NCN [2026] UKUT 42 (AAC)
Appeal No. UA-2024-001642-HS

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings or her child or the name of the respondent school.

Further, no one may use or disclose any part of the appellant's medical records, notwithstanding that they have been included in the bundle at this public hearing, without them being fully anonymised and appropriate redactions being approved by the appellant or the Tribunal.

Failure to comply with this order may be treated as contempt of court.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MT

Appellant

- v -

GOVERNING BODY OF A SCHOOL

Respondent

Before: Upper Tribunal Judge Stout

Upper Tribunal hearing date: 28 November 2025
Mode of hearing: In person

Representation:

Appellant: In person
Respondent: Ms Kiera Riddy (counsel)

On appeal from:

Tribunal:	First-Tier Tribunal (Health Education and Social Care) (Special Educational Needs and Disability)
Panel:	Judge Fearon, Ms Deacon-Hedges and Ms Ernstoff
Case reference:	EH305/23/00084
Hearing date:	11 July 2024

SUMMARY OF DECISION

DISABILITY DISCRIMINATION IN SCHOOLS (89)

The appellant brought claims of disability discrimination and failure to make reasonable adjustments under sections 15, 20 and 21 of the Equality Act 2010 (EA 2010) in respect of the respondent's decision to move her son (C) from one school site to another. The First-tier Tribunal (FTT) dismissed the appellant's claims. The Upper Tribunal (UT) holds:-

(1) When deciding whether or not to admit late evidence, the FTT must consider the overriding objective in rule 2 of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) (the FTT Rules) and follow the principles in *Denton v T H White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (*Denton*) to: (i) identify and assess the seriousness of the failure to comply; (ii) consider why the default occurred; and, (iii) evaluate all the circumstances of the case to enable the Tribunal to deal justly with the application. The absence of a good reason for the evidence being late does not mean that the evidence should not be admitted, that is just one relevant factor for the Tribunal to consider. In this case, the FTT had in substance applied the correct legal principles when deciding not to admit the appellant's late evidence so there was no material error of law in that part of its decision.

(2) The appellant had sought permission to rely in support of her late evidence application on medical evidence that she was only willing to share with the Tribunal and not the respondent. The FTT erred in law by failing to raise with the parties, and apply, the principles in rule 14 of the FTT Rules (and the parties' rights under Articles 6 and 8 of the European Convention on Human Rights). The Tribunal should first have considered the medical evidence itself as permitted by rule 14(3) and should have invited the parties to make submissions on whether a direction should be made under rule 14(2) (which permits the Tribunal to direct that a document or information be withheld from the other party where disclosure would be likely to cause "serious harm" and the Tribunal is "satisfied, having regard to the interests of justice, that it is proportionate to give such a direction"). The Tribunal's failure to adopt this approach materially affected the fairness of the FTT hearing.

(3) The FTT failed to take account of relevant medical evidence concerning C on which the appellant relied in relation to the EA 2010 claims, and/or failed to give

adequate reasons for rejecting it. This was a material error that undermined its conclusion on the section 15 disability discrimination claim.

(4) The FTT wrongly held that it did not have jurisdiction under the EA 2010 to consider issues as to educational provision that could also be the subject of an appeal under the Children and Families Act 2014 (CFA 2014) in relation to the contents of an EHC Plan. The FTT failed to apply the guidance in *SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC) at [77].

(5) The FTT also wrongly failed to consider the claim of failure to make reasonable adjustments by provision of additional support staff as a claim of failure to comply with the “third requirement” in section 20(5) of the EA 2010 rather than as a failure to comply with the “first requirement” in section 20(3) and had therefore wrongly dismissed that claim on the basis that the claimant had been unable to identify a relevant provision, criterion or practice (PCP). The Upper Tribunal explains, by reference to *Moustache v Chelsea and Westminster Hospital NHS Trust* [2025] EWCA Civ 185, the First-tier Tribunal’s obligations in respect of identifying and determining claims that are raised in the application notice, and when the Tribunal may need to depart from the list of issues drawn up at the case management stage.

The decision of the FTT is set aside and the case remitted for re-hearing by a fresh Tribunal.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved the making of errors of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside in its entirety and remit all the appellant’s claims to a fresh tribunal to be reconsidered in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing in accordance with the law as set out in this decision.**

2. **The new First-tier Tribunal should not involve the tribunal judge or specialist members previously involved in considering this appeal on 11 July 2024.**

3. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal and must consider the whole case afresh. It may consider evidence that was not before the First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the decision of the First-tier Tribunal sent to the parties on 30 July 2024 following a hearing on 11 July 2024. By that decision, the First-tier Tribunal dismissed the appellant's claims against the respondent. The claims were brought under the Equality Act 2010 (EA 2010) for discrimination arising from disability and failure to make reasonable adjustments in respect of the appellant's son (who I will refer to as "C").

2. Permission to appeal was refused by the First-tier Tribunal on 16 October 2024. The appellant appealed to the Upper Tribunal on 13 November 2024 and, at her request, I listed her permission application for an oral hearing. The listing of the hearing was in part delayed at the appellant's request. The matters that the appellant had set out in writing and attached either to her appeal form or follow-up communications as her grounds of appeal were comprehensible but somewhat unfocused. In advance of the permission hearing, I gave directions with a view to assisting her in focusing her grounds of appeal on arguably material legal errors. Following that hearing, I granted permission on four (amended) grounds as follows:-

   Ground 3 – perverse decision to refuse to admit the evidence and/or failure to take account of all relevant factors and/or taking into account irrelevant factors;

   Ground 4 – error of law in approach to appellant's request to rely on medical evidence that was withheld from the respondent;

   Ground 5 – failure to take account of medical evidence in deciding C had not been subject to unfavourable treatment in relation to the site move and/or failure to give adequate reasons;

   Ground 6 – misdirection of law as to inter-relationship between EA 2010 and the Children and Families Act 2014 (CFA 2014).

3. The structure of this decision is as follows:-

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The record of the First-tier Tribunal hearing

4. In advance of the permission hearing, I had directed the First-tier Tribunal to provide a recording of the hearing. That direction was not responded to prior to the hearing. In my directions following the permission hearing, I again directed the First-tier Tribunal to provide to the Upper Tribunal and the parties the recording of the First-tier Tribunal hearing. If the recording was not available, I asked the Judge and Panel Members to provide the parties and the Upper Tribunal with any notes that they had of the parts of the hearing relevant to Grounds 3 and 4 and/or to provide their accounts of those parts of the hearing.

5. By way of response to that order, the Upper Tribunal was provided with a recording of the last hour of the First-tier Tribunal hearing. This included the parties' closing submissions (only). The respondent's representative also provided a copy of her personal notes of the hearing.

6. At the hearing before me, these materials were therefore all that was available by way of a record of the First-tier Tribunal hearing. I decided that the appropriate course was to proceed with the hearing, and that I would revisit the question of whether it was necessary to make a third attempt to obtain a full record of the hearing or notes from the First-tier Tribunal once I had heard the parties' submissions. In the event, I am satisfied that I have been able fairly to deal with the appeal without a fuller record of hearing.

Background

7. This case is concerned with events that occurred in mid 2023. C was nine years old and attending the school for which the respondent is responsible, which I will refer to as "the School". The School operates over four different sites. C has a number of diagnoses. He has been the subject of an Education Health and Care Plan (EHC Plan) for some time. The EHC Plan that was being maintained for him by the local authority was issued in Autumn 2021 when C started attending the School. Proposed amendments to the EHC Plan were under discussion and an amended EHC Plan was issued in December 2023, after the appellant had brought her claim to the Tribunal.

