EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ravinder Khor Sandhu	v	**IBM UK Limited**

PRELIMINARY HEARING

Heard at: **Watford Employment Tribunal** **On: 10 January 2020**

Before: **Employment Judge Bedeau**

Appearances:
For the Claimant: **In person**
For the Respondents: **Mr R Dennis, Counsel**

JUDGMENT

The claimant was not dismissed by the respondent but resigned on 3 July 2018

REASONS

1. This case was listed for a preliminary hearing by Employment Judge K Andrews on 17 January 2019, sitting at London South Employment Tribunal, an Employment Judge to hear and determine whether the claimant was dismissed or resigned as set out in paragraph 1 of the agreed list of issues. In addition, to determine, if the claimant had resigned, when she resigned from her employment with the respondent?

2. At the request of the claimant, unopposed by the respondent, the case was transferred to Watford Employment Tribunal in March 2019. On 31 March 2029, regional Employment Judge Byrne, listed it for a preliminary hearing in public on 3 June 2019 but was later relisted for hearing before me. I gave judgment at the conclusion of the hearing and said to the parties that I would give written reasons later. This is my reasoned judgment.

The evidence

3. I heard evidence from the claimant. On behalf of the respondent I also heard evidence from Mr Mark Williams, who was at the time, Delivery Partner Executive and Leader, and who conducted the claimant's dismissal appeal.

4. Having heard the evidence and having been referred to some of the documentary evidence in what appears to be a joint bundle of documents comprising of 250 pages, I made findings of fact. Indeed the facts in this case are largely agreed although I acknowledge that the claimant does challenge what has been stated in the email by Ms Holmes-Smith, UKI project Services Demand & Resources Manager, dated 29 June 2018, page 208 of the bundle, which I shall return to later in this judgment.

5. The respondent provides information technology, hardware and software as well as new business solutions and services.

6. Following a transfer, the claimant commenced work for the respondent from 1 October 2002. The respondent acknowledged that her previous employment from 1 December 1997, was continuous. I emphasize at this stage that I have not seen the claimant's contract of employment but I am prepared to accept that there is no term in that contract stating that she had a contractual right of appeal against her dismissal or against any disciplinary sanction.

7. She worked as a Project Manager in the respondent's Infrastructure Services Delivery Division within the larger Global Technology Services. She had been off work, she said, for about 21 months from 3 August 2015 to 7 May 2017, caring for her son who had been diagnosed as suffering from leukemia**.** Thereafter there appeared to have been a phased return to work back to full-time hours by September 2017.

8. The respondent embarked on a restructure of its Global Technology Services to transform its operational models, in order to maintain its competitive advantage and drive profit margin and growth. In November 2017, it commenced a redundancy programme affecting, potentially, 1,100 of its employees including the claimant, in its Infrastructure Services Delivery. There was collective consultation and the appointment of employee representatives. Regular meetings were held with the representatives between December 2017 to March 2018. Criteria for selection were agreed.

9. The number of voluntary redundancies was 34. The respondent proposed 303 compulsory redundancies. Managers were trained on the selection criteria, the scoring and ranking to be applied to all affected employees.

10. The claimant was scored by her manager at the time who was in the process of transitioning to a new role. Ms Paula Holmes-Smith was due to take over that responsibility in early 2018. They both scored the claimant, applying the redundancy matrix. The target score to avoid being made redundant was 70/120 but the claimant scored 55 putting her at risk.

11. On 20 March 2028, the claimant was informed by her line manager, who was in transition, of her score and that she was at risk of being made redundant. By April 2018, it would appear that Ms Holmes-Smith had taken over as the claimant's line manager and discussed with her at a meeting on 6 April 2018, why she was being made redundant, her redundancy pay, reimbursement of expenses, her leave date would be the 29 June 2018 and that she would be paid as normal up to that date. There discussion was confirmed in a letter sent by Ms Holmes-Smith on the same day. Of interest, she wrote in paragraph 8 of her letter the following:

> "You have the right to appeal the decision to give you this notice of termination of your employment by reason of redundancy. Dismissal appeals should be sent to…[address given] within 10 calendar days of the date of the letter and should clearly specify the reason(s) why you consider that the decision **of** your case was not correctly reached."

