Appeal No. UKEAT/0232/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 June 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

EAST KENT HOSPITALS UNIVERSITY NHS FOUNDATION TRUST APPELLANT

MRS P LEVY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: Hempsons Solicitors 16th Floor City Tower Piccadilly Plaza Manchester M1 4BT
For the Respondent	MR TONY PULLEN (Representative) Kent Law Clinic Widoger Law Building University of Kent Canterbury CT2 7NS

SUMMARY

UNFAIR DISMISSAL - Dismissal/ambiguous resignation

The Claimant had experienced difficulties in the department in which she was employed by the Respondent (the Records Department) and had successfully applied for a position in the Radiology Department, subject to pre-appointment checks. Having received her conditional offer from Radiology, and after an altercation with another member of staff in Records, the Claimant handed in a letter, stating "*Please accept one Month's Notice from the above date*". The manager to whom this was addressed responded the same day accepting the Claimant's "notice of resignation" and referring to her last working day within the Records Department. He did not complete a staff termination form (only applicable for those leaving the Respondent's employment and expressly stated not to be used for internal transfers) and made no reference to the Claimant leaving her employment more generally or to any outstanding issues regarding (for example) accrued leave entitlement. Subsequently the offer of employment in Radiology was withdrawn, due to the Claimant's sick leave record, and the Claimant sought to retract her "notice of resignation". The Respondent, however, refused to agree to this and confirmed that her employment would end at the end of her notice period.

The Claimant, acting in person, brought a claim for constructive unfair dismissal in the Employment Tribunal ("ET"). She later received legal advice and was permitted to amend her claim to assert that she had been directly dismissed by the Respondent. The Respondent resisted that claim, asserting she had resigned. The ET agreed with the Claimant. It found that her letter had been ambiguous as to whether she was giving notice to leave the Records Department or to leave her employment but that the Respondent had in fact understood the Claimant was giving notice of her departure from the Records Department, which was - applying an objective test - a reasonable construction of the letter; the Claimant had thus

established that she had been dismissed and succeeded on her complaint of unfair dismissal. The Respondent appealed against the finding that the Claimant had been dismissed.

Held: *dismissing the appeal*

Although the word "notice" in the employment context might generally signify an unambiguous notification of termination of the contract, that was not so in the particular circumstances of this case; the Claimant had an offer of a position within another department and her "notice" could equally be taken to refer to her notification of her departure from the Records Department. Given the ambiguity arising from the Claimant's letter giving notice, the ET had correctly applied an objective test when determining how the words used would have been understood by the reasonable recipient of the letter. It had looked at the Respondent's immediate response to the letter and had permissibly found that the Claimant's notification had been understood to relate to her departure from the Records Department and not from her employment more generally. In context - in particular, having regard to the fact that it was known that the Claimant was intending to take up another position, still in the Respondent's employment - the ET found that the Respondent had genuinely and reasonably construed the Claimant's "notice" as referring to the termination of her position in Records before she moved to Radiology and not to the termination of her employment. Allowing that this was a mixed question of fact and law, the ET had not erred in its approach or in its conclusion that the Claimant's employment had been terminated by dismissal and not resignation.

HER HONOUR JUDGE EADY QC

Introduction

1. At the heart of this case is the question whether the employment in issue was terminated by resignation or dismissal; who really ended the employment?

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the Ashford Employment Tribunal (Employment Judge Kurrein, sitting alone on 10 April 2017; "the ET"), sent to the parties on 18 April 2017. Representation below was as it has been on this appeal. By its Judgment, the ET upheld the Claimant's complaint of unfair dismissal, holding that she had not resigned but had been dismissed from her employment with the Respondent. It is that issue that is the subject of the Respondent's current appeal, permitted to proceed at this Full Hearing after an Appellant-only Preliminary Hearing before Choudhury J.

