IN THE UPPER TRIBUNAL **Appeal No's UA-2023-000638/639-HS**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 406 (AAC)**

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

Between:

AB

Appellant

- v -

The Governing Body of Kingston Grammar School

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing:

9 April 2024, Field House, central London.

Representation:

Appellant: Mr R Dunlop KC (of counsel), instructed by Middleton Law Ltd.
Respondent: Mr S Hocking (of counsel), instructed by Browne Jacobson LLP.

ORDER UNDER RULE 14 of the TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Under rule 14(1)(b) of the 2008 Rules, the Upper Tribunal ORDERS that no person may disclose or publish any matter likely to lead members of the public to identify the Appellant's children as those in respect of whom the Appellant made the claims under the Equality Act 2010 that are the subject of this decision of the Upper Tribunal. In these reasons, the Appellant's son is referred to a S and her daughter as

D. This Order does not apply to the children's parents insofar as such disclosure or publication is made in the due exercise of parental responsibility.

DECISION

The decision of the Upper Tribunal is to ALLOW the appeal.
The decision of the First-tier Tribunal, taken on 3 May 2023 under case reference *EH 810/22/00037*, involved the making of an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision. Under section 12(2)(b)(i) of the 2007 Act, the Upper Tribunal remits this case to the First-tier Tribunal for reconsideration in accordance with the following directions:

(1) The First-tier Tribunal is to re-decide the Appellant's claims that Kingston Grammar School discriminated against her children (referred to in these reasons as S and D) contrary to the Equality Act 2020.

(2) The Appellant's claims are to be decided by a differently constituted First-tier Tribunal.

(3) The First-tier Tribunal is to hold a hearing before deciding the Appellant's claims.

(4) This case is to be referred to a salaried judge of the First-tier Tribunal as soon as possible to consider whether further case management directions are required.

Direction (3) above may be varied by direction given by the First-tier Tribunal.

REASONS FOR DECISION

1. This case concerns claims under the Equality Act 2010 (2010 Act) brought by the Appellant in respect of her daughter and son. In these reasons, her daughter is referred to as D and her son as S. The Respondent is referred to as Kingston Grammar School or the School. It has been described to me as a co-educational, selective independent school. The children were both aged 14 at the date of the Tribunal's decision.

Background

2. D and S were registered pupils at Kingston Grammar School. They were required to leave the School in 2022; the Appellant says that this was due to her alleged conduct. The Appellant claimed before the First-tier Tribunal that the School discriminated against her children in contravention of the 2010 Act. That claim argued that both children were disabled for the purposes of the 2010 Act.

3. In relation to D, whom a clinical psychologist had diagnosed with an autistic spectrum disorder (ASD), the School's response to the claim included the following:

> "Pragmatically and to save Tribunal time, the fact of that diagnosis will not be challenged, although as it was reached without seeking any information from the School and, the [Responsible Body] infers, at least in part on the basis of untested information provided by the Claimant, the [Responsible Body] does not formally concede even the diagnosis.
>
> It is further agreed that it follows that [D] will have had ASD throughout her time at the School."

4. I should add that the School also clearly disputed that D was disabled for the purposes of the 2010 Act on the basis that any impairment which she had did not have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. In relation to question whether S was disabled, the School took effectively the same stance as with D (paragraph 28 of the School's response to the Appellants' claims).

5. A telephone case management hearing took place on 10 January 2023 at which it was agreed that the evidence of Dr Vassiliadou (clinical psychologist who diagnosed D with ASD) and Dr Nwagbogu (consultant psychiatrist who diagnosed S with ADHD) would be in writing. The School indicated that it only wished to cross-examine a Dr Thompson, if his evidence were relied on by the Appellant.

6. A hearing date was listed for 7 March 2023. Both parties attended with legal representatives, but the hearing was adjourned because the judge had been unable to open the pdf bundle. The Tribunal's adjournment direction indicated that it was necessary to read the bundle documents so that witnesses could be effectively questioned on the issue whether there was a substantial and adverse long-term

impact on the children's ability to carry out normal day-to-day activities. The Appellant's claims were re-listed to be heard on 19 and 20 April 2023.

7. The Appellant's solicitors came 'off the record' on 17 March 2023. The Appellant's counsel (Mr Dunlop KC) was not instructed on a direct access basis so that, according to the Appellant, she was left without legal representation for the hearing on 19 April 2023.

