First-tier Tribunal Special Educational Needs and Disability

DECISION

Claim No:	**EH926/21/00049 Kinly V**
Claim By:	**Ms Beth Knight**
Responsible Body:	**Outcomes First Group Ltd**
Concerning:	**Chloe Mott (born 13 December 2005)**
Hearing Date:	**28 June and 26 July 2021**
Tribunal panel:	**Mr H Forrest (Tribunal Judge)** **Ms C May (Specialist Member)**

1. Outcomes First Group Ltd, the Responsible Body for Acorn Park School, discriminated against Chloe Mott, for reasons related to her disability, when they treated her unfavourably by:

- failing to consult adequately before moving her to a new class in October 2020;
- failing to put a suitable return to school plan in place, following a half day exclusion on 25 November 2020;
- when they gave notice to terminate her placement at Acorn Park School on 21 December 2020.

2. The claims of disability discrimination in relation to an incident on 7 September 2020, and the fixed term exclusion on 25 November 2020 fail and are dismissed.

The Hearing

1. The Tribunal convened on 26 June and 28 July 2021 to hear Ms Knight's complaints of disability discrimination affecting her daughter, Chloe, by the Responsible Body of Acorn Park School. The hearing was conducted by video link, using the Tribunal's Kinley platform. Given the circumstances of the Corona Virus epidemic, an attended hearing was not practicable. In the circumstances, both parties consented to a hearing proceeding by video link.

2. Ms Knight was represented by Mrs Willicott, an SEN advocate. Both Ms Knight and Chloe herself gave evidence to us. In addition, Mrs Willicott called as witnesses: Ms Springford, a former TA of Chloe's and Mr Bates a former head of Acorn Park School. We had read in advance witness statements from these two witnesses, and as their evidence related to an earlier period than the incidents complained of, we explained to Mrs Willicott that we could not see the relevance of their evidence to the complaints before us; and so we did not hear any oral evidence from them. Mr Vincent Neale,

Chloe's father also attended the hearing.

3. The Responsible Body (RB) was represented by Ms Littlewood, a barrister. She called as witnesses, on the first day: Mrs Whipp, head teacher of Acorn Park School (APS); Ms Thompson, SENCO at APS; Mr Masterson, deputy head of APS; and, on the second day, Mr Marshall, Head of Service (effectively Executive Head) of APS. Also present throughout was Mr Simpson, who introduced himself as Regional Director of Outcomes First Group Ltd for a group of schools including APS; he did not formally give evidence to us. Ms Ikra Singh, a paralegal from the legal department of Outcomes First Group attended throughout to assist Ms Littlewood; Mr Duffy, solicitor of Outcomes First Group Ltd attended on the second day for part of the morning only, and gave evidence to us, limited to the identity of the RB.

The Evidence and Documentation

4. The written evidence before us was principally contained in a bundle of documents prepared and indexed by the RB running as paginated to 692 pages (though the pagination is incorrect in the latter half of the bundle.) In addition, we received over the course of the first day's hearing additional documents from the RB: copies of the APS Behaviour and Exclusion Policies; a skeleton argument for Ms Littlewood; and some extensive contractual documentation relating to the contract under which Chloe was placed at APS by the Local Authority (LA). Ms Willicott objected to the late submission of these documents: after consideration the Tribunal decided to admit them: while there was no good reason for their late submission, they were clearly relevant to the claims , and it was in the interest of justice to admit them. The tribunal allowed a brief adjournment to read them; some had been received earlier.

5. Further documents were submitted during the adjournment from the RB: A Witness Statement from Sarah Bristow and an extract from the Gov.UK website giving information about Acorn Park School; and a witness statement from David Spencer explaining that the previous contractual documents had been submitted in error, and enclosing copies and extracts of what he now believed were the correct contractual documents, for Chloe's placement at OPS. (The contracts previously produced had been with Norfolk County Council, whereas the placing LA was actually Suffolk CC.) Mrs Willicott objected to the late submission of these documents. After consideration, the Tribunal decide to admit them for a number of reasons. Firstly, they were again clearly relevant, and while there was, again, no good reason for not submitting them earlier, the RB had in effect been invited to make a submission on the issue of the RB's identity in the Directions issued by the Tribunal on adjourning on 26 June; as for the contractual documents, having realised their error, the RB had had little choice but to rectify it as best they could; while the error reflected poorly on their management of documentation, it was to their credit that they had owned up to the error, which was not apparent on the face of the documents; moreover, Mrs Willicott had had the documents almost a week before the resumed hearing.

6. In addition, following Tribunal Directions on the adjournment, both parties submitted written submissions beforehand. The Tribunal was grateful to the representatives for their assistance.

Preliminary Issues

7. In addition to the issues related to documents described above, each party had submitted Requests for Change during the adjournment period. Mrs Willicott had requested submissions be submitted sequentially. The Tribunal refused that request, for reasons set out in an email of 6 July. She also by Request for Change Form, of 16 July, requested the RB be struck out "on the basis of continuing inadequacy". The Tribunal had some sympathy with that request: the response, on the issue of the identity of the RB, had certainly been inadequate so far; and the contractual documents produced (both sets) were silent as to the parties to the contract, were unsigned and undated: in effect were blank copies. Nevertheless, it would have been disproportionate to strike out the RB, and the request was refused.

8. The RB applied to amend the name of the RB, their fourth application to change it. This issue, which should have been a formality, dealt with in the initial Response, was surprisingly obscure, to all parties. Mrs Willicott had included a lengthy paper in the bundle, complaining about the obscurity of the ownership and management of Acorn Park School and the difficulty, within the extensive company structure of the Outcomes First group, of identifying the various components of the group, and establishing who was responsible for what. Many of her complaints in that paper were vindicated over the two days of our hearing. We deal with this point, the identity of the Responsible Body, as a separate preliminary point, below.

Identity of the Responsible Body

9. Under section 85 of the Equality Act, the duty not to discriminate is placed on the Responsible Body of a school; and under section 85(7)(c) and 85(9), the Responsible Body of a non-maintained special school (such as APS) is the "proprietor" of the school. Section 89(4) (a) of the Equality Act defines "proprietor", in relation to a school in England and Wales, as having "the meaning given in section 579(1) of the Education Act 1996". Section 579(1) Education Act states:

579 General interpretation.

(1) In this Act, unless the context otherwise requires—

- "proprietor", in relation to a school **[**or a 16 to 19 Academy**]**, means the person or body of persons responsible for the management of the school **[**or Academy**]** (so that, in relation to **[**a community, foundation or voluntary or community or foundation special school **[**or a maintained nursery school,**]** **[**or a maintained nursery school,**]** it means the governing body);

10. That is an unusual definition: it does not refer to the owner or ownership of the school at all, which is how "proprietor" is usually understood. In the context of education, that is not surprising: it has been the settled policy of government for many years, before and after the 1996 Act, to promote the local governance of schools. If "proprietor" had been left as "owner", local authorities would have been left as the responsible body for all sorts of issues across tens of thousands of schools, including in our context, discrimination. Far from the context "otherwise requiring", it makes sense in the context of a discrimination case if the Responsible Body is defined as "the person or body of

persons responsible for the management of the school". In maintained schools, the example given in the section, the governing body has control over school policies and over staff, since it is normally the employer and therefore is in a good position to oversee school policies, staff selection, training and the avoidance of unlawful discrimination, through use of the staff disciplinary procedure if appropriate.

11. Some private or independent schools have a governing body, though it may have a different name: Council or Corporation, for example. In some charitable schools, the Board of Trustees may itself be the Governing Body, or the Board may appoint a separate entity to govern the school. Similarly with proprietary schools: the owner (corporate or individual) may appoint a Governing Body; or manage the school directly, either personally, or through employing a Head, or in some other way. In such a situation – and no one has suggested that Acorn Park School has a Board of Governors or any equivalent body - we have to identify "the person or body of persons responsible for the management of the school" in order to identify the Responsible Body.

