EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

BETWEEN: **MR K BROWN** **CLAIMANT**

AND

FALCK UK AMBULANCE SERVICE LIMITED **RESPONDENT**

ON: **23RD November 2018**

Appearances
For the Claimant: **In person**
For the Respondent: **Ms M Vincent, solicitor**

REASONS

These written reasons are given at the request of the Claimant.

1. This was an Open Preliminary Hearing to:

   a. ascertain the factual and legal claims being made by the Claimant
   b. consider whether the Tribunal had jurisdiction to consider the Claimant's claims, taking into account the statutory time limits; and
   c. if appropriate, to make appropriate case management orders.

Background and history of the pleadings

2. The Claimant was employed by the Respondent as a patient ambulance transport driver from February 2012 until his dismissal on 10 August 2017.

3. The Claimant contacted ACAS and presented his claim on 10th November 2017. The claim form which was presented ticked the boxes for unfair dismissal, disability discrimination and "other payments" but contained no narrative or details. Box 8.2 (which asks for the details of the claim with dates) simply recorded that that a statement of events would be provided at a later date. As is standard in discrimination claims, the case was listed for a Preliminary hearing (case management) to take place on 8th March 2018.

4. The Respondent provided a response setting out a broad denial, stating that it was not aware that the Claimant was a disabled person and that the claim was out of time.

5. On 6th March 2018 the Claimant asked for a postponement of the preliminary hearing on grounds of ill health. On 7th March 2018 the Tribunal granted a postponement and ordered the Claimant to provide details of his claim within 14 days. He did so on 21st March 2018.

6. The pleaded particulars set out a claim of unfair dismissal and disability discrimination. The pleaded disability is PTSD, following time spent in the army. Most of the particulars relate to the claim of unfair dismissal. The Claimant was dismissed following a final warning (for failing to inform the Respondent that he had been arrested and charged with fraud) and subsequently dismissed following further matters which were alleged to have thrown doubt on his integrity. Broadly he says that he was not deceitful or dishonest with the Respondent and that the decision to dismiss was ill considered and irrational. The claim for disability discrimination is set out in a single paragraph which states that *"the Respondent was aware that the Claimant had a disability prior to these events as this was disclosed on record to the Respondent's regional manager, therefore the Respondent and should have made reasonable adjustments for the Claimant and not breach procedural fairness".*

7. The Respondent provided an amended Response saying, inter alia, that it had been unaware that the Claimant had PTSD or was disabled and so were under no duty to make reasonable adjustments.

8. At today's hearing on further enquiry, the Claimant clarified that the disability discrimination complaint was a complaint that the Respondent should have made adjustments at the disciplinary hearing. The Claimant had attended the disciplinary hearing on his own. He said that the Respondent had told Nick Richardson and Mike Gibbs that he had mental health issues, and they should have not permitted the Claimant to come to the disciplinary hearing on his own. That hearing began on 7th August and was adjourned to 10th August. To put it in a legal context, the claim was the Respondent had applied a pcp of not insisting that an individual be accompanied before proceeding with a disciplinary hearing, which had put the Claimant at a substantial disadvantage in comparison to those who were not so disabled.

9. The Claimant accepted that the Respondent had advised him of his right to be accompanied at those hearings. However, the Claimant said that he had not been able to get a colleague to assist, as the Respondent was undermanned at the time. He could not recall if he had asked for a postponement in the circumstances, but he said that the disciplinary hearing should not have gone ahead.

Time issues

10. The Claimant was dismissed by the Respondent on 10 August 2017. He contacted ACAS under the early conciliation scheme on 10 November 2017, obtained certificate the same day and presented his claim on the same day. It was not in dispute that the claim form was therefore one day outside the primary time limit. The issue was whether time should be extended to allow the claim to proceed.

The law relating to time limits

11. Section 111(2) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal:

    a. before the end of the period of three months beginning with the effective date of termination; or
    b. within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

12. A complaint which is outside the time limit in section 111(2)(a) may still be in time if a Tribunal finds that it was not "reasonably practicable" for the Claimant to have presented his claim (or contacted ACAS) within the three-month time frame. Reasonably practicable does not mean "reasonable", nor does it mean simply physically possible. Individuals who have acted "reasonably" may fall foul of the time limit provisions. It is a test which has been narrowly interpreted.

13. Section 123 of the Equality Act 2010 provides that complaints of discrimination should be presented within three months of the act complained of. Section 123(1) (b) provides that where a discrimination claim is prima facie out of time it may still be brought "within such other period as the Tribunal thinks is just and equitable". This provides a broader discretion than the reasonably practicable test for unfair dismissal claims.

14. In considering whether it would be "just and equitable" to extend the relevant time limits, all the circumstances are relevant including the extent and reasons for the delay; any prejudice to the Respondent if the application is allowed to proceed; the likely injustice to the Claimant if the complaint is not heard including whether any other redress is available, whether the Claimant was in receipt of advice; and the conduct of the parties after the complaint was received and up to the date of the application. In Robertson v Bexley Community Centre 2003 IRLR 434 the Court of Appeal reviewed the law and principles which should guide Tribunals in deciding whether to exercise their discretion to extend time. The Tribunal has a wide discretion. On the other hand, time limits are jurisdictional, and it is for a Claimant to persuade a Tribunal to accept a late Claim. The exercise of the discretion should be the exception rather than the rule. Equally in O'Brien v Department for Constitutional Affairs 2009 IRLR 294 the Court of Appeal held that the burden of proof is on the

Claimant to convince the Tribunal that it is just and equitable to extend time. In most cases there are strong reasons for a strict approach to time limits.

