Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL ON A PRELIMINARY ISSUE

Reference

1. This is a placing request reference, received on April 2021. The respondent raised a preliminary issue, namely whether the reference should be permitted to be received late. I have decided this issue under rule 22 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) (**'the rules'**).

Decision

2. The reference is dismissed.

Process

3. Following the lodging of the reference, the respondent raised the preliminary issue. The respondent asserts that the placing request, in order to have been received on time under rule 14(5) of the rules, should have been received by 29 December 2020. The appellant accepts that this date represents the end of the two-month period referred to in rule 14(5). However, the appellant argues that I should exercise my discretion to allow the reference to be received, albeit late. The parties agreed that this issue should be decided by a legal member sitting alone, as is permitted under rule 22 of the rules.

4. I directed written submissions on this question. Following receipt of submissions from both parties, I directed the production of a witness statement from the appellant. That was submitted. The respondent then lodged supplementary submissions in response to the appellant's witness statement. Both parties then indicated that they were content to allow me to take a final decision on this point on the basis of the information available to me. I agreed to do so.

5. Having considered matters, I intimated my decision to the parties in June 2021. This document records the reasons for my decision.

Findings in Fact

6. The appellant sent a placing request under the Education (Additional Support for Learning) (Scotland) Act 2004 ('**the 2004 Act**') to the respondent on September 2020 (**'the request'**). That request sought the placing of the appellant's son (**'the child'**) in an independent school.

7. The respondent informed the appellant of its refusal of the request by letter of October 2020.

8. Following receipt of the refusal of the request, the appellant and his wife sought to resolve their unhappiness with the child's education by approaching the respondent. The issue which was discussed was the provision of 1:1 support for the child to access the curriculum.

9. At a Child's Planning Meeting on December 2020, this issue was discussed. It was agreed at that meeting that a decision on whether 1:1 support would be provided for the child would be taken in January 2021 by the respondent's Assessment and Transitions Group (**'ATG'**).

10. The ATG met in January 2021. The ATG did not approve the request for 1:1 support for the child.

11. At around the time of the ATG's decision, the schools in Scotland closed due to the COVID-19 pandemic national lockdown (**'the lockdown'**). The child (as a vulnerable child) remained in school for his education. He was provided with 1:1 support. During this time, the appellant was happy with the support being provided for the child. Once schools re-opened, that 1:1 support did not continue for the child.

12. During a meeting called to review the child's Individualized Education Plan in March 2021, the appellant raised the issue of support for his son's education. The respondent's educational psychologist repeated her recommendation that the child receives 1:1 support to access the curriculum. The educational psychologist recommended to the appellant that he re-apply to the ATG panel for that support to be put in place.

13. During the period from mid-January 2021 to the end of March 2021, the home life for the appellant and his family was busier than usual. This was due to home-working for the appellant, his wife's job as a category one key worker and home-schooling for the appellant's children, all related to the lockdown.

14. The appellant first sought legal advice in relation to the reference in April 2021.

Reasons for decision

The test to be applied

15. It is clear from rule 14(5)(a) of the rules (rule 14(5)(b) being inapplicable here) that a reference 'shall be sent so as to be received' by the Tribunal within two months of the date when the respondent informed the appellant of the right to make a reference to the Tribunal. That right was clearly explained by the respondent in the letter of October 2020 (pages 24-25 of the documents lodged by the appellant with the reference). The appellant accepts that this means that the two month period referred to in rule 14(5)(a) expired in December 2020.

16. Although rule 14(5) refers to the time limit by using the word 'shall', I am not persuaded by the respondent's argument that this means that there is no discretion to allow a reference to be received late. This is clear from rule 56(1) of the rules where it is stated that a failure to comply with a provision of the rules 'shall not by itself render the proceedings void'. This means that where a reference is lodged late, there exists discretion to allow it to be received late. I can see no other way to interpret the plain

words of rule 56(1) as they apply here. That interpretation is only supported by the reference to the power to 'cure or waive the irregularity' in rule 56(2).

17. The next question is: how is that discretion to be exercised? The respondent urged me to apply the test in rule 29 of the rules. I do not accept that this is the correct test. That test deals with a situation where a rule (or directions) requires a party to do something within a period of time, and where that party seeks an extension of time within which to comply. The lodging of a reference form is the initial step in proceedings. Until a reference is lodged, there are no proceedings. This means that an appellant cannot rely on rule 29 to seek an extension of the two-month period in rule 14(5), since to do so, proceedings would have to be live. What rule 29 seeks to authorise is the extension of a time-limit put in place after a reference has been lodged and for some other step in proceedings. The fact that the time limit may be extended even after it has expired (as is provided by rule 29(1)) does not alter this analysis.

