Neutral Citation Number: [2009] EWHC 1694 (Admin)

Case No: CO/8573/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2009

**Before** :

**MR JUSTICE CRANSTON**

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**Between :**

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| **London Borough of Hammersmith and Fulham** | **Claimant** |
| **- and -** | |
| **The First-Tier Tribunal (Health, Education and Social Care Chamber)** | **First Respondent** |
| **- and -** | |
| **Ms F and Mr D** | Second Respondent |

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(Transcript of the Handed Down Judgment of
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Katherine Olley (instructed by Treasury Solicitors) for the First Repsondent
**Clive Rawlings (**instructed by **Sinclairs Solicitors)** for the **Second Respondent**

Hearing date: 24 June 2009

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# Judgment

**Mr Justice Cranston :**

1. The London Borough of Hammersmith and Fulham ("the Council") challenges the decision of the First Respondent ("the Tribunal") in respect of a successful appeal to the Tribunal by the Second Respondents ("the parents") against a Statement of Special Educational Needs of their son "L". The appeal raises a single ground of procedural unfairness, directed at the conduct of the appeal by the Tribunal. While the Tribunal does not routinely participate in appeals to this court in respect of its decision it has appeared in these proceedings, given the nature of the challenge.

Background

2. The background, in very brief outline, is as follows. At the time of the final hearing in July 2008, L was aged 11 years 11 months. He has a receptive language disorder and an expressive language disorder with associated learning problems, as well as motor coordination difficulties and sensory problems. He also has emotional difficulties and is an anxious learner.

3. His Statement of Special Educational Needs (the "Statement"), setting out his needs and the assistance he should have, had named an independent school known as Blossom House School ("Blossom House"). That was the school he has attended since 2003. It costs the Council over £25,000 a year to place him there. In April 2007 the Council issued a new Statement which named Woodlane High School ("Woodlane") as the school to which he should transfer. The Statement was 6 weeks late.

4. L's parents wanted him to remain at Blossom House School. Thus they appealed to the Tribunal. Part 2 of a Statement of Special Needs gives the description of a child's needs following the assessment, Part 3 describes all the special help to be given for a child's needs, and Part 4 gives the type and name of the school the child should attend and how any arrangements are to be made out of school hours or off school premises. The appeal in L's case was in respect of Parts 2, 3 and 4 of the Statement. In very broad outline the parents' case was that the Council were seeking to transfer L without providing a suitable alternative specialist school. The Council's case was that he had made limited progress at Blossom House and that the provision at Woodlane was superior.

5. The appeal was to be heard on the 5th November 2007 but the Tribunal adjourned it until 28 February 2008. The matter went part heard on that day and the resumed hearing was to take place on the 2nd May. That hearing was adjourned. There was then an unsuccessful application by the Council to strike out the appeal, which the Tribunal refused on the 3rd June. The renewed hearing occurred on the 4th July and the Tribunal's decision was given on the 6th August. It was in the parents' favour. An appeal to this court was lodged on the 10th September. That was out of time but I indicated at the hearing that, given the importance of the matter for the Council, it would be wrong for me not to consider the substantive issue.

The Law

6. The appeal is on a point of law, under section 11(1) of the Tribunal and Enquiries Act 1992. The Council contends that the Tribunal's decision is vitiated by procedural

unfairness. In its case this is evident in a number of the procedural decisions of the Tribunal, whether these are taken separately or cumulatively. The decisions amount to an error of law which vitiates the Tribunal's decision.

7. All parties accepted as authoritative the statement of the law by Elias J in H v Gloucestershire County Council [2000] ELR 357:

> "48 The Tribunals have to conduct their own affairs. Mr Bowden is an experienced Tribunal Chairman. It is only in the case of a very clear unfairness that the court should intervene in a case of this kind, where it is alleged that the Tribunal did not properly conduct the proceedings. I am satisfied that in this case we are nowhere near establishing the degree of unfairness that would be necessary to justify intervention of this ground."

