



EMPLOYMENT TRIBUNALS

Claimant: Mr J Hornby

Respondent: Kirkham Engineering Company Limited

Heard at: Liverpool

On: 16 January 2020

Before: Employment Judge Benson

REPRESENTATION:

Claimant: Mr B Green – Volunteer

Respondent: Mrs M Peckham - Solicitor

JUDGMENT having been sent to the parties on 22 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant brings claims of unfair dismissal and breach of contract. The issue in this case was whether the claimant was dismissed or whether he resigned. The claimant is arguing that he was expressly dismissed by his employer. Essentially that although he did leave his employment on 17 May, that decision was taken in the heat of the moment and his employer should not have taken his actions and words that day as a resignation and by writing to him to on 24 May accepting his resignation, they were dismissing him.

2. The respondent does not seek to argue a fair reason should the claimant be found to have been dismissed. The claim of breach of contract relates to the claimant's contractual notice period.

Evidence and Submissions

3. I heard evidence from the claimant, and from Mr J Guyer, Mr J Raison and Mr S Long, all managers in the respondent business, Mr B Lynam and Mr A Newton, joint Manager Directors and Mr R Newton. I was provided with an agreed bundle of

documents. Oral and written submissions were made by Mr Green and Mrs Peckham and I was referred to authorities which I have considered when coming to my decision. I have referred to those which were of particular relevance below.

The Facts

4. The claimant was a chargehand setter and he commenced work for the respondent on 1 September 1997. His employment ended on 17 May 2019, and he worked for the respondent for over 20 years. The claimant was 64 years old and regularly spoke about retirement and his pension to his colleagues.

5. On 17 May 2019 having returned that day from a break of some ten days or so on annual leave, the claimant found that he had come back to a heavy workload. During the course of that morning, he was asked to do more work by Mr Guyer, his manager. I have heard different versions of what the claimant said after Mr Guyer asked him to do more work. I find that he said words to the effect of 'Fuck this, I'm off'. It is also likely that he said, 'it's time'. The claimant in his evidence accepted that he did say something along these lines. There are different versions of the exact wording used, but I accept that it is likely that the claimant did swear. Mr Guyer confirmed that swearing was part and parcel of the shop floor language, but I believe that the claimant did not swear in anger, it was just part of his and his colleagues' normal way of speaking to each other. It is accepted by Mr Hornby that by his words and his actions that morning he was resigning, and that was his intention that day. He shook hands with Mr Newton who was standing nearby and Mr Guyer and he told both of them that he was leaving, saying 'Alan, I've had enough. I'm off'.

6. I also accept that the claimant felt frustrated when he told the respondent that he was resigning but that that was not apparent to either Mr Newton or Mr Guyer or in fact others whose evidence we heard. That morning his manner was calm, measured and controlled, and that was certainly the impression that he gave to his colleagues. The claimant was returning after a break. He was frustrated with his workload and he had retirement in mind. He decided in that instant that now was the time to go and I consider that was a decision which he made rationally at that time.

7. Over the following weekend the claimant then decided that his decision to leave was premature, and he changed his mind about what he wanted to do. He suffered a back injury on 19 May.

8. On 20 May the respondent processed the claimant's wages and they were paid into the claimant's bank account on 23 May. The respondent made no contact with the claimant between 17 May and the Thursday or Friday of that week (23 or 24 May). The respondent heard nothing from the claimant on 20 May, 21 May and 22 May. The managing directors were not surprised because they had understood that the claimant had resigned the previous Friday.

9. The claimant says he was embarrassed and that was the reason that he did not contact them during that period, but that also at other times when he had been off sick, it was not necessarily always the practice to contact the respondent and let them know.

10. I find on the balance of probabilities, that the claimant next attended the workplace on 24 May, but for the purposes of my decision it makes no difference whether it was 23 or 24 May for the reasons I explain below.

11. On that day the claimant attended work and he handed in a self-certification form. He handed that to Mr Raison. He emptied his locker and he left. He made no mention of his decision to seek to continue to work to Mr Raison, and he did not wait to see any of the directors.

12. That evening the business shut down for one week for the whit week break/closedown.

13. Earlier on that day, Mr Lynam, sent a letter to the claimant and returned the self-certification form which had been handed in by him. He confirmed his acceptance of his resignation with effect from 17 May. That letter was sent to the address which the respondent had on file for the claimant. Unfortunately, it did not reach the claimant because he was no longer at that address, and he did not receive that letter until 6 June.

14. On 5 June the claimant passed to the respondent a GP sick note, and by a further letter that sick note was returned as the respondent considered that the claimant had resigned.

15. On approximately 17 June, the claimant put together an email to send to the respondent, but he later found out that it had not been sent from his inbox, and it certainly had not been received by the respondent.

The Law

16. Claims of unfair dismissal and breach of contract require an employee to show that he was dismissed. Section 95 of the Employment Rights Act 1996 describes the circumstances in which a dismissal can occur. These include that an employer can terminate the contract of employment with or without notice. Alternatively, an employee can resign in circumstances where he is entitled to resign without notice by reason of the employer's conduct. This is sometimes known as constructive dismissal. Mr Hornby is not seeking to argue that he was constructively dismissed rather than he was expressly dismissed.

