EMPLOYMENT TRIBUNALS

Claimant: Mr B Bhogadi

Respondent: Premier Exports London Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **25 and 26 October 2021**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Mr J Patel, counsel
For the respondent: Mr R Morton, solicitor (Scotland) on Day 1
Mr Cameron, consultant on Day 2

RESERVED JUDGMENT

(1) The effective date of termination was 9 July 2018.

(2) The complaint of unfair dismissal was not presented within the time limit set out in the Employment Rights Act 1996 and is therefore dismissed.

(3) The complaint of breach of contract was not presented within the time limit set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and is therefore dismissed.

(4) Any complaint of unauthorised deduction from wages was not presented within the time limit set out in the Employment Rights Act 1996 and is therefore dismissed.

(5) These were the only complaints, and therefore the whole of the claim has been dismissed.

REASONS

Introduction

1. There is a dispute between the parties about whether the claimant, who worked for the respondent as a director and had a 25% shareholding in it, resigned on 5 July 2018 or was dismissed on 22 August 2018.

2. Several previous attempts had been made to hold a hearing to determine this as a preliminary issue. At a hearing before EJ Bedeau on 14 and 15 April 2021, he made various case management orders and listed this hearing for 25 and 26 October 2021. He confirmed that the matters for this hearing were:

    1. what was the effective date of termination of the claimant's employment;

    2. if the claimant had been presented outside of the primary limitation period, was it reasonably practicable for it to have been presented in time;

    3. if not, does the tribunal grant an extension of time such as to accept jurisdiction;

    4. if applied for, should any part of any pleading plea struck out or subject to a deposit order; and

    5. to list for hearing and set a case management timetable?

Hearing and Evidence

3. The hearing took place fully remotely by video (CVP).

4. I had an agreed electronic bundle of 367 pages. There were written statements as follows.

    4.1 On the Claimant's side, there was one from the Claimant dated 27 November 2019 and one dated 27 April 2020. There was one from Bhaveshkumar Dhirajlal Dobariya dated 27 April 2020 and one dated 14 April 2021. Each of the Claimant and Mr Dobariya attended the hearing, swore to their statements, and answered questions from the other side and from me.

    4.2 On the Respondent's side, there was one from Kieran Samani dated 22 October 2021 and one from Rajesh Samani dated 14 April 2021. I will refer to them as Kieran and Rajesh for ease of reference. Kieran attended the hearing, swore to his statement, and answered questions from the other side and from me. Rajesh did not attend, and so I gave his statement such weight as I saw fit.

5. There was also a 15 minute audio clip which I listened to during my pre-reading.

6. On Day 1, we heard both of the Claimant's witnesses, and commenced Kieran's evidence. We set a start time of 9.45am for Day 2 to maximise the chances of concluding the hearing with an oral decision on Day 2. Unfortunately, the Respondent's representative, Mr Morton, had an unforeseen emergency and was unable to attend. I am grateful to one of his colleagues, Mr Cameron, for attending the hearing to clarify the Respondent's position. On instructions from the

Respondent, he made no application to adjourn the case part heard, at the stage it had reached overnight. The Respondent's instructions to him were that they would like to have the oral evidence completed.

6.1 The application was, instead, that after the conclusion of the oral evidence, we would adjourn and submissions would be made in writing. This was on the basis that Mr Cameron had no prior knowledge of the case and it would be unfair to the Respondent to deny it the opportunity of (preferably) submissions from Mr Morton or (at the least) submissions made by another member of the organisation, who had had time to familiarise themselves with the case.

6.2 On Day 1, the Respondent's side had not confirmed whether or not Rajesh would be giving oral evidence. On Day 2, it was confirmed he would not attend that day. On receiving that information, the Claimant's side did not oppose the Respondent's application that we should adjourn prior to submissions or judgment. However, an application was made that we should adjourn after Kieran's evidence, but resume the evidence on a later date so that the Respondent's witness, Rajesh, could attend and be cross-examined.

6.3 My decision was that, since the Respondent had not provided a reason for Rajesh's absence, and had not requested a postponement for him to attend, I was not proposing to adjourn simply so that he could come and give evidence on the Respondent's behalf. Instead, I would take into account that the Claimant's side disputed his evidence, had expected to be able to cross-examine him, and had been denied that opportunity without being warned in advance or given an explanation. I would instead adjourn the hearing for written submissions only.

6.4 Each side was ordered to send their submissions to the other side and to the tribunal by 4pm on Tuesday 9 November 2021. Each side had permission (but no obligation) to respond to the other's submissions by 4pm on 16 November 2021.

7. I have taken account of those submissions forwarded to me which were received by the tribunal service by 16 November 2021, notwithstanding the fact that the Claimant's representative is correct in the comments made in the submissions of 16 November 2021; that is, my order was for initial submissions to be by 9 November, and the Respondent breached my orders by failing to comply with that date, and further breached them by waiting to read the Claimant's first.

The Issues

8. As far as possible, I will only find facts that are necessary to determine the preliminary issues. However, one of the issues for me to determine is the actual termination date of employment. In other words, I am required to do more than merely decide whether or not that date was less than 3 months before the claim was presented (allowing for any early conciliation extension)

9. In order to make a decision about the effective date of determination ("EDT") it is necessary for me to make decisions about what event(s) brought about the termination.

