

**Health and Education Chamber**  
First-tier Tribunal for Scotland



**Additional Support Needs**

**DECISION OF THE TRIBUNAL**

**Claim**

1. The claim which was received by the tribunal in July 2019 relates to alleged discrimination arising out of a number of alleged incidents dating from September 2017 to May 2019 either involving restraint or exclusion of the child along with an allegation of indirect discrimination relating to the application of the responsible body's exclusion policy to the child in respect of the exclusions.

**Decision**

2. The claim is dismissed as having not been received before the end of six months following the acts 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") apart from in respect of an allegation of discrimination arising out of an incident involving restraint of the child in May 2019 and in respect of the allegation that said incident could together with previous alleged incidents involving restraint during the school year 2018-19 amount to conduct extending over a period.

**Process**

3. The responsible body submitted that aspects of the claim were time barred and consequently at a conference call in January 2020 written submissions were required on the time bar issue with a hearing provisionally fixed for February 2020. Written submissions were lodged on behalf of both parties and are contained in the bundle at A197-200 for the claimant and R317-320 for the responsible body. Further submissions were then considered at the preliminary hearing.
4. It was agreed by parties at the outset of the hearing that the facts, as discussed at various points in this decision, were sufficient to enable us to consider the preliminary issues. Except in relation to the interpretation of the rules as detailed below there were no differences in submissions made in respect of the applicable law that were material to our deliberations.
5. After taking time to consider arguments heard, the legal member outlined our decision in summary form after the hearing in February. His summary erroneously only referred to the alleged incident of restraint in October 2018 as being capable of being part of conduct over an extended period concluding with the incident of restraint in May 2019. However, reference should also have been made to the intervening incident alleged to

have involved restraint in January 2019, but only in respect of any restraint of the child that took place on that date.

## **Reasons for the Decision**

6. The claim was brought in respect of a number of incidents relating firstly to exclusions from 2018 to 2019, and secondly, restraints (or physical intervention) in respect of the child from 2017 to 2019. It was originally in dispute whether the incident on 22 January occurred on that date or 24 January but at the preliminary hearing the claimant's representative stated that he did not have an issue with it being 22 January – as recorded in the bundle, albeit the claimant's records recorded it as being 24 January. It was accepted by parties that the allegation of discrimination in relation to the incident in May 2019 was not time barred given the claim was received in July 2019.
7. There were a number of different matters which we required to consider in coming to our decision which we detail as follows:

*Whether aspects of the claim were time-barred by virtue of rule 61 of the 2018 rules*

8. As every incident referred to (except the incident in May 2019) occurred more than 6 months before the date the claim was received on in July 2019, allegations in respect of all those incidents appeared to be time barred.
9. An argument was made to the effect that rule 104(5) (b) provides that if transmitted by fax or communicated electronically a notice or document received by the tribunal shall be deemed to have been received (subject to a couple of exceptions not relevant to the present claim), unless the contrary is proved on the first working day after the day on which it is received in legible form. Working day being defined in rule 1 to exclude any date in July, it was argued that the effective deadline for lodging of the claim in relation to events in January 2019 was August 2019.
10. However this argument did not take account of rule 104 (9) which provides that "working day" for the purposes of rule 104 has the meaning given to it in rule 1 except that it includes any day in July. Consequently the terms of rule 104 make it clear that for the purposes of rule 104, 25 July 2019, being the date of receipt, was a working day. We were not persuaded there could be any other interpretation of the rules and in particular of the combined effect of rules 61 and 104. Accordingly every incident on which the claimant sought to rely was time barred subject to the further arguments we considered below.

*Whether any part of the claim could be considered as conduct extending over a period concluding in May 2019*

11. Rule 61(4) of the 2018 rules states that "conduct extending over a period is to be treated as done at the end of the period." It was argued for the claimant that all incidents formed part of an extended period of conduct and accordingly could be considered along with the incident in May 2019.