12. For the reasons set out in her paper, Mrs Willicott had been unable to establish the identity of the Responsible Body of Acorn Park School, and the claim was therefore submitted against the RB of APS, without actually identifying the RB. Unfortunately, the Response was similarly submitted in the name of "the RB of APS", without identifying who that was. At the start of the hearing the Tribunal therefore enquired of Ms Littlewood who the RB, her client, actually was. She informed us that APS was owned and operated by Acorn Norfolk Ltd, a wholly owned subsidiary of Options Autism Ltd. The RB was therefore Acorn Norfolk Ltd. The Tribunal was unwilling to accept that application without more information, since neither of those two companies had been named in the extensive bundle of documents submitted so far. We invited Ms Littlewood to make further enquiries and revert to the Issue.

13. She did so at the end of the lunch break. She had taken instructions from Mr Simpson, Regional Director for Outcomes First Group, who had oversight of APS, and who reported to the Outcomes First Group Board; and applied to change the name of the RB to Outcome First Group Ltd, a holding company for a large group of subsidiaries, between them owning and operating over 60 special schools, including APS. She referred us to the OFSTED Report in the bundle: they refer to Outcomes First Group as the "proprietor". We accepted that application and changed the name of the RB to Outcome First Group Ltd (OFGL). The evidence in support of that application included Mr Simpson's statement, in introducing himself at the start of our hearing, the he was a "Regional Director for Outcomes First Group" for a group of 6 or so schools, including APS, owned by various companies within the Outcomes First Group. He reported on the schools to Outcomes First Group main board Directors; and in turn Mr Marshall reported to him. Mr Marshall told us he was Head of Service for APS, a position he explained that was similar to that of Executive Head, with oversight of the management of the school. The head teacher of APS, Mrs Whipp was responsible for its day to day running and reported to him.

14. In addition, the application was supported by an email from Ms Saghir to the Tribunal, attaching a letter from her dated 28 April, (written on Outcome First Group Ltd letterhead, and describing herself as a "legal assistant for Outcomes First Group"), in which she informed the Tribunal that Ms Littlewood had now been instructed to "represent us (the Responsible Body) at the hearing". Ms Saghir works under Mr Duffy's

supervision: he is the solicitor who drafted the Response for the RB.

15. However, in the late afternoon of the first day of hearing, shortly before we adjourned for the day, Ms Littlewood made a further application, this time telling us that she was instructed to apply to change the name of the RB to Acorn Care and Education Ltd (ACEL), the Registered Proprietor of APS; and a wholly owned subsidiary of OFGL. Consistent with our stance earlier that morning, the Tribunal were reluctant to accept that application without more, since ACEL had not been mentioned before, either in the papers before us, or, by now, in the oral evidence we had heard, including that of the school's head teacher, Mrs Whipp. If ACEL was responsible for the management of the school, it was perhaps surprising she had never mentioned it. She gave her evidence immediately after we had changed the name of the RB to Outcomes First Group Ltd. On adjourning we set out the position on the identity of the RB as it then stood in Direction 4, (though, in error, we omitted Ms Littlewood's first candidate for RB, Acorn Norfolk Ltd, from the recital.)

16. On resuming the hearing on our second day, we had the benefit of Ms Bristow's witness statement and the web page from Gov.UK, admitted as set out above; and in addition Ms Littlewood applied to call Mr Duffy to give evidence. Mrs Willicott objected: the Tribunal requires parties to give notice of witnesses they intend to call, and no notice of Mr Duffy's attendance had been given. She was taken by surprise by his presence; Mr Duffy had not, unlike all the other witnesses in the case submitted a witness statement in advance. The Tribunal accepted the force of her objections, but nevertheless decided to allow Mr Duffy to give evidence. The issue of the identity of the respondent is a fundamental one for any court or tribunal hearing a case; it was currently a complete mess; and that was a highly unsatisfactory position, running the risk that the Tribunal might, if it found in the claimant's favour, find itself giving a potentially damaging and distressing judgement in a discrimination case against the wrong party. That opened the possibility of an application for reconsideration or an appeal, on this technical point. On balance, it was in the interests of justice, of a fair hearing, to allow Mr Duffy to give evidence.

17. Mr Duffy opened by apologising to the Tribunal and Ms Knight for the confusion caused over this issue. The Tribunal's Response form did not actually include a question requiring the RB to be identified, and he had not realised it would be so problematic. Ms Bristow was a colleague of his; they both worked for Outcomes First Group Ltd. He confirmed the contents of Ms Bristow's witness statement. Acorn Park School was owned and operated by Acorn Care and Education Ltd, a wholly owned subsidiary of OFGL. He described ACEL to us. The two main board Directors of OFGL were David Leatherbarrow, the CEO, and Jean Luc Janet, the CFO; they both sat on the Boards of all the subsidiary companies in the Group, which facilitated the exercise of a controlled and coordinated approach throughout the Group. In addition, on the Board of ACEL were two other directors: Mr Richard Power, who was also Group MD for Children, Care and Education; and Mr Richard Cooke, who was also Group Commercial Director. The contractual position varied; some contracts might be placed locally by the school; where there was a possibility of bulk purchasing, they would be placed by the appropriate company within the Group and then distributed through the Group. Mr Cooke, for example was in charge of LA contracts for placement in the Groups' schools; they might be with ACEL, or other subsidiary companies, or with OFGL itself; utility contracts would be placed centrally. So far as employment of staff were concerned, that varied with role

and seniority of staff: some might have contracts with the school; the more senior staff would be employed by ACEL. If a case were brought against the school it would be taken against the owner, the Board of ACEL, the corporate entity. Insurance for the school was taken out as a Group Policy. Back office functions, the accounts and so on, are handled centrally at Group level; but ACEL is the legal body. Mr Duffy's understanding was that Acorn Park School was not itself incorporated: it was owned through ACEL. He was unsure if ACEL itself had a Board of Governors or any equivalent body. They were recorded as the Registered Proprietor of APS on the web page from Gov.UK.

18. We also heard evidence on the issue of the identity of the RB from Mr Marshall, Head of Service for APS (a position he described as similar to an Executive Head: the head teacher, Mrs Whipp, reported to him.) He reported in turn to Mr Simpson. He had stated with OFGL in August 2020. He had a number of meetings with Mr Power, from ACEL, over a whole number of issues, including educational issues; perhaps one a month or so. He had little contact with Mr Cooke. He had not consulted ACEL or Mr Cooke over the termination of Chloe's placement.

Consideration and Conclusion on the Identity of the Responsible Body.

19. In her submission to us Ms Littlewood also apologised for the confusion caused by the respondents over this issue. She urged us to find that ACEL was the proprietor for the purposes of the Education and Equality Acts. After all, it was named in terms as "Registered Proprietor" of Acorn Park School on the page extracted from the Gov.UK website. We queried where the web page came from: the Department of Education or the Government Information Service, for example. Ms Littlewood was unsure but told us that the Secretary of State was obliged by statute to maintain a Register of Schools, and that the entry therefore represented a definitive statement as to the identity of the proprietor of APS: ACEL was "The Registered Proprietor"; and we should accept that statement at face value. We enquired whether the Secretary of State had used the 1996 Act definition of "proprietor" in drawing up the Register. Ms Littlewood told us that it was unthinkable that a Register of Schools, maintained under statute by the S of S for Education would not have used the definition of proprietor in the Education Act. Those of us, with longer experience perhaps of the Secretary of State for Education, do not find the proposition quite so unthinkable.

20. When we consider the evidence, what was missing from the respondent was any evidence from their 4 witnesses, Ms Bristow, Mr Marshall, Mrs Whipp and Mr Simpson, of ACEL having any responsibility for or involvement in the management of APS. At its highest, Mr Marshall told us he had meetings with a Director from ACEL on matters which included educational issues. He gave no examples, and he did not suggest that ACEL had responsibility for or managed any aspect of the school. On the contrary, his evidence demonstrated a clear line of management responsibility running from Mr Simpson, who was employed by and reported to OFGL, through himself to Mrs Whipp, head teacher of APS. It was not as if the respondents proposed ACEL with any conviction or clarity: their first (28 April) and third proposal was OFGL. Nothing more was heard of the second, Acorn Norfolk Ltd; and they had a month to prepare evidence for our second hearing at which they knew the issue would be addressed. They did provide evidence, Ms Bristow's witness statement, and Mr Duffy in person, but none of it addressed the definition of proprietor in section 579. We do not doubt the facts adduced by Ms Bristow and Mr Duffy: principally that ACEL owns APS; but all the evidence on the body of persons responsible

for the management of the school indicates OFGL.

