

EMPLOYMENT TRIBUNALS

Claimant: Mr D Da Costa

Respondent: Interpub Limited

Heard at: London Central Employment Tribunal (by video)

On: 15 and 16 August 2022

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: Ms R Hodgkin (Counsel)

For the respondent: Ms D Gilbert (Counsel)

JUDGMENT

The claimant's claim that he was unfairly dismissed is dismissed.

EXTENDED REASONS

Conduct of this hearing

- (1) This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP).
- (2) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- (3) No requests were made by any members of the public to inspect any witness statements or any other written materials before the tribunal.
- (4) The parties were able to contribute to the discussion and to hear all comments made and see and hear all those giving evidence.
- (5) The participants were told that it is an offence to record the proceedings.
- (6) Each of the witnesses, who were all in different locations, had access to the relevant written materials. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The claim

- (7) The Claimant was employed by the respondent, as UK Operations Manager, from 27 May 2013 until his employment was terminated with effect from 30 June 2021. By a claim form presented on 15 July 2021, following a period of early conciliation from 6-13 July 2021, the claimant brought complaints of unfair dismissal. On 3 March 2022 an employment tribunal struck out the claimant's claim that he had been constructively dismissed on the basis that it had no reasonable prospect of success – the main reason for this being that the claimant's position before the tribunal was that he had not resigned.

The issues

- (8) The claims and issues for determination at this hearing were set out by Employment Judge JS Burns at the preliminary Hearing held on 3 March 2022, and were as follows:

Liability

- (i) Did R dismiss C employment within the meaning of section 95(1)(a) of ERA 1996? C contends his employment was terminated by R. R contends C resigned with notice.
- (ii) If yes, was the dismissal unfair within the meaning of section 98 of ERA 1996?
- (iii) If yes, would C's employment have terminated in circumstances which did not amount to an unfair dismissal in any event, and if so when would have occurred? (Polkey)

Remedy

- (iv) To what compensation is C entitled by way of basic and compensatory awards and interest?
 - (v) If C's employment would have terminated fairly in any event, to what extent if any should C's compensation be reduced to reflect that?
 - (vi) Did C by his conduct contribute to his dismissal? (vii) If so, to what extent if any should his compensation be reduced to reflect that?
 - (vii) Should there be an uplift for breach of the ACAS code?
- (9) The respondent confirmed that it is bringing no case that any dismissal of the claimant might have been fair. Therefore the issues for this tribunal to determine are simply whether the claimant resigned or was dismissed, and, if he was dismissed, what the remedy should be.

Evidence

- (10) There was an agreed file of general documents, as well as a remedy bundle of documents. The claimant gave evidence, as did Mr C Lambert, Mr M Roberts and Mr L Knowles on behalf of the respondent, respectively the Respondent's Group Operations Director, its Managing Director and its Strategy and Development Director. Each witness had produced a witness statement which set out their evidence in chief. The tribunal also had before it a short statement from the respondent's People Director, Mr M Vaughan. Although he was present at the video hearing, he was in Australia and had not received the necessary

permissions to give evidence from a foreign country. He did not therefore give evidence, nor was he cross-examined. I accepted the statement, but have given it little weight given that Mr Vaughan was not available for cross-examination.

