Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER

FTS/HEC/AR/23/0116

Reference

1. This is a placing request reference made under s.18 of the Education (Additional Support for Learning) (Scotland) Act 2004 (**2004 Act**), lodged with the Tribunal on 22 June 2023.

2. A preliminary matter arises under rule 22 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2027/366) (**the rules**) (all rule references are to these rules) since it must be determined prior to a substantive hearing on the reference and cannot be determined by the giving of directions (rule 22(1)).

3. The preliminary matter is the question of whether the late lodging of the reference should be waived.

Determination

4. The late lodging of the reference is waived.

Process

5. A preliminary matter arises. At the end of June 2023, I issued directions for a witness statement from the appellant and written submissions from both parties on the preliminary matter. The evidence provided by the appellant in her signed witness statement is not disputed by the respondent, nor is there any reason to doubt her account of events. I therefore accept the appellant's evidence.

6. Following receipt of this material (along with some correspondence and a list of authorities) and confirmation from the parties that I could proceed to determine the preliminary matter on the basis of the material lodged, I did so. I intimated my determination to the parties in August 2023, with a promise of reasons to follow.

7. I then consulted with the parties on fresh case statement dates, and having done so, fixed shortened dates in directions issued in August 2023.

Findings in fact

8. The appellant is the child's mother. The child has not attended school since February 2023. The child's mental health has worsened since he stopped attending school. The appellant has two children, the child (6 years old) and his brother (3 years old). She is a single mother who has a part-time job in a hospital. Her working hours vary.

9. On 10 February 2023, the appellant made a placing request to the respondent, seeking the placing of the child in school A.

10. On 20 February 2023, the appellant contacted the respondent by e-mail to ask for an update on her request. The respondent indicated that it would take around 8 weeks to decide it. The appellant e-mailed again on the same day, asking if the request could be dealt with more quickly.

11. The appellant contacted the respondent again on 20 March 2023 for an update on the placing request. The respondent replied indicating that she would receive a decision by 10 April 2023 at the latest, by letter. On 10 April 2023, having not received a letter, the appellant e-mailed the respondent again. On 11 April 2023, the appellant received the respondent's letter indicating that it had refused the placing request. The letter was dated 6 April 2023 (**the letter**).

12. The appellant struggled to understand the letter. On 11 April 2023, she contacted her local MP to ask for help, but received no reply. She contacted a local councillor, but he was unable to assist since he was off work unwell for a period. The appellant used the web link in the letter to access the Tribunal reference form. The appellant's mother in law printed the form for her. The appellant found the form too complex to complete on her own. The appellant did not call the Tribunal since the letter said that she should call about a 'reference' and she did not know what this was. She assumed that she should only call that number if there was already a case with the Tribunal.

13. The appellant was worried about completing the reference form herself, since if it was rejected, she was aware that she would not be able to apply again within 11 months. The appellant was concerned that if she completed the form incorrectly, and it was rejected, this could lead to the child being disadvantaged due to having to wait a further year for a decision on his education.

14. The appellant was aware that there was a two-month deadline for applying to the Tribunal, but she had read that an application could be accepted late if she had a good reason.

15. The appellant continued to contact others to get help to complete the reference form. She contacted a charity, but could not reach anyone there. The appellant e-mailed other places to get help with the form. The appellant met with a health visitor for advice. The health visitor provided the appellant with other e-mail contacts and leaflets for people who may be able to assist.

16. The appellant contacted a carer organisation. They advised her that she should get the help of an advocate. The appellant spent weeks trying to obtain an advocate, but she did not succeed at first since the child does not have a diagnosis. The appellant was, however, allocated an advocate and met that person. The following morning after their meeting, the advocate told the appellant what to do: she should get in touch with the Govan Law Centre (**GLC**). The appellant did so immediately. This led to the reference being lodged by the GLC. The appellant had, until this point, never heard of the GLC.

Reasons for the Determination

The two-month rule

17. A placing request reference should normally be lodged with the Tribunal within two months of the date on which the appellant is notified of the right to make a reference to the Tribunal, or within two months of notification of the decision on the placing request (rules 14(5) and 14(2)(e)).

18. In this case, the appellant, in her evidence, refers to having received the letter on 11 April 2023. Although it is dated 6 April 2023, it is the date of notification that counts. The two-month deadline began on 11 April 2023. This means that the reference ought to have been lodged by 11 June 2023. The reference was lodged 11 days late.

The applicable legal test

19. There are two possible tests to apply when considering whether or not a reference should be considered, despite having been received late.

20. The first is in rule 29 on 'Extension of time'. The test there is 'exceptional circumstances' (rule 29(1)). This is the test the respondent argues should apply.

