IN THE UPPER TRIBUNAL **Case No.** HS/2374/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Appellants were represented by Mr Matthew Purchase of counsel, instructed by Clifford Chance LLP

The Respondent was represented by Ms Katherine Eddy of counsel, instructed by Stone King LLP

Decision: The First-tier Tribunal's decision dated 19 January 2017, as amended on review on 14 June 2017, is set aside insofar as it found that the Respondent had not discriminated against the Appellants' son by not allowing him to attend the school's nursery in the afternoons. There is substituted a finding that the school erred in failing to reconsider the possibility of using its own funds to enable him to attend the nursery in the afternoons when its financial position eased in 2016 and it became clear that assistance could not be gained from other sources.

REASONS FOR DECISION

1. This is an appeal, brought by the parents of Joshua with my permission, against a decision of the First-tier Tribunal, dated 19 January 2017 and amended on review on 14 June 2017, whereby it dismissed the Appellant's claim against the governing body of Sinai Jewish Primary School ("the school") for various forms of relief on the ground that the school had discriminated against Joshua contrary to the Equality Act 2010. I limited my grant of permission to two grounds.

2. Sections 15 and 20 of the 2010 Act provide, so far as is material –

> "**15.**—(1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) …"

> "**20.**—(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> (4) ….
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
> (6) ….

> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
> …
> (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.
> …
>
> **21.**—(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."
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> "**85.**—(1) ….
> (2) The responsible body of such a school must not discriminate against a pupil—
> (a) in the way it provides education for the pupil;
> (b) in the way it affords the pupil access to a benefit, facility or service;
> (c) by not providing education for the pupil;
> (d) by not affording the pupil access to a benefit, facility or service;
> (e) by excluding the pupil from the school;
> (f) by subjecting the pupil to any other detriment.
> …
> (6) A duty to make reasonable adjustments applies to the responsible body of such a school.
> …"

3. It was not in dispute before the First-tier Tribunal that Joshua was a pupil with a disability for the purposes of the 2010 Act. The First-tier Tribunal said –

> "14. Written evidence from Dr. C. DeVile, Consultant in Paediatric neurology at Great Ormond Street Hospital, dated March 2016, confirmed that Joshua has a diagnosis of mild bilateral spastic/dystonic cerebral palsy, oropharyngeal dysphagia with silent aspiration and gastro-oesophageal reflux. She describes him as having difficulties in being able to eat/drink and that he can choke on his own saliva. A report from Dr. M. Smith, educational psychologist, dated November 2015, confirms that Joshua also has a diagnosis of autistic spectrum disorder (high functioning). She identifies that Joshua needs support to meet additional needs relating to eating/drinking skills; physical/motor development; interacting, communicating and building friendships with peers; sensory processing skills and successfully managing changes to his routines and transitions. …"

4. Nor were most of the primary facts in dispute. Joshua was born in December 2011. He joined the nursey at the school in September 2015, when he was still three years old. His older sister was already a pupil in the school, which was a large, three-form-entry, voluntary aided modern Orthodox Jewish primary school in the London Borough of Brent. It was agreed that, until January 2016, Joshua would attend for mornings only but his parents had indicated right from the outset that they would like him to stay for the afternoon sessions for at least three days a week and it

was agreed that the position would be reviewed in January 2016. Of 42 children who attended the nursery, 38 attended during the afternoon (and for lunch) as well as the morning and only 4 attended only in the morning. However, the school had still not arranged for Joshua to attend during the afternoons when the discrimination claim was brought in July 2016, because it considered that an extra member of staff was required to supervise Joshua and it did not have one.

5. In the claim a number of issues were raised but those that are now material are allegations that the school discriminated against Joshua because of his disabilities, both in not allowing him to attend in the afternoons and in not allowing him to stay for lunch. It appears that Joshua's parents' unhappiness with the school was such that they removed him from the school and placed him in a different school from September 2016. Nonetheless, they persisted with their claim, as they were entitled to do, and, not having succeeded before the First-tier Tribunal, have appealed to the Upper Tribunal. They were not represented before the First-tier Tribunal but are now represented by Mr Matthew Purchase of counsel. The school has been represented before both the First-tier Tribunal and the Upper Tribunal by Ms Katherine Eddy of counsel. I am grateful to both of them for their clear and helpful submissions.

