



EMPLOYMENT TRIBUNALS

Claimant: Mrs Kathleen Greenidge
Respondent: Economic Skips Limited
Heard at: London South **On:** 27 October 2020
Before: Employment Judge Fowell
Representation:
Claimant: Mr L Ogilvy, lay representative
Respondent: Ms B Venkata of counsel, instructed by SBP Law

JUDGMENT

1. The claimant was not unfairly dismissed.

REASONS

1. Mrs Greenidge brings this single complaint of unfair dismissal. It is agreed that her employment came to an end on or shortly after 13 September 2017, but there is a dispute over whether she resigned or not.
2. By way of brief introduction, she worked for the respondent company, (referred to throughout as “Economics”) as an accounts manager, and had done so for over ten years at the time of her departure. The last year of her employment was difficult and for most of it she was off sick. Changes were made at work which she saw as unfair. Then in December 2016 there was an incident in which she was supposed to have sent out some invoices before everyone went home for Christmas but had not managed to get it done. When they all returned to work in January 2017 there was a meeting at which this was raised, together with other complaints about her attitude and the way she dealt with customers, after which she was given a written warning about her conduct. Shortly after that she went off sick with stress, and remained off until the meeting with the Managing Director, Mr Michael Farrell at which she was said to have resigned. It was held at a local McDonalds, and she was there with her union representative, the Unite Regional Organiser, Mr Soave. According to Mr Farrell she made it quite clear that she was not coming back. She maintains that she said no such thing.

3. There was an exchange of letters and emails after the meeting when each side disagreed about what had been said. Mr Farrell maintained that she had resigned, and in due course she was sent a P45. It is not quite clear when, but it appears to have been dated or received on 7 October. Her case therefore is that that amounted to a dismissal.
4. The company also say that if she did not resign, and the circumstances amount to a dismissal, then it was nevertheless a fair dismissal because the working relationship had broken down. Section 98 of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal, including conduct, capability, redundancy or "some other substantial reason". The breakdown of a working relationship, if proved, is often said to come within this broader category of some other substantial reason. At first they had no such alternative case but at a preliminary hearing on 27 February 2020 leave was given for them to argue that the dismissal was nevertheless fair.
5. In deciding between these versions of events I heard evidence from Mrs Greenidge, Mr Farrell, the company's accountant Mr Rupert Clarke, the General Manager, Mr Seamus Meagher, and one of the claimant's former colleagues in the accounts team, Ms Jane Guinelly. Each side also brought their own bundles of documents, amounting to about 300 in total, although there are no records of the disputed meeting at McDonalds which generated all this paperwork, and few records predating it.
6. Before setting out my findings, I will just note that these events all took place over three years ago. This case has had a number of twists and turns before reaching the stage of a final hearing. The original claim form, submitted on 20 November 2017, included a complaint of race discrimination. When further particulars were provided by her solicitors in October 2018 there was no mention of any race discrimination, and in due course her solicitor confirmed to the Tribunal that that complaint had been dropped.
7. Then in January 2019 the respondent's solicitors wrote to the Tribunal to say that the case had been settled. This was shortly before the hearing was due to take place. When the Tribunal sought confirmation it became apparent that Mrs Greenidge had decided against settlement and had refused to sign the consent order. As preparation had been abandoned for the hearing it was considered better to adjourn it to another time.
8. There was then a hearing to decide whether the case had in fact settled, and the Tribunal took the view that an exchange of emails, however clear, was not sufficient. There was no consent order, no agreement brokered through ACAS, and no withdrawal of the claim.
9. Mrs Greenidge says that she did not know anything about her race claim being dropped and that it was done without her instructions. She instructed a new representative, Mr Ogilvy, who attempted to revive or restore that complaint.

There was a further hearing to decide that issue, and the application was refused.

10. Inevitably, therefore, in dealing with the alleged settlement, the Tribunal was made aware that £8,000 was offered. The respondent also stated in the response to the claim that Mr Farrell offered £5,000 shortly after the meeting in question. Such offers are normally regarded as without prejudice and not to be referred to without the consent of both parties – known as waiving their privilege. Given that there was no objection by the claimant, it seems clear that each side waived privilege in that first offer.
11. A Tribunal can also consider offers, as happened here, to see if a final agreement was reached, so again the disclosure of the £8,000 offer involved no breach of the without prejudice principle. In practice, when the parties are negotiating over exit terms, it may seem artificial not to be able to state in evidence what was being offered and discussed, but the law is clear that in general such offers are not to be referred to in evidence, and no other figures or proposals were mentioned at this hearing.
12. One consequence of these preliminary issues and hearings over the race discrimination claim and without prejudice material, which were in addition to other case management hearings, is that this case has taken much longer than normal to come to trial. That is unfortunate in itself and also because the case concerns recollections of an event that took place some time ago. Memory is notoriously fallible, and we all have a tendency to reimagine or recreate our own mental image of what took place, usually seeing it in a more favourable light over time. Added to that, there are few contemporaneous documents and no notes of the meeting in question. I have to decide what occurred at that meeting on the simple balance of probability, assessing what seems most likely, and to do that it is necessary to try to put myself in the position of those involved, which means setting out enough of the background to make the situation clear.

