



EMPLOYMENT TRIBUNALS

Claimant: Mr A Evans

Respondent: LH Quarry Plant Ltd

Heard at: Middlesbrough

On: 20 & 21 November 2018

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr J Morgan – Counsel

Respondent: Ms S Firth - Counsel

JUDGMENT

The claimant's claims for ordinary unfair dismissal and wrongful dismissal are dismissed.

REASONS

1. The claimant has claimed unfair dismissal contrary to the Employment Rights Act 1996, section 94 and wrongful dismissal. He resigned on 23 March 2018 and subsequently tried to retract his resignation on 26 March 2018. The respondent refused to accept his retraction.
2. I agreed with the representatives at the beginning of the hearing that I would deal with the question of whether the claimant was dismissed, given that his claim for unfair dismissal is predicated upon his assertion that his resignation was made in the heat of the moment, or in special circumstances. If he could not establish that his resignation was made in the heat of the moment, or in special circumstances. His claim for unfair dismissal and wrongful dismissal would fail.

3. The parties agree that the claimant's resignation was clear and unambiguous. What I have got to determine is whether there were special circumstances surrounding the resignation so that it was validly retracted and was not binding on the claimant. As I said above, if there were no special circumstances then the resignation was binding on the claimant and there would be no dismissal and therefore his claim for unfair dismissal and wrongful dismissal would fail. After much discussion with Mr Morgan and Ms Firth, we agreed the following issues for me to determine:
 - a. Was the resignation made in special circumstances?
 - b. If the resignation was not made in special circumstances, it is binding and there was no dismissal.
 - c. The claimant's employment was terminated by his resignation, and his claim for unfair dismissal would not fail if there were special circumstances, such as where words were spoken in the heat of the moment. The claimant's apparently unambiguous words can be considered in the light of surrounding circumstances.
 - d. Did a reasonable period of time elapse before the respondent accepted the claimant's supposed resignation? The length of time that is reasonable for a prudent employer to wait before accepting a supposed resignation is a question of fact for the Tribunal.
 - e. Did facts arise which required furthering investigation by the respondent? if there were such facts and these were not investigated, the tribunal may infer dismissal from the evidence.
4. The claimant and Mr Yorke adopted their witness statements and gave oral evidence. Mr Morgan and Ms Firth helpfully produced skeleton arguments and made closing submissions. The parties produced a paginated and indexed hearing bundle.
5. The claimant must establish the existence of special circumstances. If he is to succeed with his argument that his resignation was validly withdrawn, he must do this on a balance of probabilities.
6. The claimant was employed by the respondent as a sales director. The respondent specialises in supplying services, plant hire, spare parts and consultancy services to the quarrying industry in the United Kingdom and internationally.
7. The claimant tendered his resignation to Mr Rob Yorke, the respondent's managing director in a letter dated 23 March 2018 [112]. He sent the letter to Mr Yorke under cover of an email of the same date [111]. The claimant sent the email at 20:21 hours on 23 March 2018 which was a Friday. The claimant said, amongst other things:

I cannot apologise enough for my actions. If you would allow me to talk to you in private and confidence it would give me the opportunity to explain things fully

8. In his resignation letter, which is brief and runs to no more than two short paragraphs, the claimant offered to work his notice and to cooperate in enabling a smooth handover in whatever way Mr Yorke felt appropriate.
9. On Monday, 26 March 2018, the claimant sent another email to Mr Yorke at 12:18 [115]. In summary, he wanted to withdraw his resignation that he had submitted on the previous Friday. He explained his reasons for doing so. First, he had sent the letter late in the evening. Second, he sent it in the heat of the moment whilst he was under considerable stress and he wanted to retract his resignation. Thirdly, his resignation was a knee-jerk reaction to comments made by Kirsten Riddle. Ms Riddle was an independent HR consultant who was retained by the respondent to investigate allegations of misconduct against the claimant instigated by Tarmac, a key client, raising concerns of collusion and price-fixing by the claimant and a company called Elstone Engineering Ltd, of which the claimant was a shareholder and had at one time been a director. The claimant referred to comments made to him by Ms Riddle during a call that she had had with him on 23 March 2018 where she advised him that he was being accused of gross misconduct. He went on to refer to a disciplinary interview with Ms Riddle during which he felt that she had talked over him and had not given him a chance to explain himself. He went on to say in his email:

I'm very concerned about the process, which has been used to pursue historic allegations against me and the whole situation has caused me to become very ill with symptoms of stress.