The Factual Background

3. By her original claim, lodged with the ET on 19 September 2016, the Claimant complained that she had been constructively unfairly dismissed by reason of the Respondent's refusal to allow her to retract her giving of notice. The Respondent defended the ET proceedings contending that the Claimant had voluntarily resigned from its employment. Subsequently, on 10 March 2017 the Claimant, having received legal advice, was given leave to amend her claim so that instead of alleging constructive unfair dismissal, she relied on a straightforward claim of direct unfair dismissal. The principal issue before the ET was thus whether she had resigned or had been dismissed.

4. The Claimant had worked for the Respondent, since 29 March 2006, as an Assistant Administrator at one of its hospitals in Margate. At the time of the events with which her ET claim was concerned, she was working in the Records Department of that hospital. The Claimant had experienced various issues with her employment, in particular she had a difficult relationship with one of her co-workers and, separately, had been spoken to about her absence record by the hospital's Operational Manager, Mr Gorton-Davey. Having become unhappy in her role in Records, the Claimant successfully applied - subject to pre-engagement checks - for an alternative position in the Respondent's Radiology Department. The Claimant received news about this alternative role on 9 June 2016.

5. On the morning of 10 June 2016, an incident occurred between the Claimant and another member of staff in the Records Department. This led the Claimant to hand in a letter to Mr Gorton-Davey, stating simply: "*Please accept one Month's Notice from the above date*". Mr Gorton-Davey responded by letter on the same day in the following terms:

> **"Dear Patricia,**
>
> **Re: notice of resignation.**
>
> **Thank you for your letter dated 10 June 2016, in which you tendered your notice of resignation.**
>
> **It is with sincere regret and disappointment that I accept your notice of resignation. I can confirm that your last day of work within Health Records will be Friday 8 [July] 2016.**
>
> **I would like to [take] this opportunity in thanking you for your hard work, dedication and contributions to a highly successful team over the years, and I wish you every success with your future employment.**
>
> **Please do not hesitate to contact me if you have anything that you wish to discuss.**
>
> **Yours sincerely"**

That letter was left for the Claimant on her desk.

6. On 16 June 2016, the Claimant heard that the offer of the alternative position in the Radiology Department was to be withdrawn. This was due to the Claimant's absence record. On receiving that news, also on 16 June 2016, the Claimant immediately phoned Human

Resources ("HR") to seek advice about withdrawing her notice. She was told that this was within the discretion of the manager. On the same day, the Claimant raised the matter with Mr Gorton-Davey, which caused him to also seek HR advice and then to email the HR Department in the following terms:

> **"Hi**
>
> **I have a member of staff who has handed in their resignation last week and wishes to retract it. Currently, the post is with the executive team for approval and has not been advertised.**
>
> **Although I have not been given a reason for the retraction, I understand unofficially it is because of their sickness level declared in a reference, and that they currently have a verbal warning against them for their sickness absences.**
>
> **Do I have to accept a retraction of resignation?**
>
> **Many thanks"**

7. In his evidence before the ET it is recorded that Mr Gorton-Davey accepted:

> **"32.1. The second paragraph of his enquiry did not accurately record the reason why the Claimant wished to retract her resignation. He had understood at that time that the Claimant's reason was the fact that his reference had resulted in the job offer she had previously received being withdrawn.**
>
> **32.2. The final line of his enquiry could be read as indicating a reluctance on his part to permit the Claimant to retract what he viewed as her "resignation"."**

8. On 17 June 2016, shortly before 2pm, the Claimant emailed Mr Gorton-Davey and his line manager, Ms Tapp, confirming the conversation she had had with HR and for the first time using the word "resignation". The Respondent took legal advice on the position and Mr Gorton-Davey was advised by HR that there was no obligation to accept a retraction of a resignation; it was a matter for an employer whether it wished to do so or not. Discussing the matter with Ms Tapp, the view was taken that the Claimant's absence record was such that she would not be offered a position with the Respondent in open competition and that she should therefore not be permitted to retract her resignation.

