EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Musasizi**
Respondent:	**University Hospitals Birmingham NHS Trust Foundation**
Heard at:	**Birmingham by CVP** **On: 4 July 2022**
Before:	**Employment Judge Flood**
Appearance:	
For the Claimant:	**In person assisted by Mr Green**
For the Respondent:	**Ms Tokhai (Solicitor)**

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is **dismissed** as having been presented out of time. The claim was presented after the expiry of the statutory time limit. That time limit cannot be extended because it was reasonably practicable for the claimant to present his claim within the time limit.

REASONS

1. By a claim form presented on 19 October 2021 (early conciliation having taken place between 12 & 13 October 2021), the claimant brought a complaint of unfair dismissal (under **section 98 of the Employment Rights Act 1996 ("ERA")**.
2. The case was listed for a preliminary hearing on 16 June 2022 to consider:
    - *whether the claim was submitted outside the prescribed time limits;*
    - *whether it was reasonably practicable for the claim to be presented in time; and*
    - *if the claim was not reasonably practicable to present within the time limits whether the claim was presented within a reasonable period thereafter.*
3. The claimant gave evidence by way of his witness statement (which included an attachment and a detailed chronology); in response to cross examination and also questions from the Tribunal. I found the claimant to be honest and straightforward in his evidence. I had before a bundle of documents prepared

by the respondent ("Bundle"). I also had a chronology and skeleton argument prepared by the respondent.

4. Having finished evidence and submissions at 12.10 pm, I adjourned the hearing for a reserved decision to be made.

The Issues

5. In determining whether the claimant's complaint for unfair dismissal was presented within the time limit set out in **section 111(2)(a) & (b) of the ERA** involved considering *whether it was not reasonably practicable for a complaint to be presented within the primary time limit and if not, whether it was presented within a reasonable time thereafter*; so the issues to be determined were:

    a. What was the effective date of termination of the claimant's employment?

    b. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

    c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

    d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

The relevant law

6. The relevant legal provisions are at **section 111 (2) and (2A) of the ERA** and state that:

    "…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."

    (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

7. The authorities on this provision are clear that the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200.

8. In London Underground Ltd v Noel [1999] ICR 109 - it is not just a question of considering what was reasonable but of considering what was reasonably practicable The power to dis-apply the statutory time limit is,

    "…very restricted. In particular, it is not to be exercised, for example, 'in all the circumstances,' nor even when it is 'just and reasonable' nor even where the Tribunal 'considers that there is good reason' for doing so."

9. The onus of proving that presentation in time was not reasonably practicable lies on the claimant – Porter v Bandridge [1978]ICR 943.

10. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of Walls Meat v Khan [1979] ICR 52.

11. The issue is pre-eminently one of fact for the employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done - Palmer v Southend Council [1984] ICR 372.

Ignorance of rights

12. A claimant's ignorance of his or her rights may make it not reasonably practicable in exceptional circumstances but the claimant's ignorance must itself be reasonable. 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 – Porter v Bandridge (as above).

13. Where a claimant is generally aware of his rights, ignorance of a time limit will rarely be acceptable because if aware of rights, a claimant will generally be put on enquiry as to time limits – Trevelyans (Birmingham) Limited v Norton [1991] ICR, 488.

14. In Sodexo Health Care Services Ltd v Harmer EATA 0079/08, involved a claimant who wrongly assumed that a time limit did not start running until after the end of the appeal process. The Scottish EAT determined that it had been reasonably practicable for a complaint to be brought as the question to be determined was whether, in the circumstances, the employee was reasonably ignorant of the time limit. In Reed in Partnership Ltd v Fraine EAT 0520/10, a claimant who presented an unfair dismissal claim one day late, wrongly believing the time limit ran from the day after the effective date of termination, was found to be not reasonably ignorant of the start date of the limitation period. The EAT determined that the claimant had proceeded on a false assumption for which he had no basis and he had not been misled by the employer or any adviser and had made no enquiries.

Pursuing internal appeal proceedings

15. The existence of a contractual appeal procedures does not alter the effective date of termination – J Sainsbury Limited v Savage ICR 1, CA.

16. The existence of a pending internal appeal does not of itself sufficient to justify a finding that it was not reasonably practicable to present a claim – Bodha v Hampshire Area Health Authority (as above).