That was a case when the mother of a child with special educational needs appealed against a Tribunal decision, refusing her appeal against a decision of the Council as to school placement. She contended that the Council had wrongly been allowed to give evidence through its representative and two witnesses, contrary to the Special Educational Needs Tribunal Regulations 1995. Regulation 29(1) provided:

> "(1) During course of the hearing, the party shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the Tribunal both on the evidence and generally on the subject matter of the appeal, provided that neither party shall be entitled to call more than two witnesses to give evidence orally (in addition to any witnesses whose attendance is required pursuant to paragraph 2 below) unless the President has given permission before the hearing or the Tribunal gives permission at the hearing.
>
> (2) Evidence before the Tribunal may be given orally or by written statement …"

Elias J held that the Council was permitted by this regulation to give evidence through its representative as well as to call the evidence of two witnesses.

8. The relevant rules of procedure for this appeal were the Special Educational Needs Tribunal Regulations 2001 SI 2001, No 600 ("the Regulations"), now repealed. Under regulation 13, when there was an appeal to the Tribunal the local authority had to submit to it a written statement of its case and all written evidence on which it intended to rely. Regulation 13(3) read:

> "(3) In exceptional circumstances the authority may amend its statement of case, deliver a supplementary statement of case or amend a supplementary statement of case if permission is given by –
>
> (a) the President; or
>
> (b) the Tribunal at a hearing."

Regulation 14, "Authority's representative", provided:

> "(1) The authority may at any time change its representative for the purposes of the appeal by notifying the Secretary of the Tribunal of the name and profession of its new representative"

9. The procedure at the hearing was governed by regulation 32. That enabled the Tribunal to conduct a hearing in the manner it considered the most suitable to the clarification of the issues and generally to the just handling of the proceedings. As far as appeared appropriate, the Tribunal was to avoid formality in its proceedings. The Tribunal could also determine the order in which the parties were heard and the issues determined. Regulation 34 re-enacted regulation 29(1) of the previous regulations, quoted above, and in issue in H v Gloucestershire County Council.

Adjournments

10. The first of the procedural errors which the Council identify concerns decisions of the Tribunal to adjourn proceedings. These were on application of the parents. The first adjournment of the hearing of the case was from 5th November 2007 to 28th February 2008, the second adjournment, from 2nd May 2008 to 4th July 2008. On the Council's case the Tribunal granted these adjournments, on both occasions very late in the day, without giving any notice to the Council and without giving it the opportunity to make representations. At one point the Council seemed to be suggesting that the reasons for the adjournment have never been formally explained. In any event the reasons on each occasion were wholly inadequate. In its submission the upshot was that the case took 14 months from the appeal being lodged to the decision being issued. During this time the Council was having to fund two places for L, one at the school he was attending, Blossom House, and the other at the school to which the Council was contending he should move, Woodlane.

(a) The first adjournment

11. As far as the first adjournment is concerned, i.e. from 5th November to 28th February, it seems that the background was a number of letters from the parents' solicitors to the Council. These raised concerns over the Council denying the parents' expert access to Woodlane in order for her to assess its provision and suitability. These letters are not available but a later letter of the parents' solicitors demonstrates that they exist. In the absence of a reply by the Council to any of the letters, an application for an adjournment was submitted, albeit at the last minute, on the basis that the parents were unable to present their case against Woodlane.

12. The Council reject the suggestion that there was ever any denial of access to the parents' expert. In a letter to the chairman of the Tribunal on 5 November 2007, the Council's chief education psychologist makes this point, deplores the delay and inconvenience but then goes on to suggest that the Tribunal "should place little weight on the parents' educational psychologist", given what were said to be her misrepresentations about the denial of access. That suggestion, at first blush, is a little surprising.

13. In my view, it cannot be said that the Council were in ignorance of the reasons for the first adjournment. That is evident in the letter of the chief education psychologist, to

which I have just referred. More importantly, there is no way I can regard the Tribunal's decision to adjourn as unreasonable. Admittedly the adjournment was very late in the day. The hearing was to be on the Monday and the Council received notification of the adjournment late on the Friday afternoon. There was obvious disruption and inconvenience to it. The Council were not consulted.