Findings of fact

13. The respondent company is a medium sized firm which processes waste from commercial clients. When Mrs Greenidge was there they employed about 55 people, with about half a dozen office staff. Reporting to Mr Farrell was the General Manager, Mr Meagher, and the accounts function was overseen by Mr Clarke. He is self-employed but works at Economics for two days a week.
14. Mrs Greenidge's job involved producing invoices among other things. When deliveries of waste are received at the yard or depot, they are weighed and a ticket issued to the customer recording the amount of waste. These tickets are then passed to the accounts department to generate an invoice to send out to the customer.
15. Over the course of the ten years Mrs Greenidge had been at the company it had grown by degrees and new people had been brought in to the accounts team. As each arrived she would be the one to show them the ropes and train them on

the company's systems. They began doing data entry work but were increasingly doing the same sort of work as her, although she remained the more senior of the group.

16. Some concerns were raised from time to time by customers about Mrs Greenidge's approach. Some felt that she was a bit difficult to deal with, and asked to deal with another member of the team. That presented a problem for her managers, Mr Clarke and Mr Meagher. She had a generally good relationship with Mr Clarke but with Mr Meagher it became more strained. He felt that she was not getting the invoices out in a timely fashion and that she was blunt with customers rather than trying to keep them happy.
17. In response to these concerns, and no doubt also because the other members of the team had become more experienced, in September 2016 the company introduced a new system of invoicing whereby each member of the accounts team had a list of clients to deal with. The upshot was that they were all on much the same level. Mrs Greenidge was still the best paid and was called the Accounts Manager, but it felt to her like a demotion. And unlike her, the other member of the team had a pay rise that November, further eroding the difference. Concerned about her position, she joined the trade union at about this time.
18. In December, as mentioned already, there was an incident about getting out some invoices for an important client by the time the office closed for Christmas. It was not gone into in great detail in the hearing. Mr Ogilvy took the view that it was merely background, and it is perhaps not necessary to assign any blame. Essentially, Mrs Greenidge had not managed to get all the invoices out in time, this only became clear as everyone was leaving the office at 1.00 pm on 23 December. She told Mr Meagher that she would be back in between Christmas and New Year to finish them off. He took the view that they needed to go now. She did not come back in to finish them off, as he wanted, and so he did it himself. Some of the others saw that he had gone back into the office and came to help him out while Mrs Greenidge went home, unaware of all this. All this is recorded in the witness statement of Ms Guinelly, one of those who came back to help out, and was not challenged.
19. On any view, whether this was a misunderstanding or simple disobedience, this situation did nothing to endear Mrs Greenidge to Mr Meagher, and he felt that things could not go on as they were. Her attitude and approach needed to change.
20. It was during the afternoon of 23 December that Mrs Greenidge found out that the others had gone back into the office to do her work. A colleague rang her to tell about it. She then telephoned Mr Clarke to give her side of the story. She said that Mr Meagher had shouted at her in the yard, outside the office.
21. This call to Mr Clarke is only mentioned in his witness statement but she agreed that it took place, and also that they had a good working relationship generally.

He used to call her regularly, for example, or text, to see how she was doing during her long absence in 2017.

22. His evidence, which I accept, is that she was upset about it and told him “she was done with Mr Meagher and with Economics”. He told her that he would talk to Mr Farrell about a settlement. He contacted Mr Farrell who said it was a shame, i.e. to lose her, and it was difficult to consider this over Christmas, so to tell her to take an extra week off at the start of January, on full pay, so that they could discuss it when they got back.
23. It seems that there was some discussion, and no doubt some negotiation behind the scenes over New Year, but it did not bear fruit. It ended with Mr Farrell writing to Mrs Greenidge on 6 January 2017 as follows:

“I trust you have had a good Christmas and New Year.

I would like you to return to work on Monday 9th January at 9.30am as normal.

I will be only too happy to talk with you about your employment with Economic Skips Limited and any issues you may have.

