THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: HSW/1115/2021
[2021] UKUT 294 (AAC)

S-MR V CARMARTHENSHIRE COUNTY COUNCIL

Decided without a hearing

Representatives

Parent	Andrew Barrowclough, HCB Widdows Mason Ltd
Local authority	Jonathan Auburn QC, instructed by Joanna Corbett-Simmons of Blake Morgan LLP

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the Welsh Tribunal

Reference: S0020 1020
Decision date: 10 May 2021
Venue: Remote hearing

As the decision of the Welsh Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the Education Tribunal for Wales for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. This case is about the special educational needs of Oliver. It began with an appeal to the Welsh Tribunal (now renamed the Education Tribunal for Wales) against a Statement of those needs issued by Powys County Council. Carmarthenshire replaced Powys when Oliver's parents moved.

A. The tribunal's decision in summary

2. After setting out the background and dealing with preliminary matters, the tribunal summarised the oral evidence. It then came to its analysis. There was no

dispute about Part 2 of the Statement, so the analysis deals only with Part 3 (Oliver's special educational provision) and Part 4 (placement).

3. These were the points discussed under Part 3:

- *Small class sizes* The evidence for Oliver suggested that he needed a small class size. The tribunal concluded that this evidence did not establish a link between Oliver's special educational needs and this proposed provision. The tribunal decided that what mattered was Oliver's support and progress, not his class size.
- *Teaching assistant* The case for Oliver was that he needed 15 hours support each week. The local authority proposed 27.5 hours. The tribunal accepted the local authority's proposal as that fitted better with Oliver's needs.
- *SALT and OT* There was no dispute about Oliver's needs; the issue was how his needs should be addressed. The tribunal did not accept the evidence supporting Oliver's need for SALT, because it was premised on Oliver having a diagnosis of a language disorder, which he did not. It therefore preferred the evidence from the local authority. It also accepted the authority's position on OT, on the ground that it was consistent with the assessments of Oliver.
- *Other points* Finally, the tribunal dealt with a number of relatively minor points, explaining its preferred wording.

4. Coming to Part 4, Oliver was attending L College, where his siblings also attended. He attended that college from September 2019 and, as far as I know, he still does. The local authority did not argue that L College was not appropriate, but proposed another school, YBD. The tribunal decided that both schools were appropriate. It found that YBD was appropriate, giving seven reasons for this conclusion. Accordingly, section 9 of the Education Act 1996 applied to the naming of L College in Part 4 'so far as that is compatible with the provision of efficient instruction and training and the avoiding of unreasonable public expenditure.' The issue in this case was about public expenditure. The tribunal found that the differences in cost were £8752 for transport to L College and £10,347 for its fees. That was unreasonable public expenditure, so the tribunal named YBD in Part 4.

5. Oliver's parents proposed taking him to L College themselves. They would be transporting his siblings there, so this was a convenient arrangement. Mr Barrowclough argued that this removed travel cost from the public expenditure involved in placing Oliver there. The local authority argued that that was not the correct approach and the tribunal accepted its argument. It gave two reasons. First, as the proposal to transport Oliver was voluntary, it could end at any time, leaving the authority with a statutory duty to pay for Oliver's transport. Second, even if the tribunal ordered Oliver's parents to pay for his transport, the authority's statutory duty would remain.

6. The First-tier Tribunal gave permission to appeal to the Upper Tribunal on two issues. I gave permission on the remaining issues.

B. Parents arranging travel to their preferred school

What the tribunal got wrong

7. The tribunal gave permission to appeal on this issue. I accept that the tribunal made an error of law, but not in the way argued by Mr Barrowclough. The tribunal went wrong in law by overlooking the possibility of naming:

- more than one school in Part 4; and
- one school as the primary placement subject to a condition that the parents arrange transport at their own expense.

Certainly, the tribunal's written reasons did not expressly deal with those possibilities and do not read as if the tribunal had them in mind when making its decision. This may be because both parties, for different reasons, did not put that possibility to the tribunal. That did not relieve the tribunal of its duty to consider all options available on the evidence in order to apply the requirements of the legislation.

