Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

FTS/HEC/AC/21/0018/PRELIMINARY

DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER

Claim

1. This is a claim under the Equality Act 2010 ('**the 2010 Act'**). The claimant alleges that the responsible body discriminated against the young person by:

    a. failing to provide maths tuition in the period from January 2020 to May 2020; and
    b. failing to reach an adequate estimated grade for the young person's National 5 Maths subject for academic session 2019-2020.

2. The responsible body argues that the claim is out of time and ought to be dismissed. It was agreed that a decision on this point is a decision on a preliminary matter, to be taken by a legal member sitting alone under rule 69 of the First Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) ('**the rules**').

Decision

3. The claim will be considered, although out of time, since it is just and equitable to do so under rule 61(5) of the rules.

Process

4. A number of case conference calls took place between the legal members allocated to the claim and the parties. These took place in June, July, August and September, all 2021.

5. Written submissions on the preliminary matter were lodged by both parties, as well as supporting documents. The written submissions included responses to certain questions from the legal member, contained in the case conference call note and directions of September 2021 (T082-083). The bundle I considered consists of: T001-083; C001-091 and RB001-RB253.

6. One other procedural point to note is that the claimant lodged a withdrawal form in August 2021. Following a case conference call in August 2021, the claimant was allowed to retract that withdrawal form, for reasons explained in the case conference call note and directions at T078-081.

Reasons for the Decision

7. The background facts are not disputed, and can (for present purposes) be summarised briefly. The young person was in secondary year five of her education at the relevant time and was unable to continue her education in school between April and December 2019, since she was in hospital over that period. During part of the period from January-February 2020 the young person was provided with education by the school. The young person was then admitted to hospital again in February 2020. While the young person was in hospital the Covid-19 pandemic caused the closure of schools and the cancellation of examinations. Estimated grades were submitted by the young person's school for both English and Maths National 5 qualifications. This led to the young person securing a C grade for National 5 Maths.

8. It is not disputed that the young person is disabled under the 2010 Act.

9. I will deal with the reasons in three parts, before concluding:

   A. The scope of the claim
   B. Was the claim lodged within 6 months of the act complained of?
   C. If not, is it just and equitable to consider the claim?

A. *The scope of the claim*

10. This is explained in paragraph 1 above, and the preliminary issue is considered in relation to these two matters only.

11. There was some discussion in the claimant's written argument around the late arrival of the young person's Scottish Qualifications Authority ('**SQA**') qualifications certificate for her 2019-2020 grades. However, the claimant later conceded that this is not a matter under the control of the responsible body. He therefore retracted that allegation. In my view, this is a sensible and appropriate retraction, and so it is not included within the scope of the claim.

B. *Was the claim lodged within 6 months of the act complained of?*

12. The answer is: no.

13. The relevant provision is in rule 61(4) of the rules. A claim, in order to be on time, must be received by the Tribunal within 6 months of the time when the act complained of was done. Even if the acts representing both parts of the claim can be said to be 'conduct extending over a period' and so treated as done at the end of the period, the acts complained of were completed by 29 May 2021. This is the date by which the responsible body required to submit information to the SQA in relation to the young person's grades (RB196, para 16).

14. Six months from that date takes us to 29 November 2020. The claim was lodged on 7 April 2021.

15. I would add that the date for the purposes of the time bar argument under rule 61(4) is not when the claimant realised that there may have been a discriminatory act, the relevant date is the date when the 'act complained of was done'.

C. *If not, is it just and equitable to consider the claim?*

16. Since the claim is out of time under rule 61(4), the only way it can proceed is if, in all the circumstances of the case, the tribunal considers that it is just and equitable to do so under rule 61(5) of the rules.

17. The just and equitable test (as used in a time bar context) has been considered by courts and tribunals in numerous cases. The responsible body refers to a number of these (see in particular the submission at RB243-RB247 and RB251, para 2; see also the cases lodged by the responsible body, 15 in total). I have closely considered all of the authorities lodged and discussed. However, I find the comments of Lord Justice Leggatt in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 ('***Abertawe***') of particular assistance. While not binding on me, this does represent Court of Appeal authority in which the general approach is discussed. In addition, the approach taken by Mr Justice Leggatt is adopted from a line of case law, including from the Supreme Court (see para 18 of the judgment).

