



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4101667/2023 Preliminary Hearing by Cloud Video Platform (CVP)
at Edinburgh on 3 May 2023**

Employment Judge: M A Macleod

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Charlie Roxburgh

**Claimant
In Person**

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Sodexo Limited

**Respondent
Represented by
Mr D James
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The Judgment of the Employment Tribunal is that the claimant's claim is
30 dismissed for want of jurisdiction, being time-barred.**

REASONS

1. The claimant presented a claim to the Employment Tribunal on 11 February
35 2023 in which he complained that he was unfairly dismissed by the
respondent.

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

3. In their ET3 the respondent argued that the claim was presented out of time. The Tribunal therefore listed a Preliminary Hearing to take place by CVP on 3 May 2023 in order to determine that matter.
4. The claimant appeared on his own account, and Mr James, advocate,
5 appeared for the respondent.
5. At the outset of the Hearing, the claimant confirmed that he understood its purpose. The Notice of Hearing inviting parties to the Hearing had not specified the particular issue to be determined, but prior correspondence had made clear to the parties why the Hearing was being convened.
- 10 6. The claimant gave evidence on his own behalf. The respondent called John David Morrison, Head of Operations, as a witness.
7. An electronic joint bundle of documents was produced to the Tribunal.
8. Based on the evidence led, the Tribunal was able to make the following findings in fact.

15 ***Findings in Fact***

9. The claimant commenced employment at Her Majesty's Prison Addiewell (the prison) on 20 November 2009, as a Prison Custody Officer, with Kaylex Ltd. He continued to work there until 2017, when he was promoted to Senior Prison Custody Officer. His employment transferred to the respondent when
20 they took over the contract to manage the prison.
10. On 1 April 2022, the claimant was asked to attend the office of John Morrison, Head of Operations. Hazel Dowlin, Business Manager, was in attendance at the office when he arrived, along with Mr Morrison.
11. At the end of the meeting, the claimant was advised that he was suspended
25 on full pay pending a disciplinary investigation.
12. The disciplinary hearing which followed took place on Thursday 1 September 2022. The claimant attended at the hearing with his trade union representative, Pearl Abernethy. The hearing was chaired by John

Morrison. The investigating manager, Lilian Morrison, presented her investigation report to the hearing.

5 13. At the end of the hearing, Mr Morrison said that he would take the evening and a few days to consider the evidence and let the claimant know his decision. The claimant was anxious to hear the outcome of the hearing as he was due to fly out of the country on the following Tuesday, 6 September 2022, to be married, and asked Mr Morrison if he could let him know his decision sooner than he was suggesting.

10 14. The notes of the disciplinary hearing, at p152 of the bundle, confirmed that Ms Abernethy asked Mr Morrison to take and issue the decision as quickly as possible due to the stress and strain which the claimant was suffering as a result of the process. Mr Morrison concluded the meeting by affirming that he would consider the matter overnight and it would not be until the following day that he would be in touch with the claimant.

15 15. Mr Morrison did contact the claimant by telephone on 2 September 2022, at approximately 4.45pm. He confirmed that having read through the notes and the evidence, he had come to the decision that he would be upholding the investigation, and that the outcome would be that the claimant would be dismissed. He confirmed that the outcome was summary dismissal. He said
20 he would forward the paperwork the following week.

16. The claimant was devastated by the decision, which he described as a "bombshell". He did not recall Mr Morrison having said anything about notice to be given to him on termination of employment.

25 17. He received the letter of dismissal on 4 October 2022. The letter was dated 3 October 2022 (155). In it, Mr Morrison stated that *"As advised to you verbally via a telephone call on 2nd September 2022 my decision was to summarily dismiss you from the Company."*

18. He then set out the allegations which he had been considering, and confirmed that he upheld both of them

30 19. He went on to say:

"I believe that each allegation above amounts to gross misconduct and the appropriate sanction is summary dismissal, which results in the termination of your employment with Sodexo without notice.

