EMPLOYMENT TRIBUNALS

Claimant: **A Rupowal**

Respondent: **Kenard Engineering Company Limited**

Held at: London South Employment Tribunals by video hearing

On: 14 July 2021

Before: **Employment Judge L Burge**

Representation
Claimant: In person
Respondent: G Burke, Counsel

JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's applications to amend her claim to include claims under s.44 and s.47C Employment Rights Act 1996 and for disability discrimination under the Equality Act 2010 are refused;

2. The Claimant resigned from her employment at the Respondent; and

3. The Claimant's claim of unfair dismissed is therefore dismissed.

REASONS

The Issues and Determination of Preliminary Issues

1. At the start of the hearing there was considerable discussion about what the issues were for the Tribunal to decide.

The Claimant's first application to amend her claim

2. The Claimant made an application to amend her claim to include a claim of detriment and leave for family and domestic reasons under s.44 and s.47C Employment Rights Act 1996 ("ERA"). This was refused by the Tribunal as this was the first time she had raised such a claim – she had not raised it in

her claim form nor her Further and Better Particulars. The Claimant had not identified was the detriment was, nor the grounds on which this was a health and safety case. Further, the new claims were significantly out of time.

3. In the Tribunal's view the Respondent would be significantly more prejudiced than the Claimant if the amendment was allowed – while the refusal would mean that the Claimant would not be able to pursue these claims, it was not clear that the claims were arguable on the facts, they were significantly out of time, there was no reason given why they were only being raised at this late stage and the Respondent would not be able to fairly deal with them at the hearing. Given that the Claimant had stopped working for the Respondent some 16 months previously, a further delay was neither just nor equitable.

The Issues for the Tribunal to decide

4. In relation to the pleaded claim, the Claimant had ticked the "unfair dismissal box" in her claim form and then stated that it "may have been a constructive dismissal". However, before the Tribunal the Claimant said that she believed she had been dismissed for misconduct for raising issues in an email on 14 February 2020, those issues relating to the pressure of her work, wanting a pay rise to reflect the work she was doing and because she wanted to increase her hours. The Respondent's case was that the Claimant had resigned in that same email on 14 February 2020. The Claimant said she had not resigned and so she had not been constructively dismissed. The parties therefore agreed that the issues for the Tribunal to consider were:

    a. Did the Claimant resign on 14 February 2020?

    b. If not, was the Claimant dismissed by the Respondent?

    c. If so, was that dismissal for a fair reason?

    d. Was any dismissal procedurally fair in all the circumstances?

5. The Respondent conceded that if the Claimant was dismissed there was no fair reason for it and no fair procedure was followed.

The Claimant's second application to amend her claim

6. After the hearing the Claimant wrote to the Tribunal on 2 August 2021. She started her application with "Please kindly consider my case under the automatic unfair dismissal because of my protected characteristics of disability discrimination." She wrote again on 6 August 2021 in relation to her health records. On 17 August 2021 the Claimant wrote again and said "Just to confirm that The Claimant have requested the Tribunal to assess and include the injury to feelings in the schedule of losses, which may or may not need amendment to the Claim." The Tribunal therefore concluded that following the liability hearing on 14 July 2021, the Claimant was making an application to amend her claim to include a claim of disability discrimination.

7. The Respondent objected to the Claimant's application to amend her claim on 16 August 2021 as the Claimant had only brought a claim for unfair dismissal which was received by the tribunal on 24 March 2020 and proceeded to a final hearing on 14 July 2021. The Respondent said that the Claimant was seeking to introduce a whole new cause of action, after the final hearing, the Respondent could not have reasonably expected such a claim to be brought. Further, the application lacked the detail required and the claim was considerably out of time given that the Claimant's employment terminated in March 2020.

8. The Tribunal concluded that, for all the reasons set out in the Respondent's objections detailed in the previous paragraph, the Claimant's application to amend her claim to include a claim of disability discrimination was refused. The prejudice to the Respondent in allowing such an application would be significant. The Claimant had not shown why the application was not made earlier and why it was now being made. The delay and expense in granting the application would be considerable. It would not be in accordance with the overriding objective in dealing with cases fairly and justly to allow the application.