I will be attending at the doctors tomorrow as I could not get an appointment today where I have no doubt that he will sign me off as unfit to work. All of that said, it is in my best interest to respond formally to the allegations by continuing with the disciplinary process and I do not intend to let this process drag on as this will continue to hamper my health.

He invited Mr Yorke to confirm that his resignation was retracted.

10. Mr Yorke refused to accept the claimant's retraction of his resignation and communicated this fact to him in a letter dated 26 March 2016 [116]. He said:

I'm aware that during these two dates you received an investigation pack via email from Kirsten Riddle and she continued with the instructions to carry out an investigation and was not informed that you had submitted your resignation two days before completion on 25 March 2018. You claim that the resignation was a knee-jerk reaction to comments made by Kirsten Riddle during a telephone call on Friday where she informed you. The allegations were gross misconduct. I know you also had communication with David Green following your conversation with Kirsten where he informed you of various information Kirsten had gathered.

I consider it unreasonable to say it was a knee-jerk reaction. You

were suspended on 13 March 2018 and were informed at the time by Kirsten of the seriousness of the allegations made by Tarmac. She informed you that the police may be involved...this was 10 days prior to your conversation with Kirsten therefore giving you adequate time to consider your actions with regards to pursuing historic allegations against you.

I must stress that it was you who made us aware indirectly of the issue via an email to Carl Young at Tarmac without first consulting with me. The alleged collusion between Elstone Engineering and LH Quarry Plant was being investigated by Tarmac...You seem to be missing the gravity of these combined allegations and just concentrating on the historic one ... You said in your email you cannot apologise enough for your actions, thus insinuating confirmation of your involvement with Elstone Engineering in relation to the findings of investigation above.

I am unable to accept your wish to withdraw your resignation due to the lack of trust and confidence I have in your honesty and integrity. Any future working relationship would be untenable therefore I accept your initial resignation on 23 March 2018.

11. The claimant replied to Mr Yorke's letter by email dated 27 March 2018 at 22:57 [118]. He said:

Dear Rob following your email which I received at 14:35 today I'm writing to express my complete dismay and disappointment at the action which you have taken in relation to my attempt to resign on Friday evening, which I attempted to retract 26 hours before I had received any correspondence with you.

As you know, I have found the investigation process to date incredibly stressful and have been in such a bad place that I attended at my doctors this morning and was immediately signed off with depression. It was being under such huge stress that led to my reaction, sending a resignation letter late on a Friday evening in response to hearing the words gross misconduct. Describing my actions by Kirsten as you are aware, I received correspondence from Kirsten on Sunday evening which suggested that my purported resignation had not been received as there had not been any acknowledgement from anyone at all. At that time as I had still not received any acknowledgement that my purported resignation had been received I fully expected that my reaction before the weekend would have been sympathetically treated. When I emailed yesterday at 12:17 retracting my resignation and explaining my actions you are aware that I have medical evidence confirming my very fragile state of mind from my email this morning after I had visited my doctor. You should be aware that your response confirming my resignation this afternoon is completely unacceptable and not the reaction expected of a reasonable employer.

There is, I understand a wealth of case law in relation to resignations made which are subsequently retracted, especially when an individual is suffering from a mental condition as I currently am. As you have stated that you have no trust and confidence in my action it is clear that any disciplinary procedure and outcome was already prejudged. What you have done is turn a pressured resignation, which was not meant, and which I intended to withdraw shortly after sending into an unfair dismissal. I will return the company car phone and other property as requested.

I am devastated by your very harsh line in this matter for the reasons set out above I do not believe that your actions are in any way reasonable nor consistent with good employment law practice.

