EMPLOYMENT TRIBUNALS

Claimant: **Mr Richard Green**

Respondent: **Floorform UK Limited**

Heard at: **Newcastle CFCTC by CVP** **On:** **5 January 2021**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **In person**
Respondents: **Mr M Brien (counsel)**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant voluntarily resigned from his employment for reasons of retirement. The claims are dismissed.

REASONS

The Hearing

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was video (V). A face to face hearing was not held because it was not practicable, no-one requested the same and all the issues could be determined in a remote hearing.

2. The issues to be determined by the Employment Tribunal were agreed by the parties and set out in the case management order of Employment Judge Johnson on 16 September 2020 as follows:

    i. Did the Claimant give notice of his intention to retire?
    ii. Was the Claimant put under pressure to give a retirement date?

iii. Did the Respondent accept that notice?
iv. Did the Respondent rely on that notice?
v. What arrangements were made in preparation for the Claimant's retirement?
vi. Did the Claimant change his mind/rescind his notice?
vii. Was the Respondent required to accept the Claimant's change of mind/recission?

3. I heard witness evidence from the Claimant, Declan Canavan (contracts director of the Respondent company, Noel Prendiville (group operations manager for the Respondent company) and Sean Burns (managing director of the Respondent company).

4. I was provided with an electronic joint bundle of documents consisting of 242 pages, including the index, the majority of which were not referred to by the parties. The Claimant sent an email to the Tribunal offices at 6:17 PM the evening before the hearing to raise objections to the inclusion of extra documents by the Respondent in the Tribunal bundle, which he says he received on 21 December 2020 which was approximately 3 weeks after the exchange of witness statements had taken place. The Claimant included electronic copies of the original bundle of documents he had received from the Respondent in accordance with the Tribunal directions and requested that the original bundle be used for this hearing. The Claimant did not include the Respondent in his correspondence to the Tribunal and a copy was provided by the Tribunal to the Respondent at the beginning of this hearing. The Claimant also requested copies of further documents which he says the Respondent had failed to provide which relate to the travel arrangements made by Mr Canavan in 2018 for attendance at the Armagh office. I asked the Claimant why he made his application to the Tribunal on the evening before the hearing when he clearly knew about these issues on 21 December 2020. The Claimant said that he had been in correspondence with the Respondent's representative about the issues relating to the documents but had not received a satisfactory response. It is wholly unsatisfactory for any party to make a last-minute application to the Tribunal for documents to be disclosed. The Claimant could have made his application to the Tribunal at the same time as he entered into correspondence with the Respondent's representative and these issues could have been resolved prior to this three-hour hearing. I gave the Respondent time to take instructions on these issues.

5. The Respondent told me that the only difference in the original bundle and the copy provided to the Claimant on 21 December 2020 amount to approximately 35 pages from page 146 onwards. These documents relate to the Claimant's expenses claims in 2018. The Respondent says that the documents have been included to show the date the Claimant attended their Armagh office and the issue only arose after they received the Claimant's witness statement in which he says he attended the office on a date in October 2018 which is incorrect. The Claimant said that he would be able to give oral evidence about the extra documents included in the bundle by the Respondent and the Respondent's representative raised no objections about the Claimant being given the time and opportunity to adduce further oral evidence. In the circumstances, I decided that I would allow the Respondent to admit the documents relating to the Claimant's expenses from page 146 onwards and I would allow the Claimant the opportunity to adduce further evidence on these documents. However, I referred the parties back to the issues to be determined, as set out above, and I explained that I did not need to hear

extensive evidence about matters which do not relate directly to the issues to be determined. I note that the Claimant did not provide any supplementary oral evidence in relation to the extra documents produced by the Respondent, nor did he adduce any evidence in relation to matters arising out of the Respondent's witness statement when I asked him if there was anything he needed to tell me, other than to say that he had been mistaken about the meeting with Mr Canavan in 2018 and he now believed that it was a telephone conversation and would like to change his evidence accordingly.

