EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102363/17 Held at Aberdeen on 14 December 2018

Employment Judge: Mr J M Hendry (sitting alone)

Mr Mike Soper	Claimant In Person
Aker Solutions Limited	Respondents Represented by: Mr A Knight – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal holds that the claims for discrimination are time barred and are dismissed.

REASONS

1. This case has a lengthy history. The claimant sought findings that he had been unfairly dismissed from his employment as a Field Service Engineer. He also alleged that he had been discriminated against on the grounds of his disability namely PTSD.

2. A Hearing took place on 26 October 2017 at which the Tribunal determined that the claim for unfair dismissal was out of time and should be dismissed. The remaining issue was whether or not the claims for disability discrimination were time-barred. The Tribunal at that point after hearing both evidence and submissions from both parties concluded that the claim was not fully articulated and that the issues could not be fairly determined on behalf of both sides at that point. The claimant was allowed to lodge better and further particulars setting out why he believed he had been discriminated against particularly in relation to the redundancy process and the basis of is request to extend the time limits.

3. The important dates to bear in mind in relation to this case are 27 June 2017 when the claimant lodged a claim with ACAS and his dismissal on 7 April and the application to the Employment Tribunal dated 10 August 2017. The earlier hearing dealt with the circumstances surrounding the lodging of the application. It transpired that the claimant had instructed a solicitor who had emailed him twice after the EC certificate became available. The emails were not delivered to the claimant. The claimant had not at this point made up his mind to proceed.

5. I rehearse the facts found at the earlier hearing:

Facts

1. The claimant was dismissed by the respondent company from his position as a Field Service Engineer on 6 April 2017. The claimant was dismissed ostensibly on grounds of redundancy.

2. The claimant started work with the respondents on 2012. He had moved to the Field Team in September 2013. He worked offshore maintaining and repairing hydraulic equipment on offshore platforms. The respondent company carries out work on behalf of oil company operators principally Shell and BP.

3. *Before working in the oil industry the claimant had been in HM Armed Forces. The claimant had performed three tours of duty in Afghanistan and Iraq and had also been stationed in the Middle East. In these war zones he had experienced a number of traumatic events including on one occasion an event where he was sitting in a tent and a rocket propelled grenade or other missile exploded close nearby. He did not experience any serious side effects from these incidents at the time but later was diagnosed as having developed Post Traumatic Stress Disorder because of these incidents. He was also diagnosed with having an underlying condition of depression for which he obtained treatment.*

4. *In February 2016 the claimant had been working offshore in the North Sea when there was an explosion which caused the flotel in which he was staying to be evacuated. This emergency brought back his war time experiences. Thereafter the claimant became steadily unwell. He lacked motivation. He found it difficult to be in the presence of helicopters or to be transported on and off platforms by them. For some time he had little insight into his condition.*

5. *On 11 August 2016 the claimant saw his G.P. and was signed off for two weeks with depression and he was given anti-depressant medication. Despite this his condition deteriorated and he became increasingly unwell.*

6. *The claimant's condition began to have serious effects on him. On one occasion he became severely depressed and ran away from home. He was considering suicide. He was found by the Police and brought home. At this point he was referred to an organisation based in Glasgow which had been specifically set up to assist veterans who suffered from combat stress. They provided various types. He was assessed by their psychiatric team in September. It was at that point that he was diagnosed as having PTSD.*

7. Latterly because of the claimant's medical condition, when well enough to work, he was restricted from carrying out offshore work. The claimant believes that it was the breakdown in his health that led to his redundancy selection.

8. The claimant's dismissal on the 7 April 217 had a devastating effect on him. He felt he had 'been destroyed'. He felt he had been treated badly by his employers. He had worked all over the world for the company as a 'troubleshooter' dealing with complex situations but did not feel that his skills and experience had been valued by them.

9. After the claimant was diagnosed with PTSD he had been referred to the Royal Cornhill Hospital in Aberdeen for treatment. He was referred for desensitisation therapy. The treatment, which continued for many weeks, was to desensitise him from his war experiences by repeatedly reliving them.