12. Parties were broadly in agreement on the relevant law. Counsel for the responsible body argued the exclusions and restraints aspects of the claim could not be considered together and the solicitor for the claimant indicated it was “more of a challenge to link the restraint and the exclusions” and did not make in our view any serious attempt to link the two types of incident (see paragraphs 8 and 9 of the submissions at A198).
13. We were of the view that the restraint incidents – and in particular the incident in May 2019 being the incident that enables the claim to proceed – could not be said to be part of the same extended period of conduct as exclusions. The responsible body has an exclusion policy on which it bases decisions to exclude while separate and distinct processes are in place to guide how pupils are restrained.
14. In relation to the issue of the restraints we particularly had regard to a quoted passage from the employment law case of *Caterham School Limited v Mrs K Rose* UAEAT/0149/19/RN on similar legislation where it was stated that “ if the Tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents , such as to make it in time that complaint may be struck out”. We considered that we could not say there is no reasonable prospect of establishing the necessary link between the conduct leading to incidents of restraint in school year 2018-19 and accordingly could not dismiss that element of the claim. The incidents during the school year 2018-19, if established, occurred in the same school by staff who operated under the same training and policy regime for physical intervention, in response to challenging behaviour by the child.
15. We say “if established” above in relation to the alleged incidents involving restraint during the school year 2018-19 because from the information before us it is not at all clear whether there was restraint or indeed physical intervention by staff on the earlier dates. We have very little information on the October 2018 incident save that the responsible body states it may have involved a police officer (R6 para 3.8) and the one incident form we have for that period refers only to restraint by a police office after the child had left the school. Accordingly there is clearly some doubt as to whether there was an incident involving restraint by staff at that time. Similarly descriptions we have read in the bundle of the incident in January 2019 do not appear to make reference to any restraint by staff. Clearly at the hearing the claimant will require to establish as a matter of fact that incidents relating to the restraint of the child occurred in October 2018 and on January 2019 before we can then proceed to consider whether they are part of conduct extending over a period concluding with the incident in May 2019.
16. In relation to the restraint incident in September 2017 we noted that the papers contain little information regarding the substance of what happened, the responsible body being unaware of it. All we have is an allegation that it occurred. We do however have a description at A59 of an incident on 21 September which appears to have involved the use of restraint. However given any incident (whether on 21 or 29 September) occurred over a year before the next alleged incident and in a different school we do not consider there is any reasonable prospect of it forming part of the same conduct as the restraint incident in May 2019.

*Is it just and equitable to consider aspects of the claim which are out of time in terms of rule 61(5) of the 2018 rules.*

17. The solicitor for the claimant invited us to exercise our discretion afforded by rule 61(5) to allow consideration of any aspects of the claim found not to have been lodged timeously, which, as indicated above, is all aspects of the claim other than that related to the incident in May 2019. The submissions were to the effect that we had a wide discretion and that two factors (based on the case of *Abertawe Health Board v Morgan* [2018] EWCA Civ 640) which were almost always relevant were the length of, and reasons for the delay and whether the delay has prejudiced the respondent.
18. The solicitor for the claimant argued that the delay was not great in his view, that the responsible body was not prejudiced that the claimant was seeking to resolve matters at an early stage before bringing matters to the tribunal and that she sought advice on June 2019 with the claim being raised just over a month later. He made reference to other types of cases; exclusion appeals where there is no time limit and that if the restraint incidents had been raised as personal injury matters the delay was within the period the responsible body might have to investigate matters.
19. Counsel for the responsible body argued that the rules were there for a reason, that the delay was considerable in respect of the earlier incidents, that the claimant had sought legal advice a month before the lodging of the claim and there was no reason why the claim could not have been brought in time in respect of the January 2019 incident. She further argued that it is easy to say that the responsible body is not prejudiced but allowing claims to be received late then requires a lot of people to be spoken to about the claim and that the rules are there for a reason.
20. We agree with Counsel for the responsible body that the rules are there for a reason and should normally be followed. Most of the alleged incidents referred to occurred were of a considerable vintage and the claimant had sought legal advice in sufficient time to allow for a claim in respect of the incident in January 2019 to be lodged in sufficient time, but instead the claim was lodged late in respect of that incident. Accordingly we did not consider it to be just and equitable to allow parts of the claim otherwise time barred to be considered.
21. Finally on this point, we did not find the reference to other types of cases with different rules helpful but, by way of contrast to the submissions we heard, reference could be made to discrimination claims in the employment field that require to be raised within 3 months.

#### *Indirect Discrimination*

22. The claimant's claim in respect of indirect discrimination was connected with the exclusion incidents (particularly the exclusion policy in place) and the claimant's solicitor accepted that should the exclusion incidents be dismissed from the claim the indirect discrimination could not remain.

#### *Conclusion and further procedure*

23. Accordingly the claim is dismissed apart from in respect of the allegation of discrimination arising out of an incident involving restraint of the child in May 2019 and

in respect of the allegation that said incident could together with previous alleged incidents involving alleged restraint during the school year 2018-19 amount to conduct extending over a period.

24. A hearing in respect of what remains of the claim has been fixed for three days in May and a conference call will be arranged to consider matters relating to that hearing.