21. We are left with the web page from Gov.UK. We were not taken to any statutory or regulatory provision indicating that the statement there, that ACEL is the Registered Proprietor of ACS, was conclusive, for our or any purposes; or that the web page was itself part of any statutory Register. In those circumstances, we decide that Outcomes First Group Ltd is the correct respondent, the Responsible Body for the purposes of this discrimination claim under the Equality Act. They are, after all, the owner of all the other companies in contention and therefore have ultimate responsibility, and control over management, in any event.

The Disability Discrimination Claim: The Claims

22. The individual complaints of disability discrimination before us were identified in Case Management Directions given on 4 March 2021 and confirmed on 25 March 2021. In chronological order, they are:

1) Unfavourable treatment on 7 September 2020, when Chloe was given disproportionate punishments for breaking rules, which resulted in staff shouting at her and making derogatory remarks.
2) Placing Chloe in an unsuitable class after the October 2020 half term holiday, without sufficient transition planning.
3) The RB excluding Chloe on 25 November for part of the day without giving notice.
4) The RB failing to put in place a suitable return plan.
5) [The RB] giving notice to the LA on 21 December 2020 to cease her placement, following a failed Annual Review on 17 December 2020, which was based on inaccurate and misleading information.

23. The issue of disability was also left for us to consider. In their Response the respondents, sensibly, concede that Chloe is a disabled person: they accept that "Chloe has autism with PDA tendencies and some sensory issues". Having considered the evidence we have no hesitation in deciding that Chloe is a disabled person for the purposes of the Equality Act

Factual background

24. Having read and considered the written and oral evidence, we make the following findings of fact. Further findings, particularly on disputed points and the incidents specifically complained of, are set out as part of our Consideration, below.

25. Chloe was 15 in December 2020, towards the end of the sequence of claims we are considering; 16 at the time of our hearing. In addition to the conditions mentioned above, she has a diagnosis of ADHD and has been referred to CAMHS for support with anxiety and mental health issues in 2014, and, more recently in August 2020. She had been educated in a mainstream primary school, transferred unsuccessfully to a mainstream secondary school on secondary transition, and started at Acorn Park School, an independent special school in 2016. Her EHCP was issued in August 2019. In the summer term of 2020, she completed Year 9. She is academically able, studying for GCSEs. Her attendance was disrupted from the start of lockdown in March 2020 through to the summer half term.

26. Her school report for the Year is generally positive; and at the Annual Review of her Plan on 15 June staff reported that Chloe's levels of anxiety had dropped dramatically; her previously disruptive behaviour had diminished, and she was accessing her education successfully. However, correspondence over the summer and comments from Chloe and her mother show that Chloe was finding the changes in the school difficult: her anxiety was increasing; Chloe was not being listened to; staff did not have sufficient understanding of her difficulties; and changes in routine and arrangements were not sufficiently explained or forewarned.

27. The school was going through a number of changes at the time; and these continued over the Autumn term. Some were introduced to meet the threat of COVID: bubbles and restrictions on interaction with other pupils were introduced; access to outdoor equipment, such as swings, was allocated to particular bubbles at particular times, and so on. Moreover, the school was under pressure from OFSTED which had issued a critical report In February. Mrs Whipp was appointed head at the start of the summer term; Mr Marshall appointed in August.

28. The school's incident log, "Sleuth", records a number of incidents of disruptive and abusive behaviour from Chloe in June and July, for some of which she was given a Verbal Reprimand. The most serious of these was on 10 June when Chloe and some other pupils are reported to have locked themselves in a room, been abusive to staff, complained they were not listened to and so on. It took most of the morning before the incident was resolved. No particular consequences appear to have followed.

29. A detailed risk assessment for COVID was carried out in preparation for the Autumn term, following DfE Guidance. Mr Marshall sent a lengthy letter to parents on 27th August to introduce himself and tell parents about some of the forthcoming changes in some detail and warning of others to come. Unfortunately, Chloe's return, to her new class, on 7 September did not go well. Our findings on this and subsequent events are set out below as part of our consideration of the five complaints of discrimination.

30. On 24 September, the school received a formal Notice from the Department for Education requiring an Action Plan, as a number of standards were not being met, including the quality of education and teaching, health and safety of pupils, and the quality of leadership and management; a damming assessment, delayed from February as the school had been largely shut during lockdown. The Action Plan was required to be submitted by 24 October, and thereafter would be monitored and OFSTED asked to revisit the school.

Consideration and Conclusions

The Legal Framework

31. The legal framework is set by sections 15 and 20 Equality Act 2010 (EA)

Discrimination arising from Disability: section 15:

Section 15 EA provides:

(1)A person [the school] discriminates against a disabled person [Chloe] if—
a) [the school] treats [Chloe] unfavourably because of something arising in consequence of [her] disability, and
b) [the school] cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if [the school] shows that [the school] did not know, and could not reasonably have been expected to know, that [Chloe] had the disability.

The school do not rely on the defence of lack of knowledge in (2): they were aware of Chloe's disabilities throughout.

32. The key parts of section 20 and 21 EA are:

20 Duty to make adjustments
(3)The first requirement is a requirement, where a provision, criterion or practice of [the school'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.
21 Failure to comply with duty
(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 [school] discriminates against a disabled person if [the school] fails to comply with that duty in relation to that person.

Turning to detailed consideration of the complaints:

1) Unfavourable treatment on 7 September 2020, when Chloe was given disproportionate punishments for breaking rules, which resulted in staff shouting at her and making derogatory remarks.

33. School have taken this to refer to two incidents on 7 September; the first occurring at the swings, which under the new Covid regime were now allocated for use by a different bubble from the one Chloe was in. Swings were important to Chloe as she used them to self-regulate. School witnesses recall that Chloe was asked, along with her friends, to stop using them, which she did. Chloe herself maintains she was never at the swings that day. Evidently, any incident at the swings cannot be what Chloe is complaining about.

34. Her complaint is about a subsequent incident that day, when she was in a classroom with friends, reading. (School witnesses say this is where she went after the swings). However, at least one of her friends was now in a different bubble; and under the Covid rules, mixing bubbles was not allowed indoors. Teachers therefore say Chloe and her friends were spoken to, and asked to move, appropriately. Chloe maintains she was shouted at. In her witness statement, she says: "me, Ray and Madi were reading a book in my classroom … when a teacher came in and said my friends had to leave. Pip (Mrs Whipp, the head teacher) came in and started shouting at us, particularly Madi, to go back to our classes. …". Mrs Whipp agrees she asked them to move; she denies shouting. No one suggests this incident was taken further or had any consequences. No one was punished, disproportionately or otherwise.

35. In oral evidence, from Chloe and Ms Knight and submissions from Mrs Willicott, it was suggested that a constant feature, particularly from the newer staff (Mr Marshall, Mrs Thompson, Mrs Whipp) was a lack of understanding in how to approach and manage pupils with autism, particularly those who had oppositional tendencies, such as Chloe; and that the approach of staff on this occasion demonstrated this; and this was clearly an example of unfavourable treatment, because of Chloe's behaviour – something arising from her disability.

36. School witnesses deny any lack of understanding: they have been trained on autism and PDA. This was not "unfavourable treatment": it was for the benefit of the pupils, necessary for the health and safety of Chloe and the others to protect them from COVID.

37. Looking at section 15, we are persuaded that this was unfavourable treatment: we approach that issue from the point of view of the disabled person affected; the motive for the treatment – "for their own benefit"- is irrelevant at this stage; it comes into the question of justification. We also accept that Chloe's behaviour, for which she was spoken to, was something arising from her disability.

38. But when we consider the overall context, we are persuaded that firm action, and it may be strong words, were appropriate. This was the first day of a new regime for the school, with new procedures, required for everyone's health. School had a legitimate aim of protecting pupils health and safety; and the steps taken were proportionate: pupils were reminded of the new rules and required to keep to them.
If school had gone further, and punished the pupils, for example, administered a Verbal Reprimand (as had happened the previous term, for example) that may well have been disproportionate, but there is no suggestion of that. Mrs Willicott suggested that in following the Government Guidance on COVID, schools were also required to keep to "keep things as normal as possible". We find that is what school were doing: striking a fair balance between enforcing the new, COVID driven regime, while getting on with business as usual as far as possible.

