Appeal No. UKEAT/0289/13/GE

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 30 July 2013

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

THE SECRETARY OF STATE FOR JUSTICE — APPELLANT

MRS K HIBBERT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A SERR (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS
For the Respondent	MRS K HIBBERT (The Appellant in Person)

SUMMARY

UNFAIR DISMISSAL – Dismissal/ambiguous resignation

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The issue was whether the claim was lodged out of time which turned on the effect of a letter of resignation. Subsequent correspondence between the parties included (1) a letter from R giving C time to review her decision, and (2) a further letter from R purporting to accept C's resignation and requiring C to give notice. C was paid to the end of the notice period. ET decided no dismissal until end of notice period. EAT allowed appeal. Letter of resignation was letter of immediate resignation (**Sothern v Franks Charlesly & Co** [1981] IRLR 278) unaffected by R giving a "cooling off period" (**Willoughby v CFC Plc** [2011] EWCA Civ 115). Subsequent correspondence had no legal effect.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. The Appellant appeals against the Judgment of an Employment Tribunal, Employment Judge Starr sitting alone, sitting at Leeds and sent to the parties on 8 March 2013, which held that the Respondent's unfair dismissal claim was lodged in time and the Employment Tribunal, accordingly, has jurisdiction to hear it. The sole issue for determination before the Tribunal was whether the claim was lodged out of time which in turn depended in the main on the effect of a letter of resignation dated 29 June 2012. The Respondent did not seek to persuade the Tribunal that it was not reasonably practicable to lodge the claim in time.

2. The factual background to the letter of resignation is set out at paragraphs 4 to 7 of the Tribunal decision. In summary, the Respondent commenced employment with the Appellant as a Works Escort at HMP Wakefield in February 2008. From the end of 2008 there were problems at work. The Respondent instructed solicitors in January 2011 in relation to her employment issues. On 11 June 2012 she went on sick leave and apart from a period of three days she did not return to work thereafter.

3. The Respondent raised a grievance, which was heard on 22 February 2012. She appealed against the outcome of the decision. On 11 June, Ms Susan Howard, the Governor at HMP Wakefield, wrote to the Respondent to invite her to a capability hearing to discuss her capability for her current role as operational support grade and to discuss possible dismissal on the grounds of medical inefficiency. A date of 26 June 2012 was set in the letter for that capability hearing

4. On 25 June the Respondent responded to the letter seeking a postponement until after the determination of her grievance appeal. Ms Howard replied the same day agreeing to the request

and setting the date of 2 July for the capability hearing. On 27 June the Respondent's grievance appeal was rejected. On 29 June the Respondent hand-delivered a letter drafted by her solicitors to the Appellant, which was received and read by the Appellant on that day. In the first two pages of the letter she made reference to Ms Howard's letter of 25 June requiring her to attend a meeting on 2 July. She said that her position was that her doctor had advised her that it was detrimental to her health to attend further meetings, and she complained that her grievance had not been properly dealt with and there was no genuine attempt on the part of the Appellant to provide for a return to work by her.

5. On the third page of the letter the Respondent states:

> **"In all the circumstances, for the matters set out and in relation to the entire history of this matter from the point that I went absent in February, I am of the view that there has been a fundamental breach of my employment contract by my employer and I have no alternative but to resign my position."**

6. On 3 July Ms Howard replied so far as is material as follows:

> **"Clearly you have made your decision based on a number of factors…**
>
> **I am concerned that your decision to resign at this point may have been influenced by the timing of the imminent Capability Hearing. Therefore I believe it would be good practice to allow a period of 5 days for you to review your decision and to give time for you to be clear in your mind that this is the course of action you wish to take.**
>
> **I do believe that a Capability Hearing would provide the right opportunity for me as Governor to review the issue you have raised previously in terms of sick absence and to look with you at the potential return to work."**

7. The Respondent was invited to a meeting on 10 July. On 9 July the Respondent's solicitors wrote to Ms Howard saying, amongst other things:

> **"We have been asked to reply to your letter of 3 July on behalf of our client, Kay Hibbert. You are aware that we have been advising Mrs Hibbert for some time and rather than simply drafting letters on her behalf which she then signs and sends to you, we would ask you to accept that we have her full authority for you to correspond with us directly.**
>
> **We confirm that Mrs Hibbert's decision to resign was based on a substantial number of factors but, overall, she is of the view that there has been a significant breach of trust and confidence on the part of her employer entitling her to resign.**

We can advise you that the timing of the capability hearing has not influenced her decision to resign, but is simply one of the contributing factors to what, in essence, was the final straw issue when she received the outcome to the grievance appeal which simply ignored the two most important issues she had raised in her grievance appeal, namely the original grievance and the two occupational health reports and the recommendations arising from them.

