



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Baugh  
**Respondent:** IBM United Kingdom Limited  
**Heard in Norwich by CVP** On: 20 May 2022

**Before:** Employment Judge Warren sitting alone

## Representation

**Claimant:** Mr M Harris, Counsel  
**Respondent:** Miss D Masters, Counsel

## OPEN PRELIMINARY HEARING RESERVED JUDGMENT

1. It was not reasonably practicable for the claimant to have issued his claim of unfair dismissal in time and that claim was issued within such further period as is reasonable.
2. It is just and equitable to extend time in relation to the claimant's complaint of discrimination on the grounds of age.

## REASONS

### Background

1. The claimant's latest employment with the respondent, as Security Europe Channel Manager, began on 15 April 2014 and came to an end on 25 October 2019, (the claimant had previously been employed by the respondent for a period of 32 years ending in 2012). After early conciliation between 1 and 3 March 2021, Mr Baugh issued these proceedings on 5 March 2021, claiming unfair dismissal and discrimination on the grounds of age. This open preliminary hearing has been listed for consideration of whether the complaints of discrimination and unfair dismissal should be dismissed

because the claim has been issued after the relevant statutory time limit has expired.

2. The only allegation of discrimination is the decision to dismiss.

### **The issues**

3. The time limits for both heads of claim expired on 24 January 2020. Early conciliation was not started until 1 March 2021, 13 and a half months after the expiry of the time limit. These proceedings were issued a few days later, on 5 March 2021. Both sets of proceedings were issued outside the primary time limit of 3 months.
4. The issues for me are, in respect to the unfair dismissal claim, was it not reasonably practicable for the claim to have been issued in time? If it was not, was the claim issued within such further period of time as I consider reasonable? With regard to the discrimination claim, I must consider whether it is just and equitable to extend time.
5. Mr Baugh suffered a brain tumour which required neurosurgery followed by rehabilitation. The respondent acknowledges that between 11 March 2020 and August 2020 he was incapacitated and would not have been able to take the necessary steps to issue these proceedings. However, the respondent argues that he could have issued proceedings before he was incapacitated, during the primary limitation period and in the alternative, that his delay after his recovery is such that if it was not reasonably practicable to have issued his unfair dismissal claim before the expiry of the limitation period, he did not issue within a reasonable period of time thereafter and that in respect of his discrimination claim, the subsequent delay is such that it would not be just and equitable to extend time.

### **Evidence**

6. I had before me today a bundle containing documentation both parties wished to refer to, prepared by the claimant's representatives. I had a bundle containing witness statements and additional correspondence between the parties, prepared by the respondent's representatives.
7. I had from Miss Masters a skeleton argument with the authorities that she wished to refer to attached. I had a separate PDF containing the authorities that Mr Harris for the claimant, wanted to refer to.
8. I am grateful to both parties' representatives, solicitors and counsel alike, for their diligent preparation.
9. The bundle of witness statements included a statement and supplemental statement from the claimant Mr Baugh and also witness statements from his father, (David Leslie Baugh) and the claimant's partner Miss Georgieva. For the respondent I had a witness statement from Mr N V Gibson, Integration Executive and Mr Baugh's previous manager.
10. Before the hearing began it looked from the Tribunal file and the papers before me, as if I was going to have to deal with two preliminary issues:

- (1) The claimant's father Mr David Leslie Baugh was located in Austria and the Tribunal had not received confirmation from the Taking of Evidence Unit that the Austrian Government had no objection to the Tribunal hearing evidence from Mr D L Baugh whilst he was located in Austria, and
  - (2) A disagreement between the parties as to whether without prejudice correspondence be allowed in evidence.
11. Fortunately, at the start of the hearing Mr Harris confirmed that the claimant was content to proceed without the Tribunal being able to hear oral evidence from Mr D L Baugh. Mr Harris asked me to read his witness statement, take its contents into account, attributing to it such weight as I considered appropriate having regard to the fact that his evidence had not been tested under oath. Mr Harris also confirmed that the claimant did not object to the respondent referring to without prejudice correspondence, as proposed. I was therefore able to proceed directly to dealing with the key issue at hand, whether the claimant's claims were out of time and should be struck out.

## The law

### ***Time and Unfair dismissal***

12. Section 111(2) of the Employment Rights Act 1996 provides:

*2) [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.*

13. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

14. The expression, "reasonably practicable" has been held to mean, "reasonably feasible" applying common sense. See Palmer v Southend Borough Council 1984 IRLR 119 CA.

