# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Richard Ash**

**Respondent:** **Green Room Design Limited (1)**
**Green Room Retail Design Limited (2)**

**Heard at:** **Birmingham** **On: 5, 6, & 7 November 2018**

**Before:** **Employment Judge Butler Sitting Alone**

**Representation**
Claimant: Mr Hignett, Counsel
Respondent: Mr Meichen, Counsel

# JUDGMENT

The Judgment of the Tribunal is that the claim of unfair dismissal against the First Respondent is not well-founded and is dismissed. The claim against the Second Respondent is dismissed on withdrawal by the Claimant.

# REASONS

The Claim

1. By a claim form submitted to the Tribunal on 29 March 2018, the Claimant brought a claim of unfair dismissal against the Respondents on the grounds that his employment, which had commenced with the Second Respondent on 1 May 2001, was terminated on the 7 November 2017 in circumstances where that dismissal was unfair. In particular, as set out in the detail in Section 8.2 of his claim form, he had not been invited to a formal meeting, had not been advised of any allegations against him, was not informed of his right to be accompanied, was not given a written reason for his dismissal and was not offered a right of appeal. The Respondents denied the claim on the basis that the Claimant had not been dismissed, but had resigned.

The Issues

2. The parties had not agreed a list of issues prior to the commencement of the Hearing. The Claimant had prepared a list of issues, the first of which concerned whether the Claimant had been dismissed. Within

that heading was included an issue as to whether either the Respondents had conducted themselves in such a way that the Claimant had been entitled to resign and claim constructive unfair dismissal. Mr Meichen for the Respondent submitted that this was a new claim which the Respondents had not prepared to resist and, if it were the case that an amendment application be made and be successful, he would seek an adjournment in order that a Defence could be prepared. I considered the matter with the parties and, in particular, had regard to the particulars of the Claimant's claim referred to above. I indicated that if the Claimant wished to pursue a claim of constructive unfair dismissal, an application to amend his claim would be necessary. After consulting with the Claimant, Mr Hignett advised that he was not instructed to make such application.

3. The remaining issues which were agreed between the parties were: -
   i. If the Claimant was dismissed, what was the reason for his dismissal?
   ii. Was that reason a potentially fair reason?
   iii. If it was a dismissal on the grounds of redundancy and/or some other substantial reason, was it fair in all the circumstances?
   iv. Did the Respondent establish that there was a chance that the Claimant would have been dismissed had a fair procedure been carried out?

4. In relation to whether the Claimant was dismissed, the parties agreed that the issues were:
   i. Did Mr Clayton have the authority of the other Directors of the First Respondent to speak to the Clamant in the terms he did on the 07 November 2017?
   ii. Did the words used by Mr Clayton at the meeting on 7 November 2017 amount to an express dismissal?
   iii. If not, by his actions from 7 November 2017 onwards is the Claimant to be taken as having resigned from his employment.

5. As the Claimant confirmed that he was employed by the First Respondent and his claim lay against that company, references to "the Respondent" in this Judgment are to the First Respondent.

6. Clearly, the first issue to be dealt with is whether the Claimant was dismissed by the Respondent as alleged.

<u>The Evidence</u>

7. I heard evidence from the Claimant, Mrs N Ash, his wife, and Mr R Miller, his Personal Accountant. For the Respondent, I heard evidence from Mr S Verrall, Executive Chairman of the Respondent, and Mr A Clayton, non-Executive Director of the Respondent. All of the witnesses produced witness statements which stood as their evidence in chief and they were all cross-examined.

8. There was an agreed bundle of documents running to 271 pages and references to page numbers in this Judgment are to page numbers in the bundle.

9. The Clamant began his evidence by confirming the contents of his witness statement were true. I did not find his evidence to be reliable in a number of important points in that it appeared to me to be inconsistent with the documentary evidence and in that, having confirmed at the outset that the contents of his witness statement were true, he subsequently said in evidence that it was inaccurate in relation to a particular significant point (addressed below).