10. The claimant was aware that his wife had made a claim for unfair dismissal claims some years earlier. She had, at that time, instructed a Mr Falconer of Falconers Solicitors in Oldmeldrum. The claimant had paid little attention to the process and was unaware of the time limits for making claims both for unfair dismissal and discrimination. Following his dismissal the manner in which he had been treated by his employers was not in the forefront of his mind. He was finding it difficult to cope with his illness and the treatment and wanted to concentrate on getting better.

11. As part of this treatment he was asked to relive vivid and dramatic experiences by listening to recordings of what he had said in previous sessions. The recordings lasted between 1 and 2 hours. He found this process very tiring and wearing. He had two such sessions per week. During the months following his dismissal he found it difficult to concentrate or to relax. He lacked motivation. He was still sensitive to past events. He would

watch television programmes such as 'Our Girl' a drama set in the military and he would be unable to watch.

12. *In addition, the loss of the claimant's job had a considerable financial effect on him. The claimant was concerned both at paying fees for Employment Tribunal proceedings and the expense of instructing a solicitor. He hoped that some settlement might arise out of the early conciliation and did not want to antagonise his former employers as he hoped to work for them again in the future.*

13. *In May the claimant met Mr Falconer to discuss his employment position and take advice on whether he had a claim against his former employers. It was explained to him that before a claim could be made he would have to contact ACAS and seek early conciliation of the claim. He was told that this might take up to four weeks. At their meeting the claimant did not instruct Mr Falconer to proceed with an Employment Tribunal claim at that point because of his financial concerns about fees and expenses and also because he was focussing on the treatment he was receiving. He had not yet decided whether to proceed with a claim and wanted to wait until he felt better before making a decision. It was agreed that his solicitor would lodge the early Conciliation Application with ACAS in order to keep his options open.*

14. *Mr Falconer lodged an application on behalf of the claimant with ACAS on 27 June 2017. The claimant received an e-mail from ACAS confirming that they were dealing with Mr Falconer as his representative. The claimant was not unduly concerned about the issue of time limits as he expected to hear from his solicitor about the issue of the Certificate and the final deadline. As July passed he was not overly concerned. He was concentrating on his treatment. He assumed that there must be some delay but that did not concern him.*

15. *The ACAS Early Conciliation Certificate was e-mailed to Mr Falconer on 7 July. He attempted to contact the claimant by email to get instructions as to*

whether the Tribunal application should now be lodged. Mr Falconer did not hear anything from the claimant and took no further action.

16. Following the issue of the ACAS certificate was issued on 7 July Mr Falconer had e-mailed the claimant asking to attend a meeting to take the claim forward. The e-mail was not received by the claimant who waited to hear from his solicitor. The claimant made contact with Mr Falconer on 9 August. He said that he had been waiting to hear from him on the outcome of negotiations/conciliation with ACAS. It was realised that the claimant had not received the email from Mr Falconer. The claimant, assisted by his wife, completed an online application on 10 August.

6. The claimant was, he said, unaware of Employment Tribunal procedures and rules and had not researched the position himself although his wife had taken Employment Tribunal proceedings on her own behalf some time previously and instructed a lawyer. I summarised the position in this way:

43. I regard the facts of this case to be unusual. The respondents' agent lays fault both at the door of the claimant and his solicitor and so engages both the issue of whether there was an impediment (the claimant's ignorance of time limits) and also of potentially negligent advice from a skilled adviser.

44. I questioned Mr Knight as to where he believed the negligence arose and his response was that there was a failure to advise him when the Early Conciliation Certificate became available. That was undeniably the case but where he had no basis to believe that the email had not been properly sent, and a second and third were apparently sent and delivered, is he negligent in these circumstances where he knows that there is no guarantee that the claimant wants to proceed and that silence from him is an indication that he is not proceeding. I think that this is to judge Mr Falconer too harshly. Unless he was instructed to lodge the proceedings, and the claimant had expressed some nervousness about antagonising his former employers, he had no obligation to lodge the proceedings

himself and would have been quite wrong to take this on himself. It is also now common to rely on IT systems and to see them as being reliable when they indicate mail has been sent.

45. It was apparent that the claimant did not want to finally decide whether to proceed until he was given this time limit by his solicitor and then had to finally make up his mind whether to proceed or not. This was perhaps an understandable position to take in the circumstances as he wanted to use the delay in trying to get better. He was as he said in evidence wanting to keep his options open. However, the test is whether it was reasonably practicable for him to have lodged the claim in time and these arrangements, understandable as they may have been, were put in place by the claimant. He could for example have instructed the lawyer to lodge the claim and asked for it to be sisted pending the completion of his treatment.