17. In a situation where there are unambiguous words of resignation, the case law says that they can be taken at face value without the need for any analysis of the surrounding circumstances. There is no need therefore to consider what the employee actually intended or what a reasonable employer might have assumed they intended. Sothorn v Franks Charlesly and Co [1981] IRLR 278 CA.

18. There is, however, as has been pointed out Mr Green, a situation in which whilst unambiguous words of resignation should normally be taken at their face value, in special circumstances a Tribunal would be entitled to decide, or can decide, that there is no resignation despite appearances to the contrary. In Sovereign House Security Services v Savage [1989 IRLR 115], the Court of Appeal confirmed that unambiguous words of resignation spoken in the heat of the moment did not necessarily amount to a resignation. Mr Green has given me examples of what

might amount to “heat of the moment” and I have considered these in coming to my decision.

19. I also refer to the case of Denham v United Glass Ltd EAT 581/98 where the EAT found that the claimant had resigned in clear and unambiguous terms. What the EAT went on to say is that it is only where there is doubt as to whether the employee intended to resign that the Tribunal can go on to consider whether there were special circumstances.

20. In Kwik-Fit (GB) Limited v Lineham 1992 ICR 183 EAT, a case which Mr Green has referred me to, the EAT did not go so far as to say that in such situations where there are special circumstances there is a duty to reconsider events, rather than in such situations a prudent employer would do so and would allow a reasonable period of time to elapse before accepting a supposed resignation. The length of time that is reasonable for a prudent employer to wait before accepting a supposed resignation is question of fact for the Tribunal.

21. I have also considered the other cases, the principles of which I am familiar with, that were referred to by both Mr Green and Mrs Peckham.

Conclusions

22. Having made findings of facts, I now apply the law to those facts. The decision of the Tribunal is as follows.

23. It is accepted by the claimant that on 17 May his words and actions and indeed his intentions were to resign. He says however that the resignation was in the heat of the moment and that this amounts to special circumstances such that his words and actions should not necessarily have been taken at face value.

24. Mr Green says that the claimant was angry and frustrated at the time with his workload and the fact that he swore had demonstrated this.

25. The demeanour of the claimant, however, was calm and he shook hands with Newton and Mr Guyer as he was leaving. His behaviour and the impression given to his colleagues that morning, was that this was a rational though impromptu decision.

26. I believe, however, that he had not planned to leave that morning, but that retirement and resignation were things which the claimant had been considering whilst he was away on leave. On that morning, returning to the workplace and discovering a particularly heavy workload, he decided to make the decision to leave.

27. After employment of over 20 years it is an unusual way to leave a job. There is however in my mind no doubt that the claimant intended to resign and did so in clear and unambiguous terms. As such he cannot unilaterally withdraw his resignation. The authorities to which I have referred above state that where there is a clear and unambiguous resignation, the question of special circumstances does not arise. The respondent was therefore entitled to accept the resignation at face value, and it did this by a letter of 24 May, and by paying the claimant’s wages on 23 May.

28. Even if I am wrong on that point and this was a heat of the moment decision which amounted to special circumstances, I refer to the Kwik Fit decision above. The EAT clarified that in such circumstances there is no duty to reconsider events, but a prudent employer will allow a reasonable period of time to elapse before accepting the resignation.

29. Although the claimant's pay was actioned on 20 May, the respondent waited until 24 May before writing to confirm that the resignation was accepted, and on 24 May (or possibly 23 May, but as I have said it does not matter which of those for these purposes), the claimant attended work with his sick note. He had not notified the respondent or made any contact with it between making the decision to carry on working over the weekend and 24 May when he attended work.

30. The claimant says that he did not always contact the respondent when he was on sick leave and that he was embarrassed on this occasion, in view of his actions on 17 May. But this was a very serious situation and he did not speak to the respondent or make any efforts to contact it. When he attended on 24 May the claimant did not ask to speak to a director, nor did he tell anyone that he had changed his mind. On that date he also emptied his locker.

31. The respondent's directors are not mind-readers. They might have questioned the claimant as to why he had provided a self-certification certificate on 24 May, but it was not up to them. The claimant had a responsibility to make his own position clear and he did not. The respondent therefore did wait before actioning the resignation, but on 24 May they accepted it.

32. As I have said, it makes no difference whether the claimant attended the workplace on 23 or 24 May because he had not taken any action on the Monday, Tuesday or Wednesday of that week.

33. In these circumstances I find that the claimant was not dismissed and he resigned on 17 May. For those reasons the claim of unfair dismissal fails and is dismissed, and as the claimant was not dismissed the claim of breach of contract in respect of his notice period also fails and is dismissed.

Employment Judge Benson

Date 1 May 2020

REASONS SENT TO THE PARTIES ON

6 May 2020

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