Your date of termination, and therefore your final date of employment with Sodexo, was 02 September 2022."

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20. The claimant's evidence was that Pearl Abernethy and Jason Wylie from the trade union had given him advice to the effect that dismissal would take effect from the date of the letter, that is, 3 October 2022. He produced a letter dated 28 November 2022 from his trade union (176A), in which it was stated:

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"The dismissal would take effect from the date the decision was received by the member, in this case 3.10.2022."

21. Further, under the heading "Unauthorised deduction from salary", it was stated: *"The member states they received the dismissal letter on 3.10.2022. if the dismissal letter was sent around this date, then the members would not be dismissed until their received their dismissal letters.*

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This would mean they should be entitled to salary from 2.9.2022 to 3.10.2022."

22. The claimant then submitted an appeal against dismissal by handwritten letter dated 7 October 2022, having received the letter "which gives details of my dismissal" (160).

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23. The appeal hearing took place on 15 November 2022, chaired by John Joyce. Following the hearing, Mr Joyce telephoned the claimant on Friday 18 November, to confirm the outcome of the appeal, and then wrote to the claimant on 13 December 2022 (177) to advise that he had decided to uphold the original decision, of summary dismissal. What he actually said was *"Having fully considered the grounds of your appeal and the points raised by you and your representative at the appeal hearing, it has been decided to uphold the original decision following the Summery (sic) Dismissal on 03 October 2022. "*

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24. It was the claimant's evidence that he did not receive the notes of the appeal hearing (162ff) nor his P45 when they were sent to him, though this may have been because he moved house. He also said that he did not receive the letter by Mr Joyce confirming the appeal hearing outcome.

5 25. The claimant described finding out about the outcome of the appeal as a "bombshell". He accepted that he said a number of things to Mr Joyce on the telephone which he should not have said, but his evidence was that this was a life-changing event for him, which left him in total disbelief given the circumstances.

10 26. He saw the letter, and the minutes of the appeal hearing, for the first time when he received the joint bundle of documents.

15 27. The claimant contacted ACAS on 30 December 2022. The reason he did so was in order to give notice of his intention to claim unfair dismissal. He said that there were 2 Early Conciliation Certificates, as the trade union had advised him to pursue a claim for unlawful deductions from wages as well. The Tribunal has only had sight of one Early Conciliation Certificate (1). The Certificate was issued to the claimant by email on 12 January 2023.

20 28. The claimant said that he initially contacted ACAS in late November, and that they had sent links to him so that he could follow them. He said that they strongly encouraged him to seek to exhaust all internal avenues before taking the step of raising proceedings.

25 29. When he was dismissed, he had limited knowledge of the Employment Tribunal. He understood that until he had received a formal communication in black and white from Mr Morrison, he could not take up a case with the Tribunal, notwithstanding that Mr Morrison had informed him earlier than that by telephone what the outcome of the disciplinary process was. Friends and family with whom he had spoken had "generally seen things" in that way. His union representative confirmed to him that the date of his dismissal was 3 October 2022. At that point he did not know what the time limits for presenting a claim to the Tribunal were.