Facts

- (11) I determined that the relevant facts were as set out below. There was considerable difference between the evidence given by the claimant and that given by the respondent's witnesses, in particular over the crucial fact of whether the claimant resigned on 23 March and 7 April 2021, or whether he merely stated his intention to resign if concerns he had expressed about his employment were not addressed. I prefer the account of the respondent's witnesses on this point to the evidence given by the claimant. This is because, while there was little contemporaneous documentation on the subject, the evidence that there was supported the respondent's position for the following reasons, set out in chronological order:
- (i) By way of background, it is the respondent's case that the claimant resigned to his line manager, Mr Lambert on 23 March 2021 and confirmed his resignation on 7 April 2021, and that Mr Lambert informed his superiors within the company, including Mr K Knowles (the Chief Executive of the company and Mr L Knowles' father) and Mr Roberts on 7 April 2021 that the claimant had resigned. It is the claimant's case that he did not resign, but told Mr Lambert that he would resign if concerns he had raised, in particular about pay and management style, were not dealt with.
 - (ii) Mr Roberts spoke to the claimant on 8 April 2021. The file of documents contained an account of that conversation written by Mr Roberts on 24 June 2021, based on his contemporary handwritten notes, so it can therefore be presumed to be reasonably accurate. Mr Roberts records that he called the claimant and asked if he would reconsider his decision to resign but that the claimant confirmed that his mind was made up. The note does not record that the claimant had merely threatened to resign.
 - (iii) On 8 April Mr K Knowles telephoned the claimant and asked him to speak to his son, Mr L Knowles, because they were from the same generation. That day the claimant texted Mr L Knowles as follows: *"I guess you have heard about me leaving. Would you be free next week Monday to go for a drink at the Inn or elsewhere and have a private conversation? I really would like to explain you the reasons of why this decision in person."* This note does not talk about an intention to resign, but talks of someone leaving the company and of it being a decision. I do not accept the claimant's explanation that this was just a text to a friend, so the wording is immaterial. It was a text to the son of the chief executive of the company, whom the chief executive had asked him to contact. It would have been much more likely, had the claimant merely expressed an intention of resigning to Mr Lambert, that he would have texted something like "I guess you have heard about me thinking about leaving". I infer from this that the claimant had definitely resigned, and believed he had done so.

- (iv) The claimant found out, via LinkedIn, on 15 April 2021 that the respondent had instructed a recruitment company to recruit for his job. He describes this as a humiliation. However, there was no evidence before the tribunal that the claimant promptly complained about this, nor promptly told anyone at the respondent that they should not be recruiting for a replacement for him as he had not resigned.
 - (v) On 11 May 2021 Mr Lambert emailed the claimant, copying in amongst others the respondent's Managing Director and People Director, stating that he would like to "respond formally accepting your resignation" and, in typical terms that are written when a good employee has resigned, wishing him "all the success in the future and hope that you keep in touch". The claimant does not write any written response, until 18 June 2021, denying that he had resigned. On the claimant's case, he told Mr Lambert orally on 19 May 2021 that he had not resigned (Mr Lambert denies this), but this was still over a week later. Again, it is implausible that the claimant would not immediately have responded to the 11 May letter stating that he had not resigned.
 - (vi) The claimant's replacement began work with the company on 10 June 2021, and was receiving communications from the management team from which the claimant was excluded. The claimant does not immediately complain about this, until his email of 18 June 2021.
 - (vii) The claimant's evidence is that he told people that he intended to resign unless his working conditions changed. However he was never given any hope that this might happen – on the contrary he was told that the behaviour of the two senior managers would not change. It seems most unlikely in these circumstances that the claimant would not then have resigned, if he had not already done so, which therefore makes it much more likely that he had in fact on 7 April 2021 confirmed his earlier resignation.
 - (viii) The respondent's oral evidence was clear, and consistent at all times with the written documentation.
- (12) The claimant's employment with the respondent group began on 27 May 2013. His final employment contract, dated 11 June 2018, is with a company named Beds and Bars Limited, but the present respondent has accepted in its ET3 that it is the proper company to be the respondent in this claim. On 2 July 2018 the claimant was promoted to UK Operations Manager. He was responsible for 11 bars and pubs and 10 hostels. Paragraph 37 of the claimant's contract of employment states that the claimant was "expected to give" his employer one month's written notice to terminate his employment, and required the employer to give the claimant three months' notice. That clause also contained provisions allowing the employer to place the claimant on garden leave during any period of notice.
- (13) The hospitality business was badly affected by Covid. The respondent had to close a number of its venues. A number of staff were furloughed. Others were asked to reduce their pay to the hours they were actually working. The claimant agreed to reduce his pay by 50%.
- (14) In about March 2021 the respondent needed to recruit a new manager to be Senior General Manager at one of its high profile venues, The Village, a venue within the claimant's remit. The claimant interviewed candidates and chose a Mr

