Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER

Claim

1. The claim which was received by the Tribunal on 8 November 2019 relates to alleged discrimination arising out of the responsible body's decision not to offer the child a place in their school. The claimant was notified of the decision verbally on 25 February 2019. The preliminary hearing was to determine whether the claim had been received on time in accordance with the tribunal rules.

Decision

2. The claim is dismissed as having not been received before the end of six months following the act complained of (as required by rule 61 (4) of The First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017, hereinafter referred to as "the 2018 rules").

Process

3. A conference call took place on 27 January 2020 during which a preliminary hearing was fixed to consider whether the claim had been received out of time and, if so, whether the tribunal should exercise discretion under rule 61(5) of the 2018 rules to consider the claim. Written submissions were lodged on behalf of both parties and are contained in the bundle at A104-111 for the claimant and R 133-136 for the responsible body. Further oral submissions were then considered at the preliminary hearing on 27 February 2020.

4. It was agreed by parties at the outset of the hearing that the facts, as discussed at various points in this decision, were sufficiently agreed to enable consideration of the preliminary issues. A joint minute of agreed facts is in the bundle at T29-31 which document also contained agreement that all documents within the hearing bundle are what they appear to be, although parties disagreed about the inference to be drawn from some of them. The joint minute was helpfully framed as a chronology of relevant dates.

5. The claimant represented herself throughout the proceedings and did so ably. Throughout the process I endeavoured to ensure she was on an equal footing procedurally and she was able to participate fully in the proceedings.

Reasons for the Decision

Was the claim received on time?

6. The material facts pertaining to this question are straightforward. On 15 October 2018 the child was offered a place at the school. Subsequently the claimant supplied the responsible body with information relating to the child's medical conditions. By telephone on 25 February 2019 (A1) the responsible body advised the claimant that they could no longer offer the child a place. The decision was confirmed by email on 26 March 2019 (A50). Following the decision intimated on 25 February there was a period during which the claimant sought to persuade the responsible body to allow the place which ultimately concluded with an email dated 10 May 2019 (A39) in which the responsible body confirmed that they had "decided to maintain" their position. The claim was lodged with the tribunal on 8 November 2019.

7. The claimant argued that the responsible body's decision was made on 10 May 2019 and that was the date the last discriminatory act was alleged. She argued that there was a continuous process of discrimination by the responsible body from 25 February until the email of 10 May 2019 and that a final decision was not taken until the said email of 10 May 2019. During that period the responsible body had shown a willingness to look at further information.

8. In coming to a decision on this point I have had regard to the terms of rule 61(4) of the 2018 rules which state that the tribunal "shall not consider a claim unless the claim has been received by the First-tier Tribunal before the end 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." It is clear to me that it is a specific act that is complained of, that can be described as either a decision not to offer the child a place at the school or a decision to withdraw of the offer of a place at the school. That decision was taken, at the latest, when communicated on 25 February 2019.

9. Also of relevance is section 8.13 of the Technical Guidance for Schools in Scotland published by the Equality and Human Rights Commission. This provides " where the continuing act is a failure to do something, then the six months begins from the date on which the person said that he or she was not going to do it…an ongoing failure to do something is treated as having happened when the person in question decided not to take the action." Accordingly even if it were considered that there was ongoing discrimination by not offering the child a place in the school the relevant date would still be the date of the decision.

10. I do not agree with the claimants arguments to the effect that the responsible body was willing to look at further information can extend the date, the further discussions did not alter the date of the decision which the responsible body maintained.

11. Consequently the claim has been raised outwith the required time period.

Is it just and equitable to consider claim notwithstanding it is out of time in, terms of rule 61(5) of the 2018 rules.

12. I was referred to two authorities in connection with whether I should exercise discretion, firstly there was the decision of Lady Smith in the Employment Appeal Tribunal case of *Rodrigues v Co-Operative Group Ltd* UKEATS/0022/12/BI that required to consider a just and equitable extension of the time period for a complaint. Of particular relevance is paragraph 50, where she praises the Employment Judge for "correctly…noting that time limits in tribunals are jurisdictional, that they are strict, that there is no presumption that they should be relaxed and that it is for the party seeking an extension to satisfy the tribunal in a discrimination case that it is just and equitable to extend the time limit."