9.1 Was an agreement reached on 5 July 2018 (or any prior date) that the employment contract was to end with effect from 5 July 2018.

9.2 If not, did either party communicate to the other on 5 July 2018 (or any prior date) a unilateral decision that the employment contract was to end with effect from 5 July 2018.

9.3 If not, did either party, by their conduct, demonstrate on 5 July 2018 (or any prior date) that the employment contract was to end with effect from 5 July 2018.

9.4 If not, was there any date after 5 July 2018 but prior to 22 August 2018 on which the contract came to an end. (If so, what? And when?)

10. Neither party argues that the EDT was any later than 22 August 2018.

11. If the EDT was 20 August 2018 or later, then the claim is in time.

12. If the EDT was 19 August 2018 or earlier, then the claim is not necessarily in time, and I have to decide if I am satisfied that it was not reasonably practicable for it to have been presented in time. If I am not satisfied of that, then the tribunal has no jurisdiction to consider the claim.

13. If I am satisfied that it was not reasonably practicable to present the claim in time, then I have to decide if it was presented within such further time as I consider reasonable. If so, the claim is in time, but, if not, then the tribunal has no jurisdiction to consider the claim.

The findings of fact

14. ACAS conciliation started and finished on 19 November 2018. The claim was presented on 20 November 2018.

15. The Claimant became an employee of the Respondent around October 2011. He also held, at the relevant times, 25% of the shares in the Respondent company. He was a director from around 2012 until 22 August 2018.

16. Mr Dobariya had, at the relevant times, 20% of the shares. He was an employee from around 2010. He was placed on garden leave on 29 June 2018 by Kieran. He was a director of the company until around February 2018.

17. Rajesh is the father of Kieran. At relevant times, Rajesh held 35% of the shares. Sanjay Patel held the remaining 20%. Kieran was not a shareholder.

18. Since 22 November 2017, Kieran has been a director of the Respondent. He had worked for the Respondent intermittently between 2011 and 2014 as Financial Analyst and became a permanent employee - as Finance Manager - from October 2016.

19. In the first few months of 2018, there were various discussions about the Respondent's financial situation. The precise details of what was said and done are in dispute, as are the motivations of those concerned. On Kieran's case, he

discovered some financial irregularities, including trading with, and/or loans made to, associates of the Claimant and/or Mr Dobariya, which Kieran did not believe were adequately authorised and documented. On the Claimant's case, there was no wrongdoing, and Kieran potentially wanted to get rid of him and/or Mr Dobariya to deprive them of entitlements that they would otherwise have, and/or to increase his, Kieran's, own control and influence over the company and its assets.

20. On 29 June 2018, Mr Dobariya was placed on garden leave.

21. It is common ground that there were on-going discussions about arrangements for the Claimant's (and Mr Dobariya's) future relationship with the business. The parties were aware that if there was an agreement to end the business relationship completely, then it would have to deal with all of the directorships, the shareholdings, the employment situation. The parties were also aware that they could end one or more of these relationships, without ending all of them at the same time.

22. According to Rajesh's written statement: "*On 29th June 2018, the Claimant expressed he would be resigning from the Respondent if the decision to dismiss Bhavesh was not reversed*." Rajesh has not attended to be cross-examined on that assertion and, in any event, even on the face of the assertion, the Claimant did not unequivocally say that he was bringing the employment contract to an end (with effect from an ascertainable date, or at all).

23. Furthermore and in any event, whenever the words "resignation" or "resign" were used at the time, I need to resolve any ambiguity about whether this was a reference to (i) resigning as employee, but remaining as director; (ii) resigning as director, but remaining as employee; (iii) resigning as both employee and director. (If the latter, I also need to make a decision about whether the reference was to both such resignations taking effect simultaneously or staggered).

24. This is a convenient point for me to mention that in Kieran's second statement for County Court proceedings (page 353 of this bundle), at paragraph 5, he states: "Bala Bhogadi was appointed on 23 April 2012 and resigned on 22 August 2018." I am satisfied that that simply refers to resignation as director, and is of not addressing the employment contract at all.

25. After discussions and exchanges of correspondence, there were some crucial meetings on Thursday 5 July 2018.

26. At no time, on or before 5 July 2018, had the Claimant either requested annual leave, or else informed the Respondent (or Kieran, or Rajesh, or Kieran's sister, Isha, who ran the HR department) that he would be taking annual leave in July and/or in August 2018. It is my finding that the Claimant was sufficiently senior (and was also a part owner of the company) that he did not need to formally ask for permission from the Respondent to take annual leave (or to work remotely). Within reason, it was sufficient that he simply inform the Respondent that that is what he was going to do. I say "within reason", because in principle the Respondent could reply to say "no" and a further discussion would be needed.

