***SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC)**

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000387-HS**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

SS

Appellant

- v -

Proprietor of an Independent School

Respondent

Before: Upper Tribunal Judge Stout

Decision date: 31 January 2024
Decided on consideration of the papers

Representation:

Appellant: Alice de Coverley (counsel, instructed by Russell Cooke Solicitors)
Respondent: John Friel (counsel, instructed by DAC Beachcroft)

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal made on 26 October 2022 under number EH936/22/00230 was made in part in error of law.

Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** that decision as regards the following claims **only**:-

(a) The claim under s 15 and 85(2) of the Equality Act 2010 relating to S's permanent exclusion;

(b) The claim under s 15 and 85(2) of the Equality Act 2010 relating to an additional session with the therapy dog;

(c) The claims under s 20, 21 and 85(6) of the Equality Act 2010 relating to:

(i) The claim concerning staff training dealt with at [66]-[67] of the First-tier Tribunal's decision;

(ii) The claim concerning a positive behaviour plan dealt with at [69] of the First-tier Tribunal's decision;

(iii) The claim concerning the provision of 1:1 teaching assistant support dealt with at [70] of the First-tier Tribunal's decision; and,

(iv) The claim concerning support for S's social, emotional and mental health needs dealt with at [72] of the First-tier Tribunal's decision.

I **remit** those parts of the case to be reconsidered by a **fresh tribunal**.

I **direct** that the file be placed before a salaried judge of the First-tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs) for case management directions to be given.

RULE 14 ORDER

THE UPPER TRIBUNAL ORDERS that, save with the permission of this Tribunal:

No one shall publish or reveal the name or address of any of the following:

(a) S, who is the child involved in these proceedings;

(b) any of the other children mentioned in the evidence or argument;

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings (including the name of the school).

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

REASONS FOR DECISION

Summary of this decision

1. The appellants' appeal to the Upper Tribunal succeeds. The decision of the First-tier Tribunal involves legal errors in relation to the claims identified above. The

decision is set aside insofar as it concerns those claims (but not otherwise). Those claims now need to be reheard by a new and different First-tier Tribunal. The new tribunal may reach the same, or a different, decision to that of the previous Tribunal.

Introduction

2. The appellants (SS) are the parents of child S. They appeal against the decision of the First-tier Tribunal (Special Educational Needs and Disability) dated 26 October 2022 dismissing their claims of disability discrimination against the responsible body of S's former school (who I henceforth refer to as the RB). I use initials in order to ensure the anonymity of S.

3. Permission to appeal on limited grounds was granted by Upper Tribunal Judge Jacobs by a decision issued on 20 June 2023 following an oral hearing of the appellants' renewed application for permission. The grounds of appeal on which permission to appeal was granted are as follows. I summarise the grounds in my own words so that the legal issue is clearly identified. While I appreciate it may appear odd to other readers of this judgment, I retain the original numbering of the grounds so as to avoid any confusion for the parties:-

    a. *Ground 2* – the First-tier Tribunal erred in law in its approach to s 15 of the Equality Act 2010 (EA 2010) in determining the claim relating to an additional session for S with a therapy dog;

    b. *Ground 3* – the First-tier Tribunal erred in law in its approach to the claims of failure to make reasonable adjustments by not identifying the relevant provision, criterion or practice (PCP) or substantial disadvantage and instead dealing only with whether the adjustments sought were reasonable;

    c. *Ground 5* – the First-tier Tribunal erred in law in relation to the s 15 claim about S's permanent exclusion by: (i) failing to consider alternatives to exclusion as part of the overall s 15 proportionality assessment; (ii) failing to consider the impact on S's mental health of the exclusion; and (iii) proceeding unfairly by relying on matters at [40]-[41] of its judgment that it had not put to the parents or their expert witness, Dr Mair (Educational Psychologist).

Why I have decided this case without a hearing

4. Following the grant of permission by Judge Jacobs, the parties have made further written submissions through their respective counsel: the respondent by submissions from Mr Friel dated 8 September 2023 and the appellants by submissions from Ms de Coverley dated 28 September 2023. Judge Jacobs directed the parties to request a hearing if they wanted one, but neither party has made such a request.

5. The case having been recently allocated to me, I have considered carefully whether it is necessary to have an oral hearing in this matter, but I am satisfied that it is appropriate for me to decide the matter on the papers as permitted by Rule 34(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules).

6. I note that Ms de Coverley in her submissions appears to have thought that Judge Jacobs would be making the final determination in this case, and that part of her reason for not requesting a hearing was that the Upper Tribunal had already had the benefit of oral argument from both parties. However, Judge Jacobs did not reserve the final decision to himself, so I trust that Ms de Coverley was aware that a different judge might make the final determination on the case.

7. I have considered whether there is any real disadvantage to the parties in not having the opportunity to make further oral argument to me in this case, but I do not think there is. Oral argument at the permission stage enabled arguable legal points to be identified that had not previously been apparent to the First-tier Tribunal Judge and previous Upper Tribunal Judge who refused permission on the papers. Now that the arguable errors have been identified, it seems to me that the parties have, in their various written submissions, said all they can reasonably say about the grounds on which permission has been granted.

8. I am also conscious that the delay in this case has been outside the norm for this type of case and that listing a hearing now would involve further delay. The First-tier Tribunal hearing took place on 3 October and 11 October 2022. The core issue in the claim relates to the RB's decision to terminate S's placement with effect from 30 March 2022. It is thus now nearly two years since the main event in the underlying facts of this case. That is a long time in the life of child S.

9. For all these reasons, therefore, I have decided that it is appropriate and in accordance with the overriding objective in Rule 2 for me to determine this appeal on the papers.

Factual background and the First-tier Tribunal's decision

10. S is a child who was aged 9 at the time these proceedings commenced. She has a number of diagnosed impairments, including Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), anxiety and depression, and sensory processing difficulties. The First-tier Tribunal was satisfied (see [14] of the Decision) that these constituted a disability within the meaning of s 6 of the EA 2010.

11. The First-tier Tribunal found (at [16]-[17]) that S engages in violent and aggressive behaviour, but that this behaviour is linked to her disability. As such (although the First-tier Tribunal did not put it quite like this), the Tribunal proceeded on the basis that it was bound by the decision of the Upper Tribunal (Judge Rowley) in *C and C v Governing Body of a School and others* [2018]

UKUT 269 (AAC) to disapply of regulation 4 of the Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2028) in this case. Regulation 4 of the 2010 Regulations on its face excludes from the protection of the EA 2010 persons whose disabilities manifest in a tendency to physical abuse, but in *C and C* Judge Rowley concluded that for children whose disabilities manifest in that way, the exclusionary provision in regulation 4 of the 2010 Regulations breaches Article 14 of the European Convention on Human Rights (prohibition on non-discrimination), read together with Article 2 of the First Protocol (right to education) and thus falls to be disapplied by virtue of s 3 of the Human Rights Act 1998.

12. The First-tier Tribunal then went on its decision to deal with what it identified as three claims of disability-related discrimination under s 15 of the EA 2010. The first two concerned the termination of S's school placement and informal exclusions that had occurred. The First-tier Tribunal found that the RB had not contravened s 15 of the EA 2010 in relation to either the permanent or informal exclusions.

