EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108929/2021 Preliminary Hearing by Cloud Video Platform (CVP) on 30 September 2021

Employment Judge: M A Macleod

Charu Nandan Goel	**Claimant Represented by Steve West**
Department for Work and Pensions	**Respondent Represented by Ms M McGrady Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are dismissed as the Tribunal lacks jurisdiction to hear them, being time-barred.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 2 April 2021 in which he complained that he had been unfairly dismissed and unlawfully deprived of pay in a number of respects.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A Preliminary Hearing was listed in order to determine whether or not the Tribunal has jurisdiction to hear this claim, on the grounds that it was presented out of time. The hearing took place by CVP on 30 September 2021.

The claimant appeared, and was represented by Steve West. The respondent was represented by Ms McGrady, solicitor.

4. The claimant gave evidence on his own account.

5. The parties presented a substantial joint bundle of documents, most of which were not relevant to the current hearing. Only those documents referred to will be dealt with in his Judgment.

6. Based on the evidence heard from the claimant, the Tribunal was able to make the following findings in fact.

Findings in Fact

7. The claimant's employment with the respondent as a Presenting Officer (Executive Officer) was terminated with effect from 25 September 2020. The claimant was notified of the termination of his employment, on the grounds of gross misconduct, by letter dated 24 September 2020 (261). In that letter, the decision maker, Mrs Kim Goldrick, advised the claimant that it had been decided that the claimant's employment with the respondent had been terminated and that this would take effect immediately, without notice and without payment in lieu of notice.

8. He was advised that he had the right to appeal against this decision within 10 working days of having received the decision.

9. The claimant was represented through the internal process by Matthew Brown, a Branch Organiser of the PCS Trade Union. He was appointed by the Trade Union to represent the claimant after the latter had made contact with them on or around 14 May 2020.

10. When he received the letter confirming his dismissal, the claimant considered that he had been unfairly dismissed. He confirmed his intention to appeal against the decision on 25 September, the date upon which he received the notification of his dismissal (264). He then submitted a more detailed letter setting out the basis of his appeal (266), which was not dated. In that he said that the decision was being challenged *"based on various procedural and*

substantive irregularities, inconsistencies under the law and of reasoning, failure to establish satisfaction of legal tests and wholly being erroneous in law."

11. The submissions were detailed, running to 7 pages, and referred at one point to caselaw from the Employment Appeal Tribunal. The language used was formal, and it was stated to be a submission made for and on behalf of the claimant.

12. The claimant made further submissions to the appeal manager, Linda Stokle, dated 10 November 2020 (273ff). This submission described the decision to dismiss him as *"erroneous in law",* and was followed by a "Summary of list of errors, inter-alia…", of 27 paragraphs.

13. Mr Brown confirmed to the appeal manager that he was representing the claimant through his appeal (285). There were a number of delays which took place to the appeal hearing, but on 10 November 2020, the claimant wrote to Ms Stokle advising that before making a final submission to the appeal, he needed to submit a Freedom of Information Act request for certain information (297).

14. In that email, which was copied to Mr Brown, the claimant said:

"I am currently only looking to vacate the decision of Ms Coldrick in view of this attached submission to get back my job. If this goes to the Employment Tribunal, then I would be forced to also ask for compensation/damagers or various kinds, back pay, pensions payment etc. I do not want to stretch the case and actually want to get back to work, as it has already harmed my mental health a lot, particularly in light of Ms Coldrick's active and unreasonable delay."

15. He went on to say that *"My prayer to you, currently, is vacating the order and reinstating me. If my submissions are not satisfactory enough to vacate Ms Coldrick's decision, then I would request you to wait until the FoI information has been received by me and I have made my supplementary submission on*

it accordingly, as it would form part of the appeal before the Employment Tribunal against your decision."

16. The Appeal Meeting took place on 13 November 2020 (though the notes of that hearing stated that the date was 13 November 2019, in error)(303).

17. On 3 December 2020, Ms Stokle, having consulted Steve Moore in the respondent's Digital Group Manchester Corporate Hub, was informed that there may have been an issue with the claimant's profile requiring him to raise a "Technow incident" to ensure access was granted to an IT system, though it was impossible for Mr Moore to be more specific without more detail.

