EMPLOYMENT TRIBUNALS

Claimant: Mr A Moran

Respondent: Independent Office Equipment Ltd

Heard at: Leeds by video link

On: 14 and 15 June 2021

Deliberations in Chambers: 25 June 2021

This was a Teams video hearing which was agreed to by both parties in advance.

Before: Employment Judge Shepherd

Members:

Ms. A Brown

Mr. A Ali

Representation:

Claimant: Mr. McCracken, counsel

Respondent: Mr. Haines, consultant

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed by the respondent.
2. The claimant was not discriminated against by the respondent because of his age.
3. The claim for notice pay is dismissed.

REASONS

1. The claimant was represented by Mr. McCracken and the respondent was represented by Mr. Haines.

2. The Tribunal heard evidence from:

Paul Mitchell, an employee of the respondent;
Howard Hickling, managing director of the respondent;
Andrew Moran, the claimant;
Jean Moran, the claimant's wife.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 197 together with a copy of the handwritten statement made by Paul Mitchell following his visit to the claimant's address on 23 September 2020. The Tribunal was also provided with copies of payroll documents and bank statements. The Tribunal considered the documents to which it was referred by the parties.

4. The claims brought by the claimant were for unfair dismissal, breach of contract (non-payment of notice pay) and direct age discrimination.

5. At a preliminary hearing on 26 January 2021 before Employment Judge Smith the issues were identified as:

Unfair dismissal

On 7 August 2020 was there an agreement with the respondent that the claimant could withdraw his resignation?

If so, did the respondent make a decision later that day not to allow the claimant to return to work on Monday, 10 August 2020?

If so, was that an express dismissal by the respondent?

If so, can the respondent establish a potentially fair reason for dismissal?

If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Discrimination – age

Direct discrimination

Did the respondent dismiss the claimant?

Was that less favourable treatment? The claimant relies upon a hypothetical comparator

If so, was the reason for the treatment the claimant's age?

Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that (if, contrary to its primary case, which is there was no discrimination) its aims were that it could not afford to employ both a replacement and the claimant in addition following a Covid–19 risk assessment if a replacement had been recruited they could not work in the same room as the claimant.

Remedy

if there is a compensatory award, how much should it be. The Tribunal will decide:

What financial losses has the dismissal caused the claimant?

Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

If not, for what period of loss should the claimant be compensated?

Is a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

If so, should the claimant's compensation be reduced?

If discrimination is established in addition should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

What Injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

Notice pay

Did the respondent dismiss the claimant?

If so, what amount is payable by way of damages

6. Mr McCracken, on behalf of the claimant, indicated that the issue in respect of age discrimination should include the act of dismissal and the acts leading up to the dismissal as set out in paragraph 10 of the grounds of the application. Mr Haines said that the issues had been agreed and identified and should not be expanded without an application.

Findings of fact

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal findings are also set out in its conclusions,

to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

7.1. The claimant was employed by the respondent from 9 July 2000. At the time his employment terminated he was employed as a Sales Manager.

7.2. As a result of the Covid-19 pandemic the claimant was placed on furlough leave from 30 March 2020.

7.3. The claimant does not drive and is reliant on public transport to travel from his home in Leeds to the respondent's premises in Skipton.

7.4. In July 2020, Howard Hickling, the respondent's Managing Director telephoned the claimant and indicated that he needed the claimant to return to work. The claimant said that he did not feel safe travelling on public transport and it was agreed he would remain on furlough leave.

7.5. On 3 August 2020 Howard Hickling telephoned the claimant and left a voice message asking why the claimant was not at work. The claimant telephoned Mr Hickling and indicated that he thought his return to work date was to be reviewed at the end of August. The respondent had expected him to return on 3 August 2020. The respondent had taken steps to withdraw from the HMRC furlough scheme.

7.6. There was a heated exchange and the claimant indicated that he was resigning with immediate effect.

7.7. The respondent commenced looking for a replacement for the claimant the following day. Mr Hickling told the Tribunal that it would not be possible to train anyone in view of the limited office space and allowing for social distancing as a result of a risk assessment that have been carried out.

7.8. The vacancy was advertised with the trade association for office supplies and services (BOSS Federation). An arrangement was made for him to interview someone who was familiar with the industry and it was hoped that they could take over the claimant's role. A telephone call had been arranged for the morning of 8 August 2020.

7.9. On 7 August 2020 the claimant telephoned the respondent in the morning and indicated that he apologised and said that he would return to work on Monday, 10 August 2020. The claimant indicated that he intended to retire at the end of November 2020.He said that Howard Hickling had agreed to accept the withdrawal of his resignation.

7.10. The claimant said that the respondent made it clear that he had agreed for the claimant to return to work on the following Monday 19 August.

7.11. Howard Hickling said that he spoke to the claimant but did not agree that the claimant would return on the following Monday.