13. In relation to the permanent exclusion (which forms the subject of Ground 5 of this appeal), the First-tier Tribunal accepted the RB's evidence of the incidents that led to the exclusion as follows:-

> The RB states that [S] caused physical injury on Friday, 4 March 2022, to another pupil by kicking her, pushing her to the floor, standing on her stomach, and giving her Chinese burns. The mistreatment left a footprint on the other child's shirt. The RB also states that [S] caused physical injury to a Teaching Assistant on Friday, 11 March 2022 by stabbing him with a pencil. The Teaching Assistant described that [S] drew blood, which was observed by teachers, as confirmed in oral evidence.

14. The Tribunal concluded that the decision was taken for reasons related to S's disability and went on to consider whether the decision was justified as a proportionate means of achieving what it found to be the RB's legitimate aims of maintaining the safety and wellbeing of all pupils, enabling all children to achieve the best outcomes, maintaining order and providing a safe working environment for its staff. It decided that it was justified. At [23] it directed itself as follows:-

> 23. When considering proportionality, we have regard to the following questions:
> a. What objective did the RB pursue and is it sufficiently important?
> b. Are the measures taken rationally connected to the objective?
> c. Are they no more than necessary to achieve that objective?
> d. When balancing all the factors together, is the impact on the child disproportionate to the likely benefits?

15. It addressed each of those questions in turn at [24]-[43]. At [38] it concluded that, given the nature of S's behaviour, there was *"no rational alternative"* to exclusion. It took into account in reaching that conclusion that it had determined that the RB

had complied with its duty to make reasonable adjustments for S, for the reasons set out later in its decision ([37]).

16. In the course of reaching the conclusion that the termination of S's school placement was a proportionate means of achieving a legitimate aim, the First-tier Tribunal considered the opinion of Dr Mair (an Educational Psychologist instructed by the appellants as an expert witness) about the impact of the exclusion decision on S's mental health, and held as follows at [40]-[41] (paragraphs that are now also the subject of Ground 5 of this appeal):

> 40. We can see from her record of working with [S] that Dr Mair did not discuss the exclusion decision with [S] because her parents were concerned that informing her of the exclusion may cause her upset and possible trauma. We also see that Dr Mair obtained the views of [Mrs R], [Mrs C], and [Mr P] and none raised concerns about [S]'s mental health. We note that neither the WISC-IV (UK) nor the Boxall Profile is designed to identify mental health concerns.
>
> 41. Having examined Dr Mair's report, we find that she relies heavily on the Claimants' concerns even though these are not supported from other sources. We find that weakens the opinion Dr Mair makes and leads us to consider her conclusion is speculative when she says there are "potentially serious consequences for her mental health." As that is a speculative opinion, it is not evidence we can treat as being reliable. Any consequences would depend hugely on how the adults presented the situation to her about changing schools. We conclude that the evidence does not show that it is reasonably likely that the impact of the exclusion decision on [S] would have serious consequences for her mental health.

17. The third s 15 claim was identified by the First-tier Tribunal as "not permitting her access to the therapy dog". This is the subject of Ground 2 of this appeal. The First-tier Tribunal dealt with it at [57]-[62] of its decision. As the First-tier Tribunal made no separate findings of fact, these paragraphs set out both its factual and legal conclusions regarding this claim. The First-tier Tribunal's decision reads as follows:-

> 57. In an email dated 5 November 2021, the Claimants requested that [S] might have access to the therapy dog because she has ADHD and Asperger's. Two days later, the RB responded positively.
>
> 58. In her witness statement, [Mrs C] explained that the therapy dog is owned by the deputy head of the senior school. Arrangements were made for [S] to see the dog on a weekly basis.
>
> 59. The parties agree that the incident of concern relates to a request for an additional session around the time of [S]'s birthday. The RB refused this

> request because of [S]'s behaviour over the previous two weeks.
>
> 60. We have a number of issues about this element of claim. We have no evidence that [S] required access to a therapy dog to regulate her emotions and behaviour. There is nothing in any of the expert reports making such a recommendation and there is nothing in section F of her EHCP. It appears that the RB provided [S] with access to the therapy dog simply because it was requested by the Claimants. There is nothing to indicate that such access assisted [S], even though she was seeing the therapy dog weekly when she was being assessed as part of the EHC needs assessment.
>
> 61. We conclude that there is insufficient evidence to link access to the therapy dog and [S]'s disability. The evidence shows the arrangements were informal and not arranged to meet [S]'s emotional needs in school. In fact, the session we are considering was to be an "one off" extra session. In this context, denying [S] an extra session with the therapy dog cannot be regarded as unfavourable treatment.
>
> 62. As we do not find the RB's conduct to amount to unfavourable treatment under section 15(1)(a) of the 2010 Act, this element of claim fails.

18. The First-tier Tribunal then turned to deal with the claims of failure to make reasonable adjustments under ss 20 and 21 of the EA 2010, which are now the subject of Ground 3 of this appeal. The heading to this part of the Decision identifies the claims as follows:

> (i) Failing to make reasonable adjustments to the RB's practices of how education is provided to its pupils,
> (ii) Failing to make reasonable adjustments to the RB's practices of when permission is given to leave a classroom, and
> (iii) Failure to provide auxiliary aids in the form of visual aids.

19. The First-tier Tribunal went on to consider at [63]-[80] whether or not the RB had acted unreasonably in failing to make any of the adjustments that the appellants suggested should have been made, but concluded that they did not. By way of a preamble to this part of its Decision, the First-tier Tribunal observed as follows at [65]:

> 65. We find many of the issues raised by the Claimants overlap with the Children and Families Act 2014. We remind ourselves and those reading this decision that there has never been a duty for the RB to implement [S]'s EHCP [Education, Health and Care Plan] because it was for the LA to ensure the specified special educational provision was delivered, and in any event the RB was not named in section I of the plan. Additionally, the RB has never had a duty to take reasonable steps to prevent the incompatibility of providing efficient education for others

> because although the RB follows a mainstream curriculum, it is not a mainstream school.

20. At [66]-[67], the First-tier Tribunal dealt with the issue of staff training to meet S's needs, but concluded that it was not reasonable for the RB to provide staff training specifically relating to S because it would have required staff to attend on site which was not possible during lockdown in January 2022, the school only has two staff inset (training) days per year and it would not have been reasonable to divert staff away from *"teaching and other duties"* to provide training specifically for S at other times. The Tribunal added: *"The ethos of the school is to provide a mainstream curriculum. As with such schools, it can meet many special educational needs, but cannot be expected to provide a level of adaptations that would be expected in a special school environment".*

21. At [68], the First-tier Tribunal accepted as a fact that the RB had adapted the curriculum for S in several ways as identified by the RB in its evidence.

22. At [69], the First-tier Tribunal rejected the contention that the RB should have implemented a positive behaviour plan for S as it was *"a small prep school"* and already *"kept records about incidents and discussed how to follow up incidents"*.