13. I respectfully agree with the approach adopted by Lady Smith that the time limit is strict and that the onus in the present case is on the claimant to satisfy me that it is just and equitable to extend the time limit. That said I do not think Lady Smith is suggesting that I cannot look at potentially relevant factors that are obvious from the agreed facts but were not specifically argued before me. Indeed rule 61(5) of the 2018 rules requires consideration of "all the circumstances of the case". So, for example, the claimant did not make an argument in respect of the length of the delay or around any impact on the evidence but I do consider I am nevertheless entitled to consider these factors.

14. The responsible body's solicitor anticipated a possible argument that it would be just and equitable to allow the case to proceed as otherwise the claimant would lose the right to make the claim. With reference to the opinion of Lord Drummond Young in the outer house of the Court of Session decision in *Fleming v Keiller* [2006] CSOH 163 he argued this was not the correct approach as that loss is balanced by the responsible body's loss of an otherwise complete answer to the claim. In that case Lord Drummond required to consider time bar in a personal injury case where the question was whether it was equitable to extend the period. In particular I was referred to paragraph 7 where Lord Drummond states "The prejudice to the pursuer will normally be the loss of his right of action against the defender. The prejudice to the defender will normally be that he loses what is otherwise an unanswerable defence[…]the prejudice to the parties is equal and opposite, and the pursuer does not have a good excuse for his failure to raise proceedings timeously, the defender's rights under the limitation statute must normally prevail. This approach is in my opinion supported by the opinion of Lord Nimmo Smith in *Cowan* v *Toffolo Jackson & Co Ltd* 1998 SLT 1000, where he points out (at 1003) that the pursuer must aver more than the consequences alone, however serious for him, of the operation of section 17; the pursuer must, in his pleadings, provide the court with a basis upon which the court's discretion could properly be exercised in his favour."

15. Lord Drummond, as indicated in the quote above, took authority for his position on time bar from the decision of Lord Nimmo Smith in *Cowan v Toffolo Jackson & Co Ltd* and a decision of the High Court of Australia in *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541. I have read all these decisions and respectfully accept the approach suggested by Lord Drummond in *Fleming v Keiller* to the effect that any loss of a right by the claimant is balanced by the responsible body's loss of an otherwise complete answer to the claim. Accordingly I considered the claimant's loss of a right to make a claim is balanced by what would be the responsible body's loss of a complete answer to the claim.

16. The claimant argued that she considered the outcome of the request was only confirmed to her on 10 May 2019 and, addressing the reason for the lateness of the claim being made, argued that since that time it had taken a lot of time and effort to undertake research to establish whether she had a case. As a working single mother with children and having "multiple health conditions" (articulated in an email written by the claimant at A13) with difficulties at home it takes longer to make sense of and understand all the documentation. She argued it was only on 23 May when she got advice by email from the Scottish Council of Independent Schools (A69 in the bundle) that she realised that she may have had the possibility of a claim. The claimant advised that she does not have the resources to instruct a solicitor, is not eligible for legal aid and mentioned the lack of legal assistance available given the responsible body is an independent school. She also indicated that she was not "sign posted" towards a possible remedy by the responsible body.

17. The responsible body's solicitor emphasised the terms of rule 61(4) of the 2018 rules (particularly the words "shall not consider") and cautioned me about considering the claimant's medical issues as pivotal without some medical evidence, the extent of those issues not having been agreed between the parties. He also submitted that the email dated 23 May (A69) was received well within the 6 month period, that the claimant could at any time have made a fresh application to the school and that in allowing the claim to proceed there was further prejudice to the responsible body as the eventual outcome may be too late for their September 2000 admission process.

18. In terms of rule 61(5) of the 2018 rules I may exercise discretion if in all the circumstances of the case, it is just and equitable to do so. Accordingly I considered the factors in this particular claim outlined above as well as length of the time that elapsed from the decision and was also of the view that there would be no material difficulty with evidence, the vast majority of likely relevant facts being agreed, should I exercise my discretion. However, having done so I do not consider the factors I have referred to are sufficient to make it just and equitable to depart from the time limit that the legislative has determined is appropriate.

19. Accordingly the claim is dismissed.