9. The Claimant was on leave at that time, so on 24 June 2016 Mr Gorton-Davey communicated the decision that had been taken to the Claimant in the following terms:

> **"…**
>
> **After discussing your request with [Ms Tapp], it is with regret that I cannot accept your request and as a result, your last day of work with us will be on Sunday, 10 July 2016. I also need to inform you that due to the number of days annual leave taken already this financial year, the Trust will be looking to recover 88 hours of pay from you.**
>
> **As I am on leave this week (from 27 June) should you have any questions then please contact [Ms Tapp] as [the team leaders] will not be able to assist.**
>
> **I hope to catch up with you face-to-face upon my return."**

10. Mr Gorton-Davey then also completed a staff termination form for the Respondent's internal use, a document that was expressly stated only for use by "*employees leaving the [Respondent] … not for internal transfers*". There were some further communications between the Claimant and Ms Tapp, and she attended a meeting with Mr Gorton-Davey and HR on 6 July 2016, but the parties' respective decisions did not change and the Claimant's employment came to an end on 10 July 2016.

The ET's Decision and Reasoning

11. The ET reminded itself that the real issue it had to determine was "*Who really ended the contract of employment?*", see per Sir John Donaldson in **Martin v Glynwed Distribution Ltd** [1983] ICR 511. In the circumstances of this case, the ET rejected the Respondent's contention that the words used by the Claimant in her letter of 10 June 2016 were clear and unambiguous, reasoning as follows:

> **"42.1. The letter does not identify the subject in respect of which notice is being given. It might be her role in the Records Department, i.e. notice of an intended transfer of department, or notice of termination of her employment relationship with the Respondent.**
>
> **42.2. Support for the proposition that the notice given by the Claimant might be solely in respect of her role within the Records Department is provided by the disclosure given by the Respondent following exchange of witness statements of a sample set of documents relating to an employee ("A") who had successfully transferred her employment to a new department. I thought it noticeable that in that case:-**
>
> > **42.2.1. A was sent a conditional offer of a new post on 4 September 2014.**
> >
> > **42.2.2. A wrote a letter of resignation to HR on 12 September 2014 in which she specifically stated that she was resigning "from my role", with notice expiring on 10 October 2014.**

42.2.3. There was no evidence that this letter was treated as being a letter of resignation from her employment with the Respondent, for instance by her resignation being accepted. There was no evidence of any response.

42.2.4. By letter of 29 September 2014 HR made an unconditional offer to A, with a start date of 13 October 2014.

42.3. I also thought that exchange of correspondence to contradict the Respondent's assertion that all employees who transfer roles within the Respondent are required to resign from their employment and are then offered re-engagement on new terms and conditions. Although A was sent new terms and conditions of employment they only reflected the change of role. There was nothing to suggest a termination and re-engagement."

12. In the alternative, even if the words used were clear and unambiguous, the ET concluded that the context in which they had been used gave rise to "*special circumstances so as to require the words to be construed in that context*" (see the ET, at paragraph 43). Further explaining its approach, the ET made clear that it considered it was required to adopt an objective test for the construction of the words used by the Claimant, having regard to all the circumstances of the case. In adopting that approach the ET made plain that it had deliberately sought to avoid reference to the evidence regarding the Claimant's and Mr Gorton-Davey's subjective views as to what was meant or intended by any particular words, acts or omissions (see the ET at paragraph 50).

13. To the extent that the Claimant's letter of 10 June was ambiguous, the ET considered that context was provided by the following facts:

"45.1. The Claimant was not happy in the Records Department.

45.2. The Claimant had applied for a new role with the Respondent, had received a conditional offer for, and intended to take up, that role.