6. I raised with the parties the fact that this hearing has been listed with a time estimate of 3 hours, however there were 4 witnesses and over 240 pages in the Tribunal bundle. Therefore it appeared, at the outset, that it would not be possible to complete this hearing within the three-hour listing. I note that the Respondent wrote to the Tribunal prior to today's hearing and queried the time estimate of 3 hours, however Employment Judge Martin advised the parties on 25 November 2020 that the public preliminary hearing was listed to decide whether the Claimant had retired or was dismissed and that no witness evidence will be called. This was clearly incorrect as Employment Judge Johnson had made it clear at the preliminary hearing on 16 September 2020 that there was a requirement to exchange witness statements and documents. Neither the Claimant nor the Respondent wrote back to the Tribunal to point out this error and, as I am working remotely and do not have access to the Tribunal file, I cannot see how the error arose and whether Employment Judge Martin had sight of the previous case management orders before she made her decision. I gave the parties the opportunity to make submissions on whether they wished to proceed with this hearing, with the risk that it may go part heard, or not to start the hearing and to relist it with a longer time estimate at a later date. Both sides agreed to proceed with the hearing today and both sides requested that the hearing continued into the afternoon so that we could compete the evidence. As I did not have another matter in my list, I agreed to extend the listing for this hearing into the afternoon and we completed the evidence and submissions by 4:18 PM. However, it was not possible to give an oral decision at the end of the hearing, given the lack of time available, and I advised the parties that I would reserve my decision and provide it within 4 weeks.

7. The witness bundle and the document bundles had not been prepared in accordance with the Presidential Guidance on remote hearings. In particular, the Respondent had not carried out optical character recognition on any of the documents prior to sending them to the Tribunal. It took just over one hour for me to carry out this process on the afternoon before the hearing so that I could mark-up the documents with highlights and notes. During the afternoon of the hearing, the witness bundle became corrupted and I lost access to all of the witness statements containing my annotations. I was able to reopen the original witness bundle which had been sent by the Respondent's representative, however as the optical character recognition had not been carried out prior to service, I was unable to annotate any of the statements. I advised the parties of the difficulties I was experiencing with the electronic documents and, as it would take too long for me to carry out the optical character recognition during the hearing (particularly as this would mean I would have no access to any of the PDF documents whilst the application was running), I explained that I would have to make more detailed notes which would slow the hearing down.

8. I had several occasions to ask the Claimant to answer the specific question he was being asked, rather than answering the question he wished he had been asked. I explained to the Claimant that part of my job requires me to assess the credibility of the witnesses and that there was a risk that he might not be found credible as he appeared to be very evasive with his answers and failed to answer the majority of the questions put to him by the Respondent's representative in a straightforward way. I explained to the Claimant that he would be given the opportunity to clarify any of his answers at the end of cross examination, however he continued throughout the entirety of his evidence to fail to answer the specific questions put to him. The Claimant complained during cross examination that the questions put to him were leading and I explained to him that Mr Brien was quite correct and proper in the way he was asking his questions and that it was the function of cross examination to ask leading questions. During the cross examination of the Respondent's witnesses, the Claimant complained that he had not expected to be required to question witnesses because the Tribunal had said that no witness evidence would be called and that this would be a three-hour hearing. I find the Claimant's protestations disingenuous as Employment Judge Johnson made it perfectly clear at the case management hearing on 16 September 2020 that the parties were required to exchange witness statements and that there would be an examination of witness evidence documents at this hearing. I note that the Claimant only complained about evidence being heard and the length of the hearing during the cross examination of the Respondent's witnesses when the evidence was contradicted his own case. I also note that the Claimant was given the opportunity to say whether he preferred this hearing to be postponed to a later date, without any adverse consequences, but he voluntarily elected to proceed today. The Claimant had received the Respondent's witness statements in advance, in accordance with the case management orders, and I find that he has had sufficient time to prepare his cross examination in advance of this hearing. Indeed, I asked the Claimant at the beginning of the hearing how much of the Respondent's evidence he disagreed with, once I had explained that he only needed to cross examine on those issues which were not agreed between the parties and only as far as they were relevant to the list of issues set out above, and he told me that he disagreed with the entirety of the Respondent's evidence and that he was in a position to say exactly what he disagreed with and why.

9. The findings of fact, as set out below, are made on the balance of probabilities, taking into account the witness evidence of the parties and the documents I was referred to in the Tribunal bundle. I have not read any of the documents in the bundle which were not referred to in the statements or during evidence. This case is heavily dependent on evidence based on people's recollection of events that happened over two year ago. In assessing that evidence I bear in mind the guidance given in the case of Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case, Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process

of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties, including employees and family members. It was said in that case: '*Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*.' Therefore, I wish to make clear from the outset that simply because I do not accept one or other witness' version of events in relation to a particular issue this does not mean I consider that witness to be dishonest.