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30. The claimant did contact Ms Abernethy following his dismissal, in order to seek advice as to what he should do next. Her response was that it would be necessary to consult the trade union's solicitors in order to determine the next step.
- 5 31. He felt that throughout the internal process his trade union had led him to believe that he would not be dismissed. He sought advice from Ms Abernethy as to whether or not he could challenge the decision at an Employment Tribunal if the appeal failed, and received a positive reply.
- 10 32. The claimant said that ACAS told him, in December 2022, that he had to submit his claim within three months less one day. When he received the trade union's email on 16 January 2023, he realised that they may have given him incorrect advice about the date of his dismissal. His evidence was that if he had known that his date of dismissal was 2 September, he would have put everything in place to ensure that his claim was presented within 3 months less one day.
- 15 33. The claimant's evidence was that the trade union had advised him that he would not require to present a Tribunal claim as his appeal would be successful.
- 20 34. He said that his "head was all over the place" after his dismissal. The respondent had taken 6 months to dismiss him over a packet of crisps, as he put it, and now he found that they were challenging him about being late lodging his Tribunal claim.
- 25 35. Before he was dismissed, the claimant attended his GP. He was prescribed antidepressants in July 2022. He remains on antidepressants to the date of this Hearing. He said that "some days are better than others", as he feels that he has let people down, and that sometimes he questions whether "it would be easier if I was not here". The dismissal has taken a considerable toll on his marriage, having married his wife in New York in the week following his dismissal. He maintained that his illness has had a huge impact on his ability to present his case. He has been treated unfairly by the respondent. He regularly asks himself what the point is, in having given 14
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years' service to the respondent and having been dismissed without regard to that.

36. Following his dismissal, he started looking for new jobs within a matter of 2 weeks or so. He was able to obtain fresh employment at Tesco. He has had a number of other interviews - approximately 6 to 10 - following applications to other employers.

Submissions

37. Mr James, for the respondent, presented a submission on behalf of his clients. Essentially, his submission was that the claimant's effective date of termination in this case was 2 September 2022; that the claim was presented outwith the primary time limit; that it was reasonably practicable for the claimant to have presented his claim within the statutory time limit; and that if it was not reasonably practicable to have done so, the claim was not then presented within such further time as the Tribunal should regard as reasonable.

38. The claimant submitted that he relied upon the advice from his trade union, and that if he had known he had to submit his claim earlier, he would have done so. The respondent was guilty of a number of failures in process and protocol, which led to the claimant being in the position he was in now. The respondent does not wish this case to go to a hearing on unfair dismissal because of what would be uncovered by that.

The Relevant Law

39. Section 111(2) of the Employment Rights Act 1996 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. "*

40. 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**).
41. 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 **Trevelyan (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.
42. **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.
43. A similar decision was issued by the EAT in **Alliance & Leicester pic 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.

44. 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**).

5 **Discussion and Decision**

45. There are, as Mr James observed, 3 issues for the Tribunal in this Hearing:

1. **What was the claimant's effective date of termination?**
2. **Was it not reasonably practicable for the claimant to present his claim within the statutory time limit?**
- 10 3. **If not, was the claim presented within such further time as the Tribunal considered to be reasonable?**

46. I take these issues in turn.

Effective date of termination

15 47. It is not in dispute that the dismissal in this case was dismissal without notice. Section 97(1)(b) of the Employment Rights Act 1996 provides that where a contract of employment is terminated without notice, the effective date of termination is the date on which the termination takes effect.

20 48. In this case, the claimant sought to argue that his understanding, at the time of his employment ending, was that he would not be dismissed until he had received the formal paperwork. That did not happen until 4 October 2022, when he received the dismissal letter.

25 49. However, the respondent's position was that the claimant was informed verbally, by telephone, that he was summarily dismissed by Mr Morrison, on the afternoon of 2 September 2022, and that that was the date upon which he was aware that he had been dismissed. That was the date which was subsequently confirmed to be the claimant's date of termination in the letter of 4 October 2022. The claimant accepted that Mr Morrison told him on the

afternoon of 2 September 2022 that he had decided to dismiss him summarily.

50. In my judgment, the date upon which the claimant was informed, and was therefore aware, that he had been dismissed was unambiguously 2 September 2022. Mr Morrison told him on that date that his employment was ending immediately, and in his letter of 4 October 2022 confirmed that that was the date of termination.

51. It is not clear why the claimant's advisers told him that he would not be dismissed until he received a letter from the respondent. The claimant did not return to work after his phone call from Mr Morrison, nor was he paid. It was, or should have been, clear to him that his employment ended on 2 September, and if there was any lingering doubt in his mind about it, that should have been allayed by the letter of 4 October 2022.