23. At [70], the First-tier Tribunal rejected the appellants' claim that the RB should have funded additional hours of 1:1 teaching assistant time. Although the RB had, prior to March 2022, considered a full-time 1:1 teaching assistant would have made it possible for S to remain at the school, the First-tier Tribunal decided it was unreasonable to expect the RB to fund this from its resources *"as the Claimants were responsible for funding suitable arrangements as it was not specified in the EHCP and therefore the LA was not responsible"*.

24. At [71], the First-tier Tribunal rejected the appellants' allegation that the RB had sought to 'deliberately sabotage' their proposed approach to the LA for interim funding on the basis that it was not made out on the evidence.

25. At [72] , the First-tier Tribunal decided that it was unreasonable to expect the RB to seek specific support for S's social, emotional and mental health needs *"such as play therapy or school counsellor time, or to refer her to an ELSA or clinical psychologist"* because it would *"rely on the RB using its limited resources in a way for which they are not budgeted and therefore there would be a negative impact on other provision"*. The First-tier Tribunal added that *"such an allegation presupposes that the adjustments [S] requires are more than can be provided by an independent school following a mainstream curriculum"*.

26. At [73]-[74], the First-tier Tribunal rejected the appellants' arguments about S being permitted to leave the classroom and not being provided with a dedicated safe space outside of the classroom on the basis (I summarise) that S was in fact

permitted to leave the classroom and found safe space whenever that was possible.

27. At [75]-[77], the First-tier Tribunal concluded on the facts that the RB had provided S with the sensory diet that she required.

28. At [78], the First-tier Tribunal concluded as a matter of fact that visual timetables and prompts were in place for S.

29. At [81]-[83] the First-tier Tribunal then stated its conclusion in relation to each of the three allegations of failure to make reasonable adjustments it had identified at the outset and stated, *"As we have found that the RB made all adjustments that were reasonable, we reject this part of the claim. As a result, we do not have to consider the step-by-step approach set out in the law."*

Discussion and conclusions

30. Although there is an overlap between Grounds 3 and 5 (as Judge Jacobs noted when granting permission in this appeal), the three grounds in fact raise three discrete legal points and it is convenient to deal with each ground separately in the first instance.

Ground 2 – the First-tier Tribunal erred in law in its approach to s 15 of the Equality Act 2010 (EA 2010) in determining the claim relating to an additional session for S with a therapy dog

The parties' submissions

31. The appellants argue that the First-tier Tribunal erred in not finding that S was unfavourably treated when she was denied access to the school's therapy dog around the time of S's birthday, and that *"being denied something she was expecting to enjoy"* was unfavourable treatment. The appellants argue that the First-tier Tribunal's reason for finding that there was no unfavourable treatment (because the access to the therapy dog was not required for therapeutic purposes) was irrelevant and confused this s 15 claim with a reasonable adjustments claim. The appellants argue that the First-tier Tribunal should have found that she was denied access because of her behaviour, which was 'something arising in consequence of her disability' and thus should have gone on to consider whether the treatment was justified.

32. The RB confirms (at [2.4] of Mr Friel's submissions of 8 September 2023) that it was 'common ground' that S saw the dog on a weekly basis and that the claim related to a request for an extra therapy dog session for her birthday. At [2.5], Mr Friel refers to the RB's evidence which was that the request for an extra session was refused because of S's behaviour as *"it did not seem appropriate that she could have the expectation that she could see him [the therapy dog] whenever*

she wanted regardless of her behaviour…". At [2.6] and [2.9] Mr Friel goes on to argue that the facts are more complex than the First-tier Tribunal found, that the dog was not owned or controlled by the school, it was not actually clear that the therapy dog was available on S's birthday and there is no evidence that a therapy dog was required for S's condition so that the First-tier Tribunal was right to find that there was insufficient evidence to link access to the therapy dog with S's disability. Mr Friel further argues that denial of a 'treat' is not something that necessarily amounts to unfavourable treatment for the purposes of s 15 as a treat is not something that you have a right to. He relies on Langstaff J's decision in the EAT in *Trustees of Swansea University Pension Scheme v Williams* [2015] ICR 1025 for authority that what amounts to unfavourable treatment is a question of fact for the Tribunal.

33. In reply, Ms de Coverley for the appellants argues that the RB did not seek to justify the sanction of removing the therapy dog session as it now does on this appeal, and that there was no suggestion previously that the dog was not a service offered by the school. She points out that the *Swansea* case went to the Supreme Court ([2018] UKSC 65), that there is only a *"low threshold of disadvantage"* that has to be established and that a child having a birthday session with a dog taken away clearly meets that threshold.

The law on section 15 (discrimination arising from disability)

34. Section 15 of the EA 2010 provides:

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

35. In a claim under s 15 of the EA 2010, the First-tier Tribunal must therefore consider:

    a. Whether the disabled person has been treated unfavourably;
    b. The reason for the unfavourable treatment;
    c. Whether that reason is something arising in consequence of the disabled person's disability;
    d. Whether the school knew, or could reasonably have been expected to know, that the person had the disability relied on;

e. If so, whether the school has shown that the treatment is a proportionate means of achieving a legitimate aim.

36. That five-step process is clear from the statute itself, but further guidance on it was given by Simler J (as she then was) in *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT (a case in the employment context). In paragraph [31] of her judgment in that case, she explained (among other things) that the second step of deciding the reason for the unfavourable treatment is to be done in the same way as for direct discrimination, i.e. the 'something' must be the conscious or unconscious reason for the treatment, in the sense of having a more than minor or trivial influence on the unfavourable treatment, even if it is not the main or sole reason, while the third step of considering whether that reason is 'something arising in consequence of the claimant's disability' is an objective question that does not involve consideration of the mental processes of the alleged discriminator. It is only at the third step of deciding whether the alleged discriminator's reason for the treatment was 'something arising in consequence' that the question of a link to the claimant's disability comes in.

37. *Williams v The Trustees of Swansea University Pension and Assurance Scheme and anor* [2018] UKSC 65, [2019] 1 WLR 93, to which the parties have referred, concerned an employee who, because of his disability, initially reduced from full-time work to part-time work and then took ill-health retirement at the age of 38. He was entitled to an ill-health retirement pension, but it was calculated on the basis of the part-time salary he had at his retirement date. He brought a claim that this was unfavourable treatment contrary to s 15 because, if it were not for his disability, he would have been working full-time prior to his ill-health retirement and thus entitled to a larger pension. The Employment Tribunal upheld his claim, but the employer's appeal was allowed by the Employment Appeal Tribunal (EAT), the Court of Appeal and Supreme Court. Each of the appellate courts expressed their decisions in slightly different terms, while also indicating agreement with the reasoning of the court below. The EAT, Court of Appeal and Supreme Court judgments therefore need to be read together in order properly to understand the case. At heart, each appellate court concluded that it was perverse for the Employment Tribunal, on the facts of that case, to have regarded the pension awarded to the claimant as 'unfavourable treatment'. While the EAT, however, made an order remitting the claim to the Employment Tribunal for re-determination, the Court of Appeal concluded that it was not in fact open to a Tribunal on the facts of that case to conclude that there was 'unfavourable treatment', so that there was no remittal. The Supreme Court did not vary that order.