The Facts

10. The Claimant began his period of continuous service with the Respondent company on 1 April 1986. He was originally employed as a Contracts Manager and then became the Health and Safety Manager in 2009. The Respondent is a flooring installation company which is based in County Armagh and it is common ground that the Claimant was the only Health and Safety Manager within the whole organisation and, although he worked primarily from home, he occasionally travelled nationally to attend the Respondent's offices or client sites. It is also common ground that the Claimant organised his own workload and made his own arrangements for work-related travel and that he received payment from the Respondent in respect of any work-related expenses incurred.

11. It is common ground that the Claimant has experienced long-term issues with his back, resulting in spinal surgery on 2 occasions, as well as other hospital attendances, throughout his employment with the Respondent since 2004. The Claimant kept the Respondent updated on his health issues and the difficulties he was experiencing with pain and restricted mobility, along with his needs to attend hospital appointments.

12. In or around 2017 the Respondent became concerned that the Claimant could retire by giving 3 months' notice, should he find that his health was making it increasingly difficult for him to work, and that this would mean the organisation would be without a Health and Safety Manager. This issue was of considerable concern to the Respondent because the Claimant's role was pivotal to the smooth running of the business. The Respondent discussed this issue at board level but the Claimant was not notified of their concerns until December 2017. The Claimant has made much in his evidence about not being told about these concerns at the time, however he also stated that it was for the company to manage the business and make decisions about recruitment. Mr Canavan's uncontested evidence is that it was agreed at a board meeting that he would speak to the Claimant in late 2017 and report back to the board as to whether the Claimant was thinking of retiring.

13. Mr Canavan spoke to the Claimant in December 2017 whilst they were both at the offices in Armagh. It is common ground that Mr Canavan asked the Claimant whether he was thinking of retiring and the Claimant stated that he had no intention of retiring at that time but that he would give it some thought. Mr Canavan explained to the Claimant that they had no desire for him to leave the company, but that he was making enquiries about his retirement in order to protect the smooth running of the business and to help with a seamless transition, whenever that might be. It was agreed that Mr Canavan would speak to the Claimant again the following year. It is common ground that the Claimant was given a pay rise in the sum of £6000 shortly after his meeting with Mr Canavan.

14. The Claimant's evidence is that he was placed under pressure to give a date for his retirement in the meeting with Mr Canavan in 2017. In cross examination the Claimant said that he did not feel that the issue of his retirement should have been brought up, however he accepted that he did not raise any grievance or make any complaints about the conversation at the time. Mr Canavan's evidence is that the meeting in 2017 was very cordial and that the Claimant was not put under any pressure at all to retire. I prefer the evidence of the Respondent, particularly as the Claimant has not adduced any evidence about what it was that he alleges was unfair or any evidence about the manner in which anything was said which could be construed as placing him under pressure. The Respondent's evidence is entirely consistent with the fact that both sides agreed to speak about the matter again the following year, the fact the Claimant was given a substantial pay rise shortly after his meeting with Mr Canavan in 2017 and the fact that the Claimant raised no issues about his treatment at work between the meeting in 2017 and the meeting which occurred approximately a year later.

15. The Claimant signed an updated contract of employment with the Respondent around the end of 2017 or the beginning of 2018, a copy of which can be seen at pages 56 to 64 of the bundle. It is common ground that the Claimant was required to give 3 months' notice to terminate his employment in accordance with his contract of employment. A copy of the requirements in terms of serving notice, as set out in the Respondent's employee handbook, can be seen at pages 65 to 69 of the bundle. At page 69, under the heading "Service of Notice" it states "*should you wish to give notice in accordance with the terms detailed in your contract of employment, notice is required to be in writing, indicating the commencement of the notice period. Any notice given under the terms of this document is duly served on the company if handed by you to a director or senior manager, or left at or sent addressed to the company by ordinary letter post to our offices.*"

16. The Claimant states at paragraph 8 of his witness statement that he had a 2nd meeting with Mr Canavan in October 2018 at the Armagh office where he was again asked if he had any intention to retire. In oral evidence, the Claimant said that he was mistaken about the manner of this meeting and that it was in fact a telephone conversation with Mr Canavan in October 2018, although it was put to the Claimant in cross examination that he did not precisely recall how the conversation took place or the date, to which his response was "neither does he", meaning Mr Canavan. The Claimant accepted in cross examination that he did not attend the Armagh office in October 2018 and that this is corroborated by his claim for expenses at the relevant time. Mr Canavan's evidence at paragraph 13 of his witness statement is that the 2nd meeting took place in September 2018. However in oral evidence he amended the date to August 2018. He says that the meeting took place at the offices in Armagh where the Claimant attended to take part in an audit. Mr Canavan's evidence is that the meeting took place in his office and he asked the Claimant whether he had any plans to retire, to which the Claimant stated that he was going to retire in April 2020. The Respondent's uncontested evidence is that the April 2020 date was provided by the Claimant. In cross examination, Mr Canavan said that he would not have had such conversation on the telephone because it was so important and that he recalled the meeting was a face-to-face meeting. The Claimant's evidence is that Mr Canavan did not attend the office during the audit and, therefore, the conversation could not have taken place as alleged by the Respondent. Looking at all