39. This claim fails on the defence of justification in section 15(1)(b). We observe that if we had considered it under the alternative ground of a failure to make reasonable adjustments, (section 20, set out below) we would have found that reasonable adjustments were made; and that it would not have been reasonable to take a more moderate line, given the importance of protecting everyone from COVID, particularly on the first day back when the importance of the new regime had to be brought home to everyone, PDA or not.

2) Placing Chloe in an unsuitable class after the October 2020 half term holiday, without sufficient transition planning.

40. The background is the Action Plan school were required to implement by OFSTED. The new curriculum had to be adjusted quickly, half way through the October term. Chloe was academically able and one of the two classes in her Year was now to follow a more academic path. Moreover, Chloe was finding the behaviour of one of the other pupils in her class challenging. We accept school's evidence that the new class was suitable, at least initially, for Chloe. The teacher was someone she knew and who

knew her, and the curriculum appropriate: it was a sensible decision for the school to move her; moreover, it removed her from the pupil causing problems, for her and others. (That within a short time, another pupil in the new class also caused similar problems, does not affect its initial suitability.) Within section 15, there was no unfavourable treatment, and nothing arising from Chloe's disability to make it unfavourable.

41. But there are two aspects complained of: an "unsuitable class", and a lack of "sufficient transition planning". It is the transition planning that is of concern. The decision to change class was communicated to Ms Knight and Chloe by letter of 21 October 2020. That letter promised that "over the next day, your child's new teacher will contact you to introduce themselves to you. Your child will transition to their new class immediately after the half term." The letter gave no details of the new class. Unfortunately, pupils were not physically in school that week: school had had to close for COVID reasons, and was operating remotely by video link. Moreover, Chloe's new class teacher never contacted her. Chloe was therefore left not knowing who her new teacher or class mates were to be. Instead of being able to take a break from the pressures of school, she was left stressed over the half term week about what she would face on her return. Mrs Whipp learnt of the breakdown in communication and sent an email on the Friday before return, giving the name of the new teacher, and telling her there would be 4 pupils in the class.

42. In common with most autistic people, Chloe likes routine and unexpected changes cause stress and anxiety; and not knowing what class she would be in caused her a lot of both. That heightened stress and anxiety arose from her disability. To leave her in ignorance for 10 days or so was clearly unfavourable treatment; again, the motive is irrelevant at this stage.

43. We were not told why the transition planning – the promised phone call – broke down, save that the teacher was on holiday for half term week. It is hard therefore for school to justify the treatment: the legitimate aim, to provide Chloe with a suitable class following the reorganisation of the curriculum under the Action Plan, is clear; but to do it with such belated and minimal information to the pupil is not proportionate. (We accept that many of the normal transition steps, visits, trial days and so on, were not possible because of COVID restrictions.) It would have been relatively easy for the school to provide at least some basic individual information in the letter. This is not a large school, after all; it has 84 pupils; classes of 4 or 5. For example, "your new class teacher will be Mr Donovan; your class includes X and Y." That would have eased Chloe's transition hugely, saving much stress and anxiety.

44. We therefore find this claim of unfavourable treatment, discrimination under section 15 EA succeeds.

45. The claim is listed as a claim of unfavourable treatment under section 15 EA in the Case Management Direction of 4 March, (paragraph 14) and that is how we have primarily dealt with it. However, it was originally pleaded as a failure to make a reasonable adjustment. If we consider it under section 20 and 21 EA, we share the respondent's view that an appropriate PCP (provision, criterion or practice) cannot be identified. Certainly, informing Chloe well in advance of the changes would have been a reasonable step for the respondent to take: indeed they promised to take it. Their failure to keep that promise may have been unreasonable, but that is not sufficient to satisfy the technical requirement of section 21; it was not their "practice" to promise communication

and fail to deliver it, even if it happened on occasion.

3) The RB excluding Chloe on 25 November for part of the day without giving notice.

46. Chloe's new class had initially suited her better; but problems with another pupil (whose behaviour was physically threatening to her and others on occasion) prevented her settling. Her anxiety about school generally was still acute. Moreover, changes to school routines were still being introduced. For example, school had restricted the use of phones in school at the start of term: Chloe and her friends had not yet fully accepted the change; the restrictions on physical movement and mixing with friends caused further issues. A number of incidents were documented by the school. For example, there was an incident at the swings, on 16 November: pupils, including Chloe were abusive and disruptive and refused to return to class. That incident took a couple of hours for Mr Masterson to defuse the situation. It seems to have been handled appropriately and calmly. There is a letter from Mrs Whipp describing the incident to Ms Knight which is proportionate; it does not suggest any sanction was called for or imposed; insofar as it warns of the consequences of future conduct, it states: "Further refusal to abide by our Covid risk assessment will necessitate the removal of the play equipment … Continued refusal will lead to the calling of a meeting between pupil, family and school to discuss support strategies, following the risk assessment."

47. Support strategies were needed. School had put in place some alternatives for the swings to help Chloe with self-regulation (to meet her sensory needs), but these were not as helpful; and while new swings had been ordered, these were never installed while Chloe remained at the school. Ms Knight had raised her concerns, not for the first time, about the lack of provision specified in Chloe's EHCP. She had a lengthy meeting with Mr Masterson and Ms Saunders, the school's new SENCO (appointed in October) on 6th November. The minutes of the meeting were produced by Ms Knight, and approved by Mr Masterson in his oral evidence to us as "largely accurate". The school agreed at the meeting that provision was not being met fully in a number of respects, though progress was being made.

48. On 25 November, on arriving at school, Chloe's retention of her mobile phone again caused an issue. Chloe texted 3 of her friends; this time they went to a small breakout room in the school and barricaded themselves in, with a show of defiance and much abusive language. Various teachers attended and attempted without success to extract them and to calm the situation. Mrs Whipp, Ms Thompson, Mr Masterson and Mr Wallace were all in attendance. Mrs Whipp, after discussion with her staff, decided enough was enough: parents should be called, asked to come in and remove their children.

49. Ms Knight was telephoned and left her work at about 9.35; it took her an hour to get to school; Chloe left the room when she arrived, and went home with her mother. Initially Ms Knight's response to the situation was conciliatory. She had a brief meeting with Mrs Whipp and later sent an appreciative email. She was surprised to learn, from an email subsequently sent her by Mrs Whipp at 4.30 that day, that this had not simply been a request to take her daughter out of school, a pragmatic way of dealing with a difficult situation; rather it was treated as a formal half day exclusion of Chloe by the school. Ms Knight reacted strongly to what she saw as an abrupt and unexplained

change of approach by the school, a change which had not been indicated in her earlier conversation with Mrs Whipp. An angry exchange of emails followed, in which Ms Knight expressed her disgust at the school's actions, saying she no longer had any faith in the management team.

Consideration and conclusion

50. Any exclusion is likely to count as unfavourable treatment for the purposes of section 15, and the RB sensibly conceded that it was. However, they dispute that Chloe's behaviour on this occasion was "something arising in consequence of her disability". Ms Littlewood helpfully cites a number of authorities on how we should interpret this "deliciously vague" (Clarke J in an early EAT case) phrase. Mr Masterson, who of all the teachers we heard from knew Chloe best, and who Cloe had at least at times, a good relationship with, told us that "given the barricade took place just after 9.00 a.m. and it was well co-ordinated by Chloe with her friends, I do not believe that her behaviour was a part of her disability. I very much believe that Chloe simply chose to behave this way because she was unhappy with school's policy on mobile phones."

