

Health and Education Chamber  
First-tier Tribunal for Scotland



Additional Support Needs

FTS/HEC/AC/22/0002 PRELIMINARY

**DECISION OF THE TRIBUNAL ON PRELIMINARY MATTER**

**Claim**

1. This is a claim in which the claimant alleges that the responsible body discriminated against her daughter by not informing her of the option of taking her Scottish Qualification (SQA) National 5 examinations remotely during academic year 2021-22.
2. The claim was received by the Tribunal on 19 January 2022. The act(s) complained of occurred sometime between March and May 2021. On the face of it, the claim has been lodged late, more than 6 months having expired between the date of the act(s) complained of and the date of receipt of the claim (rule 61(4) of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366), 'the rules').
3. The claimant argues that the claim should still be considered, since it is just and equitable to do so, under rule 61(5) of the rules.
4. The responsible body does not oppose this argument.

**Decision**

5. It is just and equitable that the claim, despite being out of time, should be considered.

**Process**

6. The claimant lodged with her claim form a number of documents, namely letters of 17 June, 22 June, 23 June, 1 September and 21 December, all 2021. The argument in favour of the test in rule 61(5) of the rules being met is contained in the claimant's representative's e-mail of 19 January 2022.
7. These documents were sent to the responsible body, who indicated by e-mail that it would not be opposing the claimant's request under rule 61(5).
8. As the responsible body points out and given the wording of rule 61(5), a decision requires to be made on whether or not the just and equitable test has been met, even where the argument that it is has is not opposed. This is clear from the Court of Appeal decision in *Radakovits v Abbey National plc* [2009] EWCA Civ 1346, where the relevant

wording 'shall not consider' in s.111(2) of the Employment Rights Act 1996 is identical to that in rule 61(4) of the rules, with a similarly worded relief provision.

9. Since this issue is one on the jurisdiction of the Tribunal, a decision on it is necessary prior to the substantive hearing, and so should be made under rule 22 of the rules. I am content that the intimation of the claim form and correspondence above to the responsible body satisfies the requirements of rule 22(2) of the rules.

### **Reasons for the Decision**

10. It is clear from the correspondence available that the claimant pursued a complaint with the responsible body on the subject matter of this claim. That process began on 17 June 2021, with a letter of complaint, and concluded on 1 September 2021 with the issue of the final decision letter of the responsible body.
11. The claimant then lodged an appeal with the SQA in relation to the results of five of her daughter's National 5 subjects. While it is not clear from the available information the date of submission of that appeal, it is evident from the SQA's letter of 21 December 2021 explaining the outcome that the SQA process had taken some time.
12. Following intimation of the refusal of the SQA appeal by their letter of 21 December 2021, the claimant has acted quickly in lodging a claim in under a month. That month includes the Christmas and New Year break.
13. The approach to be taken in considering the 'just and equitable test' in rule 64(5) of the rules is set out in the Court of Appeal decision *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 (**Abertawe**), paras 18-19 and 25. The decision in this case was based on principles referred to by the Supreme Court in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at para 75. Also of relevance is the Outer House decision in *Fleming v Keiller* [2006] CSOH 163. From these decisions, and the Tribunal rules, the following can be said:
  - (a) discretion under rule 61(5) is wide and unfettered;
  - (b) the absence (and presumably cogency) of an explanation for the lateness is relevant but not determinative;
  - (c) key issues to be considered (alongside any others deemed relevant) are: the length of the delay, reasons for it and any prejudice suffered as a result;
  - (d) procedural equal footing (overriding objective, rule 2(2)(c) of the rules) may be a relevant factor; and
  - (e) the general rationales for having time-limit provisions should be considered.
14. Points (d) and (e) can be ignored here, given the lack of opposition from the responsible body (and, on (e), given that the overall time passed from the act complained of is not substantial).

15. On point (b), an explanation for the late claim is provided. It was only on 21 December 2021 (or shortly after) that the claimant became aware that the young person's SQA appeal had not been successful. It is reasonable for a claimant to pursue other avenues of redress before coming to the Tribunal. From the information provided by the claimant's representative, it seems that the claimant took the view that the outcome of the complaint to the responsible body might be satisfactory for the SQA, as constituting an admission of discrimination. Given the terms of the letter from the responsible body of 1 September 2021 (in which the claimant's complaint was partially upheld), that is not an unreasonable conclusion to have reached. It is therefore reasonable to have pursued the SQA appeal as a means of resolving the matter. It is only when that appeal was refused that the claimant turned her attention (and quickly) to the Tribunal. This seems a perfectly good explanation for the passage of time.
16. On (c), the delay is not, in itself, lengthy. Reasons for it have been provided (as addressed above). On prejudice, none is argued by the responsible body, and it is difficult to see what the prejudice would be. There is no suggestion that the delay prevents or inhibits the responsible body from investigating the case (in the sense described in *Abertawe* at para 19, or as termed 'forensic prejudice' by Mrs Justice Laing in the EAT case *Miller v Ministry of Justice* UKEAT/0003/15, para 12). Indeed, such an investigation took place at both stages of the responsible body's complaints process.
17. The delay in making the claim is perfectly explicable, it is not a long delay and there is no detectable prejudice to allowing the claim to be heard now. The request is not opposed. Taking into account all of these factors and the evidence available, the just and equitable test in rule 61(5) of the rules is met, and so the claim can be considered.