



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 21 and 22 July 2021

Claimant: Mr J Coggin

Respondent: BTU (Installation and Maintenance) Ltd

Before: Employment Judge Mr J S Burns
Members Mr T Ashby and Mr P de Chaumont-Rambert

Representation

Claimant: In person

Respondent: Mr P Collyer (ET Advocate)

REASONS

(For the judgment signed on 22/7/21)

1. The claims were for unfair dismissal and disability discrimination (failure to make reasonable adjustments) as set out in a case management Order dated 5/1/21. A holiday pay claim was withdrawn during the course of the hearing. The documents were in a joint bundle. We heard evidence from the Claimant, then his wife Mrs T Coggin, then from the Respondent's witnesses namely Ms M King (a Contracts manager and the Claimant's erstwhile line manager), then from Mr S Turnbull, supervisor and then from Mr A Hagan an HR manager.

Findings of fact

2. The Claimant whose date of birth is 26/6/1955, was employed by the Respondent as engineer from 29/11/2006 to 20/7/2020. He worked from the Respondent's Camden office.
3. The Claimant worked on servicing and repair of boilers and gas appliances in social housing. The work load varied – being heavier in the Winter than in the Summer. Work was assigned to the Claimant every day – if he had too much work he had the opportunity to ask for some of it to be transferred to someone else. While his employment continued he coped with his work and never raised any grievance or complained that his work was excessive . He had a good relationship with his manager Ms King and Supervisor Mr Turnbull.
4. The Claimant had a heart attack in about 2012 and at that point was relieved of doing emergency call-out work at nights and over weekends. After his heart attack he became depressed and his GP prescribed antidepressants (20mg Citalopram per day). This dose was increased to 30mg per day in 2016. After the Claimant's employment ended it was increased to 40mg per day. The Claimant and his wife were vague about what if any consultations with the GP had taken place between 2012 and 2020 and, (despite the Respondent's representative pointing this out to the Claimant in a letter dated 16/3/21) the Claimant has failed to provide any GP notes from 2012 to 2020. We find that there must have been at least

one consultation with the GP on the subject of depression in 2016 when the dose was increased but apart from this the Claimant did not take any other steps to get help for his depression. Although he was offered a referral to "talking therapy" he never took it up and he has never consulted with any mental health crisis team, psychiatrist or other mental health specialist.

5. The Claimant was ordered to provide an impact statement and did so on 28/1/21. Although he had been given considerable guidance by the employment judge who conducted the case management hearing on 5/1/21, the impact statement is vague and lacking in detail. The only specific example given of the claimed impact of the depression on his ability to do day to day activities is as follows; *"if I'm in a mood it feels like a black cloud has come over me and I have to shut myself off from everything. This could last up to 2 hours, I would shut myself in my bedroom until it was over. If it happened at work, I would have to try and get myself out of the mood, sometimes this would not happen and I would carry on working to the best of my ability, it was not easy but I had a job to do."*
6. The Claimant stated in his oral evidence that his depression had never interfered with his work. He gave vague evidence that he had, years ago, informally revealed his depression to Ms King and Mr Turnbull, but they denied this and we do not find it proved. It is accepted that before the last day of the Claimants employment his depression had not caused any problems or been a live issue at work.
7. Many people suffer depression and take long-term antidepressants to improve their mood without having an impairment meeting the description of a disability under the Equality Act 2010. While we accept that the Claimant had a long-term impairment, we do not find that he has shown that it had a substantial adverse effect on his ability to do day-to-day activities. Furthermore, we find that until the GP letter dated 5/8/2020 was received the Respondent did not have either actual or constructive knowledge of the Claimant's depression. For these reasons the disability discrimination claim is dismissed.
8. On 14 July 2020 the Claimant attended a job in a residential property but was unable to find the Emergency Gas valve, because he failed to look for it properly in a cupboard which was filled with kitchen pots and pans. As he had not found it other engineers had to be deployed to the property and many other neighbouring properties to find the valve and carry out related safety checks. This caused the Respondent a degree of extra work and embarrassment with its main client.
9. On 17/7/21 Ms King phoned the Claimant to ask him about the matter. The Claimant admitted he had been at fault. The conversation became a bit heated and the Claimant became upset and went home early and would not take any further calls from Ms King for the rest of the day.
10. Over the weekend the Claimant discussed with his wife the fact that he felt he needed a rest or a break from work while he arranged to consult with his GP. They planned that he would go into work and have a meeting with Ms King to discuss his going on sick-leave or holiday for a while to allow him to recover from the upset caused by the incident the week before. The Claimant went to work and asked for a meeting which took place informally on Monday 20/7/21 with Ms King and with Mr S Turnbull also in attendance.

