HS/1517/2015

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E. Mitchell, Judge of the Upper Tribunal

DECISION

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides that the decision of the First-tier Tribunal taken on 8th April 2015 involved an error on a point of law (First-tier reference: *SE 885/14/00024*). The decision is set aside. The Upper Tribunal remits the appeal to the First-tier Tribunal for re-hearing. Any further case management directions are to be given by a judge of the First-tier Tribunal.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the child's parents, (b) any person to whom a parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation to the child. The child's real name is not used in these reasons.

REASONS FOR DECISION

Introduction

1. This case was about comparing the respective costs of schools in deciding which one to specify in a child's statement of Special Education Needs (SEN). That topic was recently considered in some depth by the Upper Tribunal in *Hammersmith & Fulham LBC v. L* [2015] UKUT 0523 (AAC).

2. The statutory background to *Hammersmith* included the requirements of the School and Early Years Finance (England) Regulations 2013 (S.I. 2013/3104). Those regulations applied to the school funding period between 31st March 2014 and 1st April 2015. Different regulations apply to the funding periods for 2015/16 and 2016/17.

3. In this decision, which concerned the expenditure involved in educating a child at a maintained mainstream school, guidance is given as to whether that change in the funding regulations calls for a different approach to that outlined in *Hammersmith*. That guidance, given for the benefit of the First-tier Tribunal that is to re-hear this appeal, is that the change

to the regulations makes no material difference and the assessment of respective costs should be as outlined in *Hammersmith*.

Background

4. This appeal concerns a boy whom I shall refer to as Andrew (not his real name) who was aged 11 when the First-tier Tribunal gave its decision on the appeal. The Tribunal made its decision in April 2015 and Andrew was due to start his secondary education in September 2015. The appeal was brought by his mother Mrs P.

The evidence about teaching assistants

5. The principal ground of appeal concerns the expenditure that would be involved in providing Andrew with a teaching assistant for 25 hours per week. The First-tier Tribunal amended Andrew's statement to require that provision.

6. Both Andrew's maintained primary school, and his mother, requested a statutory assessment. The school's request described the additional provision made for Andrew during the 2013/14 school year as "1 hr 10 mins per week targeted interventions with TA / Dyslexia Teacher" and "1:1 support for literacy and numeracy sessions – 10 hours per week". The request added: "school have had to provide several hours of support for 1:1 work with [Andrew]. When unsupported, [Andrew] is unable to meet learning objectives and becomes distressed and demoralised, despite having activities individualised for him in many cases".

7. Andrew's council issued a statement of SEN which contained no quantified provision for teaching assistant support. The statement named Andrew's current maintained mainstream primary school in Part 4 "until July 2015". The main dispute on Mrs P's appeal to the First-tier Tribunal concerned the school to be named in Part 4 of Andrew's statement for Andrew's secondary schooling, beginning in September 2015. The council thought a maintained mainstream secondary school should be named. His mother preferred an independent school.

8. In a position statement, dated 18th February 2015, the local authority referred to the final working draft of Andrew's statement of SEN. Within Part 3, there was this entry:

> "[A] will require a higher level of adult support than typically required for a child in a mainstream setting – this support could be provided by a teaching assistant working under the supervision of the class teacher".

9. I note this entry did not quantify the teaching assistant provision. It said that Andrew's need for a higher level of support "could by provided by a teaching assistant", not that it would be provided by a dedicated teaching assistant working with him for a set number of hours each week. This statement also included within Part 3 provision for a "specific daily

literacy and numeracy learning programme" but made no provision about the type of education professional to deliver it.

10. A witness statement dated 12th February 2015, given by the SEN co-ordinator at Andrew's primary school, said under the heading "[A]'s current provision" that A "has access to Teaching Assistants throughout the day and his teacher or teaching Assistants and classmates work with him for paired reading".