38. The core of Langstaff J's reasoning in the EAT ([2015] ICR 1197) was (at [29]):

> "treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous"

39. In the Court of Appeal ([2017] EWCA Civ 1008, [2018] ICR 233), Bean LJ at [49] held:

> "No authority was cited to us to support the view that a disabled person who is treated advantageously in consequence of his disability, but not as advantageously as a person with a different disability or different medical history would have been treated, has a valid claim for discrimination under section 15 subject only to the defence that the treatment was a proportionate means of achieving a legitimate aim. If such a claim were valid it would call into question the terms of pension schemes or insurance contracts which confer increased benefits in respect of disability caused by injuries sustained at work, or which make special provision for disability caused by one type of disease (for example cancer). The critical question can be put in this way: whether treatment which confers advantages on a disabled person, but would have conferred greater advantages had his disability arisen more suddenly, amounts to 'unfavourable treatment' within section 15. In agreement with the President of the Employment Appeal Tribunal I would hold that it does not."

40. The Supreme Court concluded at [28]:

> "…It is necessary first to identify the relevant "treatment" to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that. By contrast in Malcolm [2008] AC 1399, as Bean LJ pointed out [2018] ICR 233, para 42, there was no doubt as to the nature of the disadvantage suffered by the claimant. No one would dispute that eviction is "unfavourable". Ms Crasnow's formulation, to my mind, depends on an artificial separation between the method of calculation and the award to which it gave rise. The only basis on which Mr Williams was entitled to any award at that time was by reason of his disabilities. As Mr Bryant says, had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. It is unnecessary to say whether or not the award of the pension of that amount and in those circumstances was "immensely favourable" (in Langstaff J's words). It is enough that it was not in any sense "unfavourable", nor (applying the approach of the Code) could it reasonably have been so regarded."

41. Although the appellate decisions at each level in the *Williams* case turned on perversity, consideration was also given to the principles to be applied when determining whether treatment is "unfavourable" within the meaning of s 15. It was argued on behalf of the employee that it was to be approached in the same way as "detriment" for the purposes of direct discrimination and victimisation in ss 13 and 27 of the EA 2010, respectively - in another words, that the House of Lords decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 applies and that 'unfavourable treatment' was established where "a reasonable worker would or might take the view that he had thereby been

disadvantaged in the circumstances in which he had thereafter to work" (cf per Lord Nicholls at [34]). The *Shamoon* test can be characterised as a 'range of reasonable responses' test or rationality test with the claimant's opinion as its focus. However, the argument that the same approach was to be taken to the word "unfavourably" in s 15 was rejected by Langstaff J in the EAT at [27]-[29] in the following terms:

> 27. As to the reasoning by reference to other possible discrimination claims, the meaning of the word "unfavourably" cannot, in my view, be equated with the concept of "detriment" used elsewhere in the Equality Act 2010 . The word "unfavourably" is deliberately chosen. So, too, the choice not to use the word "detriment" must be assumed to be deliberate: the draftsman would have been well aware of the use of the word "detriment" elsewhere within the Equality Act , and avoided it. Nor, as the parties were agreed, does the word "unfavourably" require a comparison with an identifiable comparator, whether actual or hypothetical, as would the description "less favourable". "Less" invites evidence to be provided in proof of "less than whom?"; "un …" is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial.
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> 28. Section 15 as such was introduced into the Equality Act 2010 for the first time. The word "unfavourably" is used elsewhere in the Act in respect of provisions which have a longer pedigree. Thus, in section 18, a person is held to discriminate against a woman if in a protected period in relation to a pregnancy of hers that person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it (section 18(2): see also section 18(3) and (4)). In this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. Since the word "unfavourable" is the same word in section 15 as it is in section 18, in the same part of the same Act, it is likely that the draftsman had in mind that it would mean much the same in both.
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> 29. I accept Mr O'Dair's submission that it is for a tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. Sometimes this may be obvious: as for example, where a person may suffer a life event which would generally be regarded as adverse—taking the Malcolm case [2008] 1 AC 1399 as an example, eviction; or being surcharged;

> being required to work harder, longer, or for less. A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it—his inability to perform work at the same speed or with the same efficiency. In a case such as this the contrast with the Malcolm approach is clear—for, in Malcolm , the question would be whether an able bodied worker in the same position without the disability, who did not complete work at the rate or to the standard required, would be subject to discipline. This approach is both consistent with and reflective of the sense in which "unfavourably" is applied in a case coming within section 18 .

42. Langstaff J thus adopted a wholly objective test, holding that whether treatment is unfavourable is to be determined by the Tribunal taking 'a broad view', 'judged by broad experience of life' and considering whether the claimant is 'not in as good a position as others generally would be'.

43. In the Court of Appeal Bean LJ also rejected the employee's argument that the *Shamoon* approach is to be read across to s 15, but he did not specifically approve Langstaff J's observations as to the appropriate test to adopt, or identify any alternative. At [42]-[43], Bean LJ held:

> "42. ….In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 the claimant chief inspector had part of her duties as a manager (the appraisal of subordinates) removed. The House of Lords held that it was not necessary for her to show financial loss in order to establish a detriment; it was enough that she might reasonably feel demeaned by this decision in the eyes of those over whom she had authority.
>
> 43. Ms Casserley [counsel for Mr Williams] placed the *Shamoon* case at the forefront of her argument, but I do not consider that it assists her. Mr Williams's case does not turn on a question of reasonable perception. His pension is undoubtedly less advantageous or less favourable than that of a hypothetical comparator suddenly disabled by a heart attack or stroke. But it is far more advantageous or favourable than it would be if he had not become permanently incapacitated from his job. The *Shamoon* case is not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of section 15 simply because he thinks he should have been treated better.

44. Lord Carnworth in the Supreme Court recorded the parties' submissions on the *Shamoon* issue at [23]-[26], but did not address the point directly, save to say that he was *"substantially in agreement with the reasoning of the Court of Appeal"* ([27]). He did, however, go on as follows, in a passage that appears at first blush to be 'rowing back' from the reasoning of Langstaff J on the *Shamoon* point:

> "I agree with [Ms Crasnow QC for the employee] that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."

45. The Supreme Court in *Williams* thus declined to give explicit guidance on whether "unfavourable" for the purposes of s 15 is to be decided like *Shamoon* by reference to a 'range of reasonable responses'-type approach focused on the claimant, or whether a wholly objective approach was to be taken.

46. The parties in this case have not sought to tease out precisely where the Supreme Court's decision in *Williams* leaves the law in terms of the test to apply when considering unfavourable treatment for the purposes of a s 15 claim, and there is no need for me to analyse the point in any more detail in order to determine this particular appeal, but I record here for completeness that it seems to me that, properly analysed, the Court of Appeal and Supreme Court decisions in *Williams* left Langstaff J's objective approach intact. Certainly, neither the Court of Appeal or the Supreme Court approved the adoption of the *Shamoon* approach and, in deciding that the Tribunal's decision was perverse, they expressed themselves in objective terms, albeit that the Supreme Court emphasised that "a relatively low threshold" applies.

47. What is clear, following *Williams*, is that it will be a question of fact for a Tribunal in each case whether that low threshold is crossed, and provided the Tribunal has otherwise directed itself properly in law, it will only be susceptible to appeal if its conclusion is perverse in the particular case.