8. The appellant made a disability discrimination claim to the First-tier Tribunal on 29 August 2023. The essence of her claim, as it was set out in the application notice, was that the School intended to move C from the site he had been attending for the previous two school years (Site A) to a different site (Site B), and that the School had said this was because of C's behaviour. The appellant's complaint was that the School had decided to do this without her knowledge and agreement and without taking into account the opinion of medical professionals working with C. She considered that C had already been "traumatised" by previous school moves and wished if possible to avoid a further move. She argued that the School should have put reasonable adjustments in place at Site A to support C to reduce the behaviours, including occupational therapy (OT), and other adjustments. She explained that she had been trying to get the local authority to put the recommended OT provision into C's plan and contended that, by way of reasonable adjustment, the respondent should have provided additional OT and also supported her in seeking an amendment to the EHC Plan from the local authority. She argued that C should be allowed to stay at Site A for at least a further term while new adjustments and medication were trialled to address his behaviours.

9. By case management order of 23 October 2023, Judge McCarthy identified that there were three claims, which he categorised as follows:

   a. Discrimination arising from disability (contrary to section 15 of the EA 2010) by, from July 2023, requiring C to be educated on a different school site because of his behaviour;
   b. A claim of failure to make reasonable adjustments by failing between 1 March 2023 and 29 August 2023 to provide an auxiliary service (contrary to section 20(5) of the EA 2010) by failing to put in place sensory occupational therapy when requested;
   c. A claim of failure (contrary to section 20(3) of the EA 2010) to make reasonable adjustments to a provision, criterion or practice (PCP) by failing to consider what additional support could be put in place to reduce the level of adverse behaviour.

10. The hearing was originally listed for 23 May 2024. The deadline for final evidence was set as 23 April 2024 in Judge McCarthy's directions of 23 October 2023.

11. On 23 April 2024 the appellant wrote to the Tribunal apologising for not meeting the final information deadline date, explaining the difficult personal circumstances she was experiencing and stating that she would work on that at the weekend and submit further documents the following week.

12. On 2 May 2024 she emailed the Tribunal again asking for a postponement of the hearing and explaining the various personal circumstances that had led to her still not being able to submit her further evidence.

13. By order of 10 May 2024, the hearing was postponed to 11 July 2024. No new deadline for final evidence was set. The Order stated "All other case management directions remain unchanged. Any applications regarding late evidence should

be made at the start of the hearing and will be decided by the Panel hearing the claim".

14. According to the Tribunal's decision [20], the appellant made an application on 3 July 2024 to provide late evidence, but did not include the evidence, so the application was refused by Judge McCarthy on the ground that the Tribunal could not determine whether or not to admit the evidence without seeing it. His order, as it appears from the Tribunal's decision (these documents are not in the Upper Tribunal bundle) concluded "The request can be made at the start of the hearing, subject to the Tribunal … having seen the documents".

15. By email of 8 July 2024 at 13:31, the School sent to the Tribunal an updated bundle by email and posted a paper copy to the Appellant. The School's representative explained: "On review it appears when the original bundle was run section C did not pick up a couple of items which had been filed in further evidence by the RB. We are not clear why this is the case, but apologise for this. However, the Parent has had these since the further evidence date." ("RB" referred to the respondent, being the "responsible body" for the School for the purposes of section 85 of the EA 2010.)

16. By email of 8 July 2024 at 15:40 the appellant submitted some additional evidence and stated that she was still gathering further evidence. By email of 10 July 2024 at 09:12 the appellant sent in further evidence, together with an explanation as to why the evidence was late. She marked this email "Strictly confidential – Information not to be Disclosed to RB".

17. The final hearing took place on 11 July 2024 by video, commencing at 10am. The appellant represented herself and the respondent was represented by counsel (Ms Riddy, who has also represented the respondent on this appeal). The respondent brought four witnesses. The appellant had no witnesses other than herself.

The Tribunal's decision

18. At the start of the hearing, the Tribunal considered the appellant's application for late evidence. The Tribunal listed the late evidence in [16] of its decision. The late evidence totalled 290 pages. At [17], the Tribunal dealt with the appellant's request for her own medical records not to be disclosed to the respondent. The decision records:

> 17. … The Tribunal explained to [the appellant] that if she wished to rely on the records as evidence in support of her application then the evidence should be seen by [the School] as a party to the claim and could not be considered by the Tribunal only. The Tribunal also explained to [the appellant] that she did not need to rely on the records themselves but could set out her position orally in the hearing in support of her application without specific reliance on, and reference to, the precise detail of contents of her medical records. [The appellant] proceeded with her application to rely on late evidence without reference to the specific

> contents of the records themselves. She explained, as set out in her email dated 10 July 2024, that [C's] father had been ill and had therefore not been able to support her in caring for [C], making her caring role more demanding. She also explained that she had been suffering significantly from anxiety for which she had been prescribed medication and was undergoing an autism assessment. She says when she asked for the hearing date to be moved back from 23 May 2024, she phoned the Tribunal office but was not told by the Tribunal staff she would need to explain why she needed more time to provide evidence.

19. Having listened to the recording of the last hour of the hearing, I can add here that what the Tribunal records in [17] of its decision reflects what the judge said to the appellant in an exchange that occurred during the appellant's closing submissions, when the appellant complained about not having had a fair hearing.

20. The Tribunal decided not to admit the late evidence for the reasons explained in [21] of the decision:

> 21. The Tribunal noted that much of the late evidence submitted was available to [the appellant] when the claim was submitted, was available prior to the original final evidence deadline of 23 April 2024 and prior to the hearing date of 23 May 2024 which [the appellant] applied to move back. The Tribunal made clear to [the appellant], in relation to her submissions about the lack of advice from the Tribunal office during phone calls when the application to move the hearing was made, that the Tribunal office staff are unable to provide advice to parties in relation to their claims. [The appellant] did not provide evidence that ill health prevented her from submitting her evidence in compliance with the final evidence deadline and prior to the May hearing but did explain the recent delays since May due to her ill health. The Tribunal noted the [EHC Plan] dated December 2023 and the emails about the December school site visits are already in the evidence bundle. The Tribunal did not consider it in the interests of fairness, justice and proportionality or further to the overriding objective to admit the remainder of the substantial amount of late evidence, as it relates to periods outside of the period in respect of which the claim is made and is not relevant to the issues in the claim nor required to assist the Tribunal in determining the issues in the claim. The claimant's application to rely on late evidence was dismissed.

21. The Tribunal then went on to hear oral evidence and its decision continues with its self-directions as to the law at [23]-[25]. At [27], it determined that C has a disability within the meaning of section 6 of the EA 2010. At [28]-[55], it set out its findings of fact.

22. At [62]-[74] the Tribunal considered whether the proposed site move had constituted unfavourable treatment of C for the purposes of section 15 of the EA 2010. The Tribunal concluded that it had not, so did not go on to consider the other legal elements of the section 15 claim.