46. Mr Knight pointed to the claimant being told that the Early Conciliation process would take up to four weeks. He assumed, wrongly as it turned out, that it might take longer and was not overly concerned when the solicitor was not in touch confident that he would hear when the certificate was granted. It was perhaps not wholly unreasonable for a layman to make this assumption. Many legal processes take longer than anticipated and the quick turnaround of early conciliation certificates was outside his ken. As soon as he realised that the time limit had expired he quickly completed an online ET1 and submitted it a day later. It was lodged quickly and in what cannot be disputed as not being a reasonable time.

47. In the present circumstances there is a combination of events which colour a full understanding of what happened. Firstly, the claimant although aware of time limits as a principle, was ignorant of how and exactly when they operated. He did not think that he needed to concern himself unduly with time limits as the matter was, in his view, left with his

solicitor who was to tell him when the Early Conciliation Certificate was available initiating what could be described as the 'final' time limit.

48. *Mr Knight is on stronger ground when he suggests that the claimant should have been mindful that there were time-limits (he was advised of this by his solicitor) and that the Early Conciliation Certificate should be available 'within four weeks' He was told that the solicitor was his representative by ACAS so must have been aware of when the certificate had been applied for (27 June). There was no reason why he should or could not have contacted his lawyer at the end of this period of four weeks to find out what was happening. Had he done so he would have discovered that the certificate had been issued and the time limit was running. While I understand his desire to concentrate on getting well his illness at this point was not so disabling as to have prevented him getting legal advice or in my view from following it up. Regrettably, I am drawn to the conclusion that it was reasonably practicable for the claim to have been lodged in time and that the Tribunal has no jurisdiction to hear the claim for unfair dismissal as it is presented outwith the statutory time limits.*

49. *In relation to Mr Falconer's role. He did not give evidence but his letter dated 21 August, at points corroborated by the claimant's evidence, sets out a straightforward position that he emailed three times. He emailed when the certificate was made available on or about the 7 July and then a follow up email asking to meet to discuss attend his office. On the 28 July he emailed to ascertain whether he intended proceeding with the case. This was triggered by the Tribunal Service confirming that fees were to be immediately withdrawn as was the online submission of claims service.*

50. *If what Mr Falconer says in the letter is correct namely that he had sent these first two emails and had received no indication that they had not been properly sent and received and had assumed that the claimant had*

decided not to proceed I am not sure that the solicitor has been negligent. An error has occurred because of a technical matter namely the difficulty with the server which he only discovered at a later date. Mr Falconer does state at page four of his email that he did not follow up the emails because 'what I thought had been done by phone'. His position is not completely clear on this or on what he understood the claimant's expectations were the claimant has given that background. It was, in my view, reasonable for him to assume that, having contacted the claimant twice and having had no response from him that the emails had been received and that the claimant had decided not to proceed for whatever reason. In short, I am not convinced that negligence is apparent from the solicitor's actions. He had not been instructed to proceed with the claim. He had been instructed to keep the claimant's options open and had relied on his email system in good faith to deliver the three emails that he had sent.

7. In the Judgment I came to the following conclusions which are important to note here:

55. Until the claimant's case is fully pled it is impossible to consider, except in general terms, which allegation is out of time and the circumstances surrounding that allegation. If the Tribunal were to exercise its discretion and allow the claim(s) under the Equality Act, which I understand are claims for indirect discrimination, to proceed then that would be binding on future Tribunals. The danger would be that the respondents would not be able to plead time bar against specific allegations which would have been time barred even if the action had been raised in time.

56. I regret that the conclusion that I have reached is that until the claim is fully articulated the issue cannot be fairly determined on behalf of both sides. If as seems possible the issues all revolve around the redundancy process it should not be too taxing for the claimant to set out why he thinks there has been a breach(s) of the Act. The Order for Better and Further Particulars will set out what the claimant is required to do.