My conclusion on Ground 2

48. I have set out above in the section headed *Factual background and the First-tier Tribunal's decision* the First-tier Tribunal's complete findings on the s 15 claim concerning the therapy dog. As can be seen, the thrust of the First-tier Tribunal's conclusion, as expressed at [61] of its Decision, was that *"there is insufficient evidence to link access to the therapy dog and [S's] disability"*, that the session in question *"was to be a 'one off' extra session"* and, as such, refusing it did not constitute unfavourable treatment.

49. In so concluding, however, it seems clear to me that the First-tier Tribunal had lost sight of the structure of s 15 as I have set it out above.

50. The first question it needed to answer was whether S had been treated unfavourably.

51. S's case was that the extra session with the therapy dog was regarded by her as a "treat". There is no reason in principle why a refusal of a "treat" cannot amount to unfavourable treatment, applying the low threshold approved by the Supreme Court in *Williams*. Refusal of a treat is likely to be upsetting for a child. If the school was willing to arrange it as a birthday treat, and might have been willing to arrange something similar for another child, but refused in her case, it would be open to a Tribunal to conclude that the treatment was unfavourable. Equally, it might be open to a Tribunal to conclude that being refused that "treat" did not objectively amount to unfavourable treatment, even applying the low threshold.

52. The problem in this case is that the Tribunal has not even addressed S's argument. It has not made any findings about the session being a treat or the impact on her of it not going ahead or considered whether not being permitted a treat amounted to unfavourable treatment. Rather, it has rejected her argument that the refusal to allow her the additional therapy dog session as a birthday treat was unfavourable treatment for the sole reason that the session was not required to meet her needs as a disabled person.

53. Ms de Coverley argues that that reason was irrelevant, and in one sense she is right about that, although I prefer to characterise it as the Tribunal's reasons revealing that it has misdirected itself in law.

54. As I have explained above when setting out the law on section 15, the question of whether there is a link to the child's disability only comes in at what I have identified as the third statutory step of deciding whether the RB's reason for the unfavourable treatment was something arising in consequence of S's disability.

55. The Tribunal's reasons in this case make clear that the Tribunal wrongly regarded the question of whether there was a link to S's disability as determinative of the unfavourable treatment question. It was not; indeed, in most cases it will be irrelevant to the question of whether the treatment is unfavourable. However, I would not go so far as to say that a link to disability is an irrelevant consideration in all cases at the first stage of deciding whether there has been unfavourable treatment. The fact that the session was 'just' a treat and not required to meet S's needs as a disabled person could be relevant objectively to whether the refusal of the session amounted to unfavourable treatment, but it was not determinative and the First-tier Tribunal erred in law in regarding it as being determinative.

56. The second question that the Tribunal needed to ask itself once it had decided whether being refused a treat was unfavourable treatment was what the reason was for that treatment. That question the Tribunal has answered in [59] and it does not seem to be in dispute on appeal: the RB refused the request because of S's behaviour.

57. The third question the Tribunal needed to consider was whether that reason was something arising in consequence of S's disability. It is not clear from the decision precisely what the behaviour was that led to the RB refusing the request for the

additional therapy dog session, but if it was violence and aggression then it would follow from the First-tier Tribunal's findings earlier in its decision about the link between S's violence and aggression and her disability that the RB's reason for refusing her the additional therapy session was 'something arising in consequence of her disability'.

58. The fourth step in the statutory questions is the respondent's knowledge of disability. There was no dispute in this case that the school had the necessary knowledge of S's disability, so the Tribunal would then have needed to move on to considering the fifth step, i.e. whether the RB had shown that the treatment was a proportionate means of achieving a legitimate aim. The RB does not appear formally to have identified what its legitimate aim was in refusing S the additional session, but it appears from Mr Friel's argument on this appeal that the RB in its evidence was seeking to justify the decision as being a form of behaviour sanction. These may be arguments that the RB will wish to develop when this case is re-determined. In the absence of any findings by the Tribunal as to whether the treatment was justified, these arguments cannot avail the RB on appeal. I could not possibly conclude that the legal error in the Tribunal's approach that I have identified was not material on the basis that it would inevitably have found the treatment of S to be justified if it had gone on to consider that question.

59. I therefore conclude that the Tribunal has erred in law in its approach to the s 15 claim concerning the additional birthday session with the therapy dog.

<u>Ground 3 – the First-tier Tribunal erred in law in its approach to the claims of failure to make reasonable adjustments by not identifying the relevant provision, criterion or practice (PCP) or substantial disadvantage and instead dealing only with whether the adjustments sought were reasonable</u>

The parties' submissions

60. Ms de Coverley for the appellants submits that by failing to identify the relevant PCPs, and substantial disadvantage(s) caused by the PCPs, before going on to consider whether there was a failure to make reasonable adjustments, the First-tier Tribunal erred in law and failed properly to consider 'the cost/benefit assessment' required to determine a claim under ss 20 and 21 of the EA 2010, in line with authorities such as *Environment Agency v Rowan* [2008] IRLR 20, *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, *Project Management Institute v Latif* [2007] IRLR 579 and *Greenwood v NRF Retail Ltd* [2011] ICR 896. The appellants argue that the FtT failed to consider the practical effect of the measures that the appellants argued should have been taken, contrary to the guidance given in *Proprietor of Ashdown House School v (1) JKL, (2) MNP* [2019] UKUT 259 (AAC).

61. Mr Friel for the RB in response relies on the detailed reasons given by the Tribunal in its decision (the core elements of which I have set out above). Mr Friel submits that those reasons were adequate.

62. Ms de Coverley in her reply sought to complain that the RB had not addressed points she had made about the First-tier Tribunal impermissibly concluding that the RB could not reasonably be expected to fund various adjustments from its budget. However, her arguments to that effect were originally raised under Ground 4, on which permission was refused by Judge Jacobs and I have not therefore considered these further, save to the extent that I deal with these points by way of giving general guidance on the reasonable adjustments duty at the end of this section of the judgment.

The law on ss 20 and 21 (reasonable adjustments)

63. Sections 20 and 21 of the EA 2010 provide (so far as relevant to education):

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice [PCP] of A's 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.
>
> …
>
> (5) 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 a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

…

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

…

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 6 (education)	Schedule 13

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

64. By s 212(1), *"substantial"* in s 20 (and elsewhere in the Act) means *"more than minor or trivial"*.

65. By s 85(6) of the EA 2010 a duty to make reasonable adjustments applies to the responsible body of a school. Paragraph 2 of Schedule 13 to the EA 2010 provides:

2
(1) This paragraph applies where A is the responsible body of a school to which section 85 applies.

(2) A must comply with the first and third requirements.

(3) For the purposes of this paragraph—

> (a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;
> (b) the reference in section 20(3) or (5) to a disabled person is—
> (i) in relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;
> (ii) in relation to a relevant matter within sub-paragraph (4)(b), a reference to disabled pupils generally.
>
> (4) In relation to each requirement, the relevant matters are—
> (a) deciding who is offered admission as a pupil;
> (b) provision of education or access to a benefit, facility or service.

66. There are many authorities that have given guidance on the approach to be taken to the duty to make reasonable adjustments. Of those to which the parties have referred me, it is only necessary to cite the following.