10. The history of the Respondent and how it came into being was not really in dispute between the parties. The Claimant set up the Second Respondent in 2001 and developed it into a successful business but by 2014 wanted to move it on to another level with a view to achieving a sale. With that in mind, Mr Clayton and Mr Verrall, who had become good friends of the Claimant and had worked successfully in business themselves, were appointed on a non-Executive basis in order to assist the Claimant in achieving a sale. Mr Clayton was appointed in February 2007 and Mr Verrall in 2009. Mr Verrall became a shareholder in 2010 and attempts to sell the business were unsuccessful with one proposed sale falling through to the disappointment of all three.

11. In October 2014, Mr Verrall then led and part-funded the acquisition of the Second Respondent by the Respondent as a result of which the Claimant and his wife received £1.85 million in cash and loan notes and a 45% shareholding between them. Mr Verrall held 40% of the shares and Mr Clayton 15%.

12. Mr Verrall then became Executive Chairman of the Respondent and Mr Clayton a non-Executive Director. Mr Verrall and Mr Clayton said that it was a condition of their investment and the incorporation of the Respondent that the Claimant reduce his involvement in the management of the business. The Claimant was referred to page 113 where he sent an email to the staff of the Respondent which, inter alia, said "As a result of the investments there will be some development of Steve's roles and mine. He will increase his time and involvement with the business and becomes Executive Chairman. Steve and I have agreed that he will take on the management of our existing board and executive team and I will focus on our strategic development and ensuring our start-up businesses in Amsterdam, London and Workspace all come on line.

13. Steve's increased hours have also given me the opportunity to share the load a little, so I have also taken this opportunity, after a 13-year burn, to reduce my time by one day a week which I intend to invest in my twin passions (any guesses what they are, answers on a postcard?)!" Despite the contents of this email, the Claimant gave evidence that he was not happy about Mr Verrall taking on a more active role and said that he did not accept Mr Verrall was taking on the role of CEO. He said he "never signed up to this". This is entirely contrary to the document at page 99 and, in particular, page 100 where Mr Verrall is described as "effectively interim CEO (but it doesn't have to be called this)." At page 102 it is noted that the plan submitted by

Mr Verrall "reduces costs, allows SJV to take on more responsibility and facilitates RLA starting the phased process of stepping away from the business". After some email correspondence, in which the Claimant expressed his dissatisfaction with Mr Verrall's proposals, the parties agreed on a way forward which included that the Claimant would retain his title of CEO and Founder, and this led to the Claimant's email to staff.

14. In his oral evidence, however, the Claimant said it was not one of the terms of Mr Verrall's investment in the Respondent that he reduced his time spent in the business and he did not recognise he would be less involved in it. This contradicts the email written by the Claimant and circulated to the Respondent's staff. Having been very upbeat in his email to the staff, the Claimant in his evidence contradicted the spirit of that email by saying that, as Mr Verrall thought a sale of the business could be achieved within 18-24 months, the Claimant's time he would have for management responsibility would be limited.

15. It was the Claimant's evidence throughout that he played a very active part in the management of the Respondent and by 2017 was spending two days a week in the office and other times working on pitches and preparations for the sale of the company. This is entirely at odds with his email to Mr Verrall at page 129 where he said "…. Coming to terms with the fact that my role is close to obsolete …. I suppose that Green Room, being such a major part of my life, the void it has left/is leaving has not been easy to fill. Professionally, I miss being wanted, needed or relevant". Notwithstanding this email, the Claimant attempted to explain and comment that his role was close to obsolete by saying that when he started the business he did everything including recruitment, investment and management; then his father died and he was missing him and was not being talked to in the company. He then went on to say under cross examination that, in his view, his role in the company had not significantly reduced. When it was pointed out to him that in the email at page 129, he specifically referred to "my reduced role at work", he explained that this was a dark time in his life, he did not feel he had a reduced role and possibly wrote this as he was very down at the time. He said he did not think what he wrote was entirely accurate and that maybe his words were not truly representative of the situation. I did not find the Claimant's explanations to be at all credible.

16. This is compounded by the Claimant's further oral evidence when he confirmed he had taken a step back to a degree to make matters better for a prospective purchaser. Further, page 134 illustrates in the email from the Claimant to Mr Clayton, that he was looking for any other non-Executive Director positions which Mr Clayton might be aware of. He also confirmed he had spoken to an accountancy firm about working for it as a consultant and had accepted a role with another business in June 2017.

