



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Furlong

**Respondent:** IBM UK Ltd

**Heard at:** Watford

**On:** 30 November 2023

**Before:** Employment Judge Bansal

**Representation**

**Claimant:** Mr R Magara (Solicitor)

**Respondent:** Mr J Platts-Mills (Counsel)

## RESERVED JUDGMENT

The Claimant's claims for breach of contract; holiday pay and disability discrimination are dismissed as they were brought out of time. Accordingly, the Tribunal does not have jurisdiction to consider the claims.

## REASONS

1. The claimant presented his Claim Form making claims of breach of contract, unlawful deduction of wages; unpaid holiday pay and disability discrimination on 9 November 2022. The claimant engaged with ACAS on 30 August 2022 (Day A), and was issued with an Early Conciliation Certificate on 11 October 2022. (Day B). According to the claimant, his effective date of termination was on 3 June 2022, whereas the respondent contends it was on 28 May 2022.
2. The respondent resists the claims, and in particular contends the Tribunal does not have jurisdiction to hear the claims, as these have been presented out of time as the primary limitation period to present the claims expired on 28 August 2022.
3. By Notice of Hearing dated 27 January 2023, this claim was first listed for a Preliminary Hearing on 15 May 2023, "*To consider if the claim may proceed as it may have been brought out of time.*" This hearing was postponed and re-listed for 25 September 2023, and then re-listed for this hearing.
4. By a Case Management Order dated 27 January 2023, the claimant was ordered to give disclosure of his medical evidence and serve an impact statement relating to his impairment of autism and ADHD. At the date of this hearing, the claimant has failed to comply with the Order, and neither has he particularised his disability discrimination claim.

5. For this hearing I was presented with an bundle of documents of 124 pages prepared by the respondent, and witness statements from the claimant, and Mrs Jayne Alexandra Patel for the respondent. Both witnesses gave oral evidence and were cross examined. I also asked questions of the witnesses for clarification purposes. Both representatives presented their written submissions which they expanded orally.

**Findings of fact**

6. From the evidence I heard and considered, I make the following findings of fact.
7. The respondent provides IT, technology, hardware, software, new business solutions and services. The claimant commenced his employment with the respondent on 6 February 2020 as a Software Sales Specialist in the Security business unit. The claimant was a band 9 employee; was paid monthly and based at IBM Feltham.
8. The claimant's terms of employment were subject to the terms sets out in his Contract of Employment signed on 7 February 2020, and the Employee Handbook. In particular, the Handbook requires that employees who are paid monthly, must give one month's notice of termination. There is no requirement to give this notice in writing.
9. The claimant's principal line manager was Dave Walsh, Vice President, IBM Security UK and Ireland. During the period between February and June 2022, Dave Walsh was absent from work, and in his absence Mrs Patel, (Principal Security Sales manager) who is based at IBM Warwick was appointed as the claimant's Line Manager on an interim basis. Mrs Patel's contact with the claimant was by email, IBM's instant messaging service (Slack) and telephone calls.
10. During the period of February to early March 2022, the claimant raised issues concerning the Incentive Scheme relating to his accounts, from which he decided to withdraw. Also during March 2022, the claimant raised issues regarding underpayment of sickness pay, his salary & commission, and non-payment of his expenses claim. These were not resolved to his satisfaction. Also by April 2022, the claimant had received 3 new job offers, two of which were from competitors of the respondent. In fact, the claimant began his new employment on 6 June 2022.
11. On Thursday 28th April 2022 the claimant called Mrs Patel from his mobile to her mobile. According to the claimant this call was made between 5-6pm. Mrs Patel was unable to confirm the timing of the call, but recalled it lasted some 5-10 minutes. This call was not recorded and no contemporaneous note of the discussions held was made either of them.
12. The claimant's evidence was that in this conversation he explained the issues about his pay, commission and expenses; that he had 3 job offers which he was considering, and said that he was "intending to resign". He accepted that Mrs Patel informed him that he had been approved for an exception pay rise of 2% effective from 1<sup>st</sup> May 2022. He responded by saying he would consider his position and confirm once decided. In cross examination, the claimant was adamant that he did not say he is or was resigning but said he was intending to resign.