Events on 19 April 2023 (re-listed hearing date)

8. The First-tier Tribunal's statement of reasons describes the events on 19 April 2023 as follows:

> "16. The tribunal had received shortly before the hearing a Request…from the Claimant, seeking an adjournment. [The Appellant] asserted that she was now unrepresented either by a solicitor or counsel (having been represented by both a solicitor during the preparatory stages, and then King's Counsel at the previous hearing). She said that she had only been aware on 18 April 2023 that Leading Counsel would be unable to attend the hearing and provide representation. However, Mr Hocking [counsel for Kingston Grammar School] confirmed that he had known since 20 March 2023 that Mr Rory Dunlop KC was no longer instructed and Mr Hocking's instructing solicitors had known for several days before that that the solicitors representing [the Appellant] were no longer represented. Those instructing Mr Hocking had apparently also written directly to [the Appellant] when they became aware that she was acting in person.
>
> 17. [The Appellant] asserted that she was attempting to transfer funds for representation purposes, but there was no indication within the statement in support of the [adjournment request] as to when (or indeed if) such funds would become available. She also asserted that she was unwell, which was confirmed by Ms McDougall [one of the Appellant's proposed witnesses] in oral evidence at the hearing. Again, there was no indication as to when [the Appellant] might become sufficiently well to obtain representation and instruct solicitors and/or counsel on her behalf."

9. According to paragraph 18 of the Tribunal's reasons, it "decided to deal with the claim on the papers" because "doing so gives effect to the requirements of the

overriding objective set out in rule 2 of the Tribunal Procedure Rules 2008…to deal with the case fairly and justly". It appears that neither party had requested that the Tribunal decide the claims on the papers. The Tribunal further relied on the following considerations in support of deciding the claims 'on the papers':

(a) previously, the Appellant had the benefit of competent representation and her representatives had supplied a skeleton argument and "an extensive bundle" (paragraph 19);

(b) "[The Appellant] was not intending to give evidence and she had been allowed to rely upon 4 written statements by her witness [Ms McDougall]" (paragraph 19);

(c) Kingston Grammar School also had the benefit of competent representation, and "consequently, there has (up until the date of the hearing) been equality of arms. If the hearing proceeded in the absence of the Claimant or her legal representative, that equality may be lost because the tribunal would hear oral evidence which could not then be tested by or on behalf of the Claimant. Similarly…the Respondent would be in a position to provide final submissions, but the Claimant would not. Adjourning the matter for written submissions would not assist as the Claimant would not have heard the oral evidence given at the hearing" (paragraph 20);

(d) it was in the children's interest to 'conclude' the case. The School had also incurred significant costs in defending the claims both financially and in senior staff time (paragraph 21). The School's Head Teacher, its Deputy Head and a member of its Board of Governors attended on 19 April 2023;

(e) "Ms McDougall made the tribunal aware of [the Appellant's] serious ill health, including the possibility of assessment for detention under the Mental Health Act 1983, and that an early recovery seemed unlikely" (paragraph 22).

10. The Tribunal drew together the relevant considerations, as it considered them to be, in paragraph 23 of its reasons:

> "Weighing all of these factors, the tribunal found that in order to treat both parties fairly and justly, it was appropriate to proceed with the hearing on the papers. This balanced the importance of providing a resolution of this case for the parties with the need to ensure that the parties were able to play a full part in the proceedings. The complex issues have been addressed by experienced

> legal representatives in the pleadings and skeleton arguments. Each party has had more than adequate opportunity to produce to the tribunal the documents it relies on. No prejudice arises to [the Appellant] from her absence, as she was not intending to give evidence or make representations on her own behalf. The [Responsible Body] agreed to the matter being dealt with on the papers and did not assert any prejudice from that course of action. Such an approach also takes into account the likely delay and uncertainty regarding [the Appellant's] recovery. The application for an adjournment was therefore refused and the parties and their witnesses left the hearing, leaving the Tribunal to deliberate on the documentation."

Tribunal's finding that neither child was disabled for the purposes of the Equality Act 2010

11. The First-tier Tribunal found that the Appellant had failed to show that either child was disabled for the purposes of the 2010 Act.

12. In relation to S, the Tribunal:

(a) found that "there is no evidence that the school identified any mental impairment during [S's] time at Kingston Grammar School between September 2019 and July 2022". The evidence also demonstrated that S was academically very able (paragraph 27 of the Tribunal's reasons);

(b) placed little weight on the report of Dr Nwagbogu, Consultant Child and Adolescent Psychiatrist. The Tribunal's reasons do not record Dr Nwagbogu's diagnosis but his report diagnosed ADHD. The Tribunal did not find the doctor's report persuasive because:

- the report was partly based on a questionnaire completed by the Appellant known as a Connors questionnaire as well as a 'Teacher's Connors' (as the Tribunal described it). However, neither questionnaire was appended to the report nor was the teacher's identity disclosed (the School informed the Tribunal that they had not been contacted by Dr Nwagbogu) (paragraph 31);

- Dr Nwagbogu's conclusions were arrived at without evidence from the School as to S's presentation during his three academic years there (paragraph 39);

- Since the School's evidence contradicted that of the unnamed Connors teacher, and the Appellant's assertions, "it would appear that the assessment was incomplete" (paragraph 39);

(c) took into account that the Appellant, when completing an application form for S's admission to the School, did not mention dyslexia (paragraph 41);

(d) rejected Dr Thompson's evidence that S had depression. His written evidence gave no indication that he was qualified to make such a diagnosis and lacked detail as to the extent to this condition affected S's ability to carry out normal day-to-day activities;

(e) even if S had a mental impairment within the meaning of the 2020 Act, there was no evidence that such an impairment had any substantial adverse effect on his ability to carry out normal day-to-day activities.

