EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105614/2018

Hearing Held at Aberdeen on 3 April 2019

Employment Judge McFatridge

Mr S Wright	**Claimant** **In person**
Fishkeeper Scotland Limited	**Respondents** **Represented by:** **Mr Housan** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim of disability discrimination was lodged out of time and the Tribunal has no jurisdiction to hear it. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had suffered an unlawful deduction of wages and that he had been unlawfully discriminated against on grounds of disability. The respondents submitted a response in which they denied the claims. The case was subject to a degree of case management and as a result of this the claimant

provided further and better particulars of his claim. He also withdrew his claim for unlawful deductions of wages. It was the respondents' position that the claim was time barred. In addition, they wrote to the tribunal seeking a Preliminary Hearing to strike out the claim failing which to grant a Deposit Order. An Employment Judge decided it would be appropriate to hold a Preliminary Hearing to deal with the issues. These were described in the note issued following the Preliminary Hearing on 4 February 2019 as follows.

> "(1) Whether the claim is out of time and if so whether the Tribunal should exercise its discretion and allow the claim to proceed on the basis that it is '*just and equitable'* to do so.
>
> (2) Whether the claim should be struck out on the basis that it has 'no reasonable prospect of success' in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
>
> (3) Whether the claim has 'little reasonable prospect of success' and the claimant should be required to pay a deposit as a condition of continuing to proceed with the claim."

The Preliminary Hearing took place on 3 April. At the hearing the claimant gave evidence on his own behalf in relation to the time bar point. It was agreed that the issue of whether to grant a strike out and/or Deposit Order would be made on the basis of the pleadings taking the claimant's averments at their highest. Both parties lodged a bundle of documents for the hearing. On the basis of the claimant's evidence and the documentary productions I found the following facts relevant to the matters before me to be proved or agreed.

Findings In Fact

2. The claimant was employed by the respondents at their store in Aberdeen. The claimant suffers from mental health difficulties including anxiety and depression. The respondents accept that the claimant is disabled in terms of the Equality Act.

3. The claimant's claim is that the respondents failed to comply with a duty to make reasonable adjustments. The tenor of this complaint is set out in a document provided by the claimant headed Particulars of Complaint which was lodged at R19 in response to the Tribunal's order. The claimant states that he made two requests for additional training to help him cope with hostile customers and that the respondents, despite agreeing at the time, never arranged such training. The claimant refers to the store policies and the requirements that are placed on the store by the Animal Welfare Act 2006 to ascertain the potential environment livestock are to be housed in. It is his position that when staff ask customers about their aquarium set up a significant number of customers take offence and their responses can be aggressive. The claimant states that as the only member of staff with clinical depression and anxiety issues in such circumstances he would register the response as a personal attack and would go on the defensive. He was unable to respond to such customers in an appeasing manner or to change defensive stance. He refers to two formal grievance meetings he had with Fishkeeper where he requested additional customer service training. He states that this training was not provided.

4. During the latter course of his employment the claimant made three complaints to his employer. The first was made in or around March 2017 and did not result in any formal meeting. The second complaint was made in an e-mail the claimant sent on 27 September 2017. The document was lodged (page 39). The background was a complaint about a colleague failing to show up at work when he was meant to do so according to the rota and which had caused the claimant and another employee to work short staffed. The claimant's position is that on checking matters he was told that this individual had been allowed the day off on condition that the claimant and his other colleague agreed to it. The claimant's position was that he had not agreed to the day off and the colleague had taken it anyway and he was aggrieved by this. Following this complaint the claimant met with the respondents' manager on 25 September. During this meeting the claimant set out his concerns. The claimant described this as a one-sided conversation with him explaining the incident and how the incidents had an

adverse effect on his depression and anxiety. During the course of this the claimant says he indicated that he required training in how to deal with aggressive customers. No response was given by the manager at the meeting nor did the respondents ever provide any response to this.

5. On 3 December 2017 the claimant made a third formal complaint to the respondents. This was in the form of an e-mail to his manager Colin Christian. The e-mail was lodged (R40). In the e-mail the claimant refers to his disability, the fact that it can vary in intensity. He states that he finds the attitude of a colleague towards him to cause him to be at the height of his stress and anxiety and refers to suffering panic attacks. The particular trigger for the e-mail was the fact he had to leave work at 9:30 that morning as a result of an incident with a colleague whereby the claimant had taken down a sale promotion that his colleague had put up because the claimant confused himself as to which tanks were part of the promotion and which weren't. He described this as an honest mistake. He indicated that he felt his colleague's reaction to be inappropriate. Nowhere in the e-mail does he make reference to the request he claims he made for additional training at the meeting on 25 September. Nowhere in this e-mail does he repeat the request for additional training as to how to deal with aggressive customers.

6. The respondents immediately responded to the claimant advising that they would investigate the matter (page 41). The claimant thereafter e-mailed the respondents giving further detail about the incident with his colleague (page 42 – 6 December). Again in this e-mail he makes no reference to any request for additional training. The claimant met with Mr Christian of the respondents on Friday 8 December 2017. There was a discussion regarding the claimant's perception of events and the claimant referred to his illness. The claimant spoke about the need for training in dealing with difficult customers.

7. On or about 10 December Mr Christian met with the claimant for around one hour and discussed the issue of difficult interactions with customers in an informal way. Mr Christian had ascertained that the only employee who encountered these customers was the claimant. Mr Christian discussed

with the claimant the ways in which the claimant could handle such situations, defuse them and not exacerbate his stress levels and provided general assistance to him.

8. The respondents wrote to the claimant on 11 December. The e-mail was lodged (R45). It states

> "It was good to meet with you on Friday to discuss the issues that you have been experiencing in store.
>
> With regards to the allegation of harassment by XXX I have found through my investigations that this is unsubstantiated.
>
> The initial incident on Sunday 3rd December was a minor disagreement over a minor error that you admit to making. This would not have exacerbated so quickly if both parties were civil and showed each other some patience and understanding. I do not expect colleagues to be best friends but we must all be civil and respectful to each other. I have strongly stressed this to X and X as well as to yourself. We all have a responsibility to foster a positive atmosphere within our working environment.
>
> With regards to the parting comment where you allege that X said 'you should get your head checked', X refutes this wording and that after you had revealed your depression to him and your intention to leave the store he said 'Go home and get your head straight'. As I explained when we met the environment on that morning was not liable to foster an empathetic response however I do not believe that this constitutes harassment.
>
> I would like to assure you that any unsatisfactory conduct by any employee going forwards will be fully investigated and subject to disciplinary action if deemed necessary.
>
> I have noted that in addition to the above incident the work environment in general can act as a trigger to your depression. We are fully supportive of your condition and will act to reduce triggers wherever we can. To this extent I have spoken to Tony about ensuring adequate staffing levels, policing the work ethics of the entire team and sharing responsibilities fairly.

If you have any concerns with my findings please let me know so that I can address them. Likewise if there is anything further that we can do to support you in the work environment please let us know."

9. The claimant did not revert to the respondents with any further request for additional training. During this period the claimant felt that his mental capacity was at its lowest ebb and that his symptoms of depression and anxiety were at their peak. Despite this the claimant continued to attend work without any absences. During this period the claimant was working 42 hours per week. The claimant felt that he was unable to deal with complex tasks over this period. The claimant was reluctant to seek help because of the stigma of admitting to a mental illness.

10. On or about 8 February there was an incident at work which the claimant described as him having a mental breakdown. As a result of this the claimant left. He went off sick from 9 February 2018. The claimant consulted his GP on or about 9 February. His GP recommended that he see a counsellor and made a referral to a counselling service. He advised the claimant that he should not return to work until the claimant had seen a counsellor. As it happens the claimant did not in fact return to work at any time prior to raising the current proceedings.

11. The claimant also visited Citizens' Advice Bureau on or about 9 February and took advice. He discussed tribunal proceedings with them. He was advised regarding time limits. During the period between 9 February and 4 June when the claimant finally submitted his tribunal application the claimant had around a dozen meetings with Citizens' Advice.

12. The earliest appointment available for the claimant to meet with a counsellor was 3 April. The claimant met with a counsellor on 3 April and thereafter met weekly with the counsellor. The counsellor advised the claimant that he should not return to work until his mental health symptoms had settled. The claimant did not in fact ever return to work before resigning from his employment with the respondents on or about 21 August 2018.

13. The claimant initiated early conciliation proceedings with ACAS on 9 May 2018. ACAS issued their early conciliation certificate on 18 May 2018. He submitted his ET1 to the tribunal on 4 June 2018.

14. Initially the claim was framed as a claim of unlawful deduction of wages due to discrimination. The claimant sought the difference between his monthly salary and the SSP which he had received during his absence in February, March and April 2018.