- H McNeil. Mr Roberts wanted to give the candidate a second interview. The claimant saw this as undermining him. In the event, Mr Roberts, believing that it was his prerogative to satisfy himself that candidates for important roles were suitable, did interview Mr McNeil and confirmed the appointment.
- (15) On 22 March 2021 the claimant sent an email headed March Pay to his line manager, Mr Lambert in which he expressed concerns about not being paid full pay even though he was working pretty much full time throughout the period, and that other people were being better paid. He also said he had thought that Mr Lambert had earlier agreed he would be paid in full for March, but that his March salary had not in fact been revised.
- (16) The following day the claimant and Mr Lambert met informally on a walk in Newquay. The claimant says that he told Mr Lambert it was his intention to leave if his humiliating and bullying treatment from senior management would not change, and that he wanted an explanation for his pay levels. Mr Lambert was clear in evidence that the claimant told him he was resigning, and was happy to work his notice to the best of his ability. He said that the claimant complained about his treatment from the senior team and his pay, said that he was stressed and resigned. Both agree that Mr Lambert told the claimant that the senior team would not change its behaviours. The claimant was a valued employee, and Mr Lambert's evidence is that he gave the claimant strategies to deal with the senior team, and asked the claimant to take time to reconsider his decision. The two agreed to meet following Mr Lambert's return from holiday. Mr Lambert did not tell any senior manager about the conversation, as he says he hoped the claimant would change his mind. For the reasons set out above, I prefer Mr Lambert's evidence. It would obviously have been helpful if the notice had been given in writing, but the fact that it was not does not dispose of the issue because the contract of employment merely expected written notice from the employee rather than requiring it. The fact that Mr Lambert professes to remember the specific words used by the claimant does also not indicate that the claimant never resigned.
- (17) The claimant and Mr Lambert met again at the Flying Horse Pub in Moorgate on 7 April 2021. The claimant states that he asked Mr Lambert if he had had time to consider his request for better conditions at work, and that Mr Lambert had said that the two senior individuals would never change, and then asked him what it would take for the claimant to leave quietly. The claimant also states he told Mr Lambert that his intention to leave would not be official until an agreement was reached. Mr Lambert denies the claimant's account. He told the tribunal that at the meeting the claimant had repeated his decision to resign. I accept Mr Lambert's account for the reasons set out above, and also because it seems unlikely that a significant aim the claimant hoped to achieve from the meeting was a change in management style towards him given that, in the claimant's own written evidence, Mr Lambert had told him on 23 March that they would not change their behaviour. While it is not implausible that Mr Lambert proposed some form of financial settlement, this is just as consistent with a resignation having occurred as with a threat of a resignation, if not more so.
- (18) Mr Lambert spoke to Mr K Knowles and Mr Roberts and told them that the claimant had resigned. Each telephoned the claimant on 8 April. Mr Knowles in essence said he would not change how he managed people and asked the claimant to talk to his son Luke. The claimant's evidence is that he still hoped that Mr Knowles and Mr Roberts would change their behaviours towards him. Given