13. In relation to D, the Tribunal:

(a) noted that the report of Dr Vassiliadou, clinical psychologist, who diagnosed ASD stated that D's assessment included completion of standard questionnaires including a school functioning report. However, the School's witnesses asserted that they were not contacted by Dr Vassiliadou and completed no such report (paragraph 48 of the Tribunal's reasons);

(b) considered it possible that Dr Vassiliadou thought that Kingston Grammar School had closed down, which was why D was being home-schooled, and this explained why no information was sought from the School (paragraph 49);

(c) found "itself unable to place any weight on upon Dr Vassiliadou's assessment because he has been unable to triangulate data from a variety of sources and in particular to obtain up-to-date information from the school which provided education for [D] in the 3 years preceding the assessment" (paragraph 50);

(d) found that "in any event, there is no evidence to show that the traits identified by Dr Vassiliadou had any substantial adverse impact on [D's] ability to carry out normal day-to-day activities" and "he does speculate at page B357 on ways in which her autistic qualities might influence certain things, but does not reach a conclusion on

that. Furthermore, the witnesses from the school provide evidence that [D] did not have any such difficulties with normal day-to-day activities".

14. The Tribunal found that the Appellant had failed to show that D was disabled for the purposes of the Equality Act 2010.

15. As the Tribunal rightly observed, its finding that neither child was disabled meant it was impossible for the Appellant's 2010 Act claim to succeed. However, it did go on, in a single paragraph, to explain why it considered that, even if the children were disabled, the Appellant was unlikely to have made good her claims of discrimination contrary to the 2010 Act.

Legal framework

Equality Act 2020 (2010 Act)

16. Disability is a protected characteristic under the 2010 Act (section 4). "Disability" is defined by section 6 of the Act, subsection (1) of which provides:

> "(1) A person (P) has a disability if –
>
> (a) has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

17. Section 212(1) provides that "substantial" means "more than minor or trivial".

18. Section 6 is supplemented by Schedule 1 to the Act, paragraph 2 of which provides:

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected."

19. Section 6(5) empowers a Minister of the Crown to issue guidance about matters to be taken into account in deciding any question for the purposes of section 6(1). Guidance has been issued entitled *Disability: Equality Act 2010 – Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability* (first published May 2011; republished February 2022). Within the guidance:

(a) Section B deals with the requirement for a person's impairment to have a substantial adverse effect on ability to carry out normal day-today activities. Section B identifies matters that might be relevant to the question whether an impairment has a substantial adverse effect including the way in which an activity is carried out (B3), cumulative effect of an impairment (beginning at B4), and the effects of behaviour (beginning at B7) including that "account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities";

(b) Section D deals with 'normal day-to-day activities' and the 'adverse effect' requirement. D3 states that "day-to-day activities are things people do on a regular or daily basis" and "can include…education-related activities". D7 states that "in considering the ability of a child aged six or over to carry out a normal day-to-day activity, it is necessary to take account of the level of achievement which would be normal for a person of a similar age";

(c) Section E is about disabled children. E3 addresses education:

> "Examples of children in an educational setting where their impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities:
>
> …A 14-year-old boy has been diagnosed as having attention deficit hyperactivity disorder (ADHD). He often finds it difficult to concentrate and skips from task to task forgetting instructions. Either of these factors has a substantial adverse effect on his ability to participate in class and join in team games in the playground."

(d) The Appendix contains "an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities". The list includes:

- "difficulty waiting or queuing, for example, because of a lack of understanding of the concept";

- "difficulty understanding or following simple verbal instructions";

- "persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment, or learning disability…";

- "persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder";

- "persistent distractibility or difficulty concentrating";

- "compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine".

20. The Appendix also includes "an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities". This list includes:

- "inability to speak in front of an audience simply as a result of nervousness";

- "some shyness and timidity";

- "inability to concentrate on a task requiring application over several hours";

- "a person consciously taking a higher than normal risk on their own initiative, such as persistently crossing a road when the signals are adverse, or driving fast on highways for own pleasure".

Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (2008 Rules)

21. Rule 1(3) of the 2008 Rules defines “hearing”:

> ““"hearing" means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication”.

22. The overriding objective of the 2008 Rules is “to enable the Tribunal to deal with cases fairly and justly” (rule 2(1)). Rule 2(2) provides as follows:

> “(2) Dealing with a case fairly and justly includes--
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.”

23. Rule 2(3) requires the Tribunal to seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule.

24. Rule 5(1) provides that, subject to any other enactment, the Tribunal may regulate its own procedure. Rule 5(3) provides that the Tribunal may “in particular” do certain things, which include “decide the form of any hearing” (rule 5(3)(g)).