The legislation that applies to parental preference

8. As the issue involves parental preference, section 9 of the Education Act 1996 is relevant:

> **9 Pupils to be educated in accordance with parents' wishes.**
>
> In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

9. Neither Mr Barrowclough nor Mr Auburn argued that there was some special Welsh consideration in this issue.

The issue in the Welsh tribunal

10. The parents preferred L College; the local authority proposed YBD. The tribunal found that both schools were suitable. That raised the question of whether naming L College would involve unreasonable public expenditure. The cost of travel to school has to be taken into account when answering that question. In this case, the cost of travel, if arranged by the local authority, would be £8752 a year. As Oliver's siblings attend L College, his parents said that they would take him to school at no expense to the local authority. The authority opposed this suggestion on the ground that it would have to bear the cost if the parents' circumstances changed and they no longer provided transport. The tribunal accepted that argument. These were its reasons:

> (1) The parents' proposal is voluntary. The voluntary nature of the agreement means that the parents may end the agreement at any time. Applying the relevant case law thereafter, the cost of transporting Oliver to school would fall on the Local Authority. The reasons for the ending of the agreement are manifold but include a change in the parents'

circumstances which means that they cannot facilitate transport on a daily basis. Our powers do not extend to compelling the parents to fund the transport.

(2) Even if we were able to compel the parents to fund transport, the statutory duty remains. A voluntary agreement cannot override a statutory duty upon the Local Authority.

11. Mr Barrowclough described the tribunal's decision as 'alarming'. He accepted that the authority would have to meet the cost if the parents were no longer able to do so, but 'it is unreasonable for the Tribunal panel to accept the Local Authority's suggested school provision simply because there is a duty for such transport to be provided.' He went on to describe the decision as 'very concerning because it means that parents will never have a parental preference.' After elaborating on that, he went on:

> The approach influences parents to agree to the local catchment school and completely takes away all aspects of parental preference. It is an unlawful decision that misunderstands the law entirely. It is not appropriate to do this and it simply defies all aspects of logic.

If the parents' circumstances changed, he went on, the consequences would have to be considered as a review meeting. Finally, he mentioned the value of the time spent together when parents take their children to school. I do not accept this argument and will explain why later.

12. Mr Barrowclough went on to criticise the tribunal's reasoning in respect of its fact-finding. That is a different issue. I consider that this argument amounts to no more than a disagreement with the tribunal's assessment of the evidence and the findings of fact that it made on that assessment. There is no error of law there.

How to deal with transport costs

13. Returning to the main issue, the costs of transport to school are relevant in assessing whether naming the school preferred by the parents would involve unreasonable public expenditure. By taking Oliver to school, the transport cost would be removed from the calculation. Mr Barrowclough is right that if the parents could no longer take Oliver to school, there could be a review. But it is also permissible, and in my view preferable, for the Statement to provide for this contingency in advance. This works by naming two schools in Part 4. The school preferred by the parents is named on the express condition that the parents arrange for transport at their own expense. Another school, usually the one proposed by the local authority, is also named in the event that the condition is no longer satisfied.

14. In *R v London Borough of Havering ex parte K* [1998] ELR 402 at 404, Sedley J referred to the possibility of naming 'more than one school … in a statement if, in the view of the authority or the tribunal, more than one school would equally answer the child's needs.' This is the basis for the arrangement described by the High Court in *R v Islington London Borough Council ex parte GA* [2000] EWHC 390 (Admin):

> 27. There was in fact a way in which the authority could have sought to protect its position. There is no reason why more than one school should not be specified in a statement if, in the view of the education authority, more than one school would equally answer the child's needs. This was done in *Re C* [1994] ELR 272 [actually *Re C (A Minor)* [1994] ELR 273], where the second school named was the one the child's parents preferred, which the authority agreed to include on the basis that the parents were to be responsible for all travelling expenses and arrangements. It was not done in the present case. Had Harborough been named as the authority's preferred school and Doucecroft named as the school G.A.'s parents preferred which the authority only agreed to include on the basis that the parents were to be responsible for travelling expenses, the authority could satisfy its duty under section 324(5(a)(i) [of the Education Act 1996] by making arrangements for attendance at either school. …

The Court of Appeal approved that passage in *R (M) v Sutton London Borough Council* [2008] ELR 123 at [22] as a way for a local authority to protect its position. This was the approach taken by the Upper Tribunal and approved by the Court of Appeal in *S v Dudley Metropolitan Borough Council* [2012] PTSR 1393: the Court quoted paragraph 43 of the Upper Tribunal's decision at [32] and approved it at [48]. The reference for the Upper Tribunal's case is *Dudley MBC v JS* [2011] UKUT 67 (AAC).