21. The second is in rule 56 on 'Irregularities'. That rule refers to a failure to comply with a rule being cured or waived (rule 56(2)), but does not provide a test for this to happen. In the absence of such a test, the correct approach in applying rule 56 is to do so by applying rule 2 'The overriding objective'. This is clear from the terms of rule 3 which requires the Tribunal to give effect to the overriding objective whenever it exercises a power under the rules or when it interprets any rule. This means that

the test to be used when rule 56 applies is the 'fair and just' test (rule 2(2)). This is the test the appellant argues should apply.

22. The respondent addresses rule 50 entitled 'Miscellaneous' in its submissions. This is in response to a mention of the possibility of rule 50 applying in my directions of June 2023. The appellant urges the application of rule 56, which the respondent does not address (the date for written submissions from both parties was the same). However, both confirmed that they were content for me to decide the case on the material received. In any event, had I decided that rule 50 applied, this would have led me to the same 'fair and just' test from rule 2, so the outcome would have been the same.

23. Given the difference between the tests to be applied under rules 29 and 56, I need to decide which applies before I can decide the preliminary matter. I conclude that rule 56 applies. I will now explain why, taking account of the parties' arguments on the point.

24. A reference begins when a reference form is lodged with the Tribunal. This is clear from the terms of rule 14(1)-(2). The respondent accepts that a reference does not begin until a reference form is lodged (paragraph 4 of the respondent's submissions). The respondent emphasises the wording of rule 29(1), but I need to look at the rule as a whole.

25. Firstly, the title of the rule is 'Extension of time'. This suggests that time for doing something may or has run out, and that more time is required to do it. This meaning is reflected in the wording of rule 29(1), when the power of the Tribunal under the rule is specified: a 'further period' to carry out the task in question may be granted. Notice of the 'further period' must be given to the parties (rule 29(2)). That period is also referred to as an 'extension' (final word of rule 29(2)).

26. A 'further period' or 'extension' for the lodging of a reference form cannot, logically, ever be given. This is because, in order for a reference to begin (and for any of the rules to apply), the reference form has to be lodged. A 'further period' for doing so therefore cannot be provided. The act has been completed. Rule 29 applies to a situation where, after a reference has been lodged, a deadline in a rule or direction applies and a party anticipates that they may not meet it (or has already failed to meet it) and wishes a 'further period' within which to do so. In such a situation, that party may apply to the tribunal for an extension of time.

27. Secondly, rule 29 only applies to a 'party or other person'. The reference to 'other person' is intended to refer to a person who might be the subject of a direction. This means that in order for rule 29 to apply to the appellant, she must first be a party. The word 'party' is defined in rule 13 as 'means either the appellant or authority in respect of any reference made to the First-tier Tribunal'. A person is not a party until a reference is made. A reference is made once a valid written reference (rule 14(1)-

(2)) is lodged. This means that the appellant only became a party after the reference form was lodged. This supports the point that an extension to the deadline for lodging a reference cannot be sought: the reference form will always have been lodged by the time an appellant qualifies to seek an extension of time to lodge it. This is the answer to the respondent's point (submissions, paragraph 4) about the literal, unqualified wording of rule 29(1): rule 14(5) does not require a party to do something within a period of time. That rule does not apply to a party at all, since at the time of sending a form to the Tribunal, the person doing so has not yet become a party. Indeed, that person may never become a party since, for example, a communication which does not contain all of the information under rule 14(1)-(2) is not a reference. In this situation, the purported reference would simply be rejected and the actions to be taken upon receiving a reference (rule 15) would not be carried out. So, by the time the appellant became a party, attracting the application of rule 29, the reference form had been lodged. It makes no sense to say that she requires to seek an extension of time ('further time') to do an act that had already been completed.

28. This analysis is broadly similar to that employed by the legal member in a decision from this Tribunal in July 2021, relied upon by the appellant (who provided a redacted copy: the decision is published on the Tribunal's website: ASN_D_09_06_2021). I refer to the analysis in paragraphs 15-17 of that decision, with which I agree.

Application of the 'fair and just' test: general points

29. Having decided which test applies, I will now discuss its application generally, and touch on some of the points made by the respondent.

30. I find the guidance in the Court of Appeal case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 (***Abertawe***) to be helpful. This is an appeal relating to a decision of the Employment Tribunal in which the relevant test was whether allowing the application late was 'just and equitable'. While this is not precisely the same as the 'fair and just' test, it is broadly similar in its width and content. 'Equitable' is synonymous with 'fair'.