25. Rule 23(1) provides as follows:

> “(1) Subject to paragraphs (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless-
>
> (a) each party has consented to the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without the hearing.”

26. The exceptions in rule 23(2) and (3) are not relevant in this case.

27. Rule 27 provides as follows:

> “If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

28. Rule 45 provides as follows:

"(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are— …

(c) a party, or a party's representative, was not present at a hearing related to the proceedings..."

Grounds of appeal

29. The grounds on which the Appellant was granted permission to appeal against the First-tier Tribunal's decision were described as follows in the Upper Tribunal's permission determination:

"Ground 1

36. I grant permission to appeal on the first ground. It is at least arguable that rule 23 of the FtT Rules envisages a substantive hearing, that is a hearing at which parties have the opportunity to provide evidence and submissions relevant to the substantive issues. Arguably, interpreting rule 23 so that the duty to hold a hearing may be satisfied by a hearing on procedural matters alone renders a party's right to a hearing of little practical value and is unlikely to have been intended by the legislator.

37. This grant of permission to appeal extends to the Appellant's subsidiary, or alternative, argument that the FtT acted contrary to the principles of natural justice by deciding the claim without holding a substantive hearing. I consider that the arguments advanced by Mr Dunlop, for the Appellant, have a realistic prospect of success.

38. My grant of permission to appeal on this ground encompasses the argument that the FtT erred in law by relying on a supposed need to ensure 'equality of

arms' between the parties. Arguably, the FtT's inquisitorial role and the aspects of the overriding objective listed in rule 2(2) of the FtT Rules, in particular "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings", required the FtT to address how any disadvantages that might have been faced by the unrepresented party could have been ameliorated at any hearing before deciding to determine the claims on paper without a further hearing.

39. This grant of permission to appeal should not be read as including any finding of fact as to the nature of the hearing/s that were held by the FtT. If the Respondent wishes to make submissions about the nature of the hearing/s, it is open to them to do so…

Ground 2

…47. This ground argues that the FtT gave inadequate reasons for rejecting the expert evidence. In relation to Dr Nwagbogu's evidence, the FtT stopped short of expressly rejecting the doctor's opinion but my provisional reading is that, in substance, the Tribunal rejected, or gave no weight, to that doctor's evidence. That seems to me the most obvious explanation for the finding that [S] had no impairment. I consider that the Appellant has a realistic prospect of persuading the Upper Tribunal that the FtT's reasons for rejecting the diagnostic evidence were inadequate. It is clear that both clinicians assessed the children in person: this was not a 'diagnosis on the papers'. I think it is also clear that both clinicians may properly be regarded as specialists. And, as members of registered clinical professions, both clinicians must have been subject to certain professional duties which, I provisionally assume, extended to the clinical activity of diagnosing a medical condition. In those circumstances, arguably the FtT needed to give a fuller explanation as to why the evidence was rejected. Arguably, adequate reasons would have explained why expert diagnostic evidence was rejected despite the diagnoses having been preceded by personal examination/observation and despite the clinicians having evidently thought that they had sufficient material on which to base a diagnosis.

48. The argument that the FtT acted unfairly also has a realistic prospect of success in my judgment. Mr Perkins, for the Respondent, argues that the School did not formally concede diagnosis but, on my reading of the papers, it did not indicate, or intimate, that the diagnoses were not accepted. Since the rejection of the expert evidence was probably fatal for the Appellant's claims (making it virtually impossible for her to establish disability), arguably fairness,

or natural justice, required the FtT to put the Appellant on notice that the evidence might be rejected or, alternatively or in addition, give case management directions that might have addressed the FtT's concerns about the material on which the diagnoses were based (e.g. in [S's] case for disclosure of the questionnaires referred, but not appended, to Dr Nwagbogu's report).

49. I grant permission to appeal on ground 2 to the extent described above."

Appellant's arguments

Context

30. Mr Dunlop submits that, in the First-tier Tribunal proceedings, the Appellant decided not to give evidence for reasons related to her ill-health and the intention was that a Ms McDougall would instead give live evidence about D and S. This was explained in the Appellant's skeleton argument for the First-tier Tribunal hearing (at paragraph 6). Ms McDougall had been assisting the Appellant's family since 2015, had known both children for more than half their lives and was also involved in their education. Ms Mc Dougall's witness statements spoke about D's limited social skills, difficulty talking to anyone apart from her brother and to her cat, at times only communicating using a message app on her iPad, difficulty with eye contact, reliance on her brother for basic self-care tasks, concerns expressed by D's School tutor about her 'social presentation' and social isolation, problems understanding other children's motives and when she was being bullied, that her School hockey coach, Miss Naismith (whom the School decided not to put forward as a witness), would never leave D alone due to her vulnerability. In relation to S, Ms McDougall's witness statements spoke about his deteriorating mental health especially during 'lockdown', concerns expressed by School staff about his ability to maintain concentration and his mental health, and regular bouts of crying.