8. Following the issue of the Judgment the claimant responded to the request for better and further particulars providing a chronological history of matters. The claimant alleged that in February the respondent's HR Department confirmed to him that as he was not well enough to work offshore he required a doctor's sick note. However, the claimant's position was that he worked predominately onshore anyway. He concluded that his employers did not want him to return to work and there were no adjustments being made to him to do so. The claimant also alleges that at a later meeting with one of his managers he was told that the business was not busy and did not need him to return. He alleges that it was said that he wasn't costing the company any money because he was on SSP and it was not a priority to have him return to work.

9. The company began their redundancy process in early 2017. The claimant was selected for redundancy. The claimant believed that because of his seniority and experience the scoring exercise was unfair as during a previous redundancy exercise he had been scored as one of the top engineers the company had. He believes that if he had been allocated work and efforts made to do so he might not have been dismissed. These events are in his view inter connected.

10. The respondents provided the Tribunal with a detailed response to the better and further particulars lodged by the claimant. They also made reference to their earlier response form submitted on 11 September 2017. They narrated the history of the claimant's employment including referrals by them to Occupational Health. Their position was that the company's sick pay ceased and with effect from 29 December 2016. Their position was that there was a significant downturn in work at this point necessitating redundancies. They narrate the redundancy process and attempts to follow recommendations in Occupational Health Reports. They then set out the scoring exercise that took place. The claimant did not challenge the provisional scores. The position is that the claimant was given a full and fair consultation process. Their position was that in the event that there was any disability discrimination that any such

claim is time-barred. They accept the claimant had a disability at the material time.

11. A further Preliminary Hearing took place on 27 April. It was still not clear what the claimant's position was in relation to reasonable adjustments and he was given an opportunity to address this which he did on 7 May. He reiterated that in the first round of redundancies he had been scored well and alleges that he had been scored badly in the final round of redundancies. He felt that the company could have put him back to work on a number of onshore facilities and this would have been a reasonable adjustment. He indicated that he felt harassed by the company by being asked to complete a helicopter trial "suit up".

12. The respondent's response was that there was insufficient detail and they renewed their application that the claim should be struck out on the basis of time-bar. These matters were discussed at a Preliminary Hearing on 14 June. The respondents wrote to the Tribunal on 31 August summarising their position seeking that the outstanding time bar issue should be determined on the basis of the information the Tribunal had. The Preliminary Hearing took place in front of Judge Hosie on 18 October in which the respondent's solicitor confirmed that he accepted that the claimant had now provided sufficient specification to complaints namely, a claim for direct discrimination and a failure to make reasonable adjustments. The claimant was referred to the Tribunal's power to allow claims out of time it was just and equitable to do so.

13. The respondents provided the Tribunal with written submissions which it extends its gratitude and also to the claimant who summarised his position in correspondence.

Discussion and Decision

14. A claim must be brought to an Employment Tribunal within specified time limits. Section 123 of the Equality Act 2010 ('EA') is in the following terms:

> "*123TimeLimits*
> *(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*"

15. The Tribunal has a wide discretion to allow claims late. When considering an application to extend the time limits it must be borne in mind that the discretion must be exercised with regards to both sides positions. In the case of **Robertson v Bexley Community Centre t/a Leisurelink [2003] IRLR** the Court of Appeal stated that when employment tribunals consider exercising their discretion there is no presumption that they should do so "unless they can justify failure to exercise the discretion" the Tribunal must be convinced by a claimant that it is just and equitable to extend the time limit. The Tribunal has to take into account the whole circumstances of the matter. That the Tribunal has to approach the matter carefully as was confirmed by the case of **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA** . It must look objectively at the material before it before exercising its discretion. The tribunals have also been referred to the checklist contained in section 33 of the Limitation Act 1980 as modified by the EAT in the case of **British Coal Corporation v Keeble & others [1997] IRLR 336 EAT**.

16. It has been held that time limits are exercised strictly in employment tribunals and that it is up to the claimant to persuade the Tribunal to exercise its discretion. As Langstaff.J. in the case *Abertawe Bro Morgannwg University Local Health Board v Morgan* put it the first question is to decide why was the primary time limit missed and in so far as it is distinct why the claim was not brought sooner than it was.

17. It was accepted that the claims for discrimination were out of time but the issue was how far they were out of time and should the claimant be allowed to proceed with them late. As can be seen from section 123(1)(b) the Tribunal has the power to extend the time limits if it is just and equitable to do so.