- Mr Knowles' statement, and the two firm statements from Mr Lambert that the two would not change their management style, this seems implausible. Mr Roberts' account, based on a note prepared from handwritten contemporary notes, is that he asked the claimant to reconsider his resignation but the claimant declined, saying that he was stressed and wanted a change. For the reasons set out above, I prefer Mr Roberts' account.
- (19) That day the claimant sent Mr L Knowles a WhatsApp message *'Hey Luke, How are you doing? I guess you have heard about me leaving. Would you be free next week Monday to go for a drink at the Inn or elsewhere and have a private conversation? I really would like to explain you the reasons of why this decision in person. Let me know if it's fine for you'*. The wording of the text was clear, and not to my mind ambiguous: it stated, the day after the second meeting with Mr Lambert, that the claimant was leaving, and that he had made a decision. While not a resignation letter in itself, the text is clear confirmation that the claimant believed that, following the conversations he had had with Mr Lambert, he had resigned from the company. The two men were friends. They met at a couple of pubs on 14 April 2021. The evidence Mr L Knowles very clearly gave to the tribunal, again based on a note prepared from contemporary handwritten notes, is that the claimant told Mr Knowles that he was leaving because of lack of respect from senior management, inability to take decisions without senior management intervention and stress. The claimant's evidence is that he told Mr Knowles of his intent to leave for these reasons, and that Mr Knowles told him that he could not change the senior managers' behaviours. For the reasons set out above, I prefer Mr Knowles' evidence.
- (20) On 15 April 2021 the claimant was contacted by a Ms Adams through LinkedIn who told him that she had been approached by a recruitment agency for an Operations Manager job at the respondent. The claimant understood that it was his job being advertised. He states that this was a humiliation. However he did not for a significant period complain to Mr Lambert or other senior managers that it was inappropriate for the respondent to advertise his job because he had not resigned. One would have expected him to complain if he did not in fact think that he had resigned. The first time he complained in writing was 18 June 2021.
- (21) Also on 15 April 2021 the claimant and Mr Lambert spoke by telephone. The claimant put forward proposals for what he termed his settlement package, namely paying him tax free in full for all hours worked during the coronavirus period, plus 3 months' notice pay in full, plus being paid for all untaken holiday, including untaken holiday from previous years that had now lapsed.
- (22) On 21 April the claimant emailed Mr Lambert "as per our conversation last Tuesday" asking him if he'd had time to think and review his proposal to pay the verbally agreed 3 months of salary and his remaining holidays, and concluding "As you can imagine, I would like to put this matter away and focus fully on my job during my remaining time within the company if we get to an agreement". This statement was relied on by the claimant as showing that he still only had an intention to resign, and had not actually resigned. The reference to "if we get to an agreement" is ambiguous and could refer also to the claimant's desire to resolve financial issues and focus on his job, rather than to whether or not he would leave. I do not regard the inference the claimant wishes me to put on this sentence as sufficiently strong to override the other indicators that he had actually already resigned.

- (23) The claimant and Mr Lambert had a further meeting at the respondent's head office. They dispute when the meeting took place. Mr Lambert states that it took place on 19 April 2021. The claimant originally stated it took place on 19 May 2021, but following Mr Lambert's assertion that he was not in the office that day, said that the meeting had occurred around 19 May, feeling sure about this because it preceded a management meeting attended by, among others, a Mr Rival who had only re-joined the respondent company in May. However, it appears from an email sent by the claimant to Mr Rival that Mr Rival had in fact joined the respondent by 18 April 2021, therefore meaning that he could have joined a management meeting on 19 April. I suspect neither date is strictly accurate. The email on 21 April is likely to have referred to a meeting on a Monday only two days earlier, had it happened, whereas it in fact only refers to a meeting "last Thursday" (15 April). It makes more sense, given the context of the meeting and the surrounding communications, for the meeting to have taken place in late April/early May, before the WhatsApp chain beginning 10 May 2021 about the calculation of holiday pay.
- (24) At the meeting, the claimant says he was told that his replacement had been recruited. Mr Lambert's account is that he asked the claimant for a resignation letter, and to confirm his last day in employment. Mr Lambert says that the claimant told him he'd email his resignation, and that his last day would be 30 June. The claimant says that at the meeting he told Mr Lambert that he had not resigned. I prefer Mr Lambert's account. The claimant did not state in evidence that he objected strongly to the recruitment of his replacement at that meeting.
- (25) On 10 May 2021 the claimant sent Mr Lambert a WhatsApp message setting out how much holiday he believed he was due by 30 June 2021. The claimant states that he used this date because he was asked to by Mr Lambert. However, it is much more plausible that this was the date applied because it was the date he proposed to leave the company.
- (26) On 11 May 2021, Mr Lambert emailed the claimant referring to his email of 22 March 2021 and stating that he would like to address some of the claimant's concerns and to "respond formally accepting your resignation." He sets out payments that will be made for all outstanding holiday pay and for top up of salary accumulated to 30 June 2021. In other words, arguably all of the claimant's financial demands were met, except for the one that the payments be free of tax, which would not have been legal. The claimant in evidence disputed that all demands were met as he says that he had not resigned, so would therefore have been looking for a further three months' salary from the date of resignation, rather than to be paid until 30 June 2021. The letter concluded "I would like to thank you for your time at Beds and Board and I have enjoyed working with you over the past 4 years....I wish you all the success in the future and hope that you keep in touch". This wording is typical of the sort of wording a manager would send to a valued employee who has resigned, rather than to one contemplating resigning. This letter was written some 50 days after the 23 March conversation. The delay however to my mind does not indicate that the claimant had not resigned earlier in the year. The claimant does not respond in writing to this letter until 18 June 2021. The money referred to by Mr Lambert was paid to the claimant. There was no evidence before me that the claimant complained about finances after the letter of 11 May 2021. At that stage, he had been told he would be paid the additional sums he requested, assuming a leaving date of 30 June, and had no

