Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL – Preliminary Hearing

Claim

The claim is brought by the Claimant for her son, ("the young person") on the basis of claimed discrimination in terms of the Equality Act 2010 ("the Equality Act").

1. The Decision

The claim is dismissed.

2. Preliminary Issues

The claim was lodged with the Tribunal on 29 November 2017. A conference call took place on 16 February 2018, a note of which is in the bundle (T77). The conference call note records that "Clarity is required from the Claimant as to the specifics of the discrimination that is claimed. Particular detail should be given of what the acts are and exactly when or over what time the acts occurred. As matters stand it is difficult to understand what the acts of alleged discrimination are and whether there are any time bar issues." The Claimant was to provide that further detail to the Tribunal. The Claimant was also to provide details of the remedies sought; both by 9 March.
On 19 March the Claimant's Solicitor lodged an additional case statement which did not provide the specification requested (C6-7 in the bundle). Accordingly the Legal Member discharged the evidential hearing previously fixed and substituted a preliminary hearing to hear submissions on:-

1. The specific acts which the Claimant believes supports her claim.
2. The issue of whether the claim as a whole or any aspect of it falls out with the period where the Tribunal can consider the claim.

3. If any or all of the claim could not be considered without discretion being exercised to allow a late claim. The note, erroneously repeating an error in paragraphs 8.13 and 8.14 of the "Technical Guidance for Schools in Scotland" produced by The Equality and Human Rights Commission erroneously referred to s 118(1) of the Equality Act when in Scotland it is rule 61 of The First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017 that provides that a claim must be received before the end of the period of six months beginning when the act complained of was done. Conduct extending over a period is to be treated as done at the end of the period. However the effect is the same in that both s118 (1) and rule 61(5) allow for a claim to be considered late where "it is just and equitable to do so".
4. The legal authority for both parties' positions on points two and three above.
5. The remedies sought by the Claimant.

The Claimant on 23 April lodged a revised Additional Case Statement which is contained in the bundle at C8-C12 indicating the earlier version had been sent in error. This document clearly set out in paragraph 18 the issues that the Claimant invited the Tribunal to determine.

On the instruction of the Legal Member, the case officer wrote to the parties' representatives in advance of the preliminary hearing advising that they should be in a position to address the Tribunal fully on the law as it applies to the claim.

Accordingly at the Tribunal in May 2018, we focussed on each of the issues identified by the Claimant to ascertain whether there was a potentially valid claim. These issues are referred to in the reasoning of the Tribunal below.

Finally at the outset of the preliminary hearing in May, the Claimant's Solicitor added failure to prepare an individualised educational plan as a reasonable adjustment that the Claimant considered should have been made.

3. Findings in Fact

As there was no evidential hearing we did not make any findings in fact, however we did in considering the matters detailed below accept all the facts detailed in a Joint Minute of Agreed Facts lodged by parties (T81-T83) and we also sought further clarification from parties' representatives in relation to the dates of various events referred to in the issues the Claimant wanted the Tribunal to determine. Where relevant these are referred to below.

4. Reasons for Decision

Reasonable Adjustments

The Claimant's Solicitor suggested four potential reasonable adjustments which she submitted the Responsible Body should have made in order to comply with the duty to

make reasonable adjustments for a disabled person in terms of sections 20 and 21 of the Equality Act which we will return to below. However she also suggested that one of these failings was a failure to provide "appropriate supports to secure engagement in education." Our legal member suggested to the Solicitor our view that details should be provided of what the reasonable adjustments she believed should be made but her submission was essentially that it was for the authority to make the reasonable adjustments rather than for the Claimant or her representative to specify what the reasonable adjustments should be. While we accept it is for the Responsible Body to make reasonable adjustments, we consider that in order for the Tribunal and indeed the Responsible Body to sensibly address an accusation of failure to make reasonable adjustments that the Claimant should by the time the matter is before the Tribunal be able to specify what reasonable adjustments should have been made, particularly in a matter like the present claim where any perusal of the bundle or the joint minute of agreed facts demonstrates that many adjustments were put in place to support the young person in accessing education. The Solicitor for the Claimant accepted supports had been put in place to assist the young person to access education. The Claimant's Solicitor could not provide any authority for her submission which appeared to us to be suggesting that simply because the attempts to provide education to the young person were not as successful as either party would like, that the Responsible Body must have failed to make reasonable adjustments. The submissions if accepted would put an impossible burden on the Responsible Body.

Support for our view is available from the field of Employment Law, for example in the decision of the UK Employment Appeal Tribunal ("EAT") in **Project Management v Latif UKEAT/0028/07CEA** where the EAT considered the burden of proof on reasonable adjustments at paragraphs 53 and 55 :-

"*53. We agree with … It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made… is right to say that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable amendment has been identified.*
55. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

We respectfully agree with this passage although for the avoidance of doubt we are not suggesting that the Claimant at the time of any failure requires to suggest specific adjustments, the duty to consider and make reasonable adjustments being with the Responsible Body, however we emphasise that in the context of a Responsible Body that has considered and made adjustments, we would expect by the time the matter comes before the Tribunal that the Claimant can identify what reasonable adjustments have not been made.