18. In assessing this matter I first of all looked at the circumstances surrounding the lodging of the claim. When the claimant lodged his Early Conciliation claim through his lawyer on the 27 June he had undergone a redundancy process which had resulted in his dismissal for redundancy on 6 April. I bore in mind that the claimant was still somewhat unwell and focusing on his recovery. Nevertheless, he should have kept in touch with his lawyer about these matters. Given the circumstances surrounding the apparent mishap with the notification email from his solicitors regarding the receipt by them of the EC Certificate I would have been sympathetic to the claimant's position that discounting this relatively short period in all the circumstances might be a proper exercise of the discretionary power in the light of the lack of any real prejudice to the respondents caused by this element of delay, other than that of the significant issue of facing a claim that was otherwise time barred. I noted all that no evidence was produced by the respondent that there would be any problems occasioned by the delay relating to evidential issues or other issues. The redundancy exercise would still have been relatively fresh and no doubt extensively documented.

19. My focus then turned to when any claim could be said to have arisen and whether there was any continuing act that would extend the time limits.

20. The claimant says it was a reasonable adjustment for him to return to work onshore before his actual return in March 2017. He was 'signed fit' to return to onshore work. It is not in dispute that following an Occupational Health assessment in December 2016 the claimant was deemed well enough to return on a phased basis to work onshore. This then is when the duty to make reasonable adjustments must arise although the respondents must be allowed a period to put any adjustment into place. In his ET1 the claimant makes

reference to his frustration at not getting back to work earlier than he did and efforts in February to push the employers in this direction. The respondent's position was that no such work was available. Both sides made reference to an email dated 22 February from the respondents. The respondents suggested that this was the appropriate date for crystalisation of the claim as it showed that the respondents were not intent/able on making the adjustment sought. The claim should have been initiated by 21 May. In January the redundancy exercise was commenced. The claimant was scored and did not challenge the scoring.

21. It is clear then that by the time the Early Conciliation Certificate was applied for at the end of June the claim for failure to make reasonable adjustments is time barred by approximately three months. In this period the claimant although still suffering from his PTSD and a depressive condition, was well enough to return to work. He was frustrated with the situation but as he put it he did not want to make his employers unhappy given the redundancy exercise that was being planned. The alleged comments from the claimant's line manager, made around February, that it was cheaper to keep him on SSP and he would choose engineers sitting at home over the claimant to carry out any work, if proven, might amount to a breach of the EA perhaps section 15.

22. In relation to the redundancy exercise the claimant points to his scores in an earlier round of redundancies and alleges that he was marked lower in the second and final redundancy exercise because of his being unable to work offshore because of his disability. That exercise took place in March concluding with the claimant's dismissal in April. The claimant also complains about a helicopter trial he was asked to take part in, suggesting that it was misconceived but I do not understand that any particular claim arises from those events and that it is background.

23. I did not find this an easy case to decide. The claimant acted no doubt for a mixture of reasons. He seems to have altered his position before the Tribunal or at least his emphasis referring at the initial hearing before me in October

last year to being concerned about fees/costs (and at not 'rocking the boat' in layman's terms). Latterly he suggested that his condition impacted on these matters. I am sure from his evidence that his condition would perhaps have had a bearing on his motivation. He was still unwell and undergoing therapy. His focus was he put it was not on whether he had any legal claim against his employers but on getting well. This was the judgment he made.

24. The claimant is an able, articulate and clever man who was keen to return to work in January 2017. As I noted in the earlier hearing that he had the assistance of his wife who had some experience of Tribunal claims. Any search on the Internet would disclose the sort of claims that he could have advanced and the time limits that applied. I find it hard to reconcile the picture presented by the claimant that he was keen and able to return to work from December but unable to consider and advance his position in February and March when he felt he was being discriminated against. He seems to have made a conscious choice to put these matters off until he felt better and in the hope that he would not be made redundant. At the end of the day what swayed me most was that he made what appears to have been an informed choice and must, alas, live with the consequences. The claims are out of time and I am not persuaded to grant the extension sought. The claims are accordingly dismissed.

Employment Judge: JM Hendry
Date of Judgment: 04 March 2019
Entered in Register: 05 March 2019
and copied to parties