**DECISION OF THE TRIBUNAL ON A PRELIMINARY ISSUE**

**Claim**

1. This is a claim under the Equality Act 2010 (‘**the 2010 Act’**), received on 8 July 2021. The responsible body raised a preliminary issue, namely whether the claim should be permitted to be received late.
2. As agreed by the parties, I have decided this issue under rule 69 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) (‘**the rules**’).

**Decision**

1. The claim is competent, since it is just and equitable to consider it, although it was received late.

**Process**

1. Following the lodging of the claim, the responsible body raised the preliminary issue. Case conference calls with the parties’ solicitors took place. Directions on procedure were issued in August 2021. These led to written submissions being made on the preliminary issue, supplemented by witness statements and other documents.
2. It was agreed by both parties during a case conference call in September 2021 that I should make a decision on the preliminary matter on the basis of the bundle as it currently stands. It was agreed that no oral evidence would be necessary. I agree that this is an appropriate course of action. The bundle consists of 105 pages, numbered T001-028, C001-022 and RB001-051. I took full account of the material in the bundle in reaching my decision.
3. The claimant argues that the test in rule 61(5) is met, for reasons explained below. The responsible body argues that it is not, since the claimant was aware of the incidents such that he could make a claim on time, and since he had time to seek and obtain legal advice on a possible claim.

**Findings in Fact**

1. The child has attention deficit hyperactivity disorder (‘**ADHD**’). The claimant is the child’s father. The child was born in July 2009.
2. The claimant alleges that the child was physically handled by members of staff at the school he attended in a way which was discriminatory under the 2010 Act. The claimant alleges that this happened on a number of occasions between 24 August 2020 and 9 November 2020. The dates of these incidents alleged by the claimant are: 24 August, 2 September, 21 September (two incidents) and 24 September, all 2020.
3. The claimant also alleges that the child was excluded from school on 28 September 2020 and that this exclusion was discriminatory under the 2010 Act.
4. Following the exclusion of the child on 28 September 2020, the Head Teacher of the school wrote to the claimant (RB039-043) explaining the decision to exclude and explaining the claimant’s right to appeal against the decision under s.28H of the Education (Scotland) Act 1980 (‘**the 1980 Act**’). The letter and the enclosures did not refer to a right to make a claim to this Tribunal.
5. The claimant appealed against the child’s exclusion from school to the Education Appeal Committee (‘**EAC**’) under s.28H of the 1980 Act. The hearing on that appeal took place in June 2021.
6. The claimant, as part of his preparations for the EAC appeal, made a data subject access request to the responsible body. He received certain documents as a result of that request in March 2021. These documents contained information about some of the incidents referred to in this claim. Some of this information was not available to the claimant prior to receiving these documents.
7. During the hearing on the claimant’s EAC appeal, further information relevant to the incidents the claimant refers to in this claim came to his attention.
8. New information acquired by the claimant as a result of the data subject access request and his EAC appeal included: information about two incidents about which the claimant had been previously unaware; additional information around some of the incidents about which the claimant had been aware; information around incident reporting in the school and information around school staff training.
9. Following the exclusion appeal hearing, on 13 June 2021, the claimant lodged a complaint with the responsible body about the incidents referred to in this claim.
10. On 22 June 2021, the claimant received the minutes of the EAC appeal hearing.
11. After receiving these minutes, and motivated by information received from the subject data access request and the EAC appeal process, the claimant took advice from staff at the sheriff court clerk’s office. He then approached and took advice from his current solicitors.
12. The first consultation between the claimant and his current solicitors took place on 30 June 2021. That firm was formally instructed on 7 July 2021. This claim was lodged the following day.
13. The claimant became aware in June 2021 that this Tribunal could consider claims based on exclusions from school as well as claims based around the physical handling of school pupils.

**Reasons for decision**

*Was the claim received out of time?*

1. The claimant’s representative conceded that the claim in respect of all of the incidents relied upon, has been lodged outwith the 6-month time limit in rule 61(4). This would be the case even if the claimant’s representative had persuaded me that there had existed ‘conduct extending over a period’ under rule 61(4) running from the first to the last incident. The last incident relied upon took place on 9 November 2020. Six months from that incident takes us to 9 May 2021, around two months before the claim was lodged.
2. This means that the claim was received out of time and the only way the claim can be considered is if it is ‘just and equitable’ to do so under rule 61(5).

