

DETERMINATION OF THE TRIBUNAL ON A PRELIMINARY MATTER

Reference Number: FTS/HEC/AC/23/0024

Reference

1. This is a claim under the Equality Act 2010 (**2010 Act**) lodged with the Tribunal on 11 March 2023.
2. A preliminary matter arises under rule 69 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 69(1)).
3. The preliminary matter is the question of whether the claim should be considered, when it was received by the Tribunal more than six months after the acts complained of in the claim, under rule 61(4)-(5).

Determination

4. The claim was received by the Tribunal more than six months after the date of the acts complained of and it is not just and equitable that the claim is considered.
5. The claim is therefore dismissed.

Process

6. The claim was lodged on 11 March 2023. It became clear from the claim form that it contained matters relevant to the responsible body and another responsible body. A case management call (**CMC**) took place on 21 March 2023. The claimant and the responsible body's solicitor attended, along with someone instructing the responsible body's solicitor. During this call, a number of procedural matters were discussed. In the CMC note issued following this call (T112-114), I directed the claimant to (among other things) lodge two fresh claim forms, one for the claim for each responsible body. The claimant complied with this direction by lodging a fresh claim form for this claim on 25 April 2023.
7. During the CMC on 21 March 2023, I reassured the claimant that he would not be prejudiced (in terms of time limits) by the need to lodge a fresh claim form. In other words, the claim would be treated as being lodged on 11 March 2023. That is the relevant date for time limit purposes.

8. On 27 April 2023, the claim was registered and an acknowledgement was sent to the claimant. At the same time, the claimant was informed of the case statement and attendance form deadline (29 May 2023). The claimant did not reply to that communication, and did not lodge a case statement.
9. On 10 May 2023, an e-mail was sent to both parties requesting availability for an early CMC. The claimant did not reply to that e-mail.
10. On 15 May 2023, a further email sent to both parties requesting availability for a CMC. The claimant did not reply to that e-mail.
11. On 31 May 2023, the Tribunal sent an e-mail to the claimant, inviting him to submit a late case statement and to return the attendance form. The claimant did not respond to that e-mail.
12. Following a period with no contact from the claimant, I decided to arrange a further CMC. This took place on 27 June 2023. The claimant attended this call, with representatives for the responsible body. In the note of that call (T158-161), I issued directions requiring that the claimant lodge a list of acts/omissions relating to the young person's education that the claimant is relying on in his claim. I also directed the claimant to set out in writing his arguments as to why the acts or omissions occurred within the 6-month time limit or why a late claim should be allowed. The deadline for responding was 19 July 2023. The claimant did not comply with either direction.
13. However, the claimant responded to the direction by e-mail on 12 July 2023. Attached to the e-mail were some documents. The total number of pages lodged was 304 (including the e-mail). Some of the material in those documents relates to the responsible body, some relates to another responsible body. Some of the material in that document relates to the education of the young person. Most does not.
14. On 16 August 2023, the responsible body submitted a document entitled 'Response [of the responsible body] to the Case Management Call Note and Subsequent Correspondence from the Claimant' (RB054-058). I have decided to take no account of this document since it was not sought by the Tribunal (although a copy has been made available to the claimant).

Reasons for the Determination

The six-month rule

15. A claim under the 2010 Act should normally be received by the Tribunal within 6 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 (rule 61(4)).
16. However, the Tribunal may consider any claim that is out of time if, in all the circumstances of the case, it is just and equitable to do so.
17. I will address the time limit issue in three parts.

1. Application of the test to the current material

18. As indicated above, I issued directions on 27 June 2023 requiring the claimant to set out in writing his arguments on the 6-month time limit point, alongside a list of the relevant acts/omissions. Although the claimant did lodge material in response to these directions, he did not comply with them.
19. In his e-mail of 12 July 2023 (responding to those directions) the claimant makes only one direct reference to the time limit issue:

“The tribunal should be heard regardless of the time limit being imposed [sic], the legal member stated in the first Case Management meeting we wouldn't be constrained by time, were asked to separate the claims.”
21. The reference to the statement by the legal member would appear to be a reference to my reassurance to the claimant provided in the first CMC, and explained at paragraph 7 above.
22. The claimant makes an indirect reference to the time limit point later in that e-mail where he says:

“The responsible body were directly interacting with the child's Mother about the child, as late as mid October 2022. Going to the lengths of requesting the Children's Reporter threaten her. (SM Documents)”
23. In addition to considering the claimant's response to the directions of 27 June 2023, I have carefully considered all of the material submitted by the claimant, a total of 455 pages including the claim form and attachments. I can find no material there that is relevant to the time limit issue.
24. The claimant has not complied with my clear direction of 27 June 2023 requiring him to set out his arguments in writing on the 6-month time limit point. He has also failed to set out the acts/omissions he is relying upon in a list, in order that they can be considered in the context of the time limit. Instead, he has referred to a comment I made during a CMC about a time limit which is not related to the 6-month rule. On the second comment (referring to the 'SM Documents') I have checked the documents lodged by the claimant on 12 July 2023 which are

entitled 'SM Documents' (C229-239). While there is correspondence there about the young person from the responsible body dated October 2022, it does not relate to his education. This means that those documents are not relevant to the claim, and so cannot be considered as relevant to the time limit question.