- reason to believe that management behaviours would change. It is logical that by this time he would have resigned, had he not already done so.
- (27) By 10 June 2021 the claimant's replacement as Operations Director, Mr Taylorson had arrived and was being copied in on emails. The claimant was aware of this fact at least on 10 June 2021, since he copied to himself an email sent by Mr Lambert that day inviting the recipients, including Mr Taylorson, to edit some Team Tips.
- (28) On 18 June 2021 the claimant emailed Mr Lambert. He refers (for the first time) in writing to an intent to leave his job, rather than to a resignation, and sets out his disappointment that his complaints about management behaviours and their affect on his mental health had not been addressed. He refers to his shock that his position was advertised on 5 June 2021 (presumably not the correct date since his successor was in place by 10 June) and queries whether this was constructive dismissal.
- (29) The respondent decided to treat this email as a grievance. The claimant's representative questioned whether it was a cynical move to protect the respondent from litigation. The respondent denies this, and refers to the fact that it is an Investor in People, and was following company protocol. I believe that it was appropriate to treat the letter as a grievance, whatever the motive.
- (30) Mr Lambert conducted the grievance on 25 June 2021. It was recorded, and the claimant ultimately commented on the draft notes, made changes and approved it. The claimant raised seven grievances, all centred in essence on his pay and his treatment from senior managers who he said were undermining, humiliating and bullying him and others. In the notes of the meeting several of the changes implemented by the claimant were to stress that he talked of an intention to resign, rather than a resignation. The notes record that Mr Lambert referred to the claimant as having resigned, and that the claimant did not deny that. At the end of the meeting, the claimant was placed on garden leave. After discussing the matter with lawyers, the claimant asked why he had been placed on garden leave. The respondent replied that it in order to reduce his stress, and as allowed for in his contract of employment, he was being put on garden leave until the end of his notice period, 30 June. The claimant immediately replied stating that he had not resigned so that any termination must be a dismissal. Mr Lambert replied stating that the claimant had restated his resignation to him, Mr Roberts, Mr K Knowles and Mr L Knowles when all had tried to persuade him to stay.
- (31) The claimant ceased working for the respondent on 30 June 2021.

Law

- (32) S94 of the Employment Rights Act 1996 ("ERA") gives employees the right not to be unfairly dismissed by their employer. The dismissal can be direct, in that the contract of employment is terminated by the employer, with or without notice, or because a fixed term contract comes to an end, or "constructive" in that the employee terminates the contract of employment, with or without notice because the employer's conduct has been such fundamentally to breach that contract. In the present case we are now only looking at whether the respondent dismissed the claimant, and if it did so whether that dismissal was fair, given that his complaint that he was constructively dismissed has been struck out.