the evidence in the round, I find on the balance of probabilities that the 2nd conversation between the Claimant and Mr Canavan took place in August 2018 at the Armagh offices and that this was a face-to-face discussion where the Claimant volunteered the date of April 2020 as his retirement date. As part of my deliberations on this point, I have considered the actions of the Claimant and the Respondent following their discussion in August 2018, along with the evidence that the previous meeting on the same topic had been face to face, and with the uncontested evidence of Mr Canavan that he would not hold such a meeting on the telephone, and I am satisfied that there was an in-person meeting in August 2018 at the Armagh offices where the Claimant and Mr Canavan discussed the Claimant's plans for the future. I am satisfied on the balance of probabilities that the Claimant told Mr Canavan in August 2018 that he intended to retire in April 2020 as this is entirely consistent with the Respondent starting the process of recruiting a replacement to work alongside the Claimant and it is also consistent with the Respondent's desire to manage the succession planning for the post of Health and Safety Manager.

17. The Claimant said in cross examination that he gave the date of April 2020 as his date of retirement because he was "pushed and pushed" by Mr Canavan. The Respondent's evidence is that the discussion in August 2018 was cordial and that the Claimant volunteered the date of April 2020 as his date of retirement. I prefer the evidence of the Respondent because the Claimant has failed to adduce any evidence about how he was allegedly pushed by Mr Canavan in terms of the language used for the manner in which the meeting was held. I note that the Claimant did not make any complaints, orally or in writing, after his meeting with Mr Canavan in 2017 or 2018. The Claimant has demonstrated several times throughout his employment that he is quite capable of raising concerns in writing and making complaints, such as the concerns he raised about the standard of work done by his successor and the audit in 2019. The Claimant has not adduced any evidence that he was easily intimidated by Mr Canavan and there is no reason to suppose that Mr Canavan was ever intimidating or aggressive towards the Claimant as no evidence of such behaviour has been adduced at this hearing.

18. Following the conversation between the Claimant and Mr Canavan in August 2018 in which the Claimant stated that he intended to resign in April 2020, Mr Canavan reported back to the board of directors and told them that the Claimant would be retiring at the end of April 2020 and it was agreed that the Respondent would start the recruitment process to appoint the Claimant's successor as soon as they could so that the two Health and Safety Managers could work side-by-side and the new appointee could "learn the ropes" from the Claimant. It is common ground that the Respondent began the process of recruiting a replacement for the Claimant in September 2018.

19. It is common ground that the Respondent asked the Claimant to have some involvement with the recruitment of his successor. The Claimant made much in his evidence about being told to do this rather than being asked, however I cannot see that anything turns on the issue as the employer is entitled to make reasonable requests of its employees. It is common ground that the Claimant was sent copies of 2 CVs on 15 October 2018 by the Respondent and he was asked to provide details of minimum qualifications that the Respondent should look for in a potential candidate. It is clear from the email at page 107 of the bundle that the request in writing was made following a previous discussion between Mr Prendiville and the Claimant on this point. The Claimant provided the

Respondent with a job description and details of the relevant qualifications required for the post in an email dated 19 October 2018, a copy of which can be seen at page 108 of the bundle. In this email the Claimant refers to his retirement and states "*provisional retirement date as advised in earlier discussions is the end of April 2020*". The Respondent's evidence is that this was the first time the Claimant mentioned the word provisional in reference to his retirement date. The Claimant's evidence is that he used the word provisional at the time he provided with Mr Canavan with the April 2020 date, although he then changed this to say he may have said "probably". Looking at all the evidence in the round, I prefer the Respondent's evidence that the Claimant did not use the word provisional, or any other words to qualify his retirement date of the end of April 2020 during his discussion with Mr Canavan because it is entirely consistent with the actions of both parties in engaging with the recruitment process to appoint the Claimant's successor. Furthermore, Mr Canavan's uncontested evidence is that he spoke to the Claimant on average once or twice each month throughout the Claimant's employment and that the Claimant had never indicated that he was unsure of his retirement date or that it was provisional. I accept Mr Canavan's evidence that he did not pay any attention to the use of the word "provisional" in the Claimant's email and he did not register the significance of it at the time. I am satisfied that this is also entirely consistent with a manager acting under the understanding that actual notice had already been given by the retiree.

