her (the "attendance claim");

(b) whether the school's alleged refusal to permit the S to play piano during that period was discriminatory (the "piano claim").

19. The Tribunal also observed that, while Mrs F's claim was not described as a reasonable adjustments claim "as such", she did in fact argue "the school should have made arrangements so as to enable [the child] to be school on a full-time basis".

20. In relation to the attendance claim, the Tribunal made the following findings:

(a) Part 4 of S's statement of SEN named the School but made no provision for S's "gradual return to full-time education";

(b) The school was a maintained mainstream primary school but with a specialism in educating with communication difficulties most of whom had an Autistic Spectrum Disorder;

(c) From December 2014, S's parents requests for full-time school attendance were refused;

(d) When originally consulted by the local authority, the School thought S's attendance would not be compatible with the efficient education of other pupils. Even though they subsequently admitted S, the School remained of the view she ought to attend a special school;

(e) given its specialism, the School thought it could meet S's needs but only if she began by attending only in the mornings. Initially, the School thought that, within two months, S could begin a "graduated return" to full-time education over a period of two weeks;

(f) On S's first day, she "threw things around the class, tried to throw computers, attacked school staff and lay on the floor" complaining of tiredness";

(g) In November 2014, S's behaviour meant her class was "evacuated…at least once a day";

(h) The school thought S's behaviour was due to tiredness and distress caused by her poor communication skills. The school decided to concentrate on these areas in order to "get [S] back to full-time education";

(i) The school made adjustments with a view to achieving the aim of full-time attendance. The Green Group class was split in two since many pupils were "performing at a much higher level". The school also arranged daily speech and language therapy and physiotherapy, increased the use of "visual aids", used singing as a teaching method, developed and implemented "a series of behaviour strategies" and devised a part-time timetable;

(j) By February 2014, S had made progress and school staff were better able to identify "initial signs of distress". The Tribunal relied on S's class teacher's report of 4 February 2014 which identified positive improvements in her behaviour, learning and adjustment to her class group. The report also noted she was normally "happy and engaged in learning";

(k) S's school sessions were "incrementally increased" but the Tribunal could make no more precise finding than that because her records had been transferred to her new school;

(l) A local authority educational psychologist assessed S in March 2014, reporting that she was a valued member of the School and it had made "necessary changes to meet her needs" although she did not appear tired at home in the afternoon. The psychologist advised that S's musical talents should be "embraced and confirmed";

(m) A factual dispute as to when S started full-time, whether it was late April or early May 2014, was unresolved but the parties agreed that, once she did, the remainder of her time at the School was successful (S transferred to a special school at the start of the 2014/15 academic year);

(n) The Tribunal rejected the parents' argument that S had not "shown behavioural difficulties" at other schools. This was inconsistent with a "clear description" given in her statement of SEN and reports the School said it had received (but were not before the Tribunal) from previous schools;

21. In relation to the piano claim, the Tribunal found:

(a) S's class teacher was initially unaware that pupils could perform music at a leavers' assembly. Once discovered, she made arrangements for S to play the piano at the assembly with her father's support;

(b) The school knew of the child's "love of music and her abilities" and made arrangements for her to join another class to "maximise her time doing music";

(c) "On occasions" at lunchtimes the child would play a keyboard supervised by an assistant.

The Tribunal's reasons

22. The Tribunal concluded that "excluding" the child from full-time attendance was "an act on which a finding of discrimination could be made" so that it was for the responsible body to "demonstrate that it did not discriminate". The Tribunal referred itself to the special type of disability discrimination provided for by section 15 of the 2010 Act as well as the Act's burden of proof provisions. Its reasons also show it took Mrs F's claim to include the allegation that the school failed to make reasonable adjustments to a "provision, criterion or practice".

23. The Tribunal decided that the School had shown that it did not discriminate against S for the following reasons:

(a) the reason for S's part-time attendance "arose from her behaviour" which, in turn, arose from her disability;

(b) the school knew about S's behavioural problems before she joined and "might have been able to predict" the problems she would cause;

(c) there was "no evidence before the Tribunal that other strategies could have been used or other reasonable adjustments made which would have allowed [the child] to attend on a full-time basis sooner than she did";

(d) while the school did not seek external advice "it was entitled to conclude it had the expertise to put in place a series of reasonable adjustments, which would result in [S] returning to full-time education";

(e) the psychologist's report of March 2014 showed the steps taken by the school were appropriate and successful, as was reinforced by S's successful last term;

(f) the school made a series of reasonable adjustments which resulted in a successful return to full-time schooling. Accordingly, the school's failure to provide full-time education was not discrimination: "the actions it had taken were a proportionate way of achieving a lawful

objective namely getting [the child] into school on a full-time basis". However, no relevant provision, criterion or practice in question was identified.

24. In relation to the piano claim, the Tribunal decided:

> "[there was] no evidence either showing that [the School] failed to allow [S] to play the piano, or that the refusal related to her disability. Neither was there any evidence that the two matters complained of amounted to discrimination arising from [S's] disability".

Proceedings before the Upper Tribunal

25. Following a hearing of Mrs F's application for permission to appeal against the First-tier Tribunal's decision, at which Mrs F represented herself but the council were not represented, I granted permission on the grounds that, arguably, the First-tier Tribunal erred in law in the following respects:

(1) by not dealing with deficits in the documentary evidence, in particular the absence of school behavioural records and S's most recent statement of SEN;

(2) by focussing on whether reasonable adjustments had been made, the tribunal failed properly to consider whether S had been discriminated against;

(3) by relying on a report (from a previous school) which had not been put in evidence.

26. In their response, drafted by Ms R Kamm of counsel, the School resisted the appeal. The issue of challenging behaviour was before the Tribunal and, in the light of Mrs F's claim, behaviour logs did not need to be disclosed for a fair disposal of the claim. In any event, if the school behaviour logs had been disclosed, they would have made no difference to the Tribunal's decision. The council supplied the school's behaviour records and argued they were broadly consistent with the tribunal's findings of fact. The same argument was made in relation to S's most recent statement of SEN.

27. So far as the tribunal's analysis of discrimination was concerned, the School submitted that, while the tribunal found S's treatment was due to something arising in consequence of her disability, it "made findings of fact that treatment was a proportionate means of achieving a legitimate aim". In particular, S's part-time attendance "reasonably and successfully aimed to achieve the objective of getting [S] into school on a full-time basis". If the Upper Tribunal were minded to find that inadequate reasons were given, the School argued it was in any event plain from the Tribunal's findings of fact that the discrimination claim was bound to fail.

28. In reply, Mrs F provided a detailed document which disputed that school's behaviour records supported the Tribunal's findings of fact.

29. Subsequently, I issued further case management directions indicating that, in the event that I allowed the appeal, I was minded to re-make the Tribunal's decision under appeal without holding a hearing. The parties were invited to make representations on that proposal and on the decision the Upper Tribunal should make if it were to re-make the decision.

30. The School informed the Upper Tribunal it had no further representations to make. Mrs F did. She did not think a further hearing was necessary and submitted that the further evidence supplied by the School supported her claim of discrimination. She argued there was no evidence that S was "uneducable" and the evidence showed she was wrongly denied full-time education for six and a half months. Mrs F also argued the evidence showed the School gave untruthful evidence to the First-tier Tribunal that S had been allowed to play the piano at school before the leaver's assembly. I can say at this point that I do not accept that the School gave untruthful evidence.

31. I considered that fairness required me to invite further written representations as to the full-time education requirements of the Education Act 1996, including section 19 of the Education Act 1996 which was referred to in Mrs F's previous submission. In response, Herefordshire Council informed the Upper Tribunal that "to the best of its knowledge" it had not made a decision in relation to S under section 19(3AA) of the 1996 Act authorising part-time education for S. In turn, Mrs F argued this showed the school discriminated against S "with no reasonable excuse".

Legal Framework

The equality legislation

32. It is not disputed that S is a disabled person for the purposes of the Equality Act 2010 (2010 Act).

33. Part 6 of the 2010 Act is concerned with education. Within Part 6:

(a) section 85(1) requires the responsible body (in this case, the Governing Body) of a school "not to discriminate against a person…(b) as to the terms on which it offers to admit the person as a pupil";

(b) section 85(2) requires the responsible body not to "discriminate against a pupil—

> (i) in the way it provides education for the pupil;
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> (ii) in the way it affords the pupil access to a benefit, facility or service [section 212(4) provides that affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service];
>
> (iii) by not providing education for the pupil;

(iv) by not affording the pupil access to a benefit, facility or service;

(v) by excluding the pupil from the school [not an issue on this appeal];

(vi) by subjecting the pupil to any other detriment.

34. Section 85(6) of the 2010 Act provides that "a duty to make reasonable adjustments applies to the responsible body" of a maintained school.

35. Direct discrimination occurs where person A, because of person B's disability, treats person B less favourably than person A treats or would treat others (section 14(1)).

36. Under section 15(1) of the 2010 Act, another type of disability discrimination occurs where:

(a) person A treats person B "unfavourably because of something arising in consequence of" person B disability; and

(b) person A cannot show that the treatment of person B is a proportionate means of achieving a legitimate aim".

37. In *Akerman-Livingstone v Aster Communities Ltd*. [2015] 1 AC 1399, [2015] 3 All ER 725, the Supreme Court explained:

> "The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006 1 WLR 3213, at para 165:
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> > "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
> >
> > … However, as Lord Reed explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, para 68 et seq, this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. As the European Court of Justice put it in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I 4023, "the disadvantages caused must not be disproportionate to the aims pursued"; or as Lord Reed himself put it in *Bank Mellat*, para 74, "In essence,

> the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".

38. Section 19 of the 2010 Act defines indirect discrimination. This occurs where person A applies to person B a "provision, criterion or practice" which is discriminatory in relation to person B's disability. Section 19(1) provides that a provision, criterion or practice is discriminatory in relation to B's disability if all the following conditions are met:

(a) person A applies the provision, criterion or practice to persons who are not disabled (or would so apply it);

(b) the provision, criterion or practice puts a person with whom person B "shares the characteristic" (disability) "at a particular disadvantage when compared with persons with whom B does not share" the characteristic (or would put the person at such a disadvantage);

(c) the provision, criterion or practice puts person B at that particular disadvantage (or would do so);

(d) person A cannot show that the provision, criterion or practice is a "proportionate means of achieving a legitimate aim".

39. In *Finnigan v Chief Constable of Northumbria Police* [2014] WLR 445, the Court of Appeal (Dyson MR) held:

> "29…It is important to distinguish between a PPP and the adjustments made to a PPP to alleviate the detrimental effects to which a disabled person may be subjected by it. The PPP represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the PPP. By definition, therefore, the PPP does not include the adjustments."

40. "PPP" was a reference to "practice, policy or procedure", a concept used in the equality legislation in issue in that case, but Dyson MR's analysis is applicable to section 19 of the 2010 Act. There is a distinction to be drawn between the provision, criterion or practice and adjustments made to the PCP to accommodate disabilities.

41. Closely allied to the concept of indirect discrimination are the provisions of section 20 which impose duties to make "reasonable adjustments". Section 21(1) declares that a failure to comply with a section 20 requirement "is a failure to comply with a duty to make reasonable adjustments". And section 21(2) provides that such a failure is itself a form of discrimination.

42. Care needs to be taken in applying the reasonable adjustments provisions to schools not to overlook the modifications made to section 20 by Schedule 13 to the 2010 Act.

43. Under section 20 the reasonable adjustments duty has three aspects. The second is concerned with physical features and is not relevant on this appeal (in any event, the local authority, and not the responsible body for a maintained school, is responsible for complying with the second requirement: Schedule 13(2)(2)).

44. The first requirement is potentially relevant and, by Schedule 13(2) to the Act, applies to a maintained school's responsible body.

45. The first requirement is "a requirement, where a provision, criterion or practice applied by or on behalf of the responsible body puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage" (section 20(3) with the Schedule 13 modifications underlined). Here, "substantial" means "more than minor or trivial" (section 212(1)).

46. Section 20(3) applies where the relevant matter is provision of education or access to a benefit, facility or service. In such a case, section 20(3) as modified reads:

> "The first requirement is a requirement, where a provision, criterion or practice applied by or on behalf of the responsible body puts disabled pupils generally at a substantial disadvantage in relation to provision of education or access to a benefit, facility or service in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

47. The third requirement is as follows:

> "the third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to provision of education or access to a benefit, facility or service in comparison with disabled pupils generally, to take such steps as it is reasonable to have to take to provide the auxiliary aid" (section 20(5)).