23. As to the reasonable adjustments claim relating to OT, the Tribunal had clarified the nature of that claim with the appellant at the start of the hearing, identifying it at [8] of the decision as being that, given that the local authority had not provided C with the 38 hours of OT required by his EHC Plan, the respondent "should have helped [C] by providing [OT] and helped her to get the local authority to provide the 38 sessions of [OT]". At [75]-[80], the Tribunal rejected the claim because the school had made the provision specified in the EHC Plan, arranging 13.5 hours of OT which the Tribunal held "was above the number of hours provision recommended following assessment". The Tribunal considered that it was unreasonable to expect the respondent to make the "extensive" 38-hours of provision sought by the appellant without funding being provided for that by the local authority. At [79], the Tribunal stated, "Any issues relating to provision in [C's EHC Plan] are for the [local authority] by way of SEND appeal and not an issue for the [respondent] in a discrimination claim". The Tribunal concluded that there was therefore no failure to make reasonable adjustments.

24. At [81]-[84], the Tribunal dismissed the claim in relation to additional support/additional staff on the basis that no PCP had been identified and because "the Tribunal in a discrimination claim has no jurisdiction to determine such issues arising under the Children and Families Act 2014".

The legal principles applicable to appeals to the Upper Tribunal

25. Under section 12 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), the Upper Tribunal may only allow an appeal if the decision of the First-tier Tribunal involved the making of a material error on a point of law. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors, committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings or failing to give adequate reasons for a decision. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the case on its merits. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 (*Iran*) at [9]-[13] and the cases to which the respondent has referred on this appeal: *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477, *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 and *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 (*Volpi*).

26. As *Iran* at [9]-[13] and *SSHD v AH* at [15] make clear, it is not sufficient that there has been an error of law, the error must have been a material one, which means that it must have been material to the outcome, or to the fairness of the proceedings.

27. In scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why

they have lost or won and that no error of law has been made: see *Volpi* at [2] and *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19 at [25].

28. I also have regard to the Senior President of Tribunals Practice Direction of 4 June 2024 on *Reasons for Decisions*, particularly [8], which states: "Judges and members in the First-tier Tribunal should expect that the Upper Tribunal will approach its own decisions on appeal in accordance with the well settled principle that appellate tribunals exercise appropriate restraint when considering a challenge to a decision based on the adequacy of reasons. As the Court of Appeal has emphasised, a realistic and reasonably benevolent approach will be taken such that decisions under appeal will be read fairly and not hypercritically."

29. Where an appeal is against the exercise of a case management discretion by the First-tier Tribunal, the same principles apply and the Upper Tribunal "should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge": *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 (*BPP Holdings*) at [33], citing *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 (*Walbrook*).

30. Even where the Upper Tribunal is satisfied that a material error of law has been made, the Upper Tribunal has a discretion under section 12(2) as to whether or not to set aside the decision of the First-tier Tribunal and, if so, whether to remit the case to the First-tier Tribunal for further determination or re-make the decision itself.

The grounds of appeal

Ground 3 – perverse decision to refuse to admit the evidence and/or failure to take account of all relevant factors and/or taking into account irrelevant factors

31. The First-tier Tribunal has a standard practice, which it followed in this case, of setting a final evidence deadline some time in advance of any final hearing. Since the First-tier Tribunal's standard order in that respect carries with it the implied sanction that evidence filed late will not be considered without the Tribunal's permission, the Tribunal should apply the same principles as the civil courts apply when considering whether or not to grant relief from sanctions, in line with the guidance given by the Supreme Court in *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 (*BPP Holdings*). The relevant principles are those laid down in *Denton v T H White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (*Denton*) in which the Court of Appeal (at [24]) held that the court should: (i) identify and assess the seriousness of the failure to comply; (ii) consider why the default occurred; (iii) evaluate all the circumstances of the case to enable the court to deal justly with the application.

32. In *Denton* the Court of Appeal (at [32]) held that particular consideration needed to be given to the matters specifically identified in Civil Procedure Rules 3.9(1)(a) and (b), i.e. the need for litigation to be conducted efficiently and the need to enforce compliance with rules, practice directions and orders. Although those two factors are important in the Tribunal context too, I agree with Martyn Rodger KC, Deputy Chamber President of the Lands Chamber of the Upper Tribunal in *Deane v LB of Newham* [2024] UKUT 300 (LC) (*Deane*) at [50]-[55] that in the Tribunal context, it is the overriding objective in rule 2 of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) (the FTT Rules) that needs to be considered, and that fairness, justice, the avoidance of unnecessary formality and of delay, so far as that is compatible with proper consideration of the issues will in particular always be important in such decisions.

33. The appellant in this case argues that the refusal to admit her late evidence prejudiced her case because the late evidence included material (in particular the photos and contact records) that would have been relevant to rebutting the respondent's case that C's behaviour had got so bad that he needed to be moved site for that reason, and to establishing her case that, if the school had made reasonable adjustments, his behaviour would not have been so bad as to require a site move. The late evidence also included evidence relating to transport, and communications between the appellant and the local authority and the ombudsman, which the appellant submits were relevant to demonstrating a consistent pattern of administrative difficulties and procedural disadvantage faced by the appellant which directly impacted C's educational stability. She further submits that a July 2024 updated OT report would have been relevant to the issues before the Tribunal, and other historical documents would have provided important context. The appellant further argues that the Tribunal should have reviewed the late evidence before deciding whether or not to admit it and that the Tribunal failed to take account, or to take proper account, of her medical evidence and other personal circumstances as to why the evidence was late.

34. The respondent in response to the appeal argues that the First-tier Tribunal applied the appropriate test, balancing the prejudice and considering all relevant factors. The respondent submitted that the First-tier Tribunal had properly characterised the nature of the late evidence, which included a significant number of documents that were not relevant to the period of time with which the claim was concerned. Those which did relate to the right time frame were photographs and the home school contact book, but the photos only show moments in time and the material in the contact book was covered by matters discussed in oral evidence. The respondent's witnesses accepted that the communications from the School in the contact book had been relatively positive because they had at that time tried to put positive information in contact books and raise problems orally at drop-off.

35. When granting permission on this ground, I observed (in summary):

    a. The Tribunal arguably erred in proceeding at [21] on the basis that the appellant had not provided evidence of ill health (or other personal

difficulties relating to her, C or C's father) that prevented her from submitting evidence by the 23 April 2024 final evidence deadline. This was arguably perverse given that the appellant had first asked for an extension of time on 23 April 2024 and again on 2 May 2024 and had provided some evidence in support of those applications, including about C's sleep difficulties and C's father's illness, in relation to her own medical conditions and diagnosis and a 'fit note' for herself covering the period 1 May 2024 to 31 July 2024;

b. The Tribunal arguably erred in proceeding at [21] on the basis that all of the appellant's late evidence that was not already in the bundle related "to periods outside of the period in respect of which the claim is made and is not relevant to the issues in the claim nor required to assist the Tribunal determining the issues in the claim"; and,

c. The Tribunal also arguably erred in failing to consider what, if any, prejudice would have been caused to the respondent by the admission of the late evidence.

36. I have now had the opportunity to consider the arguments, and the late evidence itself, in more detail. Having done so, I am satisfied that the Tribunal did apply the correct legal principles in substance in this case. Taking the points that concerned me in reverse order:-

37. First, the Tribunal did consider the prejudice to the respondent of admitting the late evidence. At [19], it recorded the respondent's submissions as to the prejudice that it would suffer as a result of the admission of late evidence, and it seems to me that, when the decision is read as a whole, the Tribunal's reference in [21] to "fairness" is an allusion to the prejudice that the respondent has detailed, and which the Tribunal's reasons implicitly indicate it has accepted. I add that the prejudice to the respondent of admitting so late such a large volume of evidence covering such a variety of matters as this did is clear.