12. The letter required the claimant to return all company property. I am told by her that she had a company car, mobile phone, and laptop. (pages 3-4 of the bundle)

13. The claimant exercised her right of appeal on 10 April 2018, in writing, stating that selecting her for redundancy was unfair because she had been off work caring for her sick son who was classed as disabled and that the respondent should have been aware that during her absence she was unable to update her skills. She asserted that this difficulty was not taken into account when applying the matrix. (6)

14. At this point it would be useful to read what Ms Nicky Wigmore, Employee Relations Specialist, wrote to the claimant in an email on 11 April 2018, following receipt of the grounds of appeal. She thanked the claimant for submitting her appeal and informed her that the matter would be investigated, and the investigator would contact her. In the second paragraph she wrote:

> "Please be reminded that raising dismissal appeal does not pause the notice period and should not halt your search for redeployment. Should your appeal be successful, the decision to dismiss by reason of redundancy, will be reversed." (33)

15. The appeal was conducted by Mr Mark Williams, Delivery Partner Executive and Leader, who met with the claimant 9 May 2018. She gave an account of her background and explained her grounds of appeal. Mr Williams informed her that he would need to meet with her line manager before sending his appeal outcome. He then conducted his own investigation and met with the claimant's first and second line managers on 6 June 2018, when notes were taken. (169-174)

16. He reviewed the claimant's scores and accepted her contention that as a result of her absence, she was deficient in some of her skills and was unable to satisfy the various competences in the skills matrix. On 5 June 2018, having taken this into account, he decided to upgrade her score. The result was that she came above the safe level and her appeal was successful. Her dismissal would be rescinded. He could not, however, communicate his decision to the claimant until it was given final business approval.

17. On 28 June Ms Wigmore again wrote to the claimant apologising for the delay in not receiving a response from Mr Williams. She then wrote the following:

> "Your appeal investigation is still ongoing. Mark will not be in a position to conclude the outcome to you prior to your leave date, which I understand is tomorrow. I appreciate that this is far from ideal.
>
> In answer to your question, if your appeal is successful, you will return to your former role and your management line would work to reintegrate you back. Any reinstatement would preserve continuity of service and pay. If you have secured an alternative role in IBM, it will be your choice over which role you would prefer.
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> I do not want to commit to a timeframe on the outcome of the appeal but I would hope that Mark will be in a position to conclude next week". (192)

18. There appeared to have been attempts made by Mr Williams to speak to the claimant on 29 June 2018, but he was unsuccessful. He left a message, according to the claimant, with her son who passed it on to her. She then contacted Mr Williams. In the claimant's witness statement, at paragraph 27, she stated that she managed to talk to Mr Williams at 4.55 that evening and he informed her that her appeal had been "overturned" as she described it, and that she was no longer going to be made redundant. She stated that she informed him that she was due to start new employment, but his response was to say that he was simply delivering the message regarding the outcome of her appeal. He apologised for the delay saying that there had been some mix up in communication. He explained why her appeal had been successful, namely that it was a short period of 3 months she was examined over whereas her colleagues were assessed over 24-months.

19. In his evidence with regard to the mechanics of the claimant's return to work and what she would be doing, Mr Williams said that he advised her to contact those who would be line managing her.

20. In an email from Ms Holmes-Smith sent to a Mr Brian Fitzpatrick on 29 June 2018 at 6.58 in the evening, she wrote the following:

> "Just for awareness, I am Ravi's BP manager.
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> After Michelle kindly spoke to Ravi early this evening, I also spoke with her afterwards at 6pm regarding the situation. Ravi has secured a new job starting this Monday with a two-day induction in London. Her new office is two miles from home and she has arranged childcare for her sick child, the role also pays her considerably more money and she has paid a deposit to buy a new car.
>
> As Michelle stated with the above in mind, Ravi does not wish to be reinstated with IBM as we have "left it far too late" and "have treated her appallingly". A decision was made at 15.30 today when Ravi "does not even work on Fridays".
>
> I spoke with Alison afterwards who confirmed that IBM's position would be that Ravi would need to resign from IBM as she had been reinstated but that she would lose her redundancy package as it's a resignation.