He said that in a telephone conversation later that day he told the claimant he would not be accepting his request for "employment" – i.e. his return to work.

7.12. A transcript of a telephone call from the claimant at 18:04 on 7 August 2020 shows that the claimant had indicated that he was confused:

> "I understand where you're coming from, but I basically need you to ring me to let me know where I stand here, because, ok I wasn't going to come back , and we had a spat and apologised, or I did, blah de blah and then you told me, your, going to get someone else in.
>
> So I've never actually written my notice and sent my notice in, or give you notice, and yet you're replacing me, and I just wondered where I stood for the future. Have I been sacked. Have I been made redundant. I just want to know where I stand, because there's absolutely nowt, you know…"

7.13. In the evening of 7 August 2020 at 19:12 the claimant's wife, Jean Moran, rang Howard Hickling and left a voice message in which she stated that the claimant had not handed his notice in and the respondent could not put somebody in his job when he had not put anything in writing to say that he had left.

7.14. Howard Hickling rang Jean Moran. He said that he explained that the claimant had resigned on 3 August 2020. Howard Hickling said that Mrs Moran stated that the respondent had not received the claimant's written resignation and that the claimant had been offered re-employment by the respondent following his resignation.

7.15. On 7 August 2020 Howard Hickling wrote to the claimant stating:

> "Following a lengthy conversation with your wife Jean this evening, I was both shocked and concerned at her claims and revelations. To clarify the situation, your verbal resignation was accepted by me on the 3rd August and to date we still await the written confirmation as requested. I now understand your wife will not allow the submission of your written resignation, but I can confirm your employment with the company will end on the 31st August as per your verbal instructions…"

The reference to 31st August was an error.

7.16. Following the ACAS Early Conciliation process the claimant presented a claim to the Tribunal on 4 November 2020. He brought claims for unfair dismissal, age discrimination and outstanding notice pay.

8. The Tribunal had the benefit of oral submissions provided by Mr. McCracken on behalf of the claimant and Mr. Haines on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

The law

Dismissal

9. Mr McCracken, on behalf of the claimant, referred the case of Secretary of State for Justice v Hibbert UKEAT/0289/13/GE which was a claim in which part of the appeal was with regard to discussion of whether a resignation in the heat of the moment. In that case there was reference to the case of Willoughby v CFC [2011] EWCA 1038 in which Rimer LJ stated that:

> "The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect interpretation of its terms. Moreover, one such a notice is given it cannot be withdrawn except by consent. The' special circumstances' exception as explained and illustrated in the authorities is, I consider, not strictly true exception to the rule. It is rather in the nature of the cautionary reminder for the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, they must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Ward J in Kwik-Fit v Lineham [1992] ICR 183 and 191, and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words which may quickly be regretted.
>
> The essence of the 'special circumstances' exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a 'cooling off' . Before acting upon it. Kilner Brown J in Martin v Yeoman Aggregates Ltd [1983] ICR 314 – 318 F understandably referred to such a period as an opportunity for the giver of the notice to recant, or withdraw his words, and this is in practice what is likely to happen. I would, however, be reluctant to characterise the exception as an opportunity for a unilateral retraction or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operating consistently with the principal that such a notice cannot be unilaterally retracted or withdrawn. In my judgement the true nature of the exception is rather that it is one in which the giver the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place – that, in effect, his mind was not in tune with his words"

10. Mr Haines, on behalf of the respondent, referred the case of Mr D Walker Smith v Perry's Motor Sales Limited UKEAT/0251/17/JOJ in which the Employment Appeal Tribunal referred to the case of Harris & Russell Ltd v Slingsby in which it was stated that where a notice is communicated in unambiguous terms, it remains effective unless there is a mutual agreement that it shall not have that effect.

> "However, when a resignation is tendered in the heat of the moment and the employee wishes to withdraw it, such withdrawal should be communicated promptly…
>
> The Tribunal erred in law in its approach to the effectiveness of the resignation, and, notwithstanding that it was entitled to conclude that the resignation might have been given in the heat of the moment, it was not correct conclude that it was properly withdrawn. There was a significant period of time between the initial communication of the resignation and the eventual attempt to withdraw it…"

Direct discrimination

11. Section 13 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

12. **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

13. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* and approved again in *Madarassy v Normura International plc [2007] EWCA 33.*

14. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the

respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

15. The treatment of the claimant must be compared with that of an actual or hypothetical comparator who does not share the same protected characteristic as the claimant but who is in not materially different circumstances from the claimant. In most cases a suitable actual comparator will not be available and a hypothetical comparator will be constructed by the Tribunal.

In the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 2005 it was stated that:

> " employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"

16. This indicates that the Tribunal should focus on the reason why and it is not, necessary, in most cases to go into the considerations of the hypothetical comparator. However, it is still of relevance and, in this case, instructive with regard to the reason why. The hypothetical comparator would be someone in a different age group but who had resigned and had indicated that they intended to leave the employment of the respondent in three months permanently.