17. Special circumstances which might justify delaying presenting a claim while an appeal was ongoing include where an employee was told by the employer to delay, pending the outcome of negotiations (Owen and anor v Crown House Engineering Ltd [1973] ICR 511) and where the employer had changed the appeal procedure and misled an employee (London Borough of Hackney v Allim EAT 158/93). An employer's behaviour, in combination with an internal appeal, might be sufficient to make it not reasonably practicable for a claim to be presented, where there was a suggestion (unchallenged) that an appeal outcome had been deliberately withheld – Maddison v B&M Retail Limited ET case number 2501529/15.

18. Beasley v National Grid Electricity Transmissions UKEAT/0626/06 - Section 111(2) of the ERA 1996 imposes a harsh regime for a very important policy

reason: to ensure that the parties know where they stand within a limited time of any dispute arising; the equity of the circumstances is irrelevant. Accordingly, any prejudice (or lack of prejudice) to the respondent as a result of the delay is immaterial in deciding reasonable practicability.

19. If a Tribunal finds that it was not reasonably practicable for a claimant to present a claim within the time period, it must go on to decide whether the claim was then presented within a further reasonable period, which is a less stringent test. This is a matter of fact for the Tribunal but requires objective consideration of the factors causing delay and what period should reasonably be allowed in the circumstances – Cullinane v Balfour Beatty Engineering Services Limited EAT 0537/10. This assessment should be made against the general background of the primary time limit and the strong public interest in claims being made promptly – Nolan v Balfour Beatty Engineering Services Limited EAT 0109/11.

The relevant facts

20. The claimant had worked at the respondent since 3 October 2005, and was employed as a Charge Nurse (Band 6) working at the respondent's Heartlands Hospital in Birmingham.

21. The claimant attended a reconvened disciplinary hearing on 7 May 2021 chaired by Ms Y Murphy, Acting Director of Nursing of the respondent. The claimant was accompanied at the meeting by Mr B Greene, his friend and companion at the meeting. Mr Greene did not participate in that meeting. Mr Greene does not have any legal qualifications or experience and is a retired bus driver. The transcript of that meeting was at pages 58-60 of the Bundle. These minutes record that at the conclusion of that meeting, the claimant was informed:

"Consequently you have been summarily dismissed from your contract of employment for gross misconduct with the University Hospitals Birmingham NHS Trust with effect from today, the 7th May 2020 including all bank posts. Your contact will be terminated with immediate effect and therefore you are not entitled to any notice period. You will have the right to appeal against this decision by writing to Alison Money, Deputy Director of Workforce within 14 calendar days of the date from the letter which will follow this hearing detailing the grounds of any appeal."

The claimant agreed in cross examination that he was told on 7 May 2021 that he had been dismissed and that he could appeal against the decision within 14 calendar days of receiving a letter confirming his dismissal.

22. I find that the claimant was informed by the respondent that his employment had terminated on 7 May 2021.

23. The claimant was sent a letter dated 13 May 2021, which was sent by email (page 117-119 Bundle) which confirmed the outcome of the disciplinary meeting and stated:

"Accordingly, you will be dismissed without notice (summary dismissal) from your employment with the Trust (including all bank posts) effective from 7 May 2021. As your contract has been terminated with immediate effect, you will not be entitled to any notice pay.

You have the right to appeal against this decision by writing to Alison Money, Deputy Director of Workforce within 14 days of receiving this letter, in writing detailing the grounds of your appeal."

24. On 15 May 2021, the claimant spoke to Tina at the respondent who confirmed the "*full and correct contact details*" for Alison Money to whom the claimant was to appeal any dismissal. The claimant appealed against his dismissal by a letter dated 27 May 2021 which was sent by e mail (pages 64-69). It went on to set out detailed grounds for appeal. The claimant confirmed that he had drafted this appeal document with the assistance of Mr Green. At this stage, the claimant had not yet received the transcript of the disciplinary hearings he attended so he reserved the right to make additional submissions about his appeal. The appeal document include the following provisions:

    "I'm of the view that the decision is an unfair one. The decision is focusing; of course, on the fact that the task of the dismissing officer, in a conduct case, is to establish whether on balance it is more likely than not that the alleged conduct took place. In this regard, it is my understanding that the dismissing officer was obliged to have regard to the quality of the investigation that was conducted. Noting that the belief that was held must have been arrived at on the basis of an investigation that was reasonable, in the circumstances. In the event that fairly reasonable lines of enquiries were not pursued by the investigating officer (of course avoiding fishing expeditions) the decision officer or panel's failure to address these, will certainly undermine the reasonableness of the reliance placed on the investigating officer's report, which was tendered to the dismissing panel as part of the case advanced against me."

    and

    "I consider the fact that no or insufficient weight was given to both my years of service and the fact that I had an unblemished disciplinary record. Nowhere in the panel's decision was there any reference to my years of service and I do recall that during the actual hearing, there was no consideration of the fact that in my eighteen (18) years of working at this Hospital I have not had any disciplinary sanctions, let alone one where there is an allegation of sexual misconduct. Such a failure undermines the fairness of the decision, as the sanction used (dismissal) was not a fair one."