51. Generally, we were impressed with Mr Masterson's calm and measured approach to Chole's disruptive behaviour; but we do not accept his differentiation of Chloe's challenging behaviour as on some occasions connected to her autism and PDA; but on others a simple matter of choice. It appears to be the element of pre-planning that led to his conclusion on this occasion, as opposed to a purely spontaneous challenge to authority. But Chloe has the cognitive ability of a 15 year old to plan and coordinate her defiance; her Pathological Demand Avoidance drives her to resist instruction and control; and her autism drives her to dislike changes to policy and practice. That she plans and coordinates her defiance does not mean it is any less driven. She is in a special school precisely because of her inability to control her disruptive and defiant behaviour. We note, from Ms Littlewood's authorities and others that the degree of causation required for "something" "to arise from disability" is "a looser connection that might involve more than one link in the chain of consequences" (Simler J in Sheikholeslami 10 WLUK 117). That is apt to cover a planned operation, requiring a number of stages, as much as a spontaneous one. Neither party has submitted any psychologist's or psychiatrist's reports describing Chloe's conditions; but as a specialist tribunal, we would be surprised if it were possible to differentiate the root causes of Chloe's behaviour so neatly. We find that Chloe's disruptive and challenging behaviour on this occasion was "something arising from her disability".

52. The real issue is justification: section 15(1)(b): were the means adopted, a formal half day exclusion, a proportionate means of achieving a legitimate aim? The school's legitimate aim "was to ensure the health and safety of pupils, staff and the wider community; and to maintain standards of behaviour and discipline". The first was clearly very important: the school had only recently had to be closed, before half term, for a week because of a Covid outbreak; one of the pupils in the protest was from a different bubble; (as were some of the staff called to attend); and one of the pupils involved had diabetes and might need assistance on that score. (We attach less weight to that last point: it was never mentioned at the time as a factor, and we heard no suggestion that the possibility of a hypoglycaemic attack was more than a remote possibility.) We do not regard the second aim, maintaining behaviour and discipline as being of the same significance. Mrs Whipp lays stress on the foul and abusive language used during the incident, and the

direct, personal criticism of her and the management for the school generally; but it is the job of a special school to help pupils learn to control that behaviour; and this is unlikely to be achieved, where pupils have PDA tendencies, by any direct focus on good order and discipline. Nevertheless, we accept that there must have been a disruptive effect on other pupils and classes from the noise and commotion involved.

53. Were the means used proportionate? Mrs Whipp tells us "all proper and reasonable efforts had been taken, the only remining option was to exclude the pupils and call their parents in the hope that they could draw their children out from the room". We found this a difficult, borderline issue. The other, less discriminatory, course of action available was, effectively, to do nothing. The children were no danger to each other. Deprived of the attention they sought (the procession of staff attempting to entice them out, with a mixture of cajolery and authority), they would sooner or later have wanted out, if only to go to the toilet. The approach taken on this occasion contrasts with the incident the previous week where Mr Masterson's quiet and patient perseverance in the face of similar provocation and abuse carried the day. He sent Ms Thompson away when she offered to help: "sometimes too many staff can make the situation worse".

54. On balance, we are persuaded that the step taken was proportionate. The previous occasion took place largely outside, where the risk from Covid was not so great; nor the immediate disturbance so prominent. The means used – calling on parents for support - was low key, unthreatening and effective. Ms Knight was able to remove Chloe without disruption or further defiance. Moreover, the fixed term exclusion was for the shortest practicable period. Unfortunately, it had a specific legal consequence. Removing a pupil from school in such circumstances is unlawful unless done for disciplinary reasons: parental consent does not make it lawful.

55. In our view, this last aspect was badly handled. If Mrs Whipp appreciated the formal legal consequences of asking parents to remove pupils in these circumstances, she gave no indication at the time to Ms Knight, to whom it came as a great shock. She felt she had been misled, effectively tricked into conniving at her own daughter's formal exclusion. Many schools handle this difficult situation much better. The bald letter of exclusion does not, for example, explain that school effectively had no choice but to treat any assistance from parents in this manner as a formal exclusion. Mrs Whipp would also have been wise to spell out some of the potential adverse consequences of repetition in her previous letter of 16 November; instead of stating that the only consequence of repetition would be a meeting to discuss support. Ms Knight was seriously misled. She has cause for her anger. But that school mishandled the communication does not make the exclusion an act of discrimination.

56. We find, on balance and with some hesitation, that the response was proportionate and therefore justified. We dismiss the complaint of discrimination.

4) The RB failing to put in place a suitable return plan [after the exclusion].

57. In the exclusion letter, Mrs Whipp said: "Chloe is requested to attend a reintegration interview with Emma Thompson at school on 26/11 at 9am in Emma's office. You are also welcome to attend if you wish. The purpose of the reintegration interview is to discuss and agree how best Chloe's return to school can be managed."

58. There followed a series of email exchanges between Ms Knight, Mrs Whipp and Mr Marshall, in which Ms Knight protested the exclusion, stated she would make a formal complaint about it, and that she no longer had confidence in the management of the school. This aspect was exacerbated when Mr Marshall suggested that they "meet within the framework of an annual EHCP review so that you can express your views and you can formally give notice on Chloe's placement with us." That only served to inflame Ms Knight's view of the school: "Oh dear Peter [Marshall], I was already under the impression that the school had no intentions of supporting my daughter or following her EHCP as you clearly want rid. Your reply has only confirmed my suspicions."

59. In all of this, Chloe's return to school was rather lost sight of; but Ms Knight did explain her reasons for not returning to a reintegration meeting with Emma Thompson: 25 Nov: " I will not have [Chloe] upset any further having to attend a meeting with Emma"; Nov 26: "I have little faith that the management of the school will not to (sic) force my daughter into another difficult meeting with a member of staff she does not trust."; and Nov 26, "If school continue to insist that I put my daughter through a traumatic meeting with a member of staff she feels unsupported by, then I will be unable to send her back until the matter is resolved." Nov 30: "I am unable to send Chloe back to school, until you can arrange a safe and secure return for her, which means not forcing her into a meeting with staff that intimidate her." That email drew a response on the point from Mrs Whipp, at 16.02: "Chloe continues to be welcome in school. It is the procedure at Acorn Park that pupils are welcomed back through a reintegration meeting with our Pastoral Support Lead, Emma, which supports any adjustments that may be required. … we are happy for you to attend the meeting. If it would be helpful, Emma can conduct this meeting through a Teams call in the evening?" Ms Knight replied at 16.57: "I don't feel it unreasonable, considering recent events, that we request the integration meeting with another member of staff. If school are interested in supporting Chloe, as previously requested I would expect this to be with a staff member we can trust and feel comfortable with." At 5.02, Mrs Whipp replied: "reintegration meetings are part of Emma's role as our pastoral lead in school. As she needs to work closely with pupils, it is important that Chloe and Emma build a relationship. You are very welcome to attend the meeting as well so that you can monitor the situation".

60. The matter rested there; it was subsequently, effectively overtaken by preparations (and disputes) over the proposed Review of Chloe's statement; and then the termination of her placement at APS. Chloe never did return to school, following her fixed term exclusion.

Consideration and conclusions

61. This is the one complaint that perhaps fits more naturally as a complaint of a failure to make reasonable adjustments, under section 20 and 21 EA, than a complaint of unfavourable treatment under section 15. We will give our views on both.

62. If we consider it under section 15, the act of unfavourable treatment is school's requirement that Chloe have a meeting with the school's pastoral lead, a teacher she found intimidating. From Chloe's point of view, we have no doubt that she did find Ms Thompson intimidating and did not trust her. Indeed, that was Chloe's direct evidence to us. Ms Thompson says she had no reason to mistrust her or find her intimidating. She was new to the school and had only had three points of contact with Chloe: when Chloe

was putting up a poster with inappropriate views about the school; the incident at the swings on 16 November; and the ban on mobile phones. But Chloe does not take kindly to staff who are new to her; moreover the three points of contact were all occasions when Ms Thompson was explaining to Chloe why she could not do things she wanted to. However nicely put, from Chloe's point of view, coloured by her PDA tendencies, telling her what she cannot do is not a way to build a relationship with her, save an oppositional one. Moreover, any pupil who has been excluded may fear further telling off, a reminder of what they have done wrong, at a reintegration meeting. That the meeting had a different aim does not remove the unfavourable impact on the pupil of the requirement to attend it.

63. Was that treatment unfavourable because of something arising from Chloe's disability? Many autistic pupils dislike contact with new adults; if alongside their autism, they have PDA tendencies, they dislike being told what they should not be doing. Clearly, there is a link between the treatment and Chloe's disabilities. She found Ms Thompson intimidating and distrusted her because of those disabilities, her disability was a major factor in that distrust.

64. The school had a legitimate aim: it was sensible for the school's pastoral lead to conduct the interview so she could review what assistance Chloe might require to assist her going forward, to prevent any repetition. Was it proportionate for school to stick to the requirement that Ms Thompson conduct the interview, and no one else?

65. It emerged during the oral evidence that in fact the 4 reintegration interviews required on this occasion, (with the 4 pupils involved in the barricade), were divided up between Mr Masterson and Mrs Thompson, each taking two. Mr Masterson told us that he would have been suitable to conduct the reintegration with meeting with Zoe; it might have been difficult to find the time, but we were told the meetings were generally short, 20 to 30 minutes or so; and could have been timetabled in advance to suit his commitments. We observed above that Mr Masterson did have a relatively positive relationship with Chloe. In those circumstances we can see no good reason for Mrs Whipp's intransigence over the issue. If she was willing to accept Mr Masterson, then acting Deputy Head of the school, taking Mrs Thompson's role with two of the pupils, why not with three? If that was the obstacle to Chloe's return, then there would have to some weighty reason for the school not to facilitate it, given the damage done to Chloe by keeping her out of school. Mrs Whipp's reason is undermined because it was not followed for the other two pupils.

66. This was a disproportionate means of achieving a legitimate aim and therefore unlawful discrimination under section 15 EA.

67. If we consider it under section 20 as a failure to make a reasonable adjustment (which is how the claim is answered in the school's response), then there is no difficulty in identifying the PCP (provision, criterion or practice). Mrs Whipp spelt it out in her email: "It is the procedure at Acorn Park that pupils are welcomed back through a reintegration meeting with our Pastoral Support Lead, Emma".

68. Did that "practice" put Chloe at a substantial disadvantage in comparison with [pupils] who are not disabled? Pupils who do not have autism with PDA tendencies are significantly less likely to have developed the mistrust of Emma, especially given the

fleeting contact they had had, which Chloe had developed. "Substantial" is defined in section 205 EA to mean more than minor or trivial. In our view, requiring Chloe to attend a meeting at which her exclusion and the reasons for it were likely to be discussed with a teacher she did not know and had only encountered in negative context was more than a minor disadvantage. In those circumstances, the school is required to make a reasonable adjustment if that would remove or reduce the disadvantage.

69. Would it have been reasonable for school to ask Mr Masterson to conduct the interview in those circumstances? Clearly it would; he was already conducting the same interview with 2 other pupils. He is likely to have been an acceptable teacher to Chloe. His substitution would have considerably alleviated the disadvantage she was under with Mrs Thompson. It is likely to have enabled Chloe to return to school. Ms Knight herself did not suggest Mr Masterson; but the duty to make the adjustment falls on the school; and it is therefore their responsibility to consider and identify reasonable adjustments, if they exist. After all, school knew Mr Masterson was able to conduct such interviews: Ms Knight did not. (In employment law, case law has clearly established the obligation to identify reasonable adjustments falls on the employer, not the employee. The Equality Act is a single code and should be construed compatibly across the different Parts, where practicable.)

70. We find school discriminated against Chloe by failing to make a reasonable adjustment on this occasion.

5) [The RB] giving notice to the LA on 21 December 2020 to cease her placement, following a failed Annual Review on 17 December 2020, which was based on inaccurate and misleading information.

71. The factual background to this complaint is largely set out in our consideration of the 4 earlier complaints. The additional element is the Emergency Annual Review called by the school on 17 December. In preparation, school prepared a Review Report in standard format for the Review, which was circulated to participants on 14 December. Ms Knight protested that some of the information it contained was inaccurate. Some of it was: for example, the Report states a number of times that Chloe had asked to move class before the October move. Ms Knight has always protested this was inaccurate; Chloe had complained about the behaviours of another pupil, but that is not the same as requesting a change. We have seen no evidence to support the suggestion that Chloe requested a change; and to say that the reduction in "consistency and continuity of approach" was "as a result of Chloe's request to move classes" is quite inaccurate in exonerating the school for the lack of consistency and laying it at Chloe's door.

72. Given the background, we can understand Ms Knight's exasperation with these inaccuracies; but we are not persuaded that they are particularly significant. By and large the report does paint a balanced picture of Chloe's situation in school. Chloe did find the COVID restrictions challenging; her anxiety in school had increased. And there are references to failings on the school side: in communication, for example, and the retraining staff had required to support Chloe appropriately. Some of it could have been more tactfully worded: to say "Chloe needs to develop a better theory of mind" may be true; but the fuller picture would be to say that "School need to find a better way to help her develop a better theory of mind"; after all, there were some positive proposals for this included in the report.

73. No minutes of the Meeting on the 17 December have been produced to us. From the evidence of those present, it is clear little progress was made. Mr Masterson described it to us as a difficult meeting. Ms Knight failed to get satisfactory answers to her concerns about the inaccuracies in the report, and about the school's failure to provide the provision specified in the current plan. Mr Marshall found most of Ms Knight's persistent criticisms unanswerable since they were couched in general terms of failure to meet needs, but lacked specificity. He decided to end the meeting, since it was going nowhere.

74. The following day, 18 December 20, he sent a letter to the LA, copy to Ms Knight, giving notice to terminate Chloe's placement: "Following a review of Chloe's needs we no longer feel able to meet her needs. We do not believe that Acorn Park is the correct provision and therefore we are sending you our intention to close this placement. … Chloe's last day on roll at Acorn Park will be 15 January 2021." (In fact, the required notice was 6 weeks under the contract with the LA, but the LA do not appear to have taken the point; and Ms Knight had no knowledge of the placement contract.)

Consideration and Conclusion

75. It is striking that the reason given in the letter "we no longer feel able to meet [Chloe's] needs" is quite different to the reason Mr Marshall gave us, or maintained at the Annual Review. His evidence to us, and at the Review, was that the school was able to meet Chloe's needs; was doing so properly (subject at most to a couple of issues where communication might have been better, and where changes had had to be made following the OFSTED inspection and Action Plan); and could do even better in future with the planned increase in therapy provision for Chloe. He set out his reasons to us for cancelling the placement in his witness statement:

> 57. … Both myself and [Ms Knight] agreed [at the end of the Review meeting] to consider the suitability of the placement on the grounds that the relationship was no longer tenable given the cycle of [Ms Knight's] continually stating we were not meeting need, the school believing we were meeting need, and [Ms Knight] refusing to articulate specifically how we were failing to meet need.
> 58. After the meeting I reflected on our discussions, this continual cycle of [Ms Knight's] adamant belief and view that we were failing to meet Chloe's needs, that the school was never going to be in a position to meet these needs as perceived by [Ms Knight], the fact that [Ms Knight] was continuing to prevent Chloe from returning to school, which in my view was for reasons which did not have any substance and for reasons which we could not address, and the fact that Chloe's education was significantly suffering from this unnecessary and prolonged absence.
> 59 After considering these issues and Chloe's best interests, I decided to terminate Chloe's placement so that Chloe could move to another school which would be better able to meet her needs to [Ms Knight's] satisfaction.

76. It is evident that the real reason why Chloe's placement was terminated was not because the school believed that they could not meet need; they believed they could. It was that they could not cope with Ms Knight's persistent criticism of their provision.

77. Coping with parental criticism is a fact of life for any school. The spectrum runs from parents who make persistent and unjustified complaints (and tie up vast amounts of scarce management time) to parents who make appropriate and timely complaints. On that scale, we would place Ms Knight's complaints firmly towards the latter end. She was indeed a persistent and tenacious complainant, but she had much to complain about; and her complaints were not couched in excessive or abusive terms; they are leavened by an appreciation of the difficulties the school was in, the problems caused by COVID, and not least, by apologies and understanding of the difficulties caused, on occasion, by her daughter's demanding behaviour. (Ms Knight is herself a teacher). Her emails did make stronger criticism towards the end, including her lack of faith in management and their commitment to her daughter; but that is understandable given the failure in communication with her by school management: for example Mrs Whipp's letter of 16th November which gave no warning at all that further repetition of the behaviour could lead to a formal exclusion; and, when she met Ms Whipp on 25th November, no hint at all that what was in progress was a formal exclusion.