45.3. She was unaware that her employment history might adversely affect the conditional offer.

45.4. She needed to work to support herself and her family and to assist in caring for her father."

14. Save for sub-paragraph 45.3, the ET considered that these were matters known to the Respondent. Given that context and other circumstances the ET concluded:

> **"47. … an objective consideration of the letter would lead a reasonable observer to conclude that the Claimant was doing no more than informing Mr Gorton-Davey at the earliest opportunity of her intention to accept what was then a conditional offer of a new role: it was not a termination of her employment."**

15. The ET considered its view in this regard to be reinforced by the following factors:

> **"48.1. Mr Gorton-Davey knew that:-**
>
> **48.1.1. The Claimant was not happy in the Records Department.**
>
> **48.1.2. The Claimant had applied for a new role with the Respondent, had received a conditional offer for, and intended to take up, that role.**
>
> **48.1.3. He regularly advised staff in Team Briefings, two or three times a year, that they should not resign their employment until they had received an unconditional offer of a new post.**
>
> **48.1.4. The terms of the reference he had given about the Claimant were such that it might give the recipient cause for concern.**
>
> **48.2. Mr Gorton-Davey did not treat that letter as if it were a letter of resignation from the Respondent's employment. In particular:-**
>
> **48.2.1. His letter in response is specific in referring to the end of the Claimant's work within the Records Department, not to the termination of her employment with the Respondent.**
>
> **48.2.2. That letter did not deal with the matters one would expect, such as outstanding accrued or overtaken holiday, if the letter had been understood as intending to terminate the employment relationship.**
>
> **48.2.3. He did not complete a "Staff Termination Form" at the time, and probably knew that the Claimant would have received a "Staff Transfer Form" with her conditional offer (as she in fact had).**
>
> **48.3. In contrast, when Mr Gorton-Davey and Ms Tapp decided that the Claimant's employment should cease, on or shortly before 24 June 2016, he lost no time in:-**
>
> **48.3.1. writing to tell the Claimant that her employment would cease "with us" on the specified date, and that she owed 88 hours excess holiday pay; and**
>
> **48.3.2. completing a "Staff Termination Form" with appropriate particulars the same day."**

16. On that basis, the ET found that when Mr Gorton-Davey received the Claimant's letter of notice on 10 June, he did not understand it as being a resignation from her employment with the Respondent. In the circumstances, the ET accepted that, on the balance of probabilities, the Claimant had established that she did not resign from her employment with the Respondent but was dismissed by the Respondent's letter of 24 June 2016, as a consequence of the Respondent's decision to treat her letter of 10 June as a valid resignation.

The Respondent's Case on Appeal

17. The Respondent contends that the ET erred in finding that the words used by the Claimant in her letter of 10 June 2016 were ambiguous (see the second ground of appeal). In the alternative (see the first and third grounds of appeal), assuming the ET was entitled to find ambiguity in the words used, the Respondent takes issue with the ET's approach (1) in failing to have regard to the subjective views of the Claimant and Mr Gorton-Davey; and (2) in then failing to consider all the circumstances, including the actions and words of the parties post-dating the giving of notice on 10 June and up to the Respondent's letter of 24 June 2016.

18. On the first issue raised by the appeal - whether the ET erred in finding the words used by the Claimant were ambiguous - the Respondent relies on the guidance given by the Court of Appeal in **Sothern v Franks Charlesly & Co** [1981] IRLR 278: in answering the question whether the words are ambiguous, regard was to be given to the natural meaning of the words and how they were understood by the recipient. The Respondent further derives support for this proposition from *Lewison on the Interpretation of Contracts* at Chapter 5 where it is stated:

> **"The words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy." (Respondent's skeleton argument, paragraph 21)**

There was, the Respondent contends, no reason to adopt a different approach when looking at the termination of a contract to that applicable to the construction of a contract more generally.

19. In the present case, the Claimant had used the phrase "giving notice". That was a legal term of art; it not only had a technical meaning in law but was also commonly used and understood by people in everyday language. Interpreted in its grammatical and ordinary sense in context, the plain, ordinary and popular meaning of giving notice in employment was to resign from one's employment. This was the kind of case referred to by Phillips J in **Tanner v**

Kean [1978] IRLR 110 where the words used "*could be said only to constitute … resignation*" (see paragraph 3).