48. Section 136 of the 2010 Act, headed "Burden of Proof", provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Education legislation

49. "Primary education" is defined by section 2(1) of the Education Act 1996. For children over compulsory school age, it is "full-time education suitable to the requirements of junior pupils of compulsory school age who have not attained the age of 10 years and six months". By section 7, every parent is obliged to ensure that a child receives efficient full-time education and the education must be suitable to any special needs that the child has.

50. Under section 13(1) of the 1996 Act, a local authority has the duty to ensure that "efficient primary education and secondary education…are available to meet the needs of the population of their area".

51. Section 19(1) requires a local authority to 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". In the light of the section 2(1) definition, suitable education must here mean suitable full-time education.

52. Under section 19(3A), the local authority has the following duty:

> "(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."

53. In response to case management directions, S's local authority confirmed it had not taken a decision under section 19(3AA) that it would not be in her best interests to be provided with full-time education.

54. S had a statement of SEN which named the School in Part 4. As a result, the School was obliged to admit her (section 324(5)(b) Education Act 1996). The School were also required by section 317(1)(a) of the 1996 Act to "use their best endeavours, in exercising their functions in relation to the school, to secure that, if any registered pupil has special educational needs, the special educational provision which [her] learning difficulty calls for is

made". By section 324(5), the local authority were also required to arrange that the special educational provision specified in S's statement was made.

The First-tier Tribunal's powers

55. Enforcement of the school-related rights conferred by the Equality Act 2010 is dealt with by Schedule 17 to the Act. For England, jurisdiction is conferred on the First-tier Tribunal. The Tribunal's powers, in the event that it finds a contravention, are contained in Schedule 17(5). The Tribunal may "make such orders as it sees fit" but it cannot order payment of compensation.

Conclusions

Discrimination under section 15 of the 2010 Act

56. I have decided that the First-tier Tribunal erred in law in deciding, on the attendance claim, that S had not been discriminated against contrary to section 15 of the 2010 Act. In other words, Mrs F succeeds here on ground 2.

57. The importance of a full-time education is recognised by Parliament in the provisions of the Education Act 1996 referred to above.

58. The Tribunal was clearly right to find, for section 15 purposes, that S was treated unfavourably – denied full-time schooling – because of something arising in consequence of her disability. The School do not dispute that finding.

59. Accordingly, the School needed to show that S's treatment was a "proportionate means of achieving a legitimate aim". A matter of central importance in assessing the proportionality of S's treatment was that her denial of full-time schooling was not associated with any provision for her education outside school. This meant she was denied the full-time education to which she was entitled to under the 1996 Act. In failing to take this relevant consideration into account, the Tribunal erred in law and I set aside its decision that S was not discriminated against under section 15 of the 2010 Act.

60. That is sufficient to dispose of the appeal in so far as it concerns section 15 of the 2010 Act and so I do not need to decide grounds of appeal 1 and 3. I do however observe that, in my view, the school's behavioural records should have been supplied to the First-tier Tribunal, since the pattern of her behaviour and the School's response to it was an important issue in this case. I also think it was wrong for the First-tier Tribunal to have relied on evidence that neither it nor, perhaps, Mrs F had seen.

Direct discrimination

61. The Tribunal rightly decided that S had not been directly discriminated against. There was no evidence on which it could have found that the School discriminated against S "because of" her disability.

Indirect discrimination and reasonable adjustments

62. So far as indirect discrimination was concerned, I think this was an unnecessary distraction. For indirect discrimination to be made out, the School would have needed to apply to S a provision, criterion or practice that it also applied, or would have applied, to pupils who were not disabled. I am not persuaded that there was any such provision, criterion or practice in this case, rather the steps taken by the school were a specific response to its assessment of the educational challenges posed by S. I do not find that the School applied a provision, criterion or practice that they also applied, or would have applied, to non-disabled pupils.