14. However, the adjournment took place for the reason that the parents' education psychologist had not gained access to the school to which the Council wished the child to be moved. That was a proper basis for the exercise of the power of the Tribunal to adjourn a hearing. Without the adjournment the parents would have had a good argument that they were being denied the opportunity to put their case. The decision to adjourn on this occasion cannot be said to be procedurally unfair.

(b) Second adjournment

15. It is necessary to say something about the background to the second adjournment. A hearing took place on the 28th February. The case was estimated to take one day. In fact it did not finish that day although the Council's two witnesses did complete their evidence as regards the dispute over parts 2 and 3 of the Statement and had given their evidence on the appropriateness of Woodlane. The matter was adjourned part-heard. It is said that the reason the case went part-heard was because the Council had not properly organised their case. There is no need for me to make any findings about that.

16. The resumed hearing was set for 2nd May. Then something very unfortunate happened. The parents' education psychologist said that she was double-booked before the Tribunal that day. The parents' solicitors applied to the Tribunal on Friday 24th April, requesting an adjournment. They said that their education psychologist:

> "is the only expert witness available on behalf of the mother who has visited the school. Therefore her attendance at the adjourned hearing is essential/critical. It is our view that if she were not in attendance it would significantly jeopardise our client's case.
>
> We therefore, albeit extremely reluctantly, have to request an adjournment. If any adjournment is not granted then we would have to invite the Tribunal to consider the exercise of its powers under Regulation 26 to issue a summons to compel [her] attendance."

On this basis the Tribunal granted the adjournment. The decision was taken by the chairman of the Tribunal, who was hearing the case. He says that he "gave careful consideration" to the letter of 24 April 2008 from the parents' solicitors. "I took the view that, whilst a delay was unfortunate, an adjournment was appropriate because the psychologist's evidence could be critical and she had not had an opportunity of giving evidence at the first hearing".

17. When the Council learnt about this on the following Tuesday, the 29th April they, not to put too firm a point on it, were livid. In a letter to the Tribunal dated 29th April, applying for a strike out of the parents' appeal, they said that the adjournment should

not have been granted, because it allowed the parents to benefit from their own wrong:

> "It will be now more than two months since this matter was adjourned; there are now legal concerns as to whether this appeal should continue, given the fact that matters discussed will not be fresh in the minds of any of the parties. It is evident that this appeal has become frivolous and vexatious as the parents have no desire to have this matter heard shortly … The [Council] is of the view that lawyers acting on behalf of the parents are using tactics to delay this matter in an attempt to weaken the [Council's] case. This cannot be allowed to continue and this matter should be struck out for the reasons outlined above."

The letter continued that there was now full information on Woodlane, implying, it seems to me, that the Council's view was that the evidence of the parents' education psychologist was unnecessary. The Council reiterated what it thought was behind the adjournment request. "It is the [Council] view that the parents and their representatives have chosen to get this matter adjourned on sight of the local authority evidence which indicated a lack of progress."

18. I have set out the Council's response to the adjournment because one of its complaints is that it was not contacted before the adjournment was granted. In my view good practice in listing is that, generally speaking, the other side should be informed about an adjournment and given the opportunity to object. Quite apart from anything else good case management demands that adjournments should be avoided, if at all possible. Unlike the November adjournment, which was at the very last minute, this adjournment was in time for the Council to be consulted. It should have been. Especially important on this occasion was that this was the parents' second request for an adjournment.

19. However, there is no error of law allowing me to vitiate the Tribunal's decision. There was a reasonable basis upon which to adjourn the second day of the hearing. At the first day of the hearing the Council's witnesses had tendered their evidence. The parents had yet to present their case or call any of their witnesses on the issue of school placement, including their expert, the education psychologist. She had double-booked herself. That should not have happened, but it did. The Tribunal had the option of issuing her a witness summons rather than adjourning, but that would have prejudiced the child in the other appeal. I should be very careful about concluding that, even if the Tribunal chair had had the Council's objections, it was unlikely he would have reached a different conclusion. All I need to conclude, as I do, is that there was a compelling reason for the adjournment. Good practice is that the Tribunal should have consulted the Council. However, the Council have not made out their case that the proceedings were rendered unfair as a result of the decision to adjourn.