15. In Wall's Meat Co. Ltd v Khan [1979] ICR 52 Brandong LJ said:

*"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of a complainant ..."*

16. Both parties have referred me to Schultz v Esso Petroleum Co Ltd [1999] ICR 1202 CA. The claimant in that case was ill with depression. The tribunal found

that he was capable of instructing solicitors during the first 8 weeks of the limitation period, but not thereafter. It held that it was reasonably practicable for the claim to have been issued in time, because it could have been done in those first 8 weeks. The Court of Appeal held that the tribunal had erred. Potter LJ said,

*“Thus, while I accept Mr Wynter’s general proposition that, in all cases where illness is relied on, the tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation.”*

17. At paragraph 20 of Marks & Spencer v Williams-Ryan 2005 IRLR 565, the Master of the Rolls, Lord Phillips, described as uncontroversial that the first principle is that s111(2) should be given a liberal interpretation in favour of the employee.
18. If the Claimant shows that it was not reasonably practicable to issue in time, he must then go on to satisfy the Tribunal that proceedings were issued within such further period as the Tribunal considers reasonable.
19. As to whether the time between expiry of the time limit and the issue of the claim is a reasonable period calls for an objective consideration of the factors causing the delay, viewed against the background of the expiry of the primary limitation period and strong public interest in claims being brought promptly. See Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10.
20. Ms Masters referred me to Royal Bank of Scotland v Theobald UKEAT/0444/06/RN, in particular paragraph 17. The expression, “reasonably practicable” imports an objective standard and is not a synonym for conferring an unfettered equitable discretion to allow a late claim.

### **Time and Discrimination**

21. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.
22. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply the Limitation Act or any other check list under the wide discretion afforded tribunals by s123(1), but that it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25).
23. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in Employment Law and there is no presumption, when exercising discretion on the just and

equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

24. That has to be tempered with the comments of the Court of Appeal in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 where it was observed that although Lord Justice Auld in Robertson had noted that time limits are to be enforced strictly, his judgment had also emphasised the wide discretion afforded to Employment Tribunals. Lord Justice Sedley had noted that in certain fields such as the lodging of notices of appeal in the EAT, policy has led to a consistently sparing use of the power to extend time limits. However, this has not happened and ought not to happen in relation to the discretion to extend time in which to bring Tribunal proceedings which had remained a question of fact and judgment for the individual Tribunals.
25. In Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283 EAT the claim was issued 17 days late. The tribunal rejected the Claimant's explanation that he had not wanted to bring his discrimination claim during his employment for fear of recrimination. It found that as he had consulted solicitors shortly after his dismissal, he had opportunity to be informed about time limits and that he had failed to show that it was just and equitable to extend time. HHJ Peter Clark allowed the appeal, holding that the just and equitable test involved a wide discretion and a multi-factorial approach. In this case, after rejecting the claimant's explanation, the tribunal should have gone on to consider the potential merits of the case and the balance of prejudice.

### **Findings of fact**

26. On 4 June 2019, Mr Baugh received an email sent to all employees in his area of the respondent's business, inviting voluntary redundancies. On 12 June 2019 he wrote to express interest and asked for details of the severance package that would be offered to him.
27. On 20 June 2019, Mr Baugh was sent a draft settlement agreement. He was told that he had until 4 July 2019 to return the same duly signed. The settlement agreement required the usual signature from a legal advisor. The terms of settlement included the usual agreed abandonment of all potential claims, including claims under the Employment Rights Act 1996 and the Equality Act 2010. These documents were provided to Mr Baugh by his manager, Mr Gibson.
28. Mr Baugh and Mr Gibson were on amiable terms. On 4 July 2019, Mr Baugh sent via a WhatsApp a photograph of building work being carried out at his home with a message "hell here FYI". Mr Gibson took the opportunity to reply reminding him to check the offer letter. Mr Baugh replied indicating that he realised that day was the closing date for it to be returned. Mr Gibson encouraged him to sign and post it back, informing HR that it was coming and Mr Baugh replied, "ok thanks will do. Who you advising HR I let know?"
29. At 16:39 that day Mr Baugh wrote to HR, (copying in Mr Gibson) to say, "I'm interested in your volunteer separation scheme offer but subject to enhanced terms."
30. On 8 July 2019 Mr Baugh consulted his GP. The GP's notes record, "tired all the time, feeling upset and has issues at work, sleep disturbed, low mood, no

suicidal thought, tired no focal symptoms, stopped smoking, put on weight three months ago, self-referral to counselling service, low mood/depression.”