27. To the extent that the Claimant argues that I should decide that the Respondent had actual or constructive knowledge of his (alleged) intention to take annual leave immediately after 5 July, based on the timings of his annual leave in previous years, I reject that assertion. In some previous years, the Claimant had travelled to India around July or August, spending several weeks there before returning to UK, and working while abroad. However, there was no express agreement between the Claimant and the Respondent that he would be away from the office (on leave and/or working remotely) during July and August every year, and nor was there an established pattern from which I should infer that, by their conduct, the parties demonstrated an unspoken agreement.

28. My inference from the lack of any documentation demonstrating that the Claimant had informed the Respondent (on or) prior to 5 July 2018 that he was going to be absent (on annual leave and/or working remotely) for several weeks, and from the fact that the Claimant does not claim to have informed the Respondent (or any of its officers or employees) of such an intention is that, before 5 July 2018, the Claimant had not formed the intention that he would be on holiday (or working from home) from 6 July 2018 onwards. This year, he was not planning to travel to India, but did have plans that he would spend some time with his mother who was visiting the UK. However, had he actually, as he now claims, already intended to be on holiday from 6 July, there would have been some contemporaneous record.

29. The 5 July meetings took place to discuss the latest version of draft agreements. The drafts had been produced around 4 June 2018, with updated versions being circulated by Kieran on 3 July 2018. On 4 July, Mr Dobariya had agreed to review and reply. His email at 13:43 was copied to Rajesh and to the Claimant.

30. One of the draft agreements dealt with the proceeds from shares in a third party company which were held by companies in which the individuals had some involvement. This is not relevant to the decisions that I have to make, and did not directly relate to what the Claimant's relationship with the Respondent would be going forward. It was expressed to be a (draft) agreement between "The directors / shareholders of AM2PM Feltham Ltd, Premier Retail Partners Ltd and Premier Exports London Ltd". Another dealt with proceeds from sale of a freehold asset, and again is not directly relevant.

31. The other document is more relevant.

    31.1 The overall heading was "Agreement between Bhavesh Dobariya, Rajesh Samani, Bala Bhogadi and Sanjay Patel and Kieran Samani" and those were the intended signatories. A sub-heading was "Re: Shareholders & Directors agreement to terms and conditions below for both companies (Premier Exports London Ltd & Reliance Wholesale Ltd)"

    31.2 In the body of the document, it was expressed to be a (draft) agreement between "The directors / shareholders of Premier Exports London Ltd & Reliance Wholesale Ltd".

    31.3 Amongst other clauses, it included:

- Directors will make sure there is no cash transactions in the company. Directors will present cash reconciliation report in quarterly meetings.

- Shareholder's agreement alongside this agreement will be drafted and agreed in timescale of two months.

- Premier Exports and Reliance wholesale will remove Personal Guarantees provided by exiting directors of the company. Remaining directors will replace the guarantee and will indemnify leaving directors for future claims.

- There should be no objection from the companies for other shareholders to work in the similar industry.

32. My finding of fact is that, by referring to "Shareholders and Directors" in the sub-heading and "directors / shareholders" in the agreement clause, the intention was simply to refer to all of the signatories collectively, each of whom fell into at least one such category.

33. The draft agreement is not necessarily a clear legal document, but my finding of fact is that it is clear from the context that the reference to "Directors" in the bullet point clauses was intended (where it referred to the Respondent's directors) to be a reference to the directors of the Respondent once the Claimant had resigned as director (Mr Dobariya having ceased to be a director already).

34. Nothing in the draft agreements discussed the Claimant's employment contract or that of Mr Dobariya). On 4 July 2018, at 16:12, Mr Dobariya emailed revised drafts, and also suggested an agreement for termination of his own employment, but said nothing about the Claimant's employment. In summarising the content of a 3 July meeting, he said. "B Bhogadi expressed his interest to resign from Director to pursue business opportunities and keep his shares in the company". My finding is that, as of 4 July, that accurately represented both the Claimant's position on his directorship, and what Kieran and Rajesh both knew his position to be. The Claimant had not expressed an intention to resign as director in the absence of agreement, but had made clear he wanted there to be such an agreement.

35. Mr Dobariya and Kieran had (at least) 2 separate email trails going that afternoon. However, I am satisfied that they were each reading the emails within each trail when responding. Therefore, I am satisfied that Kieran had read the email mentioned in the previous paragraph when, at 16:37, he replied to Mr Dobariya's of 16:25 and said:

> These agreements do not concern your employment with Premier Exports but instead are agreements between you shareholders regarding your related business ventures

36. Kieran also replied specifically to the 16:12 email at 16:57, in which he made clear that the parties had not yet reached agreement, though making clear the negotiations could continue. One thing he stated was:

Indemnity - would only relate to personal guarantees, it would not cover any actions undertaken whilst you or others were employed at the company (as director or in any other capacity)

37. On 5 July 2018, in the morning, Mr Dobariya, the Claimant, Rajesh and Kieran held a meeting. Mr Dobariya covertly recorded the meeting. There is a transcript at 344 of the bundle which the Claimant says is accurate and which Kieran says he has not checked for accuracy. I listened to the 15 minute recording and I am satisfied that the transcript is reasonably accurate. However, there are two differences that are sufficiently important for me to comment on.