15. That is largely the argument put by Mr Auburn. There is one part of his argument that I do not accept. He argued that the arrangement for the parents to take Oliver to L College had to be made in writing and agreed with the local authority as a binding commitment. I have not seen any authority that imposes those requirements. The matter is dealt with as a condition on placement in Part 4. There is no point making a conditional placement unless the local authority, or the tribunal, is satisfied that the parents are willing and able to perform the condition. But I see no need in a formal binding agreement. If the decision is made by the tribunal, an authority does not have a veto, which is what it would have if its consent were needed.

16. There is nothing in the written reasons to show that the tribunal considered a conditional placement. That is relevant in two ways.

17. First, it makes it difficult to judge whether the tribunal's mistake was material. It is possible that the difference in cost between L College and YBD was sufficient to justify the tribunal's decision even if the full transport cost was excluded from the calculation. Whether a mistake was material is a matter for the Upper Tribunal to decide, but it involves a judgment of how a specialist panel of the tribunal would have viewed the issue. In the circumstances, I am not prepared to decide that the effect of transport did not alter the outcome in the tribunal.

18. Second, it explains why I have not accepted Mr Auburn's request for an oral hearing. The failure to deal with the possibility of a dual placement is clear beyond argument.

This does not override parental preference

19. I said I would come back to Mr Barrowclough's argument that the parents would be deprived of the benefit of parental preference. The answer to that argument is that I have relied on decisions of the Court of Appeal. They are binding on me and render it unnecessary to deal with Mr Barrowclough's argument that this approach effectively overrides parental preference. It is sufficient to make two comments on that argument. First, section 9 does not confer a right for parents to have their choice of school accepted subject only to the two qualifications. It merely provides for decision-makers to have regard to the general principle of parental preference. Second, the dual placement arrangement is only relevant when the travel costs make a difference. The local authority, or the tribunal, must find that naming the school preferred by the parents would involve unreasonable public expenditure if the authority had to fund transport, but not otherwise. It is obviously not relevant if the preferred school would involve unreasonable public expenditure whether or not the parents met the costs of travel.

C. The integrity of one of the local authority's witnesses

20. The tribunal gave permission to appeal on this issue. Although I have set aside the tribunal's decision, I will deal with this ground as it is based on criticisms of the judge and on trenchant criticisms of the Special Educational Needs Co-ordinator at YBD (I will refer to her as the SENCo) and the school's head teacher. Mr Barrowclough has also argued that they should be barred from giving evidence at a rehearing.

21. This ground of appeal relates to the evidence given by the SENCo. She gave evidence remotely from the School. I can convey the flavour of Mr Barrowclough's complaint by some quotations from his application for permission to appeal. He noted that the tribunal 'found all the witnesses to be honest and straight forward,' but, he went on, the SENCo

> … was not honest during the Tribunal proceedings. … She was not alone during the Tribunal process and misled the Tribunal because she directly told the Tribunal that she was alone in the room when that was not the case whatsoever.
>
> This is a serious breach of Tribunal procedure, it should render all of the evidence given by [the SENCo] as inadmissible and she is actually in contempt of Court because she allowed the Tribunal proceedings to be heard by a third party throughout the entire process and the Appellants allege that she was supported during the Tribunal process by a third party which was apparent from the way in which she gave evidence.
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> …
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> The Appellants consider that [the SENCo] was clearly supported and helped during the Tribunal process. Mr Barrowclough would ask a question during the Tribunal proceedings and there was then a pause, the noise of a third party talking and then [the SENCo] would look up and give her evidence.

> What is remarkable however is that this issue was highlighted during the Tribunal and was not dealt with. In any event, this is a serious breach of Tribunal procedure. It renders all of the evidence from [the SENCo] as unsafe. A re-hearing is therefore needed to deal with this case again and [the SENCo] absolutely cannot be a witness. Furthermore, the Head Teacher should not be a witness due to her involvement in terms of this process.

22. Nothing of this sort could have happened at a face-to-face hearing. It is only something that can occur when a tribunal is hearing evidence remotely. The conditions in which witnesses, representatives and tribunals have had to operate during the Covid-19 pandemic have often been less than ideal. That does not justify breaching tribunal procedures, but it does mean that it is necessary to establish what actually happened in order to filter out misunderstandings and false impressions that may have arisen as a result of remote working.