78. Indeed, that failure to communicate clearly or effectively was continued by Mr. Marshall at the Review meeting. He told us that while he had not yet decided, he had increasingly, over the previous weeks, come to the view that Chloe's placement was becoming untenable. However, he never shared that with Ms Knight; gave her no warning. He could easily have sent a letter warning her, for example, that if she persisted with what he regarded as unjustified criticism of the school, notice to terminate might be given. He could, and should have shared that with her at a Review meeting: provision and the future of the placement are central to the statutory Review process. Instead he chose to bypass the necessity of discussion with an awkward parent by ignoring the statutory Review process altogether and resorting to the simple expedient of giving contractual notice to terminate.

79. The SEND Code of Practice provides, para 1.7

> Parents views are important during the process of carrying out an EHC needs assessment and drawing up or reviewing an EHC Plan in relation to a child. … At times, parents, teachers and others may have different expectations of how a child's needs are best met. Sometimes these discussions can be challenging but it is in the child's best interests for a positive dialogue to be maintained, to work through point of difference and establish what action is to be taken.
>
> Parents cannot contribute effectively unless the school is frank with them and share their concerns for the future with parents. If school are not open with parents they will find it much harder to work through points of difference.

80. We do not accept Mr Marshall's statement that at the end of the meeting Ms Knight agreed with his, opaque, suggestion that each would review the relationship. Ms Knight had suspected what was coming (as her email exchange with him (quoted above, para 58) showed, but she never once suggested she wanted to take Chloe out of the school. As she told us in evidence, special school places are hard to find; there was nowhere else for Chloe to go; and Chloe had previously done well in the school until the new management took over.

81. Nor do we accept his point that Ms Knight was unspecific in her criticism of a failure

to follow the provision specified in the EHCP. At the meeting on 6 November with Adam Masterson and Sarah Saunders (the Deputy Head and SENCO of the school), she "was asked to go through Section F of Chloe's Plan and discuss what parts school have not met." She did so. "At the end of the meeting AM and SS agreed there were several points to work on to ensure Chloe's plan was followed appropriately going forward." Various specific action points followed. Mr Masterson confirmed those meeting notes were "largely accurate" to us in evidence. He told us that progress had been made on some of the points identified, others were still in progress. (Chloe, after all, had only been in school for three weeks or so after the meeting.)

82. We prefer Mr Masterson' evidence on the issue of whether school was providing the provision specified, since it is first hand and he has a much closer involvement in what happened subsequently with Chloe's provision than Mr Marshall. Mr Marshall's account is set out in his witness statement over 5 pages, paragraphs 34 to 48. He states in para 37 that "the two senior staff members [AM and SS] … had not acknowledged that [the notes] were an accurate reflection of the position at school". He should have checked with Mr Masterson, who told us they were "largely accurate". We find that Ms Knight's complaints had substance and were timely. That she was persistent was because she had to be: the complaints had yet to be fully rectified; or even acknowledged, at least by the Executive Head.

83. But we are not here to rule on whether provision was provided; nor sitting as a contractual court to decide whether the power to terminate the contract was properly exercised or not. We are here to decide whether it was an act of discrimination.

84. We consider it first under section 15. Was terminating the contract unfavourable treatment? Mr Marshall tells us he had Chloe's best interests in mind; and that it was for her benefit because it enabled Chloe to find another school. That is at best, disingenuous. Changing schools is always a difficult process for an autistic pupil and requires a careful transitional process. Even if the LA were persuaded to alter Section I of the EHC Plan, they are unlikely to have done so without that process; and without steps to ensure some interim provision. If it had not been for school's disproportionate insistence on Ms Thompson conducting the reintegration meeting, Chloe would have been in school throughout; and returned in January.
Excluding a pupil from a school does not just disrupt their education. It removes them from their friends and social life. For an autistic child, with any social contact further restricted by the pandemic, the consequences were potentially very serious. It also places a major burden on family arrangements, for childcare. Neither Chloe nor her mother was asking to leave. To enforce her departure on just 4 weeks' notice (given the Christmas break, 3 weeks at most), meant there was no chance of finding another school. The LA had not even been consulted before the decision was taken. This was clearly unfavourable treatment.

85. Was that treatment "because of something arising from Chloe's disability"? The reason for the treatment was her mother's persistent complaints. Were those complaints "something arising from [Chloe's] disability?" The complaints were centrally, directly connected to her disability. It was because of her disability that she required special educational provision, that she was in a special school, that she had an EHC Plan, that her provision was specified in Section F of the Plan; without disability, Ms Knight had nothing to complain about. We commented above that the statutory language imports a

looser connection than direct causation, sometimes through a number of steps. In the words of the authorities Ms Littlewood referred us to: Grossett [2018] EWCA Civ 1105, Sales LJ at para 36: it "is an objective matter whether there is a causal link between B's disability and the relevant "something" "; Sheikholeslami [2018] 10WLUK 117, Simler J at para 62: "the critical question is whether on the objective facts, [the "something"] arose "in consequence of" (rather than being caused by) the disability. This is, a looser connection that might involve more than one link in the chain of consequences."; iForce ltd [2019] 1WLUK 508: "There must be a real objective link, and not an imagined or mistaken one, between the disability and the unfavourable treatment, in order for the requisite casual connection to be made out." In this case, Ms Knight's complaints were a direct consequence of her daughter's disabilities; and there was a "real objective link between the disability and the unfavourable treatment" as the reason for the treatment was her mother's complaints, and the complaints all arose because of her daughter's disability, which led to the EHC Plan and the specified provision, which was the subject matter of the complaints.

86. Was the unfavourable treatment justified within section 15(1)(b)? We have difficulty in identifying a legitimate aim, given our views that departure from the school in this manner was not in Chloe's interests. Termination of the contract was not required to enable her to find another school. (Indeed, it may have made it harder since an unexplained contractual termination may be seen as tantamount to a permanent exclusion – which in effect, it was.) The actual reason for the exclusion – to put a stop to Ms Knight's persistent complaints, cannot amount to a legitimate aim, since we have found her complaints were largely for good reason and properly expressed. If we widen the reason to the breakdown in the relationship, caused by the persistent complaints (and we accept that had effectively happened in this case), we do not see it as a legitimate aim to have pupils only from parents who have a working relationship with the school. Many parents distrust and dislike the staff or management of their children's school and are abusive and intolerant of the school's efforts. That hinders, but does not prevent, their children receiving an effective education. This case is an example: Ms Knight may have lost confidence in the management of the school, yet that did not prevent Chloe returning. She would have returned if not for the school's refusal to make a reasonable adjustment over the reintegration meeting.

87. In any event, it is very hard to see how what is in effect a permanent – and peremptory - exclusion could be a proportionate outcome to any of the potential legitimate aims canvassed before us. We would take a lot of persuading that where there is a carefully balanced statutory procedure for changing the placement in an EHC Plan, used by LAs, schools and parents throughout the country, that procedure can simply be bypassed altogether by use of a bare contractual power, because a parent is difficult and awkward. In an extreme case, (and this is at the other end of the spectrum) we have seen parents barred from the Review Meeting if disruptive, but the change of placement should still be discussed with the LA and others involved with the child's education.

88. Ending Chloe's placement in this manner and for these reasons was a serious act of discrimination within section 15, completely unjustifiable in our view.

89. The background to the specific claims in this case is the school's handling of the changes made following the poor OFSTED Report in February 2020. Chloe's needs, as a pupil with autism and PDA, were not given sufficient attention. Her needs were

challenging; her behaviour disruptive; but no more so than other pupils with comparable SEN. APS as a special school has the resources to cope. Instead, when her mother protested on her behalf about the school's educational and leadership failings, Chloe was forced out of school. Instead of persevering to meet her needs, school took an easier option; but one disastrous for Chloe.

Remedy

1. The Tribunal's powers on remedy are set out in Schedule 17, paragraph 5 of the Equality Act:

> 5(1)This paragraph applies if the Tribunal finds that the contravention has occurred.
>
> (2)The Tribunal may make such order as it thinks fit.
>
> (3)The power under sub-paragraph (2)—
>
> (a)may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
>
> (b)does not include power to order the payment of compensation.