The evidence

9. The Tribunal heard evidence from the Claimant who gave evidence on her own behalf. The Tribunal also heard evidence from Keith Ellis (Group Managing Director) and Danny Booth-Adams (Managing Director) on behalf of the Respondent.

10. An electronic bundle of 214 pages was provided to the Tribunal.

Findings of Fact

11. The Respondent is an engineering company. The Claimant started working for the Respondent on 13 March 2018. Her role entailed running the payroll for the Respondent's group as a monthly process and undertaking day to day Human Resources ("HR") functions such as ensuring documentation was completed for new employees, advertising for new roles, assisting with appraisals and general administration of the human resources system.

12. The Claimant wrote an email to Pat Gordon, Group Financial Controller, in the early hours of 14 February 2020 from her personal email account. The Claimant gave evidence, that is accepted by the Tribunal, that:

"when [she] woke up in the early hours… [she] was still thinking about the cover and anxious about the added pressure. At about 3.30am on that morning, [she] started to write an email… At this time and before, [she] had not been looking for any other jobs and [she] had not applied for another job."

13. The Claimant's email, in summary, set out her concerns:
    a. that her performance was not sufficiently recognised so as to obtain a pay rise;

b. the pressures of doing the payroll alone;
c. the pressure she was under when the sheet from which she was working was incorrect;
d. that she had taken over responsibility from a colleague who had gone on maternity leave, even at times when her childcare responsibility should have been prioritised;
e. that her workload had gone up and when she asked to come in an extra half or full day she was told to complete the work the following week instead;
f. that she wanted an appraisal meeting as she felt that the meeting was the forum where she could raise the issue of a pay rise but she did not see this happening as her manager, Mr Booth-Adams, was busy.

14. The email concluded:

"In these circumstances, where I don't see a pay progression as well as no recognition, I feel that it's time to move on to fit the income inline [sic] with inflation if not with the performance and duties or tasks assigned. I shall assume that you are happy to regard this as my notice of resignation i.e. I don't hear regarding the pay more formally i.e. a yes or a no or when etc…"

15. In evidence the Claimant said that the email reflected the issues she had been suppressing and she did not accept that she had resigned in the email. The Claimant said that she "*wanted the issues to be addressed – [she] wanted to know [her] situation, rather than duties and responsibilities being added…one after another, without a pay rise".*

16. Later that day, on 14 February 2020, Ms Gordon emailed the Claimant responding to her email "I write to acknowledge your email dated 14 February 2020 in which you detailed your resignation. In addition, you also have raised a number of concerns referred to in your email of resignation…" and invited her to a meeting to discuss. The email was titled "Resignation and Invite to a meeting".

17. The Claimant replied on 17 February 2020 thanking Ms Gordon for arranging the meeting and confirmed her attendance for 12.30 that day.

18. At the meeting on 17 February 2020 Mr Booth-Adams was the chair and Ms Gordon was a note taker. Contemporaneous notes were written by Ms Gordon. The Claimant said in evidence to the Tribunal that the notes were inaccurate in places. The Tribunal rejects this as she had not complained of this before and the contents made sense in the context of the written communications before and after. The Tribunal finds that at the meeting the Claimant said she had been looking forward to talking about the issues and that she had decided to "move on". The issues raised in the Claimant's email were discussed. The Claimant complained that her role had become more pressured and that this was not recognised. Mr Booth-Adams explained that there were cash flow difficulties but that her work was "certainly appreciate[d]". The Claimant accepted in evidence that she knew a number of directors had had pay cuts or were receiving no pay at the time. Towards the end of the meeting the Claimant said that she thought all of her

issues had been covered but she wished that she had spoken to them before about her pay. She said that as the Respondent could not "move on this, she ha[d] no option". At the end of the meeting it was agreed that the Claimant would work a month's notice but that the Respondent was willing to consider a different leaving date if the Claimant would like. The Tribunal finds as a fact that it was the understanding of all parties at that meeting on 17 February 2020 that the Claimant had resigned and that she would be working a month's notice.

19. On 18 February 2020 Mr Booth-Adams wrote to the Claimant formally accepting her resignation.

20. On 20 February 2020 the Claimant and Mr Booth-Adams had a meeting. The Claimant said that she had purposefully not entitled her email of 14 February "resignation" and that she had not intended to resign.

21. On 25 February 2020 the Claimant emailed Mr Booth-Adams and said that "even though my first email had no subject i.e. it should be a question whether or was a normal resignation or I felt being led to the circumstances to resign". It ended "I should be grateful, if you could consider reinstating my job following the 12th March". The Tribunal finds that the Claimant knew that her email had been taken as a resignation, that her resignation had been accepted and that she was now asking for reinstatement.

22. On 27 February 2020 the Claimant met with Mr Booth-Adams and Mr Keith Ellis. At that meeting the Claimant said that her original email had not been intended to be a resignation and that even if there had been some confusion she wanted to retract the resignation. The Tribunal finds that at the meeting Mr Keith Ellis told the Claimant that her request to withdraw her resignation was not accepted as the Respondent had already put in place measures to cover her role. This was confirmed in an email from Mr Ray Ellis (Keith Ellis' brother and Chairman of the Respondent) to the Claimant on 3 March 2020.

23. The Claimant's employment terminated on 12 March 2020.

Relevant law

24. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s.111 ERA. The employee must show that she was dismissed by the employer under s.95 ERA.

25. S.98 ERA deals with the fairness of dismissals. There are two stages:

    a. the employer must show that it had a potentially fair reason for the dismissal within s.98(2); and
    b. if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason.

26. Clear words of resignation are effective and an employer is not obliged to accept a retraction. The employee must communicate the intention to resign, by words or conduct, to the employer (*Edwards v Surrey Police* (1999) IRLR 456, EAT).

27. The Court of Appeal held in the case *of Sothern v Franks Charlesly and Co* (1981) IRLR, 278 that where words, in this case words of resignation, are ambiguous the Tribunal is to determine how they would have been understood by a reasonable listener in the circumstances (an objective test). If the words used are unambiguous, then their interpretation is to be judged by the way they were actually understood by the party hearing those words (a subjective test).

Conclusion

28. The Claimant's claim was that she had been dismissed for misconduct. However, there were no references to misconduct in the correspondence or in the minutes of meeting. The Claimant's conduct was not called into question and the Respondent confirmed that it appreciated the work she did, although they were not able to give her a pay rise. The Tribunal therefore concludes that the Claimant has therefore not shown that she was dismissed by the Respondent under s.95 ERA.

29. The Claimant's words of resignation were clear. She said "…*I shall assume that you are happy to regard this as my notice of resignation i.e. I don't hear regarding the pay more formally i.e. a yes or a no or when etc…".* The Tribunal's conclusion is that these words were unambiguous and a reasonable recipient would be likely to interpret them as the Claimant resigning because she was not content with her pay, especially in the particular circumstances that a pay rise was unlikely due to the Respondent's cashflow problems which were known to the Claimant/Ms Gordon.

30. Even if the Claimant's wording could be seen to be ambiguous, the interpretation of those words need to be judged the way they were actually understood by the party hearing those words, which is a subjective test. In this case the recipient of those words, Ms Gordon, understood them to mean that the Claimant was resigning. Her reply was entitled "Resignation and Invite to a meeting" and she wrote "I write to acknowledge your email dated 14 February 2020 in which you detailed your resignation. In addition, you also have raised a number of concerns referred to in your email of resignation…".

31. The Claimant did not seek to correct the Respondent's interpretation when she received Ms Gordon's email, nor did she say that she had not in fact resigned at the meeting which took place on 20 February 2020. As Mr Burke submitted, the Respondent is not a mind reader, if Ms Gordon and Mr Booth-Adams had misinterpreted the Claimant's intentions then she should have said so. They were entitled to take her resignation at face value. It was only once the Claimant received the formal letter accepting her resignation that she said that she had not meant to resign and/or asked if she could be reinstated. By this time it was too late, the Respondent did not

have an obligation to accept a retraction of her resignation and did not do so.

32. The Claimant was adamant that she had not resigned or been constructively dismissed. There was no dismissal of the Claimant by the Respondent. In light of the stance the Claimant had taken, she did not advance any case for constructive dismissal (a fundamental breach of her contract by the respondent which she accepted and resigned as a result of). In these circumstances, the Tribunal concludes that the Claimant's employment with the Respondent terminated on 12 March 2020 by reason of her resignation.

Employment Judge **L Burge**

Date: 27 August 2021