IN THE UPPER TRIBUNAL **Case No** HS/3653/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at London on 6 September 2016 under reference SE207/16/00004 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Health Education and Social Care Chamber) acting by way of a tribunal constituted in accordance with the relevant Practice Statement[1], none of whose members shall have had previous involvement in the case (a) to consider whether or not the local authority, the respondent in the First-tier Tribunal proceedings, should be barred from defending and if so, whether any further order is appropriate under rule 8; and (b) if the decision is that it should not be so barred, to determine afresh the substantive appeal.

I direct that the file is to be placed before a salaried judge of the First-tier Tribunal for case management directions, including as to whether or not it is appropriate for a decision on barring to be considered separately from the substantive appeal and if so, whether there should be a hearing for the former purpose; and as to the filing of updated evidence for any substantive hearing that may be required.

REASONS FOR DECISION

1. This is an appeal against the decision by the First-tier Tribunal ("FtT") that the conditions of a previous "unless" order were triggered so that the local authority, the respondent before it, was barred from defending and against the FtT's substantive decision thereafter. The relevant rules are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 No.2699 ("the Rules").

2. I held an oral hearing of the authority's application for permission to appeal on 16 December 2016. The authority was represented by Mr Auburn and the parents of the child concerned ("the parents") by Mr Wolfe QC. I gave permission to appeal, limited to one ground. The case has then proceeded by way of written submissions. Both parties are content that I should decide it on the papers and I am satisfied that I can properly do so.

3. In the FtT proceedings the authority had been directed to provide its response to the appeal by 29 June 2016. The deadline for further evidence, originally set by those directions for 11 July 2016, was subsequently twice varied, ending up as 12 noon on 8 August.

[1] "Composition of Tribunals in relation to matters that fall to be decided by the Health Education and Social Care Chamber on or after 18 January 2010" (as amended)

4. The original directions indicated that :

> "The Tribunal has power under Rule 8 to strike out all or part of a party's case or to bar a party from further participation in the proceedings if they do not comply with the Tribunal's directions."

5. The directions effecting the variations contained the warning, in the nature of a proforma, that:

> "Both parties are reminded that a failure to comply with any of these directions may result in the Tribunal using its powers in Rule 8(4)(a) to strike out all or part of the party's case or restricting the party's participation in the proceedings."

6. Though the deadline for filing further evidence had been extended and had not yet expired, as regards providing its response to the appeal, the authority was over one month in default and continued to be so when, on 2 August 2016, a Registrar, noting the authority's default in that regard, ordered in the following terms:

> "1. The LA is to send to the parent and the Tribunal so that it is received by 12 noon on 9 August 2016 its written representations explaining why the LA should not be barred from taking further part in the proceedings pursuant to Rule 8(4)(a) and 8(8) of the Tribunal Procedure Rules 2008.
>
> 2. Failure to comply with Directions (sic) under rule 7 of the Tribunal Rules will result in the LA being barred from taking any further part in the proceedings, pursuant to Rule 8(2)…"

In my grant of permission I explained why, notwithstanding the use of the plural in para 2 of the Order, that paragraph was directed solely to non-compliance with para.1. There is now no suggestion otherwise.

7. What the authority provided was a document entitled "Grounds of Response". It did so before midday on 9 August. If and to the extent that it amounted to "written representations explaining why the LA should not be barred from taking further part in the proceedings pursuant to Rule 8(4)(a) and 8(8) of the Tribunal Procedure Rules 2008" it was, accordingly, in time. As a response to the appeal, it was significantly late. The document was a relatively substantial one, setting out the history of the matter, the current position, information about the schools and costs and referring to relevant legislation, provisions of the Code of Practice and case law. Within the "Current Position" section, it contained the following:

> "18. On 2 August 2016 the LA received a Tribunal order directing the LA to submit its written representations to the Appeal, explaining why the LA should not be barred from taking further part in the proceedings.

> 19. Following recent events, the LA tribunals' functions were returned to in-house services, where it was discovered that the previous representative did not submit a response to [the parents'] appeal. The LA would like to apologise to the Tribunal and [the parents] for not responding within the required timeframe."

8. The reference to "recent events" was to the difficulties, well-publicised in the media, which a firm of solicitors active in the field on behalf of local authorities had found itself in. That firm had had a retainer to deal with the authority's SEN tribunal work, which came to be terminated as a result of those difficulties, resulting in a lot of previously outsourced work coming back to the authority. The present case, which never got as far as being referred to the external solicitors, was not among them. It appears that the authority was in something of a muddle as a result of these events. The adequacy to describe the events of the above explanation given to the FtT at the time is hotly disputed but is ultimately irrelevant to my decision and I say no more about it, save to make clear, despite what might arguably be inferred from the extract from the authority's submission above, that no blame in relation to the present case attaches to those solicitors. While something of these difficulties had been alluded to in an earlier "request for change" document lodged by the authority, it did not in my judgment materially add to the quality of information provided by the authority to the FtT in this regard.

9. Before turning to what the FtT made of this, I set out the relevant provisions of the Rules.

> **"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.

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) …; or
(e) except in mental health cases, restricting a party's participation in the proceedings.
(3) …

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) …
(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), (c) ….
(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.
(7) An application under paragraph (6) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.
(8) This rule applies to a respondent as it applies to an applicant except that—
(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and
(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.
(9) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by

that respondent and may summarily determine any or all issues against that respondent."

10. The FtT's reasoning was in the following terms (punctuation has been added to para 16 in order to give the apparently intended meaning to it):

> "9. The LA response dated 9/8/16 includes the two paragraphs (18 and 19)…that referred to the unless order made on 2/8/16.
>
> 10. Paragraph 18 explains that it had received the tribunal order directing the LA to submit its written representations to the Appeal, explaining why the LA should not be barred from taking further part in the proceedings. That was not a precise explanation, because it conflated the LA's representations on the appeal (which were by then out of time) and the obligation to explain why the LA should not be barred from taking further part in the proceedings.
>
> 11. Paragraph 19 fails to explain in any way why the LA should not be barred from taking further part in the proceedings.
>
> 12. Mr Rushton [who appeared for the authority in the FtT] acknowledged that at best the response was opaque but did not seek to identify any words which explained why the LA should not be barred from taking further part in the proceedings.
>
> 13. On that basis alone the tribunal finds that the LA was at midday on 9/8/16 barred from taking any further part in the proceedings.
>
> 14. It was of course open to the LA to make an application to be reinstated, but such application must be made under the rules and therefore within 28 days of the barring order and it must be in writing.
>
> 15. It is common ground that no such application was made.
>
> 16. It is worthy of note[,] however [,] that even if that was not the situation[,]on the day of the hearing:
>
> [In this paragraph the judge set out in 8 subparagraphs his view that the authority had always been aware of the directions, that there was no evidence to suggest that external solicitors had ever been instructed and that "whether intentionally or otherwise, the LA response misled the tribunal".]
>
> 17. It follows therefore that the content of paragraph 19 …could not under any circumstances have amounted to an explanation as to why the LA should not be barred from taking any further part in the proceeding, and the tribunal therefore finds that the LA has been barred from further involvement."

11. The operative part of the reasons appears to be that at paras 11 to 13. Para 13 suggests that what was said by counsel for the local authority played a major part in leading the FtT to its conclusion. On giving permission to appeal, I asked the judge to produce the relevant extract from his notes. They include the following (passages in square brackets added by the judge to clarify meaning from abbreviated notes):

> "Mr Rushton:
> …
> Order dated 2/8/16
> Admit no stand-alone document which amounts to written representations on debarring.
> Instead we have at p.240 in the Grounds of Response paragraphs 18 and 19, rather opaque if to be treated as a response to debarring…"
>
> and
>
> "[he] accepts 2/8/16 [order] is an unless order
> [and that it] gave LA until 12 noon on 9/8/16.
>
> 1. [Mr Rushton] invite[s] me to find that paras 18 and 19 satisfy that order.
> 2. [Asserts] giving further info does not render invalid, as no default.
> …"

12. From that it is clear that counsel for the local authority was not making any concession that paras 18 and 19 did not satisfy the unless order: quite the opposite, though he did indeed acknowledge that the authority's response was "opaque". What seems to have been the telling factor for the FtT was that he "did not seek to identify any words which explained why the LA should not be barred from taking further part in the proceedings."

13. This raises the question whether the FtT was setting the bar too high for "written representations explaining why the LA should not be barred from taking further part in the proceedings pursuant to rule 8(4)(a) and 8(8) of the Tribunal Procedure Rules 2008".

14. To avoid being barred by the unless order, all the local authority had to do was to deliver such representations, in time. Whether or not they were liable to be successful in persuading a tribunal not to make a discretionary barring under rule 8(4)(a) was not the issue.

15. There are many considerations to which a party might refer in making representations why it should not be the subject of a discretionary barring. What is very clear is that on considering whether to exercise its powers under rule 8(4)(a), a tribunal would, by virtue of rule 2(3), be required to seek to give effect to the overriding objective set out in rule 2(1), as elaborated by rule 2(2).

16. Was the issue of whether the local authority's two paragraphs in the middle of another document amounted to representations so as to satisfy the unless order judged in such a light? There is no indication on the face of the FtT's decision that it went through such a thought process. If it had done so, where might such a process have led?

17. Looking first at rule 2(2)(a), any case liable to decide where an 11 year old child should receive his education is of course important. Significant issues were in dispute, in particular whether the undoubtedly substantial additional cost (well into six figures across his secondary school career) if the child were to be sent to the school of parental preference would amount to unreasonable public expenditure, which would of course have to be met by the council tax payers and others who fund the local authority concerned. The task of a tribunal would be the difficult one of determining, so far as such a thing can be identified, the correct placement i.e. one in accordance with the relevant legal tests on the evidence before it. The proceedings are not in a technical sense adversarial. By making its overall submission, the local authority was demonstrating the importance of the case and the complexity of the issues. Proportionality would have had to have been seen in such a light.

18. A tribunal considering a discretionary barring would have had to seek to avoid unnecessary formality and to seek flexibility under rule 2(2)(b). The local authority was providing an explanation (whether or not accurate) of what had happened, an apology to the tribunal and the parties, and a belated explanation of its substantive case. That at least would have raised the question whether the formality involved in penalising the authority for its undoubted non-compliance – by then belatedly remedied - with the direction to provide its response to the appeal was "unnecessary" or not and whether "seeking flexibility" could be achieved by other routes- e.g. not barring the authority and, if the matter fell within rule 10, making a costs order against the authority.

19. For similar reasons, it would have raised the question how to "ensure so far as practicable" that the authority could participate "fully" (rule 2(2)(c)). Though the authority's application was late and written (by a non-lawyer) in terms and a format which would not commend themselves to lawyers, its wish to participate was made clear by its submission as a whole and there are no immediately obvious constraints of practicability surrounding the authority's participation.

20. Under rule 2(2)(e) the priority would have been "proper consideration of the issues". The avoidance of delay arises only insofar as compatible with that.

21. I accept that the application of rule 2 may not point all in one direction. Under rule 2(4) the local authority was under duties of co-operation with the tribunal. On the FtT's findings, which I refused permission to challenge for error of law, "whether intentionally or otherwise, the LA response misled the tribunal".

22. It may be argued that the points made in favour of not barring the authority by reference to rule 2 are points which could and should have been made expressly in the authority's submission and were not. Indeed, I infer from paras 11-13 of the FtT's decision that it was the absence of a submission along such lines, that caused it to conclude that no representations had been made and that the unless order was triggered.

23. Striking-out is a draconian remedy of last resort, perhaps especially in an inquisitorial jurisdiction where the participation of both parties is most likely to contribute to achieving the "correct" outcome. Similar rules can be found across many of the Chambers of the First-tier Tribunal, in many of which not only is it common for members of the public to present their own case or to be represented by non-legally qualified people, but for those who represent public bodies also not to have legal qualifications. The tribunals are not intended to be the exclusive preserve of professional lawyers.

24. This was not a case where the registrar's order had simply been ignored and the authority had carried on with its substantive case as if nothing had happened. The registrar's order was expressly referenced in paragraph 18 of the submission and an attempt, even if inept, made in para 19 to deal with it. Taken together with the content of the remainder of the submission, the local authority, for all the shortcomings in its submission, had done enough to make out a case which a tribunal considering a discretionary barring under rule 8(4)(a) would have had to consider and the outcome of which was, at its lowest, not inevitable. In looking for a more reasoned, better articulated, submission, the FtT was in my view not adequately taking into account the impact of the overriding objective on a tribunal considering whether to apply rule 8(4)(a) and thereby it set the bar too high for what could constitute a submission for the purposes of that rule, and so erred in law.

25. Turning to remedy, Mr Wolfe invites me to conclude that notwithstanding my conclusion that the FtT's decision on automatic barring was legally in error, the FtT also went on to bar the authority on a discretionary basis and thus that any error of law the FtT may (contrary to his primary submission) have made was not material. Mr Wolfe is concerned that I may have misunderstood this aspect of his submission at the oral hearing. He has clarified the matter in his written submission in (inter alia) the following terms:

> "…[E]ven on the basis that paragraph of the 2 August 2016 order referred only to its paragraph 1, and on the assumption that an explanation (whether good or bad) was at least given, then paragraph 1 itself specifically contemplated a discretionary barring exercise (namely consideration of the explanation which had been given with a view potentially to discretionary barring in relation to the non-compliance with the 29 June 2016 deadline); and, of course, [the local authority] was also (undisputedly) in breach of the 3 August 2016 order (which had extended the deadline for further evidence, but only to 8 August), which order had itself made clear that non-compliance with its

> requirements could lead to a discretionary barring… . And it was that discretionary exercise which the Tribunal undertook in its paragraph 16."

26. Mr Wolfe submits that in its para 16 the FtT:

> (a) was focusing on the situation at the date of the hearing, something that was only relevant if it was para 2 of the order of 2 August that it was considering;
> (b) found as fact that the authority had misled the tribunal;
> (c) found that the authority had itself received all the orders from the tribunal but had failed to act on them, including in relation to that of 3 August;
> (d) consequently, the explanation for missing the 29 June deadline was both bad and misleading and, further, the authority as also in default under the 3 August order.

27. Mr Auburn submits that:

> (a) the structure and syntax of paras 16 and 17 show that the FtT regarded the points in para 16 as going to automatic barring;
> (b) there is no hint in the judge's notes that the FtT was determining discretionary barring; rather, they show it was determining the facts relevant to automatic barring;
> (c) exchanges between Mr Rushton and the judge thereafter go to the FtT's concern as to whether it had been misled, a proper concern irrespective of any application it may have been considering;
> (d) evidence now filed from both Mr Rushton and from Mr Pugh (the parents' original representative) shows that the only sort of barring the FtT considered was automatic barring, not discretionary barring
> (e) nowhere does the FtT say it was conducting a discretionary barring exercise;
> (f) consideration of a wider range of issues would have been needed for a discretionary barring than is shown by the FtT's decision;
> (g) the FtT itself describes the finding that it had been misled as "tangential";
> (h) that the FtT mixed in explanations given on the day of the hearing into its consideration of whether the authority had been barred from a month before is indicative only of the confused nature of the FtT's grasp of the case;
> (i) that the authority had been sent directly all relevant documents demonstrated that the FtT might have made a discretionary barring decision, had it chosen to; but it did not.

28. I largely prefer Mr Auburn's submissions, though I derive no assistance from the characterisation by the FtT of the misleading of the tribunal as "tangential"'; that was a term used by a judge of the FtT, not the one who had heard the case, in refusing permission to appeal. While Mr Auburn's submission is correct so far as the available judge's notes go, the judge was

only asked to provide an extract directed to one aspect. I agree with Mr Auburn that Mr Pugh's evidence, while he regards the position as "more nuanced" than Mr Rushton indicated in his evidence, does not go so far as to suggest that the FtT actually did consider discretionary barring in the alternative.

29. I agree that the tenses used in para 17 ("could not…have amounted" and "the LA has been barred") are indicative that the judge was addressing automatic barring which had occurred, rather than discretionary barring which would have fallen to be considered then and there. Admittedly considering the situation "on the date of the hearing", as para 16 records, would be more consistent, if the FtT was there considering making a barring order at all, with making a discretionary one. However, in particular when (a) the FtT does not indicate that it was making a discretionary barring order (and in my view , given the nature of that sanction, it would have needed to be plainly spelled out if it had been); and (b) the evidence from the judge, Mr Rushton and Mr Pugh all tends to suggest no discretionary barring was being considered, even as a fall-back, there is insufficient reason to read the FtT's decision otherwise than how its syntax and grammar at first sight suggest. I also agree with Mr Auburn that one would have expected a wider range of factors to be considered on a discretionary barring: for my part, in particular, factors relating to the application of the overriding objective.

30. Whether the presence and content of para 16 is, as Mr Auburn submits, indicative only of the confused nature of the FtT's grasp of the case, or whether the FtT wished to find a vehicle to record its evident dissatisfaction with the handling of the matter by the authority for some other, imperfectly articulated, reason I do not know but for the reasons above I am unable to construe it as a decision on a discretionary basis to bar the authority. I accept that the FtT could have gone on to deal with the matter as a discretionary barring in the alternative, but not that it in fact did so.

31. I therefore conclude the FTT's decision was in material error of law and set it aside.

32. Mr Wolfe then, in the event his previous submissions failed, invites the Upper Tribunal to make its own decision on the discretionary barring point. He submits that, because I refused permission to appeal on, inter alia, the FtT's factual conclusions regarding the handling of the case, that the FtT's findings should stand "in this appeal or any subsequent consideration of the barring question". As the FtT's decision has been set aside, not on that ground but nonetheless in its entirety, I consider his position to be incorrect. While I also refused permission to challenge the FtT's exercise of its discretion to bar, if, contrary to my view, that had arisen, that does not significantly assist me if I were to be faced with making the discretionary barring decision afresh myself. Mr Wolfe submits that the possibility of any different discretionary barring decision being taken following the quashing is "entirely theoretical and unreal". I do not accept that. Even were one to share the FtT's analysis of the local authority's conduct and candour (or lack

thereof), there is an exercise to be done applying rule 2 which, while there are points both ways, might very possibly lead to a decision not to bar, but to address the substance of the case.

33. Then, submits Mr Wolfe, the authority has not been materially disadvantaged in relation to the points which led it to lose the substantive appeal. He does so on the basis that, once the decision had been taken to bar the authority from defending, the FtT went on to consider the expert and professional evidence which the authority had already submitted, so that what it was deprived of was (a) the chance to have its belated written submission considered and (b) the chance to call the witnesses it had lined up for the oral hearing. As to the key unresolved issue (the suitability or otherwise of school W) (a) the likely oral evidence of the witnesses was apparent from material that was already in evidence and which the FtT did consider and (b) in any event, reserving matters for oral evidence rather than properly flagging them up in submissions beforehand would be "by way of ambush" and contrary to the aims of, inter alia, the overriding objective, failing to ensure an open and transparent process. As to this, Mr Auburn points to detailed material in submissions to the Upper Tribunal and in an accompanying table, not disputed in these proceedings, where the authority suggests the FtT went wrong as a result of not having heard the authority's witnesses and/or as a result of its barrister being deprived of the chance to cross-examine witnesses for the parents. I am not determining the substantive issue, but it appears to me from this material that the contention that the authority has not been materially disadvantaged cannot at this stage be made out.

34. It seems to me therefore that the appropriate course is that the question of whether, on a discretionary basis, to bar the authority from defending and, if the answer is not to do so, the hearing of the substantive appeal, should be remitted to the First-tier Tribunal. It may be thought unlikely in this case that the question of discretionary barring would be considered without a hearing, given that the authority has indicated a wish to make full submissions and possibly present further evidence: if it were to be, then under the Practice Statement it would fall to be decided by a judge sitting alone, but in any other scenario, a panel will be required. In my view, the single judge (or panel) should have had no previous involvement in the case. If the matter proceeds to the substantive appeal, there will be a need to hear the evidence from both parties. In the case of the parents' evidence that will have to be heard afresh, to allow the local authority the opportunity to cross-examine. It will be preferable, indeed in my view essential to maintain confidence in the process, for the evidence to be considered by a panel that has not heard half the evidence already and formed a view in relation to it. Mr Wolfe, while inviting the Upper Tribunal if it does remit the case to do so to the same panel rather than a differently constituted one offers no argument in support of that.

35. Finally, Mr Wolfe in written submissions suggests that the present decision will be widely taken by local authorities and the FtT as setting a benchmark for conduct by parties to appeals when it comes to compliance with deadlines and straightforward dealing with the FtT and for how the FtT

should respond. It should not be. Case management is pre-eminently a matter for the relevant part of the FtT concerned. There are very many decisions it might take in case management issues which will not come anywhere near being appealable to the Upper Tribunal, because of the latitude which is offered by appellate courts and tribunals to the courts and tribunals below in discretionary case management matters.

36. I do offer the following as food for thought for the First-tier Tribunal. Although there are a number of decisions of the Employment Appeal Tribunal[2] applying a rigorous approach to the scrutiny of unless orders, Mr Auburn makes no criticism as to the original decision to make one in the present case. Nonetheless, I question whether it was necessarily the best way forward. I am acutely conscious of the tight timescale to which the FtT in its special educational needs jurisdiction seeks to operate, in the interests of the children concerned, their families, the schools and indeed the local authorities concerned. I can readily understand the need to secure prompt compliance from parties to cases. In the present situation, though, where the local authority was already significantly in default, substantially the same end could have been achieved by arranging for the papers to be placed before a judge on a given date with a view to considering the exercise of powers under rule 8(4)(a) and inviting the authority to make such representations, if any, as it might wish before that date. If the authority were not to make any representations, that would no doubt play its part in the judge's consideration of whether or not to make a barring order. The effect of proceeding by way of an unless order was to shift the matter from being one of the exercise of judicial discretion to an altogether harder-edged question of whether there had, or had not, been compliance. Where not making such a submission would be the authority's loss, no-one else's, I am doubtful whether the approach adopted was the best approach.

CG Ward
Judge of the Upper Tribunal
6 March 2017

[2] Se e.g. Rogers v Department for Business Industry and Skills UKEAT/0251/12/SM; Mace v Ponders End International Ltd UKEAT/0491/13/LA