18. The appellant relied on rule 56 of the rules. In my view, this provision does apply. However, this only takes the appellant so far. Rule 56(2) refers to prejudice to a party caused by the failure to comply with a rule (termed an 'irregularity'). But prejudice is not the test to be applied. The reference to a person who 'has been prejudiced' refers to a situation where a step may be taken by the Tribunal to make directions to tackle that prejudice prior to reaching a decision to 'cure or waive' the irregularity. That is different from saying that the test to be employed is to consider 'prejudice'.

19. Given the non-application of rule 29 and the absence of a test in rule 56, what is the correct approach? It seems to me that rule 56 provides the power to 'cure or waive' a failure to comply with the rule 14(5) time limit, and that in deciding whether to do so, the overriding objective in rule 2(1)-(2) (to be applied when interpreting all other rules: rule 3), provides the test which ought to be applied.

20. In other words, the correct question is as follows: is it fair and just to allow the reference to be received late? I will now turn to that question.

Application of the 'fair and just' test

21. Fairness involves considering the interests of both parties, within the relevant surrounding circumstances (here, the circumstances relating to the lodging of the reference).

22. The appellant has an interest in proceeding with his reference. If it is dismissed, that will cause delay since he would then require to re-start the process by making another placing request. This would lead to uncertainty over the child's future education and may (if the current reference were to be, in the end, successful) lead to a delay in the child's movement to a new school.

23. The respondent's interest is not dissimilar in nature to that of the appellant (although viewed from a different perspective): it is entitled to have placing requests deal with within a reasonable time. That interest is what is behind the 2-month time limit.

24. Turning to the circumstances relating to the lodging of the reference, the appellant relies upon two main points. I will consider each in turn.

25. Firstly, he argues that he relied upon an indication that the respondent might agree to provide the child with 1:1 support in class. The decision to refuse that request took place on January 2021. Despite that refusal, the child was, in fact, provided with 1:1 support as a result of being educated in school as a vulnerable child during the lockdown, between January and March 2021.

26. Secondly, the appellant points out that the reference was lodged once his children had returned to school in April 2021. He argues that the period of home-schooling and home-working from January to March 2021 was a difficult one, given that he and his wife had jobs (his wife being a category one key worker). He indicates in his statement (para 6) that he was unable to focus on the placing request refusal over that period.

27. While I accept that the appellant was hopeful that the decision on January 2021 about the provision of 1:1 support would go in his favour (especially given the support of the respondent's educational psychologist), he must have been aware of the possibility that this might not happen. He appears to have therefore taken the risk of not lodging the reference at the end of December. There is no suggestion that he was unaware of that deadline, and indeed the refusal letter is very clear. It would seem, then, that the risk was taken with open eyes. The lockdown leading to school closures did not begin until a few weeks after the end of the 2-month deadline. I do not think that the appellant's assumption of success at the January 2021 meeting justifies the decision to miss that deadline.

28. Turning to the period from January 2021 (the date of the ATG meeting) and April 2021 (the date of lodging the reference), I accept that this must have been a difficult period for the appellant and his family. I also accept that the child had 1:1 support over that period, albeit for a different reason, namely the lockdown. However, the appellant remained aware, over this 12-week period, that the 2-month deadline had already expired. I do not seek to minimise the difficulties of family life over that period, as described in the appellant's statement. However, I am not convinced that the description of the circumstances is strong enough to justify a conclusion that the appellant did not have any time over that 12-week period to prepare and lodge a reference.

29. Looking to the respondent's position, by the time the reference was lodged, over five months had elapsed since the decision was made to refuse the placing request. This means that the reference was lodged more than three months late, when the deadline for lodging a reference (assuming it is lodged on the last day) is only 2 months. As the respondent points out, this makes the refusal decision rather historical. While the Tribunal considers whether any of the grounds for refusal exist at the time of the hearing, it is clear that the circumstances of the child could well be significantly different even by the time of the reference having been lodged, than at the time of the decision having been made. There is a purpose to the 2-month deadline: the respondent is entitled to the resolution of placing request decisions within a reasonable time.

30. A further factor I take into account is that the appellant may make a fresh placing request for the specified school. This means that the dismissal of this reference will not deprive the appellant of an opportunity to pursue a possible placement of his son in the specified school.

31. On that point, reference was made in submissions to s.18(7) of the 2004 Act (and the related provisions in s.18(8)-(10)). However, it is not clear that these provisions apply where a second placing request is made, leading to a second refusal decision. On one view, those provisions only apply where there is a further reference within 12 months arising out of the same decision as was the subject of the first reference. That provision may not have any impact on a reference arising out of a different decision. Arguably, each refusal decision gives rise to a right to make at least one reference. The correct interpretation may rest on the meaning of the words 'such a decision' in s.18(7). I need not decide this point here, but provide these comments since the provisions were mentioned.

32. Weighing the interests of the appellant against those of the respondent, within the relevant surrounding circumstances, all as set out above, it is not fair and just to receive the reference late. The reference must, therefore, be dismissed.