13. The claimant confirmed, that shortly after this call, he wrote his resignation letter and his email to Mrs Patel, which he saved in his draft folder whilst he was considering his decision.
14. Mrs Patel's recollection of their conversation was that the claimant mentioned he had not received a pay rise which he was unhappy about, and that he had received better job offers offering him a higher salary than his current salary with the potential to earn more monies than in his current role. She had no recollection of talk about issues with any underpayment of monies. Although, Mrs Patel was unable to recall the exact words spoken by the claimant, her evidence was, *"he was very matter of fact about it – he voluntarily and freely submitted his resignation to me on that call, and that at the end of the call, I asked Neil to provide me with written confirmation of his resignation"* In cross examination, she answered, *"the claimant advised he is resigning. It is not my interpretation that he was intending to resign. I followed this up by my email that evening."*
15. That same evening, Mrs Patel, at 21.04pm sent an email to the claimant, in which she states, *"Hi Neil, Many thanks for your call this afternoon. I want to acknowledge that verbally you have provided me with your resignation as of today. I have requested that you put this into writing. As discussed please let me know on Tuesday which offer you choose to accept so we can determine if gardening leave is deemed appropriate...."* In cross examination she confirmed she requested written confirmation from the claimant so it could not be misconstrued that he had resigned, and that it was best to have written confirmation. In reply to my question why she needed written confirmation given that there is no contractual requirement for the resignation notice to be made in writing, the claimant replied, *"I wanted to document the conversation I had on that day"*.
16. On Tuesday 3rd May 2022 at 11.38pm, the claimant sent his email (that he said was saved in his draft folder) to Mrs Patel, and copied to Dave Walsh and Louise Turner (HR Partner for the respondent) which reads, *"Jane, This does not appear to have gone on Thursday night. I have just re-attached the letter also. Thanks for the conversation earlier please see attached letter....."*
17. The letter referred to is the Claimant's resignation letter, which the claimant pointed out was incorrectly dated 18<sup>th</sup> April 2022 as it should have been dated 28<sup>th</sup> April 2022. The relevant part of this letter states, *"Dear Jane, Please accept this letter as my notice of resignation from IBM and my current role at Security Client Executive... ..... as such I am reluctantly "throwing the towel in" and resigning, I feel beaten by the IBM system.."* Mrs Patel replied to this email and letter on Wednesday 4th May 2022 at 20.09pm, stating, *"Dear Neil, Many thanks for following up the verbal resignation with written confirmation. We wish you will on your next endeavour. As per the telephone tag yesterday and slack today can you please confirm which company you are going to so we can determine we require to put you on gardening leave.... "*
18. Following this there was an exchange of emails with Louise Turner concerning the claimant's termination date. The respondent initially calculated the termination date to be 18<sup>th</sup> May 2022 based on the date of the resignation letter being 18<sup>th</sup> April 2022. By email dated 24<sup>th</sup> May 2022, Louise Turner explained to the claimant the reason for calculating the leave date as 18<sup>th</sup> May 2022, and confirmed the leave date was now changed to 28<sup>th</sup> May 2022 on the understanding he did not give Mrs Patel this resignation letter until 28<sup>th</sup> April 2022.

19. In reply to this email, the claimant stated about his resignation as follows, *“I resigned in writing by e-mail, which you were copied in on May 3rd 2022 not 28th April. So my leave date should be June 3rd and I should be paid and be entitled to my benefits and protections until that date... ..”*
20. The claimant’s P45 is dated 29th June 2022. It confirms the termination date as 28th May 2022. There is no dispute the claimant was paid up to this date of 28<sup>th</sup> May 2022.
21. On 30 August 2022 the claimant contacted ACAS for early conciliation. The Early Conciliation Certificate was issued on 11 October 2022, and the claim was presented on 9 November 2022.
22. In evidence the claimant, confirmed the following;
  - (i) following his resignation he sought legal advice from a telephone based legal helpline; the Citizen Advice Bureau and ACAS, whose guidance he followed;
  - (ii) he became aware of the time limit to issue a claim to an employment tribunal sometime in late July 2022;
  - (iii) he did not inform ACAS of the conversation with Mrs Patel of 28 April 2022 and the emails with Louise Turner concerning the difference in view of his effective date of termination.
  - (iv) he told ACAS that he gave written notice of resignation by email/letter sent on 3 May 2022, and that as he was required to give one month’s notice, his last date of employment was 3 June 2022.
  - (v) he accepted there was nothing preventing him from contacting ACAS before 30 August 2022, and also presenting his claim earlier than he did.