2. In the Claim Form, Ms Knight asked the Tribunal to make findings of discrimination against Chloe, which we have done; and asked that we order Acorn Direct Learning (another part of OFGL; it provides home education provision) to remain responsible for Chloe's education until such time as a suitable placement can be found for her. In practice, that second request has been overtaken by events. The LA commissioned Acorn Direct to continue provision for Chloe in any event; and we are now told that another possible placement has been identified and it is likely Chloe can start there, possibly part time in September.

3. We therefore asked Ms Knight what remedies she and Chloe were seeking. She set out a number of requests: the first two were that we send a copy of our findings to Suffolk, County Council, the LA; and to OFSTED. Ms Littlewood informed us that, if the claims were successful, her client had no objection to our doing so. Thirdly, that the school should seek guidance or training from the Council for Disabled Children; and fourthly, that staff members should receive training on pupils with PDA in particular. On these, Ms Littlewood told us that the school already had an extensive training programme for staff, which included training on PDA; but that if further training was recommended by either the LA or Ofsted, the RB would comply.

4. The parties differed as to how far the decision should be redacted, (that is, should have identifying features removed). Ms Knight and Chloe took the view that Chloe did not hide her disability: it was part of her identity; indeed, she was a campaigner for the rights of disabled young people. The RB felt that no individual should be identified.

Consideration and Conclusions

5. We found that the termination of Chloe's placement, by giving notice under the contract, was a serious act of discrimination, and one which had a serious and lasting

impact on Chloe's education. It has meant that she has effectively lost the whole of the year's education, already disrupted by COVID. Moreover, it has removed her from her friends and social life, a serious loss particularly for an autistic young person. It is essentially a failure by the management of the school. Given that the school's management is under scrutiny, it seems appropriate to draw the attention of the various regulators to our findings; and order copies of our decision be sent to OFSTED and the LA.

6. We also order that a copy be sent to the Equality and Human Rights Commission since they have a statutory duty to prevent the occurrence of disability discrimination in schools and it may be of assistance to them in fulfilling that duty to see how one specialist Tribunal has approached the issues raised. In particular, they may wish to consider the contractual regime under which independent schools operate and whether there should be any express provision to make it clear that such contractual powers should be used only in conformity with the statutory regime for pupils with EHC Plans, and with due regard to school's duties to avoid discrimination against disabled pupils.

7. The LA may also wish to consider whether their contracts should be amended to cover such a possibility. We understand that the contract is in standard form, approved by the Department of Education. We have not seen the whole of the contract, but we also order our decision be sent to the Department of Education so that they may consider the point.

8. It is sometimes argued, applying 5(3)(a), that because the young person concerned will not benefit from such orders, we should not be considering them. We do not read that subsection as a limitation of our general power; rather it simply suggests one way in which it might be exercised. In any event drawing the attention of regulators, will, we hope, obviate or reduce the adverse effect on Chloe. The evidence shows that she sees herself as a campaigner; (though we do not endorse the methods she adopted). That the discrimination she suffered will now be drawn to the attention of regulators may give solace to the injury to her feelings; may reduce the adverse effect of the injury. In other jurisdictions the injury to feelings caused by discrimination can attract large awards of compensation (see the Court of Appeal guidance in the case of Vento v West Yorkshire Police, for example); we cannot award compensation, but that does not mean we should ignore the injury to feelings, the distress suffered by Chloe, in making our Orders.

9. Lastly, we order that a copy of our decision be sent to each member of the RB, the Board of Directors of Outward First Group Ltd, since they are collectively responsible for the discrimination that occurred.

10. As for whether the decision should be anonymised or can be published as it stands, there are powerful conflicting views. On the one hand the family courts dealing with young people or children have a strong insistence on no publicity. There is an important public interest that children and young people should not have sensitive personal data – disability and its effects, for example – made public as result of seeking the protection of the courts. On the other hand, Article 6 of the European Convention of Human Rights, which we are obliged to take into account under section 6 of the Human Rights Act, stresses the importance of a fair and public hearing in determining civil rights and obligations; and provides that "Judgment shall be pronounced publically" save "where the interests of juveniles so require".

11. Our procedural rules (The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) 2014 provide: in Rule 26:

> (3) Hearings in special educational needs cases and disability discrimination in schools cases must be held in private unless the Tribunal considers it is in the interests of justice for a hearing to be held in public.

The Rules also give Tribunals a general power in Rule 14:

> 14(1) The tribunal may make an order prohibiting the disclosure or publication of –
> (a) specified documents or information relating to the proceedings; or
> (b) any matter likely to lead members of the public to identify any person whom the tribunal considers should not be identified".

12. In this case the Tribunal has already made such an Order: in the case management directions issued on 4 March 2021: "34. No party may disclose information or documents relating to this claim which is likely to result in members of the public being able to identify the name of the child or young person who is the subject of this claim." That is in standard form for the Tribunal.

13. That order was made "on the papers" at the start of the case. We have now heard the evidence in detail and brief submissions on the point. We are only concerned with the written decision, not whether the public should be admitted to the hearing, or publication of the evidence contained in the bundle; both of which raise additional issues. The decision sets out Chloe's difficulties and describes in outline some disruptive and abusive behaviour from her. There is nothing in that which "requires" the judgment to be redacted or not published at all, simply because Chloe is 16, a "juvenile"; particularly when she and her mother have no objection to publication. We give weight to the views of Chloe and her mother, the persons principally concerned.

14. We therefore repeal order 34 made on 14 March and place no restriction on the publication of this decision as issued to the parties.

15. We turn to consider the issue of training. Our findings indicate that the discriminatory acts largely occurred at a senior, management level, rather than in the classroom. It was the Executive Head who terminated Chloe's placement; the head teacher who refused to compromise over the reintegration plan. Training should therefore be directed at that level. Both these decisions had a major impact on Chloe's education.

16. The training should comprise two sessions, each of 2 hours: an outline of duties under the Equality Act to avoid discrimination against disabled pupils; and a session on approaches to the education of autistic pupils, in particular those with PDA tendencies, and girls. The training should be conducted by an external trainer with experience of those issues. (The Council of Disabled Children or the National Autistic Society should be able to suggest such a trainer.) Both sessions should be attended by the head of service and head teacher of APS and by not less than two members of the RB, the Board of Directors of Outcomes First Group Ltd. Since the RB is responsible for a large number of special schools, we also order that the training sessions be attended by the Regional Directors and Heads of Service, so that any lessons learnt from the training can be spread throughout the group.

17. Lastly, we order that a letter from the RB be sent within 18 months of the date of our Order, to Ms Knight and to the Tribunal, confirming that the training has occurred.

ORDER

1. Order 34 of the Case Management Directions issued on 4 March 2021 is revoked. We place no restriction on the publication or dissemination of this Decision.

2. We order the RB to send a copy of our decision to OFSTED, to Suffolk County Council, to the Equality and Human Rights Commission and to the Department of Education In each case, the covering letter should draw their attention to the specific issue of the exercise by private schools of their contractual power to terminate placements, without regard to the statutory consultation procedure (where the pupil has an EHC Plan) or to their duties under the Equality Act in relation to disabled pupils.

3. A copy of our Decision should be sent to each of the Directors of Outcome First Group Ltd, the RB.

4. We order the RB to arrange for two training sessions, each of 2 hours: the first an outline of school's duties under the Equality Act to avoid discrimination against disabled pupils; the second on approaches to the education of autistic pupils, in particular those with PDA tendencies, and girls. The training should be conducted by an external trainer (or trainers) with experience of those issues. The trainer should be provided with a copy of this decision. Both sessions should be attended by the head of service and head teacher of APS and by not less than two members of the RB, the Board of Directors of Outcomes First Group Ltd; and also by the Regional Directors and Heads of Service (or equivalent positions, whatever the precise job title) of OFGL.

5. The RB, the Board of OFGL, shall send Ms Knight and the Tribunal within 2 months of the date this decision is issued a letter to confirm that copies of the decision have been sent as ordered above; and within 15 months of that date, a letter confirming that the training sessions ordered above have taken place.

Signed

Humphrey Forrest
Tribunal Judge

Date: 31 August 2021