Neutral Citation Number: [2026] UKUT 161 (AAC)

Appeal No. UA-2025-001540-HS

RULE 14 ORDER:

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of M (the Respondent in these proceedings) or C (her son) or any information that would be likely to lead to the identification of them or any member of their family in connection with these proceedings.

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.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

The Governing Body of a School

Appellant

- v -

M

Respondent

(on behalf of C)

Before:	**Upper Tribunal Judge Wikeley**
Hearing Date:	**1 April 2026**
Mode of hearing:	**Remote (CVP) hearing**

Representation:	
Appellant:	Mr E. Stenson instructed by Scholfield Sweeney LLP
Respondent:	Ms R. Swords-Kieley instructed by IPSEA

On appeal from:

Tribunal:	First-Tier Tribunal (HESC)
Judge / Panel:	Tribunal Judge S. Bradley, Ms J. Ellul and Ms B. Prendergast (specialist members)
Tribunal Case No:	EH358/25/00019
Tribunal Venue:	Remote hearing
Hearing Date:	14 July 2025

SUMMARY OF DECISION

34.10 Tribunal procedure and practice – Tribunal jurisdiction
89. Disability discrimination in schools

The Respondent (M) brought a claim for disability discrimination in respect of the Appellant's (the Governing Body's) decision permanently to exclude her son (C). Such claims are subject to a 6-month time limit (Equality Act 2010, Schedule 17, paragraph 4(1)). This claim was out of time by some 7 weeks. However, Schedule 17 paragraph 4(3) provides that the FTT "may consider a claim which is out of time". The Upper Tribunal dismissed the Governing Body's appeal against the FTT decision to consider the claim under paragraph 4(3).

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 dismiss the appeal by the Responsible Body. The decision of the First-tier Tribunal does not involve any material error of law.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal is primarily about the legal test for deciding whether a late claim for disability discrimination in the special educational needs context may be considered in the First-tier Tribunal.

2. The Appellant ('M', which is not her real initial) brought disability discrimination claims under the Equality Act 2010 ('EA 2010') to the First-tier Tribunal in relation to the treatment of her son ('C'), by the secondary school that he attended ('the School'). The claims were brought against the governing body ('the GB') of the School and concerned (among other matters) fixed-term suspensions for C and, finally and notably, a permanent exclusion ('PX') by the School.

3. Where I quote from original documents in this decision, I have redacted any individuals' names (other than those of the parties' representatives) in order to ensure the efficacy of the Rule 14 Order. I have therefore used initials or generic job description titles for all those concerned.

4. I am grateful to Mr Stenson (for the School) and Ms Swords-Kieley (for M) for their written and oral submissions. I am also sorry that it has taken so long to resolve this matter in the Upper Tribunal. The delay cannot be laid at the door of either counsel or those instructing them.

The background

5. The FTT described the background as follows, having noted that C joined the School from primary school in September 2023:

> 10. … He has ASD and experiences particular difficulties with social communication, anxiety and sensory issues. His needs and the provision he requires are set out, at least partially, in his EHCP. C is liable to become dysregulated in certain circumstances and has an extensive history of disruptive behaviour, including sometimes threatening behaviour and the use of force. From as early as September 2023 (shortly after his arrival), C has been suspended from school several times and the school explained that they increasingly struggled to engage him in learning.
>
> 11. C's behaviour in school was becoming increasingly challenging, with an increase in incidents of physical and/or threatening behaviour which led to further suspensions, e.g. suspension from 24-26 April for physical assault against a pupil; from 7-12 June for verbal abuse and threatening behaviour towards a member of staff (threatening to smash up the school kitchen and "egg" the catering manager's property); of suspension from 27 June to 2 July for verbal abuse and threatening behaviour; suspension from 4-5 July for verbal abuse and threatening behaviour against a member of staff (threatening the Assistant Headteacher and her children). An emergency annual review of C's EHCP was held on 16/07/25 and one of the options considered and agreed with the school was a move towards a hybrid model whereby C would spend 2 days a week in school and 3 days a week in alternative provision. That option would be dependent on LA support and funding.

6. The FTT then summarised the critical incident as follows:

> 12 … In summary, the incident itself started when C did not follow instructions in his PE lesson: he did not join the group that he was instructed to join and reverted several times to joining a different group. C then walked away from the PE lesson and back towards the school building. He ran away from the member of staff who was called to collect him (Mr M) and refused attempts by Mr M and another member of staff to get him to return to … the school building. He went into the school, lapping the school corridor and banging on walls and doors; he went to the toilet and came out at [the] request [of] [his trusted adult]. C's behaviour is described as being aggressive and threatening towards two members of staff. C told Mr M to "fuck off"; closed doors in an attempt to stop Mr M following him; "squared up" to him and threatened to smack him. C shouted that he was going to kill himself by jumping off a bridge and that it would be Mr M's fault and subsequently told [his trusted adult] *I will kill his fucking son*.