20. In the alternative, if the ET had not erred in finding that the Claimant's language was ambiguous, the Respondent accepted it was bound to adopt an objective test. Where the words used were ambiguous, however, then provided the recipient of the letter - here Mr Gorton-Davey - honestly and reasonably construed the language as resignation, he should be permitted to rely upon that construction even if that was not the Claimant's actual intention (see the approach as described by the learned editors of *Harvey on Industrial Relations and Employment Law* at DI [229]-[230]). The Respondent contends however that evidence of the subjective views - here, of the Claimant and Mr Gorton-Davey - were relevant to the objective question as to how the words would have been understood by a reasonable listener in context. The ET therefore erred in deliberately seeking to avoid reference to this evidence (see paragraph 50). Specifically, that had meant the ET had ignored the Claimant's evidence when asked what she was intending when she handed in her notice as follows:

> **"Nothing, I was upset … I thought I am fed up. I was so grateful that I was getting out. I just wanted to go, give my notice in and have a few weeks off then go to my new position."**

21. The Respondent says the Employment Judge's response to the Claimant's evidence evinced surprise at this, suggesting that it was seen as a concession on the Claimant's part that she had indeed intended this to be a resignation. This was not an undisclosed intention which would not be relevant for the ET's consideration but a disclosure of what the Claimant really meant and that was a distinguishing feature in this case. It was this - the disclosed subjective intent - that meant that this was a relevant matter for the ET to consider in these circumstances.

22. As to Mr Gorton-Davey's understanding, the ET erred in excluding consideration of his genuine subjective construction of the Claimant's letter of 10 June. By finding that he should have read it as giving notice of leaving the Department rather than her employment, the ET was setting too high a standard for the employer, not allowing for the genuine and (the Respondent urges) reasonable reading of the letter by the Respondent in this case. Further or in the alternative, the ET had erred in focussing on the events of 10 June 2016 and the lead up to that date. The surrounding circumstances that the ET had to evaluate were not merely those up to and including 10 June, but also those that took place subsequently; as had been allowed by the EAT in **Tanner** when addressing the application of the objective test (see paragraph 4). The ET thus needed to consider whether the events subsequent to the giving of notice were "*genuinely explanatory of the acts alleged to constitute [resignation], or whether they reflect a change of mind*". In failing to consider such subsequent events the ET erred in its approach. Specifically, the ET failed to demonstrate that it had had regard to the fact that prior to the amendment of her claim form, it had not previously been the Claimant's case that she had been misunderstood and had never intended to resign. Rather her case had been - in her dealings with Mr Gorton-Davey, with HR or with Ms Tapp, prior to 24 June 2016 and in her initial ET claim - that she had resigned in the heat of the moment; that was consistent with the fact that the Claimant had attempted to withdraw her resignation and with Mr Gorton-Davey's understanding as is apparent from his email to HR when he suggested that he thought the Claimant had resigned.

The Claimant's Case

23. For the Claimant, it is stressed that the question "who terminated the contract" was one of fact for the ET to determine and was not susceptible to being overturned on appeal unless, on

A the evidence, the finding was perverse; **Martin v Glynwed Distribution Ltd** [1983] ICR 511 CA per Sir John Donaldson MR at pages 519G-520D and Sir Denys Buckley at page 521C-D.