38. Secondly, I do not consider that the First-tier Tribunal erred in its characterisation of the late evidence. Contrary to the appellant's submission that the First-tier Tribunal had not even looked at the evidence, it is apparent that they had in order to make a cursory assessment of it and to set out the list of what it comprised at [16] of the decision. Having reviewed the evidence, it also seems to me that what the Tribunal meant to say in [21] was that all the evidence **either** related to periods outside of the period in respect of which the claim is made and was not relevant to the issues in the claim **or** was not required to assist the Tribunal in determining the issues in the claim. With an "or" in place of the "nor" that the Tribunal used, the Tribunal's reasons for refusing to admit the evidence do – just – pass the adequacy threshold. I am also satisfied that, taking the benevolent approach that is appropriate at the appellate level, it is appropriate for me to read that minor correction into the Tribunal's reasons. I also consider it was open to the Tribunal to describe all the late evidence as it did for the following reasons:-

a. So far as concerns the photos and contact records, it was reasonable to conclude that those were not necessary to do justice in the case because the Tribunal knew it would be going on to spend most of the day hearing oral evidence from witnesses about C's presentation at school. The appellant evidently did make the point that she wished to about the School not having reported behavioural concerns about C in the contact records or otherwise because the Tribunal specifically deals with this at [50] of its decision. It there accepts the respondent's evidence about seeking to record only positive communication in writing, but nonetheless there being copious other evidence of the School struggling to meet C's needs at Site A. Although it might have made a difference to the Tribunal's assessment of the case if it had had this additional evidence, it was open to the Tribunal to conclude that it would not make so much difference that it was necessary to admit it late.

b. As to transport issues, these are dealt with at [51] and [73] of the decision. It is apparent that it would not have assisted for the Tribunal to have more evidence about this because it is not its role to adjudicate on the transport dispute between the appellant and the local authority. What was relevant to the Tribunal's decision was whether transport was in place, and when, because requiring C to move site at a time when the local authority had not arranged suitable transport would evidently be capable of constituting unfavourable treatment of C. The Tribunal could make findings of fact on that without seeing the Ombudsman material. (That said, it does concern me that the Tribunal may have made a separate error regarding the transport issue because I am not convinced that it appreciated the point I have just made about the relevance of the transport issue to the section 15 disability discrimination against the School. It also focused on the fact that transport was available for C by the time the site move was implemented in September 2023. While that was relevant, the Tribunal should have been focusing on the position as it was at the time with which the claim was concerned. As the disability discrimination claim was filed by the appellant in August 2023, strictly speaking it could (unless amended) only have concerned events happening before that date: see *KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC) at [46]. I return to this point when dealing with ground 5.)

c. As to the July 2024 OT report, this post-dates the period with which the claim was concerned by nearly 12 months. As already noted, the claim related to the position prior to August 2023 when the proceedings were commenced. While the July 2024 report does show C benefitting from OT received, it could in my judgment have no material effect on the Tribunal's conclusion (at [57]-[59] and [75]-[80]) that the School had, during the relevant period, complied with the duty to make reasonable adjustments in respect of OT provision.

39. I acknowledge that the First-tier Tribunal's reasons for explaining why it did not admit the late evidence are much briefer than mine, but that does not mean they

are unlawful. Reasons need only be adequate to be lawful and brevity is appropriate on an issue such as this where the Tribunal had to make a decision speedily at the start of the hearing and not allow the mere act of dealing with the late evidence application to create a situation in which, if the evidence was not admitted, the appeal could still not be dealt with in the time allotted for it.

40. Thirdly, it does trouble me that the First-tier Tribunal failed in its reasons expressly to acknowledge that the appellant had, in her emails of 23 April 2024 and 2 May 2024, provided some medical evidence and an explanation of the difficulties that had led to her not being able to submit evidence by that stage. This may have been because it had decided it could not take this material into account because the appellant had opted not to rely on her documentary medical evidence (see ground 4).

41. However, whatever the reason for the omission, the question is whether that was a material error. In my judgment it was not. This is because, although the First-tier Tribunal at [20] quoted what Judge McCarthy had said that "late evidence **will only** be admitted if there is a good reason it was not provided in time" (my emphasis), in fact this First-tier Tribunal did not commit the error of requiring there to be a good reason for the evidence not being provided in time. As is apparent from *Denton* itself, and other authorities (see, eg, *Ridley v HB Kirtley (t/a Queen's Court Business Centre)* [2024] EWCA Civ 884, [2025] ICR 441 at [152(ii)] and *Polystar Plastic Ltd v Liepa* [2023] EAT 100 at [42] *per* Eady J), whether or not there is a good reason for delay is only a relevant and not a determinative factor when exercising this sort of discretion.

42. In this case, it is apparent from what the Tribunal says in [21] that it took the correct approach. It did not refuse the application because of what it perceived to be a lack of good explanation for not having met the original evidence deadline, but because of the nature and extent of the evidence and the balance of prejudice between the parties.

43. For these reasons, although there was an error of law in the First-tier Tribunal's decision, it was not material and ground 3 must be dismissed.

Ground 4 – error of law in approach to appellant's request to rely on medical evidence that was withheld from the respondent

44. What happened in this case was that the appellant sent medical evidence to the Tribunal by email, without copying in the respondent, and asked that it be kept confidential from the respondent. The Tribunal at the hearing, when dealing with the application to admit late evidence, told her that, if she wanted to rely on that medical evidence in documentary form, she would need to disclose it to the respondent, and that it "could not" be considered only by the Tribunal (see [17]). The Tribunal said that, if she did not want to disclose the medical evidence in documentary form, she could just tell the Tribunal what she wanted to say about her medical evidence in oral submissions, with the respondent present, and the Tribunal would take that into account. The appellant took the latter option, but

reluctantly. She felt that she was placed under undue pressure by the Tribunal to disclose her medical evidence to the respondent and that this had made the hearing unfair.

45. The respondent has responded to this ground of appeal essentially on the same basis that the First-tier Tribunal judge did at the hearing. The respondent argues that the claimant was given a choice and that she chose not to disclose her medical evidence, which was therefore not disclosed.

46. I consider that both the respondent and the First-tier Tribunal have missed the appellant's point. Both the respondent and the First-tier Tribunal have focused on the fact that the appellant was not pressured to, and did not, disclose her documentary medical evidence. However, the appellant's complaint is that she was put in a position where, if she wanted to rely on what she regarded as personal medical evidence, she either had to provide the documents themselves to the respondent or tell the Tribunal and respondent about it orally, in front of all the respondent's witnesses. In other words, the "disclosure" that she felt pressured into making was an oral disclosure, not a documentary disclosure.

47. The question for me is whether it was an error of law for the Tribunal to take that approach. On that legal issue, neither party has been able to provide me with any significant assistance.

48. On the face of the FTT Rules, there is in rule 14 an express power permitting the Tribunal to give a direction prohibiting disclosure of a document or information to another party. Rule 14 provides:

> **Use of documents and information**
>
> 14.—(1) The Tribunal may make an order prohibiting the disclosure or publication of—
> (a) specified documents or information relating to the proceedings; or
> (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
>
> (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
> (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
> (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
>
> (3) If a party ("the first party") considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—
> (a) exclude the relevant document or information from any documents that will be provided to the second party; and
> (b) provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the

document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).

(4) The Tribunal must conduct proceedings as appropriate in order to give effect to a direction given under paragraph (2).