11. On 18th February 2015, the local authority supplied the Tribunal with written information about their preferred maintained secondary school. This said:

> "For pupils with SEN, teachers differentiate the curriculum to ensure that all pupils access education. Teaching assistants are also used to provide extra support and reading and numeracy schemes give assistance and support to pupils in Years 7 to 9… The provision for students [with SEN] is related specifically to their needs. This may include:
>
> a. In-class support for small groups with a Teaching Assistant (TA);
> b. small group withdrawal with TA;
> c. individual class support / individual withdrawal;…
> j. Use of high grade TAs to devise interventions and monitor their effectiveness…"

The cases put to the First-tier Tribunal

12. In Mrs P's letter of appeal dated 14th October 2014, she argued that Andrew needed to be taught in small classes (no more than 10 pupils) with "individual attention from a specialised teacher who can give him additional support in every lesson" and he needed "specialist teaching support , writing, maths, and appropriate encouragement to keep him concentrated on each task". Mrs P argued her preferred independent school would meet those requirements but the council's preferred maintained mainstream school would not.

13. In the council's written response to the appeal, they argued that the additional public expenditure involved in Andrew attending their preferred maintained school would be £5,200 made up of £4,000 (the 'per pupil' cost) and £1,200 in SEN top-up funding. The first £6,000 in SEN expenditure was to be discounted, argued the council, because "the school is required to use the first £6,000 to fund support for children with SEN". By contrast, the parents' preferred independent school would involve some £17,000 of additional expenditure.

14. The council also argued that, were Andrew to attend their preferred school, under the council's "service level agreement with the Specialist Teaching Service…the Service will provide whatever therapy provision is outlined in a child's statement at no extra cost".

The First-tier Tribunal's decision and reasons

15. The Tribunal ordered amendments to Part 3 of Andrew's statement of SEN (the required educational provision) but named in Part 4 the authority's preferred maintained mainstream school rather than Mrs P's preferred independent school.

16. I shall focus on those parts of the Tribunal's statement of reasons that are relevant to the grounds of appeal.

17. In relation to Part 3 of Andrew's statement, the Tribunal found:

- "no persuasive case has been shown to the Tribunal for [Andrew] to have his learning programmes delivered by specialist teachers";
- Teaching assistants would be competent to "deliver the programmes under specialist supervision and guidance";
- The Statement "should quantify the amount of TA support that [Andrew] should receive, and found that the evidence given to us indicated that a level of 25 hours per week was appropriate".

18. The Tribunal named the council's preferred maintained school in Part 4 of Andrew's statement. The Tribunal found that both the contender schools were suitable and could meet Andrew's needs. The Tribunal's analysis of the respective costs, for the purposes of section 9 of the Education Act 1996, was as follows:

> "[The council's written evidence] indicated annual pupil-specific costs of £5,200 for education in a maintained school and of £17,220 for education in the independent school, with additional cost arising if Speech and Language Therapy were to be required. The Tribunal was satisfied on this evidence that significant additional public expenditure would be involved if [Andrew] were to attend the independent school.
>
> …the Tribunal found that naming the independent school preferred by the Parents would have the outcome that an unreasonable burden would be imposed on public expenditure, so that the Schools named by the [council] should be incorporated in Part 4 of [Andrew's] statement".

19. Following an unfortunate procedural detour (see below), the First-tier Tribunal refused Mrs P permission to appeal to the Upper Tribunal. Having been refused permission to appeal by an Upper Tribunal Judge on the papers, Mrs P renewed her application at a hearing before myself at Cardiff Civil Justice Centre. Mrs P was represented by Ms Rebecca Stickler of counsel, instructed by her representative Ms Nicola Morris (who is not a legal representative). The council were not represented but their representative, Baker Small Solicitors, did supply

a written submission. I granted permission to appeal. Following the grant of permission to appeal, Andrew's mother became represented by the Coram Children's Legal Centre.

The grounds of appeal

20. The grounds of appeal are as follows:

(a) whether the First-tier Tribunal erred in law in finding that 25 hours teaching assistant support per week would not, if provided at the maintained secondary school, give rise to any more than £5,200 in additional public expenditure;

(b) whether the First-tier erred in law by giving inadequate reasons for, or having insufficient evidence to support, its conclusion that the 25 hours of teaching assistant time per week, if implemented at the maintained school, would not give rise to any further additional public expenditure. Mrs P argued that the council's costs evidence, as relied on by the Tribunal, did not reflect the level of teaching assistant provision ordered;

(c) whether the First-tier Tribunal erred in law in deciding that any "specialist teaching input" would not involved any additional expenditure because it would be supplied by the council's Specialist Teaching Service.

The arguments

21. Both parties have supplied written submissions. Neither party requested a hearing of the appeal.

The council's position

22. In relation to grounds 1 and 2, the council submit that the First-tier Tribunal had before it a detailed costs schedule that set out the "respective costs" of the contender schools. They add "it is important to consider that the level of support [Andrew] would receive (25 hours) was agreed prior to the hearing if he attended the LA's proposed school. It was not determined by the [Tribunal]". On the basis of that evidence, the Tribunal was entitled to conclude that a placement at the independent school would involve unreasonable public expenditure.

23. The council argued that, under their "funding criteria matrixes", the maintained school would receive an additional £1,200 in top-funding in respect of Andrew's attendance. Under the school's "devolved resources", it was able to provide up to 20 hours of support from its own funds. That was why provision of a full-time teaching assistant would only involve additional expenditure of £1,200.

24. In relation to ground 3, the council argued there was evidence before the Tribunal to show "there is no additional cost to the LA in delivering [specialist teaching] as the specialist teaching service is a central LA service". The Tribunal was entitled to rely on that evidence to conclude that Andrew's required specialist teaching provision was "pre-funded" and, as such, would not involve additional public expenditure.

Mrs P

25. Mrs P vigorously disputes that, before the hearing, it was agreed that, were Andrew to attend the maintained secondary school, he would be provided with 25 hours of teaching assistant input each week. It followed that the costs schedule on which the council relied was flawed and not a reliable basis for quantifying the costs of the provision ordered by the Tribunal.

26. Mrs P argues the Tribunal erred in law by failing adequately to explain why it accepted the council's costs evidence. In particular, it failed to explain how 25 hours of weekly teaching assistant input could be supplied on the council's figures.

27. Mrs P relied on new evidence, in the form of a "School Block Funding Pro forma" for the maintained secondary school for 2014/15 and 2015/16. The council did not object to this being put before the Upper Tribunal. It contained the standard AWPU per-pupil funding amounts for the school. I do not think it is relevant to the issues I need to decide.

28. The parents also rely on the council's "High Needs Funding Matrix" (which was before the First-tier Tribunal). This appears to categorise pupils according to their additional weekly support requirements. For the "17.5 hours plus" category, the figure given is £21,400. The council argue the parents have misunderstood the Matrix. In referring to additional weekly support, the Matrix refers to support beyond that which a maintained school is expected to provide from its delegated budget. Since, according to the council, its maintained schools are supposed to fund the first 20 hours of additional support from their delegated budgets, the High Needs Funding Matrix does not in fact assist the parents' case.

29. The parents invited me to set aside the First-tier Tribunal's decision and remit the appeal to that Tribunal for re-hearing.

Legal framework

Section 9 Education Act 1996

30. Section 9 of the Education Act 1996 provides:

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

31. In deciding whether to name the council's preferred maintained mainstream school, or the parents' preferred independent school, the First-tier Tribunal was required to apply section 9. The following features of section 9 are I believe uncontentious:

(a) the "general principle" is not absolute. It is qualified: "pupils are to be educated in accordance with the wishes of their parents" but only "so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure";

(b) the proper application of section 9 will often call for relevant findings to be made and properly reasoned. There are no hard and fast rules given that each case is unique but in many Tribunal cases, where the application of section 9 is a key contested issue (as it often is), relevant facts need to be found. Typically, this will involve findings as to the additional costs for the local authority of the rival schools (the specificity of which will depend on the circumstances). If necessary (where the independent school costs more) the Tribunal's next task involves an exercise of judgement in deciding whether, on the costs identified, a placement at the independent school would involve unreasonable expenditure. That judgement has to be adequately reasoned but, in assessing adequacy, it must be borne in mind that the Tribunal is making a judgement on a topic falling within its area of particular expertise;

(c) even if a parental preference, in whole or in part, survives the section 9 filtering process, it is not determinative. The parental preference principle is simply something to which regard is to be had. It is possible to have regard to the principle without implementing a parent's wishes. As Denning LJ said in *Watt v Kesteven County Council* [1955] 1 QB 408 at 424:

> "[Section 9] does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so."

(d) that said, cases tend in my experience to be argued on the basis that, if there is no unreasonable expenditure, effect will be given to parental preference. The key point of dispute in most cases before the First-tier Tribunal, therefore, is simply whether a parental preference would involve unreasonable public expenditure.

Hammersmith & Fulham LBC v. L [2015] UKUT 0523 (AAC).