20. It is common ground that the Claimant was provided with the application details on 24 October 2018 of the person who was appointed as his successor and the Claimant replied to Mr Canavan on 24 October 2018, a copy of which can be seen at pages 115 and 116 of the bundle, stating "*How soon are you looking to appoint? Given my 18 months to go??*". Mr Canavan then wrote to the Claimant on 26th of October 2018, a copy of which can be seen at page 118 of the bundle, stating "*we were looking for someone for early next year so we spoke to Hays and asked them to inform us if anyone suitable came available. If the right person was available we would take them sooner but we are in no immediate rush until after Christmas. The idea is that the new person work alongside you for your last 12 months.*" The Claimant replied to this email on 26th of October 2018, a copy of which can be seen at page 119 of the bundle, stating "*okay but please note retirement date of 30 April 2020 as earlier email and discussions. I will be of assistance wherever I can on this to ensure a smooth transition. As stated also earlier, if I could be of ongoing assistance for holiday cover, advice/consultancy etc. I will do what I can.*"

21. The Claimant's successor was appointed on 4 March 2019 and he was told that he would be working alongside the Claimant in order to learn about the company and customers with a view to taking over from the Claimant on his retirement in April 2020. Unfortunately, the Claimant was absent intermittently from work due to sick leave between February and May 2019. It is common ground that upon his return to work the Claimant sent 11 emails to the Respondent criticising the work undertaken by his successor in his absence and that Mr Canavan asked the Claimant to stop sending such emails. Mr Canavan's uncontested evidence is that he was concerned about the impact the Claimant negative and critical emails might have on the Claimant's successor as the criticisms were unjustified. The Respondent's uncontested evidence is that the Claimant continued to criticise his successor's work and, therefore, the Respondent decided to allocate work in the Ireland business to the Claimant's successor and the Claimant was

asked to look after the work in Northern Ireland and the UK, thereby keeping the two of them apart.

22. On 25 November 2019 the Claimant sent an email to Mr Canavan criticising his successor in an internal audit, a copy of which can be seen at pages hundred and 121 to 124 of the bundle. Mr Canavan told the Claimant in a sharp exchange that the report was inappropriate and he asked him to remove it from his audit. 3 days later, during a telephone conversation with Mr Canavan, the Claimant informed him that he was thinking of not retiring in April 2020. Mr Canavan was shocked by this given that everyone had spent the previous 14 months discussing and working towards the Claimant's retirement at the end of April 2020. Mr Canavan felt that the Claimant was taking this action to undermine the Respondent and to be difficult because Mr Canavan had not supported the Claimant's criticisms of his successor.

23. The uncontested evidence of the Respondent is that the board of directors were extremely shocked and surprised when Mr Canavan reported back to them that the Claimant had changed his mind about retiring at the end of April 2020 and it was agreed that they would meet with the Claimant at their Liverpool office on 7 January 2020 to discuss the issue. It is common ground that both sides discussed four options in relation to how the parties might move forward, but there was no agreement. The meeting lasted approximately 2 hours and a copy of the minutes from this meeting can be seen at pages 125 to 126 of the bundle. The Claimant alleges that Mr Canavan left this meeting because he was not interested in the discussion, however Mr Canavan's evidence is that he had travelled to the Liverpool office that morning in order to specifically attend this meeting and that he had to attend another meeting at 3pm and this required him to leave the Liverpool office at a certain time. I prefer the evidence of the Respondent that Mr Canavan was engaged in the meeting with the Claimant and that he genuinely wished to reach a resolution with the Claimant but that he had to leave the meeting in order to attend his next meeting at 3pm, leaving the other director to deal with the issues and it was agreed that a further meeting would be arranged.

24. It is common ground that the parties were due to meet again to discuss the 4 issues on 3 February 2020, however the Respondent sent an email to the Claimant on 20 January 2020 enclosing a copy of the letter of the same date, which can be seen at page 128 of the bundle. The letter confirmed that the Claimant would be retiring on the 30 April 2020 as previously agreed, that the notice he had given had been accepted and relied upon and that this was the basis on which his successor had been recruited. It is common ground that the Claimant's employment came to an end on 30 April 2020 and he brought proceedings in the Employment Tribunal for unfair dismissal, disability discrimination, age discrimination and he alleged that he had not given notice but that he had been dismissed by the Respondent instead. I note that the Claimant accepted at the preliminary hearing on 16 September 2020, in front of Employment Judge Johnson, that if this Tribunal was to find that the Claimant had given notice of his retirement to the Respondent, then all of the claims brought by the Claimant under the claim number 2500745/2020 would fall to be dismissed.