11. The meeting was held in a room which the Claimant described as “like a goldfish bowl”. Ms King stood over the Claimant and asked him “*Jeff – what’s going on – do you think you have done your time?*” and “*What can we do to make sure this doesn’t happen again?*”
12. The Claimant was feeling confused and upset and was unable to think clearly. He had not come to the meeting to resign but to ask for holiday or sick-leave. He had already apologised and did not know what else he could suggest to make amends. However, as a result of what Ms King said he felt that he should offer his resignation and he did so. This was done in the heat of the moment and under pressure.
13. As soon as Ms King heard the offer of resignation, she told the Claimant that his resignation would have to be in writing and she fetched pen and paper and gave it to him. By this time the Claimant was visibly upset, tearful and rubbing his eyes behind his spectacles. Ms King told the Claimant to “write a nice letter” and then went off with Mr Turnbull for a ten-minute break after which they came back and Ms King took the Claimant’s letter and told him that his employment would end forthwith and without notice. The meeting ended after a discussion about holiday pay. Ms King sent the Claimant’s letter to Mr Hagan in HR who later the same day wrote a letter to the Claimant confirming that his employment had ended.
14. When Mrs Coggin arrived home later that day she found the Claimant holding his head in his hands and crying about what he had done.
15. On Thursday 24/7/21 the Claimant was upset to find that his final pay from the Respondent was less than he was expecting because pay in lieu of excess holiday taken by the Claimant prior to his resignation had been deducted from the final sum due.
16. Mrs Coggin phoned Ms King to discuss this and a heated discussion ensued during the course of which Mrs Coggin told Ms King that the Claimant had changed his mind and wanted to be allowed to retract his resignation. Ms King said that this was impossible because “*it is what it is*”.
17. The Claimant went to his GP who wrote a letter dated 5/8/2020 which was sent to the Respondent. The letter reads “*I can confirm that Jeffrey Coggin has been suffering with a long history of anxiety and depression and has been on regular medication for many years. He recently resigned from his employment but would now like to withdraw that resignation as he feels he was not in a proper frame of mind when he did it due to the stressful situation he was in. I write to support his request for withdrawal of the resignation due to medical reasons*”
18. This request was refused in a letter dated 6/8/2020 from Mr Hagan which stated that the particular reason why the Respondent could not agree to allow the resignation to be retracted was because the Respondent had already recruited someone else to fill the position. As now admitted by the Respondent, that was untrue – no replacement had been recruited.

Relevant law

19. As to whether there was a dismissal or simply a resignation the Employment Rights Act 1996 provides a comprehensive definition of when an employee is dismissed in Section 95(1) and two of the possibilities are as follows: “*An employee is dismissed by his employer if (a) the contract under which he is employed is terminated by the employer whether with or without notice*”; and... (c) *the employee terminates the contract under which he is employed with or*

without notice in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct".

20. A dismissal by the employer can be through actual express dismissal, ie uttering words such as "*you are hereby dismissed*" or it can be done through enforced resignation.
21. In Martin v Glynwed Distribution Ltd [1983] ICR 511, CA. Sir John Donaldson MR said as follows: "*Whatever the respective actions of the employer and the 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*".
22. An employee who resigns in the "heat of the moment", when they were angry or upset, may not have made a rational decision to terminate the employment and might regret it.
23. In these circumstances, the employer should consider giving the employee the opportunity to retract their resignation after they have had time to calm down.
24. The leading case is Sothorn v Franks Charlesly and Co Ltd 1981 IRLR 278. In that case the Court of Appeal held that the oral statement, "I am resigning" was unambiguous and that concluded the matter. Nevertheless, the Court acknowledged that there may be circumstances where it is appropriate to investigate the context in which the words were spoken. For example, where what was said was in the heat of the moment or under pressure.
25. The EAT in Kwik-Fit v Lineham 1992 ICR 183 said that where such special circumstances exist such as "*words spoken and actions expressed in temper*", apparently unambiguous words can be considered in the light of the surrounding circumstances and it may be unreasonable and risky for an employer to assume a resignation and to accept it forthwith. In such cases, the EAT added, a prudent employer will allow a reasonable period of time to elapse before accepting a supposed resignation. If, during this period, facts arise which require further investigation, an employer who does not investigate will risk the Tribunal drawing an inference of "dismissal" from the evidence. The length of time that it is reasonable for a prudent employer to wait before accepting a proposed supposed resignation is a question of fact for the Tribunal. However, the EAT said that that the appropriate period was, "likely to be a day or two".