32. The parties were given the opportunity to make supplementary submissions about the decision I gave in *Hammersmith*. Four appeals were consolidated so that the Upper Tribunal could give guidance about the approach to be taken to comparing the costs of maintained schools and independent schools for the purposes of section 9 of the Education Act 1996. Applying section 9 in the light of recent changes to the statutory system for funding maintained schools had posed real difficulties for the First-tier Tribunal.

33. I shall summarise the *Hammersmith* decision:

(a) generally, a comparative costs analysis of an independent school and a special school, for the purposes of section 9 of the Education Act 1996 (EA 1996), is to proceed on the basis that, where the special school has a vacancy, its place funding is not to be treated as an additional cost;

(b) the same approach is to be taken when comparing the costs of an independent school with a maintained school with SEN-reserved places (a specialist unit);

(c) in both those cases, AWPU-funding (Age-Weighted Pupil Unit) is irrelevant (due to the way in which special schools and reserved SEN places in mainstream schools are funded, there is no AWPU). But, in line with the Court of Appeal's decisions in *Oxfordshire CC v GB & Others [2001] EWCA Civ 1358, [2002] ELR 8* and *EH v Kent CC [2011] AACR 36, [2011] ELR 433*, local authority 'top-up' funding for the child's placement is an additional cost to be taken into account;

(d) where the choice is between an independent school and a maintained mainstream school without reserved places, the AWPU normally represents an additional cost for the purposes of section 9, in accordance with *Kent*. Further, any additional funding required in order to meet the child's needs is to be taken into account as required by both *Kent* and *Oxfordshire*.

34. *Hammersmith* describes in some detail the legislative scheme for funding maintained schools and I shall not repeat that description here in full. But I do need to refer to the provisions about funding SEN provision in maintained mainstream schools:

(a) the funding legislation is contained in the School Standards and Framework Act 1998 (SSFA 98) and the School and Early Years Finance (England) Regulations 2013 (S.I. 2013/3104) ("the funding regulations"). These Regulations apply to the financial year beginning on 1st April 2014 (the funding period) and so they were current when the First-tier Tribunal decided the present appeal;

(b) for every funding period, a local authority must allocate a "budget share" to a maintained school (section 45(1) SSFA 1998). A budget share represents a sum of money. The budget share must be made available by the local authority "to be spent by the governing body" of the maintained school (section 50(1));

(c) the funding regulations control a local authority's determination of a maintained school's budget share. A formula for determining budget shares must be set by the authority, before the beginning of the funding period (reg. 10(1));

(d) once pupil numbers are identified in accordance with the Regulations, a specific minimum amount must be included in the school's budget share for each pupil: £2,000 for reception through to KS2 pupils and £3,000 for KS3 and KS4 pupils. This is the current incarnation of what has historically been referred to as the AWPU (Age-Weighted Pupil Unit). This is a *minimum* amount and a local authority is free to include more than this per pupil in a school's budget share;

(e) regulation 11(3) is also relevant because it deals with funding SEN provision in maintained mainstream schools. It states:

> "(3) When making a determination under paragraph (1) [of a maintained school's budget share in accordance with Part 3 of the Regulations] the local authority must identify within each budget share an amount calculated by reference to the requirements, factors and criteria specified in Part 3 [of the Regulations] which are relevant to pupils with special educational needs, such amount must be calculated using a sum of £6,000 as the threshold below which school [*sic*] will be expected to meet the additional costs of pupils with special educational needs from its budget share."

(f) while regulation 11(3) is certainly not without ambiguity, in *Hammersmith* I proceeded on the basis that its effect is to require maintained mainstream schools to absorb a certain proportion of the additional costs of educating pupils with SEN from the school's budget share. Flowing from this is an implication that further costs will be met by the local authority and that is certainly how I have been told it works in practice;

(g) *Hammersmith* also proceeded on the basis that regulation 11(3)'s reference to £6,000 is a pupil-specific reference, rather than a reference to the school's total additional SEN costs for all pupils. Neither party in this case invites me to proceed on a different basis to that in *Hammersmith*. On that basis, the first £6,000 of the additional costs incurred in making provision for Andrew's SEN is not to be taken into account in comparing the costs of the contender schools for the purposes of section 9 of the Education Act 1996.