> I spoke with Ravi again at length and she is extremely angry and upset with IBM for the "shambles of a process" and the "unprecedented amount of stress" that this has caused her and her family, which she did XXX out. She will now be seeking legal action, with a solicitor on Monday/Tuesday next week. At this point in time, she will not submit her resignation. I have agreed with Ravi that we will speak again on Tuesday at the end of the day. I will set up a call with you on Monday to discuss this as Alison is on leave next week; she will discuss this with you as part of her handover on Sunday evening in advance."

21. The claimant does challenge part of the email by Ms Holmes-Smith. She told me she had no idea what reinstatement meant once it had been mentioned by Mr Williams to her. In relation to Ms Holmes-Smith's email, she said she did not say that she did not want to be reinstated.

22. She said in evidence and I do find as fact, that some two or possibly three weeks prior to 29 June, she was offered and accepted employment with another employer which she was due to start on 2 July 2018. It was better paid employment and closer to her home. She did not, however, formally withdraw her appeal against her dismissal but pursued it.

The law

23. Paragraphs 26 to 29 of ACAS Code of Practice on Disciplinary and Grievance Procedures (2015, states:

> "26. Where an employee feels that disciplinary action taken against them is unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let their employers no grounds of the inviting.
>
> 27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.
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> 28. Workers have a statutory right to be accompanied at appeal hearings.
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> 28. Employees should be informed in writing of the results appeal hearing as soon as possible."

24. In the ACAS Guide the opportunity to appeal against a disciplinary decision is seen as essential to natural justice, paragraph 4.17.

25. In is now common in an employee's contract of employment or in the employer's disciplinary policy, for there to be a provision allowing the employee to appeal against a disciplinary sanction. What then is the case of an employee who is successful on appeal against his or her dismissal?

26. In the case of West Midlands Co-operative v Tipton [ICR] 199, the House of Lords had to consider whether the refusal to allow the claimant an appeal against dismissal formed part of the decision to dismiss. In part of the judgment more relevant to the effect of a successful appeal, Lord Bridge held approving the judgment in another case of J Sainsbury Ltd v Savage [1981] ICR 1, held:

> "In our view, when a notice of immediate dismissal is given, the dismissal takes immediate effect. The provisions of this contract as to the appeal procedure continues to apply. If an appeal is entered, then the dismissed employee is to be treated as being 'suspended' without pay during the determination of his appeal, in the sense that if the appeal is successful then he is reinstated and he will receive full back pay for the period of the suspension. If the appeal is not successful and it is decided that the original decision of instant dismissal was right and is affirmed, then the dismissal takes effect on the original date. In our view, that is the date on which the termination takes effect the purposes of the Act." , page 198 paragraph F-G.

27. In that case reliance was placed on there being a provision in the contract for an appeal.

28. The normal rule in contract law is that, where either party to the contract of employment gives notice of termination, that party cannot unilaterally withdraw the notice. The termination can only be rescinded with the express consent of the other party, Harris and Another v Slingsby [1973] ICR 454 NIRC.

29. In Roberts v West Coast Trains Ltd [2005] ICR 254, the Court of Appeal held that if a contractual disciplinary procedure permits an employer to provide for a different sanction following an appeal, and that option is exercised, then the effect is to revive retrospectively the contract of employment that had been terminated by the decision to dismiss.

30. If the contract of employment provides for certain sanctions on appeal and they are applied on in the appeal outcome, the effect is to revive the dismissal even if the sanction is rejected by the employee who will be treated as not having been dismissed, BBC v Beckett [1983] IRLR 43.

31. Where the contract or the disciplinary policy provides for a lesser penalty on appeal but subject to the consent of the employee, then the employee's refusal to accept the lesser penalty, would not be a resignation but a dismissal, Piper v Maidstone and Tunbridge Wells NHS Trust UKEAT0359/12.

32. What is the position where there is no contractual provision in relation to the right of an appeal and there is no reference to sanctions which could be applied in the appeal outcome? Is the successful employee in a position to either accept or reject the outcome?

33. In the Employment Tribunal case of Gerrard v Scottish Borders Housing Association Case No: 100930/11, the Employment Judge observed that the effect of reinstatement following an internal appeal should be same irrespective of whether procedure is contractual or non-contractual and that whenever an employee embarks on an appeal under an agreed process, he or she is deemed to consent to the matter being reconsidered by the employer with the possibility of the sanction being either revoked or moderated. The issue of consent would have to be decided on a case-by-case basis.