15. During the period from December 2017 until June 2018 the claimant felt that symptoms of his depression and anxiety were severe. He felt unable to deal with complex tasks. The claimant has a number of aquaria at home and in order to ensure that fish received the correct dosage of food and other material he requires to make complex calculations relating to volumes. During this period the claimant felt unable to make such calculations.

16. During the period from February when the claimant went off sick until June the claimant did not have any face to face meetings with his GP but he did speak to his GP on the telephone on one or two occasions.

Observations on the Evidence

17. I considered that the claimant was genuinely trying to assist the Tribunal by giving truthful evidence as he saw it. His evidence was somewhat lacking in detail both in relation to the specifics of his claim and in relation to the symptoms which he claimed. Generally speaking I found him to be a credible witness. With regard to reliability I found some of his evidence rather vague albeit I accept he was genuinely recounting things as he saw them. He accepted in cross examination that none of the letters he wrote mentioned the alleged problems in dealing with difficult customers. He accepted that the assertion made by the respondents in their ET3 that Mr Christian had met with him on or about 10 December and they had discussed the issue of difficult customers and Mr Christian had given him guidance and advice regarding this. Although in his summary of claim he

refers to the respondents having previously agreed to give him training at the meeting on 25 September he did not repeat this claim in his evidence. He based his assertion that the respondents had agreed to give him training following the second meeting on the section in their letter of 11 December where they refer to his illness. I did not accept that he could take from this that they were in any way agreeing to give him further training.

Submissions

18. The respondents' agent made a full submission dealing with the issue of time bar and strike out/deposit. I will not go into the details of this since much of the submission is repeated in the discussion below. I invited the claimant to make a submission. The claimant indicated that he would prefer not to do so. I invited the claimant to take a short break should he wish to have the opportunity to have a further think about matters before making his submission but the claimant indicated that he did not wish to do this. In the circumstances I advised that in terms of the overriding objective I would seek to apply my own knowledge of the law as well as the submissions of the respondents' representative before coming to a decision

Time Bar

19. Although at an earlier stage there had been other claims the sole remaining claim before the tribunal was a claim of a failure to make reasonable adjustments. I understood that this was as set out in the document lodged at R19. The duty to make reasonable adjustments is set out in Section 20 of the Equality Act 2010. I understood the claim to be made in terms of Section 20(3). This states

> "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

20. As I understood matters the alleged PCP related to the requirement to deal with customers who might be aggressive, particularly given the requirement to make enquiries as to the potential environment livestock are to be housed in. I understood the claimant's claim to be that this provision, criterion or practice placed him at a substantial disadvantage because of his mental illness in comparison with persons who were not disabled. I understood his position to be that a reasonable adjustment would be to provide him with training in that it was his contention that such training would amount to such steps as it is reasonable to have to take to avoid the disadvantage.

21. In terms of Section 123 of the Equality Act 2010 proceedings before a tribunal may not be brought after the end of (a) the period of three 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. Section 123(3) states

> "For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

Applying these rules to the facts of this case it appears to me to be clear that Section 123(3)(b) is relevant. The claim is of a failure to do something and in my view this is to be treated as occurring when the person in question decided on it.

22. The respondents' position was that on 25 September 2017 when the claimant requested training and the respondents did not provide this. I do not consider this is quite correct. The claimant's evidence about the

meeting on 25 September (which I accepted for the purposes of this hearing) was that this was essentially a one-sided monologue on his part where he set out his various concerns. It was his evidence that one of these concerns related to dealing with aggressive customers and he asked for training. His evidence was that the respondents did not actually make any specific response to this. The letter which the respondents sent to him immediately after the meeting was not lodged. I consider that in all the circumstances the period within which the respondents might reasonably have been expected to provide training expired one month later on or about 28 October 2017. If anything I feel this is being generous to the claimant. This means that time starts to run on 29 October and accordingly the claimant would have required to start early conciliation on the claim no later than 28 January 2018. The claimant did not in fact do so until 9 May. The claim is therefore some three and a half months out of time.

23. In terms of Section 123(b) the tribunal has power to extend the time limit if it considers it to be just and equitable to do so. In this case the claimant's position is that he was suffering from immense pressure of his mental illnesses causing him to prioritise his own wellbeing over anything else.

24. The case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050 CA*** is a recent case where the appeal court has confirmed that this is a matter where Parliament has chosen to give the Employment Tribunal a wide discretion. The case goes on to say however that there will generally be factors which are almost always relevant to consider these are the length of and reason for the delay, whether the delay has prejudiced the respondents. There is no requirement that the tribunal be satisfied that there was good reason for the delay or that the claimant's explanation of it. The exercise of my discretion involves a multi-factorial approach. No single factor is determinative.