(5) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that—
(a) disclosure to the representative would be in the interests of the party; and
(b) the representative will act in accordance with paragraph (6).

(6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Tribunal's consent.

49. In short, rule 14(2) permits the Tribunal to make such a direction where the Tribunal is satisfied that the disclosure might cause "serious harm" to a person and it is proportionate and in the interests of justice to make such a direction. Rule 14(3) makes provision for the Tribunal to view the information itself in order to decide whether the document or information should be disclosed to the other party or subject to a direction under rule 14(2). Rule 14(5) provides an option for the documents or information to be disclosed to a party's representative only.

50. In applying rule 14, the Tribunal will also need to be mindful of the interpretative obligation under section 3 of the Human Rights Act 1998 (HRA 1998) and its duty under section 6 of the Human Rights Act 1998 (HRA 1998) to act compatibly with the Convention rights of the parties both to private life under Article 8 and to a fair trial under Article 6. As such, what constitutes "serious harm" should not be regarded as setting too high a threshold: where a person's Article 8 rights are engaged, it is a question of striking the appropriate balance between interference with those rights and the rights of both parties to a fair trial. Proportionality and the interests of justice are the key principles. While the harm to the claimant of disclosure would evidently have to be very significant to justify withholding from a respondent evidence or information that had a direct bearing on a central issue in a case, if the evidence or information merely has a (non-determinative) bearing on a case management issue, less significant levels of harm may still be serious enough to justify some departure from the ordinary principles that both parties should have equal access to the documents. In the latter situation, a direction under rule 14(5) that personal medical evidence is shared only with the other party's legal representative may provide an appropriate solution that strikes an appropriate balance between fair trial and privacy rights.

51. In this case the First-tier Tribunal does not appear to have given any thought to the options available to it under rule 14. It certainly did not raise those options with the parties. It did not give the appellant an opportunity to make submissions

as to whether she considered the "serious harm" test was met in this case. Given the distress that the Tribunal's actions have caused to the appellant, and the impact it appears to have had on her ability to cope with the hearing, there was, it seems to me, some prospect that a Tribunal might have concluded that test was met. Even if it was not met, if the First-tier Tribunal had paused, explained to the parties the rule 14 framework, and taken time to consider the evidence for itself as permitted by rule 14(3), that process itself might have considerably lessened the distress to the appellant.

52. It was in my judgment incumbent on the First-tier Tribunal to raise these options with the parties of its own motion. The obligation to do so arises from the overriding objective and the obligations that the Tribunal owes to litigants in person (and others who are not as familiar with the relevant legal principles as the Tribunal should be). The Tribunal's failure to consider these options in this case was an error of law.

53. Again, the question arises as to whether it was a material error of law. I do not consider that it had any material effect on the outcome of the application to admit late evidence, which I consider would have been the same regardless of the position with the medical evidence for the reasons set out under ground 3. I am, however, satisfied that this error materially affected the fairness of the hearing. The Tribunal's approach caused the appellant distress, and I am prepared to accept that it had a material effect on her ability to cope with the hearing as it is apparent, even from the short part of the hearing to which I have been able to listen, that the appellant was still upset about what happened with her medical evidence. Moreover, when she raised her concern with the Tribunal, the Tribunal judge merely repeated 'for the record' that the appellant was not required to disclose her medical evidence which, for the reasons already dealt with, was no answer to the appellant's concerns. I also accept that the effect that this matter had on the appellant's conduct of the hearing may have contributed to her not presenting her case to the First-tier Tribunal quite as well as she has to me, and thus partly account for the Tribunal's overlooking of important evidence as detailed under ground 5.

54. Ground 4 therefore succeeds.

Ground 5 – failure to take account of medical evidence in deciding C had not been subject to unfavourable treatment in relation to the site move and/or failure to give adequate reasons

55. The appellant's case as set out in her original application form to the First-tier Tribunal was that one of the reasons the site move would be detrimental to C was because it would be contrary to the opinion of medical practitioners working with C (FTTB, p 25). These opinions were set out in: (i) a letter from Dr Liew (Consultant Paediatric Neuropsychiatrist, St Thomas' Hospital, Westminster) of 1 June 2023 (FTTB, p 116); and (ii) a letter from Mr Collins (Paediatric Epilepsy Clinical Nurse Specialist, King's College Hospital NHS Trust) of 29 June 2023 (FTTB, p 145). The letter from Dr Liew included the following:

> [The appellant] spoke to school twice last week and staff have suggested that [C] will benefit from a move to their larger site …. We acknowledged that this would not be ideal as it posed a significant change in [C's] psychosocial environment and had the risk of impacting him emotionally. [The appellant] also noted that the [larger] site was further away and at present, whilst she has been progressing the appeal process (with ombudsman involvement) for school transport, this would have a significant impact on her being able to transport [C] herself.

56. The letter from Mr Collins was 1.5 pages long and entirely devoted to opposing the school site move. It includes the following:

> "The main point of this letter will be any alteration to [C's] circumstances, that may cause stress, could lead [C] to having a seizure Although [C] had neurosurgery 4 months ago to address his epilepsy, there is has been not enough time elapsed to regard [C] as free from epilepsy.
>
> "[C] struggles with car travel and becomes very upset when the vehicle is stationary or slow moving, during the time of day in which [C] will be travelling to and from school, it is unlikely that traffic jams and slow moving traffic would be avoided. In addition, I am concerned about the length of time it will take for [C] to travel to the new site; [C] has ADHD and ASD therefore being made to sit for an extended length of time would be enormously stressful."
>
> "Primary school children are not expected to have to travel more than forty-five minutes to their school, SEN children or children with disabilities journeys should be as short as possible (Department of Education 2014, this is still the advice in the 2019 draft yet to be ratified)."
>
> "[C] has poor sleep, common for children with ADHD, for him to travel to this new site would require him to be awake earlier than now, and lack of sleep is a major trigger for seizures."
>
> "Lastly, in regards to travel [C] would also require a trained person to travel with him, so if he were to have a seizure they would know how to deliver seizure first aid, including the administration of buccal midazolam. My next point of concern would be the separation of [C] from an environment where he knows the staff and has friends. Change, especially unexpected change, can be extremely stressful for children with Autism Spectrum Disorder (National Autistic society 2020). Change will be especially stressful for [C], as I believe that his understanding is limited so explaining changes in advance will not help, as [C] will not understand until the change has happened and therefore become stressed. Even if there was to be a period of visits for [C] to the new site, I believe he would not understand that this was to be his new school until the move."

> "An increase of stress can increase the chances of a seizure, therefore it is my opinion that at present it would be unwise for [C] to be moved to another site and his health needs would be best met staying at his present school".

57. Neither letter or opinion is referred to in the First-tier Tribunal's decision, although the First-tier Tribunal stated at the hearing, and in its decision, that it had read the whole bundle and the appellant alluded to the letters in her closing submissions when she referred (non-specifically) to expert reports stating that C should not be moved (at 55:40 and 58:00 of the recording). (I understand from her submissions on this appeal that the appellant also had in mind the opinion of the family's Social Worker given by email on 27 June 2023, which is to similar effect, although as I did not identify the Social Worker's opinion in my grant of permission to appeal, I do not deal with it further.)