I see you as an important member of the Economic team and look forward to seeing you next week.”
24. She therefore returned to work in circumstances where, as far as I can judge, she no longer really wanted to carry on working for the company, given the way she had been treated, as she saw it. As she described herself in her witness statement, when she returned, colleagues were surprised to see her and had been told that she had left, another indication that there had been discussions about her leaving.
25. Shortly afterwards, on 9 January, she had a meeting with the management to discuss things. It was with Mr Farrell, Mr Meagher and Mr Clarke. She was unaccompanied, and outnumbered, and may well have felt intimidated. The company’s view is that this meeting was to clear the air. She felt on the other hand that they were simply criticising her. However, I prefer the view of Mr Clarke on this point, since he was otherwise quite supportive of Mrs Greenidge, that it was an attempt at a heart to heart and to clear the air. That also seems consistent with the fact that the discussions about leaving had broken down. The company would not want her to be simply carrying on in a spirit of resentment. The best alternatives from their point of view would be either that she left if she was not happy and they could agree terms, or that she re-engaged and carried on her work in the spirit of more cooperation.
26. Be that as it may, the effect was spoiled by the subsequent warning letter from Mr Farrell. He wrote:

“Having received a number of complaints from customers we must record your failure to carry out reasonable requests and leaving early when we discussed this with you, has not been satisfactory.

We all agreed, (Seamus, Rupert and myself) that you have not been a team player in recent months.

Please treat this letter as a written warning that an immediate and significant improvement is required in the areas outlined above. Failure to ensure compliance in these areas will lead to further disciplinary action.

I trust the above is clear.”

27. This letter was simply left for her and no doubt had an upsetting effect. I bear in mind however that the company has no HR function and he was unaware of the normal process, which would involve an invitation to a meeting to discuss a disciplinary issue, and opportunity to be heard, and a right of appeal.
28. Mrs Greenidge wrote a letter in response appealing against this decision. In it she set out her complaints about her treatment, her perceived demotion, the incident at Christmas, the way she was spoken to by Mr Meagher that day, and ended with a request for a grievance meeting at which her trade union representative could attend. No meeting transpired however. Mr Farrell wrote back on 25 January, again with no wasted words:

“I never spoke to anyone re making you redundant. It is open knowledge, you have upset various customer Clients, which I myself have received complaints you are Difficult and non co operative. As Seamus has said to you You are not a team player.”
29. That is very direct indeed. It is no way to resolve a grievance or to restore a happy working atmosphere. It may already have been too late by then but if Mr Farrell had hoped to clear the air in January, it was clear by this stage that the attempt had failed. He needed instead to give her a proper chance to air her grievance, at a meeting at which she could be accompanied.
30. Mrs Greenidge then went off sick on 2 February 2017. She was diagnosed with high blood pressure, but it seems more than likely that this was also the result of stress at work.
31. I need to say a little more about Mrs Greenidge’s health. She had already had a number of absences for surgery and was in poor health. She has in fact not worked since. She has been in receipt of Employment Support Allowance and a Personal Independence Payment (PIP). Although a PIP is not inconsistent with working, her general health is poor, her mobility is affected, she uses a stick and had to stand up at points and move about while giving her evidence. I say that simply to note that this is not simply a case of absence for work-related stress.
32. During her absence she was on statutory sick pay (SSP), and needless to say it must have been very difficult to manage a long sickness absence on the basis of that rather minimal support. Perhaps for that reason she came into work on 10 March 2017 unexpectedly. This was three days before her sick note expired. But Mr Meagher sent her home. He did so calmly, because he was concerned that the company would not be covered by insurance if anything happened to

her, but she said that she had returned early in the past, and it seems likely that this was simply less awkward for Mr Meagher and the company, given what had passed. It is not for an employer to insist on an employee seeing out their period of sickness absence without good reason, and there seems no obvious reason here. That was the last day on which she went in to work. It was an attempt to resume her working relationship, which was effectively rebuffed.

33. After that things went quiet, until on 15 May 2017 Mrs Greenidge wrote to Mr Farrell again. She may well have taken some advice from her union because she asked for it to be treated as an appeal against his previous letter. In it, as before, she went over the same ground about her treatment over Christmas and lack of pay rises. She referred to the discussions about redundancy over the New Year, suggesting that the company had been willing to make her redundant and then had refused to do so, something she was unhappy about. She also began one paragraph:

“In the 9 years I worked for Economic Skips...”

i.e. using the past tense.

34. For some reason she wrote again in identical terms on 31 May. And again, instead of holding a meeting, Mr Farrell wrote back refuting her points one at a time. He did say, at paragraph 8:

“As my letter stated, we have agreed to move on and look to the future, you are considered an important part of the company team and we value your work for the company over the last number of years.”