*Application of the ‘just and equitable’ test*

1. This test is used in a number of Tribunal contexts when considering whether an out of time claim or application should nonetheless be considered. The test has generated a considerable body of judicial consideration.
2. The only authority I was referred to in written submissions is the Court of Appeal decision in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. Given that this is a Court of Appeal decision on a similarly worded test (under s.123(1) of the 2010 Act), and given that it refers (with approval) to an earlier Supreme Court decision (namely *Rabone v Pennine Care NHS Trust* [2012] UKSC 2), I regard this case as highly persuasive.
3. The claimant’s representative referred to the reference in *Abertawe* to the ‘widest possible discretion’ (para 18 of the case) in applying the just and equitable test. He also pointed to the court’s statement in *Abertawe* that the lack of a good reason for the delay in lodging a claim is not conclusive, but that the presence or absence of a good reason is a factor to be taken into account (para 25 of the case). Finally, the claimant’s representative highlighted the *Abertawe* court’s non-exhaustive suggestions as to factors likely to be relevant to the test, namely length of the delay, reasons for the delay and prejudice to the other party (para 19 of the case).
4. Applying all of this to the facts here, I am left in no doubt that I should exercise my discretion in favour of the claimant.
5. **Firstly**, the delay in presenting this claim is not, in itself, significant, especially given the contemporaneous written information available about the various incidents (this is discussed further below). Had I taken the view that the conduct represented ‘conduct extending over a period’ under rule 61(4), the claim would only have been two months late. Even had I not taken that view (and I do not take a view either way as it is not necessary to do so), the claim in respect of the earliest incident would have been five months late, that period reducing with each subsequent incident.
6. **Secondly**, the claimant has provided good reasons for the delay. It is clear that the claimant was concentrating on the exclusion of the child, and that he pursued that matter through the EAC process. The letter which explained the exclusion and the right to appeal against it did not refer to a right to pursue a claim to this Tribunal. The claimant only learned about that right much later, on taking legal advice in June 2021. In my view, no fault can attach to the claimant here. He is not legally qualified. He is entitled to rely on information provided by the responsible body about appeal rights, and assume that that information is full and complete. Once he became aware of the right to pursue a case to this Tribunal, he did so very quickly.
7. It could be said that these reasons for the delay relate only to the part of this claim concerning the child’s exclusion. However, the matter is not as simple as that. The evidence (which is not disputed) suggests that as a result of the EAC appeal, and a prior data subject request (which was made in connection with the EAC process), information about some of the incidents relied upon in this claim came to light. The claimant has explained what that further information was (see the finding in para 14 above). It seems to me that this information is relevant to the claim now made. The claimant’s explanation indicates that he became concerned about how the child had been handled more generally (not just in the exclusion) as a result of this further information. These more general concerns appear to have motivated both the internal complaint to the responsible body, as well as seeking advice from the sheriff clerk and then legal representation. That additional information only became available in March and then June, both 2021. 21 June is mentioned in connection with the claimant’s receipt of the EAC appeal hearing minutes. This claim was made only three weeks later.
8. In my view, the claimant’s understanding of his rights and the new information explain why the claim was made in July, as opposed to in the Spring or early summer of 2021 (when the claim may well have been on time, at least in part).
9. **Thirdly**, there is no practical prejudice caused to the responsible body by the claim being considered, albeit late. In *Abertawe*, the Court of Appeal give as an example of prejudice the hindering of investigating a claim while matters are fresh. While this is only an example of how prejudice can occur, it is significant that this is the example provided by the court; in my view, it represents the main form of prejudice which delay can cause.
10. The responsible body’s representative was very clear in her view that there is no practical prejudice to the responsible body if the claim is considered, despite it being received late. She accepted that there are a number of contemporaneous written accounts of many (if not all) of the incidents relied upon. Some are provided in the bundle. Given this, although memories may have faded due to the passage of time, the responsible body’s case will not, in any meaningful sense, be hindered in comparison with the position had the claim been lodged on the last day of the 6 month time limit.
11. I should add that I accept (and take account of) the inherent prejudice suffered by the other party where one party is allowed to have its claim received late. There is a clear purpose to a time limit, and where it is not complied with, this leaves the case hanging over the other party for longer than would otherwise be the case. However, this factor is not significant, especially given that the delay in presenting this claim is not prolonged.

*Conclusion*

1. Taking the points on each of the three matters together, since the delay is not (in the context of the available evidence) significant; since there are good reasons for the claim being lodged late; and since there is no practical prejudice to the responsible body in allowing the claim to be considered, it is just and equitable that the claim is considered.
2. I will issue directions for the next stage of the claim separately.