B 24. On the question whether the language used by the Claimant was ambiguous, for the reasons it had given the ET had been entitled to find as a fact that the relevant wording did not clearly and unequivocally communicate an intention to terminate her employment. Crucially, words capable of unambiguity, conveying an intention to terminate employment, such as C "resigning", "resignation" or "termination", had not been used. In any event, the ET had gone on to consider the contrary position, that is, that the words used were unambiguous and had found that there were special circumstances in this case that made it unreasonable for the words D to be construed at face value, see **Kwik-Fit (GB) Ltd v Lineham** [1992] ICR 183 EAT at page 191C-E and **Willoughby v CF Capital plc** [2012] ICR 1038 CA per Lord Justice Rimer at paragraph 37; there was no appeal against the finding of special circumstances in this case.

E 25. Turning then to the issues raised by the first and third grounds of appeal, in circumstances in which ambiguous language was used, neither the intention of the speaker or writer nor the subjective understanding of the listener/reader was the focus of the proper F interpretation; the test was an objective one: how would the words used be understood by a reasonable listener or reader? The question whether or not there had been a dismissal or resignation must then be considered in the light of all the surrounding circumstances, see **BG** G **Gale Ltd v Gilbert** [1978] IRLR 453 EAT at paragraph 8, **Chapman v Letheby & Christopher Ltd** [1981] IRLR 440 EAT at paragraph 13, and **J & J Stern v Simpson** [1983] IRLR 52 EAT at paragraph 7. The ET here had adopted an entirely correct approach to the H interpretation of ambiguous words used by the Claimant and had correctly eschewed what were simply the subjective intentions and understanding of the witnesses.

26. As for the Respondent's reliance on a specific passage of evidence given by the Claimant as had been submitted before the ET, that was not a concession that she had intended to resign her employment. It was entirely consistent with the ET's finding of ambiguity in her use of the word "notice" in her letter of 10 June. As for events subsequent to the letter of 10 June 2016 - in particular the Claimant's own reference to notice of resignation and the use of the phrase "*retracting her resignation*" - these could not give rise to a resignation of the Claimant's employment with the Respondent if, as found by the ET, the relevant letter had not done this. The ET similarly accepted that the terminology of resignation was only adopted by the Claimant after the Respondent had mis-described her letter of 10 June as being notice of resignation.

Discussion and Conclusions

27. The issue for the ET was whether the Claimant had resigned or had been dismissed, or, as Sir John Donaldson characterised the question in **Martin v Glynwed Distribution**: "*who really ended the contract of employment?*" If the Claimant had resigned when she handed in her letter of 10 June 2016, there would have been no dismissal: the Respondent would have merely accepted her notice of resignation and, later, declined to agree that she could withdraw that notice. If the words used by the Claimant on 10 June were unambiguous, that would have been an end to the ET's inquiry. It would have been the Claimant who had brought the contract to an end by her unequivocal act of resignation.

28. The ET did not, however, find that the language used by the Claimant was unambiguous or, if it was, considered that it had to be seen in the special circumstances that existed at the relevant time. That leads in to the first point raised by the appeal (albeit by the second ground

of appeal) - the Respondent's challenge to the finding that the language of the letter of 10 June 2016 was ambiguous.

29. Although short, the letter of 10 June was a significant communication; it was this that the Respondent relied on as constituting the Claimant's resignation, from which it would not later let her resile. The language used by the Claimant was of giving notice. In the context of an employment relationship, in many circumstances that phrase might well be capable of only one meaning: the party giving notice is terminating the relationship - if an employer, the notice is of dismissal; if an employee, it is of resignation. The position in the present case was, however, complicated by the fact that the Claimant was expecting to leave one job with the Respondent - that in the Records Department - to take up a new position in Radiology. In those circumstances, the ET concluded that the language used by the Claimant was not clear and unambiguous or, in the alternative, that it had to be read in the light of the special circumstances that existed.