Submissions

25. The Respondent submits that the Claimant gave notice to the Respondent in a meeting in August 2018 of his intention to retire at the end of April 2020 and this was reiterated in the emails between the parties between 19 and 26 October 2018. However, there is a dispute between the parties asked to when the discussion took place in 2018, where that discussion to place and what was said in that meeting. The Respondent submits that Mr Canavan's evidence should be accepted as it was largely consistent other than the date of the meeting itself, whereas the Claimant has changed his evidence significantly and has now said that the discussion was by way of telephone rather than an in-person meeting. The Respondent submits that it was only because the Claimant said that he was going to retire at the end of April 2020 that they started the recruitment process to appoint a successor and that it does not make sense for the Respondent to start this process before the notice had been given.

26. The Respondent submits that oral notice is sufficient, but if the Tribunal were to find that it is not sufficient, then the email of 24 October 2018 which can be seen at page 150 of the bundle would suffice as written notice as the Claimant states that he had 18 months to go before his retirement and there is no mention of this being a provisional date. Further, the Claimant stated on 26 October 2018 in the email at page 119 of the bundle that his retirement date was 30 April 2020. The Respondent submits that it would have been easy for the Claimant to add the caveat at any time that the date of 30 April 2020 was provisional, but the Claimant failed to do so and all of the Respondent's witnesses understood the Claimant to have given notice of his retirement.

27. The Respondent submits that the Claimant raised no complaint or grievance after his meeting with Mr Canavan and there is no evidence that he was under pressure to give a date for his retirement. In any event, even if he had been under pressure in August 2018, there is no evidence that the Claimant was under pressure in October 2018 when he wrote his emails to the Respondent about his retirement. The Claimant was given a pay rise and had autonomy and support throughout his career and the Respondent submits that this evidence is inconsistent with the Claimant's case, particularly as he was involved with his successor's appointment and he would not have been amenable to be engaged in that process had he not consented to it.

28. The Respondent submits that it accepted the Claimants notice and engaged in the recruitment process as a result of that notice. The Respondent advised the Claimant that they expected him to work alongside his successor and this is reflected in the email from the Respondent at page 118 of the bundle, which the Claimant did not object to. The Respondent submits that the Claimant changed his mind about his retirement and the legal position is that the Respondent was not required to accept the Claimant's change of mind. The Respondent relies on the case of East Kent Hospitals University NHS Foundation Trust v Levy [2018] UKEAT/0232/70 and submits that where the words are clear and unambiguous a subjective test this to be applied as to whether an employee has resigned. However, if the words are not clear and unambiguous, then an objective test is to be applied in formulating a reasonable construction of what the words mean and that they must be given their natural and ordinary meaning.

29. The Claimants made oral submissions by following the list of issues as set out at paragraph 2, above. The Claimant submits that he did not give notice to the Respondent and that he used the word provisional in his emails of 19 and 26 October 2018. The

Claimant submits that he had no intention to retire and this was the reason why he questioned the fact that the Respondent was recruiting so early. The Claimant submits that he was put under pressure to retire and that there is no evidence that the Respondent accepted his notice as this was never communicated to. The Claimant submits that the first he was ever aware in the Respondent regarded him as having given notice with at the meeting on 7 January 2020.

30. The Claimant submits that the Respondent started the recruitment process before he had indicated his provisional date of retirement and that he has no recollection of any meeting with Mr Canavan in 2018, as alleged by the Respondent. The Claimant submits that he did not take part in the recruitment of his successor other than in a peripheral way and that he provided information and a job description because he was instructed to do so, but that he should not have been asked to do this. The Claimant submits that, as he never gave notice to the Respondent, he could not have rescinded it. The Claimant submits that he was taking painkillers and this was the reason why he did not make any complaints about his treatment at work and that he did not want to rescind his notice in order to get back at his successor. The Claimant also submits that he was only required to give 3 months' notice and it is unacceptable for the Respondent to force him to get 18 months' notice of his retirement when he had no intention to retire.

The Law

31. Where unambiguous words are used, it is relatively easy for the Tribunal to find that there has been an express dismissal or resignation as the words can be taken at face value without the need for any analysis of the surrounding circumstances: Sothern v Franks Charlesly and Co [1981] IRLR 278, CA, although it can be useful to examine the context in which words were spoken in order to understand what was really intended and understood. The test as to whether ostensibly ambiguous words amount to a dismissal or resignation is an objective one where all the surrounding circumstances must be considered and, if the words are still ambiguous, the Tribunal should ask itself how a reasonable employer or employee would have understood that in the circumstances: Graham Group plc v Garratt EAT 161/97.

32. The question of whether or not there has been a dismissal or resignation must be considered in light of all the surrounding circumstances: BG Gale Ltd v Gilbert [1978] IRLR 453 EAT and Chapman v Letheby & Christopher Ltd [1981] IRLR 440 EAT.

33. The period of notice required for a dismissal or resignation that specifies termination date beyond the expiry of a contractual period will still be valid: Beadnell v James Howden and Co Ltd EAT 71141/95. Further, once notice has been given (whether orally or in writing), it cannot be unilaterally withdrawn and the contract will come to an end when it expires. However, if a resignation is enforced, that employee is to be regarded as having been dismissed and the principles to be considered in such circumstances were set out by the Court of Appeal in Martin v Glynwed Distribution Ltd [1983] ICR 511 in which Sir John Donaldson MR said "whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?" If the answer is the employer, there was a dismissal." He went on to hold

that this is a question of fact for the Tribunal to decide in the circumstances of the particular case.

Conclusions

34. Applying the relevant law to the facts, I find that the Claimant had a very long and fruitful relationship with the Respondent and, as the only Health and Safety Manager within the organisation, he enjoyed a close working relationship with the directors who thought highly of him and of the quality of his work. There is no evidence at all of the Claimant being mistreated by the Respondent at any point during his employment with them and certainly not in respect of his retirement. This was clearly a working relationship where the Respondent supported the Claimant with his disability and sickness absences, allowing him full autonomy in how he performed his duties and awarding the Claimant a substantial pay rise at the same time as entering into discussions about his retirement.

35. Whilst there is a conflict between parties as to exactly when and where the conversation regarding the retirement of Claimant took place, both sides agree that there was such a discussion in 2018 and that it followed from the similar discussion the previous year when Mr Canavan had asked the Claimant if he was thinking of retirement, to which he had replied he was not. Both sides agree that the Claimant voluntarily offered, in the discussion of 2018, the date of April 2020 as the date he would retire and there is no evidence that this discussion was anything other than completely amicable. The Claimant has demonstrated that he is quite capable of speaking up for himself and raising concerns and complaints when he feels justified, however he has presented no evidence whatsoever of raising any concerns or complaints about the way Mr Canavan conducted the discussion about his retirement with him in 2017 or 2018. In all the circumstances, and looking at all of the evidence in the round including the actions of both parties after their discussion in 2017 and August 2018, I find that the Claimant voluntarily gave the end of April 2020 as the date his employment would come to an end for reasons of retirement. There is no evidence that the Claimant said this was a provisional date at the time of the discussion in August 2018 and I find, looking at all the circumstances in the round, that it was not expressed to be provisional. Both sides agree that Mr Canavan had asked a straight forward question of the Claimant, i.e. whether he was thinking of retiring, and the logical and reasonable response is either yes or no. In this case, I am satisfied that the Claimant said yes he was retiring and voluntarily offered up the end of April 2020 as his retirement date. It is for this reason alone that Mr Canavan reported back to the board of directors that the Claimant was going to retire at the end of April 2020, as opposed the alternative, i.e. that he was thinking about it and would report back at a later date (which is how matters stood in 2017). The Respondent then undertook the very expensive task of recruiting a replacement for the Claimant and stated to the Claimant verbally and in emails that they wanted him to work along-side the successor. I am satisfied that the Respondent would not have taken such steps had the Claimant not been clear that he intended to retire at the end of April 2020.

36. The Claimant has made much in his evidence about the fact the notice to resign had not been reduced to writing, that it had not been delivered to the Respondent in accordance with the provisions of the staff handbook and that he was forced to give 18 months' notice. I note that the 3 months' notice, as expressed in the Claimant's contract of employment, is a *minimum* and that the parties are free to agree whatever period of

notice they see fit as long as it does not offend the minimum requirements. Further, I agree with Mr Brien's submissions that oral notice of termination is sufficient to bring the contract of employment to an end. Whilst it is preferable for notice to begiven in writing, to avoid disputes such as this one, there is no requirement in law for notice to be in writing in order for it to serve as good notice. Whilst it may cause evidential difficulties, it does not invalidate the notice itself. In any event, I agree with the Respondent's submissions that the emails from the Claimant in October 2019 constituted written confirmation of the verbal notice and they satisfy the requirements of the contract of employment. I disagree with the Claimant's submission that he was forced to give 18 months' notice by the Respondent. There is no evidence at all of any improper pressure by the Respondent and the parties to a contract are free to agree long notice if they wish, such as in circumstances where succession planning is vital to the running of an organisation.