38. The first relates to Kieran speaking, and the matching part of the audio is at 5:20.

38.1 The transcript states (and the emboldening is in the document):

> KS: You know. **What I am saying is within premier exports agreement now what things you concerned about is one thing is you leave the company, let say we start taking money under the table**. That's one thing you are concerned about. Next thing are concernd about is you leave the company and we discredit you this is what I am saying here. Next thing you should be concerned about is that is it. Only two things, right?

38.2 My finding, based on the recording, is that the actual exchange was:

> KS: You know. What I am saying is within premier exports agreement now, what things are you going to be concerned about? You leave the company.
>
> BB: Mmm. (indicating agreement / understanding of the point)
>
> KS: And then, let's say, we start taking money under the table. Yeah?
>
> BB: Mmm. (indicating agreement / understanding of the point)
>
> KS: That's one thing you are concerned about.
>
> BB: Mmm. (indicating agreement)
>
> KS: Next thing are concerned about is you leave the company and we discredit you this is what I am saying here.
>
> BB: Yeah
>
> KS: Next thing you should be concerned about is that is it. Only two things, right?

39. The other is at approximately 08:23 of audio.

39.1 The transcript states:

> BB: I have two plans one is like I said one is the same and the second one is absolutely different to what we are doing. Absolutely different. So but let me think for this one I didn't even thought of a company name yet. so that in fact put it this way so from tomorrow after I resign today I will thought of a

company name and how do I move forward and I manage to get the agreement made with in principle little money from India and how to bring it here its not very straight forward thing and just for all this things I need to work out and then am I doing the right thing, with these things, now a days to open a Bank account itself how long it took.

KS: Ya Ya.

BB: Still it not opened. And its not that easy and I am very clear what I want to do where I want to be you know so, but a lot of work needs to be done. Lets see how things goes.

39.2 My finding is that the actual words were:

BB: I have two plans one is like I said one is the same and the second one is absolutely different to what we are doing here. Absolutely different. So but let me think for this one. Actually I didn't even thought of a company name yet. so that in fact put it this way so from tomorrow, ~~after~~ I resign today, I ~~will~~ thought of a company name and how do I move forward and then I manage to get the agreement made with in principle little money from India and how to bring it here its not very straight forward thing and just for all this things I need to work out and then am I doing the right thing~~, with these things,~~ . So it is with these things, you know. Now a days to open a Bank account itself how long it took.

KS: Ya Ya.

BB: Still it not opened. ~~And~~ So its not ~~that~~ very easy ~~and~~ but I am very clear on what I want to do and where I want to be you know so, but a lot of work needs to be done. Lets see how things go~~es~~.

40. Both the transcript and the audio demonstrate that the parties were contemplating that the Claimant and Mr Dobariya would work in the same industry as the Respondent going forward, and that the meeting was a fairly amicable one. (Including, at the end of the meeting, the Claimant suggesting that he would potentially be interested in having Rajesh as an investor in his new venture, a point which caused amusement). The meeting was so different from Kieran's account of the meeting, that it affects my view of his credibility about other things that he says occurred on 5 July 2018.

41. I am satisfied that in the agreements, and in the discussion in the morning, where reference to "resigning" is mentioned, it is about resigning as director. The parties were not expressly discussing – on the audio or in the emails about draft agreements – specific contractual clauses to terminate the Claimant's employment relationship with the Respondent. It is clear, however, that none of them were anticipating the Claimant's employment contract with the Respondent continuing. For example, the Claimant expressly acknowledged that he would not be getting his salary in future as a result of the proposals.

42. At the end of the morning meeting, the parties believed that they had reached agreement, and all that needed to be done was for the drafts to be tidied up and

then signed. The Claimant believed that would be done at around 4.30pm the same day

43. At 16:02, the Claimant sent an email with handover notes to Kieran and Rajesh. He gave his personal email address to be contacted with queries. He was not expecting to be contactable on the email address which the Respondent provided to him after that date. His notes were detailed and gave contact details for suppliers, with some information about the state of the play with each.

44. On 5 July 2018, the Claimant cleared his office of all his personal effects. At 16:14, the Claimant sent an email about where he was leaving his only sets of keys for the Respondent's premises, and gave his system password.

45. At 16:37, the Claimant requested PAC codes from the Respondent's mobile phone provider. He wanted to keep the phone numbers and transfer them to a new hand set. At 20:17, Kieran instructed the provider not to action the request.

46. The Claimant carried on working through the afternoon of 5 July, his last messages being around 17:42.

47. Kieran suggests that in between the two 5 July meetings, the Claimant came to him and expressly resigned from his employment contract. Rajesh's statement says that Kieran told him this at the time, and that Rajesh, on 5 July, spoke to the Claimant about it, who confirmed having done so. My finding is that this did not happen. The Claimant denies it. Rajesh did not attend the tribunal. Kieran's account of the morning discussion does not match the audio. Furthermore and in any event, it is inherently implausible. Although the drafts did not expressly address termination of the Claimant's employment contract, my finding is that the reason for that is that – unlike Mr Dobariya – the Claimant was not seeking a severance payment for the employment contract. The Claimant's contract of employment was not at the forefront of their thinking. However, nonetheless, each of them were expecting that (if the agreements were signed) the contract of employment would come to an end and the Claimant would no longer be an employee. Thus, it is inherently implausible that, at a time the Claimant was expecting the agreements to be signed and executed later that day, the Claimant would simply orally resign as an employee. The evidence is that the Claimant was being cautious in his dealings in order to safeguard his position. Apart from the fact that resigning as an employee, and getting nothing in return, did not safeguard his position, there was also no need for him to do it. ie no need for him to utter express words of resignation, when written agreements were being negotiated to deal expressly with his other relationships with the Respondent.