31. The Appellant submits that Ms McDougall's statements about D's functioning were consistent with Dr Vassiliadou's clinical observations (made at a face-to-face clinical assessment).

32. The School chose not to provide witness evidence from any of the children's teachers. The Appellant submits that the School's three witnesses – Headteacher, Safeguarding Governor and Deputy Headteacher (Academic) – had virtually no personal knowledge of the children, as their witness statements demonstrated.

33. The Appellant submits that, before the hearing on 19 April 2023, the Tribunal gave no indication that it might reject the Appellant's diagnostic evidence. And its statement of reasons made no reference to any of Ms Mc Dougall's evidence (save for an exhibit to her fourth statement namely a School nurses' opinion that D was 'high-functioning possibly autistic') nor to any of the arguments in the Appellant's skeleton argument.

Ground 1

34. For the purposes of rule 23(1) of the 2008 Rules, the Appellant notes that no party expressly consented to the claims being determined without a hearing. The Appellant submits that, accordingly, rule 23 required the First-tier Tribunal to hold a hearing. This must mean a hearing in which the parties have the opportunity to provide evidence and submissions on the substantive issues – the issues which may 'dispose of the proceedings' as rule 23(1) puts it. This is consistent with an obvious purpose of rule 23 namely to ensure that parties are not left with the sense of injustice likely to follow if important issues are decided without giving them a full opportunity to participate, which includes by presenting oral evidence. The present Tribunal did not have both parties' consent to decide the claims without a hearing. Its approach was clearly in contravention of rule 23.

35. Regarding the School's argument that a hearing did take place and 'some oral evidence was taken at the hearing insofar as it was deemed necessary', the Appellant submits that no oral evidence was taken as to any substantive issue. The Appellant submits that there is no merit in the School's argument that, since rule 45 authorises determination of a case in a party's absence, it must permit what was done by the Tribunal in this case (refuse to hear evidence from a party's witness). Rule 45(2)(c) is predicated on a hearing having been held (which a party or representative did not attend). Here, the decision-making process was carried out on the papers. What the Tribunal should have done was decide whether it could proceed with a hearing on 19 April 2023 in the absence of one of the parties. Had it proceeded with a hearing, it would have heard from those parties and witnesses who had attended and were willing to give evidence on substantive issues, which included Ms McDougall

36. Properly construed, rule 27 supports the Appellant's case and the School's reliance on that rule is misconceived. If a party fails to attend a hearing, rule 27 requires it to either hear the case in the party's absence or adjourn. What it does not permit is a determination, once a hearing has begun, and it is clear that a party is absent, to dispense with the hearing and instead decide a claim on the papers.

37. The Appellant submits that the 'equality of arms' principle provided no justification for the Tribunal's approach. If a party, voluntarily and with good reason, chooses not to attend a hearing, the Tribunal should hear the evidence and submissions of the party and those witnesses who have attended. If fairness or justice requires it, the Tribunal can exercise its inquisitorial function by putting questions to the attending party's witnesses of the kind that the absent party might have put. That is how any equality of arms concern should be dealt with, not by proceeding without a hearing.

38. The School advance arguments by reference to rule 27 but these have no merit because the Tribunal clearly did not proceed under that rule (the Tribunal did the opposite of that permitted by rule 27). It is absurd to suggest that terminating the hearing was, in fact, the same thing as proceeding with a hearing under rule 27. The School's argument that the Appellant impliedly consented to a decision without a hearing also has no merit and finds no support in the evidence. The Appellant sought an adjournment of the hearing on 19 April 2023, an act that cannot possibly be interpreted as implied consent to a decision without a hearing. The argument that the Appellant's submissions require a tribunal to adjourn if a party fails to attend a hearing also has no merit. The Tribunal does not have to adjourn because rule 27 empowers it to proceed with a hearing in a party's absence.

39. Aside from rule 23, this was a case in which the material facts in dispute could not fairly have been resolved on the written evidence. Fairness required an oral hearing (*R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 per Lord Reed at [66]-[69]). The key factual dispute between the parties concerned the adverse impact of D and S's diagnosed impairments. On that key factual dispute, the Appellant' witness, Ms McDougall, was available to give evidence. She had far more personal knowledge of the children than any of the School's witnesses yet the Tribunal made findings that were directly contradictory to her evidence. If the Tribunal considered Ms McDougall's evidence, they must have rejected it. It was unfair and a breach of natural justice to do so without hearing from her. The School's submissions do not deal meaningfully with this aspect of ground 1 engaging instead in an attempt to minimize the likely impact of Ms McDougall's evidence had there been an oral hearing.