58. Having considered the respondent's submissions at this hearing, and the closing submissions that the respondent made to the First-tier Tribunal, it seems to me that the failure by the First-tier Tribunal to reference this medical evidence in its decision may possibly be a result of a misunderstanding. The respondent's case on this point was that the respondent wanted other professionals involved with C wanted to visit the school sites, but that the appellant would not let them. It may have been that this led the First-tier Tribunal to discount the views of the medical professionals on which C relied. However, the evidence relied on by the respondent in support of this submission was: (i) a request of 10 July 2023 for the local authority's complex needs team (CNT) to observe C in his current environment (FTTB, p 377)); (ii) the appellant's refusal of that request on the basis that CNT "ALWAYS take the side of their professional colleague, rather than critically reflecting on the situation an using unbiased judgment" (FTTB, p 370); and (iii) the respondent's oral evidence as recorded at [40] and [53] of the decision:

> 40. …[The appellant] asked [the Deputy Headteacher] to discuss the proposed site move with other professionals involved with [C], which [the Deputy Headteacher] did. Those professionals wished to visit both … sites, but [the appellant] did not consent to them doing so and the visits therefore did not go ahead.
>
> …
>
> 53. [The Headteacher] says they offered [the appellant] involvement of the complex needs team, social worker, education welfare officer and case worker and [the appellant] did not want to participate in site visits … or have any involvement with transitioning [C] to [the larger site]. In the Autumn to Christmas term 2023 [the appellant] raised issues regarding site visits and teacher qualifications. In correspondence with LA, she said the qualifications of [C's] teacher was the sticking point in the site move and she would agree to him moving to the [larger] site if he was placed in a class with a qualified teacher.

59. The import of the respondent's submission was that Dr Liew and Mr Collins were two of the professionals who wanted to observe C in school but who the appellant refused to allow to observe. However, so far as I can tell, neither Dr Liew or Mr Collins were part of the respondent's CNT team, they were medical professionals working in separate hospitals. Nor were they the "other professionals" to whom the Tribunal refers who wanted to visit the school. Both Dr Liew and Mr Collins expressed their opinions in their letters without referencing any wish to observe C at school. Dr Liew's letter in fact quotes extensively from a letter that the School had sent to him/her on 25 May 2023 and so was based in part on material the School had provided.

60. It is possible, therefore, that the First-tier Tribunal failed to appreciate that, by accepting the respondent's evidence in this respect in their decision, they were not dealing with, let alone disposing of, the medical evidence on which the appellant relied. The failure to mention the letters may also be because the appellant, being distressed at the hearing as a result in part of what happened with the medical evidence (ground 4), did not give the Tribunal the page references in the bundle for the letters. (It appears that this may also have been because the respondent had provided her with the full 500+ page bundle only shortly before the hearing so that she was, she says, having difficulty navigating it.)

61. However, even if these factors might explain why the First-tier Tribunal makes no reference to the opinions of Dr Liew and Mr Collins, the question for me is whether this relevant evidence has been left out of account by the Tribunal in its decision-making. Given the importance of medical evidence such as this, and the claimant's reliance on it as a key part of her case, the Tribunal's failure to mention the medical opinions gives the impression that they were left out of account. Given that (as I explain below), the Tribunal's reasons do not deal with the substance of the medical opinions either, I find on the balance of probabilities that the Tribunal did leave this evidence out of account when it came to making its decision.

62. Whether or not the Tribunal wholly overlooked the letters, however, the Tribunal's reasons are, in my judgment, inadequate in failing to explain how the Tribunal reached the conclusion that the site move was not even a "minor or trivial detriment" to C despite bringing with it, in the opinion of a responsible clinician, an increased risk of epileptic seizure.

63. I have considered whether it can be said the medical evidence is immaterial because in fact the clinicians were unaware of the true picture as regards the site move (as the Tribunal found it to be). However, I have decided that the Tribunal's error is material for two reasons:-

    a. First, because what is of concern to Dr Liew and Mr Collins is the impact of stress on C. The Tribunal does not address this. The Tribunal's assessment is that the move will ultimately be successful for all the reasons it gives, but it does not address the issue of short-term stress for C. The Tribunal needed to address this because the appellant's case as

set out in her original application form was not that C should never move site, but that he should be given another chance to stay at Site A, with additional reasonable adjustments in place to meet his needs and that "a more adequate transition is put in place for [C] if and when he moves school" (FTTB, p 19). I add that the fact that by November 2023 the appellant was apparently willing to allow C to move site provided he was given a qualified teacher is not a complete answer to this point because: (i) it seems to have been advanced in a spirit of compromise; (ii) Mr Collins' opinion was to some extent 'time-limited' as it was based on there having been only four months since C had an operation intended to address his epilepsy – the position might have been different by November 2023; and, (iii), as I have said, the appellant's claim as a matter of law could (unless amended) only concern the respondent's actions prior to the commencement of proceedings in August 2023.

b. Secondly, because there is another key point in the opinion of Mr Collins that the Tribunal's reasons do not address. That is what Mr Collins says about the impact on C of the increased journey time to the new site. Mr Collins in particular expresses concern about the particular effects on him of car travel during rush hour, and the impact of him having to get up earlier in the morning in order to travel. The Tribunal's reasons have not addressed any of these points. At [51] and [73] the Tribunal only states that transport was available by the time of the move in September 2023. As I have already noted, it appears the Tribunal may have thought it was not for it to consider transport issues, but although it is the local authority's responsibility to provide transport, the question of the *impact* of the transport issues and journey on C was directly relevant to whether the site move constituted unfavourable treatment of C, and to the question of whether any unfavourable treatment was justified for the purposes of section 15 of the EA 2010.

64. Ground 5 therefore succeeds.

Ground 6 – misdirection of law as to inter-relationship between EA 2010 and CFA 2014

65. The appellant argues that the First-tier Tribunal misdirected itself in law at [77] and [84] when it stated, respectively in relation to the claims of failure to make reasonable adjustments by provision of additional sensory OT and additional support staff:

> "Any issues relating to provision in [C's] EHCP are for the LA by way of SEND appeal and not an issue for the RB in a discrimination claim"
>
> And
>
> "the issues she raises as to the need for extra staff appear also to relate to issues of provision under [C's] EHC Plan and as set out in relation to

> the occupational therapy above, the Tribunal in a discrimination claim has no jurisdiction to determine such issues arising under the Children and Families Act 2014"

66. These statements are incorrect. The Tribunal had at [61] directed itself to my decision in *SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC) (*SS*) in relation to the approach it should take to the section 15 claim, but *SS* also dealt with claims of failure to make reasonable adjustments. As I explained at [77] of *SS*, there is complete overlap in the matters that may be the subject of a disability discrimination claim against the school and provision that may be made by a local authority under an EHC Plan. In essence, the contents of the EHC Plan, and the provision that is (or is not) being made in accordance with that plan, are just relevant factors for the Tribunal to take into account when deciding whether a school has complied with its duty to make reasonable adjustments under the EA 2010. In particular, at [77i.] I said:

> 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 EHC Plan, 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.

67. In *KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC) (*KTS*) at [38.n] I added:

> n. In most cases, provision that has been properly specified in Section F of an [EHC Plan] will also be provision that the duty to make reasonable adjustments under the EA 2010 will require a school to provide. This is because of the similarities in the legal provisions. The special educational provision specified in an [EHC Plan] is, by virtue of ss 21 and 37 of the CFA 2014 (as interpreted by R (A) v Hertfordshire County Council [2006] EWHC 3428 (Admin) at [25]-[27] and Devon CC v OH [2016] UKUT 0292 (AAC) at [38]), supposed to be the special educational provision 'reasonably required' by the child's special educational needs. 'Special educational needs' are in turn defined in s 20 by reference to the child having a learning difficulty or disability which presents them with 'significantly greater difficulty' in learning than the majority of others the same age or 'prevents or hinders' them from accessing the facilities generally provided for others. 'Disability' in CFA 2014 is the same as 'disability' under the EA 2010: see s 83(3). It can readily be seen therefore that, in most cases, what is specified in Section F will be provision that is also required by the duty to make reasonable adjustments because, by statutory definition, it should be the provision reasonably required to remove the disadvantage that the child is under in relation to their peers. The provision in Section F and the provision required by the duty to make reasonable adjustments will, in particular,

> normally be the same where the provision in the [EHC Plan] consists of teaching approaches, strategies and resources that would ordinarily be provided by a school from within its own resources. That is not to say, though, that there will not be scope for argument in a particular case that, for example, the provision in the [EHC Plan] is out of date or unreasonable in some other respect, or that in fact the child is not at a substantial disadvantage in relation to that particular matter so that the duty to make reasonable adjustments does not arise. Further, where an [EHC Plan] makes provision for a child to receive support from another agency, it is unlikely to be reasonable to expect the school to duplicate that support (see paragraph 6.31 of the Technical Guidance as updated in September 2023), but, as already noted at sub-paragraph i., it may be reasonable for a school to 'bridge a gap' in provision that ought to be provided by the local authority under the [EHC Plan]. However, in the ordinary course of events, a school that fails to implement the teaching approaches, strategies and resources specified in the [EHC Plan] as being required for the child is likely also to be failing in its duty to make reasonable adjustments under the EA 2010.

68. And at [33], I said:

> …the fact that some adjustments have already been made does not mean that the statutory duty does not require further or different adjustments. In all cases, unless the adjustments already in place have removed the substantial disadvantage so as to relieve the respondent of the duty to make further adjustments, the reasonableness of the adjustments sought by the claimant will need to be evaluated and consideration given to whether the adjustments sought stand a 'real prospect' of removing or further reducing the substantial disadvantage than the adjustments already in place, whether alone or in combination.

69. It was thus clearly an error of law for the First-tier Tribunal to direct itself that it had no jurisdiction to deal with questions of educational provision that either was specified or could be specified in an EHC Plan. There is no such jurisdictional divide. I need, however, to consider whether that error was material, and I need to deal separately with the OT and additional support staff claims in this respect.

Occupational Therapy

70. As regards OT, the position was that, during the period that was covered by the claim, i.e. the period leading up to the claim being commenced in August 2023, C's EHC Plan provided for an OT assessment, but did not contain any specific hours of provision. Subsequent to the period with which the claim was concerned, in December 2023, the EHC Plan was amended by the local authority to provide for 38 hours of OT. The appellant's case was, in summary, that the local authority had unreasonably delayed revising C's EHC Plan, and that the School should have acted so as to ensure that C received the sensory OT that it had been recommended he needed in advance of the local authority amending the EHC Plan.

71. The First-tier Tribunal at [76]-[80] of its decision found as a fact that the School had provided 13.5 hours OT for C in the academic year 2022/23, and that this was more than had been recommended in the OT assessment that had followed the making of the previous EHC Plan. The Tribunal concluded that the School had done all that was reasonably required of it, and that it would not be reasonable in this case for it to go any further and make 38 hours of provision out of its own funds in advance of the local authority agreeing to amend the EHC Plan and thus take responsibility for funding that provision.

72. Accordingly, it seems to me that, so far as the OT claim was concerned, despite the Tribunal's misdirection of law, it in practice actually took the approach that I set out in *SS*. Further, the First-tier Tribunal, having taken the proper approach, reached a decision that was open to it and not perverse. The error of law identified in ground 6 is not therefore material to the claim of failure to make reasonable adjustments in relation to OT provision.

Additional support staff

73. So far as the claim of failure to make reasonable adjustments in relation to the provision of additional support staff is concerned, however, I have concluded that the Tribunal's error was material as, in combination with another error, it led to it failing to determine that part of the case at all.

74. The appellant's claim was, as explained at FTTB, pp 24-27, that the School should have provided an additional member of staff "well experienced and suitably trained" to work with C at Site A so as to avoid the need for him to move to Site B. The respondent's response to that case (as summarised by the Tribunal at [11]) was that there would have been additional staff available for C at Site B. That, of course, was no answer to the appellant's claim that the reasonable adjustment would have been to provide additional staff at Site A so as to avoid the move. However, the First-tier Tribunal concluded that the appellant's case failed because: (i) it had "no jurisdiction to determine such issues arising under the Children and Families Act 2014"; and (ii) the appellant had been unable to identify a provision, criterion or practice (PCP) in relation to this claim. The error in relation to (i) would not have been material if (ii) was correct. However, as I identified when granting permission to appeal, unfortunately the First-tier Tribunal erred in that respect too for reasons I shall explain.

75. Even where a list of issues has been identified at a prior stage by a judge (Judge McCarthy in this case), the Tribunal at the final hearing must still ensure that the list of issues properly reflects the parties' cases. The Court of Appeal in *Moustache v Chelsea and Westminster Hospital NHS Trust* [2025] EWCA Civ 185 (*Moustache*) recently gave relevant guidance on this. *Moustache* was an employment law case, but the principles are equally applicable to the First-tier Tribunal when dealing with disability discrimination claims under the EA 2010 (see *KTS* at [39]-[41]). The whole of the Court of Appeal's guidance at [33]-[47] should be considered, but the following points are of particular relevance to the

present case (I adapt the language of the Court of Appeal to reflect the jurisdiction with which the present case is concerned):

a. Unless a claim has been abandoned by a claimant, a tribunal at the final hearing is under a duty to consider all the claims that properly emerge from an objective analysis of the claimant's application form (i.e. the form that the claimant commences to start proceedings in the First-tier Tribunal under rule 20): *Moustache*, [36];

b. The tribunal is under a duty to provide appropriate assistance to litigants in the formulation and presentation of their case, particularly where the litigant is not legally represented: *Moustache*, [38];

c. A failure by the tribunal to identify and address the claims that arise on an objective analysis of the claimant's application form is an error of law: *Moustache*, [39];

d. A list of issues is not a pleading, but it is a case management tool. Once a list of issues is drawn up, the tribunal and the parties can normally confine themselves to addressing the list of issues, but if it becomes apparent at the final hearing that a claim that was in the claimant's application form, and has not been withdrawn, has been omitted from the list of issues, the tribunal will normally err in law if it fails to depart from the list of issues in order to deal with it: *Moustache*, [39]-[47].

76. In disability discrimination claims, one respect in which unrepresented litigants will normally depend on the tribunal to identify the correct legal label for their claim is in determining whether a claim of failure to make reasonable adjustments should properly be considered as a claim of failure to comply with what the EA 2010 calls "the first requirement" or "the third requirement". By virtue of paragraph 2(2) of Schedule 13 to the EA 2010, a claim against a school of failure to comply with the duty to make reasonable adjustments can be either a claim of failure to comply with "the first requirement" or with "the third requirement". "The first requirement" is set out in section 20(3) and it applies where a PCP puts a disabled person at a substantial disadvantage in comparison to non-disabled persons. The third requirement is the duty to provide auxiliary aids or services where the disabled person would be comparatively substantially disadvantaged without them. It is set out in section 20(5), which must be read together with section 20(11) as follows. As can be seen, a claim based on failure to comply with the third requirement does not require the identification of a PCP:

> (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.
> …
> (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.