31. The respondent argues that *Abertawe* can be distinguished since it is an employment law case. However, the test in that case has been applied in non-employment law contexts, for example in a mental health case: *Hewlett v Chief Constable of Hampshire* [2018] EWHC 3927, High Court, at paragraph 30. In any event, I am not persuaded that the points made by the respondent in discussing the differences between employment and education cases (submission, paragraph 7) are valid. The submission refers to detriments of various types caused to existing pupils of the specified school as being 'inevitable' as a result of a late reference (see paragraphs 5 and 7 of the submission). I do not accept this as a general proposition. Much will depend on the circumstances of the case. Here, we have a reference that was lodged 11 days late. The respondent provides no specification as to why there is any

detriment (even from a planning perspective) caused by such a reference that would not have existed had the reference been lodged on time.

32. Indeed, the final day for deciding on the appellant's placing request (before it would have become a deemed refusal) was on 30 April 2023 (The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515), regulation 3)). This means that a reference that was on time could be lodged by 30 June 2023, some 8 days later than the current reference was lodged. The month of July does not count for case statement purposes (see the definition of 'working day' in rule 1(1)). Accounting for a regular case statement period of 6 weeks (rule 17), this means that a hearing for a reference lodged on 30 June 2023 may not be able to be fixed (assuming an early case management call) until late September. That hearing is likely to take place in the months afterwards. This is all provided for by Parliament in the 2004 Act and regulations (including the rules). Within that framework (and given the provision for shortening the case statement period in rule 17(6)) it is difficult to see how a reference lodged on 22 June 2023 could, in general terms, be said to be detrimental to the planning arrangements for any education authority, as the respondent claims (submission, paragraphs 5 and 7).

33. The other detriments referred to by the respondent (submission, paragraph 7) are not relevant considerations. These apply to references where the appellant succeeds. The question of whether a reference should be allowed late is entirely distinct from the merits of a reference. The respondent conflates these. In any event, all of the detriments cited are theoretical in nature, and may not apply at all, or only to a limited extent, in a particular case where an appellant succeeds in a reference.

34. The respondent goes onto attempt to distinguish the facts of the appellant in *Abertawe* with the facts relating to the appellant in this case (submission, paragraph 9). This is a misunderstanding of the relevance of *Abertawe.* The case is not relevant for its facts; it is an authority for the applicable legal test. Any factual distinction between that case and this one is therefore immaterial. I should add that while I note that the appellant suffers from depression and anxiety, I have left these factors out of account as I have no evidence from which I can infer that these conditions had an impact on how the appellant reacted to the prospect of completing the reference form. They may have so impacted, but there is no evidence to allow me to make that connection.

35. I conclude that the *Abertawe* case is applicable to the preliminary matter that arises here. It is a case on a statutory time limit for the raising of judicial proceedings in a statutory tribunal. It has been applied outwith the employment tribunal setting. It is an appeal court case (although not binding on me, as it is not from a Scottish court). It seems to me that the kinds of factors that ought to apply when considering whether a reference, claim, appeal or application that has been made to a judicial body should be allowed late, are applicable whatever the jurisdiction. The common exercise is to balance the competing interests of the parties to determine whether to waive non-

compliance with the deadline. The concepts of 'fair and just' and 'just and equitable' are similar, in this context.

Application of the 'fair and just' test: particular points

36. Turning to the facts of this case, I am in no doubt that it is fair and just that the failure of the appellant to comply with the time limit in rule 14(5) is waived, (allowing the reference to be received late) under rule 56.

37. The respondent does not challenge the appellant's factual account. In any event, that account appears perfectly credible. The appellant is someone who was clearly anxious for an early decision on her placing request (as evidenced by the e-mails sent to the respondent). This was then followed by a delay in lodging the reference. On the face of it, this seems odd: someone who is keen for (and presses for) an early resolution to the placing request who then delays in challenging the outcome of that request.

38. That delay in challenging the respondent's decision, however, is explained by the appellant's anxiety about completing the form properly, and her efforts to obtain help to so do. In combination, these explain why the appellant took the time she did to lodge the reference.

39. The appellant explains how she did not fully understand the letter, since she is not great with words. The letter contains a mixture of legal technical language and more straightforward narrative. It is not surprising that the appellant did not understand the legal technical language. On the other language, the respondent does provide the Tribunal's address, telephone number and a link to the Tribunal website. However, the appellant explains that she did not know what a 'Reference' is. Again, this is not surprising. The term 'reference' is less easily understood than 'appeal' or 'application'. Neither of those words appear in the letter. The appellant explains that she did not contact the Tribunal since she assumed that she should only do so if there was a case with the Tribunal already. Again, this is not a surprising conclusion, given the term 'reference'. I agree with the respondent's point (submissions paragraph 10) that if the telephone number of the GLC had been included in the letter, there is no reason to suspect that the appellant would have called them. But this is speculative, as the GLC's contact details were not included (and they do not require to be under s.28(2)(e)(ii) of the 2004 Act).