### **The Factual & Legal Issues.**

23. At the outset of the hearing, I clarified the factual and legal issues I have to determine. Both representatives agreed that, first I must determine the effective date of termination. If I find the effective date of termination was 3 June 2022, then the claim has been presented in time. If, however, I determine the effective date of termination to be 28 May 2022, then the claim has been presented out of time, and thus I have to give consideration to, whether it was not reasonably practicable for the complaint to be presented within the applicable time limits and/or whether it is just and equitable to extend time.

### **The Law**

#### **Effective date of termination -Section 97 Employment Rights Act 1996**

24. Section 97(1) Subject to the following provisions of this section in this part “the effective date of termination” –
  - (a) *in relation to an employee whose contract of employment is terminated by notice whether given by his employer or by the employee, means the date on which the notice expires.*
25. The effective date of termination has to be determined in accordance with the statutory definition. The belief of either party as to the correct termination date is not binding on an employment tribunal.

26. In the case of *Fitzgerald v University of Kent at Canterbury 20024 ICR 737 CA*, the Court of Appeal held that the effective date of termination of employment was a statutory construct which depended upon what had happened between the parties over time and not on what they might or might not agree to treat as having happened.

Applicable time limits

27. Subsection 18A(1) of the Employment Tribunals Act 1996 provides that, *“Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter”*. S18A(8) provides *“A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).”*
28. Section 207B Employment Rights Act 1996 describes how time limits are affected by early conciliation. In summary;
- (i) where early conciliation commences after the time limit has expired then the time limit is not extended (see Para 29 below);
  - (ii) where early conciliation commences before the time limit expires then the claimant will have at least a calendar month from the end of the conciliation (“Day B”) to present the claim;
  - (iii) in some cases they might have longer than one month from Day B (the period from the day after cancellation starts until Day B is ignored when calculating the time limit).
29. The extension provisions do not apply if by the time the claimant contacts ACAS to request early conciliation the three-month period has already expired. It is too late. *In Pearce v Bank of America Merrill Lynch and others UKEAT/0067/19/LA* it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.
30. Article 7(a) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994/1623 provides an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented, (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or, (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such period as the tribunal considers reasonable.
31. Section 23(2) of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which reduction was made. Section 23(4) provides that where an employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
32. Regulation 30(2) of the Working Time Regulations 1998 provides an employment tribunal shall not consider a complaint under this regulation unless it is presented a

before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or as the case may be, the payment should have been made. ; and (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 of three months.

33. Section 123(1)(a) of the Equality Act 2010 provides that proceedings on a complaint within section 120 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.

Reasonable Practicability

34. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact reasonably practicable or not. The onus of proving 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 on time – **Porter v Banbridge Ltd 1978 ICR 943 CA.** When doing so, the phrase “not reasonably practicable” should be given a liberal interpretation in favour of the claimant. (**Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520.**)

35. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances.

The just and equitable test

36. The “just and equitable test” is a broader test than the reasonably practicable test under the Employment Rights Act 1996. The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time. The Tribunal’s discretion is broad and it can only be challenged where it is wrongly exercised or perverse.