35. In this case, both parties submit that *Hammersmith* supports their case.

Conclusion

36. I shall deal first with the council's assertion that the case was presented to the First-tier Tribunal on the agreed basis that, were the maintained school named, Andrew would receive 25 hours per week of dedicated teaching assistant input. I agree with the parents' argument that there is no evidence to support this assertion.

37. The final working draft of Andrew's statement of SEN did not quantify teaching assistant provision. And, as the parents point out, the Tribunal's statement of reasons indicates that it made an original determination that 25 hours of teaching assistant input per week was required. The Tribunal's statement of reasons shows it carefully and conscientiously addressed the educational aspects of the appeal. I cannot accept that it mistakenly omitted to mention the parties' agreement over teaching assistant provision.

38. I agree with Mrs P that the Tribunal did not give adequate reasons for its finding that the additional costs, for section 9 Education Act 1996 purposes, of educating Andrew in the council's preferred maintained school were £5,200.

39. The council's costs evidence said its purpose was to identify the costs of delivering the provision in Andrew's current statement. That version of his statement contained no quantified provision for teaching assistant input. Once the Tribunal had decided to order 25 hours per week of teaching assistant provision, it needed to consider whether the council's costs evidence could be relied on in applying section 9 of the Education Act 1996. Its statement of reasons shows that it did not address this point. This was an important issue and the Tribunal erred in law by failing to explain why, despite ordering 25 hours per week of teaching assistant input, it was still able to rely on the council's costs evidence.

40. I cannot agree with the First-tier Tribunal judge, who refused permission to appeal to the Upper Tribunal, that such an error could not have been material given the costs gulf between the contender schools. On the Tribunal's findings, the costs difference was about £12,000. Under the school funding regulations, the maintained school was expected to meet the first £6,000 of the costs involved in providing for Andrew's SEN. I have no evidence about the costs of providing a full-time teaching assistant. However, I am quite satisfied that, whatever those costs may be, they will not be so close to the £6,000 mark as to render the Tribunal's error immaterial. It could have made a difference to its decision.

41. That disposes of grounds 1 and 2. I would not have allowed the appeal on ground 3. The First-tier Tribunal was entitled to find, on the evidence before it, that Andrew's required specialist teaching input was a "pre-funded" service. In *Oxfordshire CC v GB & Others [2001] EWCA Civ 1358, [2002] ELR 8,* the Court of Appeal found that , if specialist teaching services would be provided under previously paid-for arrangements, they are to be excluded for section 9 purposes.

What happens next?

42. I set aside the First-tier Tribunal's decision because it contained an error on a point of law and I remit the appeal to that Tribunal for re-hearing. I leave it to the First-tier Tribunal to give any necessary case management directions for the re-hearing.

43. I do, however, draw to the First-tier Tribunal's attention that, on the re-hearing, it will be considering Andrew's current circumstances. In *Wilkin v Goldthorpe (Chair of the SEN Tribunal)* CO/1251/97) the High Court decided that, when a Tribunal decides a SEN appeal under the Education Act 1996, it is "bound at that stage to look at the overall picture as to the particular special needs of the child at that time. It is not for the tribunal simply to address the issues as at the stage when the statement is drawn or when the appellant lodges her appeal".

44. With a view to minimising any delay in the re-hearing of this appeal, I give my views as to whether, in a case of this type, the recent replacement of the school funding regulations makes any material difference to the approach taken in *Hammersmith*.

45. For the funding period ending on 31st March 2016, the relevant regulations are the School and Early Years Finance (England) Regulations 2014 (S.I. 2014/3352). In my view, for the purposes of this case, those Regulations do not materially differ from the 2013 Regulations under analysis in the *Hammersmith* decision. A minimum per-pupil (or AWPU) amount must be included in each maintained mainstream school's budget share; the sum is £2,000 for pupils in Key Stages 1 and 2 and £3,000 for pupils in Key Stages 3 and 4 (regulation 13). And provision continues to made for maintained schools to meet the first £6,000 of SEN costs from within their delegated budgets (regulation 11). In my view, unless a party persuades it not to, the First-tier Tribunal ought to adopt the *Hammersmith* approach if its section 9 analysis takes place against a background of the 2014 Regulations.