6. As regards Joshua's exclusion from the afternoon sessions, the school put its case very simply in its response to the claim (which was not drafted by Ms Eddy) –

> "18. Although the nursery timetable was adjusted to include Joshua in activities, he was unable to stay for the afternoon session because the school considered it would have been too expensive to employ an extra member of staff to supervise him. Moreover, at the time, Sinai had a licensed deficit budget of over £250,000. This means the school was in debt to Brent for over a quarter of a million pounds. The school was restricted by Brent from taking on any additional members of staff for the duration of the licence without their consent. It made school life very tough for the staff as they were more than aware of the constant need to monitor and control finances.
>
> 19. Sinai did not receive additional funds for Joshua, but arranged for him to be supported on a 1:1 basis during his morning session. They did so by redeploying an existing member of staff. It was explained to [Joshua's mother] that should the school receive funding through an EHCP for Joshua then he would be able to stay in the nursery.
>
> 20. Sinai accepts that the refusal to allow Joshua to stay for the afternoon session of the nursery may amount to unfavourable treatment and that treatment was a result of his disability, but Sinai believes that the treatment can be justified. Sinai believes that their legitimate aim was to keep Joshua safe and the school were unable to ensure his safety had he been allowed to stay. It would have been too dangerous to allow Joshua to remain in the nursery without a trained staff member supervising him on a 1:1 basis. Sinai does not believe this refusal put Joshua at a disadvantage educationally as the nursery rescheduled all Joshua's learning activities so that they took place in the morning during his attendance."

7. At the hearing before the First-tier Tribunal, Joshua's parents accepted that he needed 1:1 supervision when eating or drinking but did not accept that he generally needed that degree of supervision in the classroom. However, the First-tier Tribunal

disagreed and accepted the school's assessment of his need. That finding is not challenged.

8. The First-tier Tribunal also received evidence as to the funding of the school. The headteacher confirmed the school's poor financial position, which had led to 19 lunchtime assistants being laid off, and also explained that the funding from the local authority covered only the morning sessions in the nursery, which provided the 15 hours a week entitlement to nursery provision, and that it was accepted that, in the absence of additional funding through an EHC assessment, the school had to pay for any support required in the morning sessions by children with additional needs due to disability. However, a separate fee was payable by parents in respect of afternoon sessions and that did not cover such support. The school had helped Joshua's parents to access other streams of funding but had had no success in persuading Hertfordshire County Council, in whose area Joshua lived, that funding should be provided through an EHC assessment, since that Council apparently took the view that the need was medical rather than educational (which seems doubtful), and also that "early years inclusion funding" and "emergency" funding could be sought only where a child attended a nursery within the Council's own area. The First-tier Tribunal rejected a suggestion that the school had discriminated against Joshua by failing to apply for funding, although it did express concern about the school's expertise in that regard and commented that emails from the chair of governors and the headteacher "did not seem to reflect an understanding of the support that needs to be provided from within a school's own resources and when/how to trigger additional support from the LA". Implicitly at least, it accepted the school's argument that there was no unlawful discrimination if the school could not afford to provide the requisite support from its own funds or from other funds it could access and that that was the position in this case.

9. As regards staying for lunch, Joshua's parents' case before the First-tier Tribunal was that Joshua had been allowed to stay for lunch on only one occasion without his mother being present whereas the other children who attended only the morning sessions had been allowed to stay for lunch whenever their parents wished and did so on numerous occasions, particularly on winter Fridays when the school anyway closed early for Shabbat. However, the headteacher said that there was no general offer to other parents to allow their children to stay at lunchtime but that the school tried to accommodate requests, particularly when the school closed early. The First-tier Tribunal recorded him as saying that –

> "26. … Joshua's assigned individual support was not available during lunchtimes to support him as she already had other lunchtime supervisory duties involving other children across he school. [The headteacher] explained that he had never said that Joshua could not stay for a lunchtime session but had always required one of [his parents] to come into school to feed Joshua. Written evidence contained in an email dated May 2016 supported this as being the approach that the school had adopted."