40. The School misunderstand the law by arguing that fairness is 'a matter for the fact-finding tribunal'. The Upper Tribunal must determine for itself whether a fair procedure was followed (*Osborn* at [65]). The School also fail to recognise that, as a matter of law, a party may complain about their witness not having been questioned on key elements of disputed evidence. The Supreme Court in *Griffiths v TUI UK Ltd* [2023] UKSC 48; [2023] 3 WLR 1204 at [42] said:

> "…In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases … In general the CPR does not alter that position.
>
> This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

41. Here, there was a factual dispute as to whether the children were disabled and, in that respect, Ms McDougall's evidence was in direct conflict with that relied on by the School. The only fair way of resolving this factual dispute was to ensure each party's witnesses had the opportunity to explain the apparent contradiction in the evidence. This could have been done either in cross-examination or, in the Appellant's absence, through exercise of the Tribunal's inquisitorial function. The failure to do either was unfair, both to the Appellant and Ms McDougall who had no opportunity to explain the apparent contradiction between her own evidence and the School's. The absences of Drs Vassiliadou and Nwagbogu, relied on by the School, were irrelevant and did not justify the Tribunal's approach in relation to Ms McDougall's evidence who was present.

42. Oral hearings improve the chances of a Tribunal reaching the right decision (*Osborn* at [67]). Important points are less likely to be overlooked, as they in fact were in this case. The Tribunal's reasons made no mention of Ms McDougall's evidence nor the submissions on 'adverse impact' in paragraphs 35 to 37 of the Appellant's skeleton argument.

Ground 2

43. The School's case before the First-tier Tribunal indicated that, while the diagnoses of Drs Vassiliadou and Nwagbogu were not 'formally' conceded, for pragmatic reasons they would not be challenged. In terms of how this influenced the

Appellant's presentation of her case, the only reasonable reading of the School's stance was that they had, in practice, conceded the experts' diagnoses. The School's stance was effectively reiterated at a case management hearing on 10 January 2023 when they confirmed they did not wish to cross-examine either doctor. The Tribunal's case management directions gave no indication that they had doubts about the correctness of either's diagnosis. The Tribunal unfairly appeared to endorse the parties' agreed approach and then, without warning, proceeded to reject both diagnoses.

44. The School's argument that disability was not conceded misunderstands the 2010 Act's concept of disability. By disputing the 'adverse impact' element of the definition of disability, the School could not be taken also to have disputed the impairment / diagnostic element of the definition.

45. Where a tribunal wishes to reject the evidence of an expert, there is a duty to provide a 'cogent reasoned rebuttal' that understands and addresses that evidence (e.g. *Flannery v Halifax Estate Agencies* [2000] 1 W.L.R. 377, CA). In respect of both Dr Vassialadou's and Dr Nwagbogu's evidence, the only reason given by the Tribunal for rejecting their diagnoses was that they had not contacted the School directly. This was insufficient. If the experts had considered they had insufficient information from the School, on which to base a diagnosis, they would have been professionally obliged to say so. But they did not. It was perverse for the Tribunal to have given no weight to unchallenged expert reports on the ground of insufficient information when it had not questioned the experts.

46. In particular, the Tribunal gave inadequate reasons for rejecting Dr Vassialadou's diagnosis of D, which was based primarily on clinical observations. The doctor observed several behaviours that were consistent with ASD. The Tribunal failed to explain why the absence of evidence from the School undermined those observations.

47. The School's argument that Drs Vassialadou and Nwagbogu breached their professional duties is improper and it is unfair to raise it for the first time in appeal proceedings before the Upper Tribunal. If the School held that view, they should have sought their attendance for cross-examination before the First-tier Tribunal at which such allegations could have been put to the clinicians.

48. The School argue that, even if the Tribunal erred in rejecting the experts' diagnoses, it was an immaterial error in the light of its 'adverse impact' findings. This is unrealistic. The two aspects of the definition of disability overlap in practice. The

Tribunal's rejection of D's and S's diagnoses must have influenced their consideration of whether any impairment had a substantial and adverse impact on ability to carry out normal day-to-day activities.

Disposal

49. The Appellant submits that, if this appeal succeeds, the Upper Tribunal should re-make the First-tier Tribunal's decision rather than remit this case to that tribunal for redetermination.

The School's arguments

The Appellant's new evidence

50. The School observe that the Appellant has supplied the Upper Tribunal with a number of items of new evidence. Mr Hocking argued at the hearing of this appeal that this new evidence should not be admitted. It postdates the alleged acts of discrimination and is not relevant to the issues arising on this appeal. I agree that the Appellant's new evidence should not be admitted in these proceedings because none of it is relevant to the grounds of appeal.

Ground 1

51. The School submit that the First-tier Tribunal was put in a difficult position on 19 April 2023. The Appellant had been pressing for an expedited determination of her claims and, pending that determination, had decided to keep her children out of school. The School also argue that the Appellant failed to give the Tribunal advance notice that she would not attend the hearing on 19 April. In fact, the School argue that the Appellant was untruthful about when she became aware that she would be unrepresented.

52. Rule 27 of the 2008 Rules permits the First-tier Tribunal to proceed with a hearing if a party fails to attend and it considers it in the interests of justice to do so. The Tribunal did so consider and that alone should be sufficient to dispose of Ground 1. While the School do not 'significantly disagree' with the Appellant's argument that rule 23's reference to a hearing anticipates a hearing which provides the opportunity to provide evidence and submissions on the live issues, the School submit that the Appellant was given this opportunity but chose not to make use of it.