67. In *Environment Agency v Rowan* [2008] IRLR 20, which was decided in relation to the predecessor provisions in the Disability Discrimination Act 1995, but which is equally relevant to the EA 2010, Judge Serota QC held as follows at [27] (emphasis added):-

> 27 …In our opinion an employment tribunal considering a claim [of failure to comply with a duty to make reasonable adjustments] must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises so it would be necessary to look at the overall picture. In our opinion an employment tribunal cannot properly make findings of a failure to make reasonable adjustments … without going through that process. **Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.**

68. At [44] of *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 150 Elias LJ (giving the judgment of the Court) held as follows (emphasis added):-

> 44. Mr Justice Langstaff P, giving the judgment of the EAT, rightly observed that **when considering the question of reasonable adjustment, it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine**

> **what steps might eliminate it**. These observations of the President were approved by Laws LJ giving the judgment of the Court of Appeal in Newham Sixth Form College v Sanders [2014] EWCA Civ 734 para.9.

69. At [47] Elias LJ went on to emphasise that what needs to be considered is whether a PCP that applies to all is more difficult for the disabled person to comply with; at [58], in a passage in which he makes clear that the duty to make reasonable adjustments will normally require disabled people to be treated more favourably than non-disabled people, he explained that all that is required for the duty to make reasonable adjustments to arise is for it to be established that: *"the PCP bites harder on the disabled, or a category of them, than it does on the able-bodied"*.

My conclusion on Ground 3

70. In this case, as is clear from the relevant parts of the First-tier Tribunal's decision set out above, in particular [81]-[83] where the First-tier Tribunal stated in terms *"As we have found that the RB made all adjustments that were reasonable … we do not have to consider the step-by-step approach set out in the law"*, the First-tier Tribunal deliberately did not take the approach that the EAT in the *Environment Agency v Rowan* and the Court of Appeal in *Griffiths* held was necessary. It did not identify the PCP that applied in relation to each of the claims of failure to make reasonable adjustments. It did not identify whether S was substantially disadvantaged (i.e. whether S was placed at a more than minor or trivial disadvantage) by any particular PCP and, if so, what the nature and extent of the disadvantage was. As such, it was not in a position properly to assess whether the RB had complied with its duty to make reasonable adjustments. It therefore in principle erred in law and its decision on the reasonable adjustments claims should be set aside unless the error was not material (see generally *R (Iran) v SSHD* [2005] EWCA Civ 982, [2005] Imm AR 535 at [9]-[11] and *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793 at [13]).

71. In this case, it seems to me that the only reasonable adjustments claims where the Tribunal's error was not material are those where the facts found by the Tribunal were such as to preclude the reasonable adjustments claim succeeding in any event, ie.:

    a. At [71], where the Tribunal rejected the appellants' allegation that the RB had sought to 'deliberately sabotage' their proposed approach to the LA for interim funding on the basis that it was not made out on the evidence;

    b. At [73]-[74], where the Tribunal rejected the appellants' arguments about S being permitted to leave the classroom and not being provided with a dedicated safe space outside of the classroom on the basis (I summarise) that S was in fact permitted to leave the classroom and found safe space whenever that was possible;

c. At [75]-[77], where the Tribunal concluded on the facts that the RB had provided S with the sensory diet that she required;

d. And at [78], where the Tribunal concluded as a matter of fact that visual timetables and prompts were in place for S.

72. In relation to each of the other claims, the Tribunal was not in a position to assess whether it would have been reasonable for the RB to make the adjustments sought because it had not identified either the PCP or the nature and extent of the disadvantage suffered by S as a result of the application of the PCP. This applies to the following claims:

a. The claim concerning staff training dealt with at [66]-[67];

b. The claim concerning a positive behaviour plan dealt with at [69];

c. The claim concerning the provision of 1:1 teaching assistant support at [70]; and,

d. The claim concerning support for S's social, emotional and mental health needs at [72].

73. In relation to each of these claims, the Tribunal materially erred in law.

Further guidance on the approach to be taken to reasonable adjustments claims

74. Having so concluded, there is strictly speaking no need for me to address some of the other points made in the parties' submissions about the Tribunal's approach to the question of the RB's resources or the inter-relationship between the duty to make reasonable adjustments under the EA 2010 and the Education, Health and Care Plan (EHCP) framework under the Children and Families Act 2014 (CFA 2014). However, I am concerned about some elements of the Tribunal's reasoning on these matters in this case and as the case will need to be re-determined and these matters are likely to be of importance in other cases, it is appropriate that I go on to set out my concerns and provide guidance on the proper approach.

75. My concerns relate to what the Tribunal said in [65]-[72] of its decision about the scope of the reasonable adjustments duty, in particular about the relationship between the duty to make reasonable adjustments under the EA 2010 and the Education, Health and Care Plan (EHCP) framework under the Children and Families Act 2014 (CFA 2014). I have quoted the parts of the Tribunal's reasons that I have in mind when setting out the *Factual background and the First-tier Tribunal decision* above.

76. As the Tribunal's decision contains no findings of fact about what the position was with S's EHCP, its contents or why S came to be attending a school that was not named in Section I of her EHCP, it is not wholly clear what the Tribunal means in

those passages that I have quoted or what the significance of the Tribunal's points were on the facts of this particular case. However, the Tribunal seems to come very close to saying at [65] that, because S should (or did) have an EHCP, and the RB's school was not named in Section I, the RB was relieved of its duty to make reasonable adjustments. The Tribunal also finds some of the adjustments sought to be unreasonable either because the P School is not a special school but an independent school with a 'mainstream ethos' (see [67]) or because the provision was not specified in the EHCP, and thus (the Tribunal says) the appellants and not the LA (or the RB) were responsible for funding suitable arrangements (see [70]).

77. I am concerned that the Tribunal's reasons in these respects betray a misunderstanding of the relationship between the EA 2010 and the CFA 2014 and the operation of the reasonable adjustments duty generally. The interface between the two acts has been discussed in a number of Upper Tribunal decisions (see Hertfordshire County Council v MC and KC (SEN) [2016] UKUT 0385 (AAC), *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC), *RB v Calderdale MBC (SEN)* [2022] UKUT 136 (AAC), GP v Lime Trust and EHRC [2023] UKUT 77 (AAC) and *A Multi Academy Trust v RR* [2024] UKUT 9 (AAC)). This is not the place for a full review of those authorities, and nothing that I say here is intended to conflict with those decisions, but I make the following observations with a view to providing further guidance on the interface:

    a. The EA 2010 contains no exception from the responsible body's duty to make reasonable adjustments for a pupil with an EHCP.

    b. Nor is there any exception in the EA 2010 for independent schools like P, whatever their size and whatever the nature of the curriculum they normally follow.

    c. Judge Ward in *A Multi Academy Trust v RR* [2024] UKUT 9 (AAC) has also recently confirmed that the duty applies to special schools as it is does to mainstream schools, notwithstanding that there are generally no non-disabled pupils at such schools with whom an actual comparison can be made for the purpose of establishing substantial disadvantage; the comparison in such cases must be with hypothetical non-disabled pupils.