[…] our client has asked us to indicate that she would not exclude the possibility of a further meeting at this stage but would wish to receive from you a response to the matters set out below as a precursor to a further meeting."

8. The letter continues:

"Bearing in mind that you indicated you would allow a period of 5 days for our client to review her position, she would formally request a response to this letter within 5 days also at which point she can indicate the basis of a further meeting as requested by you."

9. One 11 July Ms Howard replied to the Respondent as follows:

"I have received a letter from your solicitor dated 9th July 2012 in which they request me to answer in relation to your ongoing employment issues. The letter also states the fact that you believe there has been a significant breach of trust and confidence on the part of HMP Wakefield.

I have offered the opportunity to discuss your issues with me but you have not accepted my offer, as such I have no alternative but to accept your resignation as you have requested in your letter dated 29th June 2012.

You are required to provide 4 weeks notice therefore your last working day will be the 27th July 2012 your manager will calculate any outstanding leave and toil you have remaining, until this date this will be paid at the current rate you are receiving, he will also be in contact with you as part of the exit management policy."

The Respondent remained off sick but she was paid an amount of pay referable to the month of July.

10. The relevant statutory provisions are set out at paragraphs 13 to 15 of the Tribunal's decision as follows:

"13. Section 95 of the Employment Rights Act 1996 provides, so far as material:

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) …, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) …

14. Section 97 provides, so far as material:

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) …

15. Section 111(2) provides, so far as material given the Claimant's position here, that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

11. The expression "effective date of termination" is not a term of contract law but a statutory construct. The present case is a section 95(1)(c) case. At paragraph 39 of the decision the Employment Judge said that the Respondent terminated the contract under which she was employed. Neither side suggests otherwise. At paragraph 41 he states:

"In my view the proper analysis of the facts in this case is that the letter of 29th June 2012 was intended to, was understood to and did start the process of the Claimant's resignation rather than start and end it. The letter led to further correspondence and an agreement between the parties that the Claimant's employment should end on 27th July 2012. That is what both parties intended and believed. That outcome is not to give illegitimate effect to an agreement to alter the effective date of termination but to recognise the Claimant's resignation as taking effect on an agreed date following further discussion after communication of her resignation rather than as at the moment of that communication."

12. At paragraph 43 the Employment Judge states that the letter of 29 June 2012:

"[…] was unambiguous as to resignation but not as to the date on which termination of the contract should take effect or as to whether any notice was given, or the date on which it would expire. The letter does not say that termination of the employment contract was to take effect immediately: nor does it say when that should take place. The letter of 29th June 2012 was ambiguous as to the date on which the Claimant intended termination of her employment to take effect."

13. At paragraph 45 the Judge stated:

> **"The parties invited the Tribunal to consider what a reasonable employer in the position of the Respondent would have made of the letter of 29th June 2012. In my view an ordinary, non-technical reading by a reasonable employer in the position of the Respondent was that the Claimant intended to resign but had not yet said when that was to take effect. The Claimant was leaving that open."**

Then paragraph 45 continues:

> **"I do not accept the Respondent's submission that it is unusual for a constructive dismissal to take place on notice. The Claimant's solicitors' letter of 9th July 2012 also indicates that they considered that the Claimant had not terminated her employment with immediate effect on 29th June. Ms Howard's 11th July letter merely does what an employer can and should do in the circumstances, which was to fix the date of termination rather than leave the matter open. Payment of the July pay merely confirmed this Respondent's actual understanding of the position, which was that after the Claimant signalled an end to the relationship without signalling the end date, it fell to the Respondent to make a move to define that date. The Respondent did, and the Claimant is to be taken as having agreed that 27th July 2012 was the correct and agreed date on which the employment relationship ended."**

14. Mr Ashley Serr, for the Appellant, submits that the finding which was unarguably correct that the Respondent's letter of 29 June 2012 was "unambiguous as to resignation" should have led the Employment Judge in these circumstances to only one conclusion, namely that the dismissal was with immediate effect. He submits that the present case is indistinguishable from **Sothern v Franks Charlesly & Co** [1981] IRLR 278. Events post-dating that letter, Mr Serr submits, are wholly irrelevant.

15. Mrs Hibbert, who appears in person, submits that the Tribunal was correct in its conclusion and in its analysis. She submits that the Appellant by their letter of 3 July did not accept her resignation but instead made an offer for her consideration. Further, she submits that Ms Howard's letter of 11 July makes clear that her contract continued until 27 July, which was stated to be her last working day.