48. Prior to that time, the parties had met for the afternoon meeting. The Claimant (and Mr Dobariya) refused to sign the agreements, because they were being asked (as they saw it) to agree to terms which (i) had not been part of the prior discussions and (ii) which would have prevented them working in the same industry.

49. The effects of the agreements, had they been signed, would have been that the Claimant (and Mr Dobariya) would have ceased to be either directors or employees

of the Respondent, or to have any other day to day role. They would have remained (in the immediate future) shareholders.

50. The Claimant did not turn up for work on 6 July 2018. This was not by prior agreement. As mentioned above, his position is also that he was intending this period to be a period of annual leave, and I have rejected that assertion. He was not on pre-planned annual leave. The Claimant also invites me to find that he was fully willing and able to work remotely, and had been intending to do so, but his phone and email access were cut off, and that was the only reason he did not carry on doing work. (Or not much work; there are some messages from his personal phone to suppliers.) I will address this below.

51. On 6 July 2018, at 11:05am, Kieran replied to the handover notes email. His opening paragraph stated that "By the email below we assume you have resigned from the company." My finding is that Kieran did not genuinely believe that. He knew full well that the Claimant had written that email in the expectation of executing the agreements in the afternoon on the terms discussed in the morning. Even if, hypothetically, Kieran had thought the Claimant might have signed the revised agreements, he had been under no illusions that the Claimant had been writing the handover email with the intention of its being treated as a unilateral resignation. The second paragraph of the email went onto make assertions about alleged post-employment restrictions. I do not need to (and I think it would be inappropriate for me to) make findings of fact about whether Kieran genuinely believed that (a) there were post-employment restrictions and (b) they were as he described. I simply record that his explanation was that he had not set eyes on a written contract of employment (and there is a dispute between the parties about whether there ever was one), but had written the second paragraph of the email based on his understanding of what would be in typical contracts of this nature. The third and fourth paragraphs were warnings of potential further disputes, and the implication that the Respondent potentially would have had grounds to dismiss the Claimant. I do not need to make findings about whether Kieran had a good faith belief in the contents of those paragraphs.

52. The email was sent to the Claimant's personal email account, and he replied at 19:29. He wrote (in full)

> For the avoidance of any doubt, My email below is NOT me tendering my resignation as an employee or a Director, taking legal advice regarding my position and reserve all my legal rights.

53. The following day, Kieran replied at 16:39:

> You have cleared out your office. Left your keys. And said you will be starting your own business up,
>
> You have tendered your resignation. All of this because ...

He ended the email with allegations of dishonesty against Mr Dobariya and implied the Claimant might have been involved.

54. On 9 July 2018, Kieran wrote:

> This is a final warning.
> You have left the business in possession of several items of company property.
> iPad
> Laptop
> iPhone X 3
> Car
> If these are not returned, we will have no choice but to escalate matters this week.
> Furthermore, you have recently taken a directors loan of £75,000 from Premier Exports. All the while you have been preparing to leave the company. We are taking legal advice on this. These funds need to be returned immediately.

55. Kieran wrote a long email on 10 July which I do not need to quote from. In it, he repeated the assertion that the Claimant had resigned.

56. On 12 July, there was a polite exchange of emails between the Claimant and Isha Samani, which is equally consistent with the Claimant being treated by the Respondent, and/or regarding himself, as either a current employee or else a co-operative former employee. The exchange was via the Claimant's personal email account.

57. On 12 July, the Claimant wrote to Kieran, denying resignation, and stated a more detailed response would be by 18 July. Kieran replied asserting two things that are relevant to my decision. (i) that it was his opinion that the Claimant's 5 July emails would be regarded, from an objective point of view, as resignation and (ii) that, in any event, the company was treating them as such.

58. Kieran also requested – in the same email - that the Claimant contact suppliers and ask them to pay for goods received. In at least one case, this was done. My finding is that Kieran was not making the request as employer to employee. His email expressly said that the Claimant was not an employee. Rather, he made the suggestion because he hoped that the Claimant would see it in his best interests, as a shareholder, that the Respondent received payment. The Claimant did contact at least one supplier. This is neutral as to whether he thought he was acting as an employee, or was just protecting his interests as a shareholder.

59. On 23 July, Kieran drafted an announcement that might be sent to customers to announce the departures of the Claimant and Mr Dobariya (and asserted that it was the Respondent who made the decision).