35. But however well intentioned, that is not how grievances should be handled. The overall effect of such a response is simply to tell the employee that they are wrong.

36. Her union then took up the reins on her behalf, and Mr Soave wrote on 14 June requesting a grievance meeting. His further letter on 28 June made reference to her concerns, which she wanted to be treated as a grievance, then said:

“... may I propose that a meeting is held with me in attendance to try to resolve this issue to the benefit of all concerned.”

37. There was some dispute about the meaning behind these words, but it seems to me clear in context that he is suggesting a meeting to discuss a severance package of some sort. The mention of a grievance is simply a reminder that it in the company's interests to reach a deal with her.

38. That, therefore, is the background to the meeting on 13 September. Mrs Greenidge did not want to meet in the open-plan office, and there were no hotels nearby, so they agreed to meet at a local McDonalds. As to what happened, I have the written accounts of the three participants.

39. Mr Farrell's statement said this:

“21.3 At the meeting I asked what was the purpose of the meeting and Mr

Soave said that it was because Kathleen wanted to discuss a redundancy. I said that I would be prepared to make an offer to Kathleen of a severance package but wanted to discuss this with her privately. I did not want to discuss this matter in front of Mr Soave.

21.4 Kathleen then said to me in the presence of Mr Soave, "I'm not coming back to work" she made it perfectly clear to me that that was an end of the matter, that she had resigned and that we would not be seeing her again. I was in no doubt that she had resigned."

40. The key passage of Mr Soave's email reads:

"Mr Farrell seemed shocked to see me in attendance and did not seem to be interested in discussing Mrs Greenidge's issues only to inform her how well that the other two employees were doing who were temporarily undertaking her duties.

As it appeared that there was a breakdown in the relationship between the employer and employee, Mrs Greenidge asked if she could be made redundant.

Mr Farrell said that this was not possible as Mrs Greenidge's job was still open but he would consider offering her a compromise agreement for her to leave the company and would telephone Mrs Greenidge, who said that she would consider this, *but maintained that she preferred if she would be allowed to return to work subject to the issues in her grievance being resolved.*"

41. Later he added that at no stage did she say that she was resigning. Her own account in her witness statement was at paragraph 34:

"Having met up with Mr. Soave, when Mr. Farrell arrived, Mr. Farrell was openly unhappy about Mr. Soave's attendance and said that our Grievance Meeting would not go ahead as planned. Instead, Mr. Farrell insisted that he would either phone me or arrange a meeting separately to discuss a leaving package, as Mr. Farrell stated that he "could not make [me] redundant" and that "the girls were doing brilliantly at work."

42. From this it does appear that Mr Farrell was not happy to see Mr Soave, which is odd since the meeting was proposed by him, and for him to attend. However, it is also clear that the offer of £5,000 was not made until afterwards, and all agree (a) that he did not want to discuss figures with Mr Soave there and (b) that he did say that he would be prepared to offer her a severance package.

43. It is clear too that Mrs Greenidge asked for redundancy payment. That is the evidence of Mr Farrell and Mr Soave, and her own evidence, faced with Mr Soave's account, was that she could not remember doing so.

44. Going beyond what seems to be common ground, I have to weigh this evidence carefully. Mr Soave is not here for cross-examination, and so I have to give his account considerably less weight. On the face of it however, it is one person's word against the other's, with Mrs Greenidge's account supported to some extent by this email from Mr Soave. But that is to ignore the context and surrounding evidence. The crucial point relied on in Mr Soave's email are the words in italics

above, that her preference was to return to work. This email was written long afterwards, on 21 April 2020, two and a half years later, and it is a little surprising that he is able to recall the conversation in anything like this detail. It must have been a fairly normal meeting for him, and there is no mention of any notes made at the time from which to refresh his memory. It seems more likely that he is recalling this exchange as he might have wanted it to be, rather than as it actually occurred.