37. In this case, the words spoken by the Claimant to the Respondent in reply to their question along the lines of "are you thinking of retiring?" was yes he was going to retire and that the retirement would take effect at the end of April 2020. This was notice of the Claimant's intention to retire and it was unambiguous. This is sufficient to bring the Claimant's employment to an end on 30 April 2020 for reasons of retirement by way of resignation. I note that in cross examination the Claimant suggested that he had used the word provisional in his conversation with Mr Canavan in August 2018, but then amended his answer to say he may have said "probably". I am not satisfied that the Claimant placed any proviso on the date of his retirement, particularly as he had been thinking about if since the December 2017 conversation. Applying the guidance in Sothern, I am satisfied that that the Claimant used unambiguous words about his intention to retire at the end of April 2020.

38. In relation to the remaining issues to be determined and if I am wrong about the clear words constituting notice to retire, I am satisfied from looking at all the evidence in the round and the actions of the parties before and after August 2018 that a reasonable employer and employee (with the knowledge the parties had in the circumstances) would have understood that the Claimant had given his notice to retire at the end of April 2020. The Claimant had clearly articulated his intention to carry on working in 2017 and he knew he was going to be asked about his intentions again in 2018. The Claimant could have repeated his intentions to continue working in 2018, but the evidence from both parties is that this was not the case and the Claimant said he was going to retire in 2020.

39. The Claimant has made much in his evidence and submissions that he did not receive an acceptance of his notice from the Respondent. There is nothing in law which requires the acceptance to be in writing. It is clear from the evidence that the Respondent accepted the Claimant's notice immediately as Mr Canavan reported the resignation to the board of directors and measures were put in place swiftly to begin the recruitment of the Claimant's successor. The Claimant was aware of the recruitment efforts and was part of that process, to whatever degree he cooperated with the Respondent at the time. Therefore, the parties have demonstrated, by their actions, that the Respondent accepted the notice of retirement and the Claimant was aware of that fact.

40. No evidence has been presented to this Tribunal that there was any reason other than the Claimant's notice of resignation which led to the Respondent starting the recruitment

process to recruit the Claimant's successor and I have no hesitation in finding that the Respondent relied on the conversation between the Claimant and Mr Canavan and the notice given by the Claimant in August 2018, which was followed up by emails between the parties. The fact that the Claimant tried to change the parameters of his notice by inserting the word provisional in his email of 19 October 2018 does not change the fact that notice had already been given, accepted, acted upon and relied upon. I am not satisfied that there was an impediment to the Claimant's ability to raise a grievance if he had been unhappy in August 2018, particularly as he has not adduced any medical evidence at all in respect of his assertion that he was taking pain killers at the time.

41. The Respondent went to great lengths to find suitable candidates to replace the Claimant, which he was aware of even if the Claimant was not happy about providing the job description and the list of required qualifications. I find it is disingenuous of the Claimant to suggest that he did know that Respondent was recruiting his successor as a result of their understanding he had given notice of his retirement in August 2018 given that the Respondent only ever had one Health and Safety Manager in all the 34 years he had been employed there.

42. I do not accept the Claimant's submission that he did not change his mind because he had never given notice to the Respondent. I found the Respondent's witnesses to be compelling and their evidence never wavered throughout the hearing. The Respondent was clearly shocked at the Claimant changing his mind about his retirement. Looking at the sequence of events, it is more likely than not that the Claimant changed his mind a as result of his disagreement with Mr Canavan over his prolific complaints about his successor.

43. In the circumstances, I find that the Respondent was not required to accept the Claimant's change of mind or attempt at rescinding his resignation. Both sides accept that the correct legal position is that notice cannot be unilaterally withdrawn once it has been given and I find that the Respondent was correct to write to the Claimant in such terms in their letter of 20 January 2020.

44. In light of my findings, above, and the Claimant's concession at the preliminary hearing of 16 September 2020 that all his claims would fall if this Tribunal found that he had resigned as opposed to having been dismissed, I find that none of the claims brought by the Claimant in this matter can proceed as the Claimant voluntarily gave notice of his retirement to the Respondent and this brought his employment to an end on 30 April 2020 for reasons of retirement. The claims are dismissed.

Employment Judge Arullendran

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....12 January 2021….....