60. Later on 23 July, having taken legal advice, the Claimant sent an email to the Respondent asserting (amongst many other things) that he was still an employee. He also said it was unlawful that his phone and email had been cut off and demanded restoration. In essence, he agreed that he had been planning to leave the Respondent and that he had discussed doing that, but alleged that the discussions had been subject to contract, and had not resulted in a binding agreement and, therefore, his position was that the status quo continued, and he was still an employee (as well as still being a director).

61. About 10 minutes later, Kieran sent an email to the Claimant stating:

Please note, as you are no longer employed by premier exports; you also do not fall under our company insurance policy.

Therefore if you are driving our vehicle, you will be committing a driving offence.

Please can you return your pieces of company property. This will be the final warning.

62. On 21 August, Kieran and the Claimant exchanged emails simply repeating their arguments as described above. Of note, Kieran commented that the Claimant had not expressly stated that his "departure was conditional upon the execution of a settlement agreement". My finding of fact is that Kieran is right to say that the Claimant had not expressly requested a settlement agreement to terminate his employment contract. However, that does not address the Claimant's point head on, namely that – as far as he was concerned – everything was subject to contract.

63. On 22 August, the Claimant attended the workplace to purport to report for duty for the first time since 5 July 2018. He stated that he required his keys back and his mobile phone sim card. Kieran refused and stated the Claimant should leave the premises, and leave all company property behind.

64. My finding is that the Claimant knew what would happen (ie that he would be told he no longer worked there, and that he should go away). However, he arranged to attend with another person to act as if he was conducting business as usual as part of a plan to create evidence that it was the Respondent who was wrongly thwarting his good intentions to bring in new business. To be clear, I am not suggesting that the Claimant was dishonestly trying to create "fake" evidence; I am satisfied that he genuinely believes that it was the Respondent, not him, who terminated the employment. I am simply saying that the Claimant knew in advance he would be refused access on 22 August. The Claimant had told the Respondent several times that he had taken, and was acting upon, legal advice, and he said this again on 22 August. The third party who attended with the Claimant said that he was there as a potential customer; he took a close interest in the discussions, making suggestions as to what should happen, according to the transcript produced by the Claimant.

65. There was a discussion that the Claimant was still a director of the company and Kieran informed him that he, Kieran, was going to contact companies house for his name to be removed. That was done with effect from 21 August 2018.

66. In September, the Claimant received his P45, which stated it had been produced on 31 July 2018. It said the leaving date was 5 July. His payslip for July is not itemised. It shows gross pay of £1060.50, which is significantly less than the £5744.35 for the preceding months. It represents more than 5 days wages (though would not be inconsistent with a payment to 5 July, and then some payment in lieu of holiday or other entitlement). However, it is clearly not a full month's salary. The difference in net amounts between that amount and prior months was around £2400, and so the Claimant was aware on or shortly after the pay date (31 July) that he had not been paid his normal salary. Given the ongoing dispute, I am satisfied that he checked promptly with his bank.

67. On 31 October 2018, having received further legal advice, the Claimant wrote to the Respondent asserting that he had been dismissed on 22 August and was bringing a grievance. The Respondent repeated its stance that the Claimant had resigned.

The Law

Legislation

68. Insofar as it is relevant, section 95 of the Employment Rights Act 1996 ("ERA") states:

> **95.— Circumstances in which an employee is dismissed.**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or …

69. Section 97 ERA states:

> **97.— Effective date of termination.**
> (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,
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.
> (2) Where—
> (a) the contract of employment is terminated by the employer, and
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
> (3) In subsection (2)(b) "the material date" means—
> (a) the date when notice of termination was given by the employer, or
> (b) where no notice was given, the date when the contract of employment was terminated by the employer.
> (4) Where—
> (a) the contract of employment is terminated by the employee,
> (b) the material date does not fall during a period of notice given by the employer to terminate that contract, and
> (c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
> (5) In subsection (4) "the material date" means—
> (a) the date when notice of termination was given by the employee, or
> (b) where no notice was given, the date when the contract of employment was terminated by the employee.

70. Section 111 ERA states, in part

> (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.
> (2A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

71. A claim for breach of contract must also be brought within a similar time frame. Claims for unauthorised deductions from wages must brought within 3 months of the deduction (or last in a series).

72. Section 207B of ERA describes how time limits are affected by early conciliation. In summary:

    72.1 Where early conciliation commences after the time limit has expired, then the time limit is not extended.

    72.2 Where early conciliation commences before the time limit expires, then the Claimant will have at least a calendar month from then end of the conciliation ("Day B") to present the claim.

    72.3 In some cases, they might have longer than one month from Day B (the period from the day after conciliation starts until Day B is ignored when calculating the time limit).

Effective Date of Termination ("EDT")

73. The effective date of termination ("EDT") has to be determined in accordance with the statutory definition. An employer and employee cannot simply agree between themselves what the EDT is. See the Court of Appeal decision in *Fitzgerald v University of Kent at Canterbury 2004 ICR 737, CA*.