Listing of the resumed hearing on 4 July 2008

20. The resumed hearing on 2nd May, which was adjourned in the circumstances I have just described, was relisted for the 4th July. This was not convenient for the Council's

witnesses. The Council submits that consequently the decision to proceed on 4th July was procedurally unfair. Let me say a little about the background.

21. What had happened was that after the 2nd May adjournment the parties had been invited to submit "dates to avoid" by 12 May. The Council accepts that its list of dates was posted on 12 May, rather than faxed, and so reached the Tribunal after the deadline. Nonetheless, the Council submits that the letter ought to have arrived on 13 May 2008, and it would have been reasonable for the Tribunal to wait until its post arrived that morning before fixing the hearing. Indeed the Tribunal might even have contacted the Council to inquire about its unavailable dates, the Council having provided dates previously and it being obvious that some dates would be unavailable. Alternatively, once the Council's letter of 12 May 2008 arrived, the Tribunal should have relisted, or at least attempted to relist, the hearing. In listing for 4 July the Tribunal should have taken account that the need for this hearing only came about because of the second application by the parents for an adjournment, and that the reason for this was simply because their education psychologist had failed to realise until late in the day that she was double-booked.

22. In my view it is impossible to see how the Tribunal can be said to have acted incorrectly in regard to this 4th July hearing. The Council accepts that its dates to avoid were posted late and arrived at the Tribunal after the deadline. Under the regulations it was possible for the Council to fax or email the dates so that they would arrive in time. This was not done. The Council had been given a reasonable opportunity to provide its dates for the resumed hearing. In the light of this the Tribunal cannot be said to have made an error of law in its decision to list the resumed hearing on 4th July and in not relisting the matter once the Council's dates arrived. The reason for the re-hearing had no bearing on the decision to list it for the 4 July.

Refusal to allow Council's witnesses on 4 July

23. In a letter to the Tribunal on 24 April, the Council had said that their witnesses at the resumed hearing would be their principal education psychologist and the deputy head of Woodlane. On the day itself the deputy head was not available so an application was made that the head of services for speech and language impairment be the second Council witness. No formal application had been made for these two witnesses, but the Council's lawyer contended before the Tribunal that without the witnesses she could not continue. The parents' barrister objected on the basis that the Tribunal had already heard from two Council witnesses. The Council was trying to take advantage of a part-heard hearing to replace those two witnesses, who had not been able to provide all the answers at the February hearing. The Tribunal refused the Council's application. It recorded the arguments and considerations in its final decision. Its conclusion on the point is as follows:

> "In deciding whether to admit [the two witnesses] there was a difficult decision to be made. On the one hand, it was desirable to have all relevant information with regard to the case. On the other hand, the [Council] was effectively asking for two attempts to give evidence about Woodlane High School with four witnesses. We decided that it was not appropriate for the [Council] to have leave for further witnesses to give evidence as, in our view, it would have given the [Council] an unfair

> advantage in presenting its case. We notified the parties accordingly."

24. The first point raised by the Council in this regard relates to what happened subsequent to this decision. The Council's lawyer applied to the Tribunal that she be replaced as the Council's representative at the hearing by the Council's principal education psychologist because the latter would be in a better position to question the parents' witnesses. The Tribunal agreed but confined her role to asking questions. The Council's principal education psychologist had wanted as well to give evidence to the Tribunal.

25. Before me the Council submits that the Tribunal was wrong not to allow their representative, the principal education psychologist, to give evidence. Regulation 34 entitles "the parties" to give evidence separately from their entitlement to call witnesses. It will be recalled that Elias J in H v Gloucestershire held that the regulation, or at least its predecessor, had to be read to enable this. The Council contends that the effect of the Tribunal's refusal was that the second day of the hearing consisted of the parents, with their barrister and two witnesses, but the principal education psychologist for the Council was prohibited from giving any evidence, and as well was not allowed to have any witnesses, as I shall explain in a moment. This was contrary to regulation 34 and obviously unfair.