Conclusions

26. The Respondent was not guilty of any breach of contract and this was not an unfair constructive dismissal.
27. The list of issues from the case management hearing in January posed the question "*was the Claimant dismissed?*" and then set out a number of points apt for a constructive dismissal claim, but did not adequately flag up the issue of whether the Claimant's resignation should be regarded as reliable. However, the resignation had been mentioned in the pleadings and was dealt with by both sides in their witness statements and oral evidence, and has been the real issue between the parties throughout. The FMH employment judge raised the issue with the Respondent's representative when he was making final submissions so he had an opportunity

to deal with it. There is no forensic prejudice for the Respondent in the tribunal dealing with this case on its proper basis.

28. The Claimant's resignation was given in the heat of the moment and under pressure when he was visibly upset. The idea of his resignation was suggested to him by Ms King by her asking whether he "*had done his time*". She wanted the Claimant to resign, and hastily facilitated and secured a written resignation letter as soon as the Claimant mentioned it. She was seeking to capitalise on the Claimant's vulnerable state. She should rather have allowed the Claimant time to think and cool off and consider the matter carefully beforehand. It is notable that no discussion took place with HR before the matter was finalised. The Claimant had through his wife notified his change of mind by three days later and this was unreasonably refused.
29. In the circumstances the Respondent was not entitled to treat the Claimant's resignation as genuine and reliable and when the Respondent nevertheless acted upon it and treated it as a binding resignation which the Claimant could not retract, the Respondent dismissed the Claimant as contemplated by section 95(1)(a)
30. The dismissal was procedurally and substantively unfair.

Remedy

31. In the circumstances it was not reasonably practicable to carry out a procedure as prescribed by the ACAS code pertaining to discipline and grievances. For that reason we do not find it just and equitable to make any uplift in any award under section 207A TULCRA 1992.
32. There is no evidence to suggest that, but for the dismissal, the Claimant's employment would have ended his employment before his due retirement date namely 26/6/2021. There is no scope for a Polkey discount before this date.
33. The Claimant's statutory rights (not to be unfairly dismissed) would have been valueless after his retirement date (up to which we have awarded compensation). Hence we do not award any compensation for loss of statutory rights.
34. The Claimant's failure to do his job properly on 14 July 2020 and his going home early and breaking off communication with his line manager on Friday 17th July 2020 was conduct/action contributing to the dismissal on account of which we think it just and equitable to discount the basic and compensatory awards by 20% under sections 122(2) and 123(6) ERA 1996.
35. The Claimant stated on his ET1 that on average his gross week's pay was £740 and net was £511 per week. The Respondent failed to state on the ET3 or subsequently whether or not those figures were agreed and did not challenge them in cross-examination.
36. The Claimant was unable to explain the other details on his Schedule of Loss (for example pension loss) which had been drafted for him by a friend who was not present. The Claimant always planned to retire on 20/7/20 and we do not award compensation after that date but regard it as just and equitable to award it up to that date.

37. The Claimant did not work between his dismissal and his planned retirement date because he was signed off sick by his GP. In these circumstances he cannot be criticised for failing to mitigate.

Calculation of the unfair dismissal award

A week's pay was £740 per week before tax and £511 after tax

Claimant's age at dismissal was 65 years

Claimant service was from 29/11/2006 to 20/7/2020 – 13 years

Basic award is $19.5 \times £538 =$ £10491

Compensatory award

Loss of net earnings

24/7/20 – 26/6/2021 48 weeks x £511 = £24528

Total £35019

Less 20% contributory fault £7003.80

Net award £28015.20

J S Burns Employment Judge
London Central
9/9/2021
For Secretary of the Tribunals
Date sent to parties : 09/09/2021