74. Similarly, the mistaken belief of one or both parties as to the correct EDT is not binding on an employment tribunal. In *TB Turbos Ltd v Davies EAT 0231/04*, the EAT considered the agreed facts as determined by the tribunal. In its analysis, the EAT noted

> *There is in law no generalised concept of an "employment relationship" not governed by a contract of employment which can exist for the purposes of the Employment Rights Act 1996. "Employment" is defined in section 230 (5) of the Act as "employment under a contract of employment". "Contract of employment" is defined in the Act as "a contract of service or apprenticeship"*

75. The fact that the employee believes that employment is continuing does not postpone the EDT if the termination of employment was objectively clear at an earlier date. *Avuru v Favernmead Ltd and anor EAT 0312/19*.

76. In *Robert Cort & Son Ltd v Charman [1981] I.C.R. 816* (a case decided under the predecessor to the Employment Rights Act 1996), the EAT considered the correct effective date of termination where an employer, in breach of contract, had purported to terminate the contract summarily (and had made a payment in lieu of

notice). The EAT noted that the employer had been contractually obliged to give proper notice (and had not done so) and that the employee had stated that he did not accept that termination without notice was valid. For several reasons, including the need for certainty about when time limits expired, the EAT decided that the statutory definition of "effective date of termination" required the tribunal to treat the EDT as being the date on which the employer had unambiguously stated to the employee that it had summarily terminated the contract.

77. This case was approved by the Court of Appeal in *Radecki v Kirklees MBC [2009] I.C.R. 1244.* In doing so, the Court of Appeal made clear that if an employee did not know that he had been summarily dismissed (or purportedly so), then that would potentially be relevant to the EDT.

What constitutes a dismissal or resignation

78. Broadly speaking, the test I have to apply is whether arguably ambiguous words amount to a dismissal or not. It is an objective test. All the surrounding circumstances must be considered. If the words are still ambiguous even in light of the surrounding circumstances then the tribunal needs to ask itself how a reasonable employer or reasonable employee would have understood the words in the circumstances.

Termination without express words of dismissal or resignation

79. In *Radecki*, the employee and employer had negotiated an agreement with a termination date of 31 October. In fact, they did not then execute the agreement. However, the employer ceased to pay salary from 31 October, a fact of which the Claimant was aware. It was decided that, in the circumstances, this was a sufficiently unequivocal act of termination by the employer.

80. The Court of Appeal decided that the termination had not been one brought about by mutual consent, rather it was a dismissal, even without the Respondent expressly using words to communicate a dismissal decision. On the facts, the specific information given to the Claimant (via his representative, in that case) that he was going to be taken off payroll was sufficient. Further, given the timings of the relevant communications, on the facts of the case, the effective date of termination coincided with the last date of payment.

Reasonable Practicability

81. 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 it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

82. 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. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

83. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

84. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the dismissal, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period. Furthermore, ignorance of the true facts must be the actual reason for failing to issue the claim sooner.

85. Fault on the part of the claimant's adviser may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. It is important to consider all the circumstances and the type of adviser involved. A mistake made by a solicitor or barrister acting for the claimant is likely to deemed to be a mistake made by the claimant. As per *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the claimant or from the fault of his solicitors in not giving him such information as they should reasonably have given him. In *Northamptonshire County Council v Entwhistle 2010 IRLR 740, EAT*, Underhill P noted that there could be some circumstances where – despite having used solicitors to advise him on the matter – a claimant might show that it had not been reasonably practicable to issue the claim on time. In other words, there might be cases where the adviser's failure to give the correct advice was itself reasonable, such as where the employee and his or her solicitor had both been misled by the employer on some factual matter, such as the date of dismissal.

Analysis and conclusions

86. To repeat, as per the findings of fact, the Claimant did not utter words of express resignation in the gap between the two meetings on 5 July 2018.

87. I note the Claimant's submissions about the requirements of the staff handbook for resignations, and the need to avoid uncertainty. They do not assist me. An unequivocal resignation that was done otherwise than in accordance with the staff handbook might still have been an effective termination of employment.

88. Again, as per findings of fact, I do not accept that the Respondent genuinely believed that the emails sent by the Claimant on afternoon of 5 July were unequivocal unilateral communications of the termination of the employment contract. They clearly showed that the Claimant did not intend to return, as did the fact that he left the keys behind and cleared out his office. However, the Respondent knew the context, which was that the Claimant was going to a meeting to – as the Respondent knew he expected – sign agreements ending some of his

relationships with the Respondent (including the employment relationship) while maintaining his position as a shareholder.

89. The Claimant did not intend his actions of sending those emails, or clearing out his office, to be treated as a resignation, and the Respondent knew that. The Claimant had not expressly said word to the effect of "if we don't execute the shareholders and directors agreements, I will remain an employee", but that does not alter the fact that the Respondent knew the context and that, in context, the Claimant's actions were not unambiguous.

90. The Claimant did not attend work from 6 July 2018. He does not allege that he was on sick leave. He alleges that he was on annual leave (which I do not accept) and also that he was willing – as he usually/often did on annual leave – to work remotely. However, that is not what the Claimant said to the Respondent at the time. He certainly argued the point many times that he had not resigned. However, that is different to actually showing up for work (or else logging on to work from home). The Claimant is correct that the Respondent had cut off his access, meaning that he could not log on, but if, at the time, he had been intending to be (on holiday and) working remotely, he would have made that exact point spontaneously. (He did not need legal advice to make that point.)