17. The Claimant also denied meeting Mr Clayton on 16 October when, Mr Clayton says, "the Claimant's role in the company was discussed" and denies having a telephone call with him on 31 October 2017. He further denies that the meeting he had with Mr Clayton on 7 November

2017 was a continuation of the matters discussed in the meeting and subsequent telephone call. I did not find his evidence that he thought the meeting on 7 November 2017 was a catchup to be credible especially in the light of the document prepared by the Claimant beginning at page 237A which talked about what the Claimant had been doing in the business and what he should be doing going forward. If, as he says, this meeting was just a catchup, I cannot see that he would have gone to the trouble of producing such a long document.

18. Moving on to the meeting of 7 November 2017, I found the Claimant's evidence to be evasive and inconsistent. In respect of the issues in this case, whether the Claimant was dismissed by Mr Clayton at the meeting and, if so, what language was used, is of crucial importance. The Claimant's oral evidence was that he could not remember if Mr Clayton used the word "dismissed". He then said that he assumed with what Mr Clayton said that he had been dismissed. He said he could not remember the use of "sacked", but that he felt that was what happened.

19. Regarding Mr Clayton's notes of the meeting, which begin at page 232, the Claimant said in evidence that he was not saying the notes were incorrect. He then said he agreed they were Mr Clayton's accurate interpretation of what happened and what was said and that just because he had not challenged the notes did not mean he accepted them. Further, he said that Mr Clayton "maybe" said we could have a further meeting with Mr Verrall present. He then said he did not think Mr Clayton said this.

20. The Claimant was questioned closely around paragraph 46 of his witness statement wherein he stated that his wife met with Mr Clayton and Mr Verrall on 8 November and informed him that during that meeting, they both continued to state that he had not been dismissed. In re-examination, however, the Claimant began to prevaricate on this point. He said he could not remember exactly on which day his wife had told him that Messrs Clayton and Verrall told her he had not been dismissed. Then, almost completely out of the blue, the Claimant said his witness statement in this regard was "incorrect". This gave me no confidence in the reliability of the Claimant's evidence.

21. I found similar issues with the evidence of Mrs Ash. Importantly, she was questioned about the Claimant's witness statement at paragraph 46 wherein she is recorded as saying that Messrs Clayton and Verrall told her the Claimant had not been dismissed. Her evidence was that they did not say that and that the Claimant's reference to that was an error. She took what they said to her to confirm that he had been dismissed.

22. I found this inconsistency in the evidence of the Claimant and his wife to be illustrative of the unreliability of that evidence. The Claimant had been represented by Solicitors who had doubtless assisted in the drafting of witness statements which, effectively, both the Claimant and his wife were now saying in evidence were inaccurate. I gained the

strong impression that they had realised when the Claimant gave his evidence that his reference to his wife telling him Messrs Clayton and Verrall told her he had not been dismissed was damaging to his case and colluded in trying to change his evidence to be more supportive of his claim.

23. I found the evidence of Mr Miller to be given in a straightforward manner without any hesitation and I had no reason to doubt its reliability. Having said that, I did not find his evidence to be particularly relevant to the issues before me.

24. I found the evidence of the Respondent's witnesses to be more reliable. In the main, Mr Verrall's answers to questions put to him were straightforward and without hesitation. There were some parts of his evidence which he gave freely and which did not necessarily support the Respondent's case For example, he said that in the meeting with Mrs Ash on 8 November he probably did say that the Claimant ought to more on. Although Mr Verrall confirmed he had had a number of conversations with the Claimant about his reducing role within the Respondent, he was effectively its CEO and I was not altogether convinced that he was as ill-informed as he made out about the nature of the proposed conversation Mr Clayton was to have with the Claimant on 7 November 2017. However, in relation to the issues, I did not find this to be of great significance.

25. I had no reason to doubt the evidence of Mr Clayton. He admitted he had never before in business been solely responsible for the dismissal of an employee. He had little knowledge of without prejudice or protected conversations. He also confirmed that due to the fact that he worked two days a month at the Respondent, he did not have full visibility as to what the Claimant and Mr Verrall actually did.