18. A reconvened Appeal Hearing took place on 8 January 2021. As before, the hearing was chaired by Linda Stokle, and the claimant was in attendance with his representative Mr Brown. Notes were produced (337ff). the letter confirming the appeal outcome was sent to the claimant on 28 January 2021 (347ff), confirming that his appeal was not upheld, and that the original decision was affirmed.

19. On 18 February 2021, the claimant wrote to Ms Stokle (360) to say that *"There is quite a bit of information missing from the notes and that is why we wanted to review them and then agree on the actual minutes as it will form part of the appeal against the appeal decision…Also, I have to apply to ACAS for reconciliation and if required to the Employment Appeal. As the appeals manager, kindly provide the details of the relevant HR person with name, phone number, email address and postal address as I need to pass it to ACAS as soon as possible."*

20. Ms Stokle replied to that email on the same date (362).

21. The claimant wished to have copies of an agreed set of minutes, but he asked the respondent for the minutes through Ms Stokle, who, in the claimant's evidence, did not provide them. As a result, the claimant decided that he required to approach ACAS without an agreed set of minutes.

22. Once the appeal process was concluded, Mr Brown advised the claimant that he had to make a claim to the Employment Tribunal, and that to do so, it was

necessary for him to contact ACAS first, notifying them on his intention to make a claim. He did so on 16 February 2021, and an Early Conciliation Certificate was issued by ACAS on 22 March 2021 (366).

23. The claimant presented his claim form to the Tribunal on 2 April 2021 (374). He submitted his claim by himself, with some assistance from Steve West, from the PCS Trade Union.

24. In the Additional Information section (385) the claimant stated that *"DWP and my then union representative provided me with the advice that I had to exhaust the internal process first and only then go to ACAS and ET. The case was severely delayed by DWP and I did not know that an appeal had to be filled (sic) earlier, irrespective of the internal process."*

25. He also stated that new evidence had come to light during the appeal process, bringing his claim within the statutory timescale. He argued that following "principles of just and equitable" no prejudice would be caused to the respondent. He said that he had acted promptly, including presenting his claim to the Tribunal once he knew he was out of time.

26. Mr Brown did not attend at this hearing to give evidence, though a letter from him was presented to the Tribunal (413) in which he said that having handled very few cases with the potential to be brought to an Employment Tribunal, and never a case involving a dismissed member of staff, he had mistakenly advised the claimant that the respondent's dismissal and appeal process had to be fully exhausted before approaching the Tribunal, and the claimant followed that incorrect advice.

27. When asked for further specification of his argument that the respondent had provided him with advice that he had to exhaust the internal process before raising a Tribunal claim, the claimant, through Mr West, responded by saying (404) on 1 September 2021 that *"The dismissal decision stated what Mr Goel's next course of action had to be if he intended to appeal the decision. He maintains that he was never informed by any DWP manager to go to the ET within 3 months of the dismissal date. He was only given one course of action to follow and followed it. DWP has a pattern of informing all customers*

about their right of appeal internally and externally. They did not properly inform him of his rights in this case. The fact is he was told specifically to go through the internal process and not the Employment Tribunal."

28. It is understood that this is a reference, made by the claimant in evidence before this Hearing, to a statement made in letters issued by the respondent to social security benefits applicants that if they are dissatisfied with the decision they may submit an appeal to the Social Security & Child Support Tribunal. The claimant acknowledged that he was not an applicant nor a customer but an employee.

29. The claimant did not seek legal advice nor did he carry out any internet research in order to establish the timescales within which Employment Tribunal claims could be presented, on the basis that he had an adviser whom he trusted, who had given him advice to the effect that he could await the outcome of the appeal process run by the respondent before he took action with regard to a Tribunal claim.

30. The claimant gave evidence to the effect that he had not sought the advice of his doctor at points following his dismissal when, he said, he felt depressed, because he believed that he may have been accused of a breach of confidence by the respondent for talking with his doctor about the circumstances of his dismissal.

Submissions

31. Both parties presented written submissions to which they spoke. I deal with the salient points made by each party in the decision section below.

The Relevant Law

32. Section 111(2) of the Employment Rights Act 1996 ("ERA") provides:

"Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section 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."

33. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

34. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not "whether the claimant knew of his or her rights, but whether he or she ought to have known of them." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

32. I also took into account **Cambridge and Peterborough NHS Foundation Trust v Crouchman [2009] ICR 306** in which the discovery of new factual information should be taken into account by the Tribunal in determining this matter. However, it is to be noted that this will only assist the claimant in circumstances where he initially believes that he has no viable claim, but changes his mind when presented with new information. In that case, the

appeal letter contained reference to crucial new facts which genuinely and reasonably led the claimant to believe that he had a viable claim.