91. Thus the Claimant was not at work, and he had no valid contractual excuse for that. However, that does not lead me to decide he had resigned, given that he expressly said, first on 6 July, and then repeatedly afterwards, that he was not resigning. It just means that he was on unauthorised absence. The Respondent did not instruct him to return and, prior to 22 August, he did not purport to return.

92. However, my decision – at least for the purposes of deciding the EDT - is that the Respondent dismissed the Claimant. Similarly to Radecki, the precise thing that brought about termination is not the thing which the employer has argued for. Rather, in this case, it is the fact that the Respondent made unambiguously clear to the Claimant that it regarded the employment relationship as having ended with effect from 5 July 2018. It made clear it was not going to pay him after that date, and the Claimant knew from around 31 July 2018 that the Respondent had followed through with that decision to stop his pay.

93. Working backwards, the very latest date that the Claimant was unequivocally informed of the Respondent's position was the 23 July email at 7.55pm which said "you are no longer employed by premier exports". However, in fact, I am satisfied that the EDT was earlier than 23 July. In my opinion, the email exchanges of 6 and 7 July are not clear enough. It was at least conceivable, to an objective observer reading the correspondence, that if the Claimant had been able to show the Respondent that the Respondent had made a mistake about the Claimant's intentions, then the Respondent might have said "OK, thanks for confirming that you have not resigned" and the relationship might have continued.

94. However, my decision is that the EDT was 9 July 2018. On that date, the Respondent stated "you have left the business …". It went on to demand the return of property. That email came after the Respondent had already expressly addressed the Claimant's comments that he had not intended to resign and r]]made clear that, as far as the Respondent was concerned, he had done so.

95. This email amounted to the Respondent terminating the contract. The Respondent was wrong in law in its assessment that the Claimant had already done so, but it was unconditional and unambiguous about its stance that the employment contract had ended, notwithstanding the Claimant's protestations. Furthermore I reject the Claimant's arguments that the Respondent ever acted later acted inconsistently with a position that the Claimant's employment had terminated by 9 July (the Respondent's position being, of course, that it was earlier than that).

96. For an EDT of 9 July 2018, the time limit, subject to early conciliation extension, expired on 8 October 2018. The Claimant had not brought a claim or started early conciliation by that date. The claim was therefore not brought within the time limit set out in section 111 ERA for unfair dismissal claims, or the time limit for breach of contract claims.

97. Since the Claimant's only claim for arrears of pay related to alleged non-payment of salary after 5 July 2018, he cannot pursue the bulk of it as an unauthorised deduction claim given my decision on the EDT. However, and in any event, the date of the alleged deduction for July salary was 31 July 2018. The time limit for the unauthorised deduction claim expired on 30 October 2018. This claim is also out of time.

98. It is therefore necessary for me to decide it was not reasonably practicable to have brought the claims by the time limits.

99. My decision is that it was reasonably practicable. No illness or similar restriction prevented the Claimant starting early conciliation or doing any of the other steps needed to prepare and present a claim. He was in receipt of legal advice and he was actively contemplating litigation. He was contemplating bringing litigation of his own, as well as being put on notice by the Respondent that it might bring a claim against him.

100. I accept the genuineness of the Claimant's belief that the Respondent ought not to be able to treat the Claimant's actions as a resignation by the Claimant. However, the Claimant was fully aware of the Respondent's stated position on the matter. The mere fact that the Claimant did not agree with the Respondent's position on the date of termination (or what event brought about termination) did not prevent him bringing a claim. From 22 August onwards, he was aware the employment was over. As mentioned above, he knew from around 31 July that his pay had stopped and that he had not been paid in full for July. He also knew from the early September (on his own account) that the P45 asserted a termination date of 5 July 2018. Even if he had left it until as late as having sight of the P45 to take action, had he acted promptly then, he could have commenced early conciliation long before 8 October, and subsequently presented a claim which was in time.

101. I acknowledge that he had different lawyers providing advice about different aspects of the dispute(s) with the Respondent and others, but that does not persuade me that there was any good reason for failing to comply with a litigation deadline. He has not persuaded me that he was unaware that, if the Respondent was right about the EDT, he needed to bring his claim (or, at least, start early conciliation) within 3 months of that date. He has merely convinced me that he and/or his advisers were so sure that they were right about the EDT that they could

be relaxed about bringing the claim after 4 October (which is when the cut off date would have been for an EDT of 5 July).

102. This is not a case where, for example, some action of the Respondent's has misled the Claimant into thinking that he was employed after the EDT, or that there was some other reason to defer litigation. The Respondent did assert an argument (that the Claimant resigned) which I have not accepted, but that is not sufficient to mean that it was not reasonably practicable to bring the claim in time.

103. Therefore, the Claimant is not within the escape clause for any of the relevant claims. They are all dismissed on the basis that the tribunal does not have jurisdiction.

Employment Judge Quill

Date: 24 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 January 2022

FOR EMPLOYMENT TRIBUNALS