26. In my view, a complete answer to this submission is given in the Tribunal's decision on the matter.

> "[The Council's lawyer] indicated to the Tribunal that she wished to be replaced as [its] representative by [the principal education psychologist], pursuant to Regulation 14 of the Regulations. The application was opposed by [the parents' barrister]. He argued that the regulation only applied prior to the hearing. In this regard, he noted that Regulation 14 was included within Part 2 of the Regulations headed "Making an Appeal to the Tribunal and Statements of Case". He also argued that it was an attempt by the [Council] to enable [the principal education psychologist] to give evidence. [The Council's lawyer] undertook that [the principal education psychologist] would not give evidence and indicated that [she] was better placed to ask questions about Blossom House School. [The Council's lawyer] also indicated that she had to leave at 4pm because of child care commitments.
>
> After an adjournment, we decided that Regulation 14 of the Regulations applied and that the [Council] was entitled to change its representative. We also noted that the circumstances were most unusual and, if we were wrong in our view that Regulation 14 applied, the [Council] should be permitted to change its representative pursuant to Regulation 42 of the Regulations." (my emphasis)

In other words, whatever the legal right which the Council had to give evidence through its principal education psychologist, that right had been waived as part of the

Tribunal's agreement to a change of Council representative. The Tribunal said that otherwise it might appear that the Council was able to have a third witness through the back door. The Tribunal did not prevent the principal education psychologist from giving evidence; the Council through its education lawyer had agreed to that course.

27. The other challenge at the resumed hearing was that it was unfair of the Tribunal not to allow the Council to call any witnesses, bearing in mind that the Tribunal itself had indicated at the previous hearing the desirability of the Council calling additional witnesses who could give the evidence which the existing two witnesses could not provide. The Council also submits that the additional witnesses were crucial if the Tribunal was to make a fair and informed decision. Moreover, the Council submits that at the strike out hearing, if the Tribunal had not given formal permission for the Council's education psychologist to attend as a witness, there was at the least a very clear indication that this was to be allowed. In any event the Council had always made clear in correspondence its position with regard to additional witnesses. The Council was only in this situation because of the adjournments requested by the parents.

28. To understand these submissions it is necessary to retrace our steps. The adjournment notice for the 28 February hearing simply said that the case was adjourned because of inadequate time. The Council's lawyer seemed to think that the Tribunal had indicated she should bring along someone from the school to the adjourned hearing. On 24 April the Council's lawyer wrote to the Tribunal with the names of the Council's new witnesses. They were to be the Council's principal education psychologist and the deputy head of Woodlane. However, the Council never made a formal application under regulation 34(1) to call more than two witnesses.

29. Then in late April the Council applied to strike out the action. It will be recalled that one basis for that application was the adjournment of the May hearing. The other basis was what was said to be the refusal by the parents to allow Council experts access to assess L's learning and needs. In the course of the application letter the Council's lawyer wrote that the Council did not think that the parents "and/or those representing them have behaved in an honest and sincere manner and are preventing the Local Authority from reasonably preparing its case". The strike out application came before the President of the Tribunal, Lady Rosemary Hughes, in May. She dismissed it. In the course of her decision dated 3 June she said this:

> "We do regard it as extremely important that this case should be heard on 4 July and that there be no further adjournments or postponements; time is always of the essence in our appeals and [L] has waited long enough got some certainty in his educational future. In the adjournment notice after the February hearing, there was only mention of a School Development plan being required as further evidence and there should be no reason for any delay."

30. In my view there is no flaw in the Tribunal's decision refusing the Council permission to call these two additional witnesses. The Tribunal had heard from the two Council witnesses on the first day of the hearing. Aside from any assistance these witnesses may have given the Tribunal during the parents' evidence to, all intents and purposes

they had given their evidence. In fact they were not to attend at the resumed hearing. The Council wanted two different witnesses to attend. Regulation 34 of the 2001 Regulations clearly provides that no party may call more than two witnesses unless the President gives permission prior to the hearing or the Tribunal gives permission at a hearing.