    d. If a child's parents have decided to place the child in an independent school other than the school named on the child's EHCP, and the local authority is treating its provision duty under s 42(2) of the CFA 2014 as discharged by making the school named in Section I available to the child, it does not follow that the independent school is not under an obligation, by way of a duty to make reasonable adjustments, to make any of the provision for that child that is specified in the EHCP. The duty to make reasonable adjustments applies (in slightly varying forms) in many spheres of life, including employment and service provision as well as education. The duty would be largely emasculated if it were an answer

to a claim of failure to make reasonable adjustments for a respondent to say 'I am not going to make any reasonable adjustments because there are other employers / service providers / schools who will and the disabled person can go and work for them / use their services / attend that school' instead.

e. Although the responsible body of an independent school is not subject to the duty that applies to mainstream schools under s 66 of the CFA 2014 to secure that special educational provision is made for where it is called for by the pupil's special educational needs, the framework under the CFA 2014 is such that neither an independent school or a mainstream school are under a duty under that Act to secure that the provision in an EHCP is made for a child – that duty is on the local authority: see generally *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC) at [68]-[71] *per* Judge S M Lane. However, the duty to make reasonable adjustments applies to all schools. The framework of provision under the CFA 2014 is relevant to considering what is reasonable by way of adjustments under the EA 2010, but it is merely one factor to consider, it carries no special weight (cf the similar point made by Judge S M Lane in *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC) at [84]-[85]).

f. In all cases, it will be a question of considering what is reasonable in all the circumstances in the light of the nature and extent of the substantial disadvantage suffered by the child at the school the child attends, in comparison to non-disabled children.

g. The relevant circumstances to take into account will generally include the cost of the adjustments, how effective they will be, the independent school's resources, the reasons why the child is at the school and the nature and availability of support from a local authority through an EHCP. The Tribunal is likely to find it helpful to consider the Equality and Human Rights Commission Guidance on *Reasonable Adjustments for Disabled Pupils* (2019) (the EHRC Guidance) which identifies other factors that may be relevant in the particular case. Among other things, that guidance explains that, *"The extent to which special educational provision will be provided to the disabled pupil under Part 3 of the Children and Families Act 2014"* is a relevant factor in deciding whether it is reasonable for a school to make a particular adjustment, and notes, *"It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than for a school with fewer resources"*. It needs hardly be said that some independent schools will have more financial resources than other independent schools, and the financial resources of independent schools are likely to be differently structured, and sometimes greater, than those of maintained schools.

h. In some cases, the Tribunal may conclude that it is reasonable for an independent school to make no, or only limited, adjustments because they are not affordable or not likely to be sufficiently effective or because the substantial disadvantage could potentially be avoided by securing local authority-funded provision through and EHCP or by the child moving to the school named in the EHCP (albeit that the Tribunal will need to take into account that the child will thereby also lose what the parents are likely to see as the significant benefits of a private education). In other cases, it may be reasonable for the independent school to make the adjustment(s) sought even if the child's parents have the option of taking up the local authority-funded provision available to the child through the EHCP.

i. The focus under the EA 2010 must be on the reality. While it may be that more or better provision ought to be being made for a child by the local authority under an EHCP, if that is not in fact happening in a particular case, the Tribunal will need to decide whether it would be reasonable for the school (of whatever type, whether independent or maintained) to put that support in place. How long it may be necessary for a school to 'bridge a gap' of that sort will be a factor for the Tribunal to take into account in deciding what is reasonable.

j. It is only if appropriate support is already in place in the school in question through an EHCP, so that the child is no longer under a substantial disadvantage at that school, that the responsible body of a school is relieved of its duty to make reasonable adjustments. This point is also made in the EHRC's Guidance (although this is a passage in the Guidance that it is easy to misread as suggesting – incorrectly - that once an EHCP is in place the duty to make reasonable adjustments falls away):

> There is a significant overlap between those pupils who are disabled and those who have SEN.
>
> Many disabled pupils may receive support in school through the SEN framework. In some cases, the substantial disadvantage that they experience may be overcome by support received under the SEN framework and so there will be no obligation under the Act for the school or local authority to make reasonable adjustments.

k. If the child is under a substantial disadvantage in comparison to non-disabled pupils, the duty to make reasonable adjustments applies and the RB must fund all reasonable adjustments. It cannot require the disabled child or its parents to pay for the adjustments: EA 2010, s 20(7). If a parent volunteers to pay all or part of the cost, of course, that will be

a factor to take into account in deciding whether the adjustment is reasonable.

l. In considering costs and resources arguments, it is for the Tribunal to assess objectively what is reasonable: see *G4S (Cash Solutions) UK Ltd v Carroll* [2016] IRLR 820 at [43]-[61] *per* HHJ Richardson. Mr Friel in this case relies on paragraph [37] of the judgment of Underhill J (as he then was) in *HM Land Registry v Benson* [2012] ICR 627 to argue that allocation of resources is a matter for the school. However, *Benson* is not directly relevant here: Underhill J was there dealing with the approach to be taken where cost is relied on by an employer as justifying indirect age discrimination under s 19 of the EA 2010. Underhill J at [34]-[37] of *Benson* determined that the Tribunal should have accepted that the employer's aim of balancing its budget was legitimate and then gone on to consider whether the measure adopted to meet that aim was proportionate having regard to the impact on the individual. Although there may not in practice be much difference between the analysis required for a reasonable adjustments claim under s 20 and that required when deciding whether indirect discrimination under s 19 is justified as a proportionate means of achieving a legitimate aim, it is important not to elide the two and what Underhill J said in *Benson* cannot simply be read across to a reasonable adjustments claim. That said, in deciding whether it is reasonable to make the particular adjustment, the Tribunal will need to give careful consideration to the school's evidence about its budget and how it has decided to allocate its resources, but the question of what is reasonable in the particular case is for the Tribunal to determine: see *Griffiths*, ibid, at [73].

Ground 5 - the First-tier Tribunal erred in law in relation to the s 15 claim about S's exclusion by: (i) failing to consider alternatives to exclusion as part of the overall s 15 proportionality assessment; (ii) failing to consider the impact on S's mental health of the exclusion; and (iii) proceeding unfairly by relying on matters at [40]-[41] of its judgment that it had not put to the parents or their expert witness, Dr Mair (Educational Psychologist).

The parties' submissions

78. Ms de Coverley for the appellants argues that in dealing with the s 15 claim about S's exclusion the First-tier Tribunal failed to consider alternatives to permanent exclusion. She argues that when determining whether or not a measure is proportionate, the Tribunal must consider whether or not a lesser measure could have achieved the legitimate aim: *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] 1 WLR 1343. She further submits that the Tribunal failed to consider whether the measure was proportionate at the time at which the unfavourable treat was applied as explained by the EAT (Langstaff J) in the

Williams case (ibid) at [40]-[42]. She also submits that the First-tier Tribunal unfairly failed to put to Dr Mair the concerns it had about her evidence as expressed at [40]-[41] of the decision and failed properly to consider the impact on S's mental health of the exclusion decision, as identified by Dr Mair.