When pressed further on the issue of lack of detail the Claimant's Solicitor referred to the provision of a "co-worker" to assist the young person, such provision having been in place in the past but was withdrawn. Quite apart from whether it was appropriate to allow such a late addition to the claim, it was apparent this provision was removed some years ago and accordingly would be subject to time bar as we discuss below.

We turn now to the specific adjustments which the Claimant suggested were both reasonable and had not been taken, these being:-

(i) A claimed failure to assess the young person in respect of a suspected diagnosis of dyslexia
(ii) A claimed failure to assess the young person with a view to identifying the extent of his additional support needs in terms of section 8 of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 act")
(iii) A claimed failure to prepare an Individualised Education Plan.

The Claimant's Solicitor submitted these were continuing failures however we were interested in exploring when the failures occurred in order to ascertain whether there was a time bar issue. In considering this we had regard to and referred parties to the "Technical Guidance for Schools in Scotland" produced by The Equality and Human Rights Commission, published under authority of the Equality Act 2006. In particular we referred parties' representatives to paragraph 8.13 of the guidance, the pertinent part of which provides:-

"*However, where the continuing act is a failure to do something, then the six months begins from either the date on which the person said that he or she was not going to do it, or from the date on which he or she could have reasonably been expected to do it. However, an ongoing failure to do something is treated as having happened when the person in question decided not to take the action. In the absence of evidence showing when the decision was made, a person is taken to have decided to fail to do something when he or she either carries out an act inconsistent with doing it or on the expiry of the period in which he or she might reasonably have been expected to do it*."

In relation to the assessment for dyslexia, parties agreed that "a formal assessment was started but was unable to be completed." The Responsible Body's reason for it not being completed was the young person's lack of engagement but more importantly (for the purpose of our considerations) the issue had arisen at the time of the young person's transition from primary to secondary school in 2013. Accordingly even if such an assessment was a reasonable adjustment which should have been made it is clear that any decision not to make the adjustment was made well out with the period for bringing a claim. The claimant's Solicitor also mentioned that the parents raised concerns about dyslexia in 2016 and that it would have been open to the Responsible Body to undertake an assessment at that time, but again even if that was a failing (and we make no finding that it was) it was clearly well out with the required period.

In relation to the claimed failure to assess in terms of section 8 of the 2004 act (which very broadly, among other things, allows a parent to make a request for an assessment to establish whether a child or young person has additional support needs which, unless

unreasonable, the education authority must comply with), there was a lack of detail in the papers and case statements produced. The Claimant's Solicitor indicated that the child's mother had made requests for assessment of the child under s8 of the 2004 act but could not point to anything in the bundle to indicate when or how. The Responsible Body's position was no requests had been made. Given the Claimant had repeatedly been asked, as indicated under preliminary issues above, to provide the specifics of the claim it was surprising to us that there was no detail in the bundle. However, in any case, it was not suggested by the Claimant's Solicitor that any request had been made during the 6 months prior to the claim being made.

We next enquired as to when the decision was taken that the young person did not require an Individualised Education Plan ("IEP"). Solicitor for RB submitted, and it was agreed in the bundle, that the Claimant had been advised, that an IEP was not produced because the young person did not meet the criteria for an IEP. For this to be a failure to make a reasonable adjustment we would consider the parent being notified of the reason for the decision to be the date of the alleged failure. While neither party could provide us with specifics of when this occurred it was accepted that this was not within the 6 months prior to bringing of the claim and indeed was likely to have taken place several years ago.

Finally, on reasonable adjustments, the Claimant's Solicitor argued that the claimed failures were ongoing, were part of an ongoing pattern and the final act had taken place within the last 6 months. We do not accept that submission, as stated above no specific failure to comply with s8 of the 2004 act was articulated which leaves us with only two specified reasonable adjustments which the Claimant alleges have not been carried out, namely an Individualised Education Plan being provided and a completed assessment for dyslexia. The two alleged failures had both taken place well out with the timeframe for a complaint to be brought. Accordingly even if they comprised a pattern, which we do not accept, the claim had still not been raised timeously.

Discrimination arising from Disability

At C12 of the additional case statement the Claimant argued two events supported this claim both of which the Claimant's Solicitor accepted were time barred. One related to a claim that recommendations within a report were not followed, the date of the report being 19 August 2016 and the other related to the young person's exclusion from school. While the case statement lodged by the claimant suggested there had been more than one exclusion it was accepted at the hearing that there was only one formal exclusion which happened on or around 22 or 23 June 2016. The Claimant also (again at C12) argued views of other professionals were not considered but when pressed for specific detail at the hearing the Claimant's Solicitor said she thought she was referring to a report from 2015 (a report from CAHMS (Child and Adolescent Mental Health Services).