52. It does the respondent little credit that it took them more than a month to write the letter of dismissal to the claimant, but there is no evidence that his dismissal was in some way delayed after he was informed of it on 2 September 2022.

53. Accordingly, it is my finding that the claimant's effective date of termination was 2 September 2022.

20 ***Reasonable practicability***

54. The claimant, on the basis that his employment ended on 2 September 2022, should have presented his claim to the Tribunal by no later than 1 December 2022. He did not do so until 11 February 2023. Further, he did not stand to benefit from any extension of time based on the ACAS Early Conciliation procedure, since he did not notify ACAS of his intention to claim until 30 December 2022, outwith the 3 months statutory time limit.

55. The claim was therefore presented approximately 2 months late.

56. Was it not reasonably practicable for the claimant to have presented his claim in time? The authorities suggest an alternative formulation, namely

whether it was reasonably feasible for the claimant to have presented his claim in time.

57. In this case, the claimant was plainly receiving treatment for anxiety and/or depression, in the form of antidepressants, a course of which he had begun in July 2022. However, he did not suggest that he was unable to communicate with the Tribunal during the 3 months after his dismissal due to his illness. He said that he had good days and bad days, but it is clear that during his good days he was able to contact his trade union to seek advice, discuss with them the prospects for his claim and communicate regularly with Ms Abernethy. In addition, he was able to submit an appeal against his dismissal, and attend the appeal hearing.

58. The claimant's primary explanation for the late lodging of his claim, as it seems to me, is that the trade union advised him that (1) his effective date of termination was 4 October 2022, namely the date upon which he received the letter of dismissal; and (2) he had to await the outcome of his appeal against dismissal before submitting his claim. Both of these pieces of advice were incorrect.

59. Essentially, the claimant's position is not that it was not reasonably practicable or feasible for him to present his claim in time in this case, but that he did not do so simply on the advice of his trade union. He says now that he could have presented his claim in time if he had been given the correct advice on these two points. My conclusion on this point is that this is less than clear. If he had been advised that his date of dismissal was in fact 2 September 2022, and that he should not await the outcome of his appeal before submitting a claim, it is possible that he would have submitted a claim in time, but it is unclear whether or not he would have known about the statutory time limit at that stage anyway. He did not, he says, become aware that there was a time limit for presenting a Tribunal claim until he spoke to ACAS in December 2022. Further, even once he became aware of the outcome of his appeal, he took a considerable time to present his claim to the Tribunal thereafter.

60. It is also clear, from the authorities, that the fact that he was given incorrect advice by his trade union does not mean that it was not reasonably practicable for him to have presented his claim in time; the claimant could, if he so chose, seek redress against his trade union in relation to the incorrect advice which he was given, thus granting him the possibility of an alternative remedy for the failure of his claim before the Tribunal.

61. In short, the claimant could feasibly have presented his claim in time, but did not.

62. It is therefore my conclusion that it was reasonably practicable for the claimant to have presented his claim within the statutory time limit, but that he did not do so. As a result, I am bound to conclude that the Tribunal lacks jurisdiction to hear this case, and accordingly it must be dismissed.

63. I appreciate that the claimant will be very frustrated with this outcome. He plainly nurtures a strong sense of unfairness about the way in which he was treated by the respondent in their making the decision to dismiss. However, the test which the law requires the Tribunal to adopt in these circumstances is a high test for a claimant to overcome, and it is my judgment that the claimant in this case has failed to do so.

Further Reasonable Time

64. Given that I have found that it was reasonably practicable for the claimant to have presented his claim in time, there is no requirement for me to address the question of whether the claim was thereafter presented within such further time as I might regard as reasonable.

25 **Employment Judge: M Macleod**
Date of Judgment: 26 May 2023
Entered in register: 26 May 2023
and copied to parties