31. On 12 July 2019, a solicitor wrote to Mr Gibson to say that he had been appointed by Mr Baugh to write and confirm that he was interested in taking voluntary redundancy and asking, “if you could please send us a copy of the Settlement Agreement in Word format and we will take instructions early next week.” In oral evidence, Mr Baugh said he did not instruct a solicitor. Miss Georgieva confirmed in her evidence, that was so, she had in fact instructed the solicitor, an acquaintance of hers. She said that Mr Baugh had spoken to the solicitor, although he didn’t remember it. She said that it was on her initiative, it was heart breaking to see him suffering, she could see that he needed help, he didn’t do anything so she decided to take things into her own hands. I accept her evidence.
32. On 22 July 2019 Mr Baugh consulted his doctor again, who records low mood, that Mr Baugh had contacted the Richmond Well-Being Service, been referred for six weeks sessions, he was to continue with receipt of psychotherapy and blood tests were to be carried out.
33. On 14 July 2019 Mr Gibson had replied to Mr Baugh’s solicitors to say that the window for voluntary redundancies was closed and that a phase of involuntary redundancies was now in process. On 25 July 2019, Mr Baugh was notified that he was at risk of redundancy. Consultation meetings ensued on 1 and 8 August 2019. On 8 August he was informed that he was dismissed. His employment came to an end on 25 October 2019.
34. Mr Baugh says that by the time he left the respondent’s employment in October 2019, he was having cognition issues, was feeling confused, lacked emotional balance, had recurring headaches, blurred vision and impaired hearing. Mr Gibson disputes that, he says he had no sense of that in his dealings with Mr Baugh, although at paragraph 14 of his witness statement, he acknowledges that he had a conversation with Mr Baugh in which he was told by Mr Baugh that he was struggling to cope, was feeling low and was considering or having cognitive behavioural therapy.
35. I refer to the evidence of Mr Baugh senior. I recognise it is untested, but that does not mean that I have to ignore it. I also recognise his evidence will not necessarily be entirely objective. That said, he referred to his son at this time being virtually unrecognisable, generating an air of uneasiness, being distracted and unable to concentrate, being mistrustful and very irritable. He describes a lethargic, couldn’t care less, fatalistic attitude and general surliness.
36. Miss Georgieva described Mr Baugh as becoming increasingly unpredictable and consulting his doctor at her encouragement. She said that after his dismissal he became increasingly irrational and unpredictable, rude and irritable, forgetting things that he had started, that he was almost incapable of making any decisions. She describes him as being extremely challenging to deal with.
37. I found Miss Georgieva’s evidence particularly compelling and I accept the evidence of Mr Baugh, his father and Miss Georgieva as to Mr Baugh’s state of health and behaviour from June 2019 onwards.

38. On 4 November 2019 Mr Baugh sent an email to the respondent's telecoms team, asking for a PAC code for his mobile telephone number. He explains that he did that as somebody called Mr Elders told him that he needed to do so. Similarly, on 15 November 2019 he wrote an email regarding outstanding expenses, again because he was told he needed to do so by Mr Elders. Notwithstanding these emails, I accept the compelling evidence of Miss Georgieva in cross-examination, when asked about these matters, that Mr Baugh was very disorganised, he was trying to sort out all sorts of bits and pieces and every little thing was a lot of fuss.
39. On 11 March 2020 Mr Baugh wrote a text message to Mr Gibson, indicating that he was progressing well in a job application and asking for some information. Mr Baugh could not remember it. Miss Georgieva's evidence was that whilst she didn't know about this particular message, it was typical of Mr Baugh; it was his nature to try and make things appear fine and as if he was doing great. She said he did not pursue the job opportunity, which was at the instigation of a friend, but it was typical of Mr Baugh; one day he would be trying to do something and the next day, he wouldn't finish it. She said, "it is a complicated state of mind." She said his executive function was impaired, but that did not mean that he was completely incapable of making a decision or doing anything at all. He would start something and not finish it, but often forget what he was talking about. I accept that compelling evidence.
40. On 27 March 2020 Mr Baugh had a seizure, and on 7 and 9 April 2020 underwent serious brain surgery. He was released from hospital on 21 May 2020. At page 150 of the bundle there is a report to Mr Baugh's GP from his consultant neurosurgeon dated 9 September 2020, in relation to a meeting in clinic on 6 August, which says that he was still suffering from short term memory issues at that time.
41. At page 131 is an interim discharge report from the Wolfson New Row Rehabilitation Centre attached to the St George's University Hospitals dated 24 August 2020. At the time of discharge he was still experiencing high levels of fatigue, mental rather than physical. He had been given cognitive strategies to help support him with his difficulties in memory, processing speed and executive skills. In the summary of the report he was said to demonstrate difficulties in executive functioning in terms of planning, cognitive flexibility and self-monitoring. He was said to have demonstrated difficulties with social cognition but there had been fluctuation in his attention and working memory. Current challenges were said to include, "cognitive difficulties which require consistent use of strategies."
42. Mr Baugh described in his witness statement that after discharge, he continued to struggle with fluctuating levels of concentration, lapses of mainly short term memory and sudden bouts of fatigue. He described how in late February 2021 he felt for the first time since his dismissal that he had some clarity of thought and rationality about his dismissal and he therefore sought advice. He contacted a solicitor on 26 February 2021.
43. Mr Baugh's father describes Mr Baugh emerging from hospital in a childlike state, with little capacity to behave as a mature adult and that appropriate behaviours had to be re-learnt. His return to normality was a gradual process. He said that only in early 2021 did he start to talk rationally about his dismissal.