Thus, again, the difficulty was the lack of anyone being available to supervise Joshua unless one of his parents came in. The First-tier Tribunal accepted the school's evidence that each request from other parents that their child be allowed to stay for lunch was considered on its own merits depending on the staffing level and number of pupils attending lunch that day. It continued –

> "27. … We considered whether the school had treated Joshua unfavourably by requiring parents to support him over lunchtime sessions. We identified that whilst it was unfavourable treatment towards Joshua it was not discriminatory as it was a proportionate response given the accepted level of individual support/attention that Joshua required and the available resources of the school both financially but also in finding an appropriate member of staff.".

10. The parents now appeal on two grounds. In the first, it is alleged that the school failed to place relevant information about its finances before the First-tier Tribunal, since such information would have shown that the school's financial position was not as dire as had been suggested. In particular, it is submitted that the school had a surplus of income over expenditure amounting to £275,601 in the financial year 2015-16 and that in March 2016 it was permitted to have a deficit of £41,977 which was more than £30,000 more that its actual deficit which had been reduced to £9,000 by April 2016. This, it is said, would have been highly relevant to the question whether the school could have funded support for Joshua. When giving permission to appeal on that ground, I suggested that it raised the more fundamental question as to the extent to which, if at all, the financial position of the school was material. In the second ground of appeal, it is said that the First-tier Tribunal failed to address "the fact" that the parents were willing to fund a support assistant during lunch.

11. Both grounds of appeal are resisted by the Respondent. As regards the first, it is argued that the Appellants are not entitled to rely on evidence that was not before the First-tier Tribunal nor to advance arguments not advanced before the First-tier Tribunal. In any event, it is said that the information provided to the First-tier Tribunal in the response to the appeal was correct and is not shown to be incorrect by the information to which the parents have referred in this appeal to the Upper Tribunal, which, it is argued, the school had not been required to produce. It is also submitted that the cost of an adjustment is relevant to the question whether it is reasonable and, while cost is not sufficient by itself to justify discriminatory provision, in this case the school had had the legitimate aim of keeping Joshua safe. As regards the second ground, the Respondent argues that this is an attempt to raise an argument that was not advanced before the First-tier Tribunal and that in any event the parents' willingness to pay would not have been a relevant consideration in the light of section 20(7) of the 2010 Act.

12. An appeal to the Upper Tribunal lies only on a point of law although, if the Upper Tribunal finds there to have been an error of law, it may not only set the First-tier Tribunal's decision aside but may remake the decision itself rather than remitting the case. As both parties have acknowledged, new evidence may be relevant to the question whether the First-tier Tribunal erred in law for two reasons that are material to this case: either because it shows that there was a failure by the respondent to provide to the First-tier Tribunal all relevant evidence or because it is uncontentious evidence showing that the First-tier Tribunal made a material error of fact.

13. In one sense, it is arguable that these two approaches are really different aspects of the same point, both being concerned with the fairness of the proceedings before the First-tier Tribunal.

14. The Appellants rely principally on *R.(JF) v London Borough of Croydon* [2006] EWHC 2368 (Admin) where, in relation to an appeal to the special educational needs and disability tribunal, Sullivan J said –

> "11. … Although the proceedings are in part adversarial because the Authority will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for a Local Education Authority to say that the parents could have unearthed the information for themselves if they had dug deep enough.
>
> 12. I realise that evidence is not given on oath before the Tribunal but it is no accident that when witnesses do give evidence in a court they promise not merely to tell the truth and nothing but the truth but also the whole truth. This is a recognition of the obvious that telling only part of the truth (that part which is favourable to one's own case) may be as misleading as telling a positive untruth. …"

15. Alternatively, the Appellants argue that the First-tier Tribunal made a material error of fact and argue that the conditions for admitting evidence to prove such an error, laid down by Lord Denning MR in *Ladd v Marshall* [1954] 1 W.L.R. 1489 are satisfied. He said –

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

16. That case was decided in relation to ordinary civil litigation but it was held in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 that the same principles applied also to public law appeals limited to points of law, although they might be departed from in exceptional circumstances where the interests of justice so required. In *R (Iran)*, the Court of Appeal said that the concept of an error of law included –

> "Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made".