18. The responsible body accepts (RB251, para 2) that *Abertawe* is an appropriate case, since the approach taken there does not cut across the approach taken in the other cases cited. In my view, this is a sensible position to adopt. Having said that, I have carefully checked my approach to the test against the cases cited by the responsible body, and I am satisfied that my approach does not conflict with those cases.

19. Turning to the guidance on the 'just and equitable' test in *Abertawe*, the following points arise:

    a. The widest possible discretion applies. This is only amplified in the rule here where there is reference to 'in all the circumstances of the case', wording not found in the provision being considered in *Abertawe* (s. 123 of the 2010 Act);

    b. The length of and reasons for the delay will almost always be relevant; and

    c. Whether the delay has prejudiced the responsible body will almost always be relevant.

Length of and reasons for delay

20. On the length of the delay, in my view it is appropriate to consider the point at which it first became reasonable for the claimant to take the view that he was dissatisfied with the maths tuition and estimated grade provided by the school for the young person. That point is when he first became aware of his daughter's grade for National 5 Maths. It is accepted that the young person's parents became aware of the estimated grade on 16 August 2020 (e-mail from the deputy head teacher of the school, C012). I accept that the claimant had argued for maths tuition earlier than this, and that none was provided from January 2020. However, it is reasonable that the claimant, on realising his daughter's grade, took the view that the lack of maths tuition and/or the method for

calculating the grade may have had a practical impact on his daughter's education. Whether that is the case is a matter to be decided, of course.

21. Following disclosure of the estimated grade, there is evidence of activity by the claimant leading right up to the submission of the claim. That activity can best be viewed in three stages.

22. The **first stage** of that activity is evidenced by e-mails in which the claimant seeks clarification on how the young person's maths grade was reached. On the day after learning of the estimated grade, the young person's mother e-mailed the school's deputy head teacher and the SQA co-ordinator asking for a copy of the young person's maths portfolio submitted for the assessment (C052). That e-mail does not appear to have prompted a reply (at least none is lodged), leading to a further e-mail on 19 August 2020 (C053) to a different member of school staff. A third e-mail was sent on 20 October 2020 (C089) referring to the earlier e-mails and asking for further information. A fourth e-mail was sent on 24 November 2020, this time to a range of people, including two deputy head teachers at the school, explaining previous attempts to obtain information, and asking for the information again.

23. The school responded on 2 December 2020, in an e-mail from one of the school's deputy head teachers (T052). In that response, an apology is given for not replying sooner. It is notable that the e-mail of 2 December 2020 is the first substantive response by the school to the claimant's concerns. Further, attached to that e-mail was a document in which the school's framework explaining the steps taken by the school to arrive at evidence based estimates for each pupil (RB109-113). That document may have a direct bearing on the claimant's case. It would seem (at least from the information available to me) that this is the first time that the claimant had access to such a document.

24. The **second stage** of the claimant's activity covers the period from 2 December 2020 until 14 January 2021. During that period, there were e-mails between the claimant and the responsible body during which the issues raised by the claimant are further explored. The claimant replied to the 2 December 2020 e-mail on 6 December 2020 (T053), making certain points, stating an intention to pursue the matter further and asking for a meeting. The claimant sent a further e-mail on 13 December 2020, having received no reply (T053). A reply was received from the school the following day (T054) offering a meeting on 21 December 2020. That meeting did not take place, having been cancelled by the school.

25. The **third stage** of the claimant's activity consists of taking his concerns further. This happened through two avenues, and in tandem.

26. The first avenue was to pursue a formal complaint to the responsible body. This began with an e-mail of 26 January 2021 to the school head teacher (T055-056). In that e-mail, the claimant indicates an intention to raise a Tribunal claim if the matter is not resolved within 10 days. In addition, the claimant sets out his concerns and notes:

> "We have been trying to sort the situation out and discuss it with the school for months. Our emails are ignored or responded to offhandedly. Arranged meetings are cancelled at the very last moment and times for new ones are not provided."