25. The claimant did not agree that this letter set out his grounds for appeal in 'legal language'. He told the Tribunal that he had used search engines to carry out research to put his appeal together and stated that neither he or Mr Greene understood the legal position on unfair dismissal, stating that it was a 'coincidence' that this letter set out the test for determining unfair dismissal in the Employment Tribunal. I did not accept that this was entirely accurate and find that at the point of writing his appeal, the claimant had done some research and had some awareness of the test for unfair dismissal and was able to apply this to his own factual situation in putting together his grounds for appeal.

26. The claimant was notified that his appeal hearing would take place on 5 August 2021 (see letter at pages 71-73). The claimant e mailed the respondent on 25 June 2021 asking for the second time for the notes of the disciplinary hearings (page 76). The claimant wrote again to the respondent on 6 July 2021 asking again for the transcript of the hearing and complaining about the delay in sending this to him (page 79). In this e mail he also stated:

"In the light of the foregoing and noting that my right to a fair hearing is at risk of being infringed, I am placing you on notice that if the notes are received within less than ten working days prior to the deadline for the submission by me of any further representation, I shall be compelled to seek an extension of time, and if that request is not granted or is ignored, I will be making the appropriate application to a competent court. It is therefore important that my request is treated with the necessary urgency and attention."

27. The claimant confirmed he had written this e mail again with Mr Greene's assistance with proof reading but did not accept that either he or Mr Greene had any awareness of the claimant's legal rights at this time. I accept that whilst the claimant may not have been aware of the detail of the rights he had, he at this stage did know that he could enforce his rights in court and was prepared to do so.

28. The claimant's appeal hearing was subsequently rescheduled at his request because of the delay to providing these transcripts to the claimant (see e mail exchange between the claimant and A Money at page 81). The respondent acknowledges that there was a delay in sending the transcript to the claimant. The appeal hearing was rearranged by a letter sent to the claimant on 6 August 2021 when he was informed that it would take place on 20 September 2021 (page 83).

29. It was put to the claimant in cross examination that around this time he had made it clear that he was prepared to enforce his rights in court and so it would not have been a huge leap for him to find out how to bring a claim for unfair dismissal and what time limits applied to that. The claimant said he was ready and prepared to take his case to court but that he did not know that there was a time limit. He explained that he was concentrating fighting the decision internally, as he knew if unsuccessful, he would be referred to the Nursing and Midwifery Council (NMC) which has the power to determine whether or not his fitness to practise is impaired. He also stated that he was 100% convinced that the appeal panel would overturn the decision to dismiss him because it was so unfair. He explained he was unaware of any employment cases that may have been in the press. He acknowledged that he could have searched for information on the internet but was unaware of which search terms to use. He admitted that he was aware of the term 'unfair dismissal' at this point. I accepted that the claimant did not actually know of the time limits that applied to an unfair dismissal claim at this time. The claimant did not research how to bring a claim in the Employment Tribunal. He said he was engaged with the appeal process and did not want to take legal action. He also explained that he had asked the respondent whether he could bring a legal representative to the hearings but was told he could not.

30. The claimant sent a further e mail on 7 September 2021 setting out further submissions in support of his appeal (page 85-86). The appeal hearing took place on 20 September 2021 and the claimant was informed of the outcome of the appeal by a letter dated 29 September 2021 (page 87-88) which he received on 1 October 2021. After he received his appeal outcome the claimant made contact with a legal advisor 11 October 2021 and was then informed about his rights to bring a claim to the Employment Tribunal and that there were time limits. The claimant started his period of early conciliation on 12 October 2021 and this ended on 13 October 2021 when his early conciliation certificate was issued (page 2). He presented his claim on 19 October 2021 (pages 3-19).

He said he completed the claim form himself and at this stage he had some assistance from his legal advisor, Mr Mukulu.

31. The claimant was sent a letter from the Tribunal acknowledging his claim on 9 November 2021 (page 43) and was asked by Legal Officer Metcalf to explain "*why it was not reasonably practicable for him to have filed his claim by 12/8/2021 and why he did not approach ACAS for early conciliation until 12/10/21*" . The claimant responded on 11 November 2021 explaining that he was out of the country attending his mother's funeral (page 44). He sent an e mail on 23 November 2021 attaching a full response to this question. This was not in the Bundle but was attached to the claimant's written witness statement. In this he explained that having been given a right of appeal he requested the transcript of the disciplinary hearings in order to prepare for it and when this was not provided, the first appeal hearing was postponed. He explained that the hearing took place on 20 September 2021 and an outcome was provided on 1 October 2021. He went on to state:

    "I therefore, in anticipation of the NMC referral, consulted with an advisor who informed that whilst I had to await the Respondent's referral to the NMC, I never had to await the outcome of the internal appeal before going to the Tribunal. It was at this time that I found out about Acas and thus flowing from this, I proceeded to file the complaint with Acas and then the claim to the Tribunal.

    Therefore, I honestly held the View that I had to await the outcome of the appeal in the same way that I had to await its conclusion to hear from the NMC. Once the true position was revealed and I was informed of Acas I made the application in reasonable time."

32. He sent a further e mail on 6 June 2022 in which he stated that: "*even if the view is taken that the claim is out of time, there is a statutory discretion given to the Employment Tribunal, and I am obliged to rely on this legal fact if the Employment Tribunal takes the view that the claim is out of time. This is a matter that the Employment Tribunal can address either at a preliminary hearing or the start of the substantive hearing."*

33. The claim form was initially served on the respondent on or around 9 November 2021 and was subsequently re-served on the respondent on 10 February 2022 (at the direction of Legal Officer Metcalf) at the address at Queen Elizabeth Hospital, because "*service at the address provided by the Claimant is unlikely to come to the attention of the Respondent*" (page 45-46). The respondent submitted its response to the Tribunal on 28 February 2022 (page 20-42). The respondent's application for an extension of time to submit its response was granted by a letter from the Tribunal dated 18 March 2022 (page 51). In this letter Legal Officer Avtar Singh, confirmed that the Tribunal had "*extended the time within which to present a response until the 28th February 2022. The application to extend is granted as it is in the interest of justice and in accordance with the overriding objective to do so. The respondent has provided compelling reasons, the claimant will be prejudiced by the delay and has not raised any objections to the application."*

    The matter was listed for an open preliminary hearing on 16 June 2022 to determine the above issues which came before me today. Having finished the evidence and heard submissions from both parties by just afer 12.10, I adjourned the hearing for a reserved decision to be made as there was insufficient time for an oral decision to be made that day.

Conclusion

34. I have approached each of the issues identified above in turn and my conclusions on each are set out below

a. What was the effective date of termination of the claimant's employment?

35. I conclude that the claimant's employment terminated on 7 May 2021 when he was informed at the disciplinary meeting that he had been dismissed with immediate effect (see para 21 and 22 above). The words used by the dismissing officer at the meeting on that day as recorded in the transcript of that hearing were unambiguous and can be taken at face value. The claimant's suggestion that because he was also told that he had the right to appeal within 14 days of receiving the written confirmation of this (which was received on 13 May 2021) that this then meant the dismissal had not taken effect does not change the context or meaning of the clear words used and communicated to him. The legal authority referred to at paragraph 15 above makes it clear that the existence of an appeal does not change the effective date of termination. The subsequent written communication confirmed this decision which was that employment was terminated with effect from 7 May 2021.

b. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

36. The claimant should have commenced early conciliation by 6 August 2021 (three months less one day later) in order to take advantage of the extension of time provisions in respect of early conciliation (para 6 above). It was not commenced until 12 October 2021 and the claim was not presented until 18 October 2021. The claim was therefore made 10 weeks and 3 days out of time and was not made within three months of the effective date of termination.

c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

37. The claimant has the burden of proof in showing that it was not reasonably practicable for his claim to have been presented in time (see para 9 above). His submission on this is firstly that he was unaware of the process for enforcing his employment rights and the time limits that applied pointing out that he did not have any legal representation until 11 October 2021. He contended that it was only after he received his appeal outcome that he received legal advice and after that he acted promptly in contacting ACAS and subsequently presenting his claim. He contended that the respondent had a duty of care to have carried out the process without delay and it was the delays in holding the appeal that ultimately led to his claim being out of time. He suggested that this was a deliberate delaying tactic so that he would then be out of time to bring a Tribunal claim. He explained that he was operating on the assumption that his appeal would be successful and so there was no need to seek redress until the outcome was clear and he was then shocked that his appeal was not upheld. He also pointed out that the respondent was given an extension of time to submit its response and so in the interests of justice and fairness, he should be given the same.