33. **Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT** was a case in which the claimant knew of her rights and knew of the 3 month time limit when she was dismissed. However, a union official advised her incorrectly that the three months did not start to run while negotiations were taking place about her possible reinstatement. The EAT found that the claimant was not entitled to the benefit of the "escape clause" because the union official's fault was attributable to her and she could not claim that it had not been reasonably practicable to claim in time.

34. A similar decision was issued by the EAT in **Alliance & Leicester plc v Kidd EAT 0078/07**, in which the union official's erroneous advice that the claimant had to await the outcome of an internal appeal hearing before presenting a claim to the Tribunal was found to have been insufficient to excuse the late presentation of the claim.

35. Where a claimant relies on the advice of a trade union representative, and the claim is thereby time-barred, the claimant's remedy lies in a claim of negligence against the trade union (**Friend v Institution of Professional Managers and Specialists 1999 IRLR 173**).

Discussion and Decision

36. In this case, the claimant complains that he was unfairly dismissed by the respondent, and that he was unlawfully deprived of certain payments, including notice pay, holiday pay and arrears of pay.

37. The claimant's effective date of dismissal was 25 September 2020. As a result, the 3 month deadline for presenting a claim to the Tribunal would expire on 24 December 2020 (without taking account of any statutory extension permitted under the ACAS Early Conciliation Scheme).

38. The claimant presented his claim to the Tribunal in this case on 2 April 2021.

39. He had notified ACAS of his intention to claim before the Tribunal on 16 February 2021, outwith the original 3 month deadline, and accordingly he did not receive the benefit of an extension of the statutory timescale on that basis.

40. The claimant's argument before this Tribunal appeared to me to be based on four points:

- That the PCS trade union official advised him incorrectly that he required to await the outcome of the appeal process before presenting his claim to the Tribunal, advice which he followed;
- That the respondent also advised him that he required to await the outcome of the appeal process before presenting his claim to the Tribunal;
- That the respondent unreasonably delayed the disciplinary and appeal processes, thus rendering his claim out of time when he did present it; and
- That new information and evidence came up at or before the appeal hearing, which should then permit the claimant an extension of time.

41. While taking these points into account, I remain mindful of the need to consider the claimant's submissions in light of the statutory test, which requires the Tribunal to determine two points: firstly, whether it was not reasonably practicable, or reasonably feasible, for the claimant to have presented his claim within the statutory deadline; and secondly, if so, whether the claim was then presented within such time as the Tribunal considers reasonable.

42. Dealing with the four points above in turn, the first issue is whether the claimant was misled by incorrect advice by his trade union official. It appears that the claimant, as at the date of dismissal, was of the view that his dismissal was unfair – he very promptly submitted a letter confirming his intention to appeal, and then long submissions in support of that appeal – but was also aware of his right to make a claim to an Employment Tribunal. In his email of 10 November 2020 (297) the claimant plainly says "if this goes to the

Employment Tribunal", a clear statement of his understanding of his right to make such a claim, and one which he repeated on the next page of the same email.

43. What the claimant insists he did not know about was the 3 month deadline within which he had to present his claim, and, further, that he was given advice by his trade union representative that he had to await the outcome of the appeal process before presenting his claim.

44. The claimant now accepts, as does the union representative, that that advice was incorrect. (We heard no evidence from the union representative, but his statement did not seem to be challenged by the respondent).

45. The case law on this is clear. The claimant is bound by the erroneous advice given to him by the trade union representative, and it is insufficient to justify the late presentation of a claim to the Tribunal. The claimant may have a remedy against his trade union in respect of negligent advice, in breach of their duty of care towards him, but that is a separate matter to this claim before the Tribunal.

46. Accordingly, the fact that the claimant received incorrect advice does not excuse, of itself, the late presentation of his claim.