34. A similar view was taken by another Employment Tribunal Judge in the case of Jenkin v IBM United Kingdom Case No: 2302723/16.

35. In the case of Brook v Minerva Dental Ltd [2007] ICR 917, EAT, on 28 September 2005, the claimant was dismissed with notice expiring on 16 December. On 5 October, he appealed internally contending that his dismissal was in breach of now the repealed, statutory dismissal and disciplinary procedures. The employer withdrew the dismissal and instituted disciplinary proceedings, but the claimant contended that the employer could not unilaterally withdraw the dismissal and that his employment would terminate on 16 December. He also alleged that by their treatment of him the employer was in breach of the relationship of trust and confidence. On 23 December 2005, he claimed unfair dismissal on the ground that his dismissal was automatically unfair. The Employment Judge struck out his unfair dismissal claim on the ground that he had not been dismissed as the dismissal was rescinded by the employer during the internal appeal. The claimant appealed to the EAT. HHJ Peter Clark held the decision to dismiss was automatically unfair as the employer did not follow the statutory procedures. He then continued:

> "27. It was therefore open to the claimant to commence unfair dismissal proceedings on and after 28 September on that basis. He would not, in those circumstances, be required under the dismissal and disciplinary procedure to appeal internally against that dismissal.
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> 28. He did not take that course. Instead he appealed internally by letter of 5 October. In doing so, in my judgment, he sought withdrawal of the dismissal by the employers. In the context and is in *Harris and Russell Ltd v Slingsby*…., he consented, expressly or impliedly, to the employers' withdrawal of the dismissal notice."

36. Langstaff J, in Salmon v Castlebeck Care (Teesdale) Ltd and another [2015] ICR 735, held:

> "36. … I see no reason in principle why in any event it would be necessary for there to be an express revival or reinstatement. It must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to replace or vary the decision made. Where a decision is to dismiss, being the most draconian of sanctions, any success on appeal means that the decision is one in which dismissal does not take effect, though some sanction might.
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> 37. I see no reason in principle why an outcome on appeal against dismissal which is favourable to an employee should not, and every reason in principle why it should, therefore automatically revive the contract which, but for a successful appeal, would have terminated on the earlier dismissal.

37. In Patel v Folkstone Nursing Home Ltd [2018] EWCA 1689, a case in which the claimant's contract of employment included, by incorporation from the employee handbook, a disciplinary procedure, which provided for an appeal against a decision to dismiss. Disciplinary action was taken against him relating to charges of gross misconduct. He was dismissed for gross misconduct in April 2014 for sleeping on duty and falsifying residents' records. The dismissal letter stated that he would be referred to the Disclosure and Barring Service 'DBS' in relation to the second allegation. His appeal was heard by an external manager who wrote to him on 24 June 2014, stating that the decision to dismiss would be revoked

because he was on an unpaid break when asleep and had not breached any company rules and procedures. Claimant was dissatisfied with the outcome as it did not address the alleged falsification of records and did not state that referral to DBS had been withdrawn. He presented claims of wrongful and unfair dismissal on 17 July 2014. Employment Judge held that the claimant had been dismissed when he presented his claim. The respondent appealed. The EAT relied on the judgment in the case of Salmon v Castlebeck Care (Teesdale) Ltd (in Administration) and Another and held that the claimant had not been dismissed as his appeal was successful. He appealed to the Court of Appeal. Sales LJ, who gave the only judgment, held dismissing the appeal:

> "25. … In my view, so far as this aspect of the case is concerned, the appeal tribunal was right to follow and apply the approach in Salmon's case… .
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> 26. I consider that the short answer to this ground of appeal is that it is the implicit in a term in an employment contract confirming a contractual to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout. This is not a matter of implying terms, but simply the meaning to be given to the words of the relevant contract, reading them objectively.
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> 27. By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future…. .
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> 38. Also, I agree with the view of Elias J at paragraph 15 that if the employee exercises his right to have a domestic appeal and
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> > "chooses to keep the appeal alive, then he takes the risk that if he is subsequently reinstated in employment, his unfair dismissal be defeated, and that is so even the lodges an originating application prior to the appeal being determined." "

39. Paragraph 38 is more relevant to the claimant's case. The authorities cited had to consider a contractual right of appeal.