38. Ms Tokhai for the respondent points to the fact that the claimant had the ability (with the assistance of the internet and Mr Greene) to investigate his rights and how to enforce them (including the applicable time limits). She contends that the claimant's appeal submitted on 27 May 2021 demonstrates that he had

awareness of his rights using legal terminology and referring to the legal test for unfair dismissal. She stated that the claimant was aware he could enforce his rights in court and was prepared to do so. It is contended that as the claimant was asserting he had been unfairly dismissed and was concerned about a NMC referral, it would not have been a huge leap for the claimant to find out how to bring a claim by searching online and very quickly accessing the Government website, ACAS and Citizens Advice. The respondent contends that although there was a delay in the appeal, the claimant was not misled or deceived about his rights by the respondent and even if he did not know of his rights (including time limits applicable and the effect of an internal appeal) he ought to have known of these.

39. I have considered carefully all that the claimant has said but on balance I prefer the submissions of the respondent on this point. Although I was content that the claimant did not know of the time limits that were applicable in order to present an Employment Tribunal claim (see paras 27 and 29 above), I do not conclude that this was reasonable in these particular circumstances, following the guidance of the case of Porter v Bandridge set out at para 12 above. The claimant had the ability to conduct research on the internet (with the assistance of Mr Greene if necessary) to find out the position about how he could enforce his rights not to be unfairly dismissed. The claimant had done some research and having done so, became aware that he could make a legal complaint that his dismissal was unfair, and so was put on enquiry as to how to pursue that complaint, including any applicable time limits (see Trevelyans (Birmingham) Limited v Norton at para 13 above). Had the claimant carried out reasonable investigation, he could have quickly determined what was required to be done and by when. He could reasonably have found out that the pursuance of an internal appeal (although of course entirely within his rights and a reasonable step to take) did not mean he was absolved of the need to act promptly and to start proceedings within the relevant time limits. The claimant is intelligent and articulate and had the support of a friend throughout the process. Whilst neither was legal qualified or could be expected to necessarily possess legal knowledge, the appeal letters written by the claimant were clear, and challenged the decision to dismiss him on the basis that his dismissal was unfair. Research was undertaken by the claimant (perhaps with Mr Greene) to put together his challenge to dismissal contained in the appeal which was submitted shortly after that dismissal. It is also reasonable in my view for the claimant to have also continued that research to find out the basic information about how to enforce his rights not to be unfairly dismissed in the Tribunal and what time limits applied. This particular claimant was therefore not reasonably ignorant of the time limit in the circumstances, and I accept the respondent's contention that given the knowledge he did have, it would not have been a great leap to find out further the time limit that applied to his claim.

40. I did not find any evidence to suggest that the respondent misled or deliberately delayed the appeal process in order to scupper the claimant's ability to bring a claim. The delay in resolving matters was unfortunate but was primarily because of the delay in the production of the transcript. I make no criticism of the claimant for wanting to see this before the appeal, but neither can I find that any delay in producing this was deliberate or designed to mislead or scupper the claim. There is no basis to suggest that an employer is under a duty to advise its employees of how to enforce their employment rights against it. I also understand the claimant's frustration and sense of unfairness that the

respondent was permitted by the Employment Tribunal to present its response to the claim he presented outside the 28 day limit, but the same flexibility cannot apply to him. However these are entirely different questions in law. Whether or not to permit a response to be presented outside the specified time limit is dealt with under the Employment Tribunal Rules of Procedure if an application is made under rule 20 of those rules. That question is primarily decided by taking into account the overriding objective set out at rule 2 and all relevant factors, including prejudice to the parties. As set out in the authorities above, whether or not a claim is presented in time is a matter of the Tribunal's jurisdiction under the ERA. Any prejudice or lack of prejudice to the respondent is immaterial to the test of deciding reasonable practicability (see para 18).

41. I have sympathy for the claimant who has lost his employment after many loyal years of service and is now unable to test whether that dismissal was unfair in the Tribunal. However I have to conclude that it was reasonably practicable for the claimant to have issued his claim in time. The claimant's lack of knowledge of the time limits applicable to presenting a claim for unfair dismissal is not sufficient to meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as unfair dismissal have a particularly strict time limit with limited room for manoeuvre.

42. I do not therefore need to consider the second arm of the test as to whether the claim was presented within such further time period as was reasonable. The claimant's claim for unfair dismissal is dismissed.

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Employment Judge Flood

5 July 2022