25. The claimant is unrepresented and certain duties arise under the overriding objective in rule 2. In particular, part of that duty is to ensure, as far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings. This duty includes assisting a party in the presentation of their case, but does not extend to advocating the course that the party should take (see rule 2(2)(c)). I have carefully considered how the duty in that part of rule 2 (and in rule 2 generally) should apply in relation to the preliminary matter (as I require to under rule 3(1)). This has led me to a number of conclusions:

- a. The claimant is, as is clear from the bundle, capable of making detailed written representations in connection with formal matters (see, for example, his written communications at T115-154; C001-006 and C202-207);
- b. The claimant has (in both CMCs) made and argued complex procedural points in relation to, for example, whether a single claim can be made against two responsible bodies; whether a single claim can be made by two claimants and whether the claimant should be the young person or the parent of a young person; and
- c. The claimant is able to consider and digest legislation: he indicated this in his e-mail of 12 July 2023 where he states: "I agree with the Legal Member in Regards to the application being from myself the child's Parent. After reading the legislation advised and how it is set out."

26. Given these points, and the very clear wording of my directions of 27 June 2023, I am satisfied that the claimant has had ample opportunity to address the reasons for the claim arriving late. He has the ability to address that point, but has not done so. I have made efforts to assist the claimant by explaining what was required during the CMC on 27 June 2023 and then following that up in my directions of the same date. If I were to take any further steps, I would be going beyond my duty to assist the claimant to present his case, and would be advocating the course he should take. The duty in rule 2 is to deal with claims 'fairly and justly'. That means that I have to be fair to both parties. If I gave the claimant another opportunity to address the matter directly, this would not be fair to the responsible body.

27. For these reasons, I have decided that it is fair and just to decide the preliminary matter on the material currently available to me.

2. Has the six-month time limit been exceeded?

28. Yes, it clearly has.

29. This Tribunal only has jurisdiction to consider a claim that arises out of matters connected with the education of a child or young person. That is clear when one considers the terms of paragraph 8 of schedule 17 of the 2010 Act, taken with sections 85-89 of the 2010 Act (in particular section 85). This is also clear from the title of Part 3 of the rules (referring to claims under paragraph 8 of schedule 17 of the 2010 Act).

30. The responsible body states that the young person has not received education from it since June 2022. The claimant does not dispute this. There is nothing in all of the material lodged to suggest that the young person ought to have received any education from the responsible body after the end of June 2022. This means that a claim arising out of any matter relating to the young person's education provided by the responsible body should have been received by the Tribunal by 30 December 2022 at the latest. The claim was lodged on 11 March 2023, at least 77 days late.

3. Is it just and equitable to consider the claim out of time?

31. No, it is not.

32. The approach to be taken in considering the 'just and equitable test' in rule 64(5) is set out in the Court of Appeal decision *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 (**Abertawe**), paragraphs 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 (**Fleming**). 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)) may be a relevant factor; and

(e) the general rationales for having time limit provisions should be considered.

33. On (b), no explanation for the delay is offered by the claimant. None is apparent from any of the documents lodged. This is not determinative, but it is a relevant consideration.

34. On (c) and the length of the delay, 77 days is a significant period, when viewed in the context of a six-month time limit. The six-month period in question (June 30 – 30 December 2022) consists of 184 days. The delay in lodging the claim is around 40 per cent of that period. This represents a substantial delay. In addition, this delay is on the assumption that the acts/omissions in question continued up until the end of June 2022, an assumption that favours the claimant. No reasons for the delay in lodging the claim are provided, despite my directions. The responsible body in its case statement (RB001-007) does not refer to any particular prejudice suffered as a result of the delay, so that is not a factor in deciding the preliminary matter.

35. On (d), while the claimant is unrepresented, he has not advanced any argument to the effect that this has led to the claim being lodge late. It is clear from the materials lodged by the claimant that he is accustomed to being involved in formal proceedings. I refer to the points I make above at paragraph 25 too, around the claimant's abilities and understanding.

36. On (e), the general rationales for statutory time limits, these were discussed by Lord Drummond-Young in *Fleming* at paragraph 11. He discusses delay having an impact on the quality of justice, since relevant evidence may be lost over time and it has an impact on the decision maker's ability to assess evidence. Delay can also be oppressive to the other party. He then refers to the need for parties to be able to arrange their affairs and use their resources on the basis that a claim can no longer be raised against them on a particular matter. Finally, there is the public interest in the rapid resolution of claims. These factors are general in nature, and apply to all cases where a claim has been delayed, including here. I have had regard to these factors in reaching a decision.

37. Taking a broad approach (as provided for under (a) above) there is no material on which I can base a decision that to consider this claim out of time would be just and equitable. If I were to do so, I cannot see how such a conclusion could be justified. Even where the claimant is unrepresented, he bears the onus of making an argument that discretion should be exercised in his favour.

38. This all leads me to the conclusion that it is not just and equitable for the claim to be considered, despite it having been made late.

Conclusion

39. Since the claim has been made out of time and I consider that it would not be just and equitable to consider the late claim, the claim is not competent and is dismissed.