25. In this case I considered that amongst the factors which I required to take into account are the following:

1. Length of the delay. It appears to me that the length of the delay is significant in this case. The claimant's position is that he asked for training at the meeting in September 2017. It would have been absolutely clear to him by at the latest 29 October that the respondents were not going to do anything about this. The claimant could have raised his claim then or at any time in the three months after that. In my view the claim is some three and a half months out of time. This is significant.
2. The reason given by the claimant for the delay is vague and inspecific. He mentions his disability and he mentions an inability to carry out complex tasks such as calculating the volume of aquaria. He does not in any way differentiate between how he felt during the initial three months which expired on 28 January 2018 when he was at work and the period in May/June 2018 when he was off work as a result of his mental illness yet was able to complete the process of seeking early conciliation and lodging his claim form.
3. The claimant had access to advice from CAB. There is nothing to suggest he could not have afforded himself of this advice prior to February when he contacted CAB. During cross examination the claimant accepted that he had visited CAB around 12 times between February and 4 June when he submitted his claim form. He accepted that he had received advice about time limits. There was no reason given as to why he did not submit his claim immediately on taking advice during February.
4. There would be little prejudice to the respondents if the claim was allowed. There was no suggestion on their part that the delay had any impact on the quality of evidence or on their ability to investigate matters.

26. The case of ***Bahous v Pizza Express Restaurants [2012] Eqlr 4 EAT*** confirms that when deciding whether or not it was just and equitable to extend time the merits of the complaint do not require separate consideration but are part of the exercise of balancing the prejudice likely to be suffered by the respective parties should time not be extended. Whilst I consider that there will be little prejudice to the respondents if time limit is extended it is also my view that there would be little prejudice to the claimant

if the extension is not granted. This is on the basis that it appears to me that the claim has little reasonable prospect of success. During submissions on the strike out/deposit order point the respondents' representative indicated that the respondents were no longer seeking strike out. They accepted that on the basis of the claimant's evidence and on the basis of the pleadings taking them at their highest it could not be said that there were no reasonable prospects of success. They did however strongly reiterate their position that there was little reasonable prospect of success. They pointed to the fact that although the claimant indicates he raised the issue at the two meetings which were convened following the submission of his formal complaints none of the three formal complaints which the claimant made referred to the issue of aggressive customers or requested the additional training which the claimant now says would be a reasonable adjustment. The claimant also accepted in cross examination that the respondents' averments that he met with Mr Christian on or about 10 December and that Mr Christian spent roughly an hour going over things with him and explaining how he could possibly deal with aggressive customers had happened. It also appeared to me that the claimant would face a very high evidential burden in seeking to demonstrate that providing training would have had a reasonable chance of avoiding the disadvantage he suffered as a result of his disability. The claimant himself makes the point that it is his reaction to the customers which is the problem. I entirely accepted the claimant's evidence that this was as a result of his disability. It appeared to me that the claimant would have some difficulty in showing that some unspecified further training provided by his employer (of which he could provide no additional specification) would have a reasonable chance of preventing him being placed at the disadvantage he would otherwise suffer as a result of his disability. The claimant does not appear to be offering to provide any medical evidence or detailed evidence relating to this. In my view if I were required to consider the issue of a Deposit Order in this case then I would be granting a Deposit Order. As it is however I believe that the fact that the claimant's case has little reasonable prospect of success is something which can be taken into account by me in deciding whether or not to exercise my discretion to allow the claim to proceed.

27. Weighing up all of the relevant considerations I feel that this is not a case where it would be just and equitable to extend time. Just and equitable means just and equitable to both parties. The case of ***Robertson v Bexley Community Centre [2003] IRLR 434 CA*** makes it clear that time limits are exercised strictly in employment cases. There is no presumption that tribunals should exercise their discretion to consider a claim out of time on just and equitable grounds unless we can justify failure to exercise the discretion. We required to approach matters neutrally. Whilst, on the basis of the evidence before me the claimant's mental illness weighs heavily in favour of exercising discretion, the vague nature of the effects of this illness and the various other matters which I have highlighted lead me to conclude that justice and equity requires me to refuse to exercise my discretion in favour of granting the extension in this case. Accordingly, the disability discrimination claim was lodged out of time and the tribunal has no jurisdiction to hear it. The claim is dismissed.

Employment Judge: **Ian McFatridge**
Date of Judgment: **16 April 2019**
Entered in register: **17 April 2019**
and copied to parties