77. The Employment Appeal Tribunal in *Mallon v Aecom Limited* (UKEAT/0175/20/LA (V)) was a case in which the Employment Tribunal had, among other things, overlooked the possibility of classifying the claim as one of failure to comply with the third requirement. HHJ Tayler held that the tribunal had erred in law for the following reasons:-

> 23. While consideration is often given by parties and employment tribunals to the first requirement, the second and third are sometimes overlooked.
>
> …
>
> 27. In this case no consideration was given to whether the claim should be analysed on the basis that the Claimant was contending that he needed an auxiliary service, by way of assistance in completing the online application form. While the Claimant did not refer to the "third requirement" or rely on sections 20(5) and (11) EqA 2010, he is a litigant in person. Tribunals should have in mind when determining the issues in reasonable adjustments claims that it may not be a PCP case but may be about … auxiliary aids (including services).
> …
> 30. The Employment Judge did not consider the possibility that this should be analysed as a third requirement (auxiliary aid) case, in which, for example, the Claimant required an auxiliary service of a person, provided by the Respondent, to complete the online form during, or after, a discussion with the Claimant. This claim was only considered as a first requirement (PCP) case. The auxiliary service analysis was not raised by the Respondent.
>
> 31. The issues had been set out by EJ Russell at the Preliminary Hearing for Case Management on 8 February 2019. Understandably, as a litigant in person, the Claimant had not put the claim as either a PCP or auxiliary service case. The Claimant contended in his claim form that he needed to be allowed to make an oral application rather than having to complete an online form because of his dyspraxia. EJ Russell properly assisted in seeking to draw out a list of issues from this factual complaint. It is important that when so doing, in reasonable adjustment cases, employment judges remind themselves of the possibility that the claim might more properly be analysed as a physical features or auxiliary aids case; or that such an analysis should go forward as an alternative to the PCP analysis. An employment judge could rarely be fairly criticised for improperly entering into the arena, if s/he ensures that the factual claim being advanced by a litigant in person is analysed by application of the correct legal principles.

78. In the present case, Judge McCarthy had (on the papers, in the absence of the parties) drawn up a list of issues in which he identified the claimant's claim in relation to the failure to provide additional support staff as being a claim of failure

to comply with the first requirement. He noted that the claimant had failed to identify a PCP. At the final hearing, the Tribunal discussed this claim with the parties, but as the claimant had still not managed to identify a PCP, it dismissed the claim as follows at [81]-[83]:

> 81. [MT] has not identified a relevant Provision, Criterion or Practice (PCP) and the Tribunal was not able to identify one following discussions with the claimant, particularly in the context of [C] attending a special school.
> 82. [MT] stated [the] School should have provided extra suitable staff and she considered suitable staff to be individuals who are bigger than [C] and strong enough to handle him.
> 83. As the claimant, [MT] has not identified a relevant PCP, that element of her claim fails.

79. As is apparent, however, the claim could (and, in my judgment, should) have been considered as a claim of failure to comply with the third requirement. There was nothing further that the claimant herself as a non-lawyer could have done to identify that claim. She had set it out in the original application form. She had not abandoned it. The provision of additional support staff is provision of an auxiliary service. If C was under a substantial (i.e. more than minor or trivial: see s 212) disadvantage without additional staff, then the third requirement placed the School under a duty to provide those additional staff if it was reasonable to do so. The Tribunal was under a duty to determine that claim because it had been raised in the application notice and not abandoned, but it failed to do so because it wrongly classified the claim as a first requirement claim that required identification of a PCP.

80. Ground 6 therefore succeeds in relation to the claim of failure to make reasonable adjustments in relation to the provision of additional support staff, but not in relation to OT.

Conclusion

81. I have concluded that the First-tier Tribunal materially erred in law in:

    a. its approach to the appellant's medical evidence (ground 4),
    b. failing to take account of the opinions of Dr Liew and Mr Collins when dismissing the section 15 claim in relation to the site move (ground 5) and
    c. failing to determine the claimant's claim of failure to make reasonable adjustments by provision of additional support staff (ground 6).

82. I now have to decide whether I should exercise my discretion under section 12(2) of the TCEA 2007 to set the decision of the First-tier Tribunal aside in whole or in part, and, if so, whether I should remit the case to the same tribunal or a different tribunal or re-make the decision for myself. The respondent naturally urged me not to set aside if it could be avoided, and to remit to the same First-tier Tribunal

if that were feasible. The claimant, on the other hand, sought a fresh hearing before a new tribunal.

83. It seems to me that, given the nature and extent of the errors made, the whole of the decision of the First-tier Tribunal must be set aside. I appreciate that, as the ground of appeal in relation to the claim of failure to make reasonable adjustments by way of provision of OT did not succeed, there is a basis for not setting aside that part of the decision. However, the difficulty with that course is that the evidence in relation to OT is also relevant to the claimant's section 15 claim in relation to the site move. It forms, on the appellant's case, part of the reason why the School was not justified in moving C when it did. More OT provision was in fact required for C, and subsequently agreed by the local authority. Even if the School was not required to make further adjustments in order to provide additional OT itself, part of the appellant's argument was that C's behaviour would improve once that additional OT was provided and the School should have given C more time at Site A while the additional OT was put in place. It seems to me that it would not be in the interests of justice for any tribunal at a further hearing to be bound by the previous Tribunal's conclusions in relation to OT, rather than being free to reach its own view of the whole facts of this case. It is also relevant to my decision as to whether or not to set aside the whole of the First-tier Tribunal's decision that in allowing ground 4 I concluded that the fairness of the hearing had been materially affected. Although I cannot identify any particular respect in which the evidence and submissions in relation to OT were affected by what happened with the appellant's medical evidence, there is a realistic possibility that the appellant's distress at what happened regarding the medical evidence affected her presentation of her case more generally.

84. As I am setting the whole of the decision aside, it seems to me that the appropriate course is for the case to go back to a fresh tribunal. It is now unfortunately 18 months since the First-tier Tribunal made its decision in this matter. The panel that made the decision under appeal is unlikely to have a good recollection of this case and, in any event, even the most professional panel would have difficulty truly starting afresh on a case in these circumstances, yet that is what is required in the interests of justice. I cannot remake the decision myself because the oral evidence needs to be re-heard by the new panel.

85. I therefore set aside the whole of the decision of the First-tier Tribunal under appeal and remit the case for re-determination by a fresh panel, who must apply the law as set out in this decision. It will be a matter for the First-tier Tribunal to make directions about the submission of evidence for that remitted hearing, and about what evidence to admit, but I make clear here that there is no reason in principle why the First-tier Tribunal should not consider the evidence that the appellant sought to submit as late evidence at the last hearing. The considerations that led to that being excluded from the last hearing no longer apply because the respondent has now had ample time to consider that evidence and it is in the interests of justice for the decision to be made on the basis of all the relevant evidence on which the parties wish to rely.

86. I add that it has greatly troubled me that this case is concerned with events that took place almost three years ago. That is a very long time in the life of C and, even if part of the claim were to succeed on re-hearing, I doubt whether any remedy the First-tier Tribunal might award would be of any benefit to him personally. I encourage the parties to consider carefully whether there is a basis on which they could agree to compromise these proceedings and bring them to an end by consent. If there is, they should contact the First-tier Tribunal as soon as possible.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 27 January 2026

Re-issued on 12 March 2026 with minor typographical amendments and amendments to ensure compliance with the rule 14 order.