15. The time limits are extended to allow for early conciliation. (Section 207B of the ERA and section 140B of the Equality Act 2010.) When determining whether a time limit has been complied with, the clock will stop when ACAS receives the early conciliation request and restart the day after the early conciliation certificate is given. It follows that if ACAS does not receive the early conciliation request in time the prospective Claimant will not get the benefit of the extension of time.

Evidence relevant to the time points.

16. I heard evidence from the Claimant on oath. He told me that after he had been dismissed on 10th August, he became severely depressed and ill. I accept that.

17. The Claimant produced letters from his GP dated March and June 2018. The March letter stated that the Claimant had a diagnosis of mixed personality disorder, antisocial trait, and underlying post-traumatic stress disorder. He was seen in the outpatient mental health clinic at Springfield on 12th October 2017. In December he had attended Croydon health hospital emergency services following a drug overdose. In March 2018 he had attended the GP clinic with his ex-partner saying that he had self-harmed and was having thoughts of self-harm. (Although the latter two appointments are after the expiry of the time limit they clearly indicated an underlying issue with depression and mental health.)

18. NACRO, a social justice charity had assisted him with his disciplinary process and the appeal.

19. I was provided with an exchange of emails between the Claimant and NACRO in which the Claimant had, on 9 October 2017, asked for advice on his legal position. In that email the Claimant said that "*I am aware that my claim will be subject to an employment tribunal hearing and the deadlines are very strict."* He said he had potentially been offered other job opportunities.

20. On 10th October NACRO responded as follows: "If you want to pursue an employment tribunal you must make your application within 3 months of the final decision – that gives you until the end of December. I think the main problem that you have is that your criminal proceedings are due to begin in November; if you are found guilty of the fraud offences will only add weight Falck's decision to dismiss you. My advice would be to wait until the criminal proceedings before making your decision to apply for an employment tribunal." Nacro appears to have operated in the mistaken belief that the time limit ran from the appeal decision. It was wrong advice.

21. The Claimant was also advised that, in the meantime, he should have a conversation with ACAS, and would need to notify them and go through their conciliation process. He was also advised to discuss his case with them and to send them any relevant paperwork to see what their advice would be.

22. The Claimant then said that his partner at the relevant time was a lawyer, or at least had a legal background. He told me that he was unwell and so it was not him but his partner who had written the emails to the Respondent, who had contacted ACAS and who drafted and submitted the claim form. She had also drafted the application for a postponement (which was as in legal language.) He said that at the time his ex-partner was "controlling" him. She had told him that she would finance legal advice in relation to his ET claims, but in the end did not do so. They had split up in June 2018 and she was no longer helping him.

23. At the time of the Claimant's dismissal there were criminal proceedings pending and the Claimant had consulted a number of lawyers both in relation to the criminal proceedings and in relation to his employment situation. In evidence he told me that he said he had seen 5 sets of lawyers. A firm, Lawrence and Co, had been advising him in June 2017 when the Claimant was suspended from work. He said he did not go back to them in relation to his employment tribunal claim. The Claimant was found not guilty of the criminal charge on 20th November.

Conclusions

24. The Claimant was unwell during the relevant period. However, the Claimant's evidence was that it was not him but his former partner who was writing emails, calling the shots and taking the decisions. There was no evidence that she was unwell or unable to present a claim in time. The Claimant illness was not the reason for the late submission of the form.

25. The Claimant had received incorrect advice from NACRO. However, that advice was also not the reason for the late submission of his claim. The Claimant's partner was aware of strict time limits in the ET. She had clearly not taken NACRO's advice and had concluded that the Claim form needed to be submitted both before the outcome of his criminal trial and before the end of December. The Claimant was unable to tell me why the claim form had been presented on 10th November, i.e. what the trigger for action was. He said that it was actually his former partner that took all the relevant decisions, and who had submitted the claim. The claim was clearly presented in a hurry as it was presented on the same day as the ACAS conciliation was opened. It contained no details of the claims being made.

26. The Claimant told me that his partner had contacted someone at the ET who had told her that they would accept the form late because of his mental health, which suggests that she was aware of the time limit.

27. Although it is undoubtedly the case that the Claimant received incorrect advice from NACRO, given his evidence that his partner was taking the relevant decisions and that she was a lawyer or had a legal background, I find that it was reasonably practicable for her, on the Claimant's behalf, to have presented the claim in time and that the Claimant is not entitled to the benefit of the extension in section 111(2)(b) in relation to the claim for unfair dismissal.

28. I do have a much wider discretion to extend the time limit in clams of discrimination than I do in cases of unfair dismissal. The test is whether it would "be just and equitable" to extend the time. I need to balance the likely injustice to the Claimant if the claim is not allowed to proceed against the prejudice to the Respondent if the claim is allowed to proceed.

29. In doing that balancing exercise I considered that the claim was only one day out of time. On the other hand, the disability claim had not been articulated at all until 21st March (which was well outside the time limit) and, even then, not in clear terms until today. More importantly however, I considered that the disability claim was a weak one. The Claimant had accepted that he had been advised of his right to bring a companion to the hearing and that he had not asked for a postponement or raised any objection when he could not get anyone to accompany him. At the time he was supported by a partner who had a legal background. The Claimant would need to establish that the Respondent was aware of the disability and the disadvantage that the Claimant would suffer. He had been at work until his suspension on 26th July.

30. Although this was a finely balanced decision, all in all I do not consider that this is an appropriate case for the exercise of my discretion to extend time under section 123(1)(b).

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Employment Judge F Spencer
26th March 2019