46. For the funding period beginning on 1st April 2016, the relevant regulations are the School and Early Years Finance (England) Regulations 2015 (S.I. 2015/2033). Again, in my view, for the purposes of this case, those Regulations do not materially differ from the 2013 Regulations analysed in *Hammersmith*. A minimum per-pupil (or AWPU) amount must be included in each maintained mainstream school's budget share; the sum is £2,000 for pupils in Key Stages 1 and 2 and £3,000 for pupils in Key Stages 3 and 4 (regulation 13). And provision continues to made for maintained schools to meet the first £6,000 of SEN costs from within their delegated budgets (regulation 11). In my view, unless a party persuades it not to, the First-tier Tribunal ought to adopt the *Hammersmith* approach if its section 9 analysis takes place against a background of the 2015 Regulations.

The procedural difficulties encountered by this appeal after the First-tier Tribunal gave its decision

47. After the First-tier Tribunal decided this appeal on 8th April 2015, Mrs P sought the First-tier Tribunal's permission to appeal to the Upper Tribunal. Procedural complications set in.

48. At that stage, one of the grounds of appeal related to the qualifications of Andrew's teaching assistants. The representative drew attention to the Tribunal's reasons, in particular the following:

> "No persuasive case had been shown to the Tribunal for [Andrew] to have his learning programmes delivered by specialist teachers. It had been identified to the Tribunal that the level of teaching qualification that would be appropriate for the delivery of the programmes to [Andrew] should not be lower than Level 5, but that some TAs are trained to this level and would be competent and able to deliver the programmes under specialist supervision and guidance."

49. My understanding is that a Level 4 qualification is commensurate with a certificate of higher education and a Level 5 qualification is commensurate with a diploma of higher education. By way of comparison, an undergraduate degree is a Level 6 qualification.

50. If the statement of reasons is read as a whole, I think it is clear that the purpose of the above passage was to explain why the Tribunal rejected the parents' argument that all of Andrew's education needed to be delivered by specialist teachers.

51. The final statement ordered by the Tribunal did not specify that Andrew's teaching assistants had to be qualified to any particular level. In seeking the First-tier Tribunal's permission to appeal, Andrew's parents described this as a "discrepancy" that amounted to an error of law.

52. The salaried First-tier Tribunal Judge who considered the application for permission to appeal decided on 15th April 2015, of his own volition, that the "discrepancy" was a "clerical mistake" that he was entitled to correct under rule 44 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. The Judge proceeded to alter the statement, as ordered by the Tribunal, to specify that Andrew's teaching assistants were to be "qualified to at least Level 5" and the altered statement was issued to the parties. The Judge also refused permission to appeal.

53. The council disputed the altered statement and applied for permission to appeal to the Upper Tribunal against the alteration.

54. The First-tier Tribunal's Deputy Chamber President, Judge Tudur, received the council's application for permission to appeal and, as required by rule 47(1) of the procedural rules first considered whether to review the decision.

55. Judge Tudur concluded that the salaried judge's purported exercise of the power under rule 44 involved an error of law. While this is not an issue I need to determine, I quite agree with Judge Tudur's decision. If the Tribunal's statement of reasons is read as a whole, it is clear that its omission of a qualification level for Andrew's teaching assistants could not properly be characterised as a clerical mistake.

56. Judge Tudur reviewed the salaried judge's decision and set it aside his purported correction of a clerical mistake. The result, in terms of the contents of the statement, was 'back to square one'. It remained in the form ordered by the Tribunal following the hearing of the appeal. At the hearing of Mrs P's application for permission to appeal, I was informed that, in these proceedings, she no longer challenges the omission of a teaching assistant qualification level but reserves her position in the event that the matter is remitted to the First-tier Tribunal for re-hearing.

57. In the council's written observations on Mrs P's application for permission to appeal, they argued that, following the Deputy Chamber President's review, the First-tier Tribunal's decision became an "excluded decision" under section 11 of the Tribunals, Courts and Enforcement Act 2007. There is no right of appeal to the Upper Tribunal against an excluded decision.

58. I rejected the council's argument. It confused the review decision itself with the decision under review. It is the former that is an excluded decision. That contrast between decisions is shown by the wording of section 11(5)(d)(i) of the 2007 Act in that it refers to "a decision… to review, or not to review, an earlier decision of the tribunal". A distinction is drawn between the review decision and the "earlier decision".

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
1st March 2016