30. Given the particular circumstances of the case, I consider the ET reached a permissible conclusion on this point. The Claimant's statement that she was giving notice could have referred to her giving notice of her departure from her position in Records, with a view to taking up the new role in Radiology, *or* it could have referred to her giving notice of resignation of her employment. As to that latter possibility, I am not sure the Respondent is right in its contention that generally the expression "giving notice" can *only* refer to resignation from employment. Even if I was wrong on this point, however, the ET went on to make the specific finding that there were special circumstances in this case such that it would be wrong to simply take the reference to "giving notice" at face value. This alternative finding - from which there is no appeal - reflects the possibility allowed by the EAT (Wood J presiding) in

Kwik-Fit (GB) Ltd v Lineham. In that case, it was held that, while there was no general duty on an employer to ensure an employee using apparently unambiguous words of resignation intended to resign, in special circumstances it might be unreasonable for words to be construed at face value. That possibility was essentially approved by the Court of Appeal in **Willoughby v CF Capital plc** [2012] ICR 1038, albeit Rimer LJ characterised the approach allowed 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, over 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 a cautionary reminder to 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, 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."**

31. Given the particular circumstances of the present case, I am satisfied that the ET was entitled to find the Claimant's letter of 10 June 2016 was ambiguous and I dismiss the appeal on this ground.

32. Having thus found that the Claimant's letter was ambiguous, the ET had to return to the question, who really ended the contract of employment? That was a question that it had to answer in circumstances in which (on its findings) the Claimant had submitted an ambiguous communication, which could - on one view - be construed as a letter of resignation from her employment.

33. Although the case law is not entirely consistent as to the approach to be adopted at this stage of the inquiry, in the present case the parties are agreed that the ET was correct to adopt an objective test: how would the letter of 10 June have been construed by the reasonable

recipient? What would have been the reasonable construction of the letter is, however, something to be determined in the light of the particular circumstances known to the reader of the letter at the time; the objective observer is also to be an informed observer. What then were the relevant circumstances to which the ET was required to have regard? Did it at this stage, as the Respondent contends, (1) err in declining to have regard to the evidence of the Claimant's or Mr Gorton-Davey's subjective views, and (2) err in wrongly restricting its assessment of the position by failing to take account of the parties' respective actions after the Claimant had given notice on 10 June 2016?

34. The difficulty with the first of these points is that it assumes that there was clear evidence of subjective intention or understanding, contradicting the ET's finding as to how the letter of 10 June was to be construed on an objective basis. I am not persuaded that there was such evidence. The Respondent seeks to place particular weight on what it contends was evidence given by the Claimant, cited in its submissions above, which (it argues) the ET effectively had to positively disregard, as it made clear that her intention had indeed been to resign from her employment, not just her position in the Records Department.

35. I do not know what, if anything, the ET ultimately made of that particular passage from the Claimant's evidence. On its face, it seems to be a statement just as ambiguous as to what the Claimant might have intended as her letter of 10 June. It is certainly possible to understand the evidence as referring to the Claimant simply being grateful that she was getting out of the Records Department. By making that statement, the Claimant did not clearly say that she had been planning to leave the Respondent's employment; indeed, that construction would appear to be contradicted by her apparent desire to take up the new position with the Respondent in Radiology.

A

36. As for Mr Gorton-Davey's subjective understanding, I do not consider the ET lost sight of his use of the term "resignation". It concluded, however, that when he read the letter on 10 June he did not in fact construe it as a letter of resignation from employment; rather, he read it as notice of leaving or resigning from the Records Department. That was the ET's finding, given what it found to be Mr Gorton-Davey's understanding of the relevant circumstances pertaining at the time (see the ET at paragraphs 45 to 48.1, as set out above). That is a finding supported by the evidence of Mr Gorton-Davey's contemporaneous response, specifically his letter to the Claimant on 10 June, which specifically spoke in terms of her last day of work within the Records Department. It is also consistent with Mr Gorton-Davey's failure at that stage to take the kind of steps that he would have been expected to take if he had really understood that the Claimant was leaving her employment with the Respondent, addressing issues such as outstanding accrued leave entitlement, or the completion of a staff termination form - omissions that the ET contrasted with the actions taken immediately upon the sending out of the letter of 24 June 2016. On that basis, the ET permissibly concluded that Mr Gorton-Davey had genuinely and (given its findings as to context) reasonably construed the letter 10 June as notice only of the Claimant's intended departure or resignation from the Records Department, not from her employment.