26. His evidence was slightly inconsistent with Mr Verrall's in relation to conversations they had had regarding the Claimant's salary. Notwithstanding this, he confirmed he did not attend the meeting with the Claimant with the authority of the board of directors and did not seek their approval to meet with the Claimant, although they were aware of the conversations he was having with him.

27. Mr Clayton readily confirmed that in his email to the Claimant at page 261 he did not answer the Claimant's accusation that he would have no job and no salary beyond 31 May 2018. He further accepted that he did tell the Claimant that he thought his role and salary were unsustainable and that he had spoken to the other directors about this. He maintained that what he discussed with the Claimant about a non-executive role was a proposal not a fait accompli. He readily acknowledged that it would have been upsetting for the Claimant to lose most of his salary. He also confirmed that it would have been better had he clarified to the Claimant that, as no firm decision had been made about the Claimant's future in the business, his salary was not at risk at that time.

28. Significantly, in response to a question I asked, Mr Clayton accepted that he had not handled this situation well, particularly in persuading the Claimant that the intention of the meeting was to engage with him regarding his future.

29. For the above reasons, I found the evidence of the Respondent's witnesses to be more reliable and wherever there was a conflict on the evidence, I preferred that of the Respondent.

<u>The Facts</u>

30. In relation to the evidence and the issues before me, I find the following facts:
    i. In 2001 the Claimant set up a business called Green Room Retail Design Limited of which he was sole director and shareholder. His wife became a shareholder in 2003.
    ii. In 2007, on the recommendation of the Claimant's Accountant, Mr Miller, Mr Clayton was appointed Finance Director working on a part-time basis and he purchased 10% of the issued shares in the company from the Claimant.
    iii. In 2009, Mr Verrall was appointed a non-Executive Director of the company and purchased 20% of the issued shares at the end 2010. The relationship with Mr Verrall in the early days was strong and built upon their close friendship.
    iv. In 2014, the shareholders agreed that a new company would be incorporated to purchase the shares in Green Room Retail Design Limited into which Mr Verrall invested £450,000.00. This transaction was completed on 21 October 2014 after which Mr Verrall was a 40% Shareholder in the Respondent, the Claimant was a 38% shareholder, his wife 7%, the remainder being held by Mr Clayton.
    v. As part of the financing of the new company, the Claimant was paid just over £1million pounds in cash and £800,000.00 in loan notes in the new company, the Respondent in this case.
    vi. The rationale for this transaction was to use Mr Verrall's expertise in preparing businesses for sale and, as part of the plan, after much discussion, it was agreed that the Claimant would spend less time in the business leaving Mr Verrall to take on most of the management duties, but with the Claimant retaining his title of CEO and Founder. After this time, the Claimant did reduce his time spent in the business and his contribution to its management although he spent some time preparing information relevant to the company's potential sale.
    vii. Over the next two years or so, relations between the Claimant and Mr Verrall became strained due to the Respondent performing less well financially than had been anticipated and by Mr Verrall's desire to be responsible for the Executive Management of the Respondent and the Claimant's sporadic involvement in the business which he continued to see as "his business". The directors had all taken reductions in salary to accommodate the level of profit and to make the business more attractive for a purchaser. In 2017, the Claimant began to explore and, indeed, took up non-Executive appointments.
    viii. A sale of the company had been planned but did not happen. The Claimant then had conversations with Mr Verrall about a structured exit

from the business and a possible proposal was presented to the Claimant shortly before he and his wife went on holiday. This did not ultimately prove attractive to the Claimant and he took it no further.

ix. The Claimant had also had two conversations with Mr Clayton about a potential exit from the business. Mr Clayton had made clear to the Claimant that his salary when measured against his involvement in the business was unsustainable. At this point, the Claimant was being paid £118,000.00 pa and was not spending very much time in the business.

x. On 7 November 2017, Mr Clayton met with the Claimant. The other directors of the business were aware of the nature of the conversation he had with the Claimant but no specific instruction had been given to Mr Clayton. I find that the Claimant was also aware of the nature of the meeting given that he presented his own arguments as to what he actually did, could do and should be doing within the business.