12. The claimant's GP signed him off work on 27 March 2018 until 10 April 2018 with a stress related problem [118a].
13. Mr Yorke replied to the claimant's email by a letter dated 29 March 2018 [120]. He confirmed the original decision. In his letter he referred to Ms Riddle's letter suspending him dated 25 March 2018, which the claimant had received between the date that he had resigned and when he told Mr Yorke that he intended to retract his resignation. He also referred to the fact that the claimant knew about what documents would be in the suspension pack prior to receiving them as David Green, the respondent's engineering director, had spoken to the claimant twice after his conversation with Ms Riddle on the previous Friday. Mr Yorke referred to the fact that the claimant had admitted his guilt and involvement with Elstone and said that he would keep them sweet because he was financially involved with them. The claimant was fully aware of his actions and apologised for them. Mr Yorke had lost trust and confidence with the claimant because he had admitted his wrongdoing.
14. I now turn to the law. The general rule is that unambiguous words of resignation may be taken at face value without the need for any analysis of the surrounding circumstances. This was established in **Sothorn v Franks Charlseay and Co 1981 IRLR, CA** where it was acknowledged that there may be circumstances where it is appropriate to investigate the context in which the words were spoken to ascertain what was really intended and understood. For example, further investigation may be needed where the employee's intellectual capability was in question or where decisions were taken in the heat of the moment. This decision was subsequently confirmed by the Court of Appeal in **Sovereign House Security v Savage 1989 IRLR 115, CA**. In that case it was ruled that unambiguous words of resignation should normally be taken at their face value but in special circumstances, the Tribunal would be entitled to decide there was no resignation, despite appearances to the contrary. In that case, unambiguous words of resignation spoken in the heat of the moment did not amount to resignation.
15. In **Denham v United Glass Ltd, EAT 581/98** the Employment Appeal Tribunal emphasised that it is only when there is doubt as to whether an employee intended to resign that the Tribunal can go on to consider whether there were special circumstances. It followed **Kwik-Fit (GB) Ltd v Lineham**

1992 ICR 183, EAT but drew back from saying that where special circumstances existed the employer had a duty to reconsider events so that failure to satisfy that duty must necessarily lead to a finding that a dismissal has occurred. Rather, where special circumstances arise, such as where words were spoken in the heat of the moment, apparently unambiguous words can be considered in the light of surrounding circumstances so that it may be risky for an employer simply to accept what seems to be a resignation. In such cases the EAT said that a prudent employer will allow a reasonable period to elapse before accepting the supposed resignation. If during that period, facts arise which require further investigation and the employer who does not investigate them will risk the Tribunal drawing an inference of dismissal from the evidence. The length of time that is reasonable for a prudent employer to wait before accepting supposed resignation is a question of fact for the Tribunal. A special circumstance can be various things, including an angry or emotional investigation or a spur of the moment decision.

16. Moving onto my discussion and findings, I do not accept that the claimant has established that there were special circumstances. The claimant's position is set out in his witness statement in paragraph 36. He referred to being suspended by Ms Riddle on 13 March 2018. He says that she did not listen to him. His suspension was not initially confirmed in writing and he became sick with worry. In paragraph 38 he says that he was in a bad way following the suspension as reflected in the WhatsApp messages with Mr Green [81] where he felt very uncertain about his future and was fully expecting to be sacked. He asked Mr Green whether he should resign to preserve his credibility. He goes on to refer to a meeting with Ms Riddle on 23 March and where he said that she told him in no uncertain terms that he was looking at gross misconduct and the respondent had found evidence which would be sent over to him. He thought he would be sacked because of an error of judgement and he had decided to resign. He says that he was an emotional mess at the time, and that he had not been sleeping. He was suffering from anxiety and depression because of his suspension. He sent the investigation resignation email and then immediately regretted it and he did not know what to do and he pondered the matter over the weekend.
17. He then received Ms Riddle's suspension letter with the supporting documents on 25 March 2018 [113-114]. He thought his resignation had not been received and he decided to retract it. He describes his resignation as a huge mistake. He acted in the heat of the moment, under significant emotional stress and distress.
18. When I heard the claimant's evidence, it was clear to me that he had been upset about what had happened to him. Indeed, he became visibly upset when he was being re-examined by Mr Morgan and he needed time to compose himself. However, I do not accept that the claimant has established that he was suffering from anxiety and depression as he claimed at the time when he tendered his resignation. No doubt he felt stressed because of the serious allegations that had been made against him. These were allegations that he knew about from when he had the suspension interview with Ms Riddle on 13 March 2018. He did not consult his GP between that date and when he resigned. Had he been under such

pressure, one would have expected him to have done so. Indeed, he only went to the doctor after Mr Yorke refused to accept his resignation. Furthermore, the sick note, simply referred to the claimant as suffering from a stress related problem. There is no independent supporting medical evidence of the claimant having been diagnosed with anxiety and/or depression.