B

C

D

E

F

37. As for the evidence of the parties' statements and descriptions of the position subsequent to the Claimant's letter, the Respondent contends that the surrounding circumstances the ET had to evaluate were not merely those up to and including 10 June 2016, but also those that took place subsequently, relying in this regard on the judgment of the EAT in **Tanner v Kean**. Although the **Tanner** case was concerned with ambiguous words used by an employer (relied on by the employee in that case as words of dismissal), the Respondent

G

H

says the same approach must apply to ambiguous words of resignation. The relevant passage in **Tanner** provides as follows:

> **"4. … Some care, it seems to us, is necessary in regard to later events …: … later events, unless relied on as themselves constituting a dismissal, are only relevant to the extent that they throw light on the employer's intention; that is to say, we would stress, his intention at the time of the alleged dismissal. A word of caution is necessary because in considering later events it is necessary to remember that a dismissal or resignation, once it has taken effect, cannot be unilaterally withdrawn. Accordingly, as it seems to us, later events need to be scrutinised with some care in order to see whether they are genuinely explanatory of the acts alleged to constitute dismissal, or whether they reflect a change of mind. If they are in the former category they may be valuable as showing what was really intended."**

38. In the present case, the Respondent places particular reliance on the Claimant's subsequent adoption of the word "resignation" but that (1) might simply be reflective of her use of the same terminology as used by Mr Gorton-Davey, (2) was potentially ambiguous given that Mr Gorton-Davey had not referred to notice of resignation from employment in a general sense but had specifically referred to her departure from the Records Department, and (3) in any event, only arose after the Claimant had received news that the offer of the alternative position in Radiology was being withdrawn (it can thus be seen as consistent with a desire to withdraw her notice of departure from the Records Department, rather than the withdrawal of what had been intended as a more general notice of resignation from her employment with the Respondent). On the facts of this case, it is hard to see how the Claimant's later use of the word "resignation" - or how she subsequently talks of seeking to withdraw her notice of resignation, or her characterisation of her case in her ET1 as being one of constructive dismissal - is to be seen (to use the language of **Tanner**) as genuinely explanatory of her letter of 10 June.

39. As for the Respondent's subsequent position, I am unsure how that could offer any real assistance in the construction of the Claimant's letter of 10 June. Certainly, once it became apparent that the offer of a position in the Radiology Department had been withdrawn, and the Claimant was seeking to withdraw her notice of departure from Records, the Respondent's

position was that the Claimant's employment must come to an end. Given its findings of fact, however, I do not consider the ET erred in finding that this, in context, amounted to a dismissal and not simply the acceptance of a resignation.

40. Given the circumstances of this case - in particular, the change that occurred once the conditional offer of a position in Radiology had been withdrawn - I consider the ET was entitled to take the view that it would not be helped by trying to discern the subjective intentions of the protagonists by regard to events subsequent to 10 June. It permissibly focussed on the wording of the letter of 10 June 2016 and the circumstances prevailing at that stage, rather than trying to construe what the Claimant said with the benefit of hindsight given what the parties did or said at a later stage, when faced with entirely different circumstances. The fact was that, after 16 June 2016, the position changed; what the Claimant did and said after that date could not be viewed within the same context as that which existed on 10 June 2016.

41. Keeping its focus on that which was at the heart of the case - what the Claimant had said on 10 June 2016 and how that was understood by the Respondent at that time - the ET was entitled to find that the reference to giving notice was related to the Claimant's particular position in the Records Department and not a resignation from the Respondent's employment, and that it was reasonably so understood by the Respondent when the Claimant's letter was read on the same day it was received. Accordingly, for all those reasons, I dismiss the appeal.