xi. During the meeting, Mr Clayton explained to the Claimant that his salary and role were unsustainable. As part of a potential exit, he told the Claimant he was entitled to six months' notice which would see him receive his full salary until the end of May 2018. Thereafter, the Claimant could pursue other opportunities by way of Non-Executive Directorships and setting up his own business. During the conversation, at no time did Mr Clayton refer to the Claimant as being dismissed, either immediately or with effect from 31 May 2018.

xii. The Claimant was upset by what he heard and did not return home immediately. His wife became worried later that evening and contacted Mr Clayton trying to find out where the Claimant was. He explained to her what had happened and that there was a range of options and outcomes which needed to be discussed further.

xiii. As a result of this conversation, Mr Verrall and Mr Clayton met with Mrs Ash the following day, 8 November 2017. They told her several times that he had not been dismissed and asked her to convince him to meet with them to further discuss the various options for his structured exit from the company.

xiv. Notwithstanding this conversation, which I find was relayed to the Claimant by Mrs Ash, the Claimant emailed Mr Clayton alleging he had been dismissed and then received a further email confirming this again. After taking legal advice, Mr Clayton replied on 10 November setting out that the Claimant had not been dismissed nor had he been made redundant. Despite being invited to further meetings, the Claimant refused to meet with Mr Clayton and/or Mr Verrall and played no further part in the business.

## Submissions

31. For the Respondent, Mr Meichen referred to his written submissions. He said Mr Clayton had not intended his discussion with the Claimant to suggest the Claimant was being dismissed. The Claimant had chosen to misinterpret what was said and had only given his version of events for the first time in his witness statement. He then changed that account when giving evidence. The Claimant had taken a back seat in the business but retained a large salary. He knew what the meeting on 7 November was about because he had prepared a lengthy note about his current and future role. There was no dismissal.

32. Mr Hignett submitted that what Mr Clayton said to the Claimant, that his current role and salary were unsustainable, there was no executive role in the Company for him, he would no longer be the CEO or have that title, he had a six month notice period after which his salary would cease and there might be a non-executive role for him, amounted to a dismissal. They were not proposals and were not set out in writing. Mrs Ash said in her meeting she got the message "no job, no salary". It was doubtful Mr Clayton had board authority for what he said in the absence of an appropriate resolution. He referred to Hogg v Dover College 1990 ICR 39 EAT to support his submission that the words used by Mr Clayton clearly suggested a dismissal. The inconsistency in the Claimant's witness statement was simply a mistake.

## Conclusions

33. The Claimant was not assisted in this matter by the inconsistency between his witness statement and his oral evidence and that of his wife. It was convenient in the extreme that he changed his statement by giving evidence that it was incorrect as to what Messrs Verrall and Clayton said to his wife on 10 November 2017. He has had the benefit of legal representation throughout and his sudden change adversely affected his credibility. I cannot accept Mr Hignett's submission that there was simply a mistake in the witness statement, the sudden about turn was more cynical than that.

34. Even if I accepted the Claimant's evidence, I do not find that the decision in Hogg would assist him. In that case, the employee was told directly what was going to happen immediately. There was no room for doubt and there were no ambiguous words used. A decision had been made and he had no choice. In this case, I find that the discussion with Mr Clayton was a prelude to further discussions over the Claimant's future which had to be addressed due to his large salary and lack of significant involvement in the business. What the Claimant did was to put his own subjective interpretation onto the discussion with Mr Clayton and reach his own conclusions.

35. I do not find that the words spoken by Mr Clayton to the Claimant amounted to unambiguous words of dismissal. Following the Court of Appeal's decision in Sothern v Franks Charlesly & Co 1981 IRLR 278 CA, unambiguous words of dismissal may be taken at their face value without the need for further analysis of the surrounding circumstances. But even if the words of Mr Clayton were held to be ambiguous, the surrounding circumstances in this case do not, in my view, assist the Claimant. Ambiguous words spoken would require an objective view and consideration of any surrounding circumstances. In this regard, his own evidence was inconsistent, telling staff by email announcement he was reducing his role in the Respondent (which I find he did), discussing his future with Mr Verrall and considering a potential means of exiting the Company and then giving evidence that he was still heavily involved in the business. All of this points away from dismissal. He has not satisfied the burden of proof upon him to establish otherwise.

36. For the above reasons, I dismiss the claim.

Employment Judge Butler
Date 21 December 2018