27. The responsible body treated the claimant's e-mail of 26 January 2021 as a complaint, leading to a response from the Head of Service by letter of 8 February 2021 (T033-035). The young person's mother responded to that letter by e-mail the following day (T039). That e-mail was responded to by a further letter from the Head of Service of 15 February 2021 (T040-042), which included additional information. The claimant responded to that letter the following day (T043-044). The Head of Service concluded the complaint process by an e-mail of 16 February 2021 (T045).

28. The second avenue of this third stage was taking specialist advice. The claimant first contacted an advice body (Sen Achieve) by e-mail on 14 January 2021 (C024). Full background information prior to an appointment with the Sen Achieve adviser was sent by the claimant on 25 January 2021 (C022-023). The Sen Adviser gives some preliminary comment (mentioning the Tribunal and the potential time bar issue) on 9 February 2021 (C021). The Sen Adviser then offered an appointment to assist with the Tribunal application at the end of March 2021 (see e-mail of 16 February 2021, C020). The Sen Adviser then proceeded to assist the claimant to frame the application, taking matters into April 2021, in fact to 7 April, the date the claim was submitted (see e-mail exchanges of 7 April 2021, C049-051).

29. It is clear, then, that during the period from August to February 2021, the claimant was attempting to pursue his concerns with the school (and responsible body). However, he did not wait until that process was completed, taking advice in January 2021 in connection with a Tribunal claim. This advice process lasted until the day the claim was lodged, 7 April 2021.

30. This means that for the whole of the relevant period (16 August 2020 to 7 April 2021), there was a continuous process of engagement by the claimant. In my view, it is perfectly reasonable for a claimant to first attempt to resolve matters with the responsible body prior to going down a more formal route, such as a Tribunal application. That is what the claimant attempted to do.

31. On the period during which advice was received, one approach (and arguably a sound one) would have been for the claimant to lodge a claim right away. But that is not what was advised. Instead, the claim was lodged almost 3 months later. Again, it is reasonable for the claimant to follow the advice given. It is not the fault of the claimant that three months passed after advice was initially taken.

32. Coming back to the length of the delay (since that needs to be considered alongside the reasons for it), I should take account only of any delay for which the claimant can be held responsible. The lack of response from the school to the claimant's initial e-mail accounts for the period between 17 August and 2 December 2020. The absence of advice to lodge a claim right away in mid-January 2021 accounts for the period from then until 7 April 2021. This means that the only period of delay for which the claimant can be responsible is the period between 2 December 2020 and 14 January 2021, a period of less than 6 weeks. Even then, as indicated above, there was correspondence from the claimant as well as a planned meeting. That period also covers the Christmas and New Year breaks. This means that any delay for which the claimant was responsible was non-existent or, at most, minimal.

Prejudice

33. The responsible body points out that two types of prejudice exist: (1) the obvious prejudice of having to respond to a claim which would otherwise be time-barred; and (2) the so-termed 'forensic prejudice'. This latter type is discussed by Mrs Justice Laing in the Employment Appeal Tribunal ('**EAT**') decision in *Miller v Ministry of Justice* UKEAT/0003/15 ('***Miller***') at paras 12-13 (see the responsible body's submissions at RB246-247).

34. The 'forensic prejudice' is described as prejudice suffered 'if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents and losing touch with witnesses' (para 12 of *Miller*). This type of prejudice is also referred to by the Court of Appeal in *Abertawe* as delay which prevents or inhibits the responsible body from investigating the claim while matters are fresh (para 19, final part, in brackets).

35. Dealing with the first type of prejudice, I take into account the fact that the responsible body will, if the claim is allowed to proceed, have lost the right to have a claim lodged against it within 6 months of the relevant events. The responsible body refers to this as the 'expectation of finality' (RB252). Indeed, the relevant events were happening over a year prior to the claim being lodged. That is a matter in favour of the responsible body. As is pointed out, the time limit is there for a reason, and cannot simply be waved away.

36. On the 'forensic prejudice', I accept that there may be a degree of prejudice caused by lack of recollections of school staff around discussions about the young person's performance as the estimated grade was being considered.

37. The responsible body argues that part of the prejudice consideration involves the resources which will be required to defend the claim, such as preparation of witness statements and attendance of witnesses at a hearing (RB247). I do not agree that this is, in itself, a relevant factor. It is not mentioned in the *Miller* or *Abertawe* cases. Nor does it seem to me to be logically relevant: the responsible body requires to expend resources in every case, whether lodged out of time or not. It may be that the responsible body is arguing a connection between this point and the merits point (dealt with in the next paragraph), but even then I do not see that the matter is relevant.