64. So far as reasonable adjustments are concerned, section 20(3) of the 2010 Act applies, in the case of schools, where "a provision, criterion or practice applied by or on behalf of the responsible body puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage" (the underlining indicates the modification made by Schedule 13 to the 2010 Act). In submissions, no attempt has been made to identify a relevant provision, criterion or practice or the comparator. I have also not had submissions about whether and to what extent the local authority's discharge of its education responsibilities towards S might be relevant in determining whether the School took reasonable steps to avoid any disadvantage. In those circumstances, I decline to hold that the First-tier Tribunal erred in law in its approach to reasonable adjustments.

Piano claim

65. I decide that the Tribunal did not err in law in dismissing the piano claim. Its findings were open to it on the evidence and they properly supported its conclusions.

Why the School discriminated against S contrary to section 15 of the Equality Act 2010

66. S no longer attends the School, having transferred to a maintained special school in September 2014. I am of the view Mrs F's appeal can be disposed of without the need for specialist educational expertise. For these reasons, I have decided to re-make the Tribunal's section 15 decision rather than remit to the First-tier Tribunal for re-hearing.

67. I decide that Mrs F has made out her claim that S was discriminated against contrary to section 15 of the Equality Act 2010.

68. As I have explained, S was treated unfavourably because of something arising in consequence of her disability. So the School need to show that S's treatment – denial of full-

time schooling and thereby full-time education – was a proportionate means of achieving a legitimate aim.

69. Had the School's treatment been associated with a home-education plan for S, I doubt I would have found discrimination. But, on the undisputed facts, S was denied a full-time education for some seven months. For any child, but especially a relatively young child, that is a significant educational deficit.

70. Since S had a statement of special educational needs, the School was required to admit her. Once S became a registered pupil, the School was required by section 317(1)(a) of the 1996 Act to "use their best endeavours, in exercising their functions in relation to the school, to secure that… the special educational provision which [her] learning difficulty calls for is made". S's learning difficulty called for the full-time education specified in Part 3 of her statement of SEN. I note the Tribunal's finding that the School always harboured doubts as to whether it could provide a suitable education for S. But once she was admitted, the School came under specific statutory obligations towards S which could not be denied.

71. Section 15 of the 2010 Act requires the School to show that its treatment of S, in denying her full-time education at school, was a proportionate means of achieving a legitimate aim.
71. The School's treatment of S amounted to a failure by the School to comply with its obligation under section 317 of the 1996 Act to use its best endeavours to secure a full-time education for S. While the school's aim of preparing S for the demands of full-time attendance was legitimate, it cannot show it adopted a proportionate means of achieving that aim since it was not accompanied by any attempt to provide the full-time education to which she was statutorily entitled even after the psychologist reported in March 2014 that S did not appear tired at home in the afternoon. The disadvantages caused to S were disproportionate to the aims pursued (*R (Elias) v Secretary of State for Defence* [2006 1 WLR 3213) and so I decide that S was discriminated against contrary to section 15 of the 2010 Act by not being provided with education.

72. Standing in the shoes of the First-tier Tribunal, I have the power under Schedule 17(5) to the 2010 Act to make such other order as I see fit but not the power to award compensation. Mrs F has not invited me to make any order and, since S no longer attends the School, I see no need to make any order. The finding of discrimination is sufficient.

Postcript

73. I wish to add a few words to put my decision in context.

74. This is not a claim against S's local authority and the School have not sought to justify their actions by reference to the local authority's discharge of its education responsibilities towards S over the relevant period. However, the authority arguably owed S an even stronger duty to secure for her a full-time education given their duty to arrange the educational provision specified in her statement of SEN (section 324(5) of the Education Act 1996). I do

not know what the authority were doing to help S during the relevant period (although I have been supplied with no evidence that arrangements for afternoon education were made) and, of course, I make no findings about the local authority's conduct. I simply observe that, if the history is un-picked, it might be found that the greater part of the responsibility for S having been denied a full-time education rests with the authority. For my part, I do not know if that is the case or not.

75. I make the above observations out of fairness to the School and S's class teacher. The stigma associated with a finding of discrimination can be significant. I am not going to describe my finding as a technical finding of discrimination – far from it – but I want to provide a proper context for anyone reading this decision. What cannot be denied is that S enjoyed her time at the School ("loved it" in Mrs F's own words) and the evidence suggests her class teacher demonstrated real skill and dedication. It would be wrong to interpret my decision as finding bad faith on the part of the School or S's class teacher.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
18th October 2016