37. In the Court of Appeal case of **Robertson v Bexley Community Centre (2003) IRLR 434. Auld LJ** said, “ *The tribunal, when considering the exercise of its discretion has a wide ambit within which to reach a decision. .... It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against the tribunal’s refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.*”

38. In the case of **British Coal Corporation v Keeble (1997) IRLR 336 EAT,** it was suggested that in exercising its discretion the tribunal might be assisted by the factors

mentioned in section 33 of the Limitation Act 1980. Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, in particular the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; whether the parties sued had cooperated with any requests for information; the promptness with which the claimant acted once he knew or she knew the facts giving rise to the cause of action; and the steps taken to obtain appropriate advice once he or she knew the possibility of taking action. However, a tribunal is not required to go through the matters listed in section 33 of the Limitation Act provided that no significant factor is omitted. (**London Borough of Southwark v Afolabi (2003) IRLR 220**)

39. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 27** Underhill LJ said, “ the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just an equitable to extend time including in particular the length of and the reasons for the delay. If it checks those factors against the list in *British Coal Corporation v Keeble (1997) IRLR 336* well and good; but I would not recommend taking it as the framework for its thinking.

#### **The parties submissions**

40. Mr Magara, in his submissions focused on the effective date of termination and that a notice of resignation should be clear and unambiguous. He repeated the claimant’s position that in his discussion with Mrs Patel on 28th April 2022 he did not resign verbally. He merely said he was intending to resign and would confirm his position. The claimant’s intention to resign must not be construed as confirmation of his resignation, as a resignation must be clear and unambiguous. The claimant’s resignation was sent by email on 3rd May 2022, and that should be taken as the date of his notice of resignation, thus making the effective date of termination as 3rd June 2022. That is consistent with the claimant’s unmistakable understanding of the situation. Accordingly, the claimant’s claim has been presented in time.
41. Mr Platts-Mills submitted that the tribunal should find that the claimant’s effective date of termination was 28 May 2022. He contended that Mrs Patel’s evidence should be preferred to that of the claimant, as she was clear in her understanding, and in particular the email exchange between her and the claimant of 28th April 2022 and 4th May 2022 corroborates and reinforces her position that the claimant did verbally resign, and that this resignation was confirmed in writing by the claimant’s email/letter sent on 3rd May 2022. Further, despite being paid up to 28 May 2022, the claimant did not query or challenge why he had not been paid up to 3 June 2022 or questioned this when he received his P45. Notwithstanding the claimant is mistaken about his correct date of termination, given that he had sought advice and knew of the time limits, it was reasonably practicable for the claimant to have presented his claim in time. In respect of the disability discrimination claim, he contended that the tribunal should not exercise its discretion to extend time, because the claim has not been particularised; there is an issue about the claimant’s alleged disability; the claimant has not complied with the Order requiring information, and that the respondent should not be put to further costs and expense to defend a claim that has not been particularised or actively pursued.

Conclusion

42. I first determine the effective date of termination, which is a question of law taking into account all of the facts. In this particular case, I have taken into account the claimant's dissatisfaction about his pay and commission issues, earning potential with the respondent, and that, he had been pursuing other employment opportunities, as evidenced by the fact that as of 28th April 2022 he had received 3 good job offers.
43. I found the claimant to be intelligent and articulate person. He was candid about his his obtaining and following legal advice, and his understanding and knowledge of making a claim and of the time limits. He has not asserted that he had any impairment (physical or mental) which hindered his ability to engage in the early conciliation process and present his claim earlier than he eventually did.
44. I found Mrs Patel to be candid and consistent about her recollection of the discussions with the claimant.
45. In my judgment, I am satisfied the claimant's effective date of termination to be 28 May 2022. I prefer the evidence of Mrs Patel to that of the claimant. I find the claimant, in his conversation with Mrs Patel on 28<sup>th</sup> April 2022, did resign verbally by saying he is "resigning from IBM". These words are not ambiguous. They are in the present tense and indicate present intention of resigning. I do not interpret his resignation to mean that he was intending to resign in the future as he has contended.
46. I am also persuaded by the email exchange between Mrs Patel and the claimant, following the discussion held on Thursday 28th April 2022. Firstly, Mrs Patel in her email, sent that day in the late evening, confirms his verbal resignation in their conversation. She writes, "***...I want to acknowledge that verbally you have provided me with your resignation as of today. I have requested you put this into writing....***". This is consistent with her understanding of their conversation, namely that he told her he is resigning. Secondly, and more importantly, by his own admission, after their conversation, the claimant confirmed his resignation by preparing his letter of resignation, which he meant to send that same evening. The said email send on 3<sup>rd</sup> May 2022, states, "***Jane, This does not appear to have gone on Thursday night. I have just reattached the letter also...***" The letter of resignation is in the present tense. It is confirmation of his resignation. The letter was sent in response to the request for written confirmation of his verbal resignation. Mrs Patel, in her reply email of 4<sup>th</sup> May 2022, further confirms, "***Many thanks for following up the verbal resignation with written confirmation....***" Again, Mrs Patel, uses the words, "verbal resignation", which supports her clear understanding that the claimant resigned that day. I note the claimant did not challenge this reference to his "verbal resignation", in any correspondence or discussion with Mrs Patel. Had he not verbally resigned in that conversation, I would have expected him to have corrected Mrs Patel, given how meticulous and conscientious he has been in raising issues about his outstanding financial matters with the respondent.
47. I have taken note of the claimant's email reply of 24 May 2022 to Louise Turner, in which he writes, "***I resigned in writing by email (which you where copied in) on May 3<sup>rd</sup> 2022, so my leave date should be June 3<sup>rd</sup> and I should be paid and be entitled to my benefits and protections until that date...***" This clearly confirms it was the claimant's belief he resigned on 3<sup>rd</sup> May 2022, when he sent his notice by writing. That said, I note he was paid up until 28 May 2022, and his P45 dated 29 June 2022 records the