45. I say that because there is nothing else to support the view that Mrs Greenidge wanted to return. She had had redundancy discussions the previous New Year having said, "I am through with Mr Meagher and Economics"; she had raised her grievance and then an appeal, stressing the upsetting things that had happened to her, including the failure to make her redundant; and since all that she had been away from work for this long absence, during which there is no real evidence of contact, let alone any statement from her about a return to work. In those circumstances, I cannot accept that she did really want to come back to work. She would no doubt have much preferred a pay-off to leave. That is entirely understandable, and that view is supported by the fact that even after that meeting there was no communication about the practicalities of a return.
46. On a more straightforward level, it is also inconsistent with her asking for a redundancy payment. That was a positive request from her, and the only difference in those circumstances between her position and that of Mr Farrell was the amount of money in question. Why ask for a redundancy payment if you want to return to work?
47. Overall therefore, I prefer the account of Mr Farrell as to what took place. There is some support for it in his oral evidence, and that of Mr Meagher, that after the meeting he came back to the office and told Mr Meagher about the meeting, and the fact that Mrs Greenidge had told him that she was not coming back, and that he was going to make a settlement proposal to her. It was natural that he should discuss it with him in this way, regardless of how it went. It may be rather thought convenient to add such an important detail at this late stage, and not mention it in their witness statements, but having heard them both I am satisfied that each was being frank and straightforward in their evidence, and I accept that this further conversation took place.
48. The reality is that this was not a meeting to discuss grievances, but to discuss a pay-out. I am quite satisfied that Mr Farrell came away from the meeting with the firm belief that she had told him she was leaving – and I do not accept that he simply invented it – and I can see no reason for any misunderstanding. And so I conclude that Mr Farrell is correct, and Mrs Greenidge did say "I am not coming back to work" or some very similar form of words. That may well have been because he said that he would make her an offer. I accept however that she did not use the word "resign".
49. Pausing there to consider the negotiating positions on each side, Mrs Greenidge

had exhausted her sick pay, which was modest in any event. The company did not need to make her an offer at all. It could, in ordinary terms, have left her to stew. She was receiving no pay, and there was no prospect of an early return. But, there was some advantage for the company in a resolution. It would be hard to fill her position permanently, without being accused of having dismissed her, and they needed the work doing. She had very useful skills and experience. Resolving grievances is also a difficult process. And they may well also have felt some loyalty to her. This appears to be an old fashioned firm, with a close-knit group of people. Mr Farrell was happy to make a payment to her even after her statement that she was not coming back. He calculated a rough and ready figure of ten weeks' pay, one per years' service, at about £500 per week. That is less than her statutory redundancy payment of just under £7500, and if she had actually been dismissed at the meeting at McDonalds, would also have been entitled to notice pay in full, a further £5,500. There was therefore a negotiation to be had, and in those circumstances the offer of £5,000 seems a very reasonable one.

50. Mrs Greenidge certainly did not help her cause by saying that she was not coming back. It was a poor negotiating tactic, and may well have realised as much shortly afterwards. Mr Farrell's letter to her the next day was very short and to the point, confirming that she had told him that she would not be coming back to work.
51. Her response did not come until 19 September 2017, six days after the meeting and five days after the letter. That seems to me a significant delay. She could have sent her email over the weekend rather than wait for the next Tuesday. Most people, if wrongly told by their employer that they had resigned, would be quick to correct the mistake. In it she denied saying that she was not coming back and only added that she remained an employee who was unfortunately off sick.
52. Again, this letter contained no mention of a preferred option of return. Mrs Greenidge was saying, in essence, I am still on the books, so you will have to pay me to get rid of me - she was trying to restore her negotiating position.

Application of the law to the facts

53. It is common ground that clear words of resignation are effective and an employer is not obliged to accept a retraction. The employee must communicate the intention to resign, by words or conduct, to the employer: **Edwards v Surrey Police** 1999 IRLR 456, EAT.
54. A resignation need not be expressed in a formal way, and may be inferred from the employee's conduct and the surrounding circumstances: **Johnson v Monty Smith Garages Ltd** EAT 657/79.
55. Further, there is no need for a tribunal to go behind unambiguous words of resignation, **Sothorn v Franks Charlesly and Co** 1981 IRLR 278, CA. In that

case, the Court of Appeal held that the words “I am resigning” were unambiguous words of resignation, used in the present tense, and meant that the dismissal was with immediate effect.

56. But the word “resign” is not necessary. It simply means, “I am not going to carry on working for you anymore”. For someone who has been off sick for about seven months, words to the effect “I am not coming back” can in my view only amount to a resignation. There is no ambiguity.
57. It follows that in my view the company was entitled to accept this as a resignation and they did so. Most of the many authorities cited to me concern the alternative case based on a breakdown of the working relationship, procedural failings in that event, and the principle in ***Polkey v Dayton Services Limited*** that the Tribunal should ask what difference a proper procedure would have made. None of that need now be considered.
58. No complaint of constructive dismissal has been raised, and Mrs Greenidge clarified at an early stage that no such alternative case was pursued. There is no suggestion that any act by Mr Farrell, for example, amounted to a fundamental breach of contract, and so there is nothing more to say. It is most unfortunate from Mrs Greenidge’s point of view that she did not accept the earlier offers made, but on my view of what occurred here, there was no dismissal and so the claim must be dismissed.

Employment Judge Fowell

Date 05 November 2020