47. It should be noted that no other significant reason was put forward to explain the delay, other than the actions of the respondent, which I deal with below. The claimant accepted that he did not seek separate legal advice, nor did he take any steps to establish the legal position himself, but entirely relied upon the advice of his trade union. He also accepted that he did not attend at his doctor to seek medical treatment for the depression which he said afflicted him following his dismissal. His reason for doing so was because, he said, he did not want to be found in breach of confidence by his former employer by divulging the circumstances of his dismissal to his GP, but in my judgment, that does not explain why, if he was so unwell as to affect his ability to present a claim to the Tribunal, he did not require to seek medical assistance, and if he did so, why he would not have been free to speak about the matters which had caused his illness in general terms, but about the symptoms in particular

terms, to his medical adviser. There is therefore no basis upon which the Tribunal can find that it was not reasonably practicable for the claimant to have lodged his claim in time owing to a medical condition of such severity that it prevented him from doing so.

48. Secondly, the claimant asserted that the respondent had similarly advised him that he had to complete the internal process before lodging a claim with the Tribunal. I was very unimpressed by this claim. The claimant in evidence did not provide any evidence that anyone working for the respondent had told him that. All he said, ultimately, was that the respondent did not advise him of his right to claim before an Employment Tribunal, nor of the timescales required, but that falls very far short of evidence that the respondent actively told him that he could not make a claim until the internal process was concluded.

49. The fact that the respondent advises benefits applicants of their right to appeal against decisions to the Social Security & Child Support Tribunal does not mean that they were wrong not to tell the claimant of his right to make a claim to an Employment Tribunal. They were under no legal obligation to do so, and in my judgment it is not a criticism which can be sustained.

50. Accordingly I reject this suggestion.

51. Thirdly, the claimant argued that the respondent unreasonably delayed the internal processes which then meant that by the time the appeal process was completed, it was beyond the statutory deadline for presenting a claim to the Tribunal.

52. I found this argument difficult to grasp. The length of time taken up by the disciplinary process can have no bearing on the time limits for the Tribunal claim, since they only start to run after the conclusion of that process.

53. Similarly the length of time taken up by the appeal process seems to me to have little to do with the claimant's failure to present his claim in time. The reason he waited that long was not of itself because the respondent

prolonged the appeal process – an allegation which has not, in any event, been proved – but because he was given erroneous advice about the point at which it was necessary to present his Tribunal claim. It is clear that a significant part of any delay in the appeal process was taken up by the claimant's FoI request. That was a legitimate request by the claimant, but in requiring to deal with and answer it, it was inevitable that there would be a delay introduced into the appeal process. There is simply no evidence before the Tribunal that the respondent deliberately prolonged the internal process in order to ensure that the claim was presented out of time. They were, so far as the evidence demonstrates, unaware that the claimant had been given that advice by the trade union, and they had not given any such advice to the claimant themselves.

54. Finally, the claimant asserted that new information came to light at the time of the appeal which led him to believe that he could succeed in a claim to a Tribunal.

55. In this case, the evidence confirmed that the claimant believed, as at the date of dismissal, that he had a viable claim to the Tribunal. The terms of his appeal letter, which were formal and extensive, set out the basis upon which he believed the dismissal to be unfair.

56. Any evidence which was then uncovered in the appeal process did not, in my judgment, supply the claimant with new information which then led him to believe, for the first time, that he had a viable claim. This was information which, in my view, fortified his view that he was unfairly dismissed him, but that was a view he had already taken at the point of dismissal.

57. In any event, the point remains that the reason for the claimant's failure to present his claim in time was fundamentally that he was advised by his trade union that he had to await the outcome of the internal process before presenting his claim to Tribunal.

58. In my judgment, therefore, taking into account all of the evidence available to me, it was reasonably practicable for the claimant to have presented his claim in time. He was aware of his right to make a claim to a Tribunal, and referred

to that in his appeal letter. He had the benefit of a trade union representative, and while he received incorrect advice from him, took no steps of his own to establish the true legal position. He has to bear the burden of that incorrect advice, and if he wishes to pursue a remedy, he may be able to do so by raising proceedings against this trade union in respect of advice openly admitted to have been incorrect.

59. There was nothing preventing the claimant from presenting his claim in time. He was not so unwell that he could not communicate at some length with his former employer, and in any event he did not attend his doctor for any treatment or support, suggesting that any illness from which he was suffering was manageable, and did not of itself prevent him from taking legal action against the respondent.

60. It is therefore my judgment that the claim is time-barred, and that the Tribunal therefore lacks jurisdiction to hear the claimant's claim. The claim is therefore dismissed.

Employment Judge: **M Macleod**
Date of Judgment: **16 November 2021**
Entered in register: **18 November 2021**
and copied to parties