leaving date as 28 May 2022. The claimant has presented no evidence to show that he challenged the respondent's termination date of 28 May 2022.

48. I therefore find as a matter of fact that the claimant resigned verbally on 28 April 2022. On the basis he was contractually required to give one month's notice, his effective date of termination was 28 May 2022.
49. In terms of the primary time limits for each of the claims, I make the following findings
50. In relation to the claim for underpayment of wages (i.e limited to his salary), the respondent has conceded that this claim is in time. However, the claims for unpaid expenses, (i.e breach of contract claim) and unpaid holiday pay for year 2021/2022 are to be determined.
51. The time limit for presenting a claim for these claims expired on midnight on 28 August 2022. The claimant does not benefit from an extension of time under the Early Conciliation provisions because he did not approach ACAS (Day A) until 30 August 2022 by which date the three month time limit had already expired, and he did not obtain the Early Conciliation Certificate (Day B) until 11 October 2022. Accordingly, the claimant has presented his claim 73 days after the limitation date expired.
52. As I have stated above, the claimant is an intelligent and articulate individual. He had taken advice during the primary three month period; he knew of the applicable time limits and he has accepted there was no physical or mental impairment making it not reasonably practicable for his claim to be presented in time. I therefore conclude that it was reasonably practicable for the claimant to present the claim in time.
53. As far as the claim for discrimination, I must consider whether it is just and equitable to extend time, taking into account that time limits are to be strictly enforced and the exercise of discretion is the exception rather than the rule. I take into account that there is no dispute that the claimant knew of the applicable time limits, and there was nothing preventing him from presenting his claim within the statutory time limit or soon thereafter. Neither the claimant or Mr Magara made any representations to convince me, why it is just and equitable to extend time.
54. I am persuaded by Mr Platts Mills forceful representations, in particular about the prejudice to the respondent should I decide to exercise my discretion. I note the claim is not particularised and that the claimant has failed to actively pursue this claim which is evidenced by his non-compliance of the Order of 27 January 2022. Without knowledge of the full particulars of this claim, it is possible that the cogency of the evidence may be effected. I am not satisfied the respondent should be put to the cost and expense of defending a claim, which currently lacks full particulars, whether it has any merit or not. In the circumstances, I am not persuaded by the claimant that it would be just and equitable to extend time to pursue this claim.
55. Accordingly, for the reasons stated the tribunal does not have jurisdiction to hear the identified claims and are therefore dismissed.
56. The parties are required to notify the Tribunal within 14 days if the claim for underpayment of salary, as referred to in Para 50 above, has been resolved or that a hearing is required to determine this claim.

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**Employment Judge Bansal**

**Date 9 January 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES  
ON 18 January 2024

FOR EMPLOYMENT TRIBUNALS