79. Mr Friel for the RB submits that the First-tier Tribunal properly directed itself in law on the question of justification for the exclusion decision, including directing itself to consider whether the decision was 'no more than necessary to achieve the objective', and that it is clear from the Tribunal's detailed reasons that proportionality was properly assessed. He submits that the Tribunal properly considered whether there were any further reasonable adjustments that could have been made to keep S in school, and at [37] took into account its conclusion that there were no further reasonable adjustments as part of considering whether the exclusion was justified. As to Dr Mair's evidence, Mr Friel submits that it was open to the Tribunal to reject her evidence for the reasons that it gave and it did not need to put those reasons to Dr Mair first.

My conclusion on Ground 5

80. Given the conclusions that I have already reached on Grounds 2 and 3, I can deal with the three points raised under Ground 5 quite shortly.

81. A Tribunal determining whether treatment is justified as a proportionate means of achieving a legitimate aim must consider whether the measure is 'no more than (reasonably) necessary' to achieve the legitimate aim. Ms de Coverley is right that this normally requires the Tribunal to give explicit consideration to alternatives, and in particular to whether any measure with less impact on the individual could have achieved the same objective. However, it will not necessarily be an error of law for the Tribunal to fail to give such explicit consideration provided that it has properly considered whether the measure is 'no more than (reasonably) necessary'. That much is clear from the decision of the Supreme Court in *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] 1 WLR 1343 on which Ms de Coverley relies. At paragraph 47, the Supreme Court observes that, "Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. **But this is a question of fact, not of law** …" (my emphasis).

82. In this case, the Tribunal properly directed itself at [23] to consider whether the exclusion decision was 'no more than necessary'. Where a Tribunal has properly directed itself in law, an appellate Tribunal should be slow to conclude that it has erred: see *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [58]. In this case, it seems to me that the Tribunal's reasons at [35]-[43] were on the face of it sufficient to explain why it was satisfied that exclusion was necessary in this particular case. However, a crucial element of those reasons was, as Judge Jacobs identified when granting permission, that at [37] it referred to and took into account that it had decided the RB had complied with its duty to make reasonable adjustments. That included, in particular, that the Tribunal was satisfied (see [70])

that the duty to make reasonable adjustments did not require the RB to provide S with a full-time 1:1 teaching assistant – a measure which (the Tribunal records) the RB had prior to March 2022 thought would enable her to continue at the school.

83. It is well established (see [26] of *Griffiths*, ibid) that treatment cannot be justified under s 15 if there has been a (relevant) prior failure to comply with the duty to make reasonable adjustments.

84. In this case, since I have concluded that the Tribunal materially erred in law in dismissing several of the reasonable adjustments claims, including at least one that might have enabled S to remain at the school, it must follow that its decision to dismiss the s 15 claim in relation to the permanent exclusion was also materially flawed in law.

85. Finally, as to the Tribunal's handling of Dr Mair's evidence about the impact on S's mental health of the exclusion decision, I do not consider that the Tribunal acted procedurally unfairly in rejecting her evidence for the reasons that it gave at [40]-[41]. This was not a case of the Tribunal relying on its own expertise to reject the evidence of an expert without giving the expert a chance to comment (such as happened in *Harrow LBC v AM* [2013] UKUT 0157 (AAC) on which the appellants rely). Rather, the Tribunal was simply setting out the reasons why it found Dr Mair's opinion about the impact on S's mental health to be speculative and unreliable. It was open to it to do so. Equally, when this case is redetermined, it will be open to the Tribunal that undertakes that task to reach its own view of this evidence.

What happens next: why I have decided to set aside the decision and remit the case to a fresh tribunal

86. For the reasons set out above, I have concluded that the Tribunal materially erred in law in its determination of the following claims:

    a. The claim under s 15 and 85(2) of the Equality Act 2010 relating to S's permanent exclusion;

    b. The claim under s 15 and 85(2) of the Equality Act 2010 relating to an additional session with the therapy dog;

    c. The claims under s 20, 21 and 85(6) of the Equality Act 2010 relating to:

        i. The claim concerning staff training dealt with at [66]-[67] of the First-tier Tribunal's decision;

        ii. The claim concerning a positive behaviour plan dealt with at [69] of the First-tier Tribunal's decision;

iii. The claim concerning the provision of 1:1 teaching assistant support dealt with at [70] of the First-tier Tribunal's decision; and,

iv. The claim concerning support for S's social, emotional and mental health needs dealt with at [72] of the First-tier Tribunal's decision.

87. Under s 12 of the TCEA 2007, I have power where I conclude that the First-tier Tribunal has erred in law to set the decision (or part of it) aside and either remit the case for re-determination by the same or a fresh Tribunal or to re-make the decision myself: see generally *Sarkar v SSHD* [2014] EWCA Civ 195, [2014] Imm AR 911 at [15].

88. I have considered whether the whole decision should be set aside in the light of the errors I have found, but I have decided that that would not be proportionate or appropriate. The First-tier Tribunal's decision on the informal exclusions claim and a number of the reasonable adjustments claims contained no material errors. It is unfortunate enough that even part of this case needs to be re-determined given the length of time that has passed since S was excluded. The principle of finality in litigation is important, as is the overriding objective of dealing with cases justly and saving time and expense. Although a significant part of the case needs to be redetermined, I see no reason why the appellants should be given a 'second bite of the cherry' on the claims that they lost without any material legal error by the Tribunal. Nor is it appropriate that further Tribunal time or costs for the parties should be incurred on relitigating those parts of the case. The parts of the case on which no material legal errors were made appear to me to be properly separable from the parts in which the Tribunal erred and, indeed, in my judgment constitute the 'core' of the case as they concern the permanent exclusion and the adjustments that are most likely to have avoided that outcome.

89. I therefore set the decision aside only in relation to those claims in respect of which the Tribunal materially erred in law. The Tribunal's findings of fact and conclusions on the other claims are not set aside and remain final and binding as between the parties.

90. The next question is how the claim should be re-determined. It is not appropriate in this case for me to re-make the decision myself. Re-making the elements of the decision that I have set aside will require significant further fact-finding and exercise of judicial discretion by the Tribunal. The case therefore needs to be remitted for reconsideration to enable that fact-finding to take place and to ensure that the parties are not deprived of their first right of appeal to this Tribunal in respect of any remade decision.

91. I have considered carefully whether the case should be remitted to the same Tribunal or a different Tribunal. On the one hand, remission to the same Tribunal may save time as less of the evidence would need to be repeated. Although I have found the Tribunal materially erred in law, I have no reason to doubt the professionalism of the panel or that they would not try conscientiously to consider

the case anew. On the other hand, it is over a year since the First-tier Tribunal hearing. The panel's memory of the evidence will not be fresh. The case will need to be listed for at least a day whether it goes back to the same or different Tribunal. There is unlikely to be a significant time saving. Also, although I do not doubt the panel's professionalism, it would be a tall order for any judges genuinely to approach the case afresh as must happen if there is to be a fair retrial on the claims on which errors of law were made. The need to reconvene the same panel may also cause more delay than if the matter is remitted to a fresh Tribunal. On balance, I consider that the appropriate course is for the matter to be remitted to a fresh Tribunal.

Holly Stout

Judge of the Upper Tribunal

Authorised for issue on 31 January 2024