

# The First-tier Tribunal (SEND) has no power to stay a permanent exclusion decision pending the final hearing of a disability discrimination claim, the Upper Tribunal confirms

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## ***DB v Academy Transformation Trust (SEND) [2022] UKUT 66 (AAC)***

- 1.** *DB v Academy Transformation Trust* was published in March and held that the First-Tier Tribunal (SEND) has no power to stay permanent exclusion decision pending final hearing; it also looks at Upper Tribunal powers.
- 2.** The child concerned had significant additional and special educational needs and was permanently excluded from his school. His parent sought to have the permanent exclusion 'stayed' pending final determination of the disability discrimination claim which parents had brought in the First-tier Tribunal against the school. The First-tier Tribunal held that it had no such power; parents challenged that decision to the Upper Tribunal.
- 3.** The Upper Tribunal considered rule 5 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the HESC Rules") which sets out the First-tier Tribunal's case management powers. It held that, consistently with section 22(1) of the Tribunals, Courts and Enforcement Act 2007, the opening words of rule 5(1) are concerned with the First-tier Tribunal to regulate procedures or decisions *outwith* its own procedures, other than once the First-tier Tribunal has made its substantive decision on the claim or the appeal.
- 4.** There is an equivalent rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). The Upper Tribunal has the power under rule 5(3)(m) of the UT Rules in an appeal, or an application for permission to appeal, against the decision of another tribunal,

such as the First-tier Tribunal, to suspend the effect of the decision of the First-tier Tribunal pending the determination of the application for permission to appeal, and any appeal.

5. The First-tier Tribunal under rule 5(3)(l) of the HESC rules only has the power to suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision. It is not included within that suspension power any power to suspend on an interim basis the effect of a decision being challenged on appeal or a claim to it pending the determination of the appeal or the claim (such as the permanent exclusion decision in the present case). This limit on the First-tier Tribunal's suspension powers sits consistently with the scope of section 22(1) of the Tribunals, Courts and Enforcement Act 2007 and the wording of rule 5(1).
6. The Upper Tribunal considered that the High Court's power on judicial review to suspend an administrative decision, together with the First-tier Tribunal's power to order reinstatement after the appeal has been determined, provide a human rights effective remedy against the exclusive decision and do not require rule 5(3)(i) of the HESC Rules to be read as conferring a power on the First-tier Tribunal to suspend the effect of the permanent exclusion decision made by the respondent.

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08 August 2022



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