31. The various reasons advanced by the Council as to why the Tribunal's refusal to permit the two additional witnesses was a wrongful exercise of discretion do not add up. First, the Council's lawyer seemed to think that the Tribunal had indicated at the February hearing that the Council should bring further witnesses to the resumed hearing. The difficulty with this is that the Tribunal chair has said quite emphatically that the Tribunal did not advise the Council to bring additional witnesses. The Council's lawyer clearly believed that this was the case given her 24 April letter, to which I have referred. Regrettably, I can only conclude that for some reason she was mistaken. No formal application was ever made to the Tribunal for the Council to have additional witnesses. There is nothing in Lady Hughes' decision, to suggest she was giving permission for additional Council witnesses. As to the decision of the Tribunal on the day itself, the Tribunal gave reasons for its decision, which I have quoted. The reasons are adequate and the decision was rational. The Tribunal clearly considered the matter carefully and I cannot regard its decision as procedurally unfair.

Access for assessments

32. The Tribunal found that the Council had been "effectively thwarted in obtaining access to L for assessments by therapists and others between the first and second hearing" in spite of the parents' clear assurance, at the February hearing, that access would be allowed". It expressed itself as having been concerned by this. Nonetheless, the Tribunal said that it was most unlikely that any such assessments "would have affected the outcome of the major issue between the parties, namely placement".

33. The Council submits that it is a serious and obvious cause of unfairness for parents to engage their own private experts and allow them to assess their child but to deny the local authority, which has the statutory responsibility for the child, the opportunity to do the same. The fact that clear assurances were given, which were not maintained, exacerbates this. The only procedurally fair course the Tribunal could have taken in such circumstances was to adjourn the hearing until such assessments were allowed. The suggestion that assessments would not have made any difference is unsafe because the Tribunal had expressed itself to be concerned. The assessments would, in fact, have had a bearing on the issue of placement. Importantly, there is the general and well-known caution against finding that procedural defects would not make any difference (see John v Rees [1970] Ch 345). That applies with even greater force here where the issue is the need for the Tribunal to be fully informed about a child's special educational needs and what special educational provision is necessary for him.

34. In my view there are two answers to these submissions. First, there was the strike out hearing. It will be recalled that the Council sought to have the parents' case struck out on the grounds of their refusal to allow assessments. In this application the Council also sought to persuade the Tribunal to order that the parents allow these assessments to take place. The Tribunal President, Lady Hughes, stated:

> "There has been no clear reason as to the need for further assessments; evidence has already been taken on the contents of Parts 2 and 3 of [L]'s statement. The [Council] itself took the decision to name Woodlane High School in April 2007 and it must be assumed that all the evidence they required to make that decision had already been gathered before that date."

Given that Lady Hughes had refused to order such assessment prior to the resumed hearing, it cannot now be sensibly argued that the Tribunal ought to have been adjourned until the assessments had taken place.

35. Secondly, the Council did not itself apply for an adjournment between the strike out and the hearing, nor did they make such an application at the 4th July hearing itself. That, to me, is significant but not the end of the matter. However, in so far as it is being suggested that of its own volition the Tribunal ought to have adjourned and ordered the assessment to take place, in my view it was reasonable for the Tribunal to infer that the Council was satisfied that it had sufficient information to name Woodlane in Part 4 of the Statement. The Council say that there was a change of circumstances which justified a new assessment of L. In my view the Tribunal was entitled to take the view that the Council had effectively completed their evidence at the February hearing. Assessment subsequent to that was therefore unnecessary, notwithstanding the parents' producing their own assessment by their education psychologist.

Conduct of hearings

36. The Council challenges the conduct of the hearings on the 28 February and the 4th July. It is said that the Tribunal behaved in a manner which was not even-handed but was unfair. I can deal with each of the specific points shortly.