Public Sector Equality Duty

The Claimant submitted there had also been a failing on behalf of the Respondent to meet their public sector equality duty in terms of section 149 of the Equality Act. When put to her that the Tribunal did not consider that it had jurisdiction to consider breaches of the said duty the Solicitor simply submitted that she thought it had and that it had been "referred to"

in other claims. No specific authority was claimed for her position and we are satisfied that there is no provision conferring jurisdiction to the Tribunal over the public sector equality duty.

Exercise of Discretion

We heard submissions for both parties on whether we should exercise our discretion to allow the claim in whole or in part in the event that any or all of the claim was time barred. As discussed above we are of the view that there was no aspect of the claim that was not time barred. Rule 61 (4) of The First-tier Tribunal for Scotland Health and Education Chamber (Procedure) regulations 2017 provides that the claim must be brought before the end of six months when the act complained of was done and rule 61 (5) allows us to extend the period in all the circumstances of the case if we consider it just and equitable to do so.

The Solicitor for the Claimant submitted that she thought it relevant to highlight the failure of the Responsible Body to provide the young person with an education. She referred to the case of **British Coal Corporation v Keeble** [1997] I.R.L.R. 336 as the leading case in relation to matters we should consider in exercising our discretion. We were not given any detail on the case but after the hearing examined it. The decision of the Employment tribunal in that case refers to an earlier decision of the EAT on the same claim where the EAT advised the Employment Tribunal that they should consider the factors listed in section 33 of the Limitation Act 1980 (an act that does not apply in Scotland) in considering whether to extend the period for bringing a claim. The factors listed were:-

> "(a) the length of and reasons for the delay;
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> (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
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> (c) the extent to which the party sued had co-operated with any requests for information.
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> (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.
>
> (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

In relation to length and reasons for the delay it was argued that the Claimant was a mother with three children all with additional support needs or disabilities and that her husband has significant health difficulties and is a vulnerable individual. The Claimant had faith in the Responsible Body to resolve matters and there is evidence of her engagement with the Responsible Body in meetings. It was only laterally that she realised this was not happening and she made a placing request. A reference in respect of the refusal of the placing request was made to the, then, Additional Support Needs Tribunals for Scotland, on 23 May 2017 by the said Solicitor's firm and it was subsequently dismissed. It was only after it was dismissed that the Claimant had sought advice on further steps that could be

taken. The young person will leave school in August 2018 and until last year the Claimant was taking positive actions to resolve matters, had not wanted to enter proceedings and considered a placing request more appropriate.

Limited submissions were made on the impact on the cogency of the evidence relating to the continuing state of affairs and the consideration of certain reports but without addressing specifically the impact on the cogency of the evidence. The Claimant's Solicitor accepted (c) above did not apply.

In relation to the promptness of action we were advised the Claimant acted promptly once advised of the possibility of raising a claim and her actions before that were positive attempts to remedy the situation. Finally, on point (e) above it was argued that after the placing request was dismissed, which the Solicitor believed was around October 2017, the Claimant had taken steps to obtain advice on the grounds for this action.

We were also referred to the Employment Tribunal decision in **Callum O'Donnell v Fife Council Case No: 4104129/16** as suggesting we should consider the balance of prejudice. We were not given any detail of the case but having now considered it the circumstances were, in so far as relevant, the Claimant, who had dyslexia, attempted to submit disability discrimination claim by posting it on the final date for submission, believing the last possible date was the day after. His claim was not initially accepted by the Tribunal and the first date stamp on his submission to the Tribunal was the date 7 days after the expiry of the time limit (although due to some confusion about a reference number it was not accepted until a couple of months later). In those circumstances and "with some hesitation" the Employment Judge considered it just and equitable to extend the time period.

In light of the foregoing it was argued that it was just and equitable to allow matters time barred to proceed.

The Solicitor for the Responsible Body argued that none of the issues were raised until the placing request appeal was dismissed. He asked the Tribunal not to use its discretion to extend the time period. Even if it was accepted that discrimination was over an extended period it was unclear to him whether there was any specific act from which time bar could run from.

Having considered these submissions and all the circumstances we are not persuaded that it is just and equitable to extend the time period. The very few specific actions or failures referred to all occurred well out with the required time period, between 2013 and June 2016 and would require an extension of approximately one year to allow any of them to proceed. We did not consider any reasons were presented to us that could reasonably explain the lengthy delay in bringing the claim or in seeking legal advice prior to bringing the claim. We do not consider it would be just and equitable to extend the 6 month period for such an extended period of time to allow any aspect of the Claim to proceed.

Conclusion

We have concluded that the Tribunal and the Responsible Body is entitled to specifics of the reasonable adjustments which the Claimant considers have not been made and accordingly confined our further consideration to the claimed failures which have been specified. All of them fell well out with the required period to bring a claim and we do not consider it just and equitable to extend the time period by the time required to allow consideration of any of these matters. Accordingly the claim is dismissed.