38. The responsible body also indicates that it is important to look at the merits of the claim. I agree. However, only where a claim is patently ill-founded would the merits of the claim have a bearing on the time-bar issue. Having considered the whole of the evidence submitted, I am not convinced that this is the case. I do not require to say any more about the merits than that, and indeed it would be wise not to do so at this stage.

39. On the 'forensic prejudice' point proper, the responsible body argues that given the working conditions over the crucial period of January to June 2020, there is little information from that period. Mention is made of telephone conversations, meetings online, and no comprehensive recording system being in place. Difficulties in recalling conversations which took place between 20 April 2020 and 29 May 2020 in relation to grades would detrimentally affect the responsible body's ability to defend the claim, it is argued (RB252).

40. I accept that there may be some difficulties in the recollection of conversations over that period. However, it seems to me to be unfair that the claimant is disadvantaged in his time bar argument by the lack of a proper recording system in place to capture those

conversations. I appreciate that the conditions under which all schools were working during the period from January - May 2020 were uniquely challenging, but I do not see that those conditions necessarily prevented the recording of conversations (in minutes of meetings, for example). In any event, given the detailed response of the responsible body on the merits of the claim, I do not accept that any difficulties in recalling unrecorded conversations would in any material sense affect the responsible body's ability to defend the claim. Much of the relevant material is in writing, including e-mails and (presumably) the portfolio which was prepared for the young person's estimated grade. Further, many of the issues in this claim relate not to factual events, but the proper interpretation of those events. The responsible body has made a number of points already about those events, suggesting to me that they are in a good position to be able to counter the claim on the basis of the evidence currently available.

41. I would add that as part of the relevant test (which is a very broad one, as noted in *Abertawe*), it seems to me to be fair to consider prejudice not only to the responsible body, but to the claimant too. If this claim is unable to proceed, the claimant will be deprived of the ability to pursue a possible remedy for what he argues was unlawful discrimination against his daughter on an important matter relating to her education. He is not (and cannot in these proceedings) seeking financial compensation, and so there is no other avenue open to him to seek redress through the range of remedies which this Tribunal is empowered to grant.

Conclusion

42. In my view, there are good reasons for the delay in lodging the claim following the end of the 6-month period from the date when the acts complained of were done.

43. During the initial period from May 2020 to August 2020, the claimant was not fully aware of the impact of any alleged failures of the responsible body in the tuition/assessment of the young person's maths grade.

44. During the period from August 2020 to April 2021, the claimant was active in pursuing his concerns, with the school, the responsible body and then the Tribunal, as well as taking and following specialist advice.

45. The length of delay is not significant here, even when viewed as a whole; if we take the estimated grade submission date as the start of the 6 month period, taking us to 29 November 2020, the claim was lodged a little over 4 months later. This is not the 'many months or years' referred to by Mrs Justice Laing in *Miller* (in the context of prejudice).

46. The prejudice which would be suffered by the responsible body is not significant, especially given that a robust defence of the claim on the merits has already been developed and expressed, and given the nature of the issues in the claim.

47. Weighing up these points, it is just and equitable that the claim is considered, despite it having been lodged out of time.

Other comments

48. One additional point is raised by the responsible body which is not related directly to the time bar issue. This is the specification of the claimant's case. I take a firm view that this

is not a matter which should prevent this claim proceeding. In my view, while the specification of the claim is not perfect, this is understandable as the claimant is not represented. However, he has made very clear the points he is raising, and has made reference to forms of discrimination. Indeed, he has done so in such a way as to allow the responsible body to set out a detailed rebuttal of his points. That would not be possible if the specification of the claim was poor.

49. I am also influenced here by the clear terms of rule 2(1), and in particular rule 2(1)(c) of the rules. I also note that the obligations in rule 2 extend not only to the Tribunal, but to all parties ('with the assistance of the parties' in rule 2(1)). To the credit of the responsible body, this rule has been fully applied; that is clear from the significant efforts made so far by the responsible body to respond to the claim on its merits as well as on the time bar issue.