(a) Cross-examination

Unfairness occurred, it is said, in allowing the parents' barrister to cross-examine the Council's witnesses about a previous Tribunal decision which had been ruled inadmissible and involved other parties, not least because they did not have a copy. In my view this is a thoroughly bad point. Mr Rawlings had applied to have the previous Tribunal decision, which involved Woodlane, admitted as evidence. The Tribunal refused. Mr Rawlings then used the decision as an aide memoire to question the Council witnesses at the February hearing on factual matters regarding Woodlane. There can be no objection to that, as the Tribunal rightly held. Regulation 34 enables a party to question witnesses.

(b) Working document

37. The Council objection here is that the Tribunal structured the appeal around a working document which was produced by Mr Rawlings for the parents for the first time just before the hearing began. In particular that working document contained the paragraph said by the Tribunal to be central to the resolution of the case. The Tribunal ignored the document provided by the Council five months earlier and updated just before the hearing. This was procedurally unfair.

38. Again this submission gets nowhere. The Council had produced a working document some five months earlier and had been able to reach agreement with the parents on a number of important matters. Just before the hearing the Council updated that document. However, the updated document failed to take into account the parents' suggestions which had not been agreed. To do that Mr Rawlings, the parents' barrister, produced a version of the working document overnight before the day of the hearing. The parents' suggestions he incorporated were known to the Council through the earlier negotiations.

39. In my view it made sense for the Tribunal to work from the most up-to-date version of the working document. The Tribunal was in any case free within the 2001 Regulations to determine its own procedure. It did not depart from its usual practice with regard to the use of working documents prepared by the parties. The purpose of a working document is to attempt to cohere the parties' respective desired amendments to the Statement. Had Mr Rawlings' version of the working document not been available the Tribunal would still have received evidence from the parents in relation to their desired amendments.

(c) Amendment of statement of case

40. The Council objects that the Tribunal was unfair in refusing to allow it to amend its case to allege that Blossom House was unsuitable. That was clearly a crucial issue. The evidence had been assessed by the Council's education psychologist as demonstrating that L was making "little or no progress" there.

41. The starting point for a consideration of this submission is that regulation 13(3) of the 2001 Regulations provided that in "exceptional circumstances" the Council might amend its case, with permission of the Tribunal. The Tribunal said this in finding that the circumstances were not exceptional:

> "We were not persuaded that there had been a fundamental change of evidence or new evidence to support the change of position taken from that indicated by the [Council] on 28 February 2008. At that time, the [Council] said it did have some concerns but was not arguing that the placement was unsuitable."

The Tribunal was also concerned that the Council's new evidence in a report of June 2008:

> "… contained errors that mis-matched the position with regard to progress. In our view it was, in any event, wrong to link alleged lack of progress for one child as evidencing inappropriate provision …"

From this and other parts of the decisions where Blossom House is discussed, it is clear that the Tribunal engaged with the point which underlay the application made by the Council to amend its case. The Tribunal rejected the underlying basis for the Council's application. It was satisfied that the circumstances were not exceptional. There was no unfairness in that conclusion.

Treatment of Council lawyer

42. Finally it is said that the Council's lawyer, who represented it at the Febraury hearing, and at the outset of the second, was unfairly criticised by the Tribunal. Some of the Tribunal's comments in relation to her and the conduct of the case are indeed critical, perhaps unnecessarily so. But there is no error of law.

Conclusion

43. One has a degree of sympathy for the Council in this case. There was a catalogue of problems with getting the matter on before the Tribunal. That was compounded by what the Tribunal found was the way the council's access, to conduct assessments of L, had been thwarted by his parents. No doubt as well Council officers were working under considerable pressure of workload. There was also their concern to make sure that the placement of L at Blossom House was justified, not least because of its considerable cost to the Council. In my view, however, this appeal must be dismissed. For the reasons I have given neither individually nor in the round do the complaints made by the Council about the Tribunal amount to an error of law on the Tribunal's part so as to vitiate its decision. Procedural unfairness has not been established, nor is there any evidence of a lack of even-handedness.