40. The appellant accepts that she was aware of the 2-month deadline, but that she had read that a reference could be accepted late if she had a good reason. The picture painted by the appellant that she was very active during the period between 11 April and 22 June 2023. She contacted a range of people/organisations, some of whom she specifies: her mother in law (to print off the reference form), her MP, her local councillor, a charity, a health visitor, a carer organisation, an advocate and, finally, GLC, eight in total. She describes the process of obtaining advice from an advocate

as ‘weeks long’. The appellant refers to others from whom she sought help. I do not find it surprising that all of this took over two months, especially for a single parent of two young children who has a part time job.

41. The respondent casts doubt on the appellant’s account of her difficulty with words, as she understood that she could only make one placing request reference every 12 months (submission, paragraph 12). I should say that this is not quite accurate as it only applies to a reference which is not withdrawn (2004 Act, s28(9)); the Chamber President can allow a ‘further reference’ on good reason (s.28(10)); and in any event, arguably the prohibition on a ‘further reference’ applies only to each individual decision (s.18(7)). But that was the impression held by the appellant. This respondent’s point here is not persuasive. The appellant does not say that she cannot understand words at all; only that she has difficulty with them. She clearly read somewhere that there is a two-month deadline and that it could be exceeded for a good reason. This does not mean that she should be able to read and fully understand the letter.

42. *Abertawe* states that an explanation for the lateness is not required, but, where available, is relevant. Here, a full, credible, detailed and unchallenged explanation is provided. That explanation is a reasonable one.

43. Length of delay is stated to be relevant too. Here, the delay is 11 days long. Given the discussion at paragraph 32 above, dealing with the context in which placing request references operate, this is not a significant delay. The respondent refers to the employment case of *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, decided in the Court of Appeal (***Adedeji***). There, a three day delay in lodging the claim was not excused. However, the respondent in its submission says nothing more about that case. On reviewing it, I find the facts there to be materially different to those in this case. Indeed, the facts in *Adedeji* are rather complex. I need only refer, however, to one key difference: the appellant in *Adedeji* had access to clear professional legal advice at least a week in advance of the deadline for submitting his claim, and did not follow it, since he did not accept that this advice was correct (see paragraph 11(4) of the judgment). This simply does not apply here; the reference was presented very shortly after the appellant’s first contact with a professional legal adviser. In addition, she acted on the advice of the advocate immediately. These cases are not comparable.

44. The respondent also refers to the Supreme Court case *Matthew and others v Sedman and others* [2021] UKSC 19, a case under the Limitation Act 1980 about the impact of a fraction of a day. Again, the respondent does not explain why this authority is applicable in this case. The decision is one on a highly technical point about the impact of a fraction of a day on the reckoning of a limitation period. There is no indication that the court was, in reaching its decision, exercising a general discretionary power: this was a decision on a pure point of law. I find the case to be of no value whatsoever to the question I need to decide.

45. Another *Abertawe* factor is prejudice caused by the delay. I have considered the prejudice ('detriment') arguments advanced by the respondent above (paragraphs 31-33). I would only add here that there is no indication that the 11 day delay led to any particular prejudice compared with the situation had the reference been lodged on time. Generic statements of potential prejudice are insufficient. The delay period is too short for any credible argument that the respondent has been prevented or inhibited from investigating the claim while matters are fresh (this is the example given in *Abertawe*, paragraph 19). I can detect no real prejudice to the respondent at all.

46. I accept that there are good reasons of principle for having statutory time limits, and that they should not be waived lightly. I agree with the respondent's argument (submissions, paragraph 12) that there is no presumption that a time limit should be waived: it is for the appellant to argue in favour of a waiver. However, in this case, and taking account of the factors identified in the *Abertawe* case, it is fair and just that the two-month time limit requirement for lodging a reference should be waived. In making this determination, I am not suggesting that any responsibility for the situation attaches to the respondent. It carried out its statutory duty (including on the content of the letter under s.28(2)(e)(ii) of the 2004 Act).

Exceptional circumstances test

47. Even if I had been persuaded that the rule 29 'exceptional circumstances' test were applicable, I would have excused the late lodging of the reference. The exceptionality here lies in the very intense activity by the appellant, combined with her anxiety over completing the form properly. The appellant's determination to secure proper support for lodging a valid reference form (which was, after all, successful) was in itself exceptional. Combined with other factors, I would have concluded that exceptional circumstances exist here.