The respondent suggests that “early 2021” must mean some time sooner than late in February 2021. I do not accept that submission.

44. Miss Georgieva referred to a slow rehabilitation, with functions gradually returning, with Mr Baugh initially behaving like a happy naïve child and that it had taken 10 to 12 months for his rehabilitation to reach a stage of improving his organisation and decision making skills. Miss Georgieva’s evidence was compelling.
45. I accept the description of Mr Baugh’s state of mind and the process of his recovery as described by the claimant, his father and Miss Georgieva.
46. In accepting the evidence of the claimant, his father and Miss Georgieva, as to his capacity both before and after his seizure, I am assisted by the fact that it is corroborated by a report from a consultant neuropsychiatrist, Dr Symeon, dated 29 June 2021, (page 145) which included the following:

*“Mr Baugh underwent neurosurgeon for excision of an extensive parasagittal/parafalcine meningioma on 07/04/22. Prior to this date there were changes in his cognition and behaviour.*

*Mr Baugh had features of cognitive communication disorder, online with frontal lobe injury. He had difficulties in turn taking, self-monitoring, disinhibition and had difficulty recalling previous conversations and feedback between sessions. He had problems with social cognition and reduced weight, and significant cognitive fatigue. These were all areas of focus during his rehabilitation.*

*I did not see him in the months leading up to the operation. However I would predict, on balance of probability, that he did not have capacity in relation to management of his affairs. This is based on the evidence of the severity and nature of the impairments he had. I would anticipate that his symptoms will have been more pronounced prior to the meningioma resection. Therefore I do not think that he would have been in a position to make clear decisions about his employment in the six months leading up to the operation. This is based on him having a known disorder of mind/brain (meningioma), resulting in an impairment of his capacity (understanding, retention, weighing up and communication).”*

47. The respondent seeks to suggest that this report cannot be relied upon because Mr Symeon had not actually seen Mr Baugh in the six months prior to his seizure, had not seen the text messages and email correspondence to which we have been referred. I do not accept that submission. The report is compelling evidence when one considers it in conjunction with the evidence of the claimant, his father and Miss Georgieva. I find that his state of mind and capacity was as described in their evidence and in this report.

## **Conclusions**

48. Mr Baugh was manifestly suffering a mental impairment in June 2019 through to the time of his seizure on 27 March 2020. I find that it was not reasonably practicable for him to have given instructions to issue proceedings to claim unfair dismissal or for him to have done so himself.



49. Having regard to Mr Baugh's gradual recovery from his brain surgery, I find that his claim for unfair dismissal was issued within such further period as was reasonable.
50. Mr Baugh's case is that the respondent has a policy, openly admitted in the United States, of removing older members of staff and replacing them with millennials. If that is true, there may be merit to his claim of age discrimination that deserves to be tested on the evidence. The relative balance of hardship to the parties is as is usual in discrimination cases; if his claim does not proceed, he will be deprived of the opportunity of seeking redress for discrimination. If his case does proceed, the respondent will lose the benefit of a limitation period that Parliament saw fit to put in place, albeit subject to the just and equitable test. Having regard to Mr Baugh's state of health and his mental capacity in the period between June 2019 and March 2021, I find that it is just and equitable to extend time in relation to his claim for age discrimination.

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**Employment Judge M Warren**

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Date 23 June 2022

RESERVED JUDGMENT & REASONS SENT  
TO THE PARTIES ON

30 June 2022

FOR EMPLOYMENT TRIBUNALS

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