40. As regards a resignation from employment, this can be by words or conduct, Edwards v Surrey Police [1999] IRLR 456.

Submissions

41. Mr Dennis, counsel on behalf of the respondent, prepared written submissions and spoke to those. It is the respondent's position that following the successful appeal by the claimant against her dismissal, she was not dismissed but had resigned either on 29 June 2018 or when she commenced her new job the following Monday 2 July 2018. He invited me to consider the authorities and take the view that there is little or no distinction between a contractual and a non-contractual right of appeal where the employee has been successful. The

outcome is the same, in that a successful appeal reinstating the employment results in no dismissal having taken place.

42. The claimant submitted that the respondent had delayed in the appeal process and during that time she had to consider the welfare of her children. She, therefore, looked for employment. Her appeal was lodged on 10 April, but it was not until 29 June when she was told of the outcome. She did not resign and did not say to Ms Holmes-Smith that she did not want reinstatement. As far as she was concerned the whole process was unfair and she had been dismissed by the respondent on 29 June 2018, when her notice expired.

Conclusion

43. I have taken in to account the submissions and considered the legal position. For some time now the House of Lords, Court of Appeal and the Employment Appeal Tribunal have held that where there has been a contractual right of appeal and the dismissed employee is reinstated on appeal, the contract persists between the dismissal and the successful appeal outcome so that there had been no dismissal by the respondent.

44. Obiter judgments have been relied upon in relation to the what is to be implied if an employee pursues an appeal. It is to be taken that the appeal officer or panel could overturn the dismissal and in doing so there had been no dismissal. That it does not depend on whether there is a contractual right of appeal, nor does it depend on the employee agreeing the appeal outcome.

45. ACAS provides for there to be provision for an appeal against a disciplinary sanction. The Guide refers to it being in accordance with the principle of natural justice. What is the purpose of having such a right if the outcome could be disregarded? An employee who appeals against his or her dismissal, expects a successful outcome, namely reinstatement with all the terms and benefits they enjoyed prior to the dismissal. The employer in arranging an appeal hearing, is devoting time and resources to consider it. If having decided to reinstate the dismissed employee, that employee could say that the process was non-contractual, therefore, they would reject the outcome, that would make a mockery of the employer's appeal policy and procedure. It would also be a waste of management time and resources.

46. I do apply paragraph 37 of the judgment of Lanstaff J in Salmon approved in Folkestone Nursery Home Limited v Patel case. In addition, paragraph 28 of the judgment of HHJ Peter Clark in the Brook case. Further, the Employment Tribunal judgments in the cases of Gerrard and Jenkin. I conclude from these judgments that where there is no contractual right of appeal, but the employee is successful on appeal, there is no dismissal. This is the conclusion I have come to in this case.

1. I accept that the respondent did delay by two months in addressing the claimant's appeal and ought to have been aware, bearing in mind that they were aware that she had a disabled son, that she would be keen to look for employment elsewhere should the outcome be unsuccessful. Be that as it may,

the claimant, by appealing against her dismissal, she was seeking for it to be rescinded. The decision was taken to reinstate her. She was informed of this on 29 June 2018 and knew from the email sent to her on 11 April 2018, by Ms Wigmore, that if her appeal was successful, she would not be treated by the respondent as having been dismissed.

47. When did she resign? For perfectly proper reasons, she decided to look for employment and secured employment two to three weeks prior to 29 June 2018. According to Ms Holmes-Smith's email, it was better paid employment, two miles from her home which was important because she had childcare to consider, particularly her disabled son. For those reasons the claimant did not wish to continue in her role with the respondent.

48. I am satisfied that she resigned by taking up better paid employment, nearer to her home, on 2 July 2018. Accordingly, she is unable to pursue her s.98(4) Employment Rights Act 1996 unfair dismissal claim against the respondent.

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Employment Judge Bedeau

27.03.2020

Sent to the parties on:

……27.03.2020…….

For the Tribunal:

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