19. People who face disciplinary action, or who are being investigated are frequently stressed, but I do not accept that this is enough, in itself, to fundamentally affect a person's state of mind to bring it within the ambit of special circumstances. The claimant's resignation letter and the covering email do not suggest a person suffering under an extreme emotional burden. Both are well written and considered. The claimant apologises to Mr Yorke. He says, "I cannot apologise enough". I wanted to know what he meant by that and he told me it was because of his financial collusion in the Elstone matter. In other words, he was confessing his guilt. From this it can be taken that he knew that he had done wrong. He knew he was being investigated. It also emerged from his oral evidence that he had visited the ACAS website and researched gross misconduct and he realised that such allegations are very difficult to escape unscathed. ACAS referred to people resigning prior to being dismissed in such circumstances.
20. At this juncture, I think that it is proper to raise my concerns about the level of the claimant's involvement with Elstone. This has a bearing on his general credibility and his state of mind when he resigned. He claimed that he was only interested in investing in the property owned by Elstone. To paraphrase his words, he just wanted to buy the bricks and mortar. The property was owned by Elstone immediately adjacent to the respondent's property.
21. We were shown the executed asset purchase agreement [190C] which shows the claimant as a buyer of fixed assets, goodwill and the business of Elstone. The claimant confirmed to me that he had signed that agreement, but he then went on to say that he had not read it. I find it incredible that a person of the claimant's obvious intellectual capability who had worked in business for many years would do such a thing. It was an important legal document. I cannot see the need to be a party to the agreement if he was simply planning to invest in purchasing the property. Furthermore, he was a shareholder and I think he was more involved with Elstone, than he claimed. The obvious inference is that he suspected the investigation would throw up this information. He could have simply been referred to in the conveyance transferring title to the property and eventually would have been named as one of the registered proprietors on the land certificate.
22. Prior to resigning the claimant engaged in WhatsApp discussions with Mr Green. Mr Green appears to have acted as an intermediary between the claimant and Mr Yorke. Mr Green told Mr Yorke that the claimant thought he would be sacked, and the claimant wanted to know if the respondent would let him resign. The answer was it was up to the claimant to decide and that there could be a disciplinary the following week. If the claimant wanted to resign, the respondent would accept it from the date that he sent it. However, it would need to be sent by letter or email either to Mr Yorke,

Ms Riddle or Mr Green. The claimant replied “okay, thanks”. He then followed what Mr Green said by emailing his resignation letter to Mr Yorke.

23. In my opinion, none of this points to someone acting in extremis or impulsively. Indeed, the antecedents point the claimant realising that he was in serious difficulties because of the Elstone matter. He could be dismissed for gross misconduct and the obvious inference I draw from his state of mind was that resignation was the lesser of the two evils; difficult and stressful, though that may have been to him.
24. When the claimant was re-examined, he was asked about conversations that he had had with Ms Riddle and Mr Green on 23 March 2018. He said that Ms Riddle was aggressive when he thought that she would be compassionate. Instead, she talked over him and he collapsed when she mentioned gross misconduct. He said that when he spoke to Mr Green, later in the day, he was verbally abusive and called him a liar. What the claimant is alleging is significant. He has made serious allegations which are important elements of his claim about his state of mind being such that there were special circumstances. In such circumstances, I would have expected him to mention those serious allegations concerning what happened at those meetings on 23 March in his witness statement. He has not done that and I think this undermines his credibility although I do acknowledge Mr Morgan’s submission on this to the effect that the respondent did not offer Ms Riddle or Mr Green to provide oral evidence on this. However, I think this does not take the claimant very far because he should have mentioned this in his witness statement. Had he done so, it may have been that Ms Riddle and/or Mr Green would have been called to give oral evidence on those meetings.
25. The claimant took some time after the meeting with Mr Green before he sent his resignation letter. The evidence supports the contention that he thought about his future and what he was facing. He discussed his options with Mr Green who was acting as the intermediary and he decided to resign. Whilst it might have been stressed and upsetting, he acted in a considered and rational way. Once he received the suspension letter on 25 March 2018 together with its supporting documentation, he would have seen that it did not contain the asset purchase agreement which is perhaps the most seriously incriminating piece of evidence against him. I believe this triggered his change of mind and it had nothing to do with being stressed or deciding at the heat of the moment. It may well be that Mr Yorke did see the claimant’s resignation as a gift as Mr Morgan submitted and that obviously would have been relevant if the claimant had made out special circumstances. However, he has not established that there were special circumstances. His resignation was effective and binding on him.

His employment terminated, and he was not dismissed

Employment Judge A.M.S. Green

Date 26 November 2018