17. Referring in *Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428 to the principles in *Ladd v Marshall*, Bean LJ, with whom Tomlinson and Floyd LJJ agreed, said –

> "27. There are cases in which an over strict application of the first principle against a party who appeared without representation, as Mr Hussain did in the First-tier Tribunal, can be contrary to the overriding objective of dealing with cases justly. I prefer, therefore, rather than asking whether a consultant's report could have been

> obtained with reasonable diligence before the hearing in the FTT, to concentrate on the question of whether it would have been potentially decisive in Mr Hussain's favour or at least have had an important influence on the result of the appeal. …"

18. Thus, in *JF* the new evidence showed a procedural failing that *might* have caused the tribunal to make an error of law, whereas, in *R (Iran)*, it was contemplated that new evidence might satisfactorily prove to an appellate court or tribunal that a fact-finding tribunal had made an error of fact from which it might be inferred that there had been an error of law.

19. The Respondent argues that it is not open to the Appellants to rely in this appeal on evidence that was not before the First-tier Tribunal. I accept that parties may not submit new evidence at will on an appeal on a point of law (see *Oxfordshire County Council v GB* [2001] EWCA Civ 1358 at [9] and [10]). However, that is clearly not an answer insofar as the Appellants rely on the approach taken in *JF*, since the very question on that approach is whether the new evidence ought to have been before the First-tier Tribunal. Nor is it an answer insofar as the Appellants rely on the approach taken in *Ladd v Marshall*, as refined in *R (Iran)* and *Hussain*, if the Appellants can show that unfairness has arisen.

20. The new evidence that the Appellants have produced in this case consists of documents showing the income and expenditure of the school in the financial year 2015-2016 and a Licensed Deficit Application and Agreement Form for 2014-15. The Respondent has produced the Licensed Deficit Application and Agreement Form for 2015-16. The 2014-15 Form, signed in July 2014, shows that the London Borough of Brent had authorised the Respondent to have a deficit of £139,412 at 31 March 2015, £41,977 at 31 March 2016 and nil at 31 March 2017. However, plainly things did not go according to plan because the 2015-16 form, signed in July 2015, shows that the balance brought forward at the end of 2014-15 had been a deficit of £284,988 and that Brent had authorised the Respondent to maintain a deficit revenue balance for a period not exceeding three financial years commencing on 1 April 2015. What the income and expenditure documents show is that, as the Appellants submit, the Respondent had in fact managed to reduce the deficit to about £9,000 by 31 March 2016. (I say "about" because there appears to be a small discrepancy in the two sets of figures for the carried forward deficit that are before me, which suggests that there was an adjustment at some stage and I am not sure which figure is the adjusted one.) I accept the Respondent's point that the target of £41,977 at 31 March 2016 agreed in 2014 had been overtaken by the agreement the following year, but, while the latter agreement did not specify the rate at which the deficit should be eliminated, it did allow it to be eliminated over three years and the Respondent clearly did much better than that.

21. It is not suggested by the Appellants that the Respondent's response to the claim before the First-tier Tribunal was deliberately misleading but it is submitted that it was not in fact accurate and that it inevitably had the effect of misleading the First-tier Tribunal with the result that the First-tier Tribunal's decision was based on an error of fact. It may have been true at one stage that the school "had a licensed deficit budget of over £250,000", meaning that it "was in debt to Brent for over a quarter of a million pounds", as had been stated in the response to the claim before the First-tier Tribunal, but I accept the Appellants' submission that, in the light of

documents now before the Upper Tribunal, that was not the whole truth and that it was not true for the whole of the period under consideration, which ran from January 2016 (since it had been agreed that Joshua would attend the school only in the mornings until then) to July 2016. The school had a licensed deficit but, while the deficit had been over £250,000 in April 2015, it had been reduced to £9,000 by April 2016 and the licence to carry a deficit lasted until March 2018. Thus, whether by design or otherwise, the measures taken by the school appear to have been more stringent than perhaps they needed to have been, although I do not mean to imply by that it was necessarily wrong to have taken those measures.