23. The head teacher of YBD has provided a witness statement. This is a summary of what it says. The SENCo came into school in order to ensure a good internet connection. She set herself up a large table in the head teacher's office in order to spread out her papers. The head teacher was coming in and out. She did not hear what was being said by other participants, because the speakers on the SENCo's computer were turned down. She did not take any part in the proceedings or give any help to the SENCo while she was giving evidence. The SENCo was not aware that she had to be alone, and she was alone at the time when she was asked by the tribunal if anyone was with her. The windows were open; there were workmen on site and deliveries were taking place. The SENCo's microphone was on mute except when she was speaking.

24. I accept that statement. The problems described are akin to those that have been common recently: poor internet connections, lack of working space, noises off intruding into the hearing, difficulties of maintaining privacy. In short, it is a plausible account that many judges, representatives and litigants would recognise. What Mr Barrowclough has described fits with the SENCo looking down to switch on her microphone to speak. The voices he heard were probably related to the work going on or deliveries being made.

25. So on investigation, this was all a matter of innocent mistakes and misunderstandings as a result of the conditions in which the SENCo was working. There is no cause for the trenchant criticisms made by Mr Barrowclough. As to the suggestion that the SENCo or the head teacher should be barred from giving evidence if this case were to be reheard, that would not be an appropriate response even if the events had occurred as Mr Barrowclough described them.

26. Mr Barrowclough has also criticised the judge for not allowing him to explore his concerns further. Had he been allowed to do so, or if the judge had probed matters with the SENCo, the truth would have come to light. The judge commented on this when giving permission to appeal, saying that he did ask the SENCo if she was alone and was assured that she was. He added that her evidence was, in any event, not determinative of the tribunal's decision. There is no need to discuss this further. What happened was unfortunate, but I am satisfied that it did not affect the evidence given

to the tribunal. Even if the judge should have allowed Mr Barrowclough to question the SENCo more thoroughly than he did, or done so himself, it was not an error that was material to the outcome.

27. I reject this ground of appeal.

D. Other grounds

28. It is not necessary to deal with the remaining grounds, but I will deal with two of them, albeit more briefly than I would otherwise have done, given the nature of the criticisms they contain.

The tribunal did not confuse Parts 3 and 4 of the Statement

29. Mr Barrowclough has criticised the tribunal for confusing Parts 3 and 4 of the Statement. I reject this ground of appeal.

30. The cases are legion in which Courts and tribunals have emphasised the importance of the progression in reasoning from a child's special educational needs (Part 2) to their special educational provision (Part 3) and then to placement (Part 4). There is no value in adding to those authorities. It is, though, important to understand that this structured approach applies to decision-making only. It does not apply to evidence-gathering. Confining myself to tribunal proceedings, it would be cumbersome and inconvenient to insist that evidence is presented in that or any other order. Evidence may not neatly divide itself according to the legal structure of a Statement, and witnesses may not appreciate the distinctions involved. Tribunals have to operate efficiently and are entitled to allow witnesses to give their evidence in a way that departs from the statutory sequence. And they are entitled to rely on representatives to co-operate in the efficient operation of the hearing.

31. I have assessed Mr Barrowclough's detailed argument with the distinction between decision-making and evidence-gathering in mind. Having done so, I can find nothing in the tribunal's written reasons to suggest that it may have confused these two Parts of the Statement. Quite the opposite. The structure and content of the reasons shows that the tribunal properly maintained the distinction between Parts 3 and 4.

There was no perception of bias

32. Mr Barrowclough has made a number of criticisms of the way the judge conducted himself during the hearing, all under the heading of 'Procedural Irregularities and the Perception of Bias.' I reject this ground of appeal. It will be sufficient to make some general comments that will sweep up the individual criticisms.

33. There is a general point here. Judges may well conduct hearings differently according to whether the parties have experienced representatives. They are entitled to rely on professional representatives to explain to their clients how the tribunal will operate. That includes helping them to understand that judges question parties and their witness in order to test their evidence and to explore ideas. This is part of normal judicial process and should not be taken as an indication of bias by the judge.

34. In his reply to the appeal, Mr Barrowclough accepted that it is extremely difficult to prove that a tribunal was biased, but makes a general criticism that the way the tribunal handles evidence frequently raises concerns. He asks for assistance to be given to the tribunal, presumably by the Upper Tribunal, to ensure that there if fairness and transparency in the future. Without knowing what Mr Barrowclough has in mind, I cannot give any guidance on how the tribunal should conduct itself to avoid any problems that exist. This is a difficult issue for the Upper Tribunal to deal with in the terms that it is put. An appeal is not designed to address general arguments of this kind.

Signed on original
on 17 November 2021

Edward Jacobs
Upper Tribunal Judge