16. I turn then to consider the case of **Sothern v Franks Charlesly & Co**. In that case the Court of Appeal held that the Industrial Tribunal, and this Tribunal, had erred in finding that the meaning to be given to the words "I am resigning" is ambiguous. Fox LJ said at paragraph 17:

> **"I interpret them as meaning I am resigning now. They indicate, it seems to me, a present intention of resigning."**

17. Mrs Sothern returned to work the following day after uttering these words and stayed on for a few weeks. Fox LJ observed at paragraph 20:

> **"I do not find that inconsistent with the conclusion that I have indicated. A responsible employer may very well be expected to permit the employee to continue for a short time notwithstanding a resignation."**

18. Fox LJ noted that:

> **"This is not a case of an immature employee or of a decision taken in the heat of the moment, or an employee being jostled into a decision by the employers."**

19. Stevenson LJ at paragraph 28 described the words "I am resigning" as

> **"a simple statement of the speaker's intention to give up a job or an office or a contest now. That is what I understand the plain meaning of those three words would be. They do not naturally mean "I am going to resign in the future". They mean "I am resigning now" just as clearly as the shorter form for the present tense: "I resign" spoken, if you like, by the chess player who sees that checkmate is only a matter of a few moves away."**

20. In **Willoughby v CF Capital Plc** [2011] EWCA Civ 1115 Rimer LJ observed at paragraph 26:

> **"The principles of contract law ordinarily require that a person's intentions are ascertained not by reference to subjective intentions but objectively, by reference to how a reasonable man would interpret them."**

21. Stevenson LJ added in his Judgment in **Sothern v Franks Charlesly & Co**:

> **"The employers might have refused to accept the employee's decision to resign her post as their office manager. They did not refuse. They accepted it with thanks for her services and did not try to make her change her mind or accept her attempts to revoke a decision."**

22. In my judgment, the present case is on all fours with the case of **Sothern**. The letter of 29 June 2012 from the Respondent concluded with the words: "I have no alternative but to resign my position". In my view, those words are unambiguous and they have the same meaning as if the Respondent had stated: "I am resigning now". There is no question in the present case of the Respondent taking a decision in the heat of the moment or of being pressurised into a decision by the Appellant. The letter of 29 June 2012 was drafted by her solicitor or, at the very least, she wrote it having taken legal advice.

23. Finally this is not a case of the Appellant refusing to accept the Respondent's decision to resign. **Sothern** was not in fact a constructive dismissal case as Dame Elizabeth Lane at paragraph 24 notes. By contrast the present case is a constructive dismissal case and, therefore no question of the employer accepting or refusing to accept the employee's resignation arises, the Respondent's resignation being an acceptance of the Appellant's fundamental breach of contract. In any event, the response of Ms Howard in her letter of 3 July merely expressed concern that the Respondent's:

> **"[…] decision to resign at this point may have been influenced by the timing of the imminent Capability Hearing."**

24. Ms Howard continued:

> **"Therefore I believe it would be good practice to allow a period of 5 days for you to review your decision and to give time for you to be clear in your mind that this is the course of action you wish to take."**

25. What the Appellant was giving the Respondent was what was described in **Willoughby** by the Court of Appeal as a "cooling off" period before acting upon the resignation. In that case Rimer LJ said in a Judgment, with which Hooper LJ and Laws LJ agreed, as follows:

> **"37. The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The 'special circumstances' exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of the cautionary reminder for the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in *Kwik-Fit (GB) Ltd v Lineham* [1992] ICR 183 and 191 and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted.**
>
> **38. The essence of the 'special circumstances' exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a 'cooling off' period before acting upon it. Kilner Brown J in *Martin v Yeomen Aggregates Ltd* [1983] ICR 314-318F understandably referred to such a period as an opportunity for the giver of the notice to recant, or to withdraw his words, and this is in practice what is likely to happen. I would, however, be reluctant to characterise the exception as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. In my judgement, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place - that, in effect, his mind was not in tune with his words."**

26. The fact that Ms Howard in her letter of 11 July 2012 stated that the Respondent was required to give four weeks' notice and, therefore, her last working day would be 27 July 2012 and she was paid for that period, has, in my view, no legal effect. As a matter of law, the Respondent resigned on 29 June 2012. She terminated the contract under which she was employed without notice by reason of the Appellant's conduct and the effective date of termination was 29 June 2012.

27. Accordingly, the unfair dismissal claim was lodged out of time and the Employment Tribunal has no jurisdiction to hear it. For the reasons that I have given, this appeal succeeds.