7. This appeal to the Upper Tribunal does not concern the School's decision to impose the PX itself. In that regard, it is noteworthy that the FTT's conclusions were damning. The FTT considered "the school's decision-making process to be deeply flawed" (paragraph 26). It also itemised its "very significant concerns about the school's handling of this matter" (paragraph 29). The FTT further observed that "the decision-making process in this case indicates a fundamental misunderstanding of

the school's responsibilities under the Equality Act 2010 and more widely in respect of permanent exclusions" (paragraph 30). There has been no attempt to appeal those findings.

Key dates in the timeline of the appeal

8. The essential chronology of this case is as follows.

9. On 17 July 2024 the incident took place in which C threatened members of staff and their families, as summarised in paragraph 12 of the FTT's decision (see paragraph 6 above).

10. On 4 September 2024 the School permanently excluded C as a result of the incident on 17 July 2024.

11. On 26 September 2024 the GB upheld C's PX.

12. On 16 May 2025 M lodged a claim for disability discrimination with the First-tier Tribunal ('the FTT'). It is not in dispute that this claim was brought some seven weeks outside the six-month period in which such claims should be brought.

13. Tribunal Judge Bradley then made a series of case management orders in relation to the claim on 21 May 2025 ('the First Order'), 19 June 2025 ('the Second Order') and 8 July 2025 ('the Third Order').

14. On 14 July 2025 the FTT heard the disability discrimination claim.

15. On 18 July 2025 the FTT promulgated its decision. Having decided to exercise its discretion to consider the claim out of time, pursuant to paragraph 4(3) of Schedule 17 to the EA 2010, the FTT dismissed the School's application for M's claim to be struck out as being out of time. The FTT also found that the School had subjected C to disability discrimination contrary to sections 15 and 85(2)(e) EA 2010 in respect of his permanent exclusion.

16. On 27 August 2025 Judge Bradley granted the School permission to appeal to the Upper Tribunal.

The First-tier Tribunal's three case management Orders

17. M's claim was subject to intensive case management by the FTT. The following features are notable.

The First Order

18. In the First Order (dated 21 May 2025) Judge Bradley summarised the relevant legal test in the following way:

> 4. The Tribunal has a discretion to consider a Claim which is out of time (Schedule 17(4)(3)). However, allowing late Claims should be the exception rather than the rule (see, e.g. the Court of Appeal judgment in *Bexley Community Centre v Robertson* [2003] EWCA Civ. 578). In this Tribunal, late

> Claims are normally only admitted in exceptional circumstances or where there are very strong reasons.
>
> 5. In considering the application to exercise discretion to admit the Claim out of time I also have regard to the Court of Appeal's judgment in *Denton & Others v TH White Ltd & Others* [2014] EWCA Civ 906 sets out a three-stage approach to determine relief from sanctions. The three stages are: (1) identifying and assessing the seriousness or significance of the failure, (2) the reasons the failure or default occurred, and (3) consideration of all to circumstances of the case, so as to be able to deal justly with the matter.

19. Judge Bradley then proceeded in the First Order to assess the application to consider the late claim – or at least to make some preliminary but extensive observations in that regard – in the following paragraphs of the First Order, under the headings 'Is the failure significant or serious?' (paragraphs 6-8), 'What are the reasons for the failure? (paragraph 9) and 'Considering all the circumstances of the case, would it be just to admit the Claim?' (paragraph 10). His conclusion, having weighed those matters, was that it was "appropriate to admit the Claim for consideration in respect of the PX" (paragraph 11). However, this was plainly a provisional conclusion, for the following reasons:

> 12. I am conscious that the school has not had an opportunity to contribute to my consideration of this matter. If the school objects to the late admission of the Claim, they may do so in their response. If they do so, I will carefully consider the matter in light of any submissions made. I will do so with an open mind, however for the reasons given above, I do consider it important that the PX Claim be determined. I will list the Claim for a Case Management Hearing following the RB's response, to provide an opportunity for consideration of any matters that may need to be decided before the final hearing (e.g. scope of the claim and whether it should be admitted at all) and also to make sure that the Claim will be ready to proceed on the hearing date.