53. Rule 5(3)(g) permits the Tribunal to decide the form of any hearing and, in this case, the Tribunal decided to conduct the hearing on the basis of the written submissions and evidence received. It was right to do so given the Appellant's conduct, the delays, and the Rules' overriding objective.

54. The Appellant's case is that the Tribunal erred by not hearing Ms McDougall's oral evidence. The Appellant now says that Ms McDougall positively wanted to be heard but was prevented from doing so by the Tribunal. That does not accord with the School's recollection of events and it repeats its request for the Upper Tribunal to obtain a transcript of the Tribunal proceedings (my understanding is that the hearing was not recorded). In any event, the Tribunal is master of its own procedure which extends to deciding whether it needs to question a witness.

55. The School submit that a party's non-attendance does not convert a hearing attended by the other party into something other than a hearing (*R v Jones* [2002] UKHL 5). Adopting a common-sense perspective, the Upper Tribunal is entitled to conclude that what happened on 19 April 2023 was a hearing albeit one which a party failed to attend. Indeed, the Appellant accepts that, in such circumstances, fairness will rarely require the Tribunal to adjourn (*Adeogba v GMC* [2016] EWCA Civ 162).

56. The Appellant's case on Ground 1 leads to absurdity. Had the Tribunal heard from the School's counsel and witnesses on 19 April 2023, even if only briefly, a hearing would have taken place and the Tribunal's rule 27 powers would have been available. But if the Tribunal concluded, as it did, that it would be fairer, in the interests of maintaining an equality of arms, to hear nothing from the School then, on the Appellant's case, no hearing would have taken place and the Tribunal would have been prevented by rule 23 from doing anything other than adjourning. The absurdity is that the Rules 'apparently require the Tribunal to adopt the less even-handed approach before it can issue a final decision'. Such an odd conclusion should only be adopted if compelled by clear wording within the Rules, but it is not.

57. The Appellant argues that her witness, Ms McDougall, was available to answer questions on 19 April 2023. However, by that date Ms McDougall had filed no fewer than four witness statements (in total, 272 pages) the last of which post-dated, and responded, to the School's witness evidence. It cannot plausibly be said that the Appellant did not have a fair opportunity to present Ms McDougall's evidence in chief to the Tribunal. The Appellant cannot complain that Ms McDougall was not cross-examined by counsel for the School (if that was unfair, the School was the victim).

The Appellant's complaint must therefore be that the Tribunal did not find it necessary to question Ms McDougall. But that was for the Tribunal to determine, and its case management determination is to be lightly interfered with on appeal. Furthermore, the Appellant at no time proposed to call either Dr Vassialadou or Dr Nwagbogu to give evidence. She complains that the Tribunal failed to question Ms McDougall but had herself denied the Tribunal the chance to question either clinician or herself. The Appellant makes an opportunistic complaint without any merit.

Ground 2

58. The School submit that, in arguing that the children's diagnoses were effectively conceded, the Appellant engages with the School's case as she wishes it to have been rather than the case as actually argued. The School's skeleton argument for the proposed First-tier Tribunal hearing clearly stated that it did not concede that either child had a mental or physical impairment and proceeded, over two pages, to explain why both diagnoses should be regarded with 'extreme caution'. It is obvious that the diagnoses were not conceded, and it is unfortunate that an entirely appropriate decision not to require either doctor's attendance is now presented as a formal concession that both children had an impairment. In any event, it is clear that both diagnoses were controversial so that it cannot have been unfair of the Tribunal to have rejected them and, moreover, even if the parties came to an agreement on a particular issue, it remained open to the Tribunal to arrive at a different conclusion (*Woodhouse School v Webster* [2009] EWCA Civ 91).

59. The authority relied on by the Appellant for the proposition that a cogent, reasoned rebuttal of expert evidence is required (*Flannery*) may be readily distinguished. That case concerned an expert appointed for the purposes of litigation and subject to a duty to the court. In this case, Tribunal permission was not given for expert evidence, and it was not 'expert evidence' in the true sense.

60. The Tribunal's reasons clearly satisfied the standard in *South Bucks District Council and another v Porter* [2004] UKHL 33:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important

> controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision."

61. The principal important controversial issue in this case was whether each child had a disability. That was not simply a matter of impairment/diagnosis and the School disputed each aspect of the statutory definition. Adequacy of reasons is not necessarily determined by reference to the statement of reasons alone (*Bassano v Battista* [2007] EWCA Civ 370). In this case, that includes the School's criticisms of Drs Vassialadou and Nwagbogu, set out in its written Tribunal submissions, and which focussed on their assessments having been carried out without information from the School.