Conclusions

17. The Tribunal has considered the issues that had been identified at the Preliminary hearing on 26 January 2021 Employment Judge Smith.

18. The first issue identified is whether the respondent dismissed the claimant. This requires consideration of whether the claimant's resignation was made in the heat of the moment and whether it had been agreed that the claimant had withdrawn that resignation.

19. The Tribunal has given careful consideration to this issue. The resignation was unambiguous. It was made at the end of a heated telephone conversation. The claimant indicated that he was resigning with immediate effect. In his evidence to the Tribunal he said that he had stated "as far as I'm concerned I am finishing now."

20. The respondent commenced looking for a permanent replacement the following day.

21. This is not a case in which it is claimed that, in accordance with the judgment of Rimer J in the case of Willoughby, that, in effect, the claimant's mind was not in tune

with his words. The claimant intended to resign and did resign. He then, as he said, mulled it over. He deeply regretted ending 19 years of service in that way. However, it was a clear and unambiguous resignation and the claimant had not withdrawn it promptly. He had considered the situation over three or four days and the Tribunal is not satisfied that this was a heat of the moment resignation that was promptly withdrawn.

22. The claimant said that he realised he had probably been very hasty as Mr Hickling probably had a difficult time running his business in lockdown. Mr Hickling had supported the claimant from furlough and he rang him to apologise.

23. The Tribunal has to consider what happened during the telephone conversation on 7 August 2020. The claimant said that it was agreed that he would return to work on Monday, 10 August 2020. He said that he understood that his resignation on 3 August 2020 no longer stood. Mr Hickling agreed that the claimant had asked whether the respondent would be willing to offer the claimant employment until the end of November 2020. He said he would call the claimant later in the day to discuss it.

24. The respondent had taken steps to find a replacement employee. If there had been acceptance of the claimant's request to return to work, the respondent would miss out on the potential long-term candidate. There was no criticism of the claimant's performance. He had worked there for 19 years and had indicated that he intended to retire at the end of November 2020. The respondent had a local candidate that Mr Hickling had arranged to speak to the next day.

25. The transcripts of the phone messages made on 7 August were agreed. They made no mention of it being agreed that the claimant's resignation had been rescinded. The telephone call from Mrs Moran concentrated on the fact that the claimant had not put anything in writing and that it was, therefore, not an effective resignation. In her oral evidence to the Tribunal she said that she was of the opinion that employment law required a written resignation.

26. The Tribunal is not satisfied that it was established that the respondent had agreed to the claimant withdrawing his resignation. There was a conflict of evidence with regard to the contents of the telephone call on the morning of 7 August 2020. The Tribunal accepts, having considered all the evidence, that it was not agreed that the claimant's resignation was withdrawn. The claimant was informed that Mr Hickling would call him later in the day.

27. The essential issue to decide is whether the claimant has established that his resignation was rescinded and the respondent accepted that rescission, and that he was to return to work the following week. There was no evidence of any back to work discussion or steps to reintroduce the claimant to work following a long furlough period.

28. The Tribunal has considered all the evidence. It is accepted that the respondent would not be able to employ two people in that position in view of the Covid-19 restrictions and the decision was made, in the interests of the continuing business of the employer, that the claimant's request to recommence his employment with the respondent was not accepted.

29. As the Tribunal is not satisfied that there was a dismissal then it is not appropriate for the Tribunal to consider whether there was a potentially fair reason.

30. With regard to age discrimination, this had been limited to the decision to dismiss. Mr McCracken applied for the Tribunal to consider the dismissal and acts leading to the dismissal. As there was no dismissal, there were no acts leading to dismissal. However, the Tribunal has gone on to consider the position if there was any less favourable

treatment of the claimant with regard to any claim in respect of not accepting the claimant's proposal to withdraw his resignation or to consider his request for re-employment with the respondent. These were not claims that had been brought before the Tribunal but the Tribunal considers it is worth setting out how any such claim would have been determined.

31. A suitable hypothetical comparator, would be someone in a younger age group who had indicated that they were leaving the respondent's employment permanently in November. The Tribunal is not satisfied that the respondent would have allowed such a person to rescind a resignation.

32. Had it been established that there was less favourable treatment because of the claimant's age the Tribunal is satisfied that the treatment was a proportionate means of achieving a legitimate aim. The claimant was to leave the respondent's employment and the respondent required a long-term employee in order to maintain the performance of the business. This was a legitimate aim and it was a proportionate means of achieving it.

33. The Tribunal has concluded that there was no dismissal. The claimant did not work or offer to work during his notice period. The claimant resigned with immediate effect and, in those circumstances, the claim for notice pay is not well-founded and is dismissed.

Employment Judge Shepherd

26 June 2021.