Submissions

- (33) The representatives of both parties set out their submissions in skeleton arguments. I do not propose in this judgment to reproduce them in full.
- (34) The respondent's representative argued that the burden of proof for showing that he had been dismissed was on the claimant (relying on **Sandle v Adecco Limited** [2016] IRLR 941 EAT), and that the body of the evidence pointed to the fact that he had indeed resigned. Having resigned, he could not unilaterally retract or withdraw it, (relying on **Willoughby v CF Capital plc** [2011] IRLR 985 CA), save perhaps in circumstances in which the claimant was given time to "cool off" and reflect on his position - circumstances which could not apply here as the claimant had been given a period to reflect and had repeated his decision to resign.
- (35) The claimant's representative argued that any notice given by the claimant should be clear and unambiguous, and should specify a termination date. The lack of a resignation letter meant that the tribunal needed to examine the oral evidence. Mr Lambert's evidence as to the words used was too formal to be convincing. The matter should be looked at in the context of the state of the claimant's mental health, which on Mr Roberts' evidence was not good on 8 April 2021, which could constitute special circumstances which would make it unreasonable for the claimant's words to be construed at face value (relying on **Kwik Fit (GB) Ltd v Lineham** [1992] ICR 183 EAT). The claimant's WhatsApp message to Mr L Knowles was ambiguous. It was implausible that the claimant would have written the email of 22 March 2021, which complained about pay but did not mention resignation, and would then have resigned the next day. In addition, if the claimant had resigned on 23 March the respondent would surely have asked for this in writing before 11 May 2021. Dealing with the grievance hurriedly on 25 June 2021 paid lipservice to protocol, and was only implemented to improve the respondent's position in relation to any litigation from the claimant. The claimant was not suggesting that he had resigned in the heat of the moment, but if the words he used were unclear and ambiguous, it was open to the tribunal to find that in fact no resignation occurred.

Conclusion

- (36) The claimant's representative submitted that the state of the claimant's mental health should be taken into account when deciding whether he had actually resigned. I acknowledge that there were concerns, expressed by the respondent and the claimant, about his mental health. We have no evidence as to the extent of any mental health disorder, and on the written and oral evidence before me I do not consider that any manifestations of the claimant's understandable stress in the circumstances is sufficient to make it unreasonable for the words that the claimant used to be considered at face value. In addition, as I have found, the claimant subsequently confirmed his resignation to at least three senior managers in the company. The claimant also failed to react with any speed at all to a number of indicators that the respondent believed he had resigned, in particular the advertisement of his job and the respondent's email of 11 May 2021. I have therefore concluded that the evidence before me was insufficient to require me to expect the respondent not to accept the claimant's resignation at face value.
- (37) The claimant's representative also pointed to the fact that the email of 22 March 2021 did not refer to resignation, so it was unlikely that the claimant would in fact have resigned the next day. I do not accept this. The email also

- does not refer to management behaviours, and it is the claimant's own case that he threatened to resign the following day, so it is clear that the email did not contain the entirety of the claimant's thinking.
- (38) The claimant's representative relied on the case of ***East Kent Hospitals Foundation Trust v Levy*** in support of her argument that ambiguous words of resignation should be construed in favour of the employee. However I did not find the case helpful: in that case, the employee gave "notice" which could have been construed as giving notice either to her department or to her employer. This is not the case here. More importantly, it is not the claimant's case that he used an ambiguous phrase: his argument is that he never resigned, merely expressed a conditional intention to do so.
- (39) The claimant's representative also questioned why the claimant would continue to pursue his grievances if he felt that nothing could possibly improve his lot. However the claimant talks of in essence doing things for the greater good, for the benefit of remaining employees – an honourable and not unusual stance.
- (40) Both parties looked at the issue whether the claimant resigned in the heat of the moment, and should therefore have been allowed time to reflect and, if wished, reverse his resignation. However the claimant did not put forward the argument that he had resigned in the heat of the moment - his argument is that he had never resigned, and even if that had been the case he was given over two weeks' to reconsider his decision, which is in my view sufficient. The fact that it seems that by the middle of June the claimant regretted his resignation does not allow him unilaterally to withdraw it.
- (41) For the reasons set out above, I have concluded that the claimant resigned on 23 March 2021, and, having been asked to reconsider, confirmed his resignation on 7 April 2021. His claim that he was unfairly dismissed therefore fails.

Employment Judge Palca

16th August 2022

Sent to the parties on:

16/08/2022

For the Tribunal: