EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102220/2022

Held in Glasgow on 1, 2 and 3 August 2022

Employment Judge: Russell Bradley

Ms Yvonne Grant	**Claimant** **Represented by:** **Mr D Hay - Advocate** **[Instructed by: Ms K Bolt – Solicitor]**
Asda Stores Limited	**Respondent** **Represented by:** **A Rozycki - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant: -

1. A basic award of **SEVEN THOUSAND AND SIXTY FOUR POUNDS AND NINETY EIGHT PENCE; (£7,064.98)**; and

2. A compensatory award of **SIX THOUSAND AND THIRTY NINE POUNDS AND THIRTY EIGHT PENCE; (£6,039.38).**

REASONS

Introduction

1. In an ET1 presented on 23 April 2022 the Claimant maintained claims of unfair dismissal and for notice pay. In her form she sought reinstatement and compensation. By an ET3 form with Grounds of Resistance the claims were

defended. The claims arose from the claimant's resignation in December 2021 and her attempt to retract it.

2. On 27 May various (standard) Orders were made relating to documents and financial loss. A notice issued on 6 June convened this hearing.

3. An indexed paginated bundle was lodged. It contained 19 items and 116 pages.

4. I am grateful to parties' solicitors' efforts in producing timetables for the hearing. With the respondent's agreement the evidence of Robert Deavey was heard (i) out of order, last, and (ii) by video. I am grateful to the respondent for making facilities available to Mr Deavey so that his evidence could be taken with minimal delay on Wednesday 3 August, albeit those facilities were ultimately not used.

5. I am also grateful to counsel for producing written closing skeletons.

6. By the end of the hearing a number of remedy-related issues had narrowed. Reinstatement was not sought. No separate claim was made for notice pay.

The issues

7. The issues had not been agreed prior to the start of the hearing. That said, there was little dispute between counsel as to what they were. I record four issues here, the first two suggested by the respondent, the latter two by the claimant. Both were content to proceed on the basis that these questions should be addressed.

    1. Whether the respondent was entitled to treat the claimant's decision to resign on 9th December 2021 as a conscious and rational decision on her part;

    2. If so, whether C subsequently withdrew her resignation;

    3. Was there an agreed mechanism for the claimant to withdraw her resignation?

    4. If yes, did the claimant avail herself of that agreed mechanism?

Findings in Fact

8. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

9. The Claimant is Yvonne Grant.

10. The respondent is Asda Stores Limited. It operates about 600 stores in the UK. It employs about 140,000 people across that estate. One of its stores (Robroyston) is at 1 Monument Street Glasgow. At the time of the incidents which give rise to this claim; the general store manager was Thomas White; Colin McCabe was an operations manager there; Sinead Cameron was a customer trading manager; and Daniel Millen was a food hall trading manager. At the time of the incidents the claimant was employed as nightshift replenishment colleague. She did not report directly to any of those managers.

11. On 27 July 2019 the respondent issued a letter to the claimant which she signed that day (**pages 52-56**). It referred to then recent changes to her terms and conditions of employment. It referred her to a new handbook. It recorded the start of her continuous employment as being 24 June 2002. The claimant is a member of the GMB trade union.

12. The respondent operates a "*Leavers Policy*" (dated April 2021) (**pages 39-50**). It says that it details the process that must be followed when a colleague (employee) leaves the business. It provides that; it applies to all colleagues; all resignations must be received, acknowledged and accepted in writing; all verbal resignations must be followed up with a written resignation; all colleagues must be offered an exit interview/conversation during their notice period; in the event of a verbal resignation (as in the claimant's case) her line manager (only) should ask for written confirmation, and a File Note, record of discussion, should be placed on the colleague's personal file; if the colleague fails to confirm their resignation in writing it should still be processed; the final day of work must be confirmed to the colleague by the line manager; the notice period starts from the day of receipt of resignation; the line manager can offer

a cooling off period of seven days "*to allow the colleague to reconsider their resignation*"; *"a cooling off period can be considered following any resignation but is particularly relevant if the colleague resigns "in the heat of the moment ….or if they're suffering from a health issue and may not have considered all the options available*"; the cooling off letter must be either given to the colleague or sent recorded delivery; the cooling off period forms part of the notice period; a colleague must be allowed to retract their resignation at any time during the cooling off period, which must be given to the line manager in writing by the date indicated in the cooling off letter. The Policy contains a list of "*Frequently asked questions*". One of the questions is; "What happens if a colleague retracts their resignation after the line manager has separated them on MSS?" (Manager Self Service). The answer is, "*The line manager can submit a reinstatement form on MSS, however this cannot be submitted during the same week as the colleague was separated*." The last question is, "*What happens if a colleague verbally resigns and fails to confirm that resignation in writing?*" The answer is, *" …….a File Note should have been made and placed on the colleagues personal file by the line manager …….at the time the colleague gave their verbal resignation. Therefor keeping a record of the discussion on the colleagues file will help if the resignation is challenged or if there are any issues further down the line*." The respondent tries to ensure that any employee leaving the business receives a cooling off letter. "*Separated*" is the term used to describe the process whereby an employee's resignation is managed by the respondent which results in their contract ending.

13. In or about 2019, the claimant's' mother died. On her death, the claimant took on responsibility for the care of her mother's 92 year old partner. At the same time, she took on responsibility for the care of her adult brother. Those caring responsibilities were onerous both in time and emotionally. In August 2021 the claimant took two weeks off as unpaid leave. Her purpose in doing so was to attend to matters relating to both her brother and her mother's partner. Her wage slip dated 11 September 2021 (**page 73**) shows for the period covered by it she worked two weeks. It is likely that the "*other*" two weeks were those taken as unpaid leave. All prior wage slips produced show she worked 4 weeks in those periods.

14. In the period leading up to and including December 2021 the claimant worked three night shifts per week. Her shift pattern was to work on alternate weeks Wednesday Thursday, Friday then Thursday, Friday, Saturday. Her hours of work were 10pm until 8am. There was a tea break at about midnight. For some time leading up to December 2021, the night shift at the store was short-staffed. The claimant had discussed that issue with Mr McCabe some time previously. She had suggested, and he had agreed, to recruit more staff. However, by December 2021 short-staffing of the nightshift remained an issue.

15. In week commencing Monday 29 November 2021 the claimant worked Wednesday to Friday, 1 to 3 December. By that time, both her mother's partner and her brother were in hospital.

16. On Friday 3 December the claimant gave a colleague (Denise) a lift from work for her train home. They discussed the staffing of the nightshift. The claimant learned that for the following Saturday (11 December) 6 male colleagues were either to be off sick or had swopped shifts. She therefore knew that the shift for that night would be short-staffed.

17. On Thursday 9 December the claimant returned to work. She started her shift at 10.00pm. The claimant noticed that Denise was not at work. No night shift managers were at work. The claimant was apprehensive about what her work would be like with fewer staff on the nightshift. She felt unwell. She took her tea break at about midnight. Following her return to the shop floor at around 12.30am, she learned from another colleague (Liz) of her intention to leave after her wish about a transfer had not happened. The news of this colleague's intention to leave upset the claimant. Her state of upset increased. She felt that she had chest pains. She believed that she was having a heart attack. She spoke to Mr Millen. He had been asked to manage the nightshift that night. He knew the claimant, albeit he was not her direct line manager. He regarded her as someone who "*got on with the job*". The claimant was crying. She described some of the issues to do with her brother. She described what she believed to be her state of health. She told him that she needed to stop work to save her own life. She said that; she was "*going to quit*"; she was resigning; she would not be back; but would finish her work so as not to "*leave him in the shit*". He

saw that she was upset. He understood her to be resigning. With assistance from some colleagues the claimant continued at work. A number of her colleagues finished their shift at 6.00am. They tried to console the claimant. They asked her not to leave. She finished her work about 6.30am. Her colleagues said to her that she should not drive home "*like that*", referring to the claimant's state of upset. At about 6.30am she left the store. Mr Millen finished work at about 8.30am on Friday 10 December. Mr Millen did not approach or speak to the claimant before she left. He did not make a file note of the conversation about the claimant's resignation. Later that morning, Mr McCabe started work. Mr Millen told Mr McCabe that the claimant had verbally resigned, and that she was not coming back. Mr Millen left the matter with Mr McCabe to progress. He did not discuss the matter with anyone else at the time. Mr McCabe then completed his "*shopfloor walk*". Having done so, he compiled a letter to the claimant. He did so by using a template which he completed based on information provided to him to do with the claimant. The letter was dated 10 December 2021 (**page 57**). It was addressed to her home address. It said, "*Further to your conversation with Danny Millen on Thursday 9th December regarding your verbal resignation, I am writing to offer you some time to reconsider your decision to resign from your position at Asda. Although I am sure you will have considered this matter carefully I am prepared to allow you some more time to reflect upon your decision. Please let me know before Thursday 16th December if you would like to discuss your decision or retract your resignation. If I do not hear from you before Thursday 16th December I will continue to process your resignation. This 7 day period will be included as part of your notice period*." Mr McCabe hand addressed the envelope. The letter was sent by first class post. It was not sent by recorded delivery.

18. The claimant did not attend work on either Friday or Saturday (10 or 11 December). On Friday 10 December, Mr McCabe told Mr White about the claimant's resignation. Mr White was concerned to ensure that a cooling off letter had been sent. By that time, it had been posted.

19. In the few days following Friday 10, the claimant felt that she may be adding stress to her mother's partner now that she was out of work. She was "*worried sick*" about what her life was to be like.

20. On Tuesday 14 December, the claimant received Mr McCabe's letter. She telephoned him on receipt of it. She phoned him because the letter said that if she wanted her job back she should do so. She read the first part of the letter back to him. In the call the claimant told Mr McCabe that; she had got his letter; she did not feel that she was mentally fit to have made a decision like resigning; it was a rash decision; and she should be "*on the sick*". She mentioned her brother. She did not say that she was retracting her resignation. Mr McCabe told her that he was "*very busy*" and that he would try to call her back. He did not make a written note of the call. Mr McCabe did not call her back that day, or the next. The claimant's impression was that Mr McCabe wanted to end the call quickly. Mr McCabe's view was that the call was the latest in a series of unnecessarily lengthy telephone conversations with the claimant.

21. On the morning of Thursday 16 December the claimant called back to the store. Mr McCabe was on a day off. The claimant spoke to Ms Cameron. By that time, she had been told of the claimant's resignation by Mr McCabe. She was also aware that a cooling off letter had been sent. Mr McCabe had told her so that she was aware of the position in case she called the store. Ms Cameron was sitting next to Mr White when she answered the call. It was also a day off for him. He was, however, in the store to do a "*hand over*" with Ms Cameron. This hand over was a regular occurrence on a Thursday which was routinely a day off for him. It took a short period of time. Mr White heard what Ms Cameron said during her call with the claimant. He did not hear the claimant. The claimant asked to speak to Mr McCabe. Ms Cameron told her that it was his day off. The claimant then asked to speak to Mr White. Ms Cameron told her that he also was not in the store. She asked the claimant if there was anything she could help with. The claimant asked if Ms Cameron had heard what had happened. Ms Cameron agreed that she knew that she had resigned. The claimant said that she believed that she was "*doing the right thing*" and would not be back to work. Ms Cameron said that if that was the case, then she should

hand in her uniform and any other company property at her earliest convenience. The claimant then asked, "*So, it's official then?*" Ms Cameron said that she would let Mr McCabe know. Immediately after the end of the call Ms Cameron told Mr White that the call was from the claimant. Ms Cameron knew that she would not be in the store the next day. That being so, she asked Mr White to pass on to Mr McCabe the content of the claimant's call. Ms Cameron did not take a written note of her call with the claimant.

22. Later on 16 December, the claimant telephoned her trade union. She left a voicemail message asking for a call back.

23. On Friday 17 December Mr White arrived at work at about 6.30am.

24. In the afternoon of 17 December, Robert Deavey, regional organiser of the GMB returned the claimant's call. Mr Deavey's impression was that the claimant was very upset. In his opinion, she struggled to put a sentence together. In the course of the call he said to her more than once to take a deep breath and calm down. In the call the claimant explained that; she had serious issues at home; she had some difficulties in her workplace and in particular it being short-staffed in the run up to Christmas; one evening all of it had got too much for her; and she had told her manager that she was quitting after she completed her shift. Mr Deavey's impression, on piecing the story together, was that she had not wanted to resign. He asked if anyone had been in touch about a cooling off letter. It was his understanding that it was "*normal practice*" for the respondent to issue such a letter to an employee in such circumstances. The claimant told him that she had received the letter. She told him that she had received it on Tuesday or Wednesday (being 14 or 15). His impression was that she had not taken any steps to retract her resignation. His understanding was that she had not yet spoken to anyone at the respondent about her letter. It was his understanding that an employee in receipt of a cooling off letter had 7 days from the date of its receipt in which to retract a resignation. He believed that the claimant had sufficient time in which to retract her resignation based on that understanding and on what she had had told him about when she received the letter. He told her to; "*hang up the phone*" on her call to him; telephone the store; ask to speak to her manager; tell them and

make it clear that she was rescinding her resignation and that she had not resigned. In his experience, it was not necessary for an employee to retract their resignation by doing so in writing. Mr Deavey did not take a note of the call.

25. After her call with Mr Deavey and on 17 December the claimant telephoned the store. It was around 3.30pm. She spoke with Mr McCabe. She told him that she had spoken with the trade union. She told him that she was mentally unfit to make the decision to resign, so she had not quit. Mr McCabe asked her, "*so, you haven't quit now?*" Mr McCabe said that; the respondent would get her counselling; she would be "*on the sick*"; and they would help her. The claimant's impression was that Mr McCabe was being "*dead nice*". She was "*over the moon*." Mr McCabe did not make a note of this call. By the time of this conversation, Mr White had not passed on the message to Mr McCabe from Ms Cameron from the day before.

26. After her call with Mr McCabe, the claimant telephoned Mr Deavey again that day. She told him that Mr McCabe had said that; the respondent would get her help with occupational health and get her back on her feet; and that Mr McCabe's tone was completely different, contrasting how he had been with her on 14. Mr Deavey was quite pleased with what he had been told. He believed that she had rescinded her resignation and the store had accepted it. His impression of the claimant was that she was much more coherent than in his earlier call with her. He did not make a note of this call.

27. Just after his call from the claimant, Mr McCabe went to see Mr White. Mr McCabe described to Mr White that; the claimant was "*just off the phone*"; and had been talking about her mental health. Mr White asked him why she had called when she had handed in he notice the day before. Mr White told him that; the claimant had called in the day before; she had spoken to Ms Cameron; that he (Mr White) was present when they spoke; she had confirmed her resignation; and was bringing in her uniform or "*key card*"; On hearing what Mr White had to say, Mr McCabe was surprised because she had called in to speak to him on Tuesday, 14. By the time of his conversation with Mr White he thought she had been "*separated*" from the respondent. Mr McCabe did not

say to Mr White that in his conversation with the claimant that day she had withdrawn her resignation. He believed that she had been separated some time on 17 December.

28. At about 8.30pm on 17 December Mr McCabe telephoned the claimant. He told her that he had spoken to Mr White. He said to the claimant that in their last conversation she had not said that she had previously confirmed her resignation. He said that her resignation had already been processed. He did not make a note of the call.

29. At about 9.00pm on 17 December the claimant left a voicemail asking Mr Deavey to call her back. Mr Deavey's impression from it was that the claimant was again very upset. On Monday 20 he did so. The claimant told him that Mr McCabe had called her back to say; he had had a conversation with the store manager; her resignation had already been put through; the respondent was not going to overturn it; he had learned that she had called the previous day, 16; and he understood that from that call she was 100% wanting to resign. Mr Deavey asked her if she had called the store on 16. She told him that; she had and spoke to Ms Cameron; she had been told to hand in her belongings and that her resignation was "*official*"; but at no point had she said to Ms Cameron that she was confirming her resignation. Mr Deavey said to the claimant to leave it with him as he would contact the relevant people business partner.

30. On Monday 20 December at 15.07 Mr Deavey emailed Alan Speir, people business partner West Scotland region (**page 65**). In his email he said; he had been speaking to the claimant from Friday (meaning 17) who was looking for help; she was experiencing some "*very serious personal issues*"; he believed she was on the brink of a mental breakdown; that the claimant had "*in a state of anger and helplessness*" resigned verbally on 9 December; she had received "*the cooling off letter*" on Wednesday or Thursday 15/16 December; he had told her to contact the store immediately and explain the situation and rescind her verbal resignation; that that had "*appeared fine*" and the manager she spoke to also told her that OCC health referral would be complete for her as they "*try to help her*"; later that evening (meaning Friday 17) she had received another call stating that they (meaning the store) could not rescind

her resignation and it had been processed. He said that he was unsure what had happened between the two calls and needed to understand if the claimant had been reinstated.

31. On Monday 20 at 15.31 Mr Speir forwarded Mr Deavey's email to Mr McCabe and Ms Cameron. He asked for some details such as when the claimant had resigned, the date the cooling off letter was sent out and dates/details of telephone contact etc.

32. On Tuesday 21 December Mr Speir replied to Mr Deavey (08.31) (**page 65**). He said he would be at the store on Thursday (meaning 23 December). He said he would find out exactly what had happened and would reply.

33. It appears that on Wednesday 22 at 16.14, Ms Cameron forwarded the two emails (from Mr Speir and Mr Deavey) on to Mr White's email address. She then replied (at 16.48 that day 22 December) to Mr Speir (copied to Mr McCabe) from Mr White's email address (**page 60**).

34. In her email of 22 December (from Mr White's email account) she said that; the claimant resigned verbally to Mr Millen on Thursday 9 December at 06.30am; she then left the store 90 minutes early than her contracted shift; her cooling off letter was then sent with the deadline for retracting her resignation by Thursday 16 December; the claimant contacted Mr McCabe on Tuesday 14 December, but did not detract her resignation during the call; the claimant then called Ms Cameron on Thursday 16 December to confirm that she was still leaving and that she had made the right decision to leave the respondent; she (Ms Cameron) said to the claimant that "*that was fine*" and she would inform Mr McCabe of her call; as she (Ms Cameron) was off on Friday 17, she had asked Mr White to relay the information to Mr McCabe and to separate her; she (the claimant) then called Mr McCabe "*back*" on Friday 17 December to discuss her mental health and said that "*she was in no fit state to confirm her resignation*"; Mr McCabe then told her that the respondent could have supported her with OHA (meaning occupational health assistance) if she had come and discussed this with him sooner; the claimant then discussed the details of her mental health again and then ended the call; Mr McCabe then

discussed the call from the claimant with Mr White who then told Mr McCabe about the claimant's call the day before (Thursday) and that the claimant had already confirmed her resignation with Ms Cameron and that it was "*the right decision for her*"; Mr McCabe called her back and told her "*as the deadline of Thu 16 December had passed her resignation was already accepted and was in progress*" he asked her why she hadn't mentioned the call on 16 with Ms Cameron; the claimant's reply was *"I feel you are being aggressive towards me and that she was going to talk to the Union and that she felt bullied into resigning*"; and Mr McCabe said (to the claimant) that that was not the case as she had made the decision herself and had confirmed this.

35. On 23 December Mr Deavey replied to Mr Speir's email to him of 21 to thank him for his reply. In it he said that he was genuinely concerned for the claimant's mental health "*over this*".

36. On 24 December Mr Speirs emailed Mr Deavey (**page 64**). He said that he had spoken with "*the team in Robroyston*" and there appeared to be some omissions in the claimant's account of events. In large measure, Mr Speir replicated the content of the email from Ms Cameron. Mr Deavey replied that day (**page 63**). He expressed his disappointment and reasons for it. He said he would be passing the case for a legal opinion and the possibility of unfair dismissal.

37. After a further exchange between them, Mr Speirs advised (6 January 2022, **page 62**) that the claimant's last day of employment was 16 December, she was separated on 17 and that taking account of work done and a holiday reconciliation, no monies were due to her.

38. On 9 March the claimant began early conciliation. The certificate was issued on 24 March (**page 1**).

39. On or about 4 April Mr McCabe completed by hand and signed a general file note (**pages 58-59**). It is undated. It records his recollection of events from 9 December until 17 December with the claimant. It does not refer to the email correspondence which had been copied to him in December. It does not

reference any document source of information, for example his letter to the claimant or any of the emails produced in the hearing bundle.

40. Mr McCabe's note says, "*I started my shift at 7am on Thursday 9th Dec, on speaking to Danny Millen who was on nightshift, he informed me that nights colleague Yvonne Grant has verbally handed in her resignation and would not be returning. I then finished my shopfloor walk and went upstairs to send Yvonne her 7 day cooling off letter as per Company Process. The deadline for this was Thursday 16th December. Yvonne contacted me on Tuesday 14th December regarding issues with her brother, Yvonne made no attempt to retract her resignation and had confirmed receipt of the letter. I returned to work on Friday the 17th to another call from Yvonne regarding mental health issues, I told Yvonne that to previous calls that I had explained we could support her with Occupational Health if she had asked sooner. I also confirmed to her she had plenty opportunities to sit with myself for any support, as I had offered several of my nights colleagues. Yvonne then ended the call with me. I then bumped into Thomas White (GSM) and told him about Yvonne's call. Thomas then replied with she had called yesterday and spoke with Sinead Cameron and that Yvonne had confirmed her resignation. I then contacted Yvonne asking why she didn't mention the call on Thursday and that she had confirmed her resignation. I also confirmed that with her confirming her resignation and passing her 7 days she had been separated from the system as per Company Process. Yvonne then accused me of being aggressive on the phone and she was going to the union and hung the phone up."*

41. On 23 May 2022 the claimant began employment with One O One Convenience Stores Ltd. Her written submission seeks loss of earnings from her employment with the respondent to that date. On 23 May 2022 the claimant signed a written statement which sets out her main terms of that employment (**pages 76-79**). In the time between 16 December 2021 and 23 March 2022 the claimant did not work. She did not look for work in that time. She used her own finances for living in that period. She retreated from the world. She described herself as "*unable to function*". The claimant did not apply for any of the vacancies contained within **pages 80-116** of the bundle.

Comment on the evidence

42. It was unfortunate that despite the terms of the respondent's Leaver's Policy no contemporaneous notes were taken of any of the conversations with or about the claimant between the time from her resignation and the evening of 17 December 2021. The emails which followed appeared to me to be evidence of the respective positions of the parties and their justifications for those positions.

43. In his skeleton Mr Hay noted that the claimant was not a paradigm of clarity. I agree. Given the recent history of her circumstances (both personal and work) it is understandable that she did not have a cogent, structured, chronological recollection of the episode relating to the ending of her employment. That period could fairly be described as chaotic. I mean no upset or criticism of the claimant. Her unchallenged evidence was that she spent a number of periods at work openly in tears. She was clearly upset over a period of time including beyond the end of her employment with the respondent. It is unrealistic to expect a witness to have a clear and structured recollection of events in such circumstances.

44. Mr Millen's evidence was limited. He was not able to give much detail about a significant episode, his exchanges with the claimant when she resigned. The claimant was obviously distressed, a long-serving and able employee who was resigning mid-shift. Yet Mr Millen' recollection of that episode was very limited. Indeed he said in examination in chief that he did not recall a lot of that conversation with the claimant.

45. Mr McCabe's evidence was unimpressive. It was not clear until his cross examination that his note (**pages 58-59**) was prepared about four months after the events to which it is said to relate. He was not able to recall; the detail of what Mr Millen had told him about the claimant's resignation; all of what the claimant said to him in their call of 17 December; what the claimant had said in reply to his comment about occupational health help; or the detail of what Mr White said to him in his conversation that day. His hand note was obviously wrong in an important way in that it referred to the claimant's resignation having

taken place 24 hours before the correct time. His explanation for the need to telephone the claimant a second time on 17 December was not credible. His credibility was further diminished by his evidence about their first conversation. If (as he knew from his letter) that his deadline of 16 had passed, an obvious thing to say in that conversation was just that. But he did not.

46. Ms Cameron's evidence was direct, to the point and credible. When challenged about her recollection of her telephone conversation with the claimant on 16 December she was unequivocal that her version was correct and the claimant's was not. It was not suggested to her that she had lied about it. I accepted her version of that episode.

47. In the main, Mr White's evidence was direct, credible and reliable. However, two aspects qualify that description. First, when it was suggested to him (by me) that the 7 day period expired on 17 December and not 16 given the time of the claimant's resignation (after midnight), he in turn suggested that the period expired at exactly (to the hour) after the resignation; in other words just after midnight or at latest 6.30am when the claimant left her shift. In my view that was not credible and suggested an approach which appeared to me to be contrary to the spirit of the Policy. Second, he knew that the claimant was a long-serving employee. She was well-regarded. The nightshift was short-staffed. He was familiar with the Policy. But his position in relation to retracting her resignation is at odds with the Policy's answer to the first FAQ*; " What happens if a colleague retracts their resignation after the line manager has separated them on MSS?*" The answer is, "*The line manager can submit a reinstatement form on MSS, however this cannot be submitted during the same week as the colleague was separated*." It was clear by Monday 20 that the claimant wanted to retract her resignation, even if not before. Yet the respondent did not consider reinstating her as per the Policy even after she had been separated on 17. Despite his knowledge of the Policy, Mr White did not explain why no steps were taken to reinstate her.

48. Mr Deavey was also in the main direct, credible and reliable. He was able to recount a clear version of his first three telephone conversations with the claimant without the assistance of referring to his emails. He was firm in answer

to cross examination questions about his confidence that the claimant understood his advice in their first conversation. His opinion as to the start of the 7 day cooling off period differed from the view of the respondent's witnesses (he believed it began on receipt of the letter) but that difference from what I found did not detract from either his credibility or reliability as to the content of his conversations with the claimant.

Submissions

49. For the claimant Mr Hay produced a 12 page skeleton which he adopted. He supplemented it orally.

50. For the respondent Mr Rozycki also produced a skeleton which he adopted and supplemented.

51. I mean no disservice to either in summarising them. I am grateful for their careful submissions and the time taken to prepare them.

52. The claimant posed two questions (or issues, which are set out at paragraph 7.3 and 7.4) above. In answer to the first, the claimant argued for a contractual right (express or implied) to a cooling offer period, which failing a right to the same period derived from the letter from Mr McCabe dated 10 December (**page 57**). She argued that whatever the route to her answer to the first issue, the answer to the second was, "*yes*".

53. The claimant then argued (contrasting various cases cited by the respondent and noted below) that; her analysis and answers to her issues were consistent with those cases; none of them had as part of its factual matrix an agreed cooling off period; and she had a contractual mechanism for withdrawal of her resignation and she effectively used it.

54. My summary of what the respondent asserted to be the applicable legal principles is:-

    1. The normal "*rule*" is that an unequivocal or unambiguous resignation can be taken or accepted at face value;

2. There are, however, certain "*special circumstance*" exceptions to that normal rule which include "*heat of the moment*" resignations;

3. In such special circumstances, an employer should allow a reasonable time to elapse to see if the original resignation was indeed intended;

4. Where notice (for example of resignation) has been given it cannot be withdrawn unilaterally to have effect.

55. The respondent referred to the following case law in its consideration of applicable principles:-

1. ***Barclay v City of Glasgow District Council*** [1983] IRLR 313

2. ***Sothern v Franks Charlesly & Co Ltd*** [1981] IRLR 278

3. ***Greater Glasgow Health Board v Mackay*** [1989] SLT 729

4. ***Kwik-Fit (GB) Ltd v Lineham*** [1992] IRLR 156

5. ***Wallace v Ladbrokes Betting & Gaming Ltd*** [2015] All ER (D) 308 (Nov)

6. ***Riordan v The War Office*** [1959] 3 All ER 552

7. ***Harris & Russell Ltd v Slingsby*** [1973] IRLR 221

8. ***Martin v Yeoman Aggregates Ltd*** [1983] IRLR 49

56. In this case the respondent argued that; there were no special circumstances and thus the respondent was entitled to treat the claimant at her word in the very early hours of 10 December; she had resigned. The claimant's subsequent behaviour was consistent with a resignation until 17 December when her attempt to withdraw it was unilateral and thus of no effect.

57. Mr Rozycki did not accept that the Leaver's Policy contained an express contractual right or created an implied right as argued by the claimant. He did accept however that every time the respondent received a resignation, it issued a cooling off letter.

58. The respondent separately argued that in the event that it had proved that the claimant had failed to mitigate her loss.

The law

59. Section 98(1) of the Employment Rights Act 1996 provides that *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*" In this case the respondent did not offer to prove that there was a reason falling within section 98(2) on the premise that the claimant had not been dismissed. Its case was that she had resigned and had not withdrawn her resignation.

60. I took account of the law to which reference was made in submissions.

Discussion and decision

61. By the time of submissions, the part of the claimant's case based on her resignation being "*in the heat of the moment*" or having occurred when she was not able rationally to have done so had fallen away. The respondent posed the question, being the first issue; was the respondent entitled to treat the claimant's decision to resign on 9th December 2021 as a conscious and rational decision on her part? The answer to that issue is "*yes*". There was no real contest on it.

62. The respondent quite properly accepted that if I decided that the claimant had effectively withdrawn her resignation, her claim of unfair dismissal succeeded because in those circumstances she had then been dismissed. The respondent (again quite properly) did not offer to show that there was a "*fair*" reason for that dismissal.

63. Logically the next question is issue 3. Issues 2 and 4 are effectively two different ways of phrasing the same question.

64. In my view there was an agreed mechanism for the claimant to withdraw her resignation. The mechanism was a term implied into the contract by custom and practice. In the Court of Appeal in the case of ***Park Cakes Ltd v Shumba and others*** [2013] IRLR 800 (to which the claimant referred) Lord Justice Underhill reviewed the case law on the question of the implication of terms into a contract of employment by reference to 'custom and practice' from 1906 to 2011 (see paragraphs 26 to 37). ***Park Cakes*** concerned claims for enhanced redundancy payments derived from internal policy documents. In it, neither the claimants' written terms and conditions of employment nor the employee handbook made reference to any entitlement to those payments. While the nature of the claim in ***Park Cakes*** is obviously different from what is sought here, in my view the general principles referred to by Lord Justice Underhill are relevant and applicable. While expressly recording that he did not propose to attempt a comprehensive list of the circumstances which may be relevant, he sets out the following, which I summarise, albeit it is obvious that he had the facts of that case in mind:-

    1. On how many occasions, and over how long a period, the benefits in question have been paid;

    2. Whether the benefits are always the same;

    3. The extent to which the enhanced benefits are publicised generally;

    4. How the terms are described;

    5. What is said in the express contract;

    6. Equivocalness.

65. The letter of 27 July 2019 (**pages 52-56**) which sets out the claimant's then new terms of employment says nothing about the Leaver's Policy. None of the handbook to which the letter refers was produced. It is not clear from the evidence that the Policy was within the handbook. However, on the evidence, there was nothing within the express terms of the contract which suggested that a term could not be implied from the Policy. The Policy was known to the claimant, Mr Deavy, Mr McCabe, Ms Cameron and Mr White. The evidence of

Mr Deavy supported a finding that the store management team must follow the Policy when an employee leaves. Indeed it records, in terms, that "*the process ..must be followed when a colleague leaves the business*" (see page 39). Mr White's evidence was that the respondent tried to follow it for everyone who leaves. In my view by virtue of that custom and practice of invariably allowing a cooling off period by the use of a cooling off letter, the claimant had a contractual right to be allowed to retract her resignation at any time during the period of 7 days (the cooling off period) that period beginning with the date of her resignation. The practice of doing so is not discretionary. I am reinforced in that view by the fact that the Policy states that the cooling off period forms part of the notice period. There is thus a clear connection with the contract, notice to end it having been given. The Policy provides for the contract to remain "*alive*" in the cooling off period, albeit notice runs concurrently with the cooling off period. The benefit to the claimant (and to any other employee who leaves the business by resigning) is that they are afforded the opportunity of retracting their resignation. In my view the answer to issue 3 is "*yes*" for these reasons.

66. The cooling off letter in this case was based on a template. It largely reflected the terms of the Policy. There is an offer of time to reconsider the resignation. That offer includes the option of retracting it. While the letter reflects the timescale from the Policy where it refers to a 7 day period, it is obvious that in referring to "*before Thursday 16 December*" as the "*deadline*" after which Mr McCabe would continue to process the claimant's resignation, it is wrong. The letter is dated 10 December. The claimant had the right to withdraw or retract her resignation by 17 December. She did so. In the first place, I found that in his first conversation with the claimant on 17 December he said, "*so, you haven't quit now?*"; the respondent would get her counselling; she would be "*on the sick*"; and they would help her. Those statements were all indicative of someone who understood that her resignation had been retracted. As the author of the letter, Mr McCabe by the time of that call would have known that his time limit had expired. Yet there is no evidence from either him, the claimant or Mr White (about their subsequent conversation) to the effect that Mr McCabe referred her to the letter, to the time limit, or that it had expired. I did not find

credible Mr McCabe's version of that conversation wherein he said that the respondent would have provided help if the claimant had sought it earlier. Second, in her email of 22 December (**page 60**) Ms Cameron recorded that in her first conversation with Mr McCabe on 17 December the claimant said that she was in no fit state to confirm her resignation. On any sensible interpretation, that is indicative of retracting it. Third, the evidence of the claimant and of Mr Deavy about their conversation immediately after her call with Mr McCabe is consistent with him understanding that she had retracted her resignation. Fourth, the most credible explanation of the need for Mr McCabe to have called the claimant again, in the evening of 17 December, was to explain that her resignation had already been processed. Mr McCabe's version was not a credible one. If on his evidence he understood that in the first conversation she had not retracted her resignation, there was no reason to call her a second time. The answer to issues 2 and 4 (albeit the same) is "*yes*." That being so, the claimant was unfairly dismissed.

Remedy

67. The agreed basic award was £7064.98

68. The parties agreed the claimant's gross and net pay while employed by the respondent and the respondent's pension contributions (£19.63 per month)

69. On this question I took account of principles contained in ***Cooper Contracting Limited v Lindsey*** UKEAT/0184/15/JOJ now reported at [2016] ICR D3 being:-

    1. The burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss

    2. What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable

    3. There is a difference between acting reasonably and not acting unreasonably

    4. What is reasonable or unreasonable is a matter of fact

5. It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts

6. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

70. I do not accept that in the circumstances the claimant acted unreasonably in the period between 17 December 2021 and 23 May 2022. I accepted her evidence about her life in that period. I accepted her evidence about her use of her own resources. I accepted her evidence that she was not able to function properly in that time. It was not unreasonable for her not to have sought work in that period. Her loss of net pay in that period of 22 weeks is £5,439.72. Her loss of pension contributions in the same period is £99.66. I award £500 for the loss of her statutory rights. Her total compensatory award is therefore £6,039.38.

Employment Judge: Russell Bradley
Date of Judgment: 13 September 2022
Entered in register: 14 September 2022
and copied to parties