22. I entirely accept that a school is not required routinely to provide comprehensive financial documents in a case like this if its finances are not put in issue but, if it seeks to rely on a simple statement of its financial position, that statement must be accurate. Here it was not and it created the impression that the school could not possibly afford to employ an additional member of staff in the afternoons and, while it was true that it "was restricted by Brent from taking on any additional members of staff for the duration of the licence without their consent", the impression created was that the extent of its indebtedness was such that there was no point in asking Brent for such consent. The First-tier Tribunal plainly proceeded on that basis.

23. I also accept that, in considering whether there has been unfairness arising from an inaccurate statement, regard has to be had to the way that a claimant has put his or her case. However, in this case Joshua's parents had referred in their claim to the school's refusal to provide supervision for Joshua in the afternoon and, while they may have argued at the hearing that he did not need 1:1 supervision, that was inevitably in the light of the information provided about the school's financial provision. I accept also that the fact that a party could have obtained evidence before the hearing is material when considering whether there has been unfairness in the First-tier Tribunal making an error of fact but, where the one party has relied on an inaccurate statement of the true position, the failure of the other party to obtain evidence to prove the inaccuracy is unlikely to be persuasive unless the evidence was readily to hand or the inaccuracy obvious. It seems to me that one reason for the approach taken in *JF* is an appreciation that a public authority is likely to be better able to provide evidence than an unrepresented citizen, just as it was clearly considered in *Hussain* that it may not be realistic to expect an unrepresented litigant to realise what evidence might be sought and to act in the way that a lawyer would.

24. I am therefore satisfied that, if the school's financial position was relevant, the First-tier Tribunal's decision was wrong in law. It proceeded on the basis of misleading information provided by the Respondent that has been shown not to have been entirely accurate by uncontentious evidence that the Appellants could not reasonably have been expected to find before the hearing of their case by the First-tier Tribunal.

25. The First-tier Tribunal appears to have had some doubt as to the legal nature of the Appellants' case. As regards section 15 of the 2010 Act, it observed that the Appellants had not identified a comparator and, as regards sections 20 and 21. it observed that they had not identified a "provision, criterion or practice, for the purpose of section 20(3), it apparently taking the view that neither subsection (4) nor

subsection (5) of that section was engaged. It seems to me that the Appellants' case really fell within section 15 as they were arguing that, due to Joshua's disability, he was not allowed to attend the school in the afternoons subject to the condition that his parents paid the requisite fee when other children whose parents paid the fee were. Indeed, the school more-or-less accepted that Joshua was being treated less favourably than other children as a result of his disability but argued that that was justified because it met the legitimate aim of keeping him safe. But, given that section 20(11) has the effect that the phrase "auxiliary aid" is to be read as including "auxiliary service", the claim could perhaps also have been regarded as having been brought under section 20(5). I do not think it really matters whether it was brought under section 15 or under section 20(5).

26. As is conceded on this appeal and as was implicitly accepted before the First-tier Tribunal when the Respondent relied on the school's financial position, the financial position of the school was relevant when considering for the purpose of section 15 whether excluding Joshua from attendance in the afternoons was a proportionate means of keeping him safe. This is because the obvious alternative means of keeping him safe would have been to provide the necessary level of supervision, which would have involved paying a member of staff. The school was entitled to argue that the cost of doing that would have been disproportionate if, in the light of the fact that there was no right to free nursery education exceeding 15 hours a week, no external public funding was available. The saving of money may not be a legitimate aim in itself but it was relevant to the issue of proportionality because excessive expenditure on Joshua's would have a detrimental effect on the other children in the school. Equally, cost is relevant when considering what steps it is reasonable to take to provide an adjustment for the purposes of section 20(5). However, it is noteworthy that the school did not argue that it could never be appropriate for it to fund extra supervision for a pupil attending non-compulsory education and I consider that it was right to take that approach. As the Appellants have pointed out in the light of the financial documents they have produced, there was no separate budget for the nursery; the fees were treated as income of the school as a whole and the costs of running the nursery were not distinguished from other costs. What the school argued was that its particular financial crisis meant that it was unable to provide the necessary supervision to allow Joshua to attend in the afternoons. I am therefore satisfied that the true extent of the school's financial difficulties at the material time was relevant so that the inaccuracy in the response made to the claim was potentially important. (See, also, the Department of Education's advice in *The Equality Act 2010 and schools* (May 2014).)