20. The FTT accordingly directed that the claim in respect of C's PX on 4 September 2025 was admitted and would be considered (paragraph 15). Judge Bradley also issued detailed further case management directions and a timetable (paragraphs 16-25).

The Second Order

21. A case management hearing then took place on 19 June 2025. Here it transpired that the School had not filed a response to the claim and indeed had only become aware of the claim on the previous day, as the (correct) e-mail address to which the Registration Order and documents had been sent to was not regularly monitored. In the light of this, Judge Bradley directed that the hearing date of 1 July 2025 would be vacated and a new timetable directed. The FTT confirmed that the claim would proceed only in respect of the PX (Second Order, dated 19 June 2025, paragraph 1c), albeit that "this remains subject to the school's response on the late admission of the claim. I will make a final decision on this point in light of that response" (paragraph 1d). The revised timetable set a new hearing date for 14 July 2025.

The Third Order

22. In the Third Order (dated 8 July 2025) Judge Bradley emphasised that "I have been clear in my orders of 21/05/25 and 16/06/25 that late admission of the Claim is subject to the school's response" (paragraph 1). He now noted the School's request "that the claim be struck out or, failing that, that the hearing listed for 14/07/25 should be vacated and a Case Management Hearing held to consider their application" (paragraph 1).

23. Judge Bradley continued:

> 2. This is an important point for both parties and, in light of the school's response, I consider that this needs fuller discussion with the parties. Given the need to use Tribunal resources efficiently and the need to bring this Claim to a prompt conclusion, I consider it appropriate that this matter should be considered as a preliminary matter at the start of the hearing on 14/07/25. Both parties should continue to prepare on the assumption that there will be a substantive hearing of the claim, as that is likely to happen (even if the panel ultimately decides not to grant permission to bring the claim out of time).

24. Judge Bradley also expressed a revised provisional view in the Third Order:

> 3. On the substance, my preliminary view is that the school's response on timeliness of the claim and submissions on whether there are good reasons for admitting it are persuasive. I did take the Claimant's reasons at face value (as I typically do on matters such as this unless there are good reasons not to) and, given that this is being dealt with on a fast-track timetable, did not seek the school's views in advance. I now have them and I am satisfied that the Claimant must respond to the points made by the school and provide appropriate supporting evidence.

25. The Third Order then provided that "the school's application to strike out the claim on grounds of timeliness will be dealt with as a preliminary matter at the hearing", which hearing was confirmed as listed for 14 July 2025.

The First-tier Tribunal's decision

26. In its decision the FTT explained the procedure it had adopted in the following terms:

> 5. Following previous case management and with the claimant's agreement, the claim has been admitted for consideration only in respect of the permanent exclusion (PX) on 04/09/25. No other elements of the original claim were being pursued. The school objected to the admission of the claim for consideration out of time. In order to use our time efficiently, we structured the hearing in the following way: 1) consideration of late admission of the claim (and other preliminary issues); 2) consideration of potential remedy of reinstatement; and 3) consideration of the substance of the claim. I stressed in the hearing and repeat here that structuring the hearing in this way does not mean that we had prejudged any element of the claim. We had not decided in advance to admit the claim late and had not reached findings on whether the PX was indeed discrimination under section 15. We dealt with all three elements in this way to

use our time efficiently and because they are interlinked: the potential for reinstatement and the strength of the claim are important factors to consider when exercising our discretion whether to admit the claim for consideration out of time.

27. The FTT then explained its decision to admit the late claim as follows:

> **Late admission of the claim**
>
> 8. The school objected to the late admission of the Claim (see previous case management orders). Both parties had submitted further information in respect of this matter which we have considered carefully. We discussed the matter at the start of the hearing, though deferred making a decision on it until after the hearing, having heard from the parties about potential remedies and having considered in full the substance of the claim in respect of the permanent exclusion (PX). Having considered the three-stage process set out in *Denton* (see Order of 21/05/25), we conclude that it is just to admit the claim for consideration in respect of the PX. Our reasons are as follows:
>
> a. We acknowledge that a delay of over 7 weeks is significant in this context. However, in terms of prejudice to the school, we note that had the claimant requested an Independent Review Panel, the time for bringing a claim would not have started to run until the conclusion of that process. In other words, the school could have had to respond to the claim within a similar time frame in any case (had the Claimant requested an IRP). The delay has not, therefore, been brought so late as to prevent or hinder the school from responding fully to it. Indeed, the school did respond fully and comprehensively, and we heard from their witnesses at length in the hearing.
>
> b. Although not accepted by the school, we agree that the cumulative effect of the Claimant's circumstances materially hindered her ability to bring a claim on time. These include: drawn out eviction proceedings in respect of the family home (which remain ongoing); work on C's EHCP review taking priority over bringing the DD claim; C's grandmother's illness and medical treatment; and Ms Zaher [the volunteer representative]'s need for urgent medical treatment, who was allocated to represent the Claimant early in the new year. We acknowledge the school's point that the information from IPSEA makes it clear that a claim must be brought within 6 months and that it would have been relatively simply to submit a straightforward claim in respect of the PX within time. However, we also accept that, having been referred to IPSEA and accepted for support, it was not easy for the Claimant to take matters into her own hands once Ms Zaher was not able to help. The Claimant was relying on Ms Zaher to help her and so her unexpected and sudden health issues had a material impact on the Claimant's ability to submit the claim herself in time.
>
> c. In addition, the claim raises very important matters in respect of C's EHCP and school placement. We found the situation to be rather confused (we say more about that below), but it is clear that C has not

> been attending a school since his PX (he has been attending alternative provision) and the Claimant suggests that the School is the only potential placement on the table. It appears that the options for C comprise reinstatement at the School, continued attendance at the Alternative Provision or education otherwise than in school (under section 61 Children and Families Act 2014). Furthermore, we are concerned that C's EHCP seems on the brief side and does not appear to adequately reflect the full range of his needs or the provision that he requires. We consider it important to determine this claim as part of the wider landscape relating to C's education, so that those who make decisions about his placement have a sound basis to do so with appropriate options.
>
> d. And, finally, we have significant concerns about the school's handling of the PX (see below). These concerns arose not just from the paperwork submitted in the bundle but also from the oral evidence given in the hearing. We consider it important to scrutinise that and to make relevant findings not just for C's benefit, but also for any wider learning or lessons that can be drawn for the school itself.
>
> 9. We have considered the matter very carefully indeed and are satisfied that, when considered together, there are strong reasons for admitting the claim for consideration out of time.

28. Judge Bradley of the FTT subsequently gave the GB permission to appeal, making the following observations:

> I acknowledge that this is an important point and that admission of a claim 7 weeks' late and following the process that the Panel followed is unusual. There is limited guidance from the Upper Tribunal on how this Tribunal should exercise its discretion when considering claims against schools and so, I acknowledge, that a Judge of the Upper Tribunal may consider the Applicant's position to have some merit. Furthermore, in general terms, guidance from the Upper Tribunal on how the First-tier Tribunal should approach late admissions would be welcome. For those reasons, I give permission to the Applicant to appeal to the Upper Tribunal on this point.

The relevant legislation

29. Part 9 of the EA 2010 deals with enforcement. Section 116 of the EA 2010 provides as follows (omitting provisions that apply only to Wales and Scotland or which concern admissions and exclusions):

> **Education cases**
>
> **116.—**(1) A claim is within this section if it may be made to—
>
> (a) the First-tier Tribunal in accordance with Part 2 of Schedule 17,
>
> (b) …
>
> (c) …
>
> (2) …
>
> (3) Schedule 17 (disabled pupils: enforcement) has effect.

30. Paragraph 3(a) of Schedule 17 to the Act confers jurisdiction on the FTT:

> **3.** A claim that a responsible body in England has contravened Chapter 1 of Part 6 because of a person's disability may be made —
>
> (a) to the English Tribunal by the person's parent or, if the person is over compulsory school age, the person;

31. Paragraph 4 of Schedule 17 (entitled 'Time for bringing proceedings') materially provides as follows (emphasis in bold added):

> **4.** (1) **Proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred.**
>
> (2) …
>
> (2A) …
>
> (3) **The Tribunal may consider a claim which is out of time.**
>
> (4) Sub-paragraph (3) does not apply if the Tribunal has previously decided under that sub-paragraph not to consider a claim.

32. It is relevant to observe that paragraph 4 of Schedule 17 is expressed in different terms to the provisions governing time limits for EA 2010 claims for disability discrimination brought before the County Court and the Employment Tribunal respectively. Section 118(1) of the EA 2010, applying to the former, provides as follows:

> **Time limits**
>
> **118.** (1) Subject to section 140AA proceedings on a claim within section 114 may not be brought after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the claim relates, or
>
> (b) such other period as the county court or sheriff thinks just and equitable.

33. Section 123(1), which governs time limits for disability discrimination claims in the Employment Tribunal, adopts the model of section 118(1) rather than paragraph 4 of Schedule 17 (albeit with a shorter time limit in paragraph (a)):

> **123.** (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.

34. I return below to consider the significance of the drafting adopted for paragraph 4 of Schedule 17 to the EA 2010 on the one hand and sections 118(1) and 123(1) of the same statute on the other.

An outline of the Appellant's grounds of appeal

35. The School advances three grounds of appeal before the Upper Tribunal.

36. Ground 1 is that the FTT erred in the procedure it adopted, namely by not determining the time issue as a genuine preliminary matter, contrary to its own Order and contrary to a fair and just case management approach.

37. Ground 2 is that the FTT erred in law in its approach to the statutory discretion to admit an out-of-time claim, including its use of the principles on the CPR relief from sanctions framework established by the Court of Appeal in *Denton v T.H. White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3926.

38. Ground 3 is that the FTT's findings of fact and evaluative conclusions on "material hindrance" and the factors said to justify an extension of time for M to lodge the disability discrimination claim were perverse and/or unsupported by evidence.

39. As a result, Mr Stenson submits, the FTT's errors vitiated its decision to admit the claim out of time. Rather, he contends, the claim in respect of the PX ought to have been struck out as being out of time and the associated findings and remedies must therefore be set aside.

An outline of the Respondent's reply to the grounds of appeal

40. As to Ground 1, the Respondent submits that the School's case is put without any reference to any specific rule or case law authority. On the contrary, it is argued, the FTT's approach was both entirely standard and entirely consistent with the its previous Orders and in any event a case management decision that was not only reasonably open to the FTT but necessary to further the overriding objective.

41. As regards Ground 2, the Respondent contends that the Appellant has singularly failed to articulate a consistent position on the correct legal test and has, albeit after several iterations, proposed a test that is plainly inconsistent with the unambiguous statutory language in issue.

42. So far as Ground 3 is concerned, the Respondent's case is that the School, in an appeal to the Upper Tribunal on a point of law, is seeking rather to re-argue the facts that were in issue before the FTT and on which the FTT reached reasonable conclusions with which the Appellant simply disagrees.

43. Accordingly, Ms Swords-Kieley for the Respondent invites the Upper Tribunal to dismiss the appeal on all three grounds.

Analysis: Ground 1

44. Mr Stenson submits that the FTT erred in the process it adopted by failing to determine the jurisdictional time issue as a genuine preliminary matter, contrary both to its own Order and to the overriding objective of dealing with cases fairly and justly. Thus, the Third Order directed that the issue of the time limit "should be considered as a preliminary matter at the start of the hearing", and yet the FTT heard evidence on the merits and then used its substantive findings to shape its decision on the time issue. Moreover, the FTT's concerns arising from the oral evidence at the hearing were determinative of the outcome of the decision to defer the time determination. Mr Stenson further contends that the FTT's approach unfairly involved exposing the School to a full merits hearing when the matter should never have proceeded

beyond the preliminary issue. As such, Mr Stenson submits, the FTT had 'put the cart before the horse' as it had allowed its impression of the merits to drive its determination of the time issue.

45. In summary, Ms Swords-Kieley submits that Ground 1, properly understood, is a perversity challenge, as it seeks to characterise the procedure adopted by the FTT as an unreasonable case management decision. However, she contends that the FTT's approach was entirely consistent with the Third Order. Furthermore, she argues that the substantive merits of the claim were a proper consideration for the FTT to take into account in the exercise of its discretion on the time limit issue. In addition, Ms Swords-Kieley submits that there was no question of any unfairness – the School was legally represented and fully prepared for the substantive hearing.

46. I agree with Ms Swords-Kieley that this ground of appeal goes nowhere. The procedure adopted by the FTT was entirely in keeping with the Third Order, which had expressly stated that "this matter should be considered as a preliminary matter at the start of the hearing on 14/07/25. Both parties should continue to prepare on the assumption that there will be a substantive hearing of the claim, as that is likely to happen (even if the panel ultimately decides not to grant permission to bring the claim out of time)." It really could not be any clearer – the FTT was directing that it would *consider* (albeit not necessarily *determine*) the time issue as a preliminary matter. There was no undertaking to the effect that the FTT would give judgment sequentially. Further, and in any event, the FTT's decision to proceed as it did was well within the generous ambit of its discretion to determine case management issues as it saw fit. Nor was there any unfairness or prejudice to the School in the procedure adopted – the process was both clear and clearly explained. Furthermore, there was nothing inherently unfair in the FTT considering the merits (or its impression of the merits) of the substantive claim.

47. Accordingly, Ground 1 does not succeed.

Analysis: Ground 2

An overview of the School's case

48. Ground 2, which is that the FTT erred in law by applying an incorrect legal test on the time question, lies at the heart of this appeal. Mr Stenson submitted that the FTT had misdirected itself by applying the three-stage *Denton* test to the admissibility of the claim. He argued that the principles enshrined in *Denton* were directed to dealing with case management sanctions in general civil litigation (e.g. in the context of failures to comply with court orders or time limits within extent proceedings). They were not devised as a vehicle for altering or relaxing statutory limitation periods, which are governed by their own legislative schemes. Thus, the FTT's application of the *Denton* principles had the effect of shifting its focus from a question of statutory limitation to a case management issue about relief from procedural sanctions in the context of ongoing litigation. This encouraged the FTT to treat the admissibility of a late disability discrimination claim in the same way as ordinary deadline breaches in CPR-governed civil litigation, rather than as exceptions to a strict statutory time bar. As such, it risked re-characterising Parliament's six-month time limit as a flexible case management guideline rather than as a substantive limitation period.

49. Mr Stenson noted that under paragraph 4(1) of Schedule 17 to the EA 2010 there was simply no power to bring a disability discrimination claim after the expiry of six months. Instead, the FTT "may consider" an out of time claim under paragraph 4(3). In contrast, the County Court and Employment Tribunal time limits in sections 118 and 123 respectively could be extended where it was "just and equitable" to do so. However, Mr Stenson observed that the "just and equitable" test had applied to claims under the DDA 1995 (see paragraph 10(3) of Schedule 3). The Explanatory Notes to the EA 2010 indicated that the legislative purpose had been to harmonise and restate the existing time limit provisions. It followed, he submitted, that the intended continuity with the DDA 1995 meant that the relevant test for the exercise of the discretion under paragraph 4(3) remained a "just and equitable" test, for which the key principles were summarised by Laing J in *Miller v Ministry of Justice* [2016] UKEAT 0003/15/1503 (at [10]), notably that "Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule."

50. Mr Stenson further contended that the absence of any power to bring a disability discrimination claim after six months meant that there was necessarily a strong presumption against considering an out of time claim. Therefore, on a proper purposive reading of the EA 2010 provisions, the FTT was charged with applying the just and equitable test combined with a strong presumption against considering an out of time claim. Any broader discretion to consider late claims would have detrimental consequences, in that a clear jurisdictional bar would be subject to being unpicked by an unprincipled case by case approach that undermined predictability and finality.

An overview of M's case

51. Ms Swords-Kieley submitted that the School's case was fundamentally misconceived. In short, she argued that paragraph 4(3) conferred on the FTT a general discretion to consider a claim that was out of time. Given the plain difference in statutory language, that discretion was not synonymous with the "just and equitable" discretion expressly embodied in sections 118 and 123. Furthermore, the FTT's judgment was entirely consistent, both in substance and in form, with the correct exercise of its discretion under paragraph 4(3). However, if she was mistaken about that, and the "just and equitable" test applied, Ms Swords-Kieley submitted that the FTT's judgment was in any event consistent with that approach.

The Upper Tribunal's consideration of Ground 2

52. Ground 2 requires the determination of two issues – (i) the correct test to be applied under paragraph 4(3) of Schedule 17 to the EA 2010; and (ii) whether the FTT applied that correct test.

<u>The correct test under paragraph 4(3) of Schedule 17 to the Equality Act 2010</u>

53. I reject Mr Stenson's submission that paragraph 4(3) is governed by the same "just and equitable" test (or, as he further developed his submissions, the "just and equitable" test allied with a strong presumption against the admission of a late claim)

as sections 118 and 123. Parliament's choice of a different test for the treatment of late disability discrimination claims – a test that is linguistically different both to sections 118 and 123 and to the statutory predecessor of paragraph 4(3) in the DDA 1995 – must be taken as deliberate. The effect of the clear distinction in the statutory language is not undermined by the relatively high-level and generalised statements in the Explanatory Notes as to the policy intention.

54. There is, moreover, an important and fundamental difference of conceptual approach adopted in section 118 (together with section 123) and paragraph 4(3) respectively. The former sets a statutory time limit which can then be extended where the "just and equitable" test is met. The latter sets an absolute and immutable legislative time bar but then invests the FTT with a discretion to consider a disability discrimination claim which is (and remains) out of time. Thus, paragraph 4(3) does not empower the FTT to exercise its discretion to find that a claim brought after six months is in fact *in time*. Rather, it enables a FTT to consider a claim notwithstanding that it has been brought *out of time*. This reflects the fact that sections 118 and 123 are predominantly concerned with adversarial party and party claims whereas wider public interest considerations are (or at least may be) at play with paragraph 4(3). It also means that paragraph 4(3) has to be read on its own terms and not as in some way a mirror provision of the "just and equitable" test in sections 118 and 123.

55. Thus, as Saini J acknowledged in *R (on the application of AA v Secretary of State for Education* [2022] EWHC 1613 (Admin); [2022] ELR 700 (at [77]; and see to similar effect [118]-[120] of the same judgment):

> … there are substantial benefits to FTT complainants which do not apply in the County Court. To summarise: there are no court fees or formal pleading requirements; the procedure is designed to be less adversarial and more flexible, informal and inquisitorial; there is the benefit of specialist judges who have experience and knowledge of disability issues; and the range of remedies available is far wider (being designed to put the child's education back on track).

56. Saini J further emphasised the importance of the wider context to disability discrimination claims in schools (under the sub-heading "Benefits to the wider group of disabled pupils in the school and its potential pupils"):

> 125. Under the EA 2010, disability is treated differently from other protected characteristics (where the focus is on equal treatment) in that schools often must treat disabled pupils more favourably. Schools are required to make reasonable adjustments to ensure disabled pupils are not at a substantial disadvantage. For this reason, it is right and reasonable that the FTT should align with this principle and prioritise educational remedies that require schools to meet their additional duties for disabled pupils, benefitting the individual child by ensuring their education remains on track and also benefitting other disabled pupils (and potential pupils) at the school by improving practice – rather than focusing on financial compensation for individual families. While this may not directly benefit a child that has left the school, the intention is to facilitate systemic change that will benefit other disabled pupils (or potential pupils) at the school.

57. The potential wider impact of a disability discrimination claim in the education context was also recognised by Upper Tribunal Judge Rowland in *ML v Tonbridge Grammar School* [2012] UKUT 283 (AAC): "The right of appeal to the First-tier Tribunal is, in my judgment, intended to be a means of improving practice in schools with a view to eliminating disability discrimination against *all* pupils" (paragraph 24, emphasis added).

58. Accordingly, the extensive corpus of authorities in the case law on the jurisprudence of the "just and equitable" test does not have a direct or even an indirect read across to the application of paragraph 4(3). Read on its own terms, paragraph 4(3) plainly invests the FTT with a general discretion **–** "The Tribunal may consider a claim which is out of time", no more and no less. This was confirmed by Judge Lane in *RD and GD v The Proprietor of Horizon Primary (Responsible Body) (SEN)* [2020] UKUT 278 (AAC) (emphasis added):

> 28. The general rule under paragraph 4(1) of Schedule 17 of the Equality Act 2010 is that the proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred (italics added). However, paragraph 4(5)(b) states that conduct extending over a period is to be treated as occurring at the end of the period. This effectively moves the start date to the end of the period over which the conduct occurred. A course of continuing conduct is not defined in the Equality Act 2010. In addition to this provision, paragraph (3) states that a Tribunal may consider a claim which is out of time.
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> 29. The first decision the Tribunal has to make at this stage is whether the conduct complained of extended over a period. If the Tribunal decides that it did not, the Tribunal may in any event consider a late claim even where time has expired under paragraph 4(3)). It is plainly not correct, therefore, to state a claim must be brought within 6 months. The legislation does not sound an automatic death knell.
>
> 30. If a judge is given a discretion, s/he must exercise it (i) consciously and (ii) judicially. There are many cases on this point, but the principle is set out succinctly by Upper Tribunal Judge Markus in *T J v Secretary of State for Work and Pensions (ESA)* [2014 UKUT 445 (AAC) at [13]:
>
> > 'As the Tribunal of Commissioners said in *R(IB) 2/04* at paragraph 94, there must be a conscious exercise of a statutory discretion of the tribunal, and (if a statement of reasons is requested) reasons should be given as to why it was exercised in the manner it was. This was said in relation to a different discretion but the principle is of general application: see *Stovin v Wise* [1991] AC 923 at 950B.'

59. The FTT, in granting permission to appeal, stated that "in general terms, guidance from the Upper Tribunal on how the First-tier Tribunal should approach late admissions would be welcome." As Judge Lane indicated, the short answer is that the discretion under paragraph 4(3) should be exercised consciously and judicially. Ultimately, that is a matter for the good judgement of the FTT (see *JL v Governing Body of Cherry Lane Primary School* [2019] UKUT 223 (AAC); [2019] ELR 505 at paragraph 38). However, and in broad summary, the FTT may have regard to any

factors that it considers to be relevant, subject only to the condition that it does not act irrationally or perversely. Those factors may include (but are not limited to) the length of time by which the claim is late, the reasons why the claim was late, the merits (or apparent merits) of the claim, the importance of the claim to the claimant and/or the child, the likely prejudice to either party (depending on whether or not the claim is considered out of time) and the wider public interest in the claim being heard. It would be wrong for the Upper Tribunal to be any more prescriptive, given the open-textured nature of the discretion conferred by paragraph 4(3).

Did the FTT apply the correct test under paragraph 4(3) of Schedule 17?

60. To recap, Mr Stenson submits that the FTT fell into error and applied the *Denton* test to the time limit question, resulting in a material error of law. In response, Ms Swords-Kieley submits that the FTT had in substance applied the correct test under paragraph 4(3) and, if it did not, and had applied the wrong test, there was no material effect on the outcome.

61. There are several reasons why a respectable case can be made out for arguing that the FTT applied the *Denton* test to the time limit question. First, and in the pre-hearing case management process, the FTT's three Orders explicitly framed the time limit question by reference to the *Denton* criteria – see especially paragraph 5 of the First Order. Secondly, in its reasons for the "Late admission of the claim", the FTT again expressly stated that it had "considered the three-stage process set out in *Denton*". Thirdly, the FTT's reasons at paragraph 8 of its decision are organised by reference to those three stages. Thus, paragraph 8(a) addresses the length of the delay beyond the six-month time limit, paragraph 8(b) deals with the reasons for that delay while paragraphs 8(c) and (d) then consider other relevant circumstances.

62. There are, however, indications that the FTT was simply using the *Denton* taxonomy as a means of organising its reasoning. In paragraph 4 of its First Order the FTT expressly acknowledged that the "Tribunal has a discretion to consider a Claim which is out of time", correctly referencing paragraph 4(3) of Schedule 17. Further, although in paragraph 8 the FTT acknowledged that it had "considered the three-stage process set out in *Denton*", this was said in the context of the FTT's conclusion that "it is just to admit the claim for consideration" – and not that it was extending time as such. Paragraph 8(a)-(d) then refer to factors which are relevant to the exercise of the paragraph 4(3) discretion. Furthermore, paragraph 9 records the FTT's conclusion that "there are strong reasons for admitting the claim for consideration out of time". This demonstrates beyond peradventure that the FTT had ultimately directed itself to the correct question – namely, *should the claim be considered even though it was out of time*, and not *should time be extended to admit the late claim*.

63. Therefore, on a fair reading of the decision as a whole, I conclude that the FTT applied the correct test under paragraph 4(3).

64. Further, and in any event, if I am wrong about that, and in fact the FTT applied either the *Denton* test or the "just and equitable" test, the effect of such a misdirection was not material as in doing so the FTT would have been applying a more demanding standard for the admissibility of the claim, e.g. by the assertion that "late Claims are

normally only admitted in exceptional circumstances or where there are very strong reasons".

65. It follows that Ground 2 does not succeed.

Analysis: Ground 3

66. The FTT concluded that "the cumulative effect of the Claimant's circumstances materially hindered her ability to bring a claim on time" (paragraph 8(b)). These considerations may be summarised under the following heads: hypothetical IRP proceedings, the relative simplicity of submitting a straightforward claim, illness and medical treatment experienced by C's grandmother, M's eviction proceedings, C's EHCP and school placement and the urgent medical treatment required by M's representative. The School's case, in essence, was that the FTT's conclusion that M was materially hindered in bringing her claim by the cumulative impact of these various factors rested on findings that were either irrelevant, inconsistent or supported by the evidence.

67. However, I agree with Ms Swords-Kieley's submission that this third ground of appeal is no more and no less than an impermissible attempt to re-argue the facts as found by the FTT. This ground of appeal asserts that the FTT's factual findings were perverse, but it is axiomatic that such a charge faces a high threshold for success, not least as the weight to be attached to any particular piece of evidence was a quintessential question of fact for the FTT to determine. There is no escaping from the reality that Mr Stenson was inviting me to revisit the FTT's factual findings. That invitation must be both resisted and declined by the Upper Tribunal. As Leveson LJ held in *Secretary of State for Work and Pensions v Roach* [2006] EWCA Civ 1746 (at paragraph 31), "assuming that the fact finder's analysis was open to him or her, an appellate court or tribunal can only intervene in that process based upon an error of law which is not the same as pointing to a different analysis of the evidence."

68. It follows that Ground 3 is not made out.

Conclusion

69. As none of the three grounds of appeal succeeds, I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss the School's appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 24 April 2026