62. The evidence of Drs Vassialdou and Nwagbogu had no special, privileged status and was not inevitably of greater weight than other equally important evidence such as that of teachers who had interacted with the children for some three years. The reasons given by the Tribunal for rejecting both doctors' diagnostic evidence were rational and adequate. In both cases, the Tribunal relied on the absence of information about the children from the School. That the clinicians were subject to professional obligations is no answer to the School's criticisms.

63. In any event, the Tribunal also found, as fact, that the necessary adverse impact was absent. Those findings are not the subject of appeal so that, even if Ground 2 is made out, the Tribunal's error must be considered immaterial.

Conclusions

Ground 1

64. The first issue to address under Ground 1 is the correct interpretation of rule 23(1) of the 2008 Rules. The issue is here not so much what the rule means by a 'hearing' but what it means to hold a hearing before 'making a decision which disposes of the proceedings'. A decision disposes of proceedings if it determines all disputed issues in the proceedings. By virtue of the 2008 Rules' overriding objective and as a matter of natural justice, disputed issues may not properly be determined without considering each party's case. Therefore, the way in which rule 23(1) links a hearing with a 'decision which disposes of the proceedings' indicates that the hearing required is one in which each party's case is considered and, of course, a party's case before the First-tier Tribunal will include submissions and evidence. I therefore

conclude that rule 23(1) requires a hearing at which the parties' submissions and evidence are considered. This does not necessarily require a party's attendance (see rule 27), but the requirement to hold a hearing before making a disposal decision is not satisfied by a procedural hearing held at some point in the journey towards a decision that disposes of proceedings nor by a hearing at which only some of a party's case is considered.

65. It is clear from the present Tribunal's statement of reasons that, on 19 April 2023, it did not hold a hearing at which both party's evidence and submissions were considered. A hearing was convened but terminated shortly thereafter once the Tribunal had refused the Appellant's request for an adjournment. What happened next was not the continuation of a hearing in a party's absence under rule 27 but consideration of the parties' cases on the papers (the Tribunal's reasons say it 'decided to deal with the claim on the papers').

66. The Tribunal's decision disposing of the Appellant's 2010 Act claims was not taken following a hearing at which the parties' cases were considered. In reality, the decision which disposed of proceedings was taken without holding a hearing. That would only have been permitted under rule 23(1) if each party had consented to the claims being decided without a hearing. It is not disputed that express consent was absent. In my judgment, the Appellant's request for an adjournment of the 19 April 2023 hearing cannot properly be construed as impliedly consenting to a decision without a hearing in the event that the request was refused. The request must have been made in the knowledge that, if refused, a hearing might be held in the Appellant's absence but that cannot be considered an implied consent to a decision without a hearing. The Tribunal's decision on the Appellant's 2010 Act claims was therefore taken in breach of rule 23(1) of the 2008 Rules. 'Equality of arms' issues do not arise because such considerations do not permit a tribunal to re-write the 2008 Rules.

67. The next question is materiality. I am not, at this stage, considering whether the First-tier Tribunal proceedings were conducted fairly (if I were, the Appellant is right that I would be required to decide for myself whether the proceedings were fairly conducted). I have simply decided that the Tribunal acted in contravention of rule 23(1). I shall therefore consider whether the Tribunal's error was material. In my judgment, the Tribunal could have arrived at a different decision had it not erred by making a decision that disposed of proceedings without holding a hearing. In other words, its error cannot be considered immaterial. In the light of Ms McDougall's

written evidence, some of which was consistent with the ministerial guidance as to the meaning of disability under the 2010 Act (including the 'adverse impact' element of the definition), had the Tribunal heard oral evidence from Ms McDougall, who was in attendance, it might have decided that one or both children were disabled for the purposes of the Act. Ground 1 is made out and this appeal therefore succeeds.

68. I need not address the other aspects of ground 1.

Ground 2

69. It is not strictly necessary for me to decide Ground 2. However, if it were, I would have been minded to accept Mr Dunlop's argument, for the Appellant, that the First-tier Tribunal unfairly determined an issue (impairment) that the Appellant reasonably believed had been conceded by the School. Had the School's response to the Appellant's claims been in the same terms as its skeleton argument for the proposed Tribunal hearing, the Appellant would have no cause for complaint but, as it was, the only reasonable reading of the School's formal response was that it did not intend to dispute that both children satisfied the impairment element of the 2010 Act's definition of disability.

Disposal

70. I understand the Appellant's desire to conclude her 2010 Act claims as soon as possible but I am simply not competent to determine the medico-legal issues that arise on these claims. I have no medical expertise and could not, for instance, properly determine the weight, if any, to be given to Dr Vassialadou's and Dr Nwahbogu's diagnostic reports.

71. The Appellant's 2010 Act claims will now be remitted to the First-tier Tribunal for re-determination (before a differently constituted panel of that Tribunal).

Upper Tribunal Judge Mitchell
Authorised for issue on 4 July 2024

Corrected under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 30 November 2024 to alter the pseudonyms used to describe the Appellant's

children. The alteration was requested by the children both of whom had attained the age of 16 when the Upper Tribunal's decision was given.