27. That being so, it is common ground that the question arises whether there is a realistic possibility that the First-tier Tribunal would have reached a different decision had it been aware of the true situation. The Respondent argues that there is not because finance was not the only reason that the First-tier Tribunal rejected the Appellants' case. I do not agree.

28. Once the First-tier Tribunal had rejected the Appellants' argument that Joshua did not need 1:1 supervision the whole time, the schools' financial provision was the difficulty. It was not in issue that the school did not have an existing member of staff available to provide supervision in the afternoons and so the school would have had to employ someone else and it was the cost of doing that was said to be the obstacle

(although no doubt an existing member of staff would have had to be paid too). It was not suggested that, apart from the cost and the need to get Brent's consent, finding a new member of staff would have been impossible. When, at paragraph [27] of its statement of reasons, the First-tier Tribunal referred to the non-availability of a member of staff, it was dealing with the issue of Joshua staying for lunch from time to time. That was a different issue to which I will come in a moment.

29. In my judgment there is a realistic possibility that the First-tier Tribunal would have reached a different conclusion had it been aware of the substantial reduction in the deficit achieved by the end of March 2016 because, as the Appellants argue, if the extent to which income exceeded expenditure in 2015-16 had been continued for any significant part of the following year, the school would have been substantially in credit. The cost of employing a person to supervise Joshua for the afternoon sessions (including lunchtime) would have been modest – it might perhaps not have been quite as modest as the Appellants suggested but, on the other hand, his parents would have been paying a fee that might have exceeded the other marginal costs of Joshua staying on for the afternoons – and it would have been for a relatively short period until Joshua was old enough to attend the reception class, which would have been in September 2016. Moreover, the possibility of attending the afternoon sessions was important for Joshua, not only for their intrinsic value but because he would no longer have been treated unfavourably and would have stopped feeling left out and because it would have helped prepare him for full-time school. In all these circumstances, the First-tier Tribunal might have considered that the expenditure would not have been disproportionate and Brent might have consented to the part-time employment of an extra person had it been asked.

30. For all these reasons, I am satisfied that the First-tier Tribunal's decision that there was no discrimination involved in excluding Joshua from the afternoon sessions was wrong in law because it was materially misled. That part of its decision must be set aside.

31. However, in relation to the question whether, as a pupil attending only morning sessions, Joshua should have been allowed to stay for lunch without one of his parents being present to supervise him, slightly different considerations apply. The complaint is that the First-tier Tribunal failed to have proper regard to the Appellants' offer to pay for a supervisor and it is true that the First-tier Tribunal did not directly address that point and still regarded the financial resources of the school to be relevant. That, I consider, was an error. Section 20(7) does not appear to be relevant, even if this was a section 20(5) case, because it does not apply where it would not be reasonable to expect the school to make the adjustment in the absence of external funding and the school did not require, or even invite, Joshua's parents to provide their own funding.

32. However, I am satisfied that the error was not material. This is where the First-tier Tribunal expressly referred to the lack of availability of other members of staff in paragraph [27], clearly accepting the headteacher's evidence recorded in paragraph [26] to the effect that the member of staff who supervised Joshua during the morning could not do so at lunchtime because she had other lunchtime supervisory duties, presumably as a consequence of the school having made 19 lunchtime assistants redundant. He had also explained that the teaching staff initially

supervised the pupils at lunchtime and served their meals, before fitting in their own lunches while there was a reduced level of supervision. The First-tier Tribunal was entitled to conclude that there was no existing member of staff who could reasonably be expected to supervise Joshua at lunchtime, even if paid to work for the extra period. The First-tier Tribunal did not expressly consider in paragraphs [25] to [27] – the section of its decision headed "Staying for lunch" – the possibility of a person being recruited specially for the purpose of providing support for Joshua at lunchtimes but it had already referred at paragraph [17] to the evidence of the email correspondence between the Appellants and the nursery manager of the school.

33. This showed that it was only on 26 May 2016 that the parents' offer to fund supervision at lunchtime was made and that the nursery manager had replied on the next day, saying –

> "In theory I would like to say yes straight away, however there are legalities and logistics of staffing that will need to be sorted out before this can happen. We will need to find the 'right' person who will need to be trained accordingly to meet Joshua's needs at lunch time. Please leave it with me and I will discuss this further with SLT and get back to you as soon as possible. Please be aware that we break up for half term today therefore no roper discussion or decision will be made until after half term but of course we will do our very best to meet your requirements."

On 20 June 2016, the nursery manager had written –

> "I just wanted to let you know that we are still working on trying to get a suitable extra member of staff at lunchtime so that Joshua will be able to stay a couple of afternoons a week. We are doing our best to try and accommodate you and I will let you know as soon as I know."

Joshua's mother had replied on the following day, saying –

> "Thank you very much for doing your best to let Joshua stay. However, I am concerned that there is only a short while left to the end of term now and realistically unless something is put in place soon, it is going to get too close to the end of term to make this possible."

34. The First-tier Tribunal made no comment on that evidence. The natural inference is that it took the evidence at face value and found that the school had not ignored the offer to fund lunchtime supervision but that the school had been unable to recruit a suitable supervisor for the limited number of hours suggested within the time available. In other words, the offer to fund lunchtime supervision had been made too late to have any practical effect. That was a conclusion that it was entitled to reach and I am not satisfied that it erred in law in that regard.

35. Accordingly, I allow this appeal on the first ground but not the second.

36. Ms Eddy submitted that, if I did find the First-tier Tribunal's decision to be wrong in law, it would be disproportionate to remit the case, particularly as neither Joshua nor the headteacher who was in post in 2015-16 is now at the school and there have also been changes among the governors and in the finance department of the local authority. I agree. A retrospective analysis of the school's finances and

the choices open to the school and a consideration of the approach the London Borough of Brent would have taken to a request for consent to employ another member of staff in the first half of 2016 or, more particularly, for the second half of the summer term, are not likely to be profitable exercises and, given that the First-tier Tribunal (and therefore the Upper Tribunal) has no power to order the payment of compensation, are not necessary.

37. I consider it to be sufficient vindication of Joshua's parents' position that I hold that the school's reliance on the deficit it had had in March 2015 to justify continuing to treat Joshua unfavourably due to his disability until July 2016 was wrong. I accept that budgeting is not an exact science and that the school was entitled to be cautious in the light of its recent troubles, which appear to have arisen in the context of a change in the funding formula for schools that considerably reduced this school's income because it was a large school with relatively few pupils living in poverty. I also accept that the school made efforts to assist the Appellants in their attempts to obtain an EHC plan for Joshua and that it had to consider the needs of all its other pupils as well as Joshua when considering how to budget in the light of its improving financial situation. But there is no evidence that, as its financial position eased and it became clear that assistance could not be gained from Hertfordshire County Council, the school ever reconsidered the possibility of using its own funds to enable Joshua to attend the nursery in the afternoons in the same way as other children did. That is where it went wrong.

38. In these circumstances, I do not consider it appropriate to give any other relief. As I have said, people have moved on but it is also relevant that the issue that arose in this case did so in the exceptional circumstance of the school recovering from a financial crisis and I do not consider that a requirement that anyone